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Realizing the Right to Counsel in Guardianships: Dispelling Guardianship Myths

Criminal defendants have basic rights and proper defense counsel, yet guardianship defendants often do not. The author explores the myths behind the "best interests" approach of guardianship cases.

By Patricia M. Cavey

The imposition of a court-ordered guardianship[1] results in the massive deprivation of rights.[2] Whether limited or unlimited, the result of a court-ordered guardianship is to take away, from an adult, the power to make fundamental life decisions with respect to liberty, property, and one's own life. A guardianship order transfers that decision-making power to another adult or corporate entity.[3] The deprivation can be as profound as the termination of the ward's life[4] or the transfer of an entire estate so that the ward can be placed in a nursing home to preserve the bulk of the estate for the heirs.[5] In many ways the deprivation of liberty through an involuntary guardianship order is greater than that suffered by a convicted felon. Prisoners retain basic rights to control medical decisions, bodily integrity, the right to conduct their business affairs, and retain their estate. Wards do not.

When appropriate, a guardian or conservator can be of invaluable assistance to an incapacitated person. However, the wrong guardian or an inappropriate or premature guardianship can be the very act that triggers a chain of events leading to the unnecessary or premature institutionalization, causing the ward to give up hope. It may be the event that hastens death.[6] Many of us would welcome someone who could serve the role of protector, defender, trustee, and guardian. Unfortunately, there is also the risk that the guardian will become our warden and keeper.

The problem is not with the state of the law as written but as practiced. I have had the opportunity to work as a social worker and lawyer in a state with very progressive mental health laws,[7] yet for almost two decades, I have shared many experiences with attorneys and advocates in states with much less "progressive" laws. Over the last 10 years, many states have modernized their guardianship and adult protective service statutes. Few states fail to provide the theoretical right to either a lawyer for the defendant or a guardian ad litem.[8] However, the benefits of good model statutes or case law protections are not realized for defendants unless the participants in the process know, follow, and enforce the law.

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This article is dedicated to Attorney Jeffery R. Myer, Litigation Director, Legal Action of Wisconsin, Inc., in special appreciation for his commitment to social justice for all people.

In this article, I will explore five myths that undermine the enforcement of the law and undermine even basic access to the court system. The myths are commonly held by attorneys who practice in the field and by judges who hear guardianship cases.

Myth: A Collective Belief Built Up in Response to the Wishes of the Group[9]

Lawyers and judges need a resolution to a problem. They generally will not have a continuing relationship with the parties to the litigation. They will, however, have a continuing relationship with each other. "The group" is susceptible to myths that permit lawyers and judges to process cases and take care of the group. Unfortunately, those with the most at stake, the guardianship defendants, are not members of the group. In the system that purports to protect their best interests,[10] they are outsiders. The very individual who is the subject of the hearing often never appears at the hearing, is least likely to have an attorney, or, if an attorney is appointed, is likely to have a court-appointed attorney who is untrained and unfamiliar with the rehabilitation potential for different disabilities and dementias and is untrained in methods of communicating with disabled persons.[11] Even when a guardian ad litem is appointed, that attorney may meet with the defendant only once, briefly, before (or after) a hearing, and will purport to represent what is the "best interest" for the defendant. An order is entered. A guardian is appointed. Everyone goes home, except the defendant.

Myth 1: We're All Here to Help

On occasion, a guardianship practice seems like a throwback to the days of the "friendly visitor." As a senior becomes more frail and seeks out more assistance, more people are involved in the senior's life and everyone has an opinion on how the senior should live. At some point a crossroads is reached; someone starts a guardianship to gain control of the decision-making process. Sometimes this is a well-intentioned act; other times, it is not.

The Case of Mabel

Mabel[12] has four adult children. She has mild dementia but is independent in her care. Her children all owe her a considerable amount of money that she has loaned them over the years. Mabel has a comfortable estate. She voluntarily requests the assistance of a conservator on a limited basis and for a limited purpose: to compile an inventory of her estate and to make her current in the payment of her living expenses. Her one goal in life is to remain in her lovely home with her dog. Various children file various types of legal proceedings in two different states. All the children have different views on what is best for their mother; all have their own financial interest. The conservator sides with one of the feuding children and decides to sell Mabel's property. The conservator agrees with one child that Mabel should reside in an out-of-state nursing home. Without notice to Mabel, without a hearing, without the appointment of a guardian ad litem, this child obtains an *ex parte* temporary guardianship order. The order permits a "placement" to a nursing home[13] and allows the temporary guardian to censor Mabel's mail, her visitors, and even access to the telephone.

The "we're all here to help" myth serves the needs of the judges and lawyers in the court system. It camouflages the pecuniary interests of the children and their lawyers because, "after all, we're all here to help." It also makes a particular judge's resolution easier because blame, which is apportioned in the simplest negligence case, need not be apportioned in this case since Mabel, by her own request, needs help. Unfortunately, the myth of "we're all here to help" also permits the parties involved to forget the protections of an adversary system. Somehow it seems gentler, kinder, more humane to think of a guardianship as being less harsh if we do not think in terms of an adversarial court system. However, in this case the one who could really "help" Mabel was missing: an attorney representing Mabel. Mabel certainly had the means to hire an attorney; she even had one at the beginning of the case. However, because that lawyer also "helped" the conservator by becoming the conservator's lawyer early on, Mabel lost her own lawyer. Everyone else had a lawyer. The court had the duty to decide the case. Yet it was ill equipped to "help" Mabel because the court did not hear from her, directly or through her attorney. She didn't have one. The adversarial process was not in effect. The court did not hear from all the litigants; Mabel was excluded.

I Know Best

The "we're all here to help" myth also serves the needs of service providers and family members who

do not have a financial motive for their involvement. The following example emphasizes this point.

An elderly woman seeks assistance with errands and housekeeping. The home aide assistance increases to include help with medication and personal hygiene. The employee has opinions on how things should be done. This leads to disagreements with the client. The client feels that it is her house; she's the boss. The home aide, on the other hand, has a paternalistic attitude and believes that, as a professional, she knows what's best. Rather than quit her job, the home aide reports the client to social services because, after all, the client had requested help.

At the same time, the client's out-of-state adult children see that their mother is spending a considerable amount of money on staff to provide assistance in her home. The children fear their mother will deplete her savings. They reason that, if Mom went to a nursing home, she could get great care without the hassles of finding a new home care aide. With the right financial planning, Mom can divest her estate to the family and obtain "free" care in the nursing home.[14]

Everyone has an opinion on how things should be done. The home care agency may well have good ideas about effective methods of in-home long-term care. The children, in perfectly good faith, may believe that a nursing home is best. The client may well be justifiably resistant to leaving her home, memories, familiar surroundings, trusted neighbors, and community for life in the communal setting of a nursing home. The challenge for "the group" is to be sure that the client's best interests can be distinguished from the interests, frustrations, and opinions of others.

If there is a difference of opinion, who will be the first to file a guardianship petition? If a petition is filed, who will tell the client about the expense of fighting the inevitable? How much money will be "wasted" on litigation that could be spent on care or transferred to her children? Wouldn't it be better to compromise and move to the nursing home? Will the judge even hear from the defendant, or do others feel it would it be too upsetting for her to attend the hearing.

The "we're all here to help" myth permits us to justify our own opinions as to what help is needed. It permits us to decide when we've helped enough rather than using an objective measure of what the advance directive was and how close we came to meeting the client's goals by respecting his or her directives as to how he or she chooses to live.

Myth 2: I Can't Hire My Own Lawyer

A variation of the "we're all here to help" myth is the related myth that people adjudicated incompetent cannot hire a lawyer of their choice. This second myth has a superficial appeal. If the ward does not have the ability to make a contract, one of the most significant effects of a guardianship order, how can a ward possibly hire a lawyer?

Like the "we're all here to help" myth, the "you can't choose your lawyer" myth serves some collective interests. It is convenient for everyone to think of the guardian as being in the place of the ward. Courts and service providers have, in the guardian, a mentally competent person who has the legal power to manage the affairs of the ward as the surrogate decision maker. Indeed, that is the whole purpose of the legal proceedings resulting in the guardianship order: to grant authority to another to make decisions for someone who lacks capacity.

In a very real sense, a guardianship is the legal death of the ward, stripping the ward of the freedom and power that adults in a free society are presumed to enjoy. The fundamental liberty and property rights at stake in a guardianship are also exactly the reason why the myth does not apply to the right to counsel.

The deprivations wrought by a guardianship order, the massive curtailment of an adult's liberty and the loss of control over one's property, are of constitutional consequence.[15] Because of the risk of such a massive deprivation, it is inconceivable that the right to hire counsel would not be constitutionally required as a matter of fundamental fairness under the due process clause.[16] In light of the great variations among guardianship statutes among the 50 states, one of the points on which there appears to be unanimity among the states is the right to counsel.[17] Although there are differences about who pays for the defendant's attorney,[18] some states providing public funding and others requiring the defendant to pay, the theoretical right to defense counsel is well established.

The right to counsel is often realized by way of the court appointing defense counsel. However, a defendant is not required to accept court-appointed counsel and may choose to hire counsel independently.[19] There is an obvious reason why the

subject of a guardianship or protective placement does not need the guardian's consent to hire counsel. In some cases, the dispute will be between the guardian and the subject of the proceedings. As a practical matter, the only way a ward can end a guardianship against the wishes of the guardian is by initiating a contested court proceeding.[20]

In light of the essentially universal recognition in the 50 states' statutes of the right to counsel, the obvious importance of a skilled advocate when the most fundamental freedoms are at stake, and the obvious conflict of interests between a ward who wants to end a guardianship and a guardian who wants it continued, why does this myth persist? Part of the explanation is that the constitutional and statutory recognition of the right to counsel is of relatively recent vintage. The leading cases on the constitutional rights in civil commitment proceedings are less than 30 years old.[21] The impetus for much of the statutory modernization is less than 15 years old.[22] This relatively modern trend of recognizing guardianship as an extremely serious deprivation of freedom is at odds with the centuries' old view of guardianship as a paternalistic, *parens patriae,* proceeding, which ties in with the myth that we're all here to help. If the system works, the best help is a strong adversarial system where differing viewpoints are sharply honed and presented so that the court has the benefit of the best arguments for differing positions.[23]

Myth 3: Defense Attorney, Guardian Ad Litem—Same Thing

In addition to the lawyer for the guardianship defendant, there is usually another lawyer with the duty to "help" the defendant. Most states require a guardian ad litem in guardianship proceedings.[24] As discussed below, the guardian ad litem is responsible for advocating for the best interests of the defendant. In most legal proceedings, we assume that the parties are able to determine and protect their own best interests, and, if necessary, protect those interests through an attorney. In guardianship cases, however, because one of the critical issues is whether the party has the ability to determine his or her own "best interests" or whether those interests were previously articulated, there is a distinction that must be clearly understood between the role of the guardian ad litem and the role of defense counsel. The roles are so different, in fact, that for purposes of legal ethics, the roles are presumed to conflict. The same attorney cannot be both the guardian ad litem and defense counsel.[25]

Defense counsel must defend against the guardianship, even if the guardianship would be in the client's best interest, if the client opposes the guardianship.[26] Defense counsel is obligated by the rules of professional conduct to defend against the guardianship petition.[27]

Attorneys should recognize the distinction between defense counsel and guardian ad litem. The differing roles of guardian ad litem and defense counsel are inherently in conflict. The guardian ad litem is not the gatekeeper who can pick and choose how the defendant's own interests will be represented. When the guardian ad litem takes a position contrary to the defendant's own interest, the guardian ad litem is very much an opposing counsel to the defendant within the meaning of the Model Rules of Professional Conduct.[28] Defense counsel may not assume the role of de facto guardian to act against the client's expressed wishes or instructions.[29]

Lawyers in guardianship and conservatorship litigation are not free to change roles.[30] A lawyer who has appeared as defense or advocate counsel on behalf of a proposed ward is barred from appearing as a lawyer in a different capacity such as a "best interests" role as a guardian ad litem. A recent case is illustrative of the distinction that must be understood among advocates. In *Tamara L.P. v. Dane County (In re Guardianship of Tamara L.P.),* a Wisconsin appellate court held that because of the potential conflict of interest, it is reversible error, even in the absence of an actual conflict and even if local custom permits the practice, for an attorney to appear as an advocate for an alleged incompetent, then later switch roles to represent a different interest, even a purported "best interest."[31] This holding is consistent with the Model Rules barring representation where there is a "substantial relationship" between a current and former client.

In *Tamara L.P.,* Attorney Alexander represented Tamara L.P. as defense counsel in a mental commitment action. The representation was not for long. The representation extended from the September 2 filing of the detention petition against Tamara L.P. to the September 18 appointment of Attorney Alexander as the guardian ad litem for Tamara L.P. when the detention proceeding was

converted to a guardianship and protective placement proceeding.[32] Attorney Alexander's appointment as guardian ad litem was pursuant to a county custom of appointing a commitment defendant's attorney to serve as the guardian ad litem when the detention proceeding is converted to a guardianship and protective placement proceeding.[33]

In *Tamara L.P.,* Attorney Alexander represented to the Circuit Court, and the Circuit Court found as a matter of fact, that Alexander did not have confidential information and was able to exercise independent judgment.[34] The trial court denied a motion to disqualify Attorney Alexander.

The Court of Appeals reversed, and did not question the findings of fact that Attorney Alexander had no confidential information and was able to exercise independent judgment. Rather, the court applied the "substantial relationship" test that disqualifies an attorney from appearing in a different capacity involving a former client in every case where the two representations have a "substantial relationship":

> Under the substantial relationship test, disqualification does not require finding that a breach of ethical standards or client confidences has occurred, but only that the *attorney has undertaken representation which is adverse to the interests of a former client.* [citation omitted] We apply the substantial relationship test in attorney disqualification cases where the attorney represents a party in a matter in which the adverse party is the attorney's former client. We conclude that it is appropriate to apply that test to the appointment of a guardian ad litem in incompetency cases because the same principles of confidentiality and propriety apply.[35]

In *Tamara L.P.,* the potential conflict was the conflicting roles between defense counsel and the guardian ad litem, who represents the "best interests" of the proposed ward/defendant. The Court of Appeals held that those were conflicting roles.[36]

The "substantial relationship" test of the ethics rule and the analysis of *Tamara L.P.* is a broad, preventative, prophylactic rule. The rule of *Tamara L.P.* does not turn on wrongdoing by the attorney, or on bad faith, or on some evil design. Instead, the rule of *Tamara L.P.* is broad precisely because of the confidential nature of the attorney-client relationship and because the first client, the proposed ward, is vulnerable. When a competent client has the power and ability to waive a conflict after consultation and consideration, a client with compromised capacity may not be so able. A surrogate decision maker—a guardian ad litem, a guardian, or a conservator—may be appointed. But *that* person and his or her attorney are the ones who have the potential conflict. Thus, the rule of *Tamara L.P.*, which is consistent with the Model Rules, makes irrelevant whether there is an actual conflict.

The right to counsel cannot be realized unless the attorney is a competent advocate who maintains "as far as reasonably possible"[37] a normal attorney-client relationship, including the client's right to hire the attorney of his or her choice. Anything less results in the compromise of a client's right to counsel.

Myth 4: The "Best Interest" Is What I Say It Is

Most states now require that a guardian ad litem, sometimes called a "visitor," be appointed. Just as there is frequently confusion about the different roles of the defendant's attorney and the guardian ad litem, there is frequently confusion about what precisely is the guardian ad litem's role. While the guardian ad litem's role is often described as the "best interests," this shorthand description confuses as much as it illuminates.

The guardian ad litem is not a neutral bystander. The guardian ad litem has two basic duties. First, the guardian ad litem is the initial professional charged with the duty to ensure that the guardianship defendant's legal rights are protected. Ensuring that the defendant has proper notice of the proceedings, understands what is at stake, and is aware of the defendant's right to an independent attorney to represent the guardianship defendant often satisfies this duty. In most cases, the guardian ad litem can rely on the defendant's attorney to protect the defendant's rights.

In an unusual case, however, the guardian ad litem's duty to protect the defendant's legal rights may require further advocacy by the prospective guardian.[38] It is a basic proposition that the defendant's lawyer needs to communicate with the defendant. A trusted lawyer, such as the family attorney who represented the defendant on real estate matters, wills, a divorce, and similar personal legal problems, may not have experience with the conditions loosely referred to as "dementia" or the ability to communicate with a client under a

disability. The trust relationship with a familiar attorney is important, especially when the defendant has so much at stake with the potential loss of liberty and autonomy. Equally important, however, may be some essentially "nonlegal" skills, such as experience in communicating through hand squeezes, eye blinks, or adaptive devices, as well as an understanding of how dehydration, poor nutrition, or medication affect cognition. In these cases, it may fall to the guardian ad litem's duty to ensure that the trusted family lawyer who may have little experience in representing clients under a disability be assisted by an attorney who, although unknown to the guardianship defendant, has more experience in these essential "nonlegal" skills.

Another situation that may require additional advocacy by the guardian ad litem, even when the defendant has an attorney, is illustrated by the case of *Yamat v. Verma L.B. (In re Verma L.B.)*.[39] Verma's recently divorced son moved into Verma's home. Verma felt that her adult children were trying to take her modest home and force her into a nursing home. Verma's children filed a guardianship action against her and placed her in a nursing home. The son continued to live in Verma's home. A guardian ad litem and a defense counsel were appointed. As these lawyers dug into the facts of the case, they were troubled by the gravity of the activity not only on the part of the children but also by the children's lawyers. The trial court appointed a more experienced attorney to serve as an amicus and report to the court, independent of the guardian ad litem and the defense attorney. The advocacy of obtaining a more experienced attorney to assist the court in a complicated case permitted a resolution of the case in a way that was most protective of the person with the most at stake, the defendant. Defendant Verma required protection not only from her children but also from her children's lawyers and the lawyer/temporary guardian who was employed by her children's lawyers.

The second of the guardian ad litem's duties, and the second area in which the guardian ad litem cannot be an innocent bystander, is in being an advocate for the "best interest" of the ward. The duty is to provide the trial court with information that is not based on the self-interest of the litigants. This does not mean, however, that the guardian ad litem is a "free agent" rendering a personal opinion about what the guardian ad litem thinks is best for an incapacitated person.

The starting point in the analysis of the "best interest" is coming to an understanding of the defendant's wishes.[40] Those wishes may have been expressed in an advance directive, such as a durable power of attorney, a "living will" or a directive issued each year at the Thanksgiving dinner table that the children are never to place their mother in a nursing home. If the defendant's wishes are clearly discernible and were made known when the defendant was capable of understanding the expression of those wishes and was not improperly influenced, the guardian ad litem's duty in advocating the best interest of the defendant is to advocate those wishes.

Unfortunately, there is considerable pressure on the guardian ad litem to comply for the smooth operation of a court calendar. Courts are often busy; settlements are encouraged. If the issue of incompetency seems clear, the remaining disputes over who is the guardian, which facility is the placement, and what services are provided may, in the guardian ad litem's personal opinion, seem minor. They are not. Compared to the pressure to resolve any remaining disputed issues, it may not make much difference in the guardian ad litem's personal opinion. That is exactly, however, when the guardian ad litem's duty to advocate for the best interest, starting from the defendant's expression of wishes, is most important. The protection provided by the guardian ad litem, advocating for the best interest of the defendant, is most critical when incapacity prevents the defendant from implementing those wishes or even expressing them.

The defendant's preference may be for a particular person to be the guardian. That choice is one of the most personal decisions a person can make, literally trusting someone with life-and-death health care choices. The choice may be about where the defendant wishes to live. These choices are personal to the defendant; the guardian ad litem does not discharge his or her duty by offering or advocating the personal opinions of the guardian ad litem. The guardian ad litem cannot advocate "best interests" without first investigating whether the defendant had expressed advance directives or whether the defendant's wishes can be discerned.

Two examples of the personal nature of these choices are the companion cases of *Community Care Organization of Milwaukee County, Inc. v.*

Evelyn O. (In re Evelyn O.) and *Community Care Organization of Milwaukee County, Inc. v. Thyra K. (In re Guardianship of Thyra K.)*.[41] Evelyn O. had an advance directive and agent pursuant to power of attorney documents she executed. Thyra K. also executed advance directives and an agent pursuant to power of attorney documents. The agents for both women were attorneys.

Evelyn wanted to remain in her apartment, but she recognized her need for assistance. She could afford 24-hour home care. Thyra wanted desperately to remain in her home with her disabled daughter. Her daughter would be receiving in-home care that could have been extended for her mother. A private agency had a different opinion, determining that removal from their homes would be "best" for both women. The guardian ad litem's duty was to advocate for the advance directives. The advocacy of "best interests" is not about the personal opinions of the guardian ad litem, about the convenience of the litigants, the "efficiency" of settling things that do not seem personally important to the guardian ad litem, or preserving the defendant's estate for the heirs. It is about respecting and implementing the advance planning of the defendant.

Myth 5: We'll Protect You, If You Buy the Bullets for Your Adversaries

No, Virginia, in the United States you shouldn't have to hire a good lawyer to prosecute you, a good lawyer for your nephew who wants your money and a good lawyer for your niece who wants your house and that you, the defendant with the most at risk, must settle for the court-appointed lawyer as your "defender."

The basic rule in the United States is that the parties to litigation are responsible for paying their own attorneys.[42] Where the government threatens to take away important liberty interests, the public may have a duty to pay for attorneys for defendants who are indigent.[43] Some statutes force a litigant who has been found to have violated some law, such as a consumer protection, fair employment, or antitrust statute, to pay attorney's fees as part of the remedy for the violation.

One of the final vestiges of the "we're all here to help" myth is that the guardianship defendant should pay for all of these helpers. Some "helpers" really are helpers; some are not. Does the self-appointed "helper" have the legal right to charge the defendant for the helper's lawyer? What happened to the system of services to protect vulnerable adults?

With varying degrees of effectiveness, all states have, in theory, some sort of system to protect vulnerable adults from abuse and neglect, which would include self-neglect. Protection can include services or initiating a guardianship to ensure the availability of a decision maker for an incapacitated adult or a placement order if a particular level of care is required. The system of protective services for adults is a government service. Some states require payment for the service if the client is not indigent.[44]

As discussed above, all 50 states recognize the right of the guardianship defendant to be represented by an attorney. The attorney for the defense in a guardianship case has the same duties of loyalty to the defendant as the attorney for the defense in a criminal case. Even when the defense attorney is paid by the state, as in the representation of indigent defendants charged with crimes that might result in the deprivation of liberty of imprisonment, it is universally recognized that the defense attorney's duty runs to the defendant, not to the person who pays the bill. Expecting a nonindigent guardianship defendant to pay for the defense attorney is no different from the general rule in the United States that a party pays for that party's attorney.

In those states that also require a guardian ad litem, the argument can be made that the guardian ad litem is also providing a service to the defendant and the defendant should pay for the guardian ad litem. Although, as discussed above, the role of defense counsel is fundamentally different from the "best interest" duty of the guardian ad litem, at least it can be said that the guardian ad litem owes the defendant some duty, especially if the defendant does not have separate, independent counsel.

By what theory, however, does a court force a guardianship defendant to pay for the petitioner's attorney? The petitioner's attorney does not represent the defendant; that is the duty of the defendant's attorney. The petitioner's attorney does not represent the "best interest" of the defendant; that is the duty of the guardian ad litem. The theory cannot be that the defendant has some contract or agreement to pay the petitioner's attorney's fees; the petitioner's very premise of a guardianship proceeding is that the defendant lacks the capacity to

make a contract.

To the extent that there is any policy justification to force the guardianship defendant to pay the attorney's fees for the petitioner, it tends to be grounded on the "we're all here to help" myth. Sometimes, the justification is the view that the guardianship proceeding was "necessary" because of the defendant's incapacity, and therefore should be paid under the doctrine of necessaries.[45] Sometimes the justification is that the cost of bringing the guardianship proceeding created a debt of the defendant. Sometimes the justification is that it just is not "fair" that the petitioner should have to pay for the petitioner's attorney.

These justifications were rejected in *In re Evelyn O.*[46] The court applied the standard rule that parties to litigation are responsible for their own attorney's fees. The rule on attorney's fees is particularly appropriate, and the myth that "we're all here to help" is particularly dangerous when applied to fee requests by opposing counsel in guardianship litigation. First, there is no limit on how many litigants will seek to shift their attorney's fees to the defendants. All the potential litigants in a guardianship—hypothetically, the neighbor who is the petitioner, the out-of-state heir, any number of public and private corporations claiming an interest in the protection of the disabled, the bank nominated as guardian by the petitioner, and any actual or would-be creditors—can, with more or less good faith, assert that their particular position in the litigation is in the "best interests" of the proposed ward. All these potential litigants may arguably claim that their litigation position provides some "necessary" to the proposed ward. Standing to file a petition should not be confused with the legal authority, or lack thereof, to shift the costs of litigation.

The rule on attorney's fees protects the proposed ward, just as it does all other litigants, from the risk of underwriting the other litigants' expenses and litigation choices. In the words of the court in *Evelyn O.*, "Evelyn O. and Thyra K. were not obligated by any legal principle . . . to supply the bullets to their adversaries, either before or after the battle, even if the war is fought for what is ultimately determined to be in their benefit."[47] Without the protection of the rule, the hope for due process (which would include a fair hearing with zealous advocacy to ensure that the defendant's advance directives and choices about how he or she chooses to live his or her life are heard) is destroyed. Without the rule, the adversary system is undermined.

Conclusion

Defendants in guardianship actions suffer the same or greater deprivation of liberty as criminal defendants. The general public and the actors in the legal system understand the role and importance of defense counsel for the criminal defendant. It is important to question why there is such confusion about the role of defense attorneys in guardianship matters. Before we lock up the criminal defendant, we make sure the he or she has the right to face his or her accusers and put on a defense. Before we kick Grandma out of her home, sell it, transfer her life savings to someone else, and lock her up in a nursing home, shouldn't she have the opportunity to disagree with her "helpers"? Shouldn't she hear the accusations and have an opportunity to prove that she could continue to reside in her home with care and adaptive equipment? What is the use of advance planning if no one enforces the plan? At what age or level of disability do we lose the right, as citizens, to hear the accusations made against us, and under what authority and process are we deprived of the decisions we've made as to how we choose to live out our lives?

The only hope for a constitutionally sound guardianship system is to ensure that those with the most at stake, the guardianship defendants, are able to access real advocates. For those of us who will age and be subject to this system, we hope that our lawmakers understand the conflicts and self-interest of those who advocate the dissembling of the adversary system. Since we all age, it is in the self-interest of practitioners and policy makers in the field to develop systems in which advocacy is fostered. Very good words on paper are just not enough. There is too much at stake to hope for self-activating justice because the "help" we get isn't always the "help" we need or want.

Endnotes

1. The terminology varies slightly from state to state. Some states use the term "guardian of the person" to refer to the person who has the power to control daily "personal" decisions including medical care and the ward's residence. The term "guardian

of the estate" is used to refer to the person who controls finances and property. Some states use the term "guardian" for the "guardian of the person" concept and the term "conservator" for the "guardian of the estate" concept. Some states prefer the term "conservatorship" to refer to voluntary proceedings initiated by a "competent" person who seeks the assistance of someone to take over certain duties such as managing the "conservatees" finances. This article uses the term "guardian" to refer to the person or corporation that controls either the "personal" decisions or the "property" decisions. It is presumed that someone other than the defendant/ward initiated the legal proceeding to establish the guardianship. The terms "defendant" and "ward" are used interchangeably. The reference to defendant is an attempt to strengthen the promise of the adversarial system (if truly adverse, justice will prevail) for those subject to it.

2. Most jurisdictions provide for limited guardianships in which a ward specifically retains certain rights, such as the right to vote or to marry. Many states also provide for a voluntary proceeding, and the terms "conservatorship" and "voluntary guardianship" denote a proceeding in which the ward (as opposed to a petitioner/plaintiff) requests assistance from the court. The voluntary proceeding enables an individual to seek assistance without a court's factual finding of incompetency. In theory, this would permit an easier standard of review to dismiss the voluntary proceeding if the ward/conservatee decides the request for voluntary assistance is no longer desired.

3. BLACK'S LAW DICTIONARY 706 (6th ed.) defines guardian as "a person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person . . . who is considered incapable of administering his own affairs." THE AMERICAN COLLEGE DICTIONARY 537 (1969) lists the following synonyms for guardian: protector, defender, trustee, warden, and keeper.

4. *See, e.g., In re* Quinlan, 355 A.2d 647 (N.J. 1976).

5. *See, e.g., In re* F.E.H., 453 N.W. 882 (Wis. 1990). There is, of course, the inherent conflict of interest between the heir's interest in preserving the estate (his or her inheritance) and using the estate to provide services in the least restrictive environment, since public benefits are readily available for nursing home care but are not available for less restrictive community care. *See generally* State *ex rel.* Watts v. Combined Community Srvs. Bd. of Milwaukee, 362 N.W.2d 104 (Wis. 1985).

6. Thyra, the defendant in Community Care Org. v. Milwaukee County (*In re* Guardianship of Thyra K.), the companion case to Community Care Org. of Milwaukee County v. Evelyn O. (*In re* Evelyn O.), 571 N.W.2d 700 (Wis. Ct. App. 1997), was an elderly woman who lived with her disabled adult daughter. Her daughter's disabling neurological condition prevented her from lifting her arms or transferring herself from her wheelchair. Thyra's life was dedicated to caring for her daughter. Her primary concern was the need to return home so she could ensure that her daughter was properly cared for in their home. Mother and daughter could have shared home care that was being established for her daughter. Her daughter died, however, while Thyra was in the custody of the nursing home. Her daughter had fallen out of her wheelchair and was discovered by a home care aide who was reporting to work at the home after the New Year's holiday. Thyra's fear had come true: Her daughter died without her mother's care. Thyra did not return home; she died during the course of the litigation.

7. *See generally* WIS. STATS. §§ 51.001, 55.001; CHS. 51, 55, 880. The statutes comprising the comprehensive protective service system in Wisconsin were rewritten or developed in response to Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded,* 414 U.S. 473 (1974), *order on remand,* 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded on other grounds,* 421 U.S. 957 (1975), *order reinstated on remand,* 413 F. Supp. 1318 (E.D. Wis. 1976) (successful constitutional challenge to involuntary commitment statutes). *See also* Agnes T. v. Milwaukee County (*In re* Agnes T.), 525 N.W.2d 268 (Wis. 1995) (guardians cannot institutionalize wards without court approval; the role of the guardian ad litem includes the affirmative right to petition the court to protect the best interest); State *ex rel.* Watts v. Combined Community Srvs. Bd., 362 N.W.2d 104 (Wis. 1985) (successful equal protection challenge requiring that the subject of a guardianship and protective placement receive periodic court review of the placement); Community Care Org. of Milwaukee County v. Evelyn O. (*In re* Evelyn O.), 571 N.W.2d 700 (Wis. Ct. App. 1997) (defendants in guardianship actions cannot be required to fund the litigation of their adversaries; the American Rule on attorney fees applies to guardianship cases); *In re* J.G.S., 465 N.W.2d 227 (Wis. Ct. App.

1990) (ward has the right to community placement regardless of whether the services currently exist).

8. *See* A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L. J. 33, 110–52 (1999); *see infra* publishing charts by Sally B. Hurme, *Steps to Enhance Guardianship Monitoring* (1991).

9. *See* THE AMERICAN COLLEGE DICTIONARY 805 (1969).

10. The analysis of "best interest" starts with the advance directive of the ward. If the ward's wishes were not explicit, the question becomes whether they can be discerned. *See, e.g.*, Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1990); Spahn v. Eisenberg (*In re* Edna M.F.), 563 N.W.2d 485 (Wis. 1997); *In re* Guardianship of L.W., 482 N.W.2d 60 (Wis. 1992).

11. An interesting and helpful analysis would be the level of experience and training of court-appointed counsel in guardianship proceedings as opposed to the level of expertise of petitioning attorneys or attorneys hired to prosecute guardianships. The level of compensation for court appointments ($40 to $70 per hour) makes a legal practice of court appointments economically prohibitive for most practitioners. In Wisconsin, the prosecution of a guardianship is a government protective service; however, the practice has shifted in the last 10 years to private attorneys petitioning for guardianships because the private bar has been able to establish a lucrative practice of obtaining market-rate attorney fees for their petitions.

12. The examples in this article are based on actual cases.

13. Wisconsin law does not "permit" this type of order, but it was obtained. In Wisconsin, a statute allows a temporary guardianship hearing to be held on shortened notice. *See* WIS. STATS. §§ 880.15, 880.33. The appointment of a guardian ad litem is also required. Wisconsin law permits the placement of an individual, on an emergency basis, for his or her protection, in a nursing home or less restrictive facility. *See* WIS. STAT. § 55.06 (10)(a). Again, a hearing within 72 hours is required, as is the appointment of a guardian ad litem. *See* WIS. STAT. § 55.06(11)(b). Wisconsin law also specifically forbids the placement of a ward in a nursing home without a protective placement proceeding in which, at a hearing, the placement needs of the proposed ward and level of restrictiveness of that placement would be specifically addressed. *See* Agnes T. v. Milwaukee County (*In re* Guardianship of Agnes T.), 525 N.W.2d 268, 269 (Wis. 1995). *See also* WIS. STAT. § 55.05(5)(b).

14. Medicaid funds nursing home care for eligible recipients. There are limited waivers for home care; however, home care is not a covered service as of right and is an extremely difficult benefit to obtain especially when more than a few hours of care per week is required. Home care is easily obtained when an individual has private funds to pay for the care. *See also* State *ex rel.* Watts v. Combined Community Srvs. Bd., 362 N.W.2d 104, 110 (Wis. 1985).

15. *See generally* Vicki Gottlich, *Zealous Advocacy for the Defendant in Adult Guardianship Cases,* 29 CLEARINGHOUSE REV., 879 (1996).

16. *See generally* Anne Pecora, *The Constitutional Right to Court-Appointed Adversary Counsel for Defendants in Guardianship Proceedings,* 43 ARK. L. REV. 345 (1990). *See also* WIS. STATS. §§ 51.001, 55.001, 880.33, 55.06; State *ex rel.* Watts v. Combined Community Srvs. Bd., 362 N.W. 2d 104 (Wis. 1985); *In re* Guardianship of Tamara L.P., 503 N.W. 2d 333 (Wis. Ct. App. 1993).

17. *See* Johns, *supra* note 8, at 97–98.

18. The "incapacity" of an adjudicated ward to retain an attorney is the incapacity to pay the attorney. Payment is subject to court approval under the doctrine of necessaries. *See* Flessas v. Marine Nat'l Exch. Bank of Milwaukee (*In re* Guardianship of Hayes), 98 N.W.2d 430, 431 (Wis. 1959). There may be some cases in which the guardian has provided defense counsel acceptable to the ward and the ward's separate contract is not "necessary." The right to have an attorney of the ward's choosing, however, is a right that the guardian cannot control.

19. A ward recently hired me upon the suggestion of her guardian to serve as defense counsel for the ward. The ward has been subjected to repeated challenges to her limited guardianship by a dysfunctional family member. Every time an action is filed, defense counsel and a guardian ad litem are appointed. Each time, there is a different set of court-appointed attorneys. It is the ward's and

guardian's goal that the ward's right to counsel of her choice will provide her with continuity of representation, which is missing when the same or similar court actions are serially filed but that each filing prompts the involvement of a different judge and new set of court-appointed lawyers.

20. *See, e.g.,* Claus v. Lindemann (*In re* Guardianship of Claus), 172 N.W.2d 643 (Wis. 1969); Flessas, 98 N.W.2d at 430 (Wis. 1959); Warner v. Welton (*In re* Warner's Guardianship), 287 N.W. 803 (Wis. 1939).

21. *See generally* O'Conner v. Donaldson, 422 U.S. 563 (1975); Jackson v. Indiana, 406 U.S. 715 (1972); Lessard v. Schmidt, 406 F. Supp. 1078 (E.D. Wis. 1972).

22. *See* Johns, *supra* note 8, at 68–74.

23. Of course, the adversary system permits and encourages settlement because each party bears his or her own cost for attorney fees and litigation expenses. Good advocacy includes the ability to negotiate creative solutions.

24. *See* Johns, *supra* note 8, at 110–52.

25. *See* Gottlich, *supra* note 15, at 881.

26. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.14 & 1.2 (1995).

27. *See* Gottlich, *supra* note 15, at 881.

28. *See* MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.7 (1995).

29. *See* Linda Smith, *Representing the Elderly Client and Addressing the Question of Competence,* 14 J. CONTEMP. L. 61, 82 (1988).

30. *See* Tamara L.P. v. Dane County (*In re* Guardianship of Tamara L.P.), 503 N.W.2d 333, 334 (Wis. Ct. App. 1993).

31. *See id.*

32. *See id.* at 334–35.

33. *See id.* at 336.

34. *See id.* at 335.

35. *See id.* at 337.

36. *See id.* at 338.

37. MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14(a) (1995).

38. *See generally* Agnes T. v. Milwaukee County (*In re* Guardianship of Agnes T.), 525 N.W.2d 268 (Wis. 1995).

39. *See generally* Yamat v. Verma L.B. (*In re* Verma L.B.), 571 N.W.2d 860 (Wis. Ct. App. 1989).

40. Following the U.S. Supreme Court's decision of Cruzan v. Dir., Missouri Dep't of Health, 497 U.S. 261 (1990), the Wisconsin Supreme Court considered whether a guardian may refuse treatment for a person who was not in a persistent vegetative state and who had not previously indicated her preferences regarding life-sustaining medical treatment. In defining "best interest," the Court stated: "Certainly the patient's wishes, as far as they can be discerned, are an appropriate consideration for the guardian. If the wishes are clear, it is invariable as a matter of law, both common and statutory, that it is in the *best interests* of the patient to have those wishes honored . . ." *In re* Guardianship of L.W., 482 N.W.2d 60, 70 (Wis. 1992) (emphasis added).

41. *See generally* Community Care Org. of Milwaukee County v. Evelyn O. (*In re* Evelyn O.) and Community Care Org. v. Milwaukee County (*In re* Guardianship of Thyra K), 571 N.W.2d 700 (Wis. Ct. App. 1997). (These are companion cases.)

42. *See generally* Alyeska Pipeline Srv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975).

43. *See, e.g.,* Argersinger v. Hamlin, 407 U.S. 25 (1972). Outside of the area of criminal prosecution, the constitutional right to public-funded counsel turns on a balancing of competing private and governmental interests. *See, e.g.,* Lassiter v. Dep't of Soc. Srvs., 452 U.S. 18 (1981) (termination of parental rights); Vitek v. Jones, 445 U.S. 480 (1980) (attorney or medical advocate required for transfer to mental institution).

44. *See* WIS. STATS. §§ 55.02, 55.04, 55.043(4)(f), 55.045, 55.05.

45. The doctrine of necessaries imposes, on a third party with a duty to support another person, the cost of goods or services deemed "necessary" that were provided to the dependent. An example is that a parent must pay, under the doctrine of necessaries, for necessary goods and services provided

to a minor child because the parent has a legal duty to support the minor child.

46. *See In re* Evelyn O., 571 N.W.2d at 703.

47. *Id.* at 703–04.