

PROMOTING JUDICIAL ACCEPTANCE AND USE OF LIMITED GUARDIANSHIP

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I. INTRODUCTION

Guardianship comes within the special province of judges.¹ In the great majority of guardianship hearings, there is no jury.² The presiding judge is the sole arbiter of whether the alleged incapacitated person meets the legal standard of mental incapacity and whether that person would benefit from the appointment of a guardian.³ If a guardian is appointed, the judge determines the type and extent of the powers granted to the guardian.⁴ Of course, the judge is not simply free to follow his or her own instincts or desires, for the judge is bound to determine the facts carefully and apply the law faithfully. Still, as the saying has it, “reasonable persons can disagree,” and the judge has some latitude in how he or she responds to the facts and circumstances that arise during the guardianship hearing. Within that zone of discretion, the judge may have a range or set of choices, any of which is defensible on legal and ethical grounds. No matter which course of action the judge takes, his or her

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1. Mark D. Andrews, Student Author, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 *Elder L.J.* 75, 99 (1997).

2. *Id.*

3. *Id.* Andrews also discusses the guardianship process from beginning to end, including the lack of due process rights. *Id.* at 86–111.

4. *E.g.* Fla. Stat. § 744.344(1) (2001) (directing the court to characterize the guardianship as either plenary or limited and, if limited, to specify the rights that have been removed); N.Y. Mental Hyg. Laws § 81.02(a)(2) (McKinney 1996) (directing the court to grant to the guardian only those powers that are necessary, based on the court’s evaluation of necessity); Ohio Rev. Code Ann. § 2111.50(A)(2) (Anderson 1998) (granting the court discretion over the extent of power granted to the guardian).

decision is unlikely to be overturned on appeal.⁵ How, then, does a judge decide what to do? Put another way, what motivates a judge who presides at a guardianship hearing and how do those motivations translate into judicial action?

II. WHY DO JUDGES RULE AS THEY DO?

Judges naturally want to do what is right, that is, what is legally correct, but they also want to do what will be best for the incapacitated person. Like most people, judges want to do what is “good.”⁶ Describing what is “good,” however, is not easy. One way to begin is to consider what one may expect judges do *not* want to do. For one, judges do not want to appoint guardians for individuals who have sufficient mental capacity to handle their own affairs, nor do they want to appoint incompetent, corrupt, or uncaring individuals or institutions as guardians. Judges do not want to resort to guardianship if a less intrusive alternative exists. For example, if an individual is well served by durable powers of attorney and property-management devices such as a revocable trust and joint bank accounts, a judge might well conclude that, despite the individual’s incapacity, no guardianship is necessary.⁷

Naturally, the foremost imperative for a judge presented with a guardianship petition is the welfare of the alleged incapacitated person. Protecting the person and the property of an adjudicated incompetent is the fundamental justification for the existence of guardianship.⁸ So, above all, one may expect that

5. *E.g. Estate of Haertsch*, 649 A.2d 719, 720 (Pa. Super. 1994) (holding that “[t]he selection of a guardian for a person adjudicated incapacitated lies within the discretion of the trial court whose decision will not be reversed absent an abuse of discretion.”).

6. Mark C. Modak-Truran, *A Pragmatic Justification of the Judicial Hunch*, 35 U. Rich. L. Rev. 55, 66–67 (2001) (discussing how the ethical decision-maker becomes aware of what is good or right and uses it to make his decisions).

7. *E.g. In re Hodges*, 756 A.2d 389, 393 (D.C. 2000) (the individual was mentally ill, but a guardian was not necessary); see *In re Guardianship of Fuqua*, 646 S.2d 795, 796 (Fla. Dist. App. 1st 1994) (the individual was totally incapacitated, but the lower court should have considered a less restrictive alternative to total guardianship); *Guardianship of Collier*, 653 A.2d 898, 902 (Me. 1995) (the individual was severely mentally incapacitated, but there was evidence that he was still capable of handling his own affairs; thus, the lower court should have considered a less restrictive alternative, such as independent living in the community with supervision by mental-health providers without a guardian).

8. Jamie L. Leary, Student Author, *A Review of Two Recently Reformed Guardianship Statutes: Balancing the Need to Protect Individuals Who Cannot Protect Themselves against the Need to Guard Individual Autonomy*, 5 Va. J. Soc. Policy & L. 245,

judges want to make decisions and craft orders that promote the interests of the incapacitated person. Translating this basic and unarguable maxim into specific acts for particular individuals, however, is not automatic or formulaic. Because each individual's needs are different and the range of possible solutions will vary from case to case, judges must create individualized solutions.⁹ That is, judges are not like baseball umpires, calling strikes and balls or merely labeling someone competent or incompetent. Rather, the better analogy is that of a craftsman who carves staffs from tree branches. Although the end result — a wood staff — is similar, the process of creation is distinct to each staff. Just as the good wood-carver knows that within each tree branch there is a unique staff that can be “released” by the acts of the carver, so too a good judge understands that, within the facts surrounding each guardianship petition, there is an outcome that will best serve the needs of the incapacitated person, if only the judge and the litigants can find it.

After assuring themselves that they have met the needs of the incapacitated person, judges also may attempt to address the concerns of the other parties represented at the guardianship hearing. The judge can satisfy the petitioner's request by finding the alleged incapacitated person to be legally incompetent and appointing as guardian the individual or institution requested by the petitioner. In most guardianship hearings, various family members will be present and may testify.¹⁰ Although the judge owes no duty to the family, most judges understandably want to assuage the family trepidations¹¹ about the well-being of the incapacitated person. Representatives of social-service agencies that work with the elderly may also appear, and, as with family concerns, the judge may try to fashion a solution that meets the legitimate concerns of social-service providers. Of course,

249-250 (1997) (discussing the purposes of guardianship).

9. Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. Toledo L. Rev. 189, 192 (1994) (asserting that because the circumstances of each case are unique, the judge must consider each guardianship case differently).

10. Andrews, *supra* n. 1, at 103.

11. *E.g.* *In re Estate of Salley*, 742 S.2d 268, 271 (Fla. Dist. App. 3d 1997) (the family had genuine objections to the choice of guardian and should have received notice and an opportunity to be heard); *In re Guardianship of Braaten*, 502 N.W.2d 512, 513 (N.D. 1993) (the family was concerned that proper medical treatment was being avoided and nutritional needs were being neglected); *In re Guardianship of K.*, 2001 Wis. App. LEXIS 240 at *6 (Wis. Dist. App. 4th Mar. 8, 2001) (the family disagreed with the choice of guardian).

balancing the interests of all the parties may not always be possible. If not, the interests of the incapacitated person should take precedence.¹²

There is yet another limit on a judge's ability to meet all the interests of the parties as well as properly serve the need of the incapacitated person: the applicable statutory and common law. As much as judges might prefer to have a generalized power to do "justice," in reality their choices are limited by the state guardianship statute and case law. In almost all states, the most elemental restriction of guardianship law is that judges lack the power to initiate guardianship hearings.¹³ All guardianship statutes require someone to file a guardianship petition.¹⁴ After a petition has been filed, the judge's choice of action is constrained by the state guardianship statute. Still, once a petition has been filed, judges have a great deal of discretion because state guardianship statutes rarely force them to act in a way that they might think would be detrimental to the interests of the incapacitated person.¹⁵

The discretion afforded to judges permits them to attempt to implement the spirit and intent of the law rather than being bound to enforce the inflexible letter of the law. Historically, guardianship law was intended to protect an incapacitated individual's person and property.¹⁶ Guardianship was a way in which society, acting through the courts, could assist and protect those whose mental infirmities left them unable to fend for themselves. This was guardianship as benefice, or as an aspect of

12. *E.g.* Ind. Code Ann. § 29-3-5-5(b) (West 1994 & Supp. 2001) (granting the court discretion in choosing the guardian according to the incapacitated person's best interests); N.Y. Mental Hyg. Laws § 81.01 (declaring the legislature's intent to create a guardianship system that satisfies the needs of the incapacitated person while affording the greatest amount of independence and self-determination); Wis. Stat. Ann. § 880.33(5) (West 1991 & Supp. 2001) (mandating that the best interest of the incapacitated person prevail over opinions of the family to the contrary).

13. Andrews, *supra* n. 1, at 86. In a departure from the traditional prohibition of the courts from initiating a guardianship, Texas law permits a court, when it has probable cause to believe that an individual is mentally incapacitated, to appoint a guardian ad litem or court investigator to investigate and if necessary file an application for guardianship. The court also is granted the right to obtain information to help it establish probable cause. Tex. Rev. Civ. Stat. Ann. art. 683 (Vernon Supp. 2002).

14. *E.g.* Fla. Stat. § 744.3201(1) (2001); Ind. Code Ann. § 29-3-5-1 (West 1994); Ohio Rev. Code Ann. § 2111.03 (Anderson 1998).

15. *E.g.* N.Y. Mental Hyg. Laws § 81.01. As observed in *supra* note 12, the stated purpose of the guardianship act is to promote the best interests of incapacitated people.

16. Andrews, *supra* n. 1, at 79.

the therapeutic state.¹⁷ Also, by appointing a guardian, the court created a responsible legal surrogate actor for the incapacitated person so that he or she could participate in those aspects of life subject to law, such as managing financial affairs and consenting to medical treatment.¹⁸ This aspect of guardianship as a necessary component of a legal system presupposed that all actors were capable of reasoned choice or, if not, a surrogate would act on their behalf.

Until the wave of guardianship reform in the 1980s and 1990s, these therapeutic and legalistic aspects of guardianship not only provided its justification, but also were the guideposts for judges who ruled on guardianship matters. However, the guardianship-reform movement of the 1980s interjected new values into guardianship. Far from seeing guardianship as a benevolent act by the state, reformers claimed that guardianship was a massive intrusion upon the autonomy and independence of those adjudicated incompetent and in need of a guardian.¹⁹ In the eyes of some, guardianship ceased to be a solution and became the problem.²⁰ Just as mental-health laws and practices relied excessively on commitment to mental-health facilities, according to its critics, so also the guardianship system was too dependent on plenary guardianship and failed to seek a “less restrictive alternative.”²¹

Reformers offered many solutions to the excesses of guardianship. Some were procedural and some were substantive, but all reflected their suspicion, if not antagonism, to guardianship.²² The procedural reforms, such as better notice to

17. Barbara A. Venesy, *1990 Guardianship Law Safeguards Personal Rights Yet Protects Vulnerable Elderly*, 24 Akron L. Rev. 161, 166 (1990) (explaining the therapeutic or functional approach, in which guardianship is intended to safeguard against a person's functional deficiencies in activities of daily living).

18. Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7 Md. J. Contemp. Leg. Issues 143, 143 (1995-1996) (defining the guardian's purpose).

19. Andrews, *supra* n. 1, at 76-77.

20. *Id.* at 82.

21. Fell, *supra* n. 9, at 200-201.

22. See generally John E. Donaldson, *Reform of Adult Guardianship Law*, 32 U. Rich. L. Rev. 1273 (1998) (analyzing guardianship reforms in Virginia during 1997 and 1998); Kathleen Harris, *Guardianship Reform*, 79 Mich. B.J. 1658 (2000) (reporting on guardianship reforms in Michigan from the 1970s through 2000); Neil B. Posner, Student Author, *The End of Parens Patriae in New York: Guardianship under New Mental Hygiene Law Article 81*, 79 Marq. L. Rev. 603, 610-645 (1996) (analyzing the 1992 guardianship reform in New York, including a comparison to guardianship reforms in the 1970s).

the alleged incapacitated person of the hearing,²³ were both an attempt to ensure fairness and were meant also to discourage the filing of guardianship petitions. By making the process more costly and more time-consuming, reformers hoped to decrease the number of plenary guardianships. If nothing else, reformers hoped that the procedural changes would reduce the number of false positives, i.e., reduce the number of approved guardians in cases in which the alleged incapacitated person was not mentally incapacitated as defined in the state statute. The substantive changes, which included modifying the statutory definition of the degree of mental incapacity necessary to warrant the appointment of a guardian,²⁴ were overtly directed at reducing the number of persons for whom a guardian could be appointed. Finally, for cases in which guardianship could not be avoided, the reformers created the concept of a “limited guardianship” that would maximize the incapacitated person’s autonomy and

23. *E.g.* 20 Pa. Consol. Stat. § 5511 (West Supp. 2001). The statute contains the following passage on notice of the guardianship hearing:

Written notice of the petition and hearing shall be given in large type and in simple language to the alleged incapacitated person. The notice shall indicate the purpose and seriousness of the proceeding and the rights that can be lost as a result of the proceeding. It shall include the date, time, and place of the hearing and an explanation of all rights, including the right to request the appointment of counsel and to have counsel appointed if the court deems it appropriate and the rights to have such counsel paid for if it cannot be afforded. The Supreme Court shall establish a uniform citation for this purpose. A copy of the petition shall be attached. Personal service shall be made on the alleged incapacitated person, and the contents and terms of the petition shall be explained to the maximum extent possible in language and terms the individual is most likely to understand. Service shall be no less than 20 days in advance of the hearing.

Id.

24. For example, compare the change in Pennsylvania law that appeared to narrow the statutory definition of a person in need of a guardian. In 1975, the statute read:

“Incompetent” means a person who, because of infirmities of old age, mental illness, mental deficiency or retardation, drug addiction or inebriety: (1) is unable to manage his property, or is liable to dissipate it or become the victim of designing persons; or (2) lacks sufficient capacity to make or communicate responsible decisions concerning his person.

20 Pa. Consol. Stat. § 5501 (West 1975). By 2001, the threshold of incapacity seems to have been raised:

“Incapacitated person” means an adult whose ability to receive and evaluate information effectively and communicate decisions in any way is impaired to such a significant extent that he is partially or totally unable to manage his financial resources or to meet essential requirements for his physical health and safety.

20 Pa. Consol. Stat. § 5501 (West Supp. 2001).

independence.²⁵

Today, limited guardianship is almost always an option for someone in need of a guardian.²⁶ Yet it is rarely invoked.²⁷ If judges sincerely desire to implement both the letter and the spirit of the law — and there is no reason to doubt that this is true — why is it that they so infrequently appoint limited guardians? It is not because they are necessarily hostile to the concept (though some may be). There is no reason to believe that judges harbor an instinct distrust of limited guardianship. Rather, the very circumscribed use of limited guardianship suggests either that it is undesirable — that idea is explored later in this Article — or that structural aspects of guardianship help explain the continued judicial preference for plenary guardianship.²⁸ Judges apparently prefer plenary guardianship because it seems best to meet the needs of the incapacitated person while still conforming to other legitimate pressures of the legal system.²⁹ Perhaps, in a perfect world, only the needs of the incapacitated person would be considered. In such a world, limited guardianship would almost certainly be much more common. In the actual world, however, the needs of the incapacitated person, although paramount, are not the only judicial concern.

Solving the problem that the petitioner presents to the court, and doing so within the limits of the law, is perhaps the most basic judicial reaction to a guardianship petition. Although a few such petitions may be fraudulent or frivolous because the alleged incapacitated person is not incapacitated and has no need of a guardian, in the main, the filing of a guardianship petition is the result of something amiss, some problem that the petitioner believes can be solved best or only by the appointment of a guardian. If the petitioner can convince the judge of the reality of the problem, then, within the limitations of the law, the judge will want to solve, or at least ameliorate, the problem.

25. See Lawrence A. Frolik, *Plenary Guardianship: An Analysis, a Critique, and a Proposal for Reform*, 23 Ariz. L. Rev. 599, 652–660 (1981) (advocating the need for limited guardianship and the abolition of plenary guardianship); Sally Balch Hurme, *Limited Guardianship: Its Implementation Is Long Overdue*, 28 Clearinghouse Rev. 660, 661 (1994) (noting that the purpose of limited guardianship is to promote the incapacitated person's independence and self-determination); Leary, *supra* n. 8, at 259–269 (outlining the basic goals of guardianship reform).

26. *E.g.* Cal. Prob. Code § 1860.5 (West 1991); Fla. Stat. §§ 744.1012, 744.344 (2001).

27. Hurme, *supra* n. 25, at 663.

28. Fell, *supra* n. 9, at 203.

29. *Id.*

For example, suppose the petitioner, fifty year old Ben, files a guardianship petition asking that he be named guardian for his eighty-five year old, widowed mother Mary. The petition alleges that Mary is suffering from the early stages of dementia and, as a result, is very susceptible to phone-and-mail solicitations. In the last six months, she has spent more than \$7,000 (out of an annual income of only \$20,000) on sweepstakes, magazines, household products, and the like, and even tickets for plays, although she rarely leaves the house and never leaves to go to a play. She also has pledged more than \$3,000 to charitable solicitors. Ben has asked his mother not to respond to phone or mail solicitations and, though she has repeatedly agreed, she continues to buy, subscribe, enter, and pledge.

Although Ben has Mary's durable power of attorney and is also her representative payee for her Social Security benefits, she still has access to her savings and checking accounts as well as the monthly pension check that she receives. Ben requests that he be named her guardian so that he can deny her access to her checking or savings account and take control of her pension. He also intends to get her an unlisted phone number and have her mail sent to a mailbox to which only he has access. The medical evidence supports Ben's contention that Mary suffers from mild dementia which, over time, might or might not become more severe. The only defense offered is that Mary, other than her spending proclivities, is capable of handling her affairs.

Faced with these facts, a judge might well conclude that plenary guardianship is in order and reject any suggestion of limited guardianship. From the judicial perspective, plenary guardianship has several attractions. It will solve the problem as presented. Once Mary is a ward and Ben is her guardian, she will no longer be able to waste her money. Because plenary guardianship will both assuage Ben's concerns and enable him to protect Mary and her money, it will have met the "solve the problem" test. Next, plenary guardianship is expeditious. Although not the primary concerns of judges, judges are nonetheless cognizant of the desirability of timely and efficient resolution of conflicts, which is one result of the imposition of plenary guardianship. Plenary guardianship also offers cost savings for the parties. Once a guardianship is created, it is unlikely to create further litigation. Most guardians never return to the court because their appointment provides them with sufficient authority to deal with almost any contingency. To the

extent that the court monitors the guardian, the task is rarely complicated by questions as to whether the guardian exceeded his or her authority.³⁰ Nor need the guardian return to the court to ask for additional authority or for an interpretation as to the extent of his or her authority.³¹

The efficiency offered by plenary guardianship makes it very attractive.³² It saves the time of the judges and the litigants and therefore is less costly than limited guardianship, which might require the guardian to return to the court for expanded powers if the ward suffers a further decline in capacity. If Mary's condition worsens, Ben can expand his control of her life without returning to the court for additional power to protect her. The finality of plenary guardianship, in the sense that it both solves the present problem and is expansive enough to meet future problems, makes it extremely appealing to petitioners and judges alike. Inconclusive, halfway measures or orders that need clarification or amendment can mean additional hearings at a cost of the judge's time and at added expense to the estate of the ward. Plenary guardianship is also preferred by third parties who deal with the guardian because they know that the guardian's authority is broad enough to support his or her actions. For example, if Ben, as guardian, asks Mary's bank to deny her access to her accounts, the bank can do so without fear that Ben might have exceeded his authority.

Judges are also mindful of the need to reach a decision and to craft an order that will not be overturned on appeal. Although there is nothing about plenary guardianship that renders it immune to an appeal, when there is an appeal, in guardianship what is typically challenged is the determination that the ward was mentally incapacitated.³³ Yet, in most guardianship hearings the mental incapacity of the ward is not seriously at issue,³⁴ and

30. Frolik, *supra* n. 25, at 654.

31. *Id.*

32. Fell, *supra* n. 9, at 203.

33. *E.g. In re Guardianship of Fuqua*, 646 S.2d at 795 (the ward appealed the lower court's finding of incapacitation).

34. See *Computer Analysis Yields Portrait of Elderly Words*, L.A. Times A2 (Sept. 27, 1987) (reporting that, in a survey of 2,200 court cases dating back to 1980, judges approved 97% of the petitions; 34% were approved without a doctor's opinion). Most practitioners would agree that the rate of serious challenge to the issue of incapacity remains low despite the reforms since 1987. However, there is scant hard data on this topic due to "the dearth of research" in the area of due process and guardianship generally. Nancy Coleman, *Issue Brief: Due Process* (Nov. 30, 2001) (unpublished).

so there is little likelihood that the decision to appoint a plenary guardian will be challenged. Sometimes parties appeal the decision to name a particular party as guardian, arguing that they would have been a better choice,³⁵ but they rarely challenge the correctness of the finding that the ward was legally incompetent.³⁶

Plenary guardianship, then, has many advantages: it solves the problem presented to the court, it grants the petitioner's request (thus that party would not appeal), it is broad and flexible enough to meet future problems arising from the ward's diminished capacity, it is not likely to be the source of additional litigation, and it is not particularly susceptible to being overturned on appeal. As the saying goes, "What's not to like?" Well for those of us who favor limited guardianship, the answer is, "a lot." If examined in detail, limited guardianship has much to offer potential wards and not at a cost that should give jurists pause.

III. IS LIMITED GUARDIANSHIP BETTER FOR INCAPACITATED PERSONS?

The most basic challenge to proponents of limited guardianship is whether it is desirable for the incapacitated person. Put another way, does limited guardianship meet the needs of an incapacitated person better than plenary guardianship? The focus at this point is strictly on the ability of limited guardianship to satisfy the needs of the incapacitated person, not whether it is "best" for judges, guardians, petitioners and other parties. If limited guardianship is inappropriate or unsuccessful as to wards, then the inquiry ceases because it would be wrong to promote the use of limited guardianship if it is less effective in meeting the needs of the ward than is plenary guardianship. Only after the ward's interests have been served as best as they can should the inquiry shift to whether and how limited guardianship can meet the interests of other parties, such as the petitioner or the judge.

The operation of a guardianship should not be a compromise

manuscript prepared for Wingspan — The Second National Guardianship Conference) (on file with the *Stetson Law Review*).

35. *E.g. In re Guardianship of K*, 2001 Wis. App. LEXIS 240 at *6.

36. One exception is if the ward has a durable power of attorney. Sometimes the agent acting under such a power objects to the appointment of a plenary guardian, arguing that because of the power of attorney, no guardian is needed.

designed to alleviate the concerns of the various parties, nor should it be some utilitarian system with the goal of bringing the greatest good to the greatest number. Guardianship may have conflicting interests, but it has one primary goal: the protection and advancement of the life and property of the incapacitated person.³⁷ If limited guardianship is not the optimal solution for the incapacitated person, then it should not be used. But the obverse is also true. If limited guardianship would be better for the ward than plenary guardianship, it should be used irrespective of its effect on other parties or the judge.

In determining the efficiency of limited guardianship, it is necessary to begin with the nature or source of the individual's incapacity. The mentally incapacitated may be categorized as the old and demented, the mentally ill, and the mentally retarded. Of course, any one person can be old and demented and retarded, or old and demented and mentally ill, or retarded and mentally ill, but most incapacitated persons fit only a single category if we define "old and demented" very broadly to include stroke victims and those who suffer from other mental incapacities commonly associated with advanced age. A fourth possible category would comprise those persons who have lost consciousness, either permanently, temporarily, e.g., a coma, or who have lost consciousness as they approach death. The fourth category need not concern us, however, because such persons would appear to be obvious candidates for a plenary guardian, as they have no ability to act on their own behalf.

Individuals who are old and demented, mentally ill, or mentally retarded, however, can retain some degree of mental functioning and so raise the question of whether they might be better served by limited guardianship rather than plenary guardianship. For our purposes, the arguments that can be made on behalf of limited guardianship for the non-elderly mentally ill or mentally retarded are not relevant to the question of whether limited guardianship is better for an older person with reduced mental capacity, although the advocates of the mentally ill and mentally retarded were some of the most aggressive advocates of limited guardianship.³⁸ Those interested in the elderly were much

37. *E.g.* Cal. Prob. Code § 1800; N.Y. Mental Hyg. Laws § 81.01; 20 Pa. Consol. Stat. § 5502 (West Supp. 2001).

38. *E.g.* Maureen A. Sanders & Kathryn Wissel, Student Authors, *Limited Guardianship for the Mentally Retarded*, 8 N.M. L. Rev. 231 (1978) (advocating limited guardianship for the mentally retarded in New Mexico as part of a national movement).

less insistent about the need for limited guardianship. The difference in the degree to which the advocacy groups were interested in limited guardianship is easily explained. Advocates of the mentally ill and mentally retarded perceived limited guardianship as part and parcel of the drive to normalize life for their clients.³⁹ Advocates of the mentally ill and mentally retarded sought to deinstitutionalize the mentally-ill and mentally-retarded populations.⁴⁰ Following the doctrine of the least restrictive alternative,⁴¹ advocates proposed to place mentally-ill and mentally-retarded individuals in the community in which they could live lives that were as “normal” as possible in light of each individual’s particular disability.

Advocates saw plenary guardianship, however, as completely at odds with integrating the disabled individuals into the community. Individuals under a plenary guardianship were severely hobbled in their attempts to rejoin the community because they could not handle their financial affairs, make a valid contract, control their medical care, or even decide where to live. Advocates of the mentally ill argued that their clients should lose only such rights as were necessary to permit them to live in the community.⁴² Otherwise, they should retain the fundamental rights that were part and parcel of living in the community. According to reformers, the state could not justify stripping the mentally ill of their rights as autonomous individuals merely because they had an illness.⁴³

39. Frolik, *supra* n. 25, at 653 (describing how plenary guardianship can prevent the mentally retarded from functioning to the limits of their abilities).

40. For articles discussing and advocating deinstitutionalization, see David L. Chambers, *Alternatives to Civil Commitment of the Mentally Ill: Practical Guides and Constitutional Imperatives*, 70 Mich. L. Rev. 1107 (1972); Stephen L. Mikochik, *Advancing Deinstitutionalization*, 65 N.D. L. Rev. 143 (1989); Stephen J. Morse, *A Preference for Liberty: The Case against Involuntary Commitment of the Mentally Disordered*, 70 Cal. L. Rev. 54 (1982).

41. Ralph Slovenko, *The Hospitalization of the Mentally Ill Revisited*, 24 Pacific L.J. 1107, 1113–1114 (1993) (discussing the theory of the least restrictive alternative).

42. *Id.* at 1111–1117 (relating the theory of the least restrictive alternative to the emergence of community-based treatment of the mentally ill as an alternative to civil commitment).

43. *E.g.* Danielle Priola, Student Author, *Disability Law — Burden of Proof — An Individual Challenging the Capacity of a Developmentally-Disabled Person to Make an Independent Decision Bears the Burden of Proving by Clear and Convincing Evidence that the Disabled Person Has the Specific Incapacity to Decide — In re M.R.*, 135 N.J. 155, 638 A.2d 1274 (1994), 26 Seton Hall L. Rev. 407, 409 (1995) (discussing the New Jersey Supreme Court’s view that a finding of mental incompetence does not necessitate an absolute deprivation of rights).

Advocates of the mentally retarded not only emphasized the need for the individual to retain personal rights if he or she were truly to be a functioning member of the community, but also made another compelling point. Retarded individuals, they contended, had more potential than our society had envisioned. These individuals, far from being candidates for a useless life, hidden away in an impersonal institution, were unique individuals with capabilities and possibilities like anyone else.⁴⁴ Hence, adoption of the Education for All Children Act⁴⁵ brought retarded and other developmentally-disabled children into the mainstream of education. Reformers hoped similarly to bring adult retarded individuals into the community.⁴⁶ Plenary guardianship, with its absolute labeling and stripping of rights, was seen as a barrier to inclusion.⁴⁷ To reformers, plenary guardianship was not a solution, but rather a problem. Limited guardianship, on the other hand, held the promise of crafting just the degree of protection and assistance needed by the mentally ill and mentally retarded.⁴⁸

Advocates for the mentally ill and mentally retarded were correct about limited guardianship. It is adaptable for a ward with fluctuating capacity, as well as for a ward whose capacity is expanding but whose ability to care for himself or herself would otherwise be diminished by the imposition of plenary guardianship. Limited guardianship is the preferred paradigm for an individual who suffers from diminished or situational incapacity rather than the global incapacity that we associate, for example, with persons with advanced dementia of the Alzheimer's type.

But what of the elderly who are gradually (or even rapidly) *losing* mental capacity due to dementia or other mental disabilities? Although their desire, and that of their guardians, is that they be active, autonomous individuals, the reality is that they are often stranded on an ever-shrinking island of capability and capacity. There is no potential for autonomy; rather, there is the need to protect their lives and property. Limited guardianship

44. William Christian, Student Author, *Normalization as a Goal: The Americans with Disabilities Act and Individuals with Mental Retardation*, 73 Tex. L. Rev. 409, 410-411 (1994) (arguing that mentally retarded individuals have capabilities like anyone else).

45. 20 U.S.C. § 1400 (1994 & Supp. 1999).

46. Christian, *supra* n. 44, at 410.

47. Frolik, *supra* n. 25, at 653.

48. *Id.*

seems a poor fit for someone in decline. Rather than a solution, it seems only to assure that the parties must return to the court to grant the guardian additional power as the ability of the ward to handle his or her life continues its inevitable decline. Indeed, seen in that light, limited guardianship seems almost a cruel joke to play on the families and guardians of the incapacitated elderly.

It is a pernicious overstatement, however, to argue that the elderly with decreasing capacity should be viewed no differently than the elderly with global incapacity. Many older persons suffer from limited or selective mental incapacity. Their incapacity, if not permanent, is at least temporarily stable or, alternatively, is in a very slow decline.⁴⁹ In short, their profile is closer to that of a retarded person. Some of these older persons are stroke victims.⁵⁰ Once stabilized, their mental condition is not likely to worsen unless and until they have another stroke or other debilitating illness or accident. They might, for example, have lost the ability to speak, but they are otherwise capable of handling their own affairs and would be mortified if labeled “mentally incapacitated” and were to have a plenary guardian appointed for them. Others will have dementia that is not progressive or that is advancing only at a very slow rate.⁵¹ They, too, may be capable of handling some of their personal affairs. Their incapacity is not global, but situational or task specific. Perhaps they no longer have the capacity to manage their investments, but they may still be able to pay their bills and do their own shopping and may be expected to do so for the foreseeable future.

True, they need help, but they need a limited guardian, not a plenary guardian. For these older persons with reduced, but stable, capacity, limited guardianship provides all the assistance that they need while avoiding the excessive intrusion on their lives as well as the sense of shame that may accompany plenary guardianship. For these elderly a limited guardian is the analogue to a physical caretaker. The older individuals receive just that degree of help that is needed. They are also spared being

49. Fell, *supra* n. 9, at 192.

50. A stroke is defined as a heterogeneous group of vascular disorders that result in brain injury. Daily functioning in the workplace, home, and community is often reduced and many stroke patients are impaired in their ability to walk, see, and feel. Each year about 750,000 Americans have a stroke and about 150,000 of them die. *The Merck Manual of Geriatrics* 397–398 (Mark H. Beers & Robert Berkow eds., 3d ed., Merck Research Labs. 2000).

51. Dementia is a deterioration of intellectual function and other cognitive skills, leading to a decline in the ability to perform activities of daily living. *Id.* at 357.

told by a judge that they are no longer autonomous, but rather, incapacitated, with no more legal rights than people in comas. For the elderly, limited guardianship is to plenary guardianship what an assisted-living facility is to a nursing home. It offers the proper balance of care and protection with dignity and autonomy.

Despite the attraction of limited guardianship in theory, the difficulty of tailoring the power of the limited guardian to the needs of the older person is sometimes cited as a serious impediment to its adoption.⁵² That objection rings true if each court attempts to craft a unique, limited guardianship for each older ward who has limited capacity. To do so, the court would have to make detailed findings about the mental condition and capabilities of the potential ward,⁵³ which would require a time-consuming process both in the fact-finding stage and in the drafting of the order of guardianship. But this need not be the case.

Although guardianship orders never should become “off-the-shelf” standardized, “one size fits all” orders, they need not be handcrafted. The goal should be sufficient individualization to meet the degree of help needed by the elderly person, blended with the efficiencies gained using semi-standard court orders based on a limited number of categories of limited guardianship not unlike the federal classification of Medigap⁵⁴ plans into ten standardized plans. A court could create modules of limited guardianship, though not as inflexible or detailed as the Medigap program. In turn, guardianship petitioners could request a form of guardianship relief consistent with the preexisting modules and ask for any modifications deemed necessary because of the condition and needs of the incapacitated elderly person. Such a system also could inform petitioners about the proof of incapacity they will need to justify the appointment of a limited guardian with the requested powers. Armed with the knowledge of the universe of possible limited guardianship orders, the petitioner and the court could engage in an efficient hearing. The petitioner would know what evidence to present, while the court would know what order to issue as the proper response.

Still, the appointment of a limited guardian, although desirable, is not enough. The appointing court cannot merely

52. Fell, *supra* n. 9, at 203.

53. Of course, some states require such findings even for plenary guardianships. *E.g.* 20 Pa. Consol. Stat. § 5511 (West 1975 & Supp. 2001).

54. 42 U.S.C. §§ 1395a, 1395b-2, 1395ss (1994 & Supp. 1999).

appoint a guardian and proceed institutionally to “forget” about the incapacitated individual. Rather, the court must monitor the guardianship. It must oversee the acts of the guardian to ensure that the guardian is complying with the terms of the limited guardianship.⁵⁵ Just as monitoring of a plenary guardian by the use of mandatory reports and field inspections by court visitors is essential if courts are to fulfill their function as the protector of the mentally incapacitated,⁵⁶ so too must courts accept that it is their unique duty to see that the limited guardian acts according to the court order and in the best interests of the incapacitated person. The court also must be ready to amend or expand the powers of the limited guardian in response to the changing needs and conditions of the incapacitated person. If the courts fail in this critical role, then guardianship reform will be little more than a charade. Guardianship will be a world of court orders without compliance, paper reforms without reality, and a smug, self-satisfied system that turns a blind eye to the needs of the mentally incapacitated. Yet, it need not be so. Courts can and must monitor guardians and aggressively seek the resources necessary to support the effective oversight of guardians and the protection of persons adjudicated mentally incapacitated.

Assuming that courts and reformers indeed create a workable system of limited guardianship, in many cases, limited guardianship could be voluntary.⁵⁷ The elderly person might be aware of his or her limitations and welcome the opportunity to turn over part of his or her life to a guardian, comforted by the promise of court supervision and knowing that, if his or her capacity should decline, further protection will be present in the form of a trusted guardian whose powers the court can expand if necessary. If the older person acceded to the imposition of a limited guardian, the process could proceed more quickly, at less cost, and without the acrimony that can accompany plenary guardianship. A compliant ward who understood and agreed with the need for assistance in the form of a guardian with limited powers, would convert guardianship from a “solution” imposed on the individual to a cooperative arrangement in which the court, the petitioner and, most importantly, the elderly person, together could create a limited guardianship that assists rather than

55. Fell, *supra* n. 9, at 203.

56. *Id.* at 197.

57. The Uniform Probate Code provides for consensual guardianship. Unif. Prob. Code § 5-303, 8 U.L.A. 357 (1998).

oppresses.

Whether imposed or consensual, the greater use of limited guardianship would be in accord with the expressed intent of many reformed guardianship statutes.⁵⁸ If nothing else, having guardianship practice in compliance with the law is desirable. Otherwise, the stated custom of many statutes for a preference for limited guardianship⁵⁹ is little more than false advertising. Although the initial lack of use of limited guardianship in the years after the adoption of reformed guardianship could be attributed to the natural difficulty of instituting the new, unknown, and unusual, with the passage of years, it becomes less defensible to ignore the statutorily-stated preference for limited guardianship. If judges and lawyers do not really have any confidence in limited guardianship, then reformers should just admit that it was an idea whose time was never to come, amend the statutes by making limited guardianship a possible, but not preferred, outcome, and turn our attention to other guardianship concerns, such as how to supervise guardians properly.⁶⁰

Reformers should also admit that limited guardianship is not a solution to all the problems of guardianship. It will not make guardianship hearings less expensive or less time-consuming. It will not stop relatives from fighting about the need for a guardian, even about a guardian with limited authority. And, because of the limits on the guardian's authority, limited guardianship creates the distinct possibility of future hearings to provide judicial clarification and amendment of the powers of the guardian.

Indeed, the difficulties of limited guardianship seem so well known or so real that they appear to have created an insurmountable obstacle to its adoption.⁶¹ Unfortunately, these practical problems, these "real world" concerns, have triumphed over the "softer" values of personal autonomy, dignity, independence, and respect for individual freedom. For some

58. *E.g.* Fla. Stat. § 744.344(2) (2001) (directing the courts to order the least restrictive alternative); N.Y. Mental Hyg. Laws § 81.02(a)(2) (providing that the powers granted to a guardian "shall constitute the least restrictive form of intervention"). The Uniform Guardianship and Protective Proceedings Act provides that a court "shall grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs." Unif. Guardianship & Protective Proc. Act § 311(b), 8A U.L.A. 146 (Supp. 2001).

59. Leary, *supra* n. 8, at 264.

60. See Thomas L. Hafemeister & Paula Hannaford, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 Elder L.J. 147 (1994) (discussing supervision of guardians).

61. Fell, *supra* n. 9, at 203.

reason, a complaint, such as that limited guardianship will require too much judicial time, seems more compelling than the importance of helping older persons retain their sense of self-respect while providing them with the assistance they need.

Complaints about limited guardianship miss the point. Instead of asking what limited guardianship will do to the guardianship system, society needs to ask what the guardianship system is doing to the elderly. The burden should not be on limited guardianship to prove its worth. Instead, the proponents of plenary guardianship should bear the burden of defending it. Consider the present system of plenary guardianship with its attendant costs, court proceedings, family squabbles, shortage of guardians, ill-prepared and unsupervised guardians, and lack of protection for wards; the list goes on and on. Yet, those who advocate limited guardianship continue to bear the burden to “prove” it will work or to demonstrate solutions to any and all objections. It need not be so. Of course, the widespread use of limited guardianship will be beset with problems. But so is the present world of plenary guardianship. The only way to create a workable system of limited guardianship is to put it into effect and address the problems as they arise. “Life in all its fullness must supply the answer”⁶²

If limited guardianship were to be widely used, one can predict many benefits, but the fundamental attraction would be how it would change the relationship between the guardian and the ward. Limited guardianship will make it more obvious to guardians that they must take into account the wishes and wants of the ward who, after all, will remain in charge of many aspects of his or her life. A guardian acting under a limited guardianship often will need to consult and compromise with the ward as the two of them attempt to act in concert to maintain and improve the ward’s quality of life. And, although much is not known as to how limited guardianship would play out day to day, limited guardianship has the potential to change the relationship between the guardian and the ward from one of command and dominance to one of negotiation and compromise.

62. *Welch v. Helvering*, 290 U.S. 111, 115 (1933). When the issue before the Supreme Court was the definition of “ordinary and necessary” business expenses for tax purposes, Justice Benjamin Cardozo resisted laying down a bright-line test. Rather, he concluded, “The standard set up by the statute is not a rule of law; it is a way of life. Life in all its fullness must supply the answer to the riddle.” *Id.*

IV. WILL JUDGES USE LIMITED GUARDIANSHIP?

So how does society advance to this brave new world of limited guardianship? Judges and judicial attitudes are the keys. Certainly, no reform of guardianship will have much success unless the judges are supportive, and that, in turn, depends on judges being assured that they will have the time and resources to make limited guardianship successful. Judges do not live in the theoretical land of law reviews in which hope and idealism rule, and reality is often far removed. Because they preside in a world of real courts, real incapacitated persons, and real costs, their enthusiasm for guardianship reform is necessarily tempered by concern that proposed reforms are not only desirable, but also feasible. Judges are all too aware of the difficulty of translating a statute from the code book to the courtroom. For example, if judges are expected to appoint guardians with limited powers, then judges will need court investigators to help them understand the needs and capabilities of the alleged incapacitated person.⁶³ For that matter, judges need court investigators to alert them to instances in which the alleged incapacitated person might be a candidate for limited guardianship. Of course, the petitioner and the lawyer for the alleged incapacitated person (assuming there is one) should be capable of informing the court as to when a limited guardianship might be appropriate. But that model, the pure adversarial model with the court as the passive adjudicator, is not appropriate for guardianship hearings in which the court is supposed to promote the best interests of the ward. The ward's best interests may or may not be best advocated by the petitioner or even by counsel for the alleged incapacitated person.⁶⁴ Judges need independent sources of information about the mental, physical, and economic conditions of the alleged incapacitated person if they are to employ limited guardianship successfully. Limited guardianship also requires post-guardianship monitoring for the court to know whether the guardian is carrying out the prescribed level of duties and whether the powers granted to the guardian are sufficient to protect the interests of the ward.

63. Fell, *supra* n. 9, at 210.

64. See Alfreida B. Kenny, *Is Article 81 the Appropriate Vehicle to Address the Needs of the Mentally Ill?* 125 (P.L.I. N.Y. Prac. Skills Course Handbook Series, Guardianship Law, Aug. 21, 2001) (available in Westlaw at 106 PLI/NY 103) (reminding lawyers that so long as the client understands the consequences, a lawyer may not substitute his or her own judgment for that of the client, even if the lawyer believes the client is not acting in his or her own best interest).

Expecting courts to oversee guardians and, in particular, limited guardians, may not be realistic because it is asking an adjudicatory body to perform a supervisory function. Courts and judges are very skilled at finding facts, deciding cases, and creating remedies, but they are neither trained, nor do they have the staff support, to monitor the post-trial actions of the parties.⁶⁵ Normally, courts expect that the opposing party will have an interest in ensuring that judicial orders are carried out. But in guardianship, there may be no “opposing party” who can complain to the court if the guardian acts improperly. Although the ward has the right to inform or petition the court,⁶⁶ in most instances the reduced capacity of the ward makes the exercise of that right unlikely. Interested third parties, such as relatives, friends, or service providers, may seek out court help for wards whom they believe are not being properly cared for by the guardian,⁶⁷ but such intervention will not always occur. Rather, it is necessarily up to the courts, meaning the judges, to supervise guardians and guardianships and see that the interests of the ward are properly protected.⁶⁸ To perform this function, the courts must be funded adequately so that they can hire investigators and skilled personnel to direct the investigators.

Providing judges with the level of financial support required to institute, operate, and maintain a limited guardianship system is a necessary component, but is relatively useless unless judges understand and appreciate the potential advantages of limited guardianship. One reason that limited guardianship is used so infrequently is that judges do not perceive that its advantages outweigh its drawbacks.⁶⁹ If judges really accepted the superiority of limited guardianship over plenary guardianship, there would be no need for essays such as this that extol its virtues. What is needed is judicial education about the benefits to wards of the greater use of limited guardianship, for it is, after all, the welfare

65. See generally Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 *Stetson L. Rev.* 867 (2002) (discussing the problems associated with courts acting as guardianship monitors, surveying various state attempts to solve these problems, and offering recommendations for reform).

66. *E.g.* Fla. Stat. § 744.3715 (2001) (providing that “any interested person, including the ward,” may request the court to review the order of guardianship on the ground that the guardian is not acting in the best interests of the ward).

67. *E.g. id.*

68. Fell, *supra* n. 9, at 203, 210.

69. *Id.* at 202 (discussing perceived drawbacks to limited guardianship).

of wards with which the judges are most concerned. Once the judges are won over, and once they believe they will have the resources to manage a limited guardianship system successfully, they will have little difficulty persuading attorneys who engage in guardianship practice to appreciate the advantages of limited guardianship.

Judges, then, are the key to the adoption of limited guardianship. How to educate them about the virtues of limited guardianship and how it might be successfully implemented should be the next steps. The answers to those questions will be found among the judges who must perceive that they can be the creators of a limited guardianship system and thus invested with the desire that it succeed. State-by-state, judicial conferences must convene and address the whys and hows of limited guardianship and create action plans for its adoption. There must be specific plans for monitoring guardians, both limited and plenary, with realistic cost estimates. It is pointless to claim that the guardianship system is "reformed" unless judges institute formal systems to fulfill their oversight function.

Finally, those who finance the courts must be persuaded of the need for adequate funding. Courts require not great sums, but critical dollars, if limited guardianship is to work and if the dignity and autonomy of the elderly are to be respected. With a judicial commitment and adequate funding, limited guardianship finally will move from the land of the ideal to the real world of the elderly with diminished capacity who are in need of help, but not at the cost of their personal freedom.