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CARING FOR THE INCAPACITATED—A CASE FOR NONPROFIT SURROGATE DECISION MAKERS IN THE TWENTY-FIRST CENTURY*

Linda S. Whitton**

Present demographic patterns of disability in our aging society herald a rising need for surrogates to make personal and financial decisions for those who have lost the capacity to manage their own affairs.¹ The inadequacy of our present guardianship system to meet rising surrogate decision-making needs continues to receive attention in both legal and sociological literature. Common criticisms include the expense and time-consuming nature of the guardianship process, not only for the ward and guardian, but also for societal and judicial resources.² Guardianship is also faulted on substantive grounds as overly restrictive and poorly supervised, thus undermining the well-being of the ward it was ostensibly designed to protect.³

One legislative response to the inadequacies of guardianship was the creation of durable property and health-care powers that a competent individual may delegate to the agent of his or her choice so that guardianship is unnecessary in the event of later incapacity.⁴ However, the

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1. No comprehensive collection of data exists to track exactly how many individuals are presently served by a surrogate decision maker via either guardianship or durable powers of attorney. However, demographic projections of the rate of incapacitation among the elderly as well as widespread anecdotal evidence support the general consensus that the need for surrogate decision makers is significantly rising. See GEORGE H. ZIMNY & JUDITH A. DIAMOND, ST. LOUIS UNIV. HEALTH SCIENCES CTR., SOCIAL SERVICE AGENCIES AS GUARDIANS OF ELDERLY WARDS 1-2 (1994); see also Aida Rogers, *In Search of Volunteer Guardians*, SHEPARD'S ELDERCARE/LAW NEWSL., Sept. 1994, at 1 (noting that the need for surrogates is a problem national in scope); SUBCOMM. ON HOUSING AND CONSUMER INTERESTS, HOUSE SELECT COMM. ON AGING, SURROGATE DECISIONMAKING FOR ADULTS: MODEL STANDARDS TO ENSURE QUALITY GUARDIANSHIP AND REPRESENTATIVE PAYEESHIP SERVICES, 100th Cong., 2d Sess., pt. 1, at 20 (Comm. Print 1989) (Don Bonker, Chairman) [hereinafter HOUSE COMM. MODEL STANDARDS]; *infra* notes 7-16 and accompanying text.

2. Alison P. Barnes, *Beyond Guardianship Reform: A Reevaluation of Autonomy and Beneficence for a System of Principled Decision-Making in Long Term Care*, 41 EMORY L.J. 633, 688-90 (1992); see also John J. Lombard, Jr., *Asset Management Under a Durable Power of Attorney—The Ideal Solution to Guardianships or Conservatorships*, 9 PROB. NOTES 189, 189-91 (1983).

3. Lawrence A. Frolik, *Abusive Guardians and the Need for Judicial Supervision*, TR. & EST., July 1991, at 41. Although limited guardianship for partially incapacitated individuals is legislatively available in most states, plenary guardianship remains the norm most likely because of the additional time and effort required of court personnel, counsel, experts, and the parties in a limited guardianship proceeding. Barnes, *supra* note 2, at 648-49.

4. Every state, as well as the District of Columbia, has some type of general durable power

effectiveness of durable powers as an alternative to guardianship presumes public awareness of the durable powers option as well as the existence of competent, trustworthy agents to whom the powers can be delegated. Based on current statistical projections,⁵ a growing shortage of qualified individuals to serve as either agents under durable powers or as guardians may seriously undermine care of the incapacitated in the twenty-first century.

The purpose of this Article is to examine the increasing need for surrogate decision makers and to explore the concept of permitting competent individuals to appoint nonprofit organizations as agents under durable powers when an appropriate individual is unavailable to serve in that capacity. Although corporate fiduciaries are commonly delegated financial durable powers and trust powers, this practice has not yet extended to delegation of powers over the person, such as health-care authority. Many state statutes do permit, however, court appointment of corporate guardians over both the estate and person of incapacitated individuals.⁶ This Article proposes expanding the options for delegation of durable health-care powers to include nonprofit agents so that competent persons who are without appropriate individual agents may still avoid guardianship through the privileges of self-determination afforded by durable powers.

To support this proposal, Section I of this Article provides current data that demonstrate the growing unmet need for surrogate decision

legislation for the delegation of property-related powers, and nearly every state expressly permits the delegation of health-care powers through a durable power of attorney or medical agent appointment. For a comprehensive list of statutory citations, see Linda S. Whitton, *Durable Powers as a Hedge Against Guardianship: Should the Attorney-at-Law Accept Appointment as Attorney-in-Fact?*, 2 ELDER L.J. 39, 40-41 & n.5, 46 & nn.39-40 (1994).

5. See *infra* notes 25-27 and accompanying text.

6. In 1971, Ohio was the forerunner in the corporate guardianship movement when it passed House Bill 290, which established procedures for corporate guardianship of mentally retarded citizens. See John M. Seelig & Sandra R. Chesnut, *Corporate Legal Guardianship: An Innovative Concept in Advocacy and Protective Services*, 31 SOC. WORK 221 (1986). Now, the National Guardianship Association, a nonprofit national organization formed in 1988, has approximately 480 members, 164 of which are corporations. Telephone Interview with Joan Gray, Association Manager, National Guardianship Association (Sept. 5, 1995) [hereinafter Telephone Interview with Joan Gray].

See, e.g., ALA. CODE § 26-2A-104.1(b) (1992) (recognizing the judicial designation of private nonprofit corporations as guardians for persons with developmental disabilities); IND. CODE ANN. §§ 29-3-1-6, -12 (Burns 1989 & Supp. 1995) (recognizing both nonprofit and for-profit corporations as "persons" eligible for court appointment as guardians over the person or property of an incapacitated person); PA. CONS. STAT. ANN. tit. 20, § 102 (Supp. 1993) (recognizing both individual and corporate fiduciaries for the care and management of the estate and person of an incapacitated individual); *Guardianship of Bassett*, 385 N.E.2d 1024, 1028-29 (Mass. Ct. App. 1979) (holding that the court had statutory authority to approve as guardian a nonprofit corporation that exercised guardianship powers through a committee).

makers. Section II follows with a description of the theoretical bases for meeting this need with nonprofit organizations, and Section III assesses what characteristics of nonprofit corporate guardianship programs merit consideration for a system of private delegation of durable powers to nonprofit agents. Finally, Section IV evaluates how permitting nonprofit corporate agents to accept both property and health-care powers could improve the overall structure of surrogate decision making in an aging society.

I. THE NEED FOR SURROGATE DECISION MAKERS

Absent the gift of clairvoyance, it is impossible to know with certainty how many Americans will become incapacitated, and of that number, how many will be without a close friend or relative who could serve as a surrogate decision maker. Incapacitation can result from unexpected acute illness or injury as well as long-term degenerative conditions. Consequently, every competent individual is, to some degree, vulnerable to the possibility of needing a surrogate decision maker.

Researchers have discovered, however, that the probability of incapacitation increases with age. While actual life expectancy has increased, the expectancy of life without disability—or “active” life expectancy—has not.⁷ Furthermore, current medical science holds out little hope that the chronic, nonlethal degenerative diseases of old age can be significantly prevented or delayed.⁸

Surveys of the ability of elderly persons living in noninstitutional settings to handle personal and home care activities without assistance indicate that approximately fifteen percent of those age sixty-five to sixty-nine report difficulty with one or more such activities and that this percentage rises to forty-nine percent for persons eighty-five years or older.⁹ Statistically, the over age eighty-five group is also the most likely to suffer from disability or impaired function due to chronic disease.¹⁰ Adding to the predictive significance of these probabilities is the fact that the population over age eighty-five is currently the fastest

7. GERIATRIC MEDICINE 16 (Christine K. Cassel et al. eds., 2d ed. 1990).

8. *Id.* at 22.

9. SENATE SPECIAL COMM. ON AGING, AGING AMERICA: TRENDS AND PROJECTIONS (Annotated) 101st Cong., 2d Sess., 84-85 (Comm. Print 1990) (revised by Elizabeth Vierck [hereinafter SPECIAL COMM.]).

10. GERIATRIC MEDICINE, *supra* note 7, at 17; see SPECIAL COMM., *supra* note 9, at 91 (“[T]hose 85 and older have a three-fold greater risk of losing their independence, seven times the chance of entering a nursing home, and two-and-a-half times the risk of dying compared to persons 65 to 74 years of age.”).

growing in the nation.¹¹ Between 1980 and 2030, the percentage of persons eighty-five years old and older is expected to triple.¹²

Although not all disabling conditions are severe enough to necessitate surrogate decision making, consideration alone of the statistical incidence of Alzheimer's disease—a degenerative disease whose primary symptom is the impairment of cognitive function—is sobering. Studies show that organic mental disorders such as Alzheimer's disease affect more than six percent of older adults.¹³ In 1980, more than two million individuals had Alzheimer's disease.¹⁴ That number is expected to increase to four million by the turn of the century and to between eight million and ten million by 2050 unless a cure or preventative measures are discovered.¹⁵

Clairvoyance aside, a reasonable conclusion based on the foregoing statistical probabilities is that the need for surrogate decision makers is going to increase significantly during the next fifty years. Already in 1988, a congressional report noted a plea from courts and social service agencies for more surrogate decision makers.¹⁶ The key question is: Who will serve as these needed surrogate decision makers?

Traditionally, guardianship authority and durable powers have been vested in a relative of an incapacitated person.¹⁷ However, such individuals are becoming less plentiful due to decreasing fertility rates, rising divorce and nonmarriage rates, and increasing geographic mobility among young adults.¹⁸ By 2030, 21.8 percent of the population is expected to be over the age of sixty-five as compared to only thirteen percent at the turn of the century.¹⁹ Thus, the aggregate potential net-

11. SPECIAL COMM., *supra* note 9, at 7.

12. *Id.*

13. *Id.* at 83.

14. GERIATRIC MEDICINE, *supra* note 7, at 24.

15. *Id.*

16. HOUSE SUBCOMM. MODEL STANDARDS, *supra* note 1, at iii.

17. ZIMNY & DIAMOND, *supra* note 1, at 1 ("The traditional and principal source from which courts appoint guardians is individual family members, particularly daughters, of elderly persons."); Patricia E. Salkin, *The Durable Power of Attorney: Guarding Against Abuse*, SHEPARD'S ELDERCARE/LAW NEWSLETTER, Sept. 1994, at 16 (noting that agents are often a family member or close friend, but a close degree of relationship is not required for delegation of durable powers).

18. See U.S. DEP'T OF COMMERCE, 1994 STATISTICAL ABSTRACT OF THE UNITED STATES No. 90, 75 (114th ed. 1994) (comparing rates of live births, deaths, marriages, and divorces from 1950 to 1992); Martha N. Ozawa, *Solitude in Old Age: Effects of Female Headship on Elderly Women's Lives*, 8 AFFILIA 136 (1993) (analyzing how demographic shifts and the increasing rates of divorce and nonmarriage among women will affect women's responses to the demands of others for care as well as their own needs for care); David J. Dewit et al., *Physical Distance and Social Contact Between Elders and Their Adult Children*, 10 RESEARCH ON AGING 56 (1988) (studying the effects of proximity on family relationships).

19. SPECIAL COMM., *supra* note 9, at 3.

work of younger people who could assist incapacitated elderly is shrinking. Even for those elderly who live alone, but have children or siblings, surrogate decision making by family members may be impractical due to geographic separation.²⁰

In the first survey of its kind, The Commonwealth Fund Commission on Elderly People Living Alone discovered that approximately thirty percent of elderly Americans live alone in an independent household.²¹ The majority of these individuals are women who have outlived their husbands.²² Women comprised seventy-seven percent of the elderly living alone in 1988, and that percentage is expected to rise to eighty-five percent by 2020.²³ Although the total proportion of elderly who live alone is not expected to increase, the sheer numbers of elderly living alone will double due to the anticipated overall aging of the population base.²⁴

The survey also discovered that a much higher percentage of "older" elderly—those over age eighty-five—live alone than do those age sixty-five to seventy-four (almost fifty percent for the former group compared to twenty-five percent for the latter).²⁵ Thus, the segment of the population that is statistically most likely to suffer disabling conditions and impaired function is also the most likely to be living alone. Whether these individuals will have someone to assist them if they can no longer manage their personal and financial matters is an essential inquiry for purposes of planning an adequate surrogate decision-making system.

Of the elderly people living alone who responded to the survey, twenty-seven percent stated that they had no living child or sibling.²⁶ With respect to having someone on whom they could depend in times of need, twenty-eight percent of the respondents stated that they had no one to help them even for a few weeks, and eighteen percent stated that they had no one on whom to depend even for a few days.²⁷ Given that the poverty rate is almost five times higher for elderly living alone than for elderly couples,²⁸ purchasing needed assistance may not be an

20. ZIMNY & DIAMOND, *supra* note 1, at 2; HOUSE SUBCOMM. MODEL STANDARDS, *supra* note 1, at 6.

21. THE COMMONWEALTH FUND COMMISSION ON ELDERLY PEOPLE LIVING ALONE, *AGING ALONE: PROFILES AND PROJECTIONS* 22, 26 (1988).

22. *Id.* at 23, 27-28.

23. *Id.* at 31.

24. *Id.* at 30.

25. *Id.* at 26.

26. *Id.* at 67.

27. *Id.* at 62.

28. *Id.* at 36. Furthermore, the poverty rate among those living alone is not expected to decline in the next 10 years. *Id.* at 37.

alternative for elderly who live alone and are without a supportive network of friends or family.

Looking then at only the segment of the population that statistically is the most likely to become incapacitated, it appears that the number of elderly who may need surrogate decision makers will continue to increase along with the probability that neither family nor friends will be available to provide assistance. Of course, elderly living alone are not the only population for whom surrogate decision making may become necessary. Both members of an elderly couple may become incapacitated, not to mention the number of younger adults who may find themselves unexpectedly incapacitated and without a spouse or children to provide assistance.²⁹ Although the anticipated needs of the elderly are easier to quantify than for younger individuals, a system for surrogate decision making must be adequate to accommodate the needs of all incapacitated individuals, regardless of age.

II. THEORETICAL BASES FOR NONPROFIT ORGANIZATIONS AS SURROGATE DECISION MAKERS

As noted in the introduction, nonprofit corporations have already begun to play a significant role in meeting society's need for surrogate decision makers, but in a default manner through court appointment as guardians rather than in a directed fashion as preappointed agents under durable powers. Before evaluating what characteristics of nonprofit corporate guardianship programs merit consideration for a system of advance delegation of durable powers, the first question that must be answered is: Why prefer a nonprofit form of corporate entity over a for-profit form for surrogate decision making?

A. Nonprofits as the Third Sector

Although Americans have formed voluntary associations since early colonial times to provide for unmet societal needs,³⁰ it was not until the

29. Consider, for example, that two of the most widely publicized surrogate decision-making cases concerned young women. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990) (30-year-old woman in a persistent vegetative state resulting from injuries sustained in an automobile accident); *In re Quinlan*, 355 A.2d 647 (N.J.) (21-year-old woman in a persistent vegetative state from undetermined causes), cert. denied, 429 U.S. 922 (1976). Demographic shifts and increasing divorce and nonmarriage rates among women suggest that in the coming decades growing numbers of women will live alone and may not have surrogate decision makers available in the event of incapacitation. See *Ozawa*, supra note 18, at 148-50.

30. W. Andrew Achenbaum, *A Brief History of Foundation Funding in Aging*, in *AGING: THE BURDEN STUDY OF FOUNDATION GRANTMAKING TRENDS* 17-18 (Loren Renz ed., 1991).

1980s that legal theorists attempted an economic analysis of why non-profits exist and how they operate. Professor Henry B. Hansmann's seminal article, *The Role of Nonprofit Enterprise*,³¹ was the first to analyze nonprofits as a response to market failure in the for-profit sector. Based on the premise that a properly functioning market is one where profit-seeking firms supply services at the quantity and price that represent maximum social efficiency, Hansmann postulated that the market will fail when consumers are incapable of evaluating the services promised or delivered.³² This market failure, which Hansmann labeled "contract failure," occurs because the lack of consumer monitoring places unfettered discretion in the hands of profit-seeking producers who can then engage in opportunistic behavior such as charging excessive prices for inferior services.³³

Examples of contract failure include transactions where the recipient of the service and the purchaser are different individuals (for example, services rendered to the needy, but paid for by others); as well as situations where the recipient-purchaser of the service is in a poor position to police the quality of what is received or to shop for alternatives (for example, nursing care provided to the infirm or day care provided to children).³⁴ In these contract failure contexts, the checks-and-balances function of the normal marketplace cannot operate successfully because the consumer has lost the ability to monitor the producer.

Where contract failure applies, Hansmann hypothesized that the public will prefer nonprofit entities because the consumer is protected by a broader contract—the legal commitment, which a nonprofit organization must make in exchange for tax-exempt status, to reinvest any net earnings in the provision of the nonprofit's services, rather than distribute those profits to persons who control the enterprise.³⁵ Hansmann theorized that this "contractual" restraint on profit distribution, based on and enforced under state and federal law, lessens the importance of the consumer's lack of ability to police the producer. In other words, the economic efficiencies of the collective contract between the nonprofit organization and the state, for the benefit of the organization's patrons, compensates for the patrons' lack of contractual power on an individual level.³⁶

31. Henry B. Hansmann, *The Role of Nonprofit Enterprise*, 89 YALE L.J. 835 (1980).

32. *Id.* at 843-45.

33. *Id.*

34. *Id.* at 846-47, 862-65.

35. *Id.* at 844 (noting, however, that "in spite of the limitations imposed upon them, nonprofits may succeed in distributing some of their net earnings through inflated salaries, . . . and other forms of excess payments").

36. *Id.* at 853.

Hansmann also distinguished nonprofits according to their sources of financing as either donative or commercial.³⁷ Donative nonprofits are those that receive most of their income from donations or grants, such as organizations that provide relief to the needy. Commercial nonprofits are those that charge a fee for the service provided to the consumer, such as organizations that provide nursing care, health care, and day care. Of course, these categories are not mutually exclusive, as in the case of universities, for example, which rely on a varying mix of consumer-provided tuition and donations to fund their activities.³⁸

Although the restraint on net profit distribution is, under Hansmann's theory, the essential characteristic that provides nonprofits with a niche in an otherwise for-profit world, it is also a limiting factor that prevents at least commercial nonprofits from squeezing their for-profit counterparts from the marketplace.³⁹ When donations and retained earnings are poorly matched to the capital needs of a nonprofit organization, the nonprofit organization cannot sell equity shares to raise additional capital as can for-profit enterprises.⁴⁰ Moreover, if profit distribution is a primary motivation for efficient production and market responsiveness, then the absence of profit motivation may make nonprofits less vigilant and responsive than their for-profit competitors.⁴¹ Based on these considerations, Hansmann concluded that nonprofit firms will only have a competitive edge where the protective value of the prohibition on profit distribution outweighs its disadvantages.⁴²

In the development of an economic theory of nonprofit enterprise, the role of government has also received considerable attention.⁴³ The "government failure" theory recognizes that the government or public sector, in addition to the commercial or private sector, supplies significant goods and services to the consuming public, but that not all goods and services are provided governmentally or privately.⁴⁴ This theory states that the level of government-provided services is determined by the voting process and that the political process always leaves a signifi-

37. *Id.* at 840-41.

38. *Id.* at 841.

39. *Id.* at 871-79.

40. *Id.* at 877.

41. *Id.* at 878.

42. *Id.* at 879.

43. See generally Burton A. Weisbrod, *Toward a Theory of the Voluntary Nonprofit Sector in a Three-Sector Economy*, in *THE ECONOMICS OF NONPROFIT INSTITUTIONS* 21 (Susan Rose-Ackerman ed., 1986); JAMES DOUGLAS, *WHY CHARITY?* (1983).

44. Weisbrod, *supra* note 43, at 22 (explaining the development of a voluntary, or nonprofit, sector as "an adjustment to the restricted capabilities of the other two sectors").

cant number of unsatisfied voters who may then turn to the nonprofit sector as one option for supplying the additional level of service desired.⁴⁵ The combination of the market failure and government failure theories, deemed the "twin failure theory,"⁴⁶ heralds nonprofit enterprise as the "third sector," which exists to accommodate public demand when neither the commercial nor government sectors can respond with an adequate supply of the desired service.

Most economic analyses of nonprofits offer some variation on the twin failure theme. One recent theory, however, argues that the twin failure theory is incomplete because it neglects to consider the role of altruism inherent in the existence and behavior of the nonprofit sector.⁴⁷ The "altruism" theory suggests that a truly nonprofit enterprise operates from a conscious concern for "need" instead of as a purely derivative response to failure of the public and private sectors to meet demand.⁴⁸ In other words, according to the altruism theory, the nonprofit sector also functions prospectively, rather than just reactively to failures in the commercial and government sectors.

For purposes of this Article it is neither necessary nor particularly helpful to attempt a reconciliation of the various economic theories of nonprofit enterprise. Each, however, as a perspective on the relationship among the nonprofit, private, and public sectors, provides insight for developing a systematic approach to caring for the incapacitated. Heretofore the term "need" has been used nonspecifically in this Article to describe the growing requirement for more surrogate decision makers. In order to evaluate this requirement from an economic perspective, an attempt must now be made to differentiate between the "demand" and the "need" for surrogate decision making.

B. Surrogate Decision Making—Marketplace Demand Versus Need

Most guardianship statutes reflect the historical tradition of, and preference for, a family member serving as an incapacitated person's

45. *Id.* at 26-32.

46. See DOUGLAS, *supra* note 43, at 160.

47. See generally Rob Atkinson, *Altruism in Nonprofit Organizations*, 31 B.C. L. REV. 501 (1990). It is interesting to note that in 1983, James Douglas concluded that the "twin failures argument" was only a beginning point for a rationale of the "Third Sector," and identified among the important unanswered questions the role of altruism in society. DOUGLAS, *supra* note 43, at 160.

48. Atkinson, *supra* note 47, at 638 (noting that "the invisible hand of the market, operating without regard to need, is not the ideal, but a necessary stopgap where the helping hand of altruism, implementing conscious concern for need, has not yet reached").

surrogate decision maker. Relatives, if available and willing to serve, have priority for court appointment as a guardian unless challenged as unfit for the position.⁴⁹ Although there are no national comparative data to show the respective percentages of family members or close friends who have served as volunteer guardians compared to strangers appointed at the behest of the court, the fact that corporate guardianship services are a relatively recent phenomenon suggests that family members and friends once provided a basically adequate source of surrogate decision making.⁵⁰

Under a family-based guardianship system, if a person loses the capacity to manage personal or financial affairs, it is assumed that the relative of closest relationship will seek court appointment to supervise the care of the incapacitated individual. This type of voluntary surrogacy is ostensibly motivated by emotional commitment or moral obligation stemming from the family relationship rather than economic motivation. Although guardianship statutes may provide for reasonable compensation to guardians for services rendered,⁵¹ usually relatives serve without compensation. Regardless, the court does not conduct a

49. The Uniform Guardianship and Protective Proceedings Act, which has been adopted in substantial part by fourteen states and the District of Columbia, contains the following typical specifications for who may serve as a guardian and the priorities for selection among qualified candidates:

§ 2-205. Who May be Guardian; Priorities.

(a) Any qualified person may be appointed guardian of an incapacitated person.

(b) Unless lack of qualification or other good cause dictates the contrary, the Court shall appoint a guardian in accordance with the incapacitated person's most recent nomination in a durable power of attorney.

(c) Except as provided in subsection (b), the following are entitled to consideration for appointment in the order listed:

(1) the spouse of the incapacitated person or a person nominated by will of a deceased spouse or by other writing signed by the spouse and attested by at least 2 witnesses;

(2) an adult child of the incapacitated person;

(3) a parent of the incapacitated person, or a person nominated by will of a deceased parent or by other writing signed by a parent and attested by at least two witnesses;

(4) any relative of the incapacitated person with whom the person has resided for more than 6 months prior to the filing of the petition; and

(5) a person nominated by the person who is caring for or paying for the care of the incapacitated person.

(d) With respect to persons having equal priority, the Court shall select the one it deems best qualified to serve. The Court, acting in the best interest of the incapacitated person, may pass over a person having priority and appoint a person having a lower priority or no priority.

UNIF. GUARDIANSHIP AND PROTECTIVE PROC. ACT § 2-205, 8A U.L.A. 489-90 (1993) [hereinafter UGPPA].

50. ZIMNY & DIAMOND, *supra* note 1, at 3.

51. See UGPPA, *supra* note 49, §§ 2-209 & 2-109(d).

search for the individual offering the best service at the lowest price, but only inquires as to whether the petitioner for guardianship powers is the most appropriate individual of those willing to serve.⁵²

Thus, when the requirement for a surrogate decision maker is met by a willing volunteer, the process falls outside the commercial marketplace of supply and demand. Availability of suitable volunteers, rather than the operation of an efficient market, determines who will render surrogacy services. Borrowing from the altruism theory of nonprofit enterprise, the acts of volunteer guardians could be described as incidents of individual altruism, prompted not as a derivative response to the lack of a marketplace alternative, but motivated by the belief that surrogate decision making by a relative or friend of the incapacitated person is superior to a commercially-provided surrogate. The requirement for surrogacy in this instance then is more appropriately viewed as a "need" rather than as a "demand" asserted in the marketplace.

The same rationale could be applied to the voluntary delegation of durable powers to a family member or friend by a competent person prior to incapacity. Although agents under durable powers, like guardians, may be entitled to compensation for their services, in reality most family members and friends serve without remuneration.⁵³ The role played by this type of individual altruism is especially significant in situations where the incapacitated individual has no private resources with which alternative surrogacy services could be hired, or as is frequently the case, what financial resources there once were become depleted by the costly custodial and health care often necessitated by incapacity.⁵⁴

However, where no volunteer family member or close friend exists to respond altruistically to the "need" for surrogate decision making, either as an agent under durable powers or as a guardian, does the resulting requirement for a surrogate represent a marketplace "demand" or a "need" outside the operation of an efficient market? The answer to this question would appear to rest primarily on the financial resources of the incapacitated person.

For indigent persons who have no resources with which to purchase surrogate decision-making services, the requirement for a surrogate can

52. *Id.* § 2-205(d).

53. 1 FRANCIS J. COLLIN, JR. ET AL., *DRAFTING THE DURABLE POWER OF ATTORNEY: A SYSTEMS APPROACH* 80 (1992).

54. A 1991 documentary on financing the costs of long term care estimated that it takes the average single person only 13 weeks to exhaust enough personal savings and assets to become eligible for Medicaid when paying for long-term care in a nursing home and the average couple only 20 weeks. *Frontline: Who Pays for Mom and Dad?* (PBS television broadcast, Apr. 30, 1991).

hardly be viewed as a demand to be satisfied in the marketplace. On the contrary, when individual volunteers are unavailable to provide surrogate decision making for indigent persons, the "need" for surrogacy is one felt reluctantly, and by default, in the public sector. A 1993 survey of public guardianship statutes indicates that public guardianship of some type is available in forty-three states.⁵⁵ However, in many states, a government employee is appointed as a guardian of last resort, with no formal program of support services to ensure that the incapacitated person receives care in a manner that is most appropriate and least restrictive.⁵⁶ At the time of the survey, only seven states had an independent state agency established for the purpose of providing surrogacy services, twelve provided public guardianship through a government agency which also provided other social services, and twelve states handled public guardianship through contracts with nongovernment providers.⁵⁷ From the survey results, it appears that of the states that contract with nongovernment entities for guardianship services, most deal with nonprofit organizations.⁵⁸ Based on economic theory, the fact that nonprofit organizations exist to handle this type of need could be viewed as a response to the lack of enough guardianship services by government personnel and agencies (the government failure theory), or as a collective altruistic response to a need that cannot be effectively expressed in the marketplace as consumer demand (the altruism theory).

If, however, an individual can afford to pay for guardianship services, the search for a guardian is one that, arguably, can be expressed in the marketplace as consumer demand. Depending on the jurisdiction, the options may range from individual professional guardians to organizations, nonprofit and for-profit, which have established programs for providing guardianship services. Although a competent person could ostensibly shop and compare to find the organization that appears to offer quality guardianship service at the best price, the empirical reality is that competent individuals generally do not shop for guardianship services before they are required. And once guardianship services are required, the incapacitated consumer is no longer in a position to shop for or monitor the quality of the service received. For these reasons, fee-based surrogate decision-making services present a

55. Dorothy Siemon et al., *Public Guardianship: Where Is It and What Does It Need?*, 27 CLEARINGHOUSE REV. 588, 594 (1993).

56. *Id.* at 594-98 (noting one case in Alabama where a sheriff was not even aware that he had been appointed as a guardian for a woman in a mental hospital until advocates began helping the ward contest her wrongful commitment there).

57. *Id.* at 594.

58. *Id.* at 590-93.

classic example of Hansmann's contract failure scenario.

Despite the inability of incapacitated persons to monitor the quality of their own surrogate decision-making services, nonprofit guardians do not have an exclusive market in the corporate guardianship arena. Although there are no quantitative statistics that compare the number of for-profit corporate guardianship programs with nonprofit programs, the predominance of nonprofit programs discussed in recent articles and studies suggests that they are in the majority.⁵⁹ Nonetheless, the role of for-profit surrogate decision makers merits careful consideration in the formulation of any recommendation for expanding the permissible types of agents to whom durable powers may be delegated. The question that legislators must consider is whether states should permit their citizens to delegate durable health-care powers to corporate agents, and if so, whether these corporate agents should be limited to nonprofit organizations.

Hansmann's theory hypothesizes that the marketplace will adjust itself according to the relative advantages and disadvantages of the nonprofit versus for-profit form of organization in contract failure situations. If the prohibition on profit distribution is of great importance to the consumer or purchaser of surrogate decision-making services, then nonprofit providers should prevail; if, however, a factor such as flexibility in raising sufficient capital resources is more important than nondistribution of profit, then for-profit providers will remain viable in the market.⁶⁰

However, the underlying premise of Hansmann's theory—that consumers discern the differences between nonprofit and for-profit enterprise—has been criticized as unsupported by actual marketplace behavior.⁶¹ A telephone survey was conducted in the New Haven, Connecticut metropolitan area to test the contract failure theory.⁶² The objective was to determine whether consumers actually perceive differences between nonprofit and for-profit organizations and whether the nonprofit versus for-profit distinction influences patronage. Among the

59. See generally Rogers, *supra* note 1; ZIMNY & DIAMOND, *supra* note 1; Siemon et al., *supra* note 55; see also Penelope A. Hommel & Lauren B. Lisi, *Model Standards for Guardianship: Ensuring Quality Surrogate Decision Making Services*, 23 CLEARINGHOUSE REV. 433, 435 (1989) ("Private entities tend to be not-for-profit, although for-profit organizations and sole proprietorships using a fee-for-service arrangement appear to be on the rise.").

60. See *supra* notes 39-42 and accompanying text.

61. Steven E. Permut, *Consumer Perceptions of Nonprofit Enterprise: A Comment on Hansmann*, 90 YALE L.J. 1623 (1981) (suggesting that several assumptions implicit in Hansmann's theory must be reexamined).

62. *Id.* at 1626-27 (based on a response from 225 households out of a random sample of 338 households).

results, thirty-five percent of the respondents did not perceive any difference between nonprofit and for-profit organizations, fifty-six percent did not feel, or were uncertain, that nonprofits would treat them more fairly than for-profits, and thirty percent did not feel that nonprofits would be more concerned with them as a person than for-profits.⁶³ With respect to whether the respondents would prefer a nonprofit organization for an elderly relative's nursing home care, sixty-eight percent responded that they would not care if the nursing home was nonprofit.⁶⁴

If there is in fact ambivalence or ignorance on the part of the consuming public about nonprofit/for-profit distinctions, perhaps the most important question for future planning is whether the differences *should* matter. In the corporate guardianship context, legislatures and social service agencies often have greater influence over the design of the guardianship system than consumers of guardianship services. One possible explanation for the existence of for-profit corporate guardianship programs is that legislatures and social service agencies do not perceive the contract failure problem in the guardianship system. Although an incapacitated person is in no position to monitor the quality of services provided, the guardian is supposedly monitored through court supervision. In theory, the court's supervisory role compensates for the loss of the ward's monitoring capabilities.

Although the safeguards of court supervision have at least theoretical appeal, practice has not born out the merits. Courts generally do not have the funding or personnel to visit wards or investigate guardians.⁶⁵ The court's supervisory role is usually limited to proforma approval of annual financial accountings, and even compliance with this requirement is often unenforced.⁶⁶ Few jurisdictions require any update on the nonfinancial well-being of the ward.⁶⁷

The potential for abuse of guardianship authority prompted the

63. *Id.*

64. *Id.* at 1627.

65. Frolik, *supra* note 3, at 43-44 (arguing that judges need to demand more resources from legislatures for the training and supervision of guardians, as well as a system of court-appointed visitors for wards).

66. Vicki Gottlich & Erica Wood, *Statewide Review of Guardianships: The California and Maryland Approaches*, 23 CLEARINGHOUSE REV. 426, 426 (1989) (citing the 1987 investigative report of the Associate Press, which found after a year-long study of 2,200 probate files that 48% were missing annual financial accountings; and a grand jury investigation in Dade County, Florida, which found that 75% of the randomly selected probate files were missing financial reports).

67. Frolik, *supra* note 3, at 43; *but see* Gottlich & Wood, *supra* note 66, at 427-32 (describing statutorily mandated systems in California and Maryland for monitoring guardianship).

Subcommittee on Housing and Consumer Interests of the House Select Committee on Aging to propose model standards in 1988 for programs providing guardianship and representative payeeship services.⁶⁸ One of the Subcommittee's concerns was that corporate guardianship programs, especially for-profit programs, may result in an overuse of guardianship for surrogate decision making.⁶⁹ The Subcommittee feared that the need for a sufficient number of clients to stay in business may promote solicitation of unneeded guardianship, as well as reluctance to terminate authority over a paying client where guardianship was no longer appropriate.⁷⁰ Concern was also raised over what would happen to the wards of for-profit guardians when the ward's funds became exhausted.⁷¹

One could argue that a number of the foregoing concerns are also applicable to nonprofit corporate guardianship programs because, like their for-profit counterparts, continued viability may depend on having a sufficient number of clients. However, nonprofits can subsidize the cost of providing services with donations and grants. Furthermore, the financial pressure of merely covering operating expenses is far less than that of meeting proprietary expectations of a profit above and beyond the break-even point. The fate of wards who run out of money would also be less problematic in a nonprofit program. When a ward becomes impoverished, a nonprofit organization that is dedicated to the mission of providing surrogate decision-making services is far more likely to continue those services than is a for-profit organization that cannot justify unprofitable endeavors to its ownership. Thus, although for-profit guardianship services compete with nonprofit programs in some jurisdictions, the lack of the ward's ability to monitor the services, the minimal effectiveness of court supervision, and the vulnerability of a ward in the event of impoverishment all argue in favor of a preference for nonprofit surrogate guardianship programs.

In summary, the traditional guardianship system was based on the premise that family members or friends would volunteer to act as surrogate decision makers for incapacitated individuals. The failure of this system to accommodate the rising requirement for surrogates has placed increasing pressure on government public guardianship programs and prompted the advent of corporate guardianship programs. Although for-profit programs exist, several theories help explain the predominance of and preference for nonprofit programs. First, not only

68. See HOUSE SUBCOMM. MODEL STANDARDS, *supra* note 1.

69. *Id.* at 9, 22.

70. *Id.* at 22.

71. *Id.*

are recipients of surrogate decision-making services unable to monitor the quality of services received, but court supervision is minimal. The nonprofit's prohibition on profit distribution reduces the likelihood that surrogate decision makers will decrease the quality of services offered in order to increase profits (the contract failure theory). Second, the inability of government to supply adequate public guardianship services may prompt dissatisfied voters to meet unsatisfied public needs through collective nonprofit enterprise, which is more economically efficient than isolated individual efforts (the government failure theory). Third, altruism may also be a driving force that prompts individuals to identify and respond to the unmet needs of those who cannot help themselves (the altruism theory). Further, because of the limited circumstances in which the requirement for surrogate decision making can be expressed as a marketplace demand (that is, where funds exist to initiate and maintain payment for services rendered), for-profit programs have limited utility in meeting the growing requirement for surrogate decision makers.

As the prior discussions demonstrate, despite the advent of corporate guardianship programs, the present guardianship system will be unable to compensate for rising surrogate decision-making needs and declining availability of individual surrogate decision makers. If the supply of individual surrogates is inadequate, innovative ways to improve and expand the role of nonprofit corporate surrogate decision makers should be explored. Before analyzing the merits of expanding durable powers authority to include delegation of full powers to nonprofit corporate agents, examples of exemplary nonprofit corporate guardianship programs will be examined in the next Section. Section IV will then address how the successful components of nonprofit guardianship programs could be used as a foundation for expanding durable powers to provide a guardianship alternative for persons who are without individual surrogate decision makers.

III. ANATOMY OF THE PROTOTYPIC NONPROFIT CORPORATE GUARDIANSHIP PROGRAM

Despite the flurry of interest in guardianship and guardianship reform that began in the late 1980s,⁷² the research on corporate and agency-based guardianship programs is limited.⁷³ The localized nature

72. See HOUSE SUBCOMM. MODEL STANDARDS, *supra* note 1; see also Barnes, *supra* note 2, at 637; Frolik, *supra* note 3; Carol A. Mooney, *Guardianship Reform: A Federal Mandate*, PROB. & PROP., Mar.-Apr. 1990, at 48.

73. There is no national directory of nonprofit guardianship programs. Interview with

of guardianship may be one of the primary reasons why so little is known about how many and what type of corporate guardianship programs exist. Likewise, because guardianship is subject to state legislative control, there are no uniform federal standards that apply to the procedural or substantive aspects of guardianship.⁷⁴ Federal guardianship reform bills, which would have conditioned states' receipt of certain federal benefits upon reform compliance, have repeatedly failed.⁷⁵

The following description of a prototypic nonprofit guardianship program is therefore based on limited studies and anecdotal information collected about successful guardianship programs in various parts of the country. What information is available indicates that nonprofit guardianship programs tend to fall within three basic categories: general social service agency programs,⁷⁶ programs devoted to the needs of developmentally disabled individuals,⁷⁷ and programs initiated through cooperative efforts among the public, private, and nonprofit sectors.⁷⁸

Marc Greidinger, American Bar Association Commission on Mental & Physical Disability Law, in Washington, D.C. (Oct. 20, 1994). However, there is a professional association for guardians of all types known as the National Guardianship Association. See Telephone Interview with Joan Gray, *supra* note 6.

The goal of a recent study funded by the AARP Andrus Foundation was to determine the number, capacity, and characteristics of social service agencies that are providing guardianship services for elderly wards. Of the 359 agencies that responded to the survey, only 52 (14%) provide guardianship services. ZIMNY & DIAMOND, *supra* note 1, at 5, 13.

74. See generally Mooney, *supra* note 72 (describing the relationship of two proposed federal reform bills to current state regulatory controls); HOUSE SUBCOMM. MODEL STANDARDS, *supra* note 1.

75. Three guardianship reform bills (H.R. 5275, S. 2765, and H.R. 5266) were introduced in the 100th Congress, and reintroduced, as amended (H.R. 1702, S. 235, and H.R. 372) in the 101st Congress. See Mooney, *supra* note 72, at 48. Although the bills were not enacted, the later passage of The Patient Self Determination Act of 1990 indicates the power of the federal government to exact national reform compliance in areas otherwise subject to exclusive state legislative control. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 4206, 4751, 104 Stat. 1388 (codified in scattered sections of 42 U.S.C.).

76. Social service agencies that also provide guardianship services tend to be members of one of four national umbrella organizations: the Association of Jewish Family and Children's Agencies, Family Service America, Catholic Charities USA, and the Evangelical Lutheran Church America. ZIMNY & DIAMOND, *supra* note 1, at 8.

77. A typical example would be the LIFEguardianship Program operated under the auspices of The Arc of North Carolina, Incorporated. The Arc of N.C., Inc. (formerly the Association for Retarded Citizens/North Carolina, Inc.), LIFEguardianship History, Structure, and Program 4 (unpublished information furnished on October 26, 1994; on file with the *University of Cincinnati Law Review*) [hereinafter LIFEguardianship Program]; see also The Arc Nat'l Headquarters, Future Planning Resources (unpublished information furnished on October 13, 1994, including a state-specific resource guide for guardianship planning materials; on file with the *University of Cincinnati Law Review*).

78. See, e.g., *Agency Profile: L.E. Phillips Career Dev. Ctr. Corp. Guardianship Program*, Eau Claire, WIS. GUARDIANSHIP SUPPORT CTR. NEWS, Sept. 1994, at 6 (highlighting nonprofit program developed at the joint request of the Eau Claire Department of Human Services and the Eau Claire County Circuit Court, and funded by the Eau Claire Department of

The subsequent descriptive profile integrates the best attributes of the various types of nonprofit guardianship programs as an example of what is both desirable and possible in a system utilizing nonprofit surrogate decision makers. The program characteristics that will be examined include: 1) protocol for evaluating the appropriateness of guardianship; 2) the board or committee system for exercising guardianship authority; 3) systems for managing fiduciary responsibilities; 4) sources of funding and support; 5) protections against liability; and 6) use of volunteers for increasing personal contact with wards.

A. Protocol for Evaluating the Appropriateness of Guardianship

Most programs use a number of criteria to determine whether guardianship of a proposed ward is appropriate and whether the nonprofit entity is well suited to meet the ward's needs. An informal assessment is usually conducted by a social worker/case manager in addition to the formal medical and psychological evaluations that may be required.⁷⁹ Where indicated, alternatives to guardianship are discussed with the proposed ward.⁸⁰ If it is determined that a relative is available to serve as guardian or that the proposed ward would be better served by a less restrictive alternative than guardianship (for example, representative payeeship or perhaps a drug or alcohol rehabilitation program), then the referral for guardianship is declined.⁸¹ Some programs also have financial guidelines for acceptance of a proposed ward,⁸²

Human Services and private fees); see also Rogers, *supra* note 1, at 3-5 (highlighting, among others, Guardian, Inc., a nonprofit agency in Battle Creek, Michigan, which was an outgrowth of the county guardian and is funded through a combination of funds from the county, United Way, private donations, corporate funds, and fees for service; and Volunteer Guardianship Programs of Ohio, which are funded by monies from the Indigent Guardianship Fund (generated by probate filing fees), as well as a variety of other sources including donations from hospitals and county mental health boards.).

79. See The Arc of N.C., Inc., Guidelines for Referral of Candidates for ARC/NC Corp. Guardianship (unpublished information furnished on October 26, 1994; on file with the *University of Cincinnati Law Review*); ZIMNY & DIAMOND, *supra* note 1, at 36-37, 62, 75-76, 85-87, 100-01, 110-11 (describing the assessment criteria of six nonprofit guardianship programs for acceptance of wards).

80. See, e.g., ZIMNY & DIAMOND, *supra* note 1, at 76 (reporting procedures used by Catholic Charities of the Archdiocese of St. Paul and Minneapolis).

81. See *supra* note 79.

82. ZIMNY & DIAMOND, *supra* note 1, at 36-37 (noting that Jewish Family Service of Los Angeles requires a prospective ward to have a minimum of \$60,000 in assets to assure that the ward's expenses will be paid and that the agency will be able to collect its fees for one to one and one-half years); The Arc of N.C., Inc., Chart II—Admissions Process (Jan. 27, 1994) (unpublished flowchart furnished on October 26, 1994, indicating that The Arc will not become a guardian in situations where there are no resources to pay for services; on file with the *University of Cincinnati Law Review*).

whereas others accept both indigent and paying clients. Once a ward is accepted for guardianship services, the program develops a personalized plan for meeting the ward's needs.⁸³

B. Board or Committee System for Exercising Guardianship Authority

A relatively new concept in corporate guardianship is the use of a board or committee to act as the surrogate decision-making body for the ward or as an advisor to the individual within the organization who is carrying out the entity's guardianship responsibilities.⁸⁴ The advantage of a board or committee system for surrogate decision making is that multiple perspectives and fields of expertise can inform the process.⁸⁵ A multiperspective approach is particularly helpful when ethical decisions regarding a ward's health care must be made⁸⁶ or technical decisions concerning maximization of a ward's estate are at issue.⁸⁷

One distinct advantage of the nonprofit form of corporate guardianship is that it can usually attract volunteer board and committee members. Volunteer professionals not only enhance the quality of a program's services through their collective expertise, but also may make possible the provision of services on a reduced cost or pro bono basis to

83. See LIFEguardianship Program, *supra* note 77, at 6-7.

84. While The Arc of North Carolina, Inc., is the legally-designated guardian for its wards (identified as "proteges"), the LIFEguardianship Council is authorized by the corporation's by-laws to be the actual surrogate decision-making body for proteges. The Council is a diverse group of least 21 members encompassing parents and relatives of developmentally disabled individuals and professionals from the fields of medicine, law, social work, mental retardation, religion, and accounting. *Id.* at 4-5.

The board or committee concept is also being used in public guardianship programs. In Idaho, a volunteer board serves as the guardian of last resort. The Board of Community Guardian, appointed by the county board of commissioners, is comprised of 7 to 11 volunteers from the fields of elder law and social service. Siemon et al., *supra* note 55, at 597-98. The committee concept has also been used successfully by the Montgomery County Department of Social Services in Maryland. The volunteer ethics committee (originally composed of social workers, a physician, psychologist, nurse, attorney, the director of the local area agency on aging, a rabbi, a nurse psychiatrist, an ethicist, and relatives of family members who were eligible for Department services) was formed to advise the Director of the Department in his role as public guardian. Jay Kenney & Joan Planell, Ethics Committee 2 (October 21, 1994) (unpublished information furnished on October 21, 1994 at the Joint Conference on Law & Aging in Washington, D.C.; on file with the *University of Cincinnati Law Review*).

85. See Kenney & Planell, *supra* note 84, at 2, 4-5.

86. See *id.* at 1, 3.

87. See ZIMNY & DIAMOND, *supra* note 1, at 43 (noting that under the procedures of Jewish Family Service of Los Angeles, the program director can call upon a group of advisors composed of an attorney, broker, accountant, and any other special resource person needed).

needy wards. One program has been so successful with its volunteer ethics committee that there is a waiting list of professionals who are willing to participate.⁸⁸

C. Systems for Managing Fiduciary Responsibilities

When a corporate entity is appointed as the conservator or guardian of the estate, a system needs to be in place for ensuring that the organization will faithfully meet its fiduciary responsibilities and that accurate records will be maintained of the receipts and disbursements handled on the ward's behalf. Computerized checkbook ledger systems have made it possible for corporate guardians to keep accurate accounting records of the income and expenditures for numerous wards and for that information to be easily converted into periodic court reports.⁸⁹ Notwithstanding the convenience and efficiency of computerization, attention must still be paid to office procedures for protecting the ward's assets against theft or mismanagement.

The financial security systems of corporate guardianship programs vary in complexity,⁹⁰ but the most security conscious share several characteristics. One common characteristic is a separation of duties among the staff who record, endorse, and deposit checks for wards, as well as for those who approve, record, and sign checks for disbursements to pay the ward's bills.⁹¹ With separation of duties, intentional mismanagement of funds can occur only as a result of collusion among staff members who exercise complementary functions.

Direct deposit of regular payments to wards is another common method of reducing security risks,⁹² as is requiring multiple signatures for large checks drawn on ward funds.⁹³ To monitor the effectiveness of the entire system, some programs are audited annually by an outside accountant, whereas others rely on the internal process of preparing

88. Joan Planell, Remarks at the Joint Conference on Law & Aging in Washington, D.C. (October 21, 1994).

89. ZIMNY & DIAMOND, *supra* note 1, at 42, 67, 90, 105, 112, 125 (noting the various computer software systems used by corporate guardians to track ward receipts and disbursements).

90. *See id.* at 42-43, 55-57, 67-70, 79-80, 90-92, 104-06, 112-14, 125-26 (comparing the procedures of eight different agencies for handling ward's estates).

91. *See, e.g., id.* at 42-43, 55-56, 126 (noting the separation of duties policies at Jewish Family Service of Los Angeles, Jewish Association for Services for the Aged, and Family Services, Inc.).

92. *See id.* at 67, 105, 113.

93. *See id.* at 43, 56 (noting two programs where checks over the amount of \$1000 must be signed by at least two authorized agency officials).

periodic ward accountings for court review.⁹⁴

D. Sources of Funding and Support

The nonprofit status of a corporate guardianship program can be both a bane and a blessing from the standpoint of funding. According to Hansmann's contract failure theory, the nondistribution constraint on profits ostensibly encourages consumers and charitable donors to place more trust in nonprofit programs than for-profit entities for the provision of services to the vulnerable and indigent.⁹⁵ But, when program fees and charitable support are inadequate to cover the cost of services provided, nonprofit entities cannot sell equity shares to raise money as can their for-profit counterparts.⁹⁶ Consequently, nonprofit guardianship programs must use the advantages of their tax-exempt status to develop diverse sources of nonproprietary funding for continued viability.

Possible sources of funding for nonprofit guardianship programs include: private fees for service, contracts with governmental units (for example, counties and protective services departments), court-administered funds (for example, funds generated by probate filing fees or interest on lawyer's trust accounts), private contracts with hospitals and nursing homes (usually limited to the costs of initiating guardianship for patients or residents without family members), agency support (for example, United Way and religious organizations), donations, and grants.⁹⁷ Although a ward may initially have an estate from which fees can be paid when guardianship is instituted, these funds are often depleted by expensive custodial or health care.⁹⁸ Because it is the policy of most nonprofit programs to continue services for wards who have exhausted their funds,⁹⁹ supplementary sources of funding are crucial.

94. *Id.* at 56, 79, 91, 113, 126 (describing the control and oversight policies of various agencies).

95. *See supra* notes 31-36 and accompanying text.

96. *See supra* note 40 and accompanying text.

97. *See ZIMNY & DIAMOND, supra* note 1, at 33-34, 44, 58-59, 71-72, 81-82, 92-93, 107-08, 114-115, 129-31 (summarizing funding sources for eight nonprofit guardianship programs); *see also* Rogers, *supra* note 1, at 3 (noting the flexibility of the nonprofit form of guardianship program for soliciting funds from a variety of sources).

98. *See supra* note 54.

99. *See, e.g., ZIMNY & DIAMOND, supra* note 1, at 44, 131 (indicating that the policies of Jewish Family Service of Los Angeles and Family Services, Inc., are to continue services for wards whose funds have become depleted).

E. Protections Against Liability

Another critical component to the viability of nonprofit corporate guardianship programs is adequate protection against liability. Liability issues arise with respect to the conduct of directors, officers, employees, and volunteers, as well as in connection with property owned by the corporation and its wards. In addition to minimizing potential liabilities through security and safety-oriented office procedures,¹⁰⁰ three types of protection are available for nonprofit corporate guardians and their constituents: insurance, surety bonds, and volunteer protection laws.

The following are examples of insurable risks for which a corporate guardian may seek protection: 1) injuries to wards, volunteers, employees, or third parties; 2) exposure of directors and officers to liability for their own errors and omissions or the acts of other corporate agents; and 3) theft of or damage to property belonging to the ward or corporation.

Most guardianship programs have general liability and casualty policies that cover injuries to person and property.¹⁰¹ Additionally, a number of corporate guardians carry professional liability or malpractice insurance for the activities of professional staff,¹⁰² a worker's compensation policy for employee injuries, and an accidental injury and death policy for volunteers.¹⁰³ Directors' and officers' liability insurance is available for errors and omissions, as is theft and employee dishonesty coverage for loss of corporate or ward property.¹⁰⁴ Programs may also purchase excess auto liability insurance when employees or volunteers drive personal automobiles on guardianship business.¹⁰⁵ As a final measure of protection, an umbrella excess liability policy can insure against liabilities that fall between the parameters of other coverages.¹⁰⁶

Notwithstanding applicable insurance coverages, ward assets are also protected by statutory bond requirements for guardians. A typical bond amount is equal to the aggregate value of the property in the guardian's control plus one year's estimated income from the property

100. See *supra* notes 89-94 and accompanying text.

101. See ZIMNY & DIAMOND, *supra* note 1, at 43, 70, 106 (mentioning examples of programs with general liability policies).

102. *Id.* at 70 (describing a \$1,000,000 professional liability policy obtained from the National Association of Social Workers).

103. *Id.* at 81.

104. *Id.* at 114.

105. See *id.* at 81, 97 (explaining the benefits of excess auto liability insurance).

106. *Id.*

less the value of assets that cannot be sold or conveyed without court approval.¹⁰⁷ Because most bonds are subject to a minimum bond premium, wards with small estates may pay proportionately higher bond fees than those with larger estates. With the advent of corporate guardianship programs, some states are permitting umbrella bonding so that a corporate guardian can purchase one large bond to cover a number of small estates.¹⁰⁸

A third form of liability protection, volunteer protection legislation, is also available to some degree in every state.¹⁰⁹ Although statutes vary by jurisdiction, volunteer protection laws usually shield noncompensated¹¹⁰ directors, officers, and other volunteers of nonprofit organizations from specified types of liability. Immunity from liability is based on a statutory standard of conduct. The broadest protection is afforded by statutes that shield all but intentional, willful, or wanton acts.¹¹¹ Lesser standards may be based on recklessness or gross negligence.¹¹²

In addition to different standards of liability, statutes also vary with respect to exclusions from protection. A common exclusion from protection is liability for motor vehicle accidents.¹¹³ Other typical exclusions include injuries for which the volunteer or organization is insured.¹¹⁴ Although volunteer protection statutes shield individual

107. See, e.g., UGPPA, *supra* note 49, § 2-310.

108. See ZIMNY & DIAMOND, *supra* note 1, at 58.

109. See generally Charles Tremper, *Liability for Volunteers of Charitable, Religious and Nonprofit Organizations*, in *TORT LIABILITY FOR CHARITABLE, RELIGIOUS AND NON-PROFIT INSTITUTIONS* pt. A, at 4 (A.B.A. Sec. Tort & Ins. Prac. ed., 1992).

110. Most, but not all statutes require that an individual be a noncompensated director, officer, or volunteer to qualify for immunity from liability. See, e.g., MINN. STAT. ANN. § 317A.257(1) (West Supp. 1995); NEV. REV. STAT. ANN. §§ 41.485(1), (3)(c) (1996); WYO. STAT. § 1-1-125 (Supp. 1995); cf. TENN. CODE ANN. § 48-58-601(c) (1995) (granting immunity to members of nonprofit boards whether compensated or not). Compensation, however, for purposes of statutory immunity does not include reimbursement for actual expenses incurred. See, e.g., MINN. STAT. ANN. § 317A.257(3)(1) (West Supp. 1995); NEV. REV. STAT. § 41.485(3)(c) (1996); WYO. STAT. § 1-1-125(a)(i) (Supp. 1995).

111. See, e.g., GA. CODE ANN. § 51-1-20 (Michie Supp. 1995) (willful or wanton misconduct); IOWA CODE ANN. § 613.19 (West Supp. 1995) (intentional misconduct); KAN. STAT. ANN. § 60-3601(b)(1) (1994) (willful, wanton, or intentionally tortious conduct).

112. See, e.g., MINN. STAT. ANN. § 317.257(1) (West Supp. 1995) (willful or reckless misconduct); TEX. CIV. PRAC. & REM. CODE ANN. § 84.007(a) (West Supp. 1996) (acts or omissions that are "intentional, wilfully or wantonly negligent, or done with conscious indifference or reckless disregard"); ARIZ. REV. STAT. ANN. § 12-982 (West Supp. 1994) (willful, wanton, or grossly negligent misconduct); DEL. CODE ANN. tit. 10, § 8133(d) (Supp. 1994) (willful, wanton, or grossly negligent conduct).

113. See, e.g., MISS. CODE ANN. § 95-9-1(3)(b) (1994); N.J. STAT. ANN. § 2A:53A-7.1(b) (West Supp. 1995); UTAH CODE ANN. § 78-19-2(2)(a) (1992).

114. See, e.g., KAN. STAT. ANN. § 60-3601(b)(2) (1994); N.C. GEN. STAT. § 1-539.10(b) (Supp. 1995).

volunteers, the organization itself is not protected from liability under such laws.¹¹⁵

Volunteer protection laws were intended to encourage volunteerism by decreasing exposure to liability and costs of insurance;¹¹⁶ however, there appears to be no appreciable decline in the use of insurance by nonprofit organizations.¹¹⁷ The reasons that volunteer protection laws have not decreased the need for insurance are two-fold. First, the extent of protection is uncertain because few statutes have been challenged or invoked in litigation,¹¹⁸ and second, insurance is still necessary to provide volunteer defense costs and to protect the organization.¹¹⁹ Of course, it is unknown how many potential liability suits may have actually been deterred by the existence of volunteer protection laws.

F. Use of Volunteers for Increasing Personal Contact with Wards

The issue of volunteer liability and protection is one of many that impact a nonprofit corporate guardian's ability to recruit and retain volunteers. The effective use of volunteers is a key attribute of a prototypic nonprofit corporate guardianship program. Nonprofit guardians can attract the support of volunteers principally because of their nonprofit status and worthy mission. It is difficult to imagine the willingness of volunteers to donate their time to a for-profit program so that the proprietor could generate a larger profit.

Volunteers presently serve nonprofit guardianship programs in a number of valuable capacities. These include service on advisory boards and committees,¹²⁰ as office staff,¹²¹ and most importantly, as regular visitors to wards.¹²² By maintaining regular contact with wards, volunteers become the heart and hands of the corporate person, providing the personal touch that might otherwise be lost in institutional guardianship.

115. See, e.g., KAN. STAT. ANN. § 60-3601(d) (1994); NEV. REV. STAT. § 41.485(2) (1996); WYO. STAT. § 1-1-125(d) (Supp. 1995).

116. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 84.002(7) (West Supp. 1996) (citing purpose of act as reducing "the liability exposure and insurance costs of these [charitable] organizations and their employees and volunteers in order to encourage volunteer services and maximize the resources devoted to delivering these services").

117. See *supra* notes 101-06 and accompanying text.

118. Tremper, *supra* note 109, pt. A, at 23.

119. *Id.* pt. A, at 13, 23.

120. See *supra* note 84 and accompanying text.

121. See, e.g., ZIMNY & DIAMOND, *supra* note 1, at 82-83 (noting program where volunteers are used to do tax reports and bookkeeping).

122. See *id.* at 94-97; see also Rogers, *supra* note 1.

Although well-established volunteer programs are one of the most cost-effective ways to provide needed services in a nonprofit guardianship program, the recruitment, training, and supervision of volunteers requires an ongoing commitment on the part of the organization's regular staff.¹²³ To be effective, volunteers must serve an integrated function in the program with direct channels of communication to other staff members.¹²⁴ Regular ward visits not only provide the care and concern desperately needed by incapacitated persons, but also serve a monitoring function essential to responsible guardianship.

As the foregoing profile of the prototypic nonprofit corporate guardianship program demonstrates, personal attention, fiduciary accountability, and conscientious decision making do not have to be sacrificed when an incapacitated person is served by a corporate, rather than an individual, guardian. In fact, when an appropriate individual is unavailable to serve, a number of factors support nonprofit corporations as the alternative of choice.

First, the contract failure, government failure, and altruism theories suggest that the nonprofit form of enterprise will be more responsive to the needs of vulnerable wards than will for-profit entities. Taken in combination, these theories support the conclusion that nonprofits are best suited to respond to societal needs that remain unmet by the government and private sectors (for example, the needs of those who are indigent and left unserved by the commercial marketplace or government programs such as public guardianship), as well as the demands of consumers who are unable to monitor the quality of the service provided (for example, the inherent condition of the incapacitated consumer of surrogate decision-making services). Second, although funding may be problematic for nonprofit programs, their tax-exempt nonprofit status does enable them to attract grants, donations, and government contracts that are unavailable to for-profit programs. Third, the incentives for volunteer support are also greater in nonprofit programs because volunteers know that the incapacitated wards, rather than profiteering proprietors, are benefiting from their altruistic contribution of personal time and effort.

The final question then that must be addressed is whether the interests of society in general, and incapacitated persons in particular, would be enhanced by permitting competent individuals to appoint nonprofit corporations as agents under durable powers. In the present system, persons without appropriate individual agents are left with no

123. See, e.g., ZIMNY & DIAMOND, *supra* note 1, at 95-97.

124. See *id.*; Rogers, *supra* note 1, at 10.

option other than judicial determination of their fate through guardianship proceedings. Simply put, should there be an alternative for such persons?

IV. THE CASE FOR DELEGATING DURABLE POWERS TO NONPROFIT CORPORATE AGENTS

Any system of care for the incapacitated must strike a delicate balance between protection of the individual and preservation of the individual's autonomy. The inherent tension between protection and autonomy presents a dilemma for legislators. A measure taken to increase protection is, of necessity, also one that decreases autonomy. Traditional plenary guardianship, for example, is both the most protective¹²⁵ and the most restrictive form of surrogate decision making. The legal process that vests the guardian with protective powers over the ward's property and person also divests the ward of even nondelegable powers such as the right to vote or marry.¹²⁶ Durable powers were created, in part, as a reaction to the stringent consequences of guardianship.

Implicit in durable powers legislation is the trade-off of protective court supervision for the autonomy of privately choosing one's own surrogate and the scope of authority to be delegated. An indication of our culture's high regard for personal autonomy is the adoption by every jurisdiction of durable powers legislation,¹²⁷ as well as the enactment by Congress of The Patient Self-Determination Act of 1990.¹²⁸ This act requires all Medicare and Medicaid provider organizations to inform patients of their respective state-law rights to make health-care decisions and to formulate advance directives for surrogate decision making.¹²⁹ If self-determination is one of the paramount societal values, should this privilege hang by so slender a thread as the availability of family or friends to serve as surrogate decision makers?

Based on the demographic predictions for the twenty-first century, society will be forced to answer this question as the number of incapacitated persons increases and the number of available individual sur-

125. Of course the protective quality of guardianship presumes that the court is performing an effective supervisory role. *But see* sources cited *supra* notes 65-67.

126. *See* Mooney, *supra* note 72, at 48 (noting that "most guardianship orders remove such basic rights as the rights to vote, own property, marry, consent to medical treatment and contract").

127. *See* sources cited in Whitton, *supra* note 4, at 40-41, 46.

128. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, §§ 4206, 4751, 104 Stat. 1388 (codified in scattered sections of 42 U.S.C.).

129. 42 U.S.C.A. §§ 1395cc(f), 1396a(w) (Supp. 1995).

rogates declines.¹³⁰ Already the growing shortage of volunteer surrogate decision makers has impacted probate courts, social service agencies, and public guardianship programs.¹³¹ If a corporate or public guardian will be the only alternative for an incapacitated person, the interests of personal autonomy and economic efficiency argue in favor of allowing that individual, while still competent, to investigate the options for corporate surrogate decision making and to exercise the privilege of self-determination with respect to those options.

As the subsequent analysis will demonstrate, advance delegation of durable powers to nonprofit corporate agents could make the privilege of self-determination an equal opportunity proposition without sacrificing society's interest in protecting the vulnerable and incapacitated. The interests of society and incapacitated persons could benefit in several ways from the private delegation of durable powers to nonprofit corporate agents. First, more comprehensive use of durable powers would reduce the burden placed on public and judicial resources by guardianship proceedings. Second, advance delegation of durable powers to nonprofit corporate agents could improve the quality and availability of surrogate decision-making services. Third, nonprofit corporate surrogate programs could provide an economically efficient means to combine scarce public and private funding for maximum program effectiveness.

A. *Reducing the Burden of Guardianship on Public and Judicial Resources*

Permitting delegation of durable powers to nonprofit corporate agents is only one of several necessary components in a multi-faceted approach to reducing guardianship burdens on public and judicial resources. The primary reason individuals become respondents in guardianship proceedings is a failure to plan for the possibility of incapacitation. Failure to plan may be the result of procrastination, denial, lack of education about surrogate decision making, or lack of access to legal services for document preparation.¹³² An effective program to address the increased need for surrogate decision makers must therefore begin with a commitment to public education and access to legal services.

130. See *supra* notes 7-29 and accompanying text.

131. See *supra* note 16 and accompanying text.

132. See Charles P. Sabatino, *Surrogate Decision-Making in Health Care: A Legislative Overview*, *BIOETHICS BULL.*, Summer 1993, at 1, 2 (noting that "[d]espite the statutory recognition of health-care powers of attorney nationally . . . [i]t is estimated that only about 15% of Americans have executed any sort of written medical directive").

Public education programs concerning surrogate decision making could be co-sponsored by bar associations, the public guardian's office, hospitals, and nonprofit corporate surrogates. Bar associations could also address the issue of access to legal services by initiating pro bono seminars for preparation of advance directives. Advance directives are neither difficult nor time-consuming to prepare and would therefore present an ideal way for attorneys to perform pro bono work without incurring long-term representational responsibilities to pro bono clients. Law school clinics would be another appropriate medium for educating the public about surrogate decision making and providing the necessary legal documentation.

As part of the education process, individuals could also be counseled on the importance of selecting trustworthy agents for delegation of durable powers and about the existence of professional nonprofit surrogates who could serve in the event that appropriate individual agents were not available. Clients who were interested in nonprofit surrogate decision-making services could then interview provider organizations to determine what type of organization would best meet their needs. Through education, access to legal services, and the availability of nonprofit corporate surrogates, persons who might have otherwise fallen to the guardianship system would have the opportunity to make informed choices about their future care without burdening public or judicial resources.

B. Improving the Quality and Availability of Surrogate Decision-Making Services

For individuals who do not have appropriate family members or friends to act as their surrogates, a well-established nonprofit corporate surrogate program may actually provide better quality surrogate decision-making services than an individual agent who lacks the experience, skill, or interest. Nonprofit corporate guardianship programs would be ideal candidates for appointment under durable powers because they already have staff trained for assessing and visiting incapacitated clients, and systems in place for principled decision making and fiduciary accountability. In addition, private delegation of durable powers before incapacitation permits an opportunity for the corporate agent to ascertain from the principal what personal beliefs, values, and preferences should inform the surrogate decision-making process.

Another advantage of nonprofit corporate surrogates serving under durable powers rather than guardianship is that surrogate decision making via durable powers carries with it less stigma for the incapacitated person. Court adjudication of incapacitation is not required to

activate springing powers¹³³ in a durable power of attorney, and the principal suffers no termination of nondelegable legal rights. Activation of durable powers can be safeguarded, however, by requiring protective triggering mechanisms, such as concurring opinions about the principal's incapacitation by two physicians or by one physician and one psychologist. The principal, by choosing the terms and conditions of the agency relationship while still competent, plays a proactive role in creating a plan of care that maximizes desired autonomy while providing necessary protection.

C. Combining Public and Private Funding for Maximum Program Effectiveness

Of course, the ability of nonprofit corporate programs to fill unmet needs for surrogate decision makers will depend in large part on adequate funding. Permitting corporations to serve as privately delegated agents under durable powers may increase the fee-for-service base of corporate guardianship programs, but nonprofit corporate surrogates will still need a dependable mix of non-fee financial support due to the number of persons who are indigent or have small estates at the time of incapacitation. As noted earlier, nonprofit guardianship programs currently draw from a variety of funding sources, including contracts with governmental units, court-administered funds, agency support, donations, and grants.¹³⁴ The ability to attract funds from other private and nonprofit sources is particularly crucial during this era of federal budget cuts.¹³⁵

Federal funding cutbacks tend to affect nonprofit organizations from two directions. First, when government reduces funding for services that are provided by the government as well as by the nonprofit sector (for example, public guardianship services), the demand for services

133. Durable powers can be either immediate or springing. If immediate, and the principal retains competency, the principal and agent will have coextensive authority with respect to all property powers, but the agent's health-care powers will remain unexercisable as long as the principal is competent. A springing power, on the other hand, does not become effective until the principal's incapacity or a designated triggering event. Springing powers are often preferred by clients because they allow the principal to retain sole authority over person and property while competent, but protect against the need for guardianship in the event of later incapacity. See COLLIN ET AL., *supra* note 53, at 9-10.

134. See *supra* note 97 and accompanying text.

135. See Jackie Calmes & Christopher Georges, *House Approves Bill to Balance Budget, Lower Taxes and Cut Role of Government—Senate Expected to Clear Its Version Today; GOP Faces Tough Bargaining*, WALL ST. J., Oct. 27, 1995, at A3 (reporting on the progress of the Republican-dominated 104th Congress and its "Contract with America" to balance the budget and cut government spending).

from nonprofit providers increases.¹³⁶ Second, government reduction of funding for subsidized nonprofit services (for example, contract guardianship services to the indigent) reduces the nonprofit's financial resources for meeting both the already existing need for services as well as the now expanding need caused by the reduction in government-provided services.¹³⁷ In light of the likely "double-crunch" effect of current federal budget cuts on nonprofit providers of services to the incapacitated, creative public-private funding collaborations will be essential to the continued viability of nonprofit surrogate decision-making programs.

A recent study of national grantmaking trends in the field of aging was conducted to predict what programs will attract future funding.¹³⁸ Currently, grantmakers view the funding of community-based support services and health programs as the highest priority, especially those programs that provide direct service or education and training.¹³⁹ Programs that address problems which affect a broad spectrum of age groups are also favored.¹⁴⁰ From the perspective of the grantmakers, their primary role is to encourage the testing of innovative ideas.¹⁴¹

Nonprofit corporate surrogate programs could be ideally situated to attract such new project grants with the collaborative support of local governments, courts, and community agencies. These programs are community-based, provide direct service, and can respond to the needs of incapacitated persons of all ages. The innovation of expanding corporate guardian programs to include services based on advance delegation of durable powers also has the appeal of offering community savings in terms of public and judicial resources, as well as affording the opportunity of self-determination to persons whose destinies may otherwise be determined by public guardianship. Grantmakers are attracted to projects where grant dollars can be leveraged by other public and private support such as that already available to nonprofit corporate guardians from local government offices, court administered funds, and health-care providers. Lastly, public education with respect to advance planning for incapacitation is also congruent with the types of goals currently funded by grantmakers.

136. LESTER M. SALAMON & ALAN J. ABRAMSON, *THE FEDERAL BUDGET AND THE NONPROFIT SECTOR* 3 (1982).

137. *Id.*

138. GREENBERG ET AL., *AGING—THE BURDEN STUDY OF FOUNDATION GRANTMAKING TRENDS* 13-16 (Loren Renz ed., 1991).

139. *Id.* at 12.

140. *Id.*

141. *Id.*

D. The Role of Legislative Reform

The development of innovative surrogate decision-making services by nonprofit providers will depend not only upon joint initiatives with the public and private sectors, but also upon support from state legislatures. At present, many states exclude corporations from eligibility as agents under durable health-care powers and provisions for medical agent appointment.¹⁴² Although these statutes may reflect a prior public concern with the propriety of giving health-care authority to impersonal corporate entities, the present reality of corporate guardianship programs indicates that health-care decision making by corporate bodies is gaining in acceptability. In fact, the Supreme Court of Wisconsin has held that a corporate guardian may even consent to the withholding or withdrawal of a ward's life-sustaining medical treatment without prior court approval, provided that certain conditions are met.¹⁴³

The necessity of legislative reform to permit delegation of durable health-care and medical agent powers to nonprofit corporations gives legislatures the opportunity to attach whatever limitations and conditions to this statutory privilege they deem necessary for the protection of their citizenry. What subjective value judgments should be made in this regard are beyond the scope of this Article. The range of possibilities for legislative reform is broad enough to satisfy the most protection or autonomy conscious concerns. If autonomy is the prevailing concern, legislators can place nonprofit corporate agents on par with individual agents and require no additional safeguards. If, however, protection is

142. See, e.g., ARIZ. REV. STAT. ANN. § 36-3201(1) (1993) (agent means an "adult"); IND. CODE ANN. § 16-36-1-2 (Burns 1993) (health-care representative means an "individual"); IOWA CODE ANN. § 144B.1(1) (West Supp. 1995) (attorney-in-fact means an "individual"); MASS. ANN. LAWS ch. 201D, § 1 (Law Co-op. 1994) (health-care agent means an "adult"); MICH. COMP. LAWS ANN. § 700.496(1) (West 1995) (patient advocate must be "person who is 18 years of age or older"); N.H. REV. STAT. ANN. § 137-J:1 (Michie Supp. 1994) (agent means an "adult"); N.J. REV. STAT. ANN. § 26:2H-55 (West Supp. 1995) (health-care representative must be a "competent adult"); N.Y. PUB. HEALTH LAW § 2980(5) (McKinney 1993) (agent is an "adult"); N.D. CENT. CODE § 23-06.5-02(1) (Supp. 1995) (agent means an "adult"); OR. REV. STAT. § 127.505(2) (1990) (attorney-in-fact means an "adult"); S.C. CODE ANN. § 62-5-504(A)(1) (Law Co-op. Supp. 1995) (agent means an "individual"); TEX. CIV. PRAC. & REM. CODE ANN. § 135.001 (West Supp. 1996) (agent means an "adult"); VT. STAT. ANN. tit. 14, § 3452(1) (1989) (agent means an "adult"); WIS. STAT. ANN. § 155.01(4) (West Supp. 1995) (health-care agent is an "individual").

143. *In re Guardianship of L.W.*, 482 N.W.2d 60, 71-73 (Wis. 1992) (holding that when an incompetent patient has been determined with reasonable medical certainty to be in a persistent vegetative state with no reasonable chance of recovery to a sentient and cognitive life, the guardian may consent to the withholding or withdrawal of life-sustaining treatment if to do so is in the best interests of the ward as determined by objective criteria such as the risks and benefits of various treatment options and the degree of humiliation, dependence, and loss of dignity likely to result from the condition and treatment).

the predominate concern, legislators can enact regulations or a code of conduct to govern corporate surrogate decision makers.¹⁴⁴ There are, of course, endless permutations of protection/autonomy trade-offs between these two extremes. The more immediate task for legislators, local governments, courts, social service agencies, health-care providers, and nonprofit guardians is to find ways of raising social consciousness about the growing need for surrogate decision makers and the present inadequacy of our resources to meet that need. Dialogue will be the beginning point from which initiatives for demonstration projects and programs develop.

V. CONCLUSION

As we enter the twenty-first century, the growing needs of our aging society will necessitate greater cooperation among the public, private, and nonprofit sectors to maximize efficient use of limited community resources. An area overdue for collaborative reform is our present system of care for the incapacitated. With increasing frequency, individuals fall subject to public guardianship because they did not plan for incapacitation and have no family or friends who can serve as volunteer surrogates. Improving public education and access with respect to advance directives is a partial solution to this problem, but alternative sources of surrogate decision makers are also needed. One answer is legislative reform to permit the delegation of durable property and health-care powers to nonprofit corporate agents when individual agents are unavailable. Nonprofit corporate guardianship programs have demonstrated the ability of corporate surrogates to provide services in a caring, principled, and financially responsible manner. Increased access to both advance directives and skilled surrogate decision makers will not only enhance individual interests in self-determination, but also further society's interests in providing appropriate care for those who can no longer care for themselves.

144. See, e.g., *supra* note 68 and accompanying text.