

THE WINGSPAN OF WINGSPREAD: WHAT IS KNOWN AND NOT KNOWN ABOUT THE STATE OF THE GUARDIANSHIP AND PUBLIC GUARDIANSHIP SYSTEM THIRTEEN YEARS AFTER THE WINGSPREAD NATIONAL GUARDIANSHIP SYMPOSIUM

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I. INTRODUCTION

In his 1881 treatise, *The Common Law*, Justice Oliver Wendell Holmes, Jr. said, “The life of the law has not been logic: it has been experience.”¹ What is the experience of guardianship?

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Professor Schmidt’s teaching experience includes health law, mental-health law, elder law, and social science and law. His guardianship-related publications include the books *Guardianship: Court of Last Resort for the Elderly and Disabled* (Winsor C. Schmidt, Jr., ed., Carolina Academic Press 1995), and Winsor C. Schmidt, Kent S. Miller, William G. Bell & B. Elaine New, *Public Guardianship and the Elderly* (Ballinger Publ. Co. 1981), as well as twenty book chapters and articles on guardianship and adult protective services. He is currently a member of the Board of Directors, National Committee for the Prevention of Elder Abuse with past service that includes the National Mental Health Association Board of Directors, Florida Mental Health Association Board of Directors, Florida Mental Health Institute Board of Advisors, and the District Two Human Rights Advocacy Committee, Florida State Hospital. He was the 1983–1984 Mental Health Law Fellow, Institute of Law, Psychiatry and Public Policy, University of Virginia. Professor Schmidt was one of the thirty-eight attendees at the 1988 Wingspread National Guardianship Symposium. The National Guardianship Symposium, which was sponsored by the ABA Commissions on Legal Problems of the Elderly and on Mental Disability, was held at the Johnson Foundation’s Wingspread Conference Center in Wisconsin.

1. Oliver Wendell Holmes, Jr., *The Common Law* 1 (Little, Brown & Co. 1881). Holmes continued:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and

“Guardianship” is the authority of a guardian, and the relationship between guardian and ward.² A “guardian” manages the person and property of another, the “ward,” who is considered to be incapable of self-administration.³ Although the purpose of guardianship is management for another, we must

[r]ecognize guardianship for what it really is: the most intrusive, non-interest serving, impersonal legal device known and available to us and as such, one which minimizes personal autonomy and respect for the individual, has a high potential for doing harm and raises at best a questionable benefit/burden ratio. As such, it is a device to be studiously avoided.⁴

This Article examines highlights of the available social-science research related to the topic areas of the Recommendations emanating from Wingspan — The Second National Guardianship Conference.⁵ The areas examined in this Article include “Diversion and Mediation,” “Due Process,” “Adversarial Litigation,” “Public, Agency and Professional Guardianship,” and “Guardianship Monitoring and

what it tends to become.

Id. For more on early criticism of classical jurisprudence, see John Monahan & Laurens Walker, *Social Science in Law* 2–29 (4th ed., Found. Press, Inc. 1998). Monahan and Walker survey the writings of Oliver Wendell Holmes, Louis Brandeis, and Roscoe Pound, and explain “how changes in American society eventually led to the reformulation of their early criticism into the ‘school’ of legal realism.” *Id.* at 2.

2. See *Black’s Law Dictionary* 712 (Bryan A. Garner ed., 7th ed., West 1999) (defining guardian as “[o]ne who has the legal authority for another’s person or property, because of the other’s infancy, incapacity, or disability”).

3. *Id.* at 1577.

4. Winsor C. Schmidt, *Guardianship of the Elderly in Florida: Social Bankruptcy and the Need for Reform*, 55 Fla. B.J. 189, 189 (Mar. 1981) (quoting E.S. Cohen, Speech, *Protective Services and Public Guardianship: A Dissenting View* (31st Annual Meeting of the Gerontological Socy., Dallas, Tex., Nov. 20, 1978)).

5. Primary sponsors of the Wingspan Conference were the National Academy of Elder Law Attorneys, Stetson University College of Law, host of the Conference, and the Borchard Center of Law and Aging. Co-sponsors were the ABA Commission on Legal Problems of the Elderly, the National College of Probate Judges, the Supervisory Council of the ABA Section on Real Property, Probate and Trusts, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, and the Center for Social Gerontology, Inc. The Wingspan Conference Recommendations are printed at 31 Stetson L. Rev. 595, 595–609 (2002). The Recommendations, authored by Wingspan Conferees, do not purport to have the endorsement of the Wingspan Conference’s individual sponsor organizations. To view commentary or dissenting opinions, as well as the Recommendations on-line, visit the National Academy of Elder Law Attorney’s Web site at <<http://www.naela.com>>.

Accountability.” The areas are examined in the order in which an alleged incapacitated person faces them while proceeding through the guardianship system. A sixth Recommendation topic, “Lawyers as Fiduciary or Counsel to Fiduciary,” seems more illuminated by professional ethics analysis than by empirical analysis and is outside the scope of this Article.⁶ The Article reviews what is known and not known about the state of the guardianship and public guardianship system related to the Wingspan Recommendation topic areas. Based on this knowledge, the Article suggests the need for strategic planning, including a mission and vision for the guardianship system.

II. DIVERSION AND MEDIATION

A. Diversion

To begin in the order in which an incapacitated person proceeds through the guardianship system, diversion should be addressed before mediation because mediation is premised on the idea of alternative dispute resolution. If a potential guardianship dispute is resolved through mediation before a formal adjudication of incapacity, then mediation might be considered a diversion from guardianship.⁷ However, there is an important distinction between alternatives to guardianship, like durable

6. Research has been conducted, however, on the legal needs of, and duties lawyers owe to, the mentally disabled, developmentally disabled, and the elderly. See Alice K. Nelson, Winsor Schmidt & Kent Miller, *The Legal Needs of the Mentally and Developmentally Disabled—A Florida Study*, 6 *Mental Disability L. Rptr.* 418 (1982) (analyzing then-current literature and surveying service providers, consumers, and advocates to identify deficiencies in legal services for the mentally and developmentally disabled); Winsor C. Schmidt, *Accountability of Lawyers in Serving Vulnerable, Elderly Clients* 5 *J. Elder Abuse & Neglect* 39 (1993) (reviewing existing behavioral research on extent of poor-quality legal representation to disabled clients and guardians and demonstrating the need for greater accountability of lawyers to disabled clients); Winsor C. Schmidt, Kent S. Miller, James G. Cameron & Christa L. Collins, *The Impact of Attorneys' Attitudes toward Pro Bono Publico Efforts on Behalf of the Mentally Disabled*, 12 *Stetson L. Rev.* 395 (1982) (reporting the results of a survey of a random sample of Florida Bar members that found a deficiency of legal services to the mentally disabled).

Unfortunately, the examination of the legal needs of and duties lawyers owe to the mentally and developmentally disabled and the elderly has found that not only are their legal needs not being met, but also that “there are cases of extraordinary abuse by lawyers serving as guardians.” Edward D. Spurgeon & Mary Jane Ciccarello, *Lawyers Acting as Guardians: Policy and Ethical Considerations*, 31 *Stetson L. Rev.* 791, 843 (2002).

7. Ellie Crosby, *Issue Brief: Mediation and Diversion* (unpublished manuscript prepared for the Wingspan Conference Nov. 30, 2001) (copy on file with the *Stetson Law Review*) (stating that “[m]ediation is one method for diverting cases from full guardianships”).

powers of attorney, and alleged “diversions” or “prevention” services, like the provision of a representative payee, advocate, non-durable power of attorney, bill payer, or money manager.⁸

The United States Administration on Aging reflected a widespread guardianship-service hypothesis that “assistance and education, before the issue reaches the crisis stage, might reduce the level of service required, delay the need for the service and even make the service unnecessary.”⁹ However, a study of clients and client outcomes for public guardianship services and so-called guardianship “alternatives” services did not support that hypothesis. The study found:

To characterize the nonguardianship services of both programs [staff service and volunteer staff service] as “guardianship alternatives” is both erroneous and detrimental to the intentions and purposes of public guardianship. The guardianship clients are adjudicated legally incompetent; the “guardianship alternative” service clients are not legally incompetent. “Guardianship alternative” service would not be appropriate for the clients who are legally incompetent and are receiving “guardianship alternative” service. If “guardianship alternative” service were actually an alternative to guardianship, the “guardian alternative” clients should be more similar to guardianship clients. An alternative connotation for “guardian alternative” service is that such service prevents or delays legal incompetence. (The only “guardian alternative” service that in theory prevents legal incompetence is durable power of attorney service that survives an adjudication of legal incompetence.) In fact, the available empirical research suggests that “guardian alternative” service does not substitute for, divert, prevent, or delay legal incompetence. The need for “guardian alternative” service is very real and should be addressed, but it is a disservice to characterize the services as “guardian alternatives.”¹⁰

8. See generally Pamela B. Teaster, Winsor C. Schmidt, Hillel Abramson & Richard Almeida, *Staff Service and Volunteer Staff Service Models for Public Guardianship and “Alternatives” Services: Who Is Served and with What Outcomes?*, 5 J. Ethics L. & Aging 131, 148–149 (1999) (discussing the guardianship “alternatives” misnomer and arguing that this misnomer may be harmful).

9. 53 Fed. Reg. 50164, 50166 (Dec. 13, 1988).

10. Teaster et al., *supra* n. 8, at 148–149 (citations omitted). In fact, it is important to find true guardianship alternatives because, after the elderly become wards of the public guardianship system, “there is some evidence of home selling, institutionalization, and

More specifically and definitively, one of the leading social-science researchers on guardianship used an elegant quasi-experimental design to show no significant difference in rates of conservatorship between those offered the hypothesized guardianship “alternative” of daily money-management services and those not receiving daily money-management services.¹¹ The reported base rate of legal incapacity (1/1700) in the general population,¹² and even in so-called at-risk populations, is so low that predictions of incapacity would generate unacceptable multiples of both false positives and false negatives.¹³ That is, intervening with alleged diversion or prevention services like representative payee, advocate, non-durable power of attorney, bill payer, and money-manager services with the intent to divert and prevent legal incapacity will falsely and inaccurately serve persons who will never become incapacitated (false positives). Such intervention services intended to divert and prevent legal incapacity will also fail accurately to identify and serve some who do become legally incapacitated (false negatives). There are no known scientifically-evaluated services (except, for example,

possibly death.” Winsor C. Schmidt, *Quantitative Information about the Quality of the Guardianship System: Toward the Next Generation of Guardianship Research*, 10 Prob. L.J. 61, 79–80 (1990).

11. Kathleen H. Wilber, *Alternatives to Conservatorship: The Role of Daily Money Management Services*, 31 *Gerontologist* 150, 153 (1991) [hereinafter Wilber, *Alternatives to Conservatorship*]. Wilber continued her research on daily money-management services and decision-making interventions in general. See Kathleen H. Wilber, *Commentary: Alternatives to Guardianship Revisited: What’s Risk Got to Do with It?*, in *Older Adults’ Decision-Making and the Law* 213, 213–224 (Michael Smyer, K. Warner Schaie & Marshall Kapp eds., Springer Publ. Co. 1996) (summarizing Wilber’s study on daily money-management services for elderly individuals); Kathleen H. Wilber, *The Search for Effective Alternatives to Conservatorship: Lessons from a Daily Money Management Diversion Study*, 7 *J. Aging & Soc. Policy* 39 (1995) (exploring the outcomes of her study on daily money-management services for elderly individuals); Kathleen H. Wilber & Sandra L. Reynolds, *Rethinking Alternatives to Guardianship*, 35 *Gerontologist* 248 (1995) (discussing ways to assess and identify performance expectations and limitations of decision-making interventions, including financial management).

For published empirical research that begins the identification of factors that place older adults at risk for conservatorship, see Sandra Reynolds & Kathleen Wilber, *Protecting Persons with Severe Cognitive and Mental Disorders: An Analysis of Public Conservatorship in Los Angeles County, California*, 1 *Aging & Mental Health* 87 (1997).

12. Schmidt, *supra* n. 4, at 189.

13. Cf. Michael L. Perlin, *Mental Disability Law: Civil and Criminal* 104–121 (2d ed., Lexis L. Publ. 1998) (discussing individuals in involuntary civil commitment proceedings and concluding that predictions of their future violence is “slightly better than chance”); see generally Monahan & Walker, *supra* n. 1, at 357–395 (regarding empirical contexts for determining future facts).

durable powers of attorney) that divert or prevent legal incapacity. Timely durable powers of attorney are, of course, effective prophylactics for guardianship.

Because appropriate participants in mediation are not legally incapacitated,¹⁴ mediation is not a likely guardianship diversion or prevention service. Mediation intended or targeted to divert or prevent legal incapacity and guardianship could generate inaccurate and inefficient multiples of both false positives and false negatives.

B. Mediation

Regarding mediation, I would like to add to Professor Mary F. Radford's assessment of mediation's appropriateness in adult guardianship cases.¹⁵ Professor Radford acknowledges that "[t]here is little empirical evidence as to the use or effectiveness of mediation in adult guardianship cases."¹⁶ There is, however, some empirical research on the use of mediation in divorce child-custody proceedings suggesting that women's satisfaction with mediation is less than their satisfaction with adversarial proceedings.¹⁷ These research findings resonate with the criticism

14. See e.g. Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 *Stetson L. Rev.* 611, 470 (2002) (stating that "[m]ediation . . . is grounded in the principle of self-determination and presumes that the parties are capable of participating in the process and bargaining for their own interests."); Erica F. Wood, *Dispute Resolution and Dementia: Seeking Solutions*, 35 *Ga. L. Rev.* 785, 808 (2001) (stating that "[m]ediation is premised on the notion that the disputing parties understand the problem at issue and the process for resolution").

15. See generally Radford, *supra* n. 14.

16. *Id.* at 615.

17. E.g. Robert E. Emery, Sheila G. Matthews & Katherine M. Kitzmann, *Child Custody Mediation and Litigation: Parents' Satisfaction and Functioning One Year after Settlement*, 62 *J. Consulting & Clinical Psychol.* 124 (1994) (finding that mediating women are significantly less satisfied than litigating women in a study of child-custody disputes in which families were randomly assigned to mediation or adversarial proceedings); Robert E. Emery, Sheila G. Matthews & Melissa M. Wyer, *Child Custody Mediation and Litigation: Further Evidence of the Differing Views of Mothers and Fathers*, 59 *J. Consulting & Clinical Psychol.* 410, 413-415 (1991) (concluding that litigating mothers, who won ninety percent of litigated child-custody disputes, are especially likely to believe they had won more and lost less than mediating mothers); Robert E. Emery & Melissa M. Wyer, *Child Custody Mediation and Litigation: An Experimental Evaluation of the Experience of Parents*, 55 *J. Consulting & Clinical Psychol.* 179, 183 (1987) (describing how litigating mothers reported significantly greater satisfaction with the outcomes of their contacts with the court than mediating mothers). Women's attitudes toward mediation and litigation appear to be in direct opposition to men's attitudes toward mediation and litigation. See Emery, Matthews & Kitzmann, *supra*, at 128 (concluding that mediating men "were substantially more satisfied with the process of dispute resolution and its effects

acknowledged by Professor Radford that mediation in guardianship “may jeopardize the rights of traditional ‘outsiders’ such as women and racial minorities.”¹⁸

How is an alleged incapacitated person necessarily capacitated enough to be mediating on equal footing with a guardianship petitioner? If effective legal counsel represents the alleged incapacitated person and the mediation is negotiation in the shadow of, and with recourse to, a full adversarial proceeding, then mediation might be a viable alternative dispute resolution mechanism. Professor Radford observes that “the nature of most guardianship mediations mandates that the adult be represented by an attorney (preferably) or someone else who is trained to advocate zealously and represent the adult’s wishes.”¹⁹

The effectiveness of mediation in adult guardianship cases is an empirical question. Regarding alternative dispute resolution, Judge Richard Posner asserts that “the success or failure of the [alternative dispute resolution] procedure must be verifiable by accepted methods of (social) scientific hypothesis testing If we are to experiment with alternatives to trials, let us really experiment; let us propose testable hypotheses, and test them.”²⁰

on them, their children, and their relationship with their former spouse” than litigating men). Perhaps this is the case because mediation produced settlements more quickly than litigation and generated more legal joint-custody arrangements than litigation. Emery, Matthews & Wyer, *supra*, at 412.

18. Radford, *supra* n. 14, at 620.

19. *Id.* at 674.

20. Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. Chi. L. Rev. 366, 367 (1986). Judge Posner criticizes the legal profession for failing to test legal hypotheses against empirical research:

The criteria for evaluating proposed alternatives to the conventional methods of resolving legal disputes are mostly taken for granted. That is because those making the proposals are practical rather than theoretical men, and most practical men think that they can tell at a glance whether something works, and if it does they pronounce it successful. I, however, a prisoner of my academic past, propose four stringent criteria for evaluating any procedural reform.

I am unconvinced by anecdotes, glowing testimonials, confident assertions, appeals to intuition. Lawyers, including judges and law professors, have been lazy about subjecting their hunches—which in honesty we should admit are often little better than prejudices—to systematic empirical testing. Judicial opinions and law review articles alike are full of assertions . . . that have no demonstrable factual basis. Not that the authors of these articles and opinions must be wrong on any of these assertions; they may be right on all. But they have only impressions; they have no verified knowledge.

Id. at 366–367.

For “theoretical” and “academic” men and women and their fellow travelers,²¹ there is published work developing theory about the functioning of procedures.²² Orderly planning of guardianship systems requires “empirical evaluation of change.”²³ Important institutions that have met the need for evaluation in analogous subject areas include the American Bar Foundation, the Federal Judicial Center, the National Center for State Courts, and the RAND Corporation’s Institute for Civil Justice.²⁴ In sum, let us propose testable hypotheses about the effectiveness of mediation in guardianship cases and test them. Let us propose testable hypotheses about mediation as an alternative to or for prevention of adult guardianship, and test them. I hypothesize that alleged incapacitated persons in guardianship are less satisfied with mediation than with adversary processes. Another interesting hypothesis is that there is no significant difference in rates of guardianship between those offered the field’s postulated guardianship “alternative” (prevention or diversion) of mediation services and those not receiving mediation services.²⁵ I recommend independent testing of the hypotheses.

III. DUE PROCESS

The Wingspan Conference *Issue Brief* related to due process

21. *Id.*

22. *E.g.* E. Allan Lind & Tom R. Tyler, *The Social Psychology of Procedural Justice* (Plenum Press 1988) (providing in-depth research on, and theories about, the social psychology of procedural justice); Jonathan D. Casper, Tom Tyler & Bonnie Fisher, *Procedural Justice in Felony Cases*, 22 *L. & Socy. Rev.* 483 (1988) (analyzing various case disposition processes, such as plea bargaining and alternative dispute resolution techniques, and exploring the relationship between subjects’ evaluation of the fairness of the process and their satisfaction with the outcome of the case.); E. Allan Lind, Bonnie E. Erickson, Nehemia Friedland & Michael Dickenberger, *Reactions to Procedural Models for Adjudicative Conflict Resolution*, 22 *J. Conflict Res.* 318, 318 (1978) [hereinafter Lind et al., *Procedural Models*] (revealing the results of “[a] cross-national experimental study examining perceptions of four procedural models for adjudicative conflict resolution”); John Thibaut & Laurens Walker, *A Theory of Procedure*, 66 *Cal. L. Rev.* 541, 541 (1978) (proposing an overarching theory of procedure that seeks to promote truth and justice in the resolution of conflicts); Laurens Walker, E. Allan Lind & John Thibaut, *The Relation between Procedural and Distributive Justice*, 65 *Va. L. Rev.* 1401, 1401 (1979) (analyzing “the impact of variations in procedure on the perceived justice of the outcome of litigation”).

23. Monahan & Walker, *supra* n. 1, at 601.

24. *Id.* at 602.

25. *Cf.* Wilber, *Alternatives to Conservatorship*, *supra* n. 11, at 153 (concluding, after a quasi-experimental study, that the opportunity of elderly individuals to participate in daily money-management services had no impact on the appointment of conservators).

cites the “dearth of research in this field” of due-process and concludes, “We are in desperate need for more research in this area.”²⁶

One thing I believe that we do know on the basis of research is the therapeutic utility²⁷ and client satisfaction²⁸ associated with

26. Nancy Coleman, *Issue Brief — Role of Counsel for the Alleged Incapacitated Person: Due Process 4* (unpublished manuscript prepared for the Wingspan Conference Nov. 30, 2001) (copy on file with the *Stetson Law Review*).

27. Research indeed shows that hearings in general have therapeutic value. See Robert G. Cumming & Peter F. Goyer, *Therapeutic Consequences of the Involuntary Commitment Process*, 1 *Am. J. Forensic Psych.* 37, 42–43 (1979) (asserting that commitment hearings may have therapeutic value for mentally-ill patients by presenting a model for a rational approach to problem-solving that results in some reduction in psychotic symptoms); John J. Ensminger & Thomas D. Liguori, *The Therapeutic Significance of the Civil Commitment Hearing*, 6 *J. Psych. & L.* 5, 5 (1978) (asserting that “the civil commitment process could have positive therapeutic effects”); Winsor C. Schmidt, Jr., *Considerations of Social Science in a Reconsideration of Parham v. J.R. and the Commitment of Children to Public Mental Institutions*, 13 *J. Psych. & L.* 339, 347–348 (1985) (discussing extent to which hearings are therapeutic); Winsor C. Schmidt, *Critique of the American Psychiatric Association’s Guidelines for State Legislation on Civil Commitment of the Mentally Ill*, 11 *New Eng. J. Crim. & Civ. Confinement* 11, 33 (1985) (stating that “persons facing commitment are more likely to have a favorable reaction to the outcome of an adversary procedure than a nonadversary procedure”).

28. Many studies have examined the satisfaction of participants in adversarial and non-adversarial proceedings. *E.g.* Lind & Tyler, *supra* n. 22, at 203–218 (discussing the social psychology of procedural justice and, specifically, the consequences and sources of procedural fairness judgments); Gary B. Melton & E. Allan Lind, *Procedural Justice in Family Court: Does the Adversary Model Make Sense?*, in *Legal Reforms Affecting Child and Youth Services* 80 (Gary Melton ed., Haworth Press 1982) (asserting that, in child-custody disputes, adversarial procedures may increase children’s perceptions of fairness and satisfaction with the outcomes); Casper, Tyler & Fisher, *supra* n. 22 (discussing research that examines subjects’ evaluations of the fairness of the case disposition process in relation to their satisfaction with the outcome of the case); Lind et al., *Procedural Models*, *supra* n. 22, at 335 (concluding that results for United States, Britain, France and West Germany showed general preference for disputant-controlled adversary models over adjudicator-controlled inquisitorial models); E. Allan Lind, John Thibaut & Laurens Walker, *A Cross-Cultural Comparison of the Effect of Adversary and Inquisitorial Processes on Bias in Legal Decision-Making*, 62 *Va. L. Rev.* 271, 271–276 (1976) (examining client satisfaction in Paris, France to determine whether cultural variations would affect previous conclusions in the area of client satisfaction); John H. Martin, *Justice and Efficiency under a Model of Estate Settlement*, 66 *Va. L. Rev.* 727, 775 (1980) (advocating widespread adoption of the Uniform Probate Code because, in part, it maximizes process values, thus increasing party satisfaction); William M. O’Barr & John M. Conley, *Lay Expectations of the Civil Justice System*, 22 *L. & Socy. Rev.* 137, 159 (1988) (finding that “process is at least as important in the minds of the litigants as the substantive issues in their cases”); Tom R. Tyler, *The Role of Perceived Injustice in Defendants’ Evaluation of Their Courtroom Experience*, 18 *L. & Socy. Rev.* 51, 51 (1984) (“explor[ing] the role of perceived injustice in generating dissatisfaction with legal authorities”); Walker, Lind & Thibaut, *supra* n. 22, at 1401 (analyzing “the impact of

an adversarial, due-process hearing compared with an inquisitorial, non-adversarial hearing. Subjects of the adversarial, due-process hearing are found to be more satisfied with the fairness of the process, even when they lose, than are subjects of an inquisitorial, non-adversarial hearing.²⁹ This, of course, is social-science evidence for the adage that at least one gets one's "day in court."³⁰

I also concur with Professor Joan L. O'Sullivan's opinion that "the attorney should protect the due-process rights of the alleged incapacitated individual and advocate strenuously for the client's wishes. If the attorney does not do this, the alleged incapacitated person has no voice in the proceeding."³¹ If the attorney does not voice the alleged incapacitated individual's wishes, who will?

IV. ADVERSARIAL LITIGATION

The Wingspan Conference *Issue Brief* related to adversarial litigation asserts a "lack of empirical evidence that appointment of counsel actually increased the effectiveness of [guardianship] proceedings."³²

This may be an issue when constitutional due-process analysis is more appropriate and important than whether proceedings were more effective.³³ Should we necessarily ask whether appointment of counsel in criminal, juvenile, and mental-health proceedings increases effectiveness? Or is it sufficient that legal proceedings like criminal trials, juvenile hearings, civil-commitment proceedings, and guardianship hearings are inherently unfair without effective legal representation and voice

variations in procedure on the perceived justice of the outcome of litigation").

29. See Walker, Lind & Thibaut, *supra* n. 22, at 1415-1416 (finding that, although unfavorable results produced negative reactions to the result, satisfaction with the procedure was present more often with adversarial hearings than with non-adversarial proceedings).

30. Empirical research has shown that one's "day in court," or one's perception of justice based on procedure, is truly important, perhaps even more so than the actual issues at stake in the case. See e.g. O'Barr & Conley, *supra* n. 28, at 159 (finding that "process is at least as important in the minds of the litigants as the substantive issues in their cases").

31. Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 *Stetson L. Rev.* 687, 688 (2002).

32. Robert Fleming, *Issue Brief* (unpublished manuscript prepared for the Wingspan Conference Nov. 30, 2001) (copy on file with the *Stetson Law Review*).

33. Professor O'Sullivan summarizes recent appellate proceedings regarding due-process right to counsel. O'Sullivan, *supra* n. 31, at 704-710. For a discussion of the right to counsel in guardianship proceedings, see Perlin, *supra* n. 13, at 278-283.

for those subjected to such proceedings?

V. PUBLIC, AGENCY, AND PROFESSIONAL GUARDIANSHIP

I would like to highlight additional information about what is known and not known about public, agency and professional guardianship.³⁴

We know that

[a] guardianship study of six states (Delaware, Minnesota, North Carolina, Ohio, Washington and Wisconsin) with a total population of 29 million, found that 17,000 guardianship petitions were filed in one year [1979]. This filing rate of .059 percent (one of every 1,706) corresponds interestingly with the filing rate of .056 percent (one of every 1,785) for Florida in 1977 (4,724 guardianships opened in a population of 8,432,927).³⁵

An estimation of annual filing rates for other states can be extrapolated.³⁶ We do not know how many people are under guardianship in any state or in the country as a whole. This knowledge gap suggests the need for state and national guardianship reporting and information systems.

We know that 11,147 identifiable people had an unmet need for guardianship in Florida in one year (1983).³⁷ This count is conservative. The count did not include private clients needing guardianship in nursing homes and adult congregate living facilities, and transients.³⁸ We know that as many as 3,003 elderly nursing-home residents in Tennessee needed public limited-guardian, conservator, representative-payee, and power-of-attorney services in the Summer and Fall of 1988.³⁹ We do not

34. For additional information on public, agency, and professional guardianship, see Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 *Stetson L. Rev.* 941 (2002); Erica Wood, *Issue Brief — State Adult Guardianship Legislation: Directions of Reform — 2001* (unpublished manuscript prepared for the Wingspan Conference Nov. 30, 2001) (copy on file with the *Stetson Law Review*).

35. *Guardianship: Court of Last Resort for the Elderly and Disabled* 3–4 (Winsor Schmidt ed., Carolina Academic Press 1995) (footnotes omitted) [hereinafter *Guardianship*].

36. Winsor Schmidt, *Public Guardianship Issues for New York: Insights from Research*, 6 *Elder L. Atty.* 31, 34 (1996) (estimating guardianship annual filing rate of 10,500 in 1990 based on New York's reported population of 17,990,455).

37. *Guardianship*, *supra* n. 35, at 19; Winsor C. Schmidt & Roger Peters, *Legal Incompetents' Need for Guardians in Florida*, 15 *Bull. Am. Acad. Psych. & L.* 69 (1987).

38. Schmidt & Peters, *supra* n. 37, at 78.

39. David Hightower, Alex Heckert & Winsor Schmidt, *Elderly Nursing Home*

know current need or future unmet need.

There are four models for providing public guardianship services: a court model, an independent state office, a division of a social-service agency, and a county agency.⁴⁰ We think we know that spending public money by contracting out is less accountable than direct employment of government personnel.⁴¹ There is no quasi-experimental research testing which models produce better guardianship outcomes.⁴²

Residents' Need for Public Guardianship Services in Tennessee, 2 J. Elder Abuse & Neglect 105, 108 (1990).

40. Winsor C. Schmidt, Kent S. Miller, William G. Bell & B. Elaine New, *Public Guardianship and the Elderly* 17, 59 (Ballinger Publ. Co. 1981) (citing John Regan & Georgia Springer, *Protective Services for the Elderly: A Working Paper*, Sen. Comm. Print 95-1009, at 111 (July 1977) (prepared for the United States Senate Special Committee on Aging on behalf of the National Council of Citizens Legal Research and Services for the Elderly Project)); *but see* Dorothy Siemon, Sally Balch Hurme & Charles P. Sabatino, *Public Guardianship: Where Is It and What Does It Need?*, 27 Clearinghouse Rev. 588, 589 n. 7 (1993) (proposing five models for providing public guardianship services: "(1) Independent State Public Guardianship Agency," "(2) Government Agency [A]lso Providing Social Services," "(3) Private Sector via Volunteers or by Contract," "(4) Government Employee Not Providing Social Services," and "(5) Other," which includes court-created models of guardianship).

41. Winsor C. Schmidt, Pamela B. Teaster, Hillel Abramson & Richard Almeida, *Second Year Evaluation of the Virginia Guardian of Last Resort and Guardianship Alternatives Demonstration Project*, app. B, 2 (1997) (unpublished report on file with the *Stetson Law Review*) [hereinafter *Second Year Evaluation*]. This distinction in accountability between public and private services is significant because

[i]n a constitutional democracy, a major societal value is the idea that public officials should be held accountable for their actions to elected officials and through [these] officials to the public. When a public function is assigned to a private [entity], usually through a contract, there is an inevitable weakening in the lines of political accountability. While a government agency is directly accountable to elected officials, a private entity under contract has only an indirect and tenuous relationship to elected officials. What occurs . . . is the emergence of "third-party government."

Id. (quoting Roland C. Moe, *Exploring the Limits of Privatization*, 47 Pub. Admin. Rev. 453, 457 (1987)). Moe cautioned, "Third-party government is not only dangerous to the political order, . . . it is corrosive of management supervision and personnel." Moe, *supra*, at 458. One example of the risks of "third-party management of government programs is provided by the tangled web of decision making between NASA and the Morton Thiokol Company in the wake of the Challenger disaster." *Id.* Another is the experience of Medicaid and Medicare with "contracted out managed health and mental health care." *Second Year Evaluation, supra*, app. B, 3.

42. There is, however, research comparing the outcomes of a volunteer model and a staff model of guardianship. Teaster et al., *supra* n. 8, at 131 (finding that "[t]he volunteer model provided similar or higher-quality guardian service, with similar or better client planning and accountability, with no worse than comparable maintenance on client functioning, with more direct client contact hours per client, at a lower cost than the staff model").

We think we know, on the basis of evaluative research,⁴³ that the quality and success of public guardianship is correlated with several structure-and-process considerations:

The public guardian must be independent of any service providing agency (no conflict of interest), and the public guardian must not be responsible for both serving as guardian, and petitioning for adjudication of incompetence (no self-aggrandizement). The public guardian must be adequately staffed and funded to the extent that no office is responsible for more than 500 wards, and each professional in the office is responsible for no more than thirty wards. A public guardian is also only as good as the guardianship statute governing adjudication of incompetence and appointment. Failure in any of these considerations will tip the benefit burden ratio against the individual ward, and the ward would be better off with no guardian at all.⁴⁴

We think we know more about the use of volunteers as guardians than the panacea idea that, with volunteers, you get something for nothing. A comparison of professional and volunteer programs for public guardianship services in Florida discovered the following:

The professional model (Dade) in this pilot [public guardianship program], while determined to deliver higher quality services overall, reported less total work, on fewer wards, for the same amount of money, than did the volunteer model (Suncoast). The volunteers do not perform more than 24% of the effort accomplished by Suncoast.⁴⁵

A later study in Virginia found that the

volunteer model provided similar or higher quality guardian service, with similar or better client planning and accountability, with no worse than comparable maintenance of

43. For research evaluating public guardianship models, see Schmidt et al., *supra* n. 40, at 25–177.

44. *Guardianship*, *supra* n. 35, at 14 (citations omitted).

45. *Id.* at 176 (footnote omitted). This comparison of professional and volunteer public guardianship programs in Florida revealed that, “[w]hile the philosophy that government can get something for nothing by use of volunteers is not totally debunked by this pilot [public guardianship project], the volunteer panacea should be sharply questioned.” *Id.* For more empirical findings on professional and volunteer guardianship programs, see Winsor C. Schmidt, Kent S. Miller, Roger Peters & David Loewenstein, *A Descriptive Analysis of Professional and Volunteer Programs for the Delivery of Public Guardianship Services*, 8 Prob. L.J. 125 (1988).

client functioning, with more direct client contact hours per client, at a lower cost than the staff model.⁴⁶

The Virginia study cautioned,

Volunteers, once recruited and trained, must have ongoing monitoring. The program must have adequate mechanisms for retention, re-training, and updating volunteers in order to reduce turnover in volunteer guardians. Volunteers must be well supported by paid program staff.⁴⁷

The Florida study concluded,

Volunteers must be recruited, trained, professionally supported, monitored, and replaced. All of this activity is at the opportunity cost of the direct client services that recruiters, trainers, professionals, and monitors could be performing instead. In essence, volunteers are not truly cost-free, and needless to say, a true volunteer model should consist of nothing but volunteers.⁴⁸

Independent evaluations, published in refereed journals, are not available for all guardianship programs using volunteers.

We think we have some hard data about public guardianship costs based on published research. A Virginia “staff service” program annual cost per client was \$2,662.36⁴⁹ compared with a Florida professional program annual cost per client of \$2,857.08.⁵⁰ The Virginia volunteer program annual cost per client was \$2,297.10⁵¹ compared with the Florida volunteer program annual cost per client of \$2,068.92.⁵² Hard dollars per hour of work data are not available for all guardianship programs.

We think we know from published evaluation research that public guardianship is cost-effective.⁵³ For example, at the same time that the annual cost per client was \$2,662.36, the Virginia public guardianship program reported

a saving of at least \$23,000 in potential hospitalization and

46. Teaster et al., *supra* n. 8, at 131, 133.

47. *Id.* at 148.

48. *Guardianship*, *supra* n. 35, at 176.

49. Teaster et al., *supra* n. 8, at 144.

50. *Guardianship*, *supra* n. 35, at 170.

51. Teaster et al., *supra* n. 8, at 145.

52. *Guardianship*, *supra* n. 35, at 170.

53. For research evaluating the cost-effectiveness of public guardianship, see Teaster et al., *supra* n. 8, at 142–148.

kidney dialysis costs as a result of prompt authorization of needed kidney surgery; \$85,680 annual hospitalization costs as a result of representative payee service that facilitated discharge of a Western State Hospital patient; and \$1,148 as a result of accessing a Social Security entitlement and securing a General Relief refund.⁵⁴

The Greater New York Hospital Association reported providing 22,000 alternate level of care days from April 1993 to December 1994 at a cost of \$13 million for 400 patients awaiting only appointment of guardians before they could be discharged.⁵⁵ In contrast, I agree with Professor Alison Barnes's observation that "[m]ore research is needed to determine what benefits accrue to the for-profit form of guardianship"⁵⁶ in a guardianship-system environment where "a substantial proportion of NGA [National Guardianship Association] members have chosen to be for-profit corporations."⁵⁷

VI. GUARDIANSHIP MONITORING AND ACCOUNTABILITY

I also would like to highlight additional information about what is known and not known about guardianship monitoring and accountability.⁵⁸

Guardianship monitoring and accountability are arguably about quality. The conceptual framework to measure quality in the health-services field was developed by physician Avedis Donabedian.⁵⁹ His nomenclature of structure, process, and outcome is standard in the field.⁶⁰ The major health-services foci

54. *Id.* at 144–145.

55. Schmidt, *supra* n. 36, at 37.

56. Barnes, *supra* n. 34, at 988.

57. *Id.*

58. See generally Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 *Stetson L. Rev.* 867 (2001) (analyzing the development of the law and practice of guardianship monitoring and accountability from 1988 to the present); Charlie Sabatino, *Issue Brief: Guardianship Monitoring and Accountability* (unpublished manuscript prepared for the Wingspan Conference Nov. 30, 2001) (copy on file with the *Stetson Law Review*) (identifying recommendations, changes in the law, current standing, and key questions concerning guardianship monitoring and accountability).

59. Avedis Donabedian, *Explorations in Quality Assessment and Monitoring* vol. 2 (Health Admin. Press 1982). This volume, separately titled *The Criteria and Standards of Quality*, attempted to establish "a science of criteria" to assess quality in health services. *Id.* at xiii.

60. Beaufort B. Longest, Jr., Jonathon S. Rakich & Kurt Darr, *Managing Health Services Organizations and Systems* 487 (Health Professions Press 2000).

in the 1980s were structure and process.⁶¹ In the late 1980s, around the time of the Wingspread Symposium, the health-services field began a long-term effort to emphasize outcome indicators.⁶² Some focus on structure and process has occurred in guardianship.⁶³ Wingspan authors have referred to guardianship plans.⁶⁴ Guardianship plans are also structure-and-process measures of guardianship quality:

Guardianship plans are similar to habilitation and treatment plans used to establish goals and methods of treatment on behalf of developmentally disabled, psychiatric, and other clients for which state services are provided. The guardianship plan is intended to serve as a bridge between identified client needs or deficits and specific services necessary to remedy these deficits. The plan may function to alert and acquaint staff to client needs, and to facilitate long-term planning and coordination of staff and other resources to meet these needs. Federal court decisions have required treatment and habilitation plans as minimum constitutional requirements for adequate treatment of the mentally ill and developmentally disabled.⁶⁵

A guardianship plan should include the following elements:

1. A statement of the specific needs of the ward (in particular functioning areas).
2. A statement of the optimal (least restrictive) conditions to meet those needs, and to achieve at least the standard of living enjoyed by the ward prior to incompetency [incapacity] and guardian appointment.
3. A statement of the available services that will be obtained to meet those needs, both within six months, and longer term.
4. A statement of the rationale for provision of any non-optimal service.
5. A notation of the guardian or staff responsible for obtaining or providing the service.
6. A statement of the minimum conditions, for each functioning

61. *Id.*

62. *Id.* at 488.

63. See *supra* notes 43–44 and accompanying text for a discussion of research that suggests that the structure of a guardianship system determines whether guardianship benefits wards individually.

64. *E.g.* Hurme & Wood, *supra* n. 58, at 892–897.

65. Schmidt et al., *supra* n. 45, at 136–137.

area, under which the public guardian might be relieved.⁶⁶

In the early twenty-first century, the guardianship field should emphasize outcome indicators. I am being consulted as a potential expert witness in a lawsuit against a jurisdiction's guardianship system. I have performed research⁶⁷ with colleagues evaluating guardianship-system performance. We gathered data from guardianship-client functional-assessment instruments,⁶⁸ guardianship plans, and work-activity logs.⁶⁹ We first gathered baseline functional-assessment data. The functional-assessment data were used to formulate the guardianship plan. The work-activity-log data reported the work accomplished to implement the plan. We gathered additional functional-assessment data at the end of the evaluation period. We were thereby able to measure and evaluate any changes in the ward's functioning over time and the extent of compliance with the guardianship plan. Regular recording and reporting of functional data also enabled any necessary and appropriate adjustments to guardianship plans. We could measure and report individual guardianship performance and guardianship-program performance.⁷⁰

In my opinion, the structure-and-process measures of guardianship-client functional-assessment instruments, guardianship plans, and work-activity logs represent a standard of care for individual guardianships and for guardianship programs. Complying with this guardianship standard of care enables individual and program assessment of guardianship outcomes

66. *Id.* at 132.

67. *Id.* at 125–156; Teaster et al., *supra* n. 8, at 131–151.

68. In Florida, the functional assessment survey measured guardianship performance by assessing wards' needs in the following areas: "(1) living situation; (2) activities; (3) functional status (daily skills); (4) nutrition status; (5) medical status; (6) intellectual functioning and behavior; (7) services and social support." Schmidt et al., *supra* n. 45, at 131–132. In Virginia, the functional assessment survey assessed wards' needs in similar areas: "finances, physical environment, activities of daily living," (e.g., dressing, bathing, and walking), "instrumental activities of daily living," (e.g., laundry, telephone, home maintenance, money management, and transportation), "assisted devices," medical care and health status, nutrition, cognitive and emotional status, "caregiver support, and employment." Teaster et al., *supra* n. 8, at 137–139.

69. The work-activity log, or guardian-activity report, "is similar to an attorney's timekeeping log, or work chronology record." Schmidt et al., *supra* n. 45, at 132.

70. Such reporting and measurement have been conducted on guardianship programs and models. See Schmidt et al., *supra* n. 45, at 125–156 (reporting the outcomes of an evaluative study on two guardianship programs); Teaster et al., *supra* n. 8, at 131–151 (comparing "clients and client outcomes of a staff service model of public guardianship and 'alternatives' service with a volunteer staff service model").

and assessment of guardianship quality. Complying with this guardianship standard of care would enable measurable continuous quality improvement.

VII. CONCLUSION

I will conclude with a vision of a guardianship system in which every incapacitated person receives continuously-improving management of, and surrogate decision-making for, their person and property.

Some of what we knew about guardianship in the 1980s led us to Wingspread. And the Wingspread Recommendations stimulated significant statutory reform.⁷¹ Remember Holmes' reminder, however: "The life of the law . . . has been experience."⁷²

As a participant at Wingspread fourteen years ago, I am frustrated with the need for a Wingspan — The Second National Guardianship Conference. I fear that fourteen years from now, in 2016, there will be a need for a third (or more) national guardianship symposium that may look a lot like these first two. (I sense everyone calculating their age and likelihood of incapacity in 2016.) A difference may be that some number of us will be subjects of the system we reform. The saying, "Do unto others as you would have them do unto you,"⁷³ is acquiring an increasing urgency.

Perhaps we need to do some strategic planning. We could start with the mission: an identification of the "purposes for which the [guardianship system] exists."⁷⁴ Is the purpose of the guardianship system to serve third-party interests?⁷⁵

71. See generally Hurme & Wood, *supra* n. 58 (listing statutory reforms that have been enacted since the Wingspread Symposium in 1988).

72. Holmes, *supra* n. 1, at 1.

73. *Matthew* 7:12.

74. Longest et al., *supra* n. 60, at 351 (regarding missions for managing health-services systems and organizations in general).

75. In practice, the guardianship system seems to serve third-party interests. For example,

[in] the present system of "Estate Management by Preemption," we divest the incompetent of control of his property upon the finding of the existence of serious mental illness whenever divestiture is in the interest of some third person or institution All of these motives may be honest and without any intent to cheat the aged; but none of the proceedings are commenced to assist the debilitated.

George J. Alexander, Travis H.D. Lewin, Richard M. Alderman & Douglas Meiklejohn, *The Aged and the Need for Surrogate Management* 135 (Syracuse Univ. Press 1972). Or, as a psychiatrist with a county general hospital succinctly put it, "[F]or every \$100,000 in a

A mission statement declares the system's "purpose and reasons for existence" and describes what the system does and for whom.⁷⁶ A mission statement specifies the system's basic service, primary market, and method of delivery.⁷⁷ Using these criteria, a guardianship system's mission statement could be the following:

The mission of the guardianship system of [the United States, the state of X] is to improve continuously management of, and surrogate decision making for, the person and property of incapacitated people through competing private and public delivery mechanisms.

Missions rarely change. When a mission does change, the change can result from accomplishment. For example, the original mission of the March of Dimes was polio elimination. The new mission of the March of Dimes is to combat birth defects and arthritis.⁷⁸

The Institute of Medicine recently recommended a mission for the health system of reducing the rate of patient injuries by fifty percent in five years.⁷⁹ The American Diabetes Association's mission is "to prevent and cure diabetes and to improve the lives of all people affected by diabetes."⁸⁰ Is a mission of the guardianship system to reduce the unmet need for guardianship by fifty percent every five years?⁸¹

A mission statement is usually accompanied by the system's vision, "a strategic view of the future direction and 'a guiding concept of what the [system] is trying to do and to become.'"⁸² The vision is a vehicle to communicate the future desired state of the system to all constituents.⁸³ A statement of a guardianship system's guiding concept could be, "The vision of the United

given estate, a lawyer shows up; for every \$25,000, a family member shows up." Schmidt et al., *supra* n. 40, at 109.

76. Alan M. Zuckerman, *Healthcare Strategic Planning: Approaches for the 21st Century* 37 (Health Admin. Press 1998).

77. John A. Pearce II & Richard Robinson, Jr., *Strategic Management: Formulation, Implementation, and Control* 33 (5th ed., Richard D. Irwin, Inc. 1994).

78. Longest et al., *supra* n. 60, at 351.

79. *To Err Is Human: Building a Safer Health System* (Linda T. Kohn, Janey M. Corrigan & Molla S. Donaldson eds., Natl. Acad. Press 1999).

80. Longest et al., *supra* n. 60, at 351.

81. See *supra* notes 37-39 and accompanying text discussing the quantification of unmet guardianship needs.

82. Longest et al., *supra* n. 60, at 351 (quoting Arthur A. Thompson & A.J. Strickland, *Strategic Management: Concepts and Cases* 24 (10th ed., Irwin/McGraw-Hill 1998)).

83. *Id.* at 351.

States guardianship system is to become the best in the world.” Or, “The vision of the [state of X] guardianship system is to become the best in the United States.” Or, “The vision of the [county of Y] guardianship system is to become the best in the state.”⁸⁴ The vision of every guardianship system should be that every incapacitated person receives continuously-improving management of, and surrogate decision-making for, his or her person and property.

84. Judges seem to have a first and singular responsibility as the leaders and strategic managers of their county and state guardianship systems. See Lawrence A. Frolik, *Guardianship Reform: When the Best Is Enemy of the Good*, 9 *Stan. L. & Policy Rev.* 347, 354–355 (1998) (discussing the judge’s role in adopting limited guardianship and the need to persuade judges to do so).