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Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship

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LAWYERS FOR LEGAL GHOSTS: THE LEGALITY AND ETHICS OF REPRESENTING PERSONS SUBJECT TO GUARDIANSHIP

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Abstract: A person subject to guardianship has been judicially determined to lack legal capacity. Stripped of legal personhood, the individual becomes a ward of the state and his or her decisions are delegated to a guardian. If the guardian abuses that power or the guardianship has been wrongly imposed—as research suggests is not infrequently the case—the person subject to guardianship may rightly wish to mount a legal challenge. However, effectively doing so requires the assistance of an attorney, and persons subject to guardianship typically have not only been declared by a court to be incapable of directing their own affairs but have been stripped of the capacity to contract. As a result, those who wish to challenge the terms and conditions of their guardianship, or even merely to exercise unrelated retained rights, can be stymied because attorneys are unwilling to accept representation for fear that it is unlawful or unethical. Drawing on constitutional law, as well as the law of agency and contract, this Article shows why such representations are, contrary to the assumptions of many attorneys, not merely legally permissible but essential to protect fundamental constitutional rights. It then explores the professional rules governing attorney conduct in order to show how attorneys may ethically represent persons subject to guardianship. Finally, it proposes a modest change to the Model Rules of Professional Conduct to clarify attorneys' duties in this context.

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INTRODUCTION

In 2012, Jenny Hatch, a 28-year-old woman with Down syndrome, was placed in a group home by her parents, who had been appointed as her guardians. Despondent about the restrictive placement and the loss of her independent lifestyle, and devastated that she was no longer able to work her much-loved job at a local thrift store, Jenny engaged an attorney to challenge both the existence of the guardianship and the appointment of her parents as guardians.[1] The following year, she prevailed. In a landmark decision, a Virginia court removed her parents as guardians, appointed Jenny's close friends in their place, and held that the guardianship itself would terminate after a year.[2] A year later, Jenny was thus legally reincarnated, restored from being a ward of the state—a condition often referred to as a legal death[3]—to full legal personhood.

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1. Consistent with how she refers to herself and how she is referred to by her advocacy team, we refer to Jenny by her chosen first name. Her full legal name is Margaret Jean Hatch.

2. Ross v. Hatch, No. CWF120000426P-03, slip op. at 5 (Va. Cir. Ct. Aug. 2, 2013), http://jennyhatchjusticeproject.org/docs/justice_for_jenny_trial/jhjp_trial_final_order.pdf [https://perma.cc/VA2E-J48F].

3. *See, e.g.*, *In re* Interdiction of Parnell, 129 So. 3d 690, 692 (La. Ct. App. 2013) ("Interdiction is a harsh remedy. A judgment of interdiction amounts to civil death . . . ." (quoting Interdiction of Haggerty, 519 So. 2d 868, 869 (La. Ct. App. 1988))); Patricia M. Cavey, *Realizing the Right to Counsel in Guardianship: Dispelling Guardianship Myths*, 2 MARQ. ELDER'S ADVISOR 26, 28 (2000) (describing guardianship as a "legal death"); Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN ST. L. REV. 1159, 1159 (2013) (describing guardianship

Jenny's story captured national attention[4] in large part because it is so unusual. Few persons subject to guardianship[5] are able to change the terms and conditions of their guardianships, let alone regain legal capacity after a court has determined that they lack capacity to make decisions for themselves.[6] Jenny was able to do both.

A key factor in this success was that Jenny had access to legal representation.[7] Unfortunately, many people in Jenny's position do not.[8] A major factor contributing to this lack of access is that attorneys are unsure whether they may legally and ethically represent a person subject to guardianship.[9]

Attorney reluctance to undertake such representation is

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as a "civil death").

4. *See, e.g.*, Don Dahler, *Woman with Down Syndrome Becomes Icon for Disabled*, CBS NEWS (Nov. 30, 2013), http://www.cbsnews.com/news/woman-with-down-syndrome-becomes-icon-for-disabled [https://perma.cc/S5FR-RXW8]; Natalie DiBlasio, *Judge: Woman with Down Syndrome Can Live with Friends*, USA TODAY (Aug. 3, 2013), http://www.usatoday.com/story/news/nation/2013/08/03/down-syndrome-custody/2614587 [https://perma.cc/3PEA-6Q8N]; Theresa Vargas, *Woman with Down Syndrome Prevails over Parents in Guardianship Case*, WASH. POST (Aug. 2, 2013), https://www.washingtonpost.com/local/woman-with-down-syndrome-prevails-over-parents-in-guardianship-case/2013/08/02/4aec4692-fae3-11e2-9bde-7ddaa186b751_story.html [https://perma.cc/48HS-VA7R].

5. We use the term "person subject to guardianship" in lieu of the traditional legal term "ward," which has been criticized as dehumanizing the individual and carrying an unnecessary connotation of dependency. By doing so, however, we do not mean to mask the very real power inequalities that exist among parties in the guardianship system. We have settled on the somewhat cumbersome term "persons subject to guardianship" in an attempt to stay focused on the personhood of individuals while also situating them in the guardianship structure. At times, however, we use the descriptor "ward" when discussing statutes or court opinions that employ that term.

6. *See* Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L.J. 83, 83 (2015) (finding that petitions for restoration of rights are uncommon).

7. Ms. Hatch was represented by attorney Jonathan Martinis, then with the Quality Trust for Individuals with Disabilities, a nonprofit advocacy organization. *See* Respondent's Motion for Access to Her Counsel and Supplement to Motion for a Continuance at 7, *Ross*, slip op.

8. *See* Cassidy, *supra* note 6, at 102, 121 (discussing attorneys' reluctance to represent persons seeking to challenge their guardianship, and concluding that "one of the greatest barriers to restoration is the ability of the protected individual to hire counsel").

9. Over the course of the past several years, with a particular spike in interest in May 2015, the American Bar Association's Elderbar listserv has featured a series of postings expressing concern about the legal and ethical status of representing persons subject to guardianship. *See, e.g.*, Posting of Erica Wood, erica.wood@americanbar.org, to elderbar@mailamericanbar.org (May 7, 2015, 5:25 PM) (on file with authors) (curating a series of posts on this topic). Partially in response to this concern, the authors presented a continuing legal education training on this topic to a sizeable audience of public interest attorneys at the 2014 National Aging and Law Conference. Even among this highly progressive, predominately legal aid-affiliated audience, concerns about the legal permissibility—and ethical ramifications—of such representation were common. *See also* Cassidy, *supra* note 6, at 102 (discussing the reasons why attorneys are reluctant to represent persons subject to guardianship seeking restoration of rights).

understandable. A person subject to guardianship has, by definition, been judicially determined to lack legal capacity and his or her decisions have been delegated to a third party. This third party is typically called a "guardian" but sometimes referred to as a "conservator."[10] Through this process, the person has not only been declared by a court to be incapable of directing his or her own affairs but has typically been stripped of the capacity to enter into a legally binding contract. Both may appear to be insurmountable barriers. Attorneys generally can only represent clients who have the capacity to enter into a contract to hire the attorney and the capacity to direct the attorney during the course of the representation. Moreover, in some jurisdictions, probate courts have taken the position that they can prevent a lawyer from representing a person subject to guardianship who wishes to challenge the guardianship.[11]

A lack of clear ethical guidance for attorneys further contributes to the current confusion as to the legal permissibility and ethics of representing a person subject to guardianship. Although much has been written about an attorney's role and ethical obligations when representing a client with questionable cognitive capacity,[12] there is

10. Most states use the term "guardianship" to refer to the process by which a surrogate is appointed to make personal and health care decisions for an incapacitated person. Many states also use the term "guardianship" to refer to the process by which a surrogate is appointed to make financial decisions for a person who has been adjudicated to lack capacity to make such decisions, and the corresponding term "guardian" to refer to the resulting surrogate. In other states, by contrast, the term "conservatorship" is instead used to refer to the process by which a surrogate is appointed to make financial decisions and the corresponding term "conservator" to refer to the resulting surrogate. However, there are a few states that use the term "conservator" to refer to someone appointed to make both financial and personal decisions, and Louisiana uses the term interdiction. *See* Nina A. Kohn, *Matched Preferences and Values: A New Approach to Selecting Legal Surrogates*, 52 SAN DIEGO L. REV. 399, 402–03 (2015). In this Article, we choose to use the term "guardianship" for simplicity to cover appointments over both the person and property.

11. *See, e.g.*, *In re* Guardianship of Zaltman, 843 N.E.2d 663, 664 (Mass. App. Ct. 2006) (requiring an evidentiary hearing to determine whether a woman had capacity to retain counsel to challenge the guardianship before permitting her to engage such counsel). Notably, attorney participants in the American Bar Association's "Elderbar" listserv have documented a series of such refusals in their correspondence to one another. *See, e.g.*, Posting of Erica Wood, *supra* note 9 (curating posts).

12. *See* Henry Dlugacz & Christopher Wimmer, *The Ethics of Representing Clients with Limited Competency in Guardianship Proceedings*, 4 ST. LOUIS U. J. HEALTH L. & POL'Y 331 (2011) (discussing practical and ethical issues when defending a client against a guardianship petition); Vicki Gottlich, *Zealous Advocacy for the Defendant in Adult Guardianship Cases*, 29 CLEARINGHOUSE REV. 879 (1996) (describing the role of attorneys for allegedly incapacitated individuals as zealous advocates); David A. Green, *"I'm Ok—You're Ok": Educating Lawyers to "Maintain a Normal Client-Lawyer Relationship" with a Client with a Mental Disability*, 28 J. LEGAL PROF. 65 (2004) (arguing in favor of lawyer education and guidance to improve representation of persons with mental disabilities); Stanley S. Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609 (1989–1990)

virtually no legal or social science literature on representing a client who has been judicially determined to lack legal capacity and whose rights have been delegated to a guardian.[13] Furthermore, as we show in this Article, existing ethical rules are confusing and arguably internally inconsistent, secondary sources of ethical guidance provide little additional assistance, and the courts have yet to articulate a clear framework for guiding such representations.

This lack of guidance available to attorneys is unfortunate, particularly because the questions of whether a person who has been adjudicated incapacitated may retain an attorney and the ethical duties of attorneys who are retained are of increasing importance within the legal community. One reason is that the aging of the population means the number of persons potentially subject to guardianship is likely increasing.[14] Perhaps more importantly, there is a growing recognition

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(analyzing power dynamics in the attorney-client relationship); Maria M. das Neves, *Project: Legal Ethics and the Elderly: The Role of Counsel in Guardianship Proceedings of the Elderly*, 4 GEO. J. LEGAL ETHICS 855 (1991) (advocating mandatory legal representation for defendants in pre-appointment guardianship proceedings); Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 STETSON L. REV. 687 (2002) (arguing attorneys should advocate strenuously for clients' preferences to protect due process rights of allegedly incapacitated persons); Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL'Y REV. 241 (1998) (criticizing the American Bar Association's Model Rules of Professional Conduct for failing to address the challenge of establishing an attorney-client relationship); Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decisionmaking and the Questionably Competent Client*, 1987 UTAH L. REV. 515 (discussing options available when a client may lack capacity to give informed consent).

13. To the extent that the legal literature has explored the lawyer's ethical obligations with regard to persons subject to guardianship, the focus has been on attorneys' obligations to a person subject to guardianship when the attorney represents the guardian. In a classic article on representing fiduciaries, Geoffrey Hazard, Jr. explored the obligation of a lawyer who represents a guardian to a person subject to guardianship to craft an argument that the traditional concept of the attorney-client relationship is inadequate and to advocate for a modulated approach that recognizes the commonly shared interests of the parties, absent direct conflict. Hazard's analysis stops short of directly exploring the lawyer's obligation when representing the person subject to guardianship. *See* Geoffrey C. Hazard, Jr., *Triangular Lawyer Relationships: An Exploratory Analysis*, 1 GEO. J. LEGAL ETHICS 15 (1987); Kennedy Lee, *Representing the Fiduciary: To Whom Does the Attorney Owe Duties?*, 37 ACTEC L.J. 469 (2011) (considering the attorney's duty to a person subject to guardianship when representing a guardian).

14. Although precise figures are unknown, estimates suggest that about 1.5 million adults are subject to guardianships in the United States. *See* BRENDA K. UEKERT & RICHARD VAN DUIZEND, ADULT GUARDIANSHIPS: A "BEST GUESS" NATIONAL ESTIMATE AND THE MOMENTUM FOR REFORM (2011), http://www.guardianship.org/reports/Uekert_Van_Duizend_Adult_Guardianships.pdf [https://perma.cc/A88D-4LPE]. Many of these are older persons who suffer from Alzheimer's disease or other forms of dementia. The number of persons subject to guardianship may grow as the number of persons with such conditions increases. *See* Alzheimer's Ass'n, *2014 Alzheimer's Disease Facts and Figures*, 10 ALZHEIMER'S & DEMENTIA 2, 22 tbl.2 (2014) (projecting that by 2025 the number of older individuals over age sixty-five in the United States diagnosed with Alzheimer's disease will reach more than seven million, a forty percent increase

that many guardianships have been wrongly imposed or are overbroad.[15] This recognition, encouraged in part by the United Nation's adoption of the Convention on the Rights of Persons with Disabilities (CRPD),[16] has led to increased interest from the disability rights community in restoring the rights of persons subject to guardianship by challenging judicial determinations of incapacity.[17]

This Article seeks to provide, for the first time, a comprehensive account of the legal status of attorney representation of persons subject to guardianship and to distill a legal framework for such representations. To do so, it draws upon constitutional law, agency law, contract law, and the law and professional rules governing attorneys to answer two critical questions. First, can an adult subject to guardianship engage in an attorney-client relationship despite the declaration of legal incapacity?[18] Second, if so, what is the attorney's role and ethical obligation when representing a person subject to guardianship?

The Article proceeds in four primary parts. Part I provides an overview of guardianship and describes the circumstances under which a lawyer might be called on to represent a person subject to guardianship. Part II considers the legal permissibility of attorney representation of persons subject to guardianship from the perspective of common law, constitutional law, and statutory law. Part III considers the role and ethical standards of attorneys representing persons subject to guardianship. Finally, Part IV suggests how existing ethical rules could be reformed to provide better and more appropriate guidance to attorneys who undertake representation of persons subject to guardianship.

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over 2014 figures).

15. *See* Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111 (2013) (discussing the overuse of guardianship, the overbreadth of guardianship orders, and the increasingly common critiques of guardianship).

16. In particular, the language of Article 12 of the CRPD has prompted some to rethink the appropriateness of guardianship and its uses. *See generally* Perlin, *supra* note 3; Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93 (2012) (describing the CRPD approach as shifting the established guardianship paradigm, and thus having the potential to change guardianship law or perhaps even lead to the abolition of guardianship).

17. *See, e.g.*, JENNY HATCH JUST. PROJECT, http://www.jennyhatchjusticeproject.org [https://perma.cc/Y338-Z7F8] (last visited July 21, 2015); THE ARC, POSITION STATEMENT: ADVOCACY (2010), http://www.thearc.org/document.doc?id=3637 [https://perma.cc/FL9Q-5D59].

18. The questions of how a minor subject to guardianship may engage an attorney and the proper role of that attorney are also important topics, but are beyond the scope of this Article.

I. CONTEXTS OF LEGAL REPRESENTATION

Guardianship is the judicial process through which a court determines whether an allegedly incapacitated person is unable to make decisions for him or herself. To be placed under a guardianship, an individual must be found by a judge or jury to meet the criteria for legal incapacity.[19] Jurisdictions differ in how they define "incapacity" in the guardianship context, but the modern trend is to use a functional definition that focuses on what the individual is able to do, not simply his or her medical diagnosis.[20] As a practical matter, those found to be incapacitated for the purpose of guardianship are a diverse group. On one extreme are individuals in a vegetative state or coma. On the other end of the spectrum are those who are highly functional, but whose conditions impair judgment, leading to potentially dangerous decision-making or rendering them vulnerable to exploitation.[21]

If a person is declared incapacitated in a guardianship proceeding, a guardian can be appointed to manage all or some of the person's affairs. If the guardian is appointed over all decisions, the guardianship is called "plenary," "full," or "general," and the person subject to guardianship can lose the right to independently make even the most fundamental choices such as where to live, how to spend financial resources, or whether to consent to medical treatment. These decisions become the prerogative of the guardian, subject to the supervision of the court. In other cases, the guardianship is "limited" and the guardian is appointed only to manage a subset of the person's affairs. An individual under a limited guardianship retains all rights that are not expressly restricted by the guardianship order.[22]

An individual who has been placed under guardianship may seek attorney representation for a variety of reasons. Often the legal assistance is for a matter related to the guardianship. For example, the

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19. The American Bar Association Commission on Law and Aging has helpfully compiled all fifty states' standards for determining incapacity. ABA COMM'N ON LAW & AGING, CAPACITY DEFINITION & INITIATION OF GUARDIANSHIP PROCEEDINGS (2015), http://www.americanbar.org/content/dam/aba/administrative/law_aging/CHARTCapacityandInitiation.authcheckdam.pdf [https://perma.cc/GRQ4-B8Z9]. Persons subject to guardianship who would seek representation would generally be expected to be those who may well have significant decision-making challenges but who are still able to form and articulate personal preferences and goals.

20. *See* NINA A. KOHN, ELDER LAW: PRACTICE, POLICY, AND PROBLEMS 152 (2014).

21. Notably, it is at this end of the spectrum that judges are most likely to erroneously impose guardianship due to misjudgment of functional capacity.

22. *See* Lawrence A. Frolik, *Promoting Judicial Acceptance and the Use of Limited Guardianship*, 31 STETSON L. REV. 735, 741–42 (2002) (defining limited guardianship).

person subject to guardianship may consult with an attorney to understand the scope and effects of the guardianship, what rights have been retained, or the obligations and prerogatives of the guardian. The person may wish to challenge the acts or fitness of the guardian, amend the terms of the guardianship order, or seek to be restored to capacity. Representation may also be sought for the purpose of influencing how the guardian exercises discretion or makes decisions under the terms of an existing guardianship.

A person subject to guardianship may also seek legal representation for a matter that is unrelated to the guardianship. For example, the person may be a party to a civil or criminal case, or may require legal assistance to exercise a retained right. This right might be one not covered by the provisions of a limited guardianship or one that the state imposing the guardianship considers to be unaffected by the guardianship—for example, in some states the right to vote,[23] marry,[24] or make a will.[25]

II. THE LEGALITY OF REPRESENTING PERSONS SUBJECT TO GUARDIANSHIP

At first glance, it might seem incongruous to talk about an incapacitated person hiring an attorney. An attorney-client relationship is both an agency relationship and a contractual one. As a general matter, in order to enter into either type of relationship, an individual must have the legal capacity to do so. Because an attorney is an agent of the client,

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23. *See* Sally Balch Hurme & Paul S. Appelbaum, *Defining and Assessing Capacity to Vote: The Effect of Mental Impairment on the Rights of Voters*, 38 MCGEORGE L. REV. 931, 950 (2007) ("[N]ineteen states have *specific* provisions that persons under full or limited guardianship retain all legal and civil rights not specifically taken away, which at least by implication would include the right to vote. When the guardianship law provisions that favor limits on the removal of rights are examined, the argument can be made that persons in thirty-two states found to be sufficiently incapacitated to need a guardian *may* be eligible to vote under certain circumstances." (emphasis in original)).

24. *See, e.g.*, CAL. PROB. CODE § 1900 (West, Westlaw through 2016 Reg. Sess. and 2015–2016 2d Exec. Sess.) (stating a person under conservatorship retains the right to marry); MINN. STAT. ANN. § 524.5-120 (West, Westlaw through 2016 Reg. Sess.) (reserving ward's rights, unless restricted by court order, to marry and to vote, among others).

25. *See, e.g.*, GA. CODE ANN. § 29-4-20 (West, Westlaw through 2015 Legis. Year) (stating the appointment of a guardianship is not a determination regarding the right to vote or testamentary capacity); N.Y. MENTAL HYG. LAW § 81.29(b) (McKinney, Westlaw through L. 2016) (stating appointment of a guardian is not conclusive evidence that a person lacks capacity to dispose of property by will); OKLA. STAT. ANN. tit. 84, § 41(B) (West, Westlaw through 2016 2d Reg. Sess.) (requiring a will executed by a person subject to guardianship to be signed and acknowledged in the presence of a judge).

the attorney's ability to act on behalf of a client may be limited by what the client is legally authorized to do. Likewise, lack of capacity to enter into a contract may prevent a client from signing an engagement agreement or committing to compensate the lawyer.

Despite this apparent paradox, the law permits attorneys to represent persons subject to guardianship and to be compensated for that representation. As this Article shows: (1) agency principles do not bar such representation; (2) contract principles do not bar such representation; and (3) even if such representation were inconsistent with state law (whether it be agency law, contract law, or the statutory law governing guardianship), constitutional due process protections would require that exceptions be made to permit representation of persons subject to guardianship, at the very minimum to challenge the terms or existence of their guardianships and arguably under a broader set of circumstances.

A. Squaring Representation of Persons Subject to Guardianship with Agency Law

When an attorney undertakes representation of a client, the attorney is agreeing to act as the client's agent. The client is thus the "principal" who directs the agent as to the objectives of the representation and the means of achieving them.[26] Under traditional agency law, the agent's authority is derived from the authority of the principal. In order to have the capacity to serve as principal in an agency relationship, an individual generally must possess the legal capacity to carry out the acts he or she is delegating to the agent.[27] If the principal does not have the legal capacity to carry out an action, neither does the agent.[28] Therefore, the general rule is that the agent's authority terminates once the principal has been adjudicated to lack capacity to do a particular act.[29] States can, of course, create exceptions to this general principle of agency law. For example, all states have statutorily authorized durable powers of attorney that allow an agent to continue to take actions on behalf of a principal

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26. The attorney is not passive in this process and should provide candid advice about the means of achieving the client's goals. Ultimately, however, the attorney must defer to the client's decisions or withdraw. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-404 at 4 (1996); MODEL RULES OF PROF'L CONDUCT r. 1.2 cmt. 2 (AM. BAR ASS'N 2002).

27. RESTATEMENT (THIRD) OF AGENCY § 3.04 cmt. b (AM. LAW INST. 2006).

28. *Id.* § 3.04(1). Comment b to section 3.04 of the Restatement (Third) of Agency explains, "[t]he capacity to do a legally consequential act by means of an agent is coextensive with the principal's capacity to do the act in person." *Id.* § 3.04 cmt. b.

29. *Id.* § 3.08(1).

even after the principal is no longer capable.[30]

Some might read this traditional rule of agency as barring an attorney from acting on behalf of a person who has been adjudicated incapacitated.[31] This would be a misreading of the law of agency. An agent is only barred from performing acts the principal cannot carry out.[32] Thus, whether or not an attorney can represent a person subject to guardianship in a matter depends on whether the client has been stripped of the right to pursue that matter. If the person subject to guardianship retains the right to pursue the matter, agency law does not pose any bar to the person subject to guardianship engaging a lawyer to assist with that matter.

There are two types of rights retained by persons subject to guardianship. The first are rights retained under the state's guardianship statute. For persons subject to limited guardianship, these rights can be extensive as they include any rights not explicitly stripped by the court.[33] Even persons subject to plenary guardianships, however, can have meaningful retained rights under state law. For example, state statutory law may specifically grant those subject to guardianship the right to vote.[34] Moreover, some states explicitly preserve a right to engage counsel in certain situations, although they vary in the exact contours of this right.[35]

The second type of rights retained by persons subject to guardianship are those that are constitutionally required. Specifically, despite being

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30. *See* Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 RUTGERS L. REV. 1, 6 (2006).

31. *See, e.g.*, 2 HORNER PROBATE PRAC. & ESTATES § 35:41, Westlaw (database updated May 2016) ("Upon the appointment of a guardian, no one except the guardian can act for or on behalf of the ward without express authority or appointment.").

32. *See* RESTATEMENT (THIRD) OF AGENCY § 3.04(1) ("An individual has capacity to act as principal in a relationship of agency as defined in § 1.01 if, at the time the agent takes action, the individual would have capacity if acting in person."). Notably, a person may have capacity to carry out some acts but not others, and an agent's authority is defined by what the principal would be legally permitted to do directly. *See id.* § 3.08 cmt. b.

33. *Cf. In re* Guardianship of Holly, 164 P.3d 137, 145 (Okla. 2007) (holding that a person subject to a limited guardianship continues to have the right to choose his own attorney).

34. *See, e.g.*, MINN. STAT. ANN. § 524.5-120(14) (West, Westlaw through 2016 Reg. Sess.); *see also* Hurme & Appelbaum, *supra* note 23, at 950.

35. For example, Nebraska's guardianship statute adopts a narrow approach, stating that a person subject to guardianship "may retain an attorney for the sole purpose of challenging the guardianship, the terms of the guardianship, or the actions of the guardian on behalf of the ward." NEB. REV. STAT. ANN. § 30-2620(b) (West, Westlaw through 2016 2d Reg. Sess.). On the other hand, the Minnesota guardianship statute contains a "Bill of Rights for Wards and Protected Persons" which grants persons subject to guardianship the right to "be represented by an attorney in any proceeding or for the purpose of petitioning the court." MINN. STAT. ANN. § 524.5-120(13) (Westlaw).

adjudicated incapacitated, a person subject to guardianship has an ongoing right to due process. As explored at length in Section C of this Part, constitutional due process guarantees require persons subject to guardianship to retain rights, at a minimum, related to challenging the terms and conditions of their guardianship.[36]

In short, agency principles do not bar persons subject to guardianship from engaging an attorney to provide counsel related to—or to assist with the exercise of—retained rights, including rights related to challenging the terms and conditions of the underlying guardianship.

B. Squaring Representation of Persons Subject to Guardianship with Contract Law

Much as agency principles have raised concerns that persons subject to guardianship cannot authorize a lawyer to act on their behalf, contract principles can pose a barrier to persons subject to guardianship authorizing payment to attorneys who do represent them. A person subject to guardianship, unless the guardianship is limited, has lost the legal capacity to enter into a contractual agreement.[37] The question is whether this lack of capacity to contract presents an obstacle to an individual making a legally binding promise to compensate a lawyer for services. If it does, even if a person subject to guardianship is able to enter into an agency relationship with an attorney, finding one willing to represent a client who cannot pledge payment may be quite challenging.[38]

Some courts have suggested that contract law thus prevents a person subject to guardianship from hiring a lawyer. For example, in *In re Guardianship of Bockmuller*,[39] a woman subject to guardianship named Mary Bockmuller hired attorney William Reischmann to help her move back to her home against the wishes of her guardian.[40] Consistent with Bockmuller's directions, Reischmann petitioned to terminate the

36. *See infra* Section II.C.

37. RESTATEMENT (SECOND) OF CONTRACTS §§ 12–13 (AM. LAW INST. 1981).

38. *Cf.* Cassidy, *supra* note 6, at 102 (noting that concern over receiving payment for services is a barrier to attorneys accepting representation of persons subject to guardianship); JEROME IRA SOLKOFF & SCOTT M. SOLKOFF, 15 FLORIDA PRACTICE SERIES, ELDER LAW § 30:267, Westlaw (database updated Nov. 2015) (advising attorneys to seek court approval before representing a person subject to guardianship to protect against the risk of providing representation without compensation).

39. 602 So. 2d 608 (Fla. Dist. Ct. App. 1992).

40. *Id.* at 609.

guardianship, remove the current guardian, or both.[41] The petition was unsuccessful, but he nevertheless sought court approval for attorney fees. The court distinguished the right to counsel, granted by state statute,[42] from the capacity to contract with an attorney:

> Mary's right to contract was removed by the order determining her incapacity. Although Mary has a right to counsel, that counsel must be contracted for by one of the guardians or appointed by the court. . . . Because Mary's right to contract was removed, she had no power to contract with Mr. Reischmann to represent her in any proceedings.[43]

Such strict and un-nuanced approaches are inconsistent with constitutional due process guarantees discussed in Section C of this Part. As a U.S. Virgin Islands court reasoned in overturning a lower court's decision denying payment to the attorney for the person subject to guardianship:

> [I]mposing an additional requirement that the ward possess the legal capacity to enter into a contract with retained counsel would make it exceedingly difficult for individuals served with guardianship petitions, or those attempting to terminate an existing guardianship, to obtain retained counsel. Any contract the ward entered into with retained counsel would be completely invalidated if the guardianship petition is granted or the petition to terminate the guardianship is denied.[44]

Moreover, contract law—or, more precisely, the law of quasi-contract—includes a doctrine that explains why, in fact, persons subject to guardianship can enter into valid contracts with attorneys. The doctrine of necessaries allows a party who supplies certain goods or services to a person who lacks capacity to contract to nonetheless be reimbursed for the value of those goods or services.[45] Under the doctrine, the party who provided the goods or services may demand payment, even though there is not a valid underlying contract, if the goods or services fall into the category of necessaries.[46] Legal services

41. *Id.*

42. In Florida, a person subject to guardianship retains the right to counsel. FLA. STAT. ANN. § 744.3215(1)(*l*) (West, Westlaw through 2016 2d Reg. Sess.).

43. *In re Bockmuller*, 602 So. 2d at 609 (citations omitted).

44. *In re* Guardianship of Smith, 58 V.I. 446, 453–54 (2013). The attorney sought legal fees for representing a client prior to adjudication of incapacity. *Id.* A related appeal challenging the dismissal by the court of the attorney for the person subject to guardianship following the appointment of the guardian was rendered moot by the person's death. *Id.* at 448.

45. 57 C.J.S. *Mental Health* § 238, Westlaw (database updated Apr. 2016).

46. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 22 cmt. c (AM. LAW

have, across a variety of contexts, been found to be necessaries for the purpose of applying the doctrine.[47]

The doctrine of necessaries has long been used to hold persons subject to guardianship liable for debts,[48] and some courts have explicitly found that the doctrine can be used to reimburse an attorney for legal services provided to a person subject to guardianship,[49] including to provide legal services to challenge the guardianship itself.[50]

For example, in *Collins v. Marquette Trust Co.*,[51] the attorney who had represented the person subject to guardianship in the initial

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INST. 2011) (describing duty to third persons for specific goods and services known as "necessaries").

47. *See* RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS, THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 1.14-3 (2013–2014) (concluding incapacitated individuals cannot contract, yet the doctrine of necessaries will create a liability to compensate counsel); Angela Zielinski, Comment, *Attorney Fees as Necessaries of Life: Expanding a Domestic Violence Victim's Access to Safety and Justice*, 60 MONT. L. REV. 201, 217 (1999) (arguing that the modern rule is that legal services in divorce proceedings are considered necessaries); E.R. Tan, Annotation, *Infant's Liability for Services Rendered by Attorney at Law Under Contract with Him*, 13 A.L.R. 3d 1251 (1967), Westlaw (database updated weekly) (examining the doctrine of necessaries as applied to children with legal services contracts and concluding that legal services can be necessaries if designed to assist with seeking compensation for personal injuries and to assist with matters related to protecting personal liberty, security, and reputation); *Employment or Services of Another*, A.L.R. DIG., Westlaw ALRDG 211K1070 (database updated Mar. 2016) (examining the doctrine of necessaries as applied to children and indicating that legal services designed to assist with seeking compensation for personal injury and will contests are necessaries).

48. The courts typically apply the doctrine of necessaries to cases involving persons subject to guardianship in much the same way they apply the doctrine to cases involving other incapacitated individuals. Thus, courts have allowed persons subject to guardianship to be held liable for necessaries such as medical expenses incurred by a spouse. *See, e.g.*, *In re* Rauscher, 531 N.E.2d 745, 747–49 (Ohio Ct. App. 1987).

49. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 14 cmt. d (AM. LAW INST. 2000).

50. *See, e.g.*, *In re* Guardianship of Smith, 58 V.I. 446, 454 (2013) (attorney may be reimbursed for attorney's fees that "were reasonably necessary to . . . attempt to terminate the guardianship"); *In re* Estate of Kutchins, 523 N.E.2d 1025, 1027 (Ill. App. Ct. 1988) ("As a general rule, attorney fees and costs incurred in the representation of an incompetent in an incompetency proceeding are a 'necessary' of that incompetent for which his estate may be assessed reasonable fees by the court."); Collins v. Marquette Trust Co., 246 N.W. 5, 6 (Minn. 1932) (holding that legal services are indistinguishable from other categories of necessaries); *In re* Allen, 552 N.E.2d 934, 937–38 (Ohio 1990) ("[I]t is settled law in Ohio and in a number of other states that any debt arising out of the services of an attorney to a ward is in the nature of necessities. . . . It is within the province of the probate court to determine what constitutes a necessary good or service. For attorney fees to be granted in this context, a court should apply a three-part test to determine if attorney fees are merited . . . whether the attorney acted in good faith, whether the services performed were in the nature of necessities, and whether the attorney's actions benefited the guardianship." (citations omitted)); *In re* Guardianship of Hayes, 98 N.W.2d 430, 433 (Wis. 1959) (recognizing legal services can be necessaries under proper circumstances).

51. 246 N.W. 5 (Minn. 1932).

appointment proceedings assisted his client in petitioning unsuccessfully for restoration of capacity a month after the guardian was appointed.[52] When he sought approval of attorney fees, the guardian objected, claiming that the court had no authority to approve fees for an attorney who had not been employed by the guardian. In granting the attorney's fee request, the court observed:

> All her property being then in the hands of her guardian and subject to the control of the probate court, she would be practically helpless to carry on the proceeding for restoration to capacity, unless the probate court would allow sufficient of her property in the hands of her guardian to be used for the payment of necessary attorney's fees and expenses.[53]

The court qualified its holding, explaining that such services must be rendered in good faith and be reasonably necessary.[54]

Similarly, in the case *In re Guardianship of Hayes*[55] the person subject to guardianship hired an attorney to assist him in exercising his right to an annual re-examination of his condition. Two court-appointed psychiatrists examined the person subject to guardianship and determined that the guardianship was still necessary.[56] The court approved the payment of attorney fees based on a determination that the legal services were necessaries, defined as follows:

> Necessaries are generally considered as what is reasonably necessary for the support, maintenance, care and comfort of the insane person according to his status and condition in life but not necessarily limited to his actual physical wants. A person's liberty and freedom to do what he wishes with his property is a cherished right. An insane person should have reasonable access to legal services which are required for the benefit of the insane person or necessary for the protection of his property.[57]

In short, the doctrine of necessaries indicates that a lack of contractual capacity should not be deemed as preventing a person subject to guardianship from entering into an enforceable, implied contract for

52. *Id.* at 5.

53. *Id.* at 6.

54. *Id.*

55. 98 N.W.2d 430 (Wis. 1959).

56. *See id.* at 433.

57. *Id.* A similar definition of necessaries was used in *Collins*. 246 N.W. 5, 6 (Minn. 1932) ("Being necessary for the protection of the ward's legal rights, it must be held that these expenditures stand on the same footing as expenses for necessary food, clothing, and other requirements for the ward.").

certain attorney services. This does not mean, however, that attorneys can expect payment for all services for which persons subject to guardianship seek their assistance. In some situations, the doctrine may be inapplicable since the sought-after services cannot reasonably be said to fall into the category of necessaries. For example, suppose a person subject to guardianship schedules a meeting with the intention of seeking the attorney's assistance to perform an act that she is no longer legally capable of doing. Were the attorney to proceed to represent the person in the matter after determining (or after the lawyer should have determined) that the individual could not carry out the act, the doctrine of necessaries would likely not apply.[58]

Similarly, such an agreement may not be enforceable where the services in question are not reasonable. For example, the person subject to guardianship in *In re Guardianship of Hayes* engaged the same attorney three months later to petition for another re-examination.[59] The underlying state statute entitled a person subject to guardianship to one re-examination per year, but a re-examination could be ordered by the court at any time.[60] The court appointed two different psychiatrists who examined the person and came to similar conclusions as those of the first psychiatrists.[61] In denying the attorney's request for payment of fees related to this second re-examination, the court rejected the assertion that the right to seek a re-examination qualified as necessaries per se.[62] Instead, the court described a case-by-case assessment in which individuals' rights are balanced against the need to protect them from financial waste.[63] The court also stated that for legal services to be necessaries, there should be some reasonable basis to believe that the action will be successful.[64] In this case, the court found there was no reason to doubt the qualifications or disinterest of the first set of psychiatrists.[65] Therefore, the services provided in the second representation were redundant, unlikely to lead to different results, and

58. We hope that in such circumstances lawyers would nonetheless provide these individuals with pro bono advice and counsel about their rights pursuant to guardianship.

59. 98 N.W.2d at 430.

60. *Id.* at 433–34.

61. *Id.* at 433.

62. *See id.*

63. *Id.* ("[T]he county court must carefully examine such claim so that an incompetent is not deprived of the means of securing his freedom and restoration to competency and yet the property which is necessary for his support and maintenance is not wasted.").

64. *Id.* at 434.

65. *Id.* at 433.

did not qualify as necessaries.[66]

The *Hayes* opinion thus represents a narrower and more problematic interpretation of the doctrine of necessaries. If courts take the type of balancing approach adopted in *Hayes* when applying the doctrine of necessaries—that is, weighing the need for legal representation against the impact of obtaining those services on the client's financial resources—lower income individuals will likely be disproportionately denied legal representation. It is also sometimes difficult to determine in advance whether a case has a reasonable basis for success, and an attorney may reasonably be concerned that the court will engage in a post hoc assessment of the merits.[67]

By contrast, *Collins*' more expansive interpretation of the doctrine, which asks whether the services were reasonably necessary to protect the rights of the person subject to guardianship and whether they were rendered by the attorney in good faith,[68] better reflects the underlying rationale of the doctrine of necessaries and appears to be the more modern approach.[69] Contractual rights of persons with diminished capacity are restricted to protect vulnerable individuals from harm in the form of exploitation or fundamentally unfair agreements. The doctrine of necessaries recognizes that circumstances exist when restricting the right

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66. *Id.*

67. In *Hayes*, for example, the court held that the first petition seeking to have the petitioner examined by psychiatrists had merit, but that the second petition for re-examination by different psychiatrists did not. As it happened, the second set of psychiatrists confirmed the findings of the first. Had the second psychiatric report contradicted the first, the court could very well have decided that the petition for a second re-examination had been justified. *See id.* at 433–34. In contrast, the Wisconsin Supreme Court, relying on *Hayes*, upheld attorney fees in a successful termination proceeding. Comparing the case at bar to *Hayes*, the court stated:

> There a trial court finding that legal services were not necessary was upheld, but here, particularly in view of the outcome of this appeal, it is equally clear that they are to be so considered. While the mere fact that the ward is unsuccessful at a hearing or on appeal is not to be the determining factor as to the necessity of legal services involved, a ". . . reasonable basis and hope for success" are factors to be given weight. In the case before us, appellant appealed the portion of the trial court order denying a termination of the guardianship over her estate. Two issues of law were raised, and on both the essential position of appellant was sustained. Clearly the attorney's fees involved in taking this appeal are to be considered necessaries, to be allowed and paid out of the guardianship estate.

In re Guardianship of Claus, 172 N.W.2d 643, 646–47 (Wis. 1969) (alteration in original) (quoting *Hayes*, 98 N.W.2d at 433).

68. Collins v. Marquette Trust. Co., 246 N.W. 5, 6 (Minn. 1932).

69. *See In re* Guardianship of Smith, 58 V.I. 446, 454 (2013) (allowing fees "reasonably necessary to . . . attempt to terminate the guardianship" and not considering effect on finances); *In re* Allen, 552 N.E.2d 934, 934–35 (Ohio 1990) (listing three factors relevant to the determination of whether fees constituted necessaries, none of which included the impact on the person's finances). Although later opinions appear to adopt a more liberal approach, the small number of reported cases makes it difficult to identify trends with certainty.

to contract potentially causes more harm than allowing a person to enter a contractual agreement. When the general restriction prevents a person from obtaining needed services, the protective justification for the restriction no longer applies.[70] Relative to other types of agreements that persons subject to guardianship might attempt to enter into, an attorney-client arrangement is relatively lower risk because there are already a wide range of safeguards to protect clients from exploitative or unfair contracts with attorneys. Most guardianship statutes require attorneys' fees to be approved in advance of payment by the court overseeing the guardianship,[71] Model Rule of Professional Conduct 1.5 prohibits attorneys from charging or collecting unreasonable fees or expenses,[72] and Model Rule of Professional Conduct 3.1 prohibits an attorney from bringing or defending frivolous proceedings with no basis in law or fact.[73] Thus, in this context, it is particularly appropriate to interpret the doctrine of necessaries broadly so as to minimize the negative effects of treating persons subject to guardianship as lacking contractual capacity.

In short, the doctrine of necessaries should be interpreted broadly to allow attorneys to be compensated for the good faith provision of services reasonably necessary to protect the rights of persons subject to guardianship. Even under a narrower interpretation of the doctrine, however, attorneys can be compensated for representing persons subject to guardianship under some circumstances. Thus, contract law is not an insurmountable barrier to access to counsel for persons subject to guardianship.

C. Constitutional Protections of Access to Counsel

The preceding two Sections have shown why at least some forms of representation of persons subject to guardianship are permitted despite contract and agency law principles that might suggest otherwise. Even if contract law or agency law were inconsistent with persons subject to guardianship engaging attorneys to represent them, such persons would still have a constitutional right to representation in certain situations.

While guardianship is often strongly criticized for stripping

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70. *Cf.* Steve Hedley, *Implied Contract and Restitution*, 63 CAMBRIDGE L.J. 435, 440–42 (2004) (discussing the purpose of the doctrine of implied contract).

71. To the extent that refusal to approve fees may serve as a barrier to legitimate legal representation, courts should be cautious in exercising their authority.

72. *See* MODEL RULES OF PROF'L CONDUCT r. 1.5 (AM. BAR ASS'N 2002). For discussion of the role and importance the Model Rules, see *infra* note 121 and accompanying text.

73. *Id.* r. 3.1.

individuals of their legal personhood, even those subject to the most drastic plenary guardianships retain certain legal rights guaranteed to them under the Federal Constitution. These retained rights include the right to both procedural and substantive due process under the law as guaranteed by Section 1 of the Fourteenth Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law."[74]

These rights are not extinguished merely because a person has been found to lack capacity under proper legal procedures. While the United States Supreme Court has never directly addressed the due process rights of persons subject to guardianship, the Court has considered the rights of persons subject to involuntary commitment[75] and found that such persons retain due process rights.[76] As other courts have recognized, the two situations are analogous, and the Supreme Court's reasoning with regard to involuntary commitment can—and should—be applied to conclude that persons subject to guardianship retain due process rights even after being lawfully adjudicated incapacitated.[77] Consistent with this approach, courts that have considered the question generally recognize that persons subject to guardianship retain a constitutionally protected due process interest.[78]

The leading precedent outlining the contours of the constitutional right to procedural due process, *Mathews v. Eldridge*,[79] states that the process due depends on:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and

74. U.S. CONST. amend. XIV, § 1.

75. *See* Youngberg v. Romeo, 457 U.S. 307, 315 (1982) (finding that a disabled person who had been involuntarily committed retained substantive due process rights).

76. *See id.*

77. *In re* Guardianship of Hedin, 528 N.W.2d 567, 572 (Iowa 1995) (finding that the deprivation of liberty created by guardianship is analogous to that created by involuntary institutionalization).

78. *See In re* Mark C.H., 906 N.Y.S.2d 419, 425 (Surr. Ct. 2010) (finding that a person subject to guardianship's due process rights include periodic review of the guardianship). Similarly, it is widely agreed, although the Supreme Court has never directly decided the issue, that due process requirements as set forth in *Mathews* require allegedly incapacitated persons subject to guardianship proceedings have notice of those proceedings and opportunity to be heard. *See, e.g.*, Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceedings*, 2 MARQ. ELDER L. ADVISOR 13, 15–16 (2000), http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1328&context=elders [https://perma.cc/USU4-G4N5] (walking the reader through the application of *Mathews* to guardianship proceedings).

79. 424 U.S. 319, 335 (1976).

> finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.[80]

The first *Mathews* factor weighs heavily in favor of finding that persons subject to guardianship retain robust procedural due process rights. Guardianship poses an ongoing threat to liberty by the state. As such, both the continuance of a guardianship and the terms and conditions by which it is imposed trigger Fourteenth Amendment rights to due process.[81] In addition, by labeling the person subject to guardianship as incapacitated, guardianship creates an ongoing "badge of infamy" of a type that the United States Supreme Court has also recognized as implicating due process interests.[82] For this reason too, the continuance of guardianship triggers procedural due process rights.

The second *Mathews* factor also weighs heavily in favor of finding that persons subject to guardianship retain substantial procedural due process rights. A person's cognitive capacity depends on a number of different factors. Some of these are stable, but many others are not. For example, capacity can be significantly diminished by acute medical conditions, which may subsequently be cured or ameliorated.[83] A person's functional capacity may also be affected by the person's environment and resources, including the availability of support networks and services.[84] A person who is able to acquire an effective form of decision-making support may, therefore, be able to regain the capacity to make decisions she was previously unable to make despite

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80. *Id.* at 335.

81. *Cf. In re Mark C.H.*, 906 N.Y.S.2d at 426 (discussing how the deprivation of liberty created by guardianship gives rise to due process rights of persons subject to guardianship).

82. *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (holding that procedural due process required a state to give persons notice and opportunity to be heard before posting their names as persons to whom liquor sales were prohibited because of prior excessive drinking because, by so doing, the law created a "badge of infamy"); *In re Guardianship of Hedin*, 528 N.W.2d at 574 (analogizing the "badge of infamy" at issue in *Constantineau* to that created by a determination of incapacity through a guardianship determination).

83. *Cf.* AM. BAR ASS'N & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF CAPACITY IN OLDER ADULTS PROJECT WORKING GROUP, COMMISSION ON LAW AND AGING, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR PSYCHOLOGISTS 9–15 (2008) (illustrating the complexity of capacity assessment and importance of contextual factors with the hypothetical example of Mr. Olsen whose diminished capacity may be at least in part attributable to reversible causes including an adverse medication reaction, renal failure, social isolation, and anxiety).

84. For example, the quality of the relationship between a person with dementia and the person's primary caregiver as well as caregiver stress levels have been found to influence the functional and problem-solving capacity of the person with dementia. *See* Astri Ablitt et al., *Living with Dementia: A Systematic Review of the Influence of Relationship Factors*, 13 AGING & MENTAL HEALTH 497 (2009).

no other changes in her medical condition. Situations that were once dangerous for a person with diminished capacity may become safer, allowing that individual to regain independence. If persons subject to guardianship are unable to advocate for restoration of their capacity, either in part or in total, there is a serious risk that they will continue to be subjected to a severe deprivation of liberty that—even if previously appropriate—is no longer necessary.

The third *Mathews* factor also weighs in favor of finding robust procedural due process rights, although perhaps not as heavily as the first two. Although states have an interest in lowering the costs of court administration, the purpose of guardianship is to protect the person subject to guardianship, even if that protection comes at the expense of the taxpayer as in the case of indigent persons subject to the protection of a public guardian. In some cases, welcoming challenges to guardianship may actually reduce overall court expenditures. If a particular arrangement is not in fact protective, it is not in the state's interest to devote court resources to overseeing the guardianship. If the rights of a person subject to guardianship are restored, court oversight of guardianship is no longer needed.

Thus, the *Mathews* factors indicate that persons subject to guardianship have a substantial constitutionally protected interest in meaningful access to procedures that allow them to challenge the existence and breadth of their guardianships. When a person subject to guardianship is seeking to challenge the terms or existence of the guardianship, the guardian has a conflict of interest that makes it untenable to defer to her to protect the due process interests of the person subject to guardianship.[85] At a bare minimum, procedural due process should be interpreted as requiring that such persons have the opportunity to directly (i.e., without approval of the guardian or a court) challenge the continuance or breadth of their guardianships.[86] Procedural due process rights in this context should also be interpreted as requiring that persons subject to guardianship have the ability to directly challenge

85. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 24 cmt. f. (AM. LAW INST. 2000). This conflict of interest is further suggested by the fact that guardians appear to frequently oppose petitions for restoration when they are brought by persons subject to guardianship. *See* Cassidy, *supra* note 6, at 107.

86. Using this general line of reasoning, attorney Patricia Cavey has challenged the "myth" that an incapacitated person lacks the ability to hire an attorney, but one can be hired by the guardian on the individual's behalf. *See* Cavey, *supra* note 3, at 28 ("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.").

certain terms and conditions of the guardianship, including the selection of a particular individual to serve as a guardian. Here too, the guardian has an intractable conflict of interest that makes it untenable to defer to the guardian to protect the person's due process interest. Indeed, without an ability to directly be heard, it would be virtually impossible for a person subject to guardianship to appeal a determination of incapacity, challenge the actions of a guardian, or seek to alter or terminate the guardianship.

Arguably, the person subject to guardianship also has a substantive due process right that supports the ongoing right to counsel.[87] There is a line of constitutional jurisprudence that suggests that substantive due process requires states to adhere to the principle of the least restrictive alternative (i.e., to not infringe on individual rights more than necessary to achieve the government's purpose) when depriving citizens of rights on the basis of disability.[88] If persons subject to guardianship cannot engage an attorney to directly challenge their guardianship arrangement, including to seek restoration of capacity or of certain legal rights, it will not be possible to adhere to this principle.[89]

To deny persons subject to guardianship access to legal representation

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87. Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. TOL. L. REV. 189, 202 (1994) (presenting the claim that the least restrictive alternative is constitutionally required in the guardianship context).

88. The Supreme Court's decision in *Shelton v. Tucker*, 364 U.S. 479 (1960), which stated that "[t]he breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose," gave rise to significant speculation that the state must abide by the least restrictive alternative when limiting individual rights. *Id.* at 488. This understanding was significantly undermined by the Court's later decision in *Heller v. Doe*, 509 U.S. 312 (1993), in which the Court held that a statute can withstand rational basis review even though the state has not used the least intrusive means necessary to achieve its purpose. *Id.* at 329–30. Since *Heller* did not directly refute the statement in *Shelton*, and since there is a line of post-*Shelton* jurisprudence supportive of the least restrictive alternative as constitutional mandate, an argument can continue to be made that there is a constitutionally protected substantive due process interest in having the state adhere to the least restrictive alternative principle. That said, the current trend is not to expand the doctrine. *See* Michael L. Perlin, *"Their Promises of Paradise": Will* Olmstead v. L.C. *Resuscitate the Constitutional "Least Restrictive Alternative" Principle in Mental Disability Law?*, 37 HOUS. L. REV. 999, 1000–02 (2000) (discussing the history of cases suggesting a constitutionally grounded "least restrictive alternative" and describing the status of this approach as murky and muddled); Judith A. Goldberg, Note, *Due Process Limitations on Involuntary Commitment of Individuals Who Abuse Drugs or Alcohol*, 75 B.U. L. REV. 1481, 1498 (1995) (discussing the impact of *Heller* on the constitutional status of the least restrictive alternative principle in the involuntary commitment context).

89. *See In re* Guardianship of Dameris L., 956 N.Y.S.2d 848, 855 (Surr. Ct. 2012) (reasoning that "[t]o the extent that New York courts have recognized least restrictive alternative as a constitutional imperative . . . proof that a person with an intellectual disability *needs* a guardian must exclude the possibility of that person's ability to live safely in the community supported by family, friends and mental health professionals" (emphasis in original) (citations omitted)).

in order to challenge the existence, terms, or conditions of a guardianship would be to impose restrictions on their rights beyond those strictly needed for their protection. The right to be represented by an attorney is fundamentally different from other rights taken from a person subject to guardianship in that its exercise typically results in more protection for the person subject to guardianship, not less. An attorney can serve as a check on unnecessary infringements of liberty, an advocate in decision-making, and a watchdog to make sure the guardian acts responsibly. Moreover, as discussed earlier, attorney-client relationships are generally highly regulated relative to other types of agreements into which persons subject to guardianship might attempt to enter.[90]

In short, even after being adjudicated incapacitated, a person subject to guardianship has important retained procedural and substantive due process rights with regard to matters related to the guardianship. In addition, those subject to limited guardianship—and those in states that recognize that certain rights are retained absent an adjudication to the contrary—may have retained rights related to matters outside of the guardianship.

These rights may, naturally, require legal advice or advocacy to exercise. Indeed, having the right to directly challenge the continued necessity or terms of the guardianship, including who serves as guardian, is virtually meaningless without the accompanying right to legal representation.[91] Recognition of this practical necessity is reflected in the fact that almost all state guardianship statutes extend the right to counsel to persons subject to guardianship involved in certain adversarial guardianship proceedings.[92] Moreover, to deprive persons subject to

90. *See supra* notes 71–73 and accompanying text.

91. An Illinois appellate court recognized this in *In re Estate of Thompson*, 542 N.E.2d 949 (Ill. App. Ct. 1989), in which the court held that a person subject to guardianship had a right to counsel to seek restoration of his rights. *Id.* at 951. In so doing, the court explained that this right was designed to "ensure that disabled adults are afforded their procedural and constitutional rights, one of these rights being the right to be represented by counsel." *Id.* at 952.

92. Some statutes implicitly extend the right to counsel that exists in an initial guardianship hearing by requiring the same procedural safeguards that apply in petitions to appoint a guardian to particular procedures that can occur after the appointment of a guardian. *See* ALA. CODE § 26-2A-110 (Westlaw through 2016 Reg. Sess.) (requiring court to follow same procedures to safeguard ward's rights before appointing a successor guardian or restoring ward to capacity); ALASKA STAT. ANN. § 13.26.125 (West, Westlaw through 2016 2d Reg. Sess.) (requiring court to follow same procedures and empowering the court to send a visitor before removing a guardian, changing a guardian's responsibilities, or ordering the guardianship to be modified or terminated); ARIZ. REV. STAT. ANN. § 14-5307 (Westlaw through 2016 2d Reg. Sess.) (requiring court to follow same procedures before substituting a guardian, accepting a guardian's resignation, or restoring a ward's capacity); COLO. REV. STAT. ANN. § 15-14-318 (West, Westlaw through 2016 2d Reg. Sess.)

(requiring court to follow same procedures before terminating a guardianship); HAW. REV. STAT. ANN. § 560:5-318 (West, Westlaw through 2015 Reg. Sess.) (requiring court to follow same procedures before terminating a guardianship); IDAHO CODE ANN. § 15-5-307 (West, Westlaw through 2016 2d Reg. Sess.) (requiring court to follow same procedures before removing a guardian, accepting the guardian's resignation, or ordering restoring the ward's capacity); LA. CODE CIV. PROC. ANN. art. 4554 (Westlaw through 2015 Reg. Sess.) (requiring court, except for good cause, to follow substantially same procedures before changing or terminating an interdiction judgment); ME. REV. STAT. ANN. tit. 18-A, § 5-307 (Westlaw through 2015 2d Reg. Sess.) (requiring court to follow same procedures before removing a guardian or accepting a guardian's resignation); MASS. GEN. LAWS ANN. ch. 190B, § 5-311 (West, Westlaw through 2016 2d Annual Sess.) (requiring court to follow same procedures before appointing a successor guardian or restoring capacity); MICH. COMP. LAWS ANN. § 700.5310 (West, Westlaw through 2016 Reg. Sess.) (requiring court to follow same procedures before removing a guardian, appointing a successor guardian, changing the terms of the guardianship, or terminating the guardianship); MINN. STAT. ANN. § 524.5-317 (West, Westlaw through 2016 Reg. Sess.) (requiring court, except as otherwise ordered by the court for good cause, to follow same procedures before terminating a guardianship); MONT. CODE ANN. § 72-5-325(3) (West, Westlaw through 2015 Sess.) (requiring court to follow same procedures before appointing a successor guardian or restoring the ward's capacity); NEB. REV. STAT. ANN. § 30-2620 (West, Westlaw through 2016 2d Reg. Sess.) (requiring court to follow same procedures before removing a guardian, accepting a guardian's resignation, or restoring the ward's capacity); N.H. REV. STAT. ANN. § 464-A:39 (Westlaw through 2016 Reg. Sess.) (requiring court to follow same procedures before removing a guardian, accepting a guardian's resignation, or restoring the ward's capacity); N.M. STAT. ANN. § 45-5-307 (West, Westlaw through 2016 2d Reg. Sess.) (requiring court to follow same procedures upon the filing of a petition to terminate the guardianship, for reasons other than death of incapacitated person, or in a proceeding that increases guardian's authority or reduces protected person's autonomy); N.D. CENT. CODE ANN. § 30.1-28-07 (West, Westlaw through 2015 Reg. Sess.) (requiring court to follow same procedures before removing a guardian, accepting a guardian's resignation, or finding that the ward is no longer incapacitated and terminating the guardianship); OR. REV. STAT. ANN. § 125.090 (West, Westlaw through 2016 Reg. Sess.) (granting same rights and procedures when motion to terminate is filed and opposed by fiduciary); 20 PA. CONS. STAT. ANN. § 5512.2 (West, Westlaw through 2016 Reg. Sess.) (granting same rights in review hearing); TENN. CODE ANN. § 34-3-108 (West, Westlaw through 2016 2d Reg. Sess.) (granting same rights in hearing on petition to modify or terminate conservatorship); UTAH CODE ANN. § 75-5-307 (West, Westlaw through 2015 1st Spec. Sess.) (requiring court to follow same procedures before removing a guardian, accepting a guardian's resignation, or finding that the ward is no longer incapacitated). Other states expressly recognize the right of a person subject to guardianship to be represented in certain procedures related to the guardianship. *See* CAL. PROB. CODE § 1471 (West, Westlaw through 2016 Reg. Sess. and 2015–2016 2d Exec. Sess.) (requiring appointment in proceeding to terminate conservatorship, remove conservator, modify legal capacity, or remove conservatee from place of residence); CONN. GEN. STAT. ANN. § 45a-649a (West, Westlaw through 2016) (granting conserved person right to attorney in proceedings subsequent to appointment of conservator); *id.* § 45a-681a(6) (Westlaw) (granting person with an intellectual disability the right to attorney in annual guardianship review); FLA. STAT. ANN. § 744.464 (West, Westlaw through 2016 2d Reg. Sess.) (requiring notice to ward's attorney, if any, of filing of suggestion of capacity and, if contested, requiring court-appointed attorney if ward not already represented); GA. CODE ANN. § 29-4-42 (West, Westlaw through 2015 Legis. Year) (reserving the ward's right to bring guardianship-related action through legal counsel); 755 ILL. COMP. STAT. ANN. 5 / 11a-21 (West, Westlaw through 2016 Reg. Sess.) (entitling ward to be represented by counsel in hearing on termination, modification, or revocation); KY. REV. STAT. ANN. § 387.620 (LexisNexis, LEXIS through 2016 Reg. Sess.) (entitling disabled person right to counsel in hearing on petition to terminate or modify guardianship, remove or replace guardian, or renew guardianship appointment); MASS. GEN. LAWS ANN. ch. 190B, § 5-106 (Westlaw) (stating

guardianship of such representation would expand the scope of the guardianship beyond what is ordered by the court, thereby violating both procedural due process guarantees and potentially the person's substantive due process rights by making the guardianship more restrictive than necessary.[93]

Some might argue that these due process rights could be adequately protected by providing for a guardian or court to hire an attorney for the person subject to guardianship. However, such provision would render the right to counsel hollow. If forced to defer to a potential adversary

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that provision allowing court to appoint attorney for ward does not limit ward's right to retain counsel of own choice to defend or prosecute petition under guardianship statutes); MINN. STAT. ANN. § 524.5-120 (Westlaw) (reserving the ward's right to be represented by an attorney in any proceeding or to petition the court); MO. ANN. STAT. § 475.083(b) (West, Westlaw through 2016 2d Reg. Sess.) (entitling ward to legal representation if petition to restore capacity filed without joinder of guardian); NEB. REV. STAT. ANN. § 30-2620 (Westlaw) (authorizing the ward to retain counsel for the sole purpose of challenging the guardianship, the terms of the guardianship, or the guardian's actions); N.Y. MENTAL HYG. LAW § 81.36 (McKinney, Westlaw through L. 2016) (granting right to jury trial in proceedings to discharge guardian or modify guardianship if incapacitated person, individually or through counsel, raises an issue of fact as to incapacitated person's ability to provide for personal needs or manage property); N.C. GEN. STAT. ANN. § 35A-1130 (West, Westlaw through 2015 Reg. Sess.) (granting ward right to be represented by counsel or guardian ad litem in hearing on restoration of capacity); OHIO REV. CODE ANN. § 2111.49 (West, Westlaw through 131st Gen. Assemb. 2015-16) (allowing ward or ward's attorney to request hearing to evaluate continued necessity of guardianship); OKLA. STAT. ANN. tit. 30, §§ 3-106(A)(7), 3-107 (West, Westlaw through 2016 2d Reg. Sess.) (granting person found to be incapacitated right to court-appointed counsel upon request—or sua sponte if the respondent is not capable of making informed decisions—in any hearing conducted pursuant to Article III of Guardianship Act); OR. REV. STAT. ANN. § 125.300 (Westlaw) (reserving protected person's right to contact and retain counsel unless otherwise ordered by the court); 33 R.I. GEN. LAWS ANN. § 33-15-18 (West, Westlaw through 2016 Sess.) (allowing ward to retain counsel to request removal of guardian); TEX. EST. CODE ANN. §§ 1202.101, .103 (West, Westlaw through 2015 Reg. Sess.) (requiring court to appoint attorney ad litem to represent ward in proceedings for modification or restoration and permitting ward to retain attorney in proceeding to modify guardianship or restore capacity); VT. STAT. ANN. tit. 14, § 3065 (West, Westlaw through 2015–2016 Adjourned Sess.) (requiring court to appoint counsel for respondent in any proceeding once the initial guardianship petition is filed, if requested); WASH. REV. CODE § 11.88.120 (2014) (recognizing the right of a person subject to guardianship to be represented by counsel and requiring the person be given reasonable notice of right to be represented by attorney of own choosing at any hearing to modify or terminate guardianship); W. VA. CODE ANN. § 44A-4-6 (West, Westlaw through 2016 Reg. Sess.) (requiring court to appoint counsel for protected person in proceedings related to modification, termination, or revocation); WIS. STAT. ANN. § 54.42 (West, Westlaw through 2015) (granting the ward right to counsel upon request or if court determines interests of justice requires representation of ward); *id.* § 54.64(2)(b) 42 (Westlaw) (granting ward right to retain and contract for payment of attorney, subject to court-approval, or court-appointed counsel in review proceedings).

93. *E.g.*, N.C. Bar Ass'n, Formal Op. 16 (1999), http://www.ncbar.com/ethics/ethics.asp?page=304 [https://perma.cc/239U-V7WC] (stating that a person subject to guardianship was "entitled to counsel of her own choosing particularly with regard to a proceeding [to challenge imposition of guardianship because it] so clearly and directly affects her freedom to continue to make decisions for herself").

(the guardian) to select one's counsel, the person would have no viable mechanism—without an attorney—for challenging a failure to make such provisions. Furthermore, unless permitting a person subject to guardianship to engage her own attorney poses a substantial risk of harm, delegating this right to the guardian is an unnecessary infringement on rights that is inconsistent with the least restrictive alternative principle.

We recognize, of course, that the right of a person subject to guardianship to engage an attorney is not unlimited. Neither procedural nor substantive due process rights entitle a person subject to guardianship to retain the right to make decisions that the guardian has lawfully been authorized to make, and thus do not entitle such persons to engage an attorney to represent them as to those decisions. Several courts have explicitly recognized this distinction. For example, in *In re Guardianship of Giventer*,[94] after a guardian and conservator were appointed, Giventer engaged her attorneys to provide ongoing legal services for her, including filing an appeal challenging the guardianship.[95] Once the appeal had been resolved in favor of the guardianship continuing, an objection was filed challenging Giventer's attorneys' authority to represent her further.[96] Under the relevant Nebraska statute, a person subject to guardianship was only authorized to be represented by an attorney "for the sole purpose of challenging the guardianship, the terms of the guardianship, or the actions of the guardian on behalf of the ward."[97] Giventer responded by asserting her right to be represented to challenge the payment of attorney fees and costs (payable to lawyers representing the guardian and conservator) out of her estate. She claimed that her guardian's refusal to contest these fees was a "term of the guardianship."[98] The court disagreed, finding that she was not challenging the guardianship, the terms of the guardianship, or the actions of the guardian, and therefore was not entitled to representation.[99]

In short, due process guarantees mean that persons subject to guardianship must have the opportunity to challenge the existence,

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94. Nos. A-11-806, A-11-974, 2013 WL 2106656 (Neb. Ct. App. Apr. 9, 2013).

95. *Id.* at *1.

96. *Id.*

97. *Id.* at *3 (quoting NEB. REV. STAT. ANN. § 30-2620(b) (Westlaw)).

98. *Id.* at *2.

99. *Id.* at *4. This distinction was also recognized by the Massachusetts Supreme Court in *In re Guardianship of Hocker*, 791 N.E.2d 302 (Mass. 2003), discussed *infra* notes 172–180 and accompanying text.

terms, and conditions of their guardianships and to employ an attorney to assist in this process. By contrast, such persons do not have a due process right to representation with regard to tasks that have been delegated to the guardian. This limitation, however, does not mean that a person subject to guardianship can necessarily be stripped of the right to challenge any decision made by the guardian. If the person is not simply challenging the guardian's judgment, but rather is alleging that the guardian acted in a manner inconsistent with the guardian's authority (e.g., the guardian breached a fiduciary duty), due process rights may well attach.

D. Statutory Protections of Access to Counsel

In addition to the constitutional protections discussed in the preceding Section, many states have adopted statutes that explicitly or implicitly require persons subject to guardianship be permitted to engage counsel to represent their interests in certain conditions. In some states, there is an explicit right to counsel, for example, to seek restoration of rights.[100] Even more states have adopted the "least restrictive alternative" standard which may have a similar effect.[101]

The least restrictive alternative standard requires that guardianship only be imposed if there is no less restrictive alternative available and that, when imposed, guardianships be no more restrictive than necessary.[102] A court order stripping an individual of the ability to engage counsel to represent her—with regard to retained rights or for the purpose of challenging the existence, terms, or conditions of the guardianship—would be inconsistent with this standard.

Most states have codified the least restrictive alternative standard in their guardianship statutes. In many cases, this reflects the states' decision to adopt language from the 1997 version of the Uniform Guardianship and Protective Proceedings Act (UGPPA)[103] which

100. *See supra* note 92 and accompanying text.

101. *See infra* notes 104–08.

102. *See* UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT prefatory note (UNIF. LAW COMM'N 1997) (describing the principle of least restrictive alternative as, among other things, requiring that a court only remove "those rights that the incapacitated person no longer can exercise or manage"); Am. Bar Ass'n Comm. on the Mentally Disabled & Comm. on Legal Problems of the Elderly, *Guardianship: An Agenda for Reform*, 13 MENTAL & PHYSICAL DISABILITY L. REP. 271, 293 (1989) (discussing the least restrictive alternative approach).

103. *See, e.g.*, ARIZ. REV. STAT. ANN. § 14-5304 (West, Westlaw through 2016 2d Reg. Sess.); COLO. REV. STAT. ANN. § 15-14-311 (West, Westlaw through 2016 2d Reg. Sess.); HAW. REV. STAT. ANN. § 560:5-311 (West, Westlaw through 2015 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 190B, § 5-306 (West, Westlaw through 2016 2d Annual Sess.); MINN. STAT. ANN. § 524.5-310

embraced the standard by permitting the appointment of a guardian only if the court finds "the respondent's identified needs cannot be met by less restrictive means."[104] The vast majority of states require the court to consider whether guardianship is necessary, whether the respondent's needs or interests could be protected by less restrictive means, or both.[105]

(West, Westlaw through 2016 Reg. Sess.). As of the date of publication, the UGPPA was under revision.

104. UNIF. GUARDIANSHIP & PROTECTIVE PROCEEDINGS ACT § 311(a)(1)(B). The comment to this section explains, "[t]he Act's emphasis on less restrictive alternatives, a high evidentiary standard and the use of limited guardianship is consistent with the Act's philosophy that a guardian should be appointed only when necessary, only for as long as necessary, and with only those powers as are necessary." *Id.* § 311 cmt.

105. *See* ALASKA STAT. ANN. § 13.26.090 (West, Westlaw through 2016 2d Reg. Sess.) (limiting use of guardianship to where necessary to promote and protect incapacitated person's well-being); *id.* § 13.26.113 (Westlaw) (permitting court to dismiss petition if finds alternatives are feasible and adequate); ARK. CODE ANN. § 28-65-213 (West, Westlaw through 2015 Reg. Sess. and 2015 1st Exec. Sess.) (requiring court to consider feasibility of less restrictive alternatives before imposing guardianship); CAL. PROB. CODE § 1800.3 (West, Westlaw through 2016 Reg. Sess. and 2015–2016 2d Exec. Sess.) (prohibiting appointment of conservator unless court expressly finds granting conservatorship is least restrictive alternative); CONN. GEN. STAT. ANN. § 45a-650 (West, Westlaw through 2016) (permitting court to appoint conservator only if findings include conservatorship is least restrictive means of intervention available); FLA. STAT. ANN. § 744.331 (West, through Westlaw 2016 2d Reg. Sess.) (limiting appointment of guardianship to situations in which court finds no sufficient alternative exists); 755 ILL. COMP. STAT. ANN. 5 / 11a-12 (West, Westlaw through 2016 Reg. Sess.) (permitting court to appoint limited guardian if necessary for protection of disabled person and plenary guardian if court determines limited guardian insufficiently protective); IND. CODE ANN. § 29-3-5-3 (West, Westlaw through 2016 2d Reg. Sess.) (requiring court to appoint guardian if finds necessary to provide care and supervision of incapacitated person); IOWA CODE ANN. § 633.556 (West, Westlaw through 2016 Reg. Sess.) (permitting court to appoint guardian if necessity proved by clear and convincing evidence); KAN. STAT. ANN. § 59-3067 (West, Westlaw through 2015 Reg. Sess.) (requiring court to deny guardianship petition if other appropriate and sufficient alternatives exist); KY. REV. STAT. ANN. § 387.540 (LexisNexis, LEXIS through 2016 Reg. Sess.) (requiring interdisciplinary evaluation team to consider whether alternatives to guardianship are available); LA. CIV. CODE ANN. art. 389, 390 (Westlaw through 2015 Reg. Sess.) (allowing court to order partial or full interdiction for individual whose interests cannot be protected by less restrictive means); MICH. COMP. LAWS ANN. § 700.5306a (West, Westlaw through 2016 Reg. Sess.) (requiring proof of incapacity and need for a guardianship to be proved by clear and convincing evidence); MONT. CODE ANN. § 72-5-306 (West, Westlaw through 2015 Sess.) (permitting guardianship only as necessary to promote and protect well-being of person); NEV. REV. STAT. ANN. § 159.055 (West, Westlaw through 2015 Reg. Sess.) (requiring necessity of guardianship be proven by clear and convincing evidence); N.H. REV. STAT. ANN. § 464-A:9 (Westlaw through 2016 Reg. Sess.) (requiring finding that (1) guardianship is necessary; (2) no alternative resources are available; and (3) guardianship is least restrictive intervention); N.M. STAT. ANN. § 45-5-301.1 (West, Westlaw through 2016 2d Reg. Sess.) (permitting guardianship to be used only as necessary); N.Y. MENTAL HYG. LAW § 81.02 (McKinney, Westlaw through L. 2016) (permitting court to appoint a guardian if it determines appointment necessary); OHIO REV. CODE ANN. § 2111.02 (West, Westlaw through 131st Gen. Assemb. 2015-16) (requiring a finding of necessity and permitting court to deny petition for guardianship if it finds less restrictive alternative available); OKLA. STAT. ANN. tit. 30, § 3-111 (West, Westlaw through 2016 2d Reg. Sess.) (requiring court to determine if guardianship is needed); OR. REV. STAT. ANN. § 125.300

A number of states also reference the least restrictive alternative standard in describing legislative intent or the purpose of guardianship.[106]

States adopting a least restrictive alternative standard also generally require that, if guardianship is granted, the guardianship order be limited to what is necessary to protect the interests of the person subject to guardianship.[107] In addition, some states impose ongoing requirements to

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(West, Westlaw through 2016 Reg. Sess.) (permitting guardianship only as necessary to protect protected person's well-being); R.I. GEN. LAWS ANN. § 33-15-2 (West, Westlaw through 2016 Sess.) (requiring petitioner to describe steps taken to use less restrictive alternative); S.D. CODIFIED LAWS § 29A-5-312 (Westlaw through 2016 Reg. Sess.) (listing availability of less restrictive alternatives as factor in determining need for guardianship); 2015 Tex. Gen. Laws 1291 (requiring court to determine alternatives to guardianship are not feasible); VT. STAT. ANN. tit. 14, § 3063 (West, Westlaw through 2015–2016 Adjourned Sess.) (requiring petitioner to describe alternatives considered and why they are unavailable or unsuitable); *id.* § 3065 (Westlaw) (requiring counsel for respondent to seek to ensure there are no less restrictive alternatives); VA. CODE ANN. § 64.2-2007 (West, Westlaw through 2015 Reg. Sess.) (listing availability of less restrictive alternatives as factor in determining need for guardianship); W. VA. CODE ANN. § 44A-2-10 (West, Westlaw through 2016 Reg. Sess.) (listing availability of less restrictive alternatives as factor in determining whether individual is a protected person); WIS. STAT. ANN. § 54.10 (West, Westlaw through 2015) (requiring court to find individual's needs are unable to be met less restrictively though means person will accept); WYO. STAT. ANN. § 3-2-104 (West, Westlaw through 2015 Gen. Sess.) (permitting court to appoint guardian upon finding that necessity proved by a preponderance of evidence). A few states require the court to find a guardianship is necessary or desirable. ALA. CODE § 26-2A-105 (Westlaw through 2016 Reg. Sess.); ME. REV. STAT. ANN. tit. 18-A, § 5-304 (Westlaw through 2015 2d Reg. Sess.); S.C. CODE ANN. § 62-5-304 (West, Westlaw through 2016); UTAH CODE ANN. § 75-5-304 (West, Westlaw through 2015 1st Special Sess.) (permitting court to appoint guardian if satisfied that appointment is necessary or desirable to provide care and supervision of incapacitated person).

106. *See* FLA. STAT. ANN. § 744.1012 (West, through Westlaw 2016 2d Reg. Sess.) (declaring the legislative intent of making available the least restrictive form of guardianship); KY. REV. STAT. ANN. § 387.500 (LexisNexis, LEXIS through 2016 Reg. Sess.) (stating, to fulfill legislative purpose, guardianship should be utilized only as necessary to promote well-being of disabled persons); NEB. REV. STAT. ANN. § 30-2601.02 (West, Westlaw through 2016 2d Reg. Sess.) (declaring legislative intent to encourage least restrictive alternative possible); N.Y. MENTAL HYG. LAW § 81.01 (McKinney, Westlaw through L. 2016) (declaring desire of legislature to make available least restrictive form of intervention that assists individuals to meet needs while permitting exercise of independence and self-determination); 20 PA. CONS. STAT. ANN. § 5502 (West, Westlaw through 2016 Reg. Sess.) (declaring the purpose of guardianship statute to include protecting rights of incapacitated persons through the use of the least restrictive alternative); R.I. GEN. LAWS ANN. § 33-15-1 (West, Westlaw through 2016 Sess.) (declaring the legislature's intent to make the least restrictive form of guardianship available); VT. STAT. ANN. tit. 14, § 3060 (West, Westlaw through 2015–2016 Adjourned Sess.) (stating policy that guardianship be utilized only as necessary to promote well-being and protect human and civil rights).

107. *See* ALASKA STAT. ANN. § 13.26.116 (West, Westlaw through 2016 2d Reg. Sess.) (prohibiting guardianship plan from being more restrictive than reasonably necessary and limiting the duties or powers assignable to a guardian to those proven necessary with no less restrictive alternative available); FLA. STAT. ANN. § 744.3215 (West, through Westlaw 2016 2d Reg. Sess.) (requiring guardianship order to be least restrictive alternative and reserving ward's right to make decisions in all matters ward has ability to do so, to remain as independent as possible, to access the

justify the continuation of the guardianship as the least restrictive alternative.[108]

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court, and to counsel, among others); GA. CODE ANN. § 29-4-1 (West, Westlaw through 2015 Legis. Year) (allowing guardianship only to the extent necessary and after a determination that less restrictive alternatives are not available or appropriate); *id.* § 29-4-20 (Westlaw) (granting ward right to least restrictive form of guardianship); IDAHO CODE ANN. § 15-5-303 (West, Westlaw through 2016 2d Reg. Sess.) (stating that minimizing interference with legal capacity of wards to act in their own behalf best fulfills the objectives of guardianship); *id.* § 15-5-304 (Westlaw) (instructing court to issue appointive and other orders only to extent necessitated by incapacitated person's limitations or conditions); 755 ILL. COMP. STAT. ANN. 5 / 11a-3 (West, Westlaw through 2016 Reg. Sess.) (limiting guardianship to extent necessary by individual's limitations); KY. REV. STAT. ANN. § 387.660 (LexisNexis, LEXIS through 2016 Reg. Sess.) (imposing duty on guardian to only limit ward's civil rights or personal freedom to extent necessary to provide needed care and services); MD. CODE ANN., EST. & TRUSTS § 13-708 (West, Westlaw through 2016 Reg. Sess.) (requiring court to grant guardian only powers necessary); MICH. COMP. LAWS ANN. § 700.5306a (West, Westlaw through 2016 Reg. Sess.) (granting right to limit guardianship to powers and time necessary); N.H. REV. STAT. ANN. § 464-A:1 (Westlaw through 2016 Reg. Sess.) (defining purpose of guardianship statute to include imposing protective orders only to extent necessary); *id.* § 464-A:25 (Westlaw) (instructing guardian to safeguard ward's civil rights to greatest extent possible and restrict ward's personal freedom only as necessary); N.M. STAT. ANN. § 45-5-301.1 (West, Westlaw through 2016 2d Reg. Sess.) (stating guardianship should be ordered only to extent necessary); N.C. GEN. STAT. ANN. § 35A-1201 (West, Westlaw through 2015 Reg. Sess.) (stating guardianship should offer incompetent person opportunity to exercise rights within person's comprehension and judgment and to participate as fully as possible in decisions); N.D. CENT. CODE ANN. § 30.1-29-08 (West, Westlaw through 2015 Reg. Sess.) (authorizing protective orders only to extent made necessary by individual's limitations and conditions); OKLA. STAT. ANN. tit. 30, § 1-103 (West, Westlaw through 2016 2d Reg. Sess.) (instructing court to make appointive or other orders only to extent necessary by incapacitated person's limitations or conditions); OR. REV. STAT. ANN. § 125.300 (West, Westlaw through 2016 Reg. Sess.) (stating guardianship may be ordered only to extent necessary and reserving all legal and civil rights not expressly limited, including right to contact and retain counsel); *id.* § 125.305 (Westlaw) (requiring guardianship order be no more restrictive than reasonably necessary); S.C. CODE ANN. § 62-5-304 (West, Westlaw through 2016) (instructing court to make appointive or other orders only to extent necessary by incapacitated person's limitations or conditions); VT. STAT. ANN. tit. 14, § 3069 (West, Westlaw through 2015–2016 Adjourned Sess.) (requiring court to grant guardian powers in least restrictive manner); WASH. REV. CODE § 11.88.005 (2014) (declaring legislative intent to restrict liberty and autonomy only to minimum extent necessary); WIS. STAT. ANN. § 54.10 (West, Westlaw through 2015) (limiting guardian's powers to what are necessary and requiring the exercise of powers in a manner that constitutes the least restrictive form of intervention).

108. *See* CONN. GEN. STAT. ANN. §§ 45a-656, -660 (West, Westlaw through 2016) (requiring conservator to state in annual report whether conservatorship remains least restrictive alternative and court to conduct periodic reviews of conservatorship and to terminate conservatorship unless finds by clear and convincing evidence that conserved person continues to be incapable and no less restrictive alternatives are available); DEL. CH. CT. R. 180-C (West, Westlaw through Mar. 1, 2016) (requiring court to terminate guardianship upon finding no longer necessary); FLA. STAT. ANN. § 744.3215 (West, through Westlaw 2016 2d Reg. Sess.) (granting ward rights to continuing review of need for restrictions of rights and to be restored to capacity as soon as possible); MD. CODE ANN., EST. & TRUSTS § 13-708 (West, Westlaw through 2016 Reg. Sess.) (requiring court to annually review whether grounds for original petition continue to exist); OKLA. STAT. ANN. tit. 30, § 4-305 (West, Westlaw through 2016 2d Reg. Sess.) (requiring annual report to state reasons why guardianship should continue and why no less restrictive alternative would meet ward's needs);

To deny persons subject to guardianship access to legal representation would impose restrictions on their rights beyond those strictly needed for their protection.[109] In addition, those subject to limited guardianship—and those in states that recognize that certain rights are retained absent an adjudication to the contrary—may have retained rights related to matters outside of the guardianship. These rights may, naturally, require legal advice or advocacy to exercise. To deprive the person subject to guardianship of such representation would expand the scope of the guardianship beyond what is ordered by the court, thereby making the guardianship more restrictive than necessary.[110] Unless permitting a person subject to guardianship to engage his or her own attorney poses a substantial risk of harm, delegating this right to the guardian is an unnecessary infringement on rights that would violate the least restrictive alternative requirement.

Related to the requirement that guardianship be no more restrictive than necessary, many state statutes affirmatively encourage or require courts or guardians to promote the independence and self-reliance of persons subject to guardianship.[111] To the extent that legal representation

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N.C. GEN. STAT. ANN. § 35A-1242 (West, Westlaw through 2015 Reg. Sess.) (requiring guardian to describe efforts to seek alternatives to guardianship in status reports).

109. As discussed *supra* page 601, the right to be represented by an attorney differs from other rights removed through a guardianship proceeding in that exercising this right generally increases rather than reduces the protection afforded to the person subject to guardianship because an attorney can check unnecessary infringements of liberty, advocate for the person, and guard against misconduct by the guardian.

110. *See supra* note 107

111. ALA. CODE § 26-2A-105 (Westlaw through 2016 Reg. Sess.) (requiring court to encourage development of the incapacitated person's self-reliance and independence); ALASKA STAT. ANN. § 13.26.090 (West, Westlaw through 2016 2d Reg. Sess.) (stating purpose of guardianship to encourage person's maximum self-reliance and independence); *id.* § 13.26.116 (Westlaw) (requiring guardianship plan to be designed to encourage ward to participate in decisions and act on own behalf to maximum extent possible); *id.* § 13.26.150 (Westlaw) (requiring guardian to encourage ward to participate in all decisions affecting ward and act on ward's own behalf to maximum extent possible); ARIZ. REV. STAT. ANN. § 14-5304 (Westlaw through 2016 2d Reg. Sess.) (requiring court to encourage development of incapacitated person's self-reliance and independence); *id.* § 14-5312 (Westlaw) (requiring guardian, if appropriate, to encourage ward to develop maximum self-reliance and independence and to actively work toward limiting or terminating guardianship); CAL. PROB. CODE § 1801 (West, Westlaw through 2016 Reg. Sess. and 2015–2016 2d Exec. Sess.) (requiring limited conservatorship to be designed to encourage conservatee's maximum self-reliance and independence, and specifying legislative intent that persons with developmental disabilities receive services to promote independence and productivity); COLO. REV. STAT. ANN. § 15-14-311 (West, Westlaw through 2016 2d Reg. Sess.) (requiring court, whenever possible, to grant guardian only powers necessitated by ward's limitations and to encourage development of ward's maximum self-reliance and independence); CONN. GEN. STAT. ANN. § 45a-656 (West, Westlaw through 2016) (requiring conservator to help conservatee achieve self-reliance and provide conservatee opportunity for meaningful participation in decision-making); FLA. STAT. ANN. § 744.1012 (West,

through Westlaw 2016 2d Reg. Sess.) (declaring the best way of achieving statutory purpose is to permit incapacitated persons to participate as fully as possible in decisions affecting them, protecting their rights, and developing or regaining abilities to maximum extent possible); GA. CODE ANN. § 29-4-1 (West, Westlaw through 2015 Legis. Year) (requiring guardianship to be designed to help ward develop maximum self-reliance and independence); HAW. REV. STAT. ANN. § 560:5-311 (West, Westlaw through 2015 Reg. Sess.) (requiring court to encourage development of ward's maximum self-reliance and independence); *id.* § 560:5-314 (Westlaw) (imposing duty on guardian to encourage ward to participate in decisions, act on his or her own behalf and develop or regain capacity); IDAHO CODE ANN. § 15-5-303 (West, Westlaw through 2016 2d Reg. Sess.) (stating guardianship should permit incapacitated persons to participate as fully as possible in decisions affecting them, protect their rights, and assist them to develop or regain abilities to maximum extent possible); *id.* § 15-5-304 (Westlaw) (instructing court to encourage development of maximum self-reliance and independence); 755 ILL. COMP. STAT. ANN. 5 / 11a-3 (West, Westlaw through 2016 Reg. Sess.) (requiring guardianship to be used to encourage development of ward's maximum self-reliance and independence); *id.* 5 / 11a-17 (Westlaw) (imposing duty on guardian to assist ward to develop maximum self-reliance and independence); IOWA CODE ANN. § 633.635 (West, Westlaw through 2016 Reg. Sess.) (permitting, but not requiring, court to authorize guardian to assist ward to develop maximum self-reliance and independence); KAN. STAT. ANN. § 59-3075 (West, Westlaw through 2015 Reg. Sess.) (requiring guardian to encourage ward to participate in decisions, act on the ward's own behalf, and develop or regain skills and abilities as well as strive to protect the ward's personal, civil, and human rights); KY. REV. STAT. ANN. § 387.500 (LexisNexis, LEXIS through 2016 Reg. Sess.) (stating to fulfill legislative purpose guardianship must be designed to encourage development of maximum self-reliance and independence); ME. REV. STAT. ANN. tit. 18-A, § 5-304 (Westlaw through 2015 2d Reg. Sess.) (requiring court to exercise authority to encourage development of maximum self-reliance and independence); MASS. GEN. LAWS ANN. ch. 190B, § 5-306 (West, Westlaw through 2016 2d Annual Sess.) (requiring court to exercise authority to encourage development of maximum self-reliance and independence); MICH. COMP. LAWS ANN. § 700.5306a (West, Westlaw through 2016 Reg. Sess.) (granting ward the right to guardianship designed to encourage development of maximum self-reliance and independence and the right to consult with guardian about major decisions affecting ward); MINN. STAT. ANN. § 524.5-310(c) (West, Westlaw through 2016 Reg. Sess.) (requiring court to make orders that encourage development of maximum self-reliance and independence); MONT. CODE ANN. § 72-5-306 (West, Westlaw through 2015 Sess.) (requiring court to exercise authority to encourage development of maximum self-reliance and independence); N.H. REV. STAT. ANN. § 464-A:1 (Westlaw through 2016 Reg. Sess.) (defining purpose of guardianship statute to include encouraging the development of maximum self-reliance in the individual); N.J. STAT. ANN. § 3B:12-57 (West, Westlaw through 2015 Reg. Sess.) (instructing guardians to encourage ward's participation in decision-making processes, act on ward's own behalf, and develop decision-making capacity to maximum extent possible); N.M. STAT. ANN. § 45-5-301.1 (West, Westlaw through 2016 2d Reg. Sess.) (requiring guardianship to be designed to encourage the development of maximum self-reliance and independence); N.D. CENT. CODE ANN. § 30.1-29-08 (West, Westlaw through 2015 Reg. Sess.) (requiring court to exercise authority to encourage development of maximum self-reliance and independence); OKLA. STAT. ANN. tit. 30, § 1-103 (West, Westlaw through 2016 2d Reg. Sess.) (declaring the purpose of guardianship to be to provide for the fullest possible participation by wards in decisions affecting them, requiring courts to encourage the development of maximum self-reliance and independence, and instructing guardians to encourage wards to participate in decisions, act on their own behalf, and regain or develop capacities to maximum extent possible); 20 PA. CONS. STAT. ANN. § 5502 (West, Westlaw through 2016 Reg. Sess.) (declaring the purpose of guardianship statute to include permitting incapacitated persons to participate as fully as possible in decision-making); R.I. GEN. LAWS ANN. § 33-15-1 (West, Westlaw through 2016 Sess.) (declaring the legislature's intent to permit incapacitated persons to participate as fully as possible in decisions, to protect rights, and assist them to regain or develop

enables a person to engage in decision-making, allowing a person subject to guardianship to be represented by an attorney furthers this goal, and courts and guardians might reasonably be deemed to be acting unlawfully by standing in the way of a person subject to guardianship entering into an attorney-client relationship in many situations.

Finally, as a purely practical matter, if persons subject to guardianship cannot engage an attorney to directly challenge their guardianship to seek restoration of capacity or of certain legal rights, there would be no viable mechanism for enforcing the statutory requirement that courts adhere to the least restrictive alternative principle.[112] Forcing a person subject to guardianship to rely on counsel selected by the guardian would mean allowing a potential adversary (the guardian) to choose and potentially direct the person's attorney. This would leave the person with no reliable mechanism for challenging an overbroad guardianship.

In summary, most state guardianship statutes protect the right to legal representation explicitly, by requiring that guardianships conform to the least restrictive alternative standard, or both. Moreover, depriving persons subject to guardianship of the right to counsel would, in many cases, render the guardianship more restrictive than authorized by statute and effectively prevent such persons subject to guardianship from exercising their retained rights.

III. THE ROLE AND ETHICAL OBLIGATIONS OF ATTORNEYS REPRESENTING PERSONS SUBJECT TO GUARDIANSHIP

Having determined that an attorney may lawfully represent a person subject to guardianship under a variety of circumstances, the question becomes, how should the attorney go about doing so? In this Part, we describe three theoretical models of representation and analyze the leading sources of ethical guidance, relevant case law, and ethics

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abilities to maximum extent possible through assistance that least interferes with legal capacity); S.C. CODE ANN. § 62-5-304 (West, Westlaw through 2016) (requiring court to exercise authority to encourage development of maximum self-reliance and independence); S.D. CODIFIED LAWS § 29A-5-402 (Westlaw through 2016 Reg. Sess.) (instructing guardian to exercise authority only to extent necessary and, if feasible, to encourage protected person to participate in decision-making, act in person's own behalf, and develop or regain capacity); VT. STAT. ANN. tit. 14, § 3069 (West, Westlaw through 2015–2016 Adjourned Sess.) (requiring guardian to encourage person under guardianship to participate in decisions, act on the person's own behalf, and develop or regain capacity to greatest extent possible).

112. We recognize that it is theoretically possible for persons to challenge their own guardianships. Doing so would be difficult, however, even for a person with no particular cognitive or functional limitations, and persons who have had a guardian appointed are likely to have significant challenges even if guardianship is not appropriate.

opinions to determine under what circumstances each has been applied.

A. Three Models of Representation

The various approaches that attorneys might take when representing a person subject to guardianship can be grouped into three primary models of representation: derivative representation, best interest, and expressed interest (or "normal" or "traditional" relationship).[113]

In the derivative representation model, the guardian is considered the primary client and the person subject to guardianship is considered the derivative client. The lawyer thus takes direction from the guardian, at least to the extent that the guardian is not violating his or her fiduciary duty. This is a significant deviation from the normal attorney-client relationship in which an attorney can only take direction from a third party if expressly authorized to do so by the client.[114]

Under the best interest model, by comparison, the attorney's obligation is to advocate for the best interests of the person subject to guardianship, and thus has a duty to independently assess what the client's best interests are. The attorney's determination of the client's best interests may or may not correspond with either the client's or the guardian's viewpoint.[115] Thus, the best interest model also represents a

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113. Alberto Bernabe, writing about models for representing children in the juvenile justice system, identifies three roughly parallel approaches. In Bernabe's account:

> [T]hree models can be described as follows: the "expressed interests lawyer or advocate," whose role is to advocate for the minor client's expressed interests, the "best interest lawyer or guardian," whose role is to substitute the lawyer's judgment for that of the minor client and to advocate for what the lawyer decides are the best interests of the minor, and the "judicially designated investigator," whose role is "to serve as the eyes and ears of the appointing authority, to gather information to share with the court, and to aid in making judicial decisions . . . .

Alberto Bernabe, *The Right to Counsel Denied: Confusing the Roles of Lawyers and Guardians*, 43 LOY. U. CHI. L.J. 833, 836 (2012). Like Bernabe's "judicially designated investigator," our first model of representation reflects an approach in which the attorney's primary relationship is with someone other than the person subject to guardianship. We choose the term "derivative representation" as developed by Geoffrey Hazard. *See* Hazard, *supra* note 13. This reflects the fact that, in this model, the attorney's relationship to the person subject to guardianship is derived from the attorney's relationship to the guardian.

114. *See* MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2002).

115. In part, this is because there is not a consensus as to what the determination of a person's best interests should involve. One approach is to define best interests as honoring and carrying out the individual's previously expressed interests, if known and if communicated when the person had capacity. *See* Cavey, *supra* note 3, at 31. Frolik and Whitton, by contrast, identify two types of best interests: strict and expanded. Strict best interest is based on what a reasonable person would do under the circumstances. Only the burdens and benefits that directly impact the represented person would be considered. Expanded best interest allows for consideration of the consequences to others whose interests would be relevant to the incapacitated person under a reasonable person standard.

significant deviation from typical practice. Normally, an attorney's personal opinion of what is in a client's best interest is not a legitimate basis for taking action on behalf of a client, particularly without the client's consent.[116] Rather, the attorney's traditional role is to advocate for the client's expressed preferences, even if these are inconsistent with what the attorney considers to be the preferred or appropriate course of action.

Finally, under the expressed interest model, the attorney maintains the traditional advocacy role even when a client is subject to a guardianship. As described throughout the Model Rules of Professional Conduct (discussed further in the next Section), a normal attorney-client relationship entails keeping client communications confidential,[117] making sure a client stays reasonably informed about the status of the legal matter,[118] and providing competent legal advice and services.[119] Perhaps most importantly in terms of representing a client under guardianship, a normal attorney-client relationship requires a lawyer to comply with the client's directions regarding the objectives of the representation and to consult with the client regarding the means of achieving those objectives.[120] Unless the client instructs the attorney to take action that is unlawful or frivolous, the attorney advocates for the client's stated preferences regardless of whether they correspond with the attorney's or others' perceptions of what would be in the client's best interest. Because of this, the expressed interest model could simply be referred to as a "normal relationship model."

B. Model Rules and Related Commentary

1. Model Rules of Professional Conduct

The primary source of ethical guidance for attorneys is the code of professional conduct adopted by the court system in the state in which they are licensed to practice. Although there is some variation among the states as to the standards in those codes, the vast majority have adopted, in whole or in large part, the American Bar Association's Model Rules

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See Lawrence A. Frolik & Linda S. Whitton, *The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 45 U. MICH. J.L. REFORM 739, 755–57 (2012).

116. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 96-404 (1996).

117. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6.

118. *Id.* r. 1.4.

119. *Id.* r. 1.1.

120. *Id.* r. 1.2.

of Professional Conduct.[121] Thus, the Model Rules are the leading source of guidance for attorneys representing persons subject to guardianship.

Model Rule 1.14 directs an attorney who represents a person with diminished capacity to "as far as reasonably possible, maintain a normal client-lawyer relationship."[122] The rule does recognize limited circumstances under which the need to protect a vulnerable client may justify deviating from the normal relationship. Model Rule 1.14(b) permits an attorney to take "reasonably necessary protective action" when the lawyer reasonably believes that a client has diminished capacity, is at risk of substantial harm, and cannot act in her own interest.[123] When all three criteria are met, an attorney may veer from the normal attorney-client relationship, including by revealing confidential information or acting without the consent of the client, to the extent it is "reasonably necessary to protect the client's interests."[124] Thus, even when protective action is appropriate, the client continues to be entitled to have her information kept confidential unless the risk to the client justifies a breach of confidentiality.[125]

The main text of Model Rule 1.14 does not distinguish between clients whose diminished capacity has been determined by a court and those who have not been declared legally incapacitated. However, two of the comments to the Rule specifically address the situation of a client who has a legally appointed representative, such as a guardian. Comment 2 states:

> The fact that a client suffers a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of

121. *See State Rules Comparison Chart*, AMERICAN BAR. ASS'N, http://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.html [https://perma.cc/M9H9-ET2C] (last visited May 26, 2016). More importantly, almost every state has adopted Model Rule 1.14. *See* AM. BAR ASS'N, VARIATIONS OF THE ABA RULES OF PROFESSIONAL CONDUCT RULE 1.14: CLIENT WITH DIMINISHED CAPACITY (2015), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_14.authcheckdam.pdf [https://perma.cc/M9H9-ET2C].

122. *See* MODEL RULES OF PROF'L CONDUCT r. 1.14(a).

123. *See id.* r. 1.14(b).

124. *See id.* r. 1.14(b)–(c).

125. When it was first promulgated in 1983, Model Rule 1.14 represented a significant departure from the emphasis on protection in the Model Code of Professional Responsibility which the Model Rules replaced. Subsequent amendments to both the Rule and its comments have continued to emphasize honoring client autonomy. *See, e.g.*, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT 344 (Art Garwin ed., 2013) (reporting 2001 amendment to Model Rule 1.14 restricting action to only that which is "reasonably necessary").

client, particularly in maintaining communication.[126]

However, Comment 4 states, "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."[127]

By advising attorneys to "ordinarily" look to the appointed representative to make decisions, Comment 4 undermines the main text of Rule 1.14. The primary guidance provided by the rule itself is that attorneys should default to a normal model of representation when working with individuals with diminished capacity and only veer from that model if the person with diminished capacity faces significant risk otherwise and such deviation is reasonably necessary. By stating that the ordinary approach should be to accord the representative with decision-making authority, Comment 4 reverses this default. This reversal is particularly strange given that most persons with appointed representatives have never been adjudicated incapacitated; rather, they appointed the representative through a document such as a power of attorney, the validity of which depended on the individual having at least some decision-making capacity when executing it.[128]

Comment 4 is also at odds with the unequivocal statement in Comment 2 that a lawyer should "as far as possible" accord a person with a legal representative "the status of a client."[129] Comment 4 reverses the default approach set forth in Comment 2, making deviation from the normal attorney-client relationship the ordinary approach.

Thus, not only does Model Rule 1.14 not provide clear guidance to attorneys trying to determine their role when representing persons subject to guardianship, but the guidance it does provide is arguably self-contradictory.

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126. *See* MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 2. Comment 2 originally included the sentence, "[i]f the person has no guardian or legal representative, the lawyer often must act as de facto guardian." MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 2 (AM. BAR ASS'N 1993). The removal of this sentence in 2002 again indicates an ongoing movement away from protectionism. However, a soft echo of Rule EC 7-12 of the Model Code can still be heard in Comment 4, instructing an attorney to ordinarily look to the representative for decisions on behalf of a person subject to guardianship.

127. *See* MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 4 (AM. BAR ASS'N 2002).

128. Durable powers of attorney are extremely common among older adults, especially among the oldest of the old. *See* AARP RESEARCH GRP., WHERE THERE IS A WILL . . . LEGAL DOCUMENTS AMONG THE 50+ POPULATION: FINDINGS FROM AN AARP SURVEY 5 (2000), http://assets.aarp.org/rgcenter/econ/will.pdf [https://perma.cc/G2N6-BXXR] (reporting that forty-five percent of Americans age fifty or older reported having executed a durable power of attorney, and that this rate increased dramatically with age such that seventy-three percent of those eighty years of age and older reported having executed one).

129. MODEL RULES OF PROF'L CONDUCT r. 1.14 cmt. 4.

2. ACTEC Commentary

The American College of Trust and Estate Counsel (ACTEC), the leading nonprofit association of trust and estate attorneys and scholars, publishes *Commentaries on the Model Rules of Professional Conduct*. These *Commentaries* provide detailed ethical guidance, including interpretations of the Model Rules, tailored for trust and estate attorneys.[130]

ACTEC's Commentary on Model Rule 1.14 pertaining to clients subject to guardianship initially mirrors the language of Comments 2 and 4 of the Model Rules. The Commentary advises that an attorney "should ordinarily look to the representative to make decisions on behalf of the client," then continues, "[t]he lawyer, however, should as far as possible accord the represented person the status of client, particularly in maintaining communication with the represented person."[131] The Commentary then goes on to distinguish among three situations: (1) initiating representation for a person already subject to guardianship, (2) continuing to represent a client who has subsequently been determined to be incapacitated, and (3) representing the fiduciary.[132]

The ACTEC Commentary states that an attorney hired to represent a person with diminished capacity by the fiduciary, including a guardian or conservator, "stands in a lawyer-client relationship" with the *fiduciary*.[133] It continues, "[a] lawyer who is retained by a fiduciary for a person with diminished capacity, but who did not previously represent the person with diminished capacity, represents only the fiduciary. Nevertheless, in such a case the lawyer for the fiduciary owes some duties to the person with diminished capacity."[134] The reader is directed to consult the ACTEC Commentary on Model Rule 1.2 for guidance about what these duties might be.[135]

When, on the other hand, there is a prior attorney-client relationship

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130. AM. COLL. OF TR. & ESTATE COUNSEL, COMMENTARIES ON THE MODEL RULES OF PROFESSIONAL CONDUCT (4th ed. 2006), http://www.actec.org/assets/1/6/ACTEC_Commentaries_4th.pdf [https://perma.cc/X33Q-97T5].

131. *Id.* at 132.

132. *Id.* at 132–33.

133. *Id.* at 133.

134. *Id.*

135. *Id.* The ACTEC Commentary on Model Rule 1.2 deals generally with duties owed to fiduciaries and beneficiaries, but does not specifically address duties owed to persons subject to guardianship. An attorney is prohibited from taking advantage of her position to the detriment of the beneficiary or the fiduciary estate. Moreover, under some circumstances (which are not elaborated), an attorney may owe a beneficiary affirmative duties. *Id.* at 32–37.

between the attorney and the person who is subsequently found to lack capacity, the Commentary allows for a direct relationship to continue, at least in a limited way. The attorney may "continue to meet with and counsel" the client even after a guardian or other fiduciary has been appointed.[136] When the attorney is working with the fiduciary on behalf of the client, but is not representing the fiduciary, her duties are to the client alone.[137] It may also be possible that an attorney jointly represents a current or former client and the guardian. This is permissible only if there is no significant risk that representation of one will be adverse to or materially limited by representation of the other.[138]

The Commentary contemplates a third possible situation in which the attorney's only client is the guardian. An attorney who does not have an attorney-client relationship with the person subject to guardianship nevertheless owes that individual some duties. Specifically,

> [a] conflict of interest may arise if the lawyer for the fiduciary is asked by the fiduciary to take action that is contrary either to the previously expressed wishes of the person with diminished capacity or to the best interests of such person, as the lawyer believes those interests to be.[139]

Thus, the ACTEC Commentaries on Model Rule 1.14 would find it ethical for an attorney to represent—and take direction from—a person subject to guardianship who was previously a client. They also address how an attorney hired by a fiduciary may represent either the fiduciary or the person subject to guardianship. They are, however, silent on whether attorneys may—and, if so, how they should—represent persons subject to guardianship who directly seek such representation but who were not clients prior to being placed under guardianship.

3. Restatement on Law Governing Lawyers

Another leading source of ethical guidance for attorneys is the Restatement (Third) of Law Governing Lawyers. Section 24 of the Restatement instructs attorneys to generally look to the guardian for direction when representing persons subject to guardianship. It explains,

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136. *Id.* at 133.

137. *Id.* ("If the lawyer represents the person with diminished capacity and not the fiduciary, and is aware that the fiduciary is improperly acting adversely to the person's interests, the lawyer has an obligation to disclose, to prevent, or to rectify the fiduciary's misconduct.").

138. *Id.*

139. *Id.* The comment provides little guidance for what an attorney should do if such a conflict of interest arises, suggesting only that a lawyer "should give appropriate consideration" to the client's interests.

"[i]f a client with diminished capacity as described in Subsection (1) has a guardian or other person legally entitled to act for the client, the client's lawyer must treat that person as entitled to act with respect to the client's interests in the matter."[140] Comment *f* of section 24 elaborates on the attorney's duty to defer to the guardian's authority, stating: "[w]hen a guardian has been appointed, the guardian normally speaks for the client as to matters covered by the guardianship . . . . The lawyer therefore should normally follow the decisions of the guardian as if they were those of the client."[141]

However, the Restatement recognizes a few situations when deference to the guardian is not appropriate. It carves out an exception for adversarial proceedings, such as a petition to terminate the guardianship or replace the guardian.[142] It also recognizes limited circumstances when a person under a guardianship is authorized to take action without a guardian's knowledge or permission, such as the right of a mature minor to seek a court order to have an abortion.[143] However, if the lawyer merely disagrees with the guardian but believes the guardian's actions are legal, this alone does not justify advocating for a position contrary to that of the guardian.[144]

Thus, the Restatement would find it ethical for an attorney to represent a person subject to guardianship for the purpose of challenging the terms and existence of a guardianship, as well as to challenge certain acts or conditions imposed by guardians, and to exercise certain rights that do not require the guardian's authorization.

C. Ethics Opinions

Every state bar association has a mechanism for regulating the ethical behavior of attorneys licensed by the state. To determine how states are interpreting attorneys' duties when representing persons subject to guardianship, we performed a review of publically available state bar opinions as of fall 2014.[145] We found very few opinions directly on point. This may reflect several things, including that attorneys are not accepting representation of persons subject to guardianship, or that

140. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 24(3) (AM. LAW INST. 2000).

141. *Id.* cmt. f.

142. *Id.*

143. *Id.*

144. *Id.* ("If the lawyer believes the guardian to be acting lawfully but inconsistently with the best interests of the client, the lawyer may remonstrate with the guardian or withdraw . . . .").

145. Our search was limited to all state bar association opinions available online during fall 2014.

attorneys are not accepting representation of persons subject to guardianship in situations in which guardians or other third parties object.

We found five opinions directly on point and one opinion that discussed the role of an attorney for a person subject to guardianship in dicta.[146] Of the five directly on point, four embraced an expressed interest approach and one adopted a modified expressed interest approach that incorporated elements of a best interest approach. The opinion which considered the matter in dicta, by contrast, offered limited support for the derivative representation approach.

The most passionate articulation of the expressed interest model is found in the Alaska Bar Association's Ethics Opinion 94-3, an opinion involving a client described as a severely intellectually disabled person who was in an institution in order to receive treatment. The client expressed a wish to his attorney that he be allowed to leave the institution and receive outpatient treatment instead.[147] In order to help his client fulfill this goal, the attorney determined that diagnostic tests would be necessary. However, the client adamantly objected to subjecting himself to these tests.[148] In determining that the lawyer's duty was to advocate for his client's expressed interests, including to not be subjected to the tests, the ethics committee pointed out that it was the guardian's responsibility, not the attorney's, to advocate for the client's best interest.[149] The opinion explained that:

> The disabled client has no one but his attorney to speak for him. Perhaps the client's wishes do not carry the day before the finder of fact. Nevertheless, a disabled individual has the right to be heard through counsel. Counsel has a duty to zealously advocate on behalf of that individual.[150]

According to the committee, the duty to advocate for the client's expressed interests applies even when the attorney believes that the client's position or proposed course of action is not in the client's best interest.[151] In such a case, the committee recommended that the attorney

146. For the opinions on point, see State Bar of N.D., Formal Op. 09-03 (2009); S.C. Bar, Formal Op. 05-11 (2005); Alaska Bar Ass'n, Formal Op. 94-3 (1994); State Bar of Mich., Formal Op. CI-919 (1984); N.C. Bar Ass'n, Formal Op. 16 (1999). The opinion with dicta is State Bar of Michigan, Formal Op. RI-213 (1994).

147. Alaska Bar Ass'n, Formal Op. 94-3, at 2.

148. *Id.*

149. *Id.* at 3–4.

150. *Id.* at 4.

151. *Id.* at 3.

carefully explain to the client the likely ramifications of the proposed course of action as clearly as possible.[152] However, if the client could not be persuaded, it was the attorney's duty to make the client's wishes known to the court and zealously advocate for them on the client's behalf.[153]

The express interest approach was also applied by two bar associations in cases where a person subject to guardianship sought restoration of rights. The State Bar of Michigan took such an approach in a case in which an attorney sought restoration of rights on behalf of a client who had previously entered into a voluntary guardianship.[154] Similarly, a North Carolina Bar Association opinion considered an attorney's role when representing a woman who had been found incompetent by a state agency and who sought to challenge that determination in court.[155] The North Carolina Bar Association found that the attorney could ethically represent the woman using an expressed interest approach.[156] However, it added a potential restrictive caveat, warning that if the attorney had reason to believe the client was in fact incompetent, filing an appeal could be frivolous and therefore violate Model Rule 3.1, which prohibits frivolous claims.[157]

In addition, the expressed interest approach was applied by the South Carolina Bar in a case in which an attorney had represented the person subject to guardianship on an estate planning matter and sought to determine to whom to provide the legal file pertaining to that matter.[158] The Association found that the estate matter was outside the scope of the conservator's powers and, therefore, the attorney was required to act in the same manner as an attorney representing any client with diminished capacity.[159] Thus, the attorney was to follow the expressed interest model and only share the legal file or engage in other protective action

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152. *Id.*

153. *Id.* at 4.

154. State Bar of Mich., Formal Op. CI-919 (1984). The opinion emphasized that the guardianship was voluntary and suggested that the lack of judicial determination of incapacity was relevant, but did not directly opine as to the result had the guardianship been the result of a contested proceeding. *Id.*

155. N.C. Bar Ass'n, Formal Op. 16 (1999).

156. *Id.* at 2 ("If Attorney A is able to maintain a relatively normal client-lawyer relationship with Wife [the client] and Attorney A reasonably believes that Wife is able to make adequately considered decisions in connection with her representation, Attorney A may continue to represent her alone without including the guardian in the representation.").

157. *Id.*

158. S.C. Bar, Formal Op. 05-11, at 1 (2005).

159. *Id.* at 2.

to the extent reasonably necessary to protect the client's interest and then only if the attorney reasonably believed the client unable to act in her own interest in the matter.[160]

In a somewhat more complex opinion, by contrast, the Ethics Committee of the State Bar Association of North Dakota applied a modified express interest approach to a situation in which a person under a full guardianship was represented by an attorney with regard to criminal charges.[161] Although a district court had determined she was incapacitated, the defendant was deemed competent to stand trial.[162] The guardian insisted that the defense attorney communicate with the guardian about the client's case and allow the guardian to participate in decisions about pleadings and strategy.[163] The person subject to guardianship expressly forbade her defense counsel to communicate with the guardian.[164] In deciding that the attorney was required to communicate with the guardian, the committee stated that such communication with the guardian should be limited to what is "reasonably necessary to protect the client's interests."[165] It cited paragraph *c* of North Dakota's version of Model Rule 1.14 related to disclosure of confidential information when taking protective action.[166] The committee then referenced the state's version of Comment 2 to Model Rule 1.14 (numbered as Comment 4 in the state rules), finding that the requesting attorney "must keep the client's interests foremost[167] . . . . [e]ven though the client has a guardian, the attorney should, as far as possible, accord the client the status of client, and particularly maintain communication with her in all matters pertaining to the representation."[168]

This approach taken by the State Bar Association of North Dakota can thus be seen as a variation on the expressed interest approach. The attorney is to maintain confidentiality and communication with the

160. *Id.*

161. State Bar of N.D., Formal Op. 09-03, at 1 (2009).

162. *Id.* at 6.

163. *Id.* at 1.

164. *Id.*

165. *Id.* at 7 (quoting N.D. R. PROF'L CONDUCT r. 1.14(c) (2002)).

166. *Id.* at 2.

167. *Id.* at 3.

168. *Id.* at 8. The attorney also requested guidance about whom to look to for decision-making authority when the client and guardian were not in agreement. The committee found that this question raised significant due process and other constitutional issues and was therefore beyond its purview, and declined to issue an opinion. *Id.*

person subject to guardianship as with any other client. However, unlike a traditional attorney-client relationship in which the attorney is merely *permitted* under Model Rule 1.14 to disclose information to a third party in the name of reasonable protective action, here the attorney was deemed to be *required* to do so. Thus, the approach resembles the best interest model in that a paternalistic approach is required, but does not go so far as to require that the attorney act only in the client's best interest.

While the opinions directly on point thus all adopted either an express interest model or a variation thereon, dicta in an opinion of the State Bar of Michigan offers limited support for derivative representation as to matters delegated to the guardian. Specifically, in a 1994 opinion, the State Bar of Michigan considered the ethics of a law firm acting simultaneously as a guardian for an individual and as that individual's counsel.[169] It found that these dual roles were improper. In discussing the role of the attorney for a person subject to guardianship as part of its consideration, the State Bar of Michigan stated that the guardian should typically be "viewed as the primary client and the disabled person as the derivative client."[170] However, it recognized this is not the case "in circumstances where the guardian/conservator might be abusing the position."[171]

D. Court Opinions

Whereas the few state ethics opinions directly on point support the expressed interest model of representation, court opinions addressing the role of attorneys when representing persons subject to guardianship are more diverse in their approaches.

In cases where persons subject to guardianship sought representation related to powers that had been delegated to a guardian, and not for the purpose of challenging the existence, terms, or conditions of the guardianship, some courts have endorsed the derivative representation model. For example, in *In re Guardianship of Hocker*,[172] a person subject to guardianship sought to retain the services of an attorney for purposes other than challenging the continuation of his guardianship or the fitness of the guardian.[173] The attorney had represented Hocker

169. State Bar of Mich., Formal Op. RI-213 (1994).

170. *Id.* at 3.

171. *Id.*

172. 791 N.E.2d 302 (Mass. 2003).

173. The lower court had explicitly allowed that a person subject to guardianship could be

during the pendency of the guardianship petition.[174] Once the guardian was appointed, the attorney sought to continue to represent her client in order to attend a meeting of the guardian, guardian's attorney, and other family members.[175] The attorney argued that Massachusetts's version of Model Rule 1.14 imposed on her an affirmative duty to continue to represent her client after a guardian had been appointed.[176] She focused on Comment 2, instructing an attorney whose client has a guardian or legal representative to "as far as possible accord the represented person the status of client, particularly in maintaining communication."[177] The court disagreed that the Rule contemplated the continuation of the relationship between the person subject to guardianship and his attorney who, as in this case, had been appointed by the court for the limited purpose of representing an alleged incapacitated person during the pendency of the guardianship petition.[178] Absent a controversy between the person subject to guardianship and the guardian, the court found derivative representation to be the most appropriate model. The court emphasized Comment 3 to the state's version of Model Rule 1.14, which advised, "[i]f a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client."[179] Because the attorney must represent the person subject to guardianship through the guardian, and because the guardian did not choose to continue the attorney-client relationship, the representation was terminated.[180]

The derivative representation model was also applied to representation unrelated to the guardianship proceedings in *In re Disciplinary Action Against Kuhn*.[181] The court considered whether it was improper for an attorney to assist a client known to be under a guardianship to execute a will.[182] The attorney met privately with the client (who he had represented prior to the guardianship), drafted a new will at the client's request, and helped the client execute it without

represented by counsel for these purposes. *Id.* at 306.

174. *Id.* at 304.

175. *Id.* at 304 n.2.

176. *Id.* at 309.

177. *Id.* (quoting MASS. RULES OF PROF'L CONDUCT r. 1.14 cmt. 2 (1998)).

178. *Id.*

179. *Id.* at 309–10. Comment 3 is similar to Comment 4 of Model Rule 1.14. *See id.* at 310 n.20.

180. *Id.* at 308–09.

181. 785 N.W.2d 195 (N.D. 2010).

182. *Id.* at 198.

communicating with the guardian.[183] The will was subsequently found to be invalid.[184] The court held that the attorney had violated his ethical duties when he gave advice and provided legal services to a person subject to guardianship without informing or consulting the guardian.[185] Like *Hocker*, competing arguments were made emphasizing different comments to Model Rule 1.14.[186] The court focused on Comment 5 of North Dakota's version of Model Rule 1.14, which stated in pertinent part, "[i]f the client has an appointed representative, the lawyer should ordinarily look to the representative for decisions on behalf of the client."[187] The court rejected the attorney's claim that he was giving his client attention and respect as directed by Comment 3,[188] which instructed, "[e]ven if the person has an appointed representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication."[189]

By contrast, the best interest model was applied in *In re Clark*,[190] in which an attorney who had been representing a person subject to guardianship acted contrary to the client's express wishes. In this case, the client, Janet Clark, was placed under a guardianship after suffering a head injury in a motor vehicle accident.[191] An attorney, A. Frank Johns, was hired[192] to represent Clark with regard to guardianship and trust matters that were expected to arise once Clark's personal injury suit was resolved.[193] Nearly two years after the attorney began representing Clark, a petition to terminate the guardianship was filed by Clark's husband.[194] Johns, still acting as Clark's attorney, opposed the

183. *Id.*

184. *Id.* at 197–98.

185. *Id.* at 202.

186. *Id.* at 200–02.

187. *Id.* at 200 (quoting N.D. R. PROF'L CONDUCT r. 1.14 cmt. 5 (2006)). This language is nearly identical to language in Comment 4 of Model Rule 1.14.

188. *Id.* at 200–02.

189. *Id.* at 201–02 (quoting N.D. R. PROF'L CONDUCT r. 1.14 cmt. 3). This language is materially identical to language in Comment 2 of Model Rule 1.14.

190. 688 S.E.2d 484 (N.C. 2010).

191. *Id.* at 485.

192. The attorney was hired by Clark's sister. Although Clark's sister eventually became her guardian, Johns was hired before Clark's sister was officially appointed. *Id.* at 486. Other attorneys from Johns' firm also provided legal services to Clark and are sometimes mentioned by the court. For the sake of simplicity, our rendition of the facts includes Johns only.

193. *Id.* at 486.

194. *Id.*

petition.[195] A few weeks later, Clark submitted a letter to the court asking that a hearing be held to determine if she could be restored to capacity.[196] She also expressed a preference that her husband, rather than her sister, serve as her guardian if one were still required and that she wished to be represented by her husband's attorney rather than by Johns.[197] Less than a week later, the court approved a $4 million settlement in Clark's personal injury case.[198] Around this time Clark was involuntarily committed to a psychiatric hospital after becoming hysterical in her guardian's car.[199] In light of these facts, the trial court refused to remove Johns as Clark's attorney.[200] After a second petition seeking to remove the current guardian was filed by Clark's husband, the guardian hired her own attorney to represent her in her fiduciary role.[201] The parties entered into a settlement in which an irrevocable trust was established, and Clark was restored to capacity.[202] Johns then filed several motions seeking the approval of his firm's attorney fees,[203] to which Clark objected on the grounds that it was unfair to charge her for services she had not wanted and that furthered a position contrary to her own.[204]

In affirming the lower court's decision approving the payment of attorney fees, the appellate court characterized the attorney's duty as promoting the client's best interest:

> [T]here is no question but that Ms. Clark wanted her competency restored, objected to Mr. Johns' actions to the extent that they obstructed her attempts to obtain that goal, and wanted him relieved as her attorney. However, the trial court found as a fact that Mr. Johns genuinely believed that Mr. Clark was attempting to obtain control over Ms. Clark's personal injury settlement for his own purposes and that it would not be in Ms. Clark's best interests for her competency to be restored. . . . As long as Ms. Clark's competency had not been restored, Mr. Johns had a duty to exercise his best judgment on

195. *Id.*
196. *Id.* at 487.
197. *Id.*
198. *Id.*
199. *Id.* at 488.
200. *Id.*
201. *Id.*
202. *Id.* at 488–89.
203. *Id.* at 491–93.
204. *Id.* at 493.

> behalf of his client . . . .[205]

Thus, in this situation, the court approved of a best interest model of representation.

In cases in which an attorney has been retained by a person subject to guardianship explicitly for the purpose of challenging a guardianship or its terms or conditions, by comparison, courts generally appear to embrace the expressed interest model of representation. For example, the expressed interest model was adopted in *In re M.R.*,[206] a case involving a young adult with a developmental disability. The person subject to guardianship and her father petitioned the court to allow her to move into her father's home, contrary to the wishes of her mother who served as her guardian.[207] The attorney representing the person subject to guardianship asked the court to clarify whether his role was to advocate for his client's expressed preferences or to act based on his own perceptions of what was in her best interest.[208] In deciding that the role of the attorney was to advocate for the client's preferences, the court distinguished the role of an attorney from that of a guardian ad litem (GAL).[209] According to the court, it is the GAL's responsibility to evaluate what is in the best interest of the person subject to guardianship, even if this contradicts the expressed wishes of the represented person.[210] The attorney for the person subject to guardianship, on the other hand, should not "dilut[e]" the representation with "excessive concern for the client's best interests."[211] The court cautioned, however, that an attorney for a person subject to guardianship should not advocate for decisions that are "patently absurd or that pose an undue risk of harm to the

205. *Id.* at 497–98.

206. 638 A.2d 1274 (N.J. 1994).

207. *Id.* at 1276.

208. *Id.* at 1282.

209. *Id.* at 1283.

210. *Id.* at 1284.

211. *Id.* at 1285. A similar description of the roles of the GAL and attorney for the person subject to guardianship is provided in *In re Guardianship of Jennifer M.*, 779 N.W.2d 436 (Wis. Ct. App. 2009), in which a woman subject to a limited guardianship sought to have counsel present during an interview with her GAL. *See id.* at 437. In considering whether she was entitled to the presence of counsel, the court observed that under state law it was possible for a person subject to guardianship to be represented by both a GAL and an "adversary attorney," and that the roles of these two types of representatives were different. *Id.* at 439. According to the court, the GAL is an advocate for the person's best interests who, although required to take the person's preferences into account, is not bound by those wishes. *Id.* (quoting Knight v. Milwaukee Cty., 640 N.W.2d 773, 784 (Wis. 2002)). By comparison, in accord with state statute, the adversary attorney must maintain a normal attorney-client relationship and advocate for the expressed interests of the person subject to guardianship. *Id.*

client."[212]

Finally, a more complex, modified expressed interest approach was also adopted by the Supreme Court of Connecticut in the context of a person who objected to the continuation of his conservatorship.[213] The court in *Gross v. Rell*[214] addressed what an attorney should do when faced with conflicting instructions from the client and the guardian. After a petition was filed alleging that Daniel Gross was legally incapacitated, Gross informed his court-appointed attorney that he opposed being placed under conservatorship.[215] However, his attorney failed to object to the appointment of a conservator, finding no grounds upon which to contest the petition despite his client being, by his own account, intelligent and alert.[216] The attorney continued representing Gross after the guardian was appointed.[217] Gross was placed in a locked ward of a nursing home where he was assaulted by his roommate.[218] By filing a writ of habeas corpus (apparently without the assistance of his court-appointed attorney), Gross was eventually able to demonstrate numerous procedural and due process violations, resulting in an order freeing him from the nursing home and terminating the conservatorship.[219] Following his release, Gross sued his court-appointed attorney, among others, for violations of his due process rights, intentional and negligent infliction of emotional distress, and legal malpractice.[220] In rejecting the attorney's claim of quasi-judicial

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212. *In re M.R.*, 638 A.2d at 1285. In remanding the case, the court stated, "[h]er attorney's role should be to advocate for her choice, as long as it does not pose unreasonable risks for her health, safety, and welfare." *Id.* at 1286. Noting that the state's ethics rules were inadequate and in need of reform, the court offered some guidelines until amendment to the rules could be achieved:

> The primary duty of the attorney for [a developmentally disabled] person is to protect that person's rights, including the right to make decisions on specific matters. Generally, the attorney should advocate any decision made by the developmentally-disabled person. On perceiving a conflict between the person's preferences and best interests, the attorney may inform the court of the possible need for a guardian *ad litem*.

Id. at 1285 (emphasis in original).

213. In Connecticut, adult guardianship of the person, the property, or both is called conservatorship. *See* CONN. GEN. STAT. ANN. § 45a-644 (West, Westlaw through 2016).

214. 40 A.3d 240 (Conn. 2012).

215. *Id.* at 246.

216. *Id.* at 246–47. Later, a superior court judge said that the adversary attorney's failure to find a basis upon which to challenge the conservatorship "completely blows my mind." *Id.*

217. *Id.* at 247.

218. *Id.*

219. *Id.* at 248. When Gross returned home, he found the house "ransacked." *Id.* According to the court, he lived there independently until his death. *Id.*

220. *Id.* at 248 n.4.

immunity,[221] the court grappled with the issue of the proper role of a lawyer representing a client subject to a conservatorship. First, the court recognized that the primary function of an attorney representing a person under a conservatorship is to advocate for the client's expressed wishes.[222] However, the court granted a significant amount of discretion to the attorney to determine whether to be guided by the client or conservator. If the lawyer and the conservator both agreed that the client's preferences were unreasonable, the attorney could follow the conservator's directions.[223] Otherwise, "the attorney may advocate for those [the client's] wishes and is not bound by the conservator's decision."[224] The best interest standard, the court continued, was only appropriate in exceptional cases.[225] Thus, *Gross* represents a modified express interest approach akin to that in the North Dakota bar opinion discussed in the preceding Section.[226]

In short, what model of representation courts condone appears to depend in large part on the purpose of the underlying representation. Consistent with this pattern, in *In re Estate of Kutchins*,[227] an Illinois court endorsed two different models in a single case—one for representing the person in challenging the guardianship and another for representing the same person seeking to perform a task that had been delegated to the guardian. Lawrence Kutchins hired a law firm to represent him to oppose his guardian's efforts to sell certain stocks in his estate and to petition for restoration of capacity.[228] When the firm subsequently filed a motion for attorney's fees, the court granted the request for fees related to the representation in the capacity restoration matter, but denied the fees connected with the appellate work involving the stock sale because the firm had not obtained the court's or the guardian's permission prior to filing the appeal.[229] Thus, the court condoned the representation only insofar as it related to the terms and

221. Newman, the attorney, claimed that he was entitled to quasi-judicial immunity because his primary role was to assist the court to determine and serve the best interests of his client. *Id.* at 257.

222. *Id.* at 260.

223. *Id.*

224. *Id.* ("Thus, as a general rule, attorneys for respondents and attorneys for conservatees are not ethically permitted, much less required, to make decisions on the basis of their personal judgment regarding a respondent's or a conservatee's best interests, although they may be required to do so in an exceptional case.").

225. *Id.*

226. *See supra* Section III.C.

227. 523 N.E.2d 1025 (Ill. App. Ct. 1988).

228. *Id.* at 1026.

229. *Id.* at 1027–28.

conditions of the guardianship itself.[230]

IV. A PROPOSED ETHICAL FRAMEWORK AND CLARIFICATION

So what is an attorney to do? In this Part, we provide a synthesis of the underlying law and available ethical guidance and distill it into a simple ethical framework to guide attorneys who are representing, or considering accepting representation of, persons subject to guardianship. We then show how a simple clarification to Model Rule 1.14 could provide much-needed guidance for attorneys in such situations.

A. A Framework for Determining the Appropriate Model of Representation

Our review of the underlying law and the current ethical guidance available to attorneys in the preceding two Parts indicates that attorneys may legally and ethically represent and take direction from persons subject to guardianship in certain situations, but not in others. Specifically, based on the research presented in Parts II and III of this Article, we conclude that attorneys legally may, and ethically should, adopt an expressed interest (or "normal relationship") model of representation when representing persons subject to guardianship who seek to challenge the existence, terms, or conditions of their guardianship, or who seek legal advice about their rights in this regard. The expressed interest approach is also appropriate when a person subject to guardianship seeks legal assistance to exercise other retained rights. By contrast, where such persons seek legal representation to undertake a legal act that has been lawfully delegated to the guardian, an attorney may not legally or ethically directly represent them in the matter. In any case, the best interest standard should only be applied when the client is at risk of substantial harm, justifying reasonable protective action consistent with Model Rule 1.14.

Thus, we suggest that the ethical framework for attorneys representing persons subject to guardianship can be distilled in the following manner:

230. *Id.*

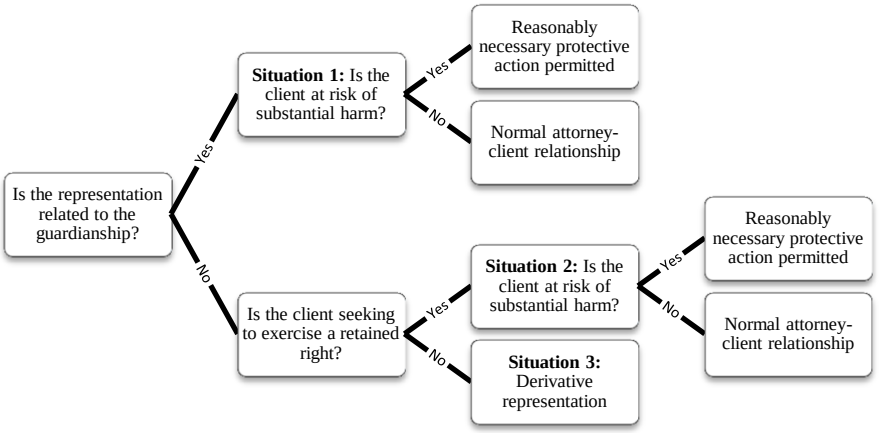

Figure 1: Ethical Framework for Representing Clients Subject to Guardianship

As depicted in Figure 1, we differentiate between three situations in which an attorney would be called upon to represent a person subject to guardianship: (1) situations in which the representation is related to a guardianship matter (e.g., the existence, terms, or conditions of the guardianship); (2) situations in which the representation is related to other retained rights; and (3) situations involving representation related to matters that are related neither to retained rights nor to the guardianship.

In the first situation, an expressed interest model of representation with only limited exceptions is necessary to protect the fundamental due process rights of persons subject to guardianship. If such persons are not able to engage counsel and direct the attorney to act according to their wishes, as a practical matter they will effectively be denied the ability to protect their fundamental constitutional rights. Therefore, the default ethical standard for an attorney representing a person subject to guardianship in a matter related to the guardianship should be to maintain a normal attorney-client relationship. As described earlier, a normal attorney-client relationship entails keeping client communications confidential, making sure a client stays reasonably informed about the status of the legal matter, providing competent legal advice and services, complying with the client's directions regarding the objectives of the representation (unless the client's expressed wishes are

patently frivolous or unlawful), and consulting with the client regarding the means of achieve those objectives.[231] As with persons not subject to guardianship, an attorney would be permitted to deviate from a normal attorney-client relationship to take protective action when, as set forth in Model Rule 1.14, "the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest."[232]

In the second situation, the representation is unrelated to the guardianship and the primary question is whether the matter pertains to a retained right. To prevent excessive infringement on an individual's fundamental rights, guardianship must be no more restrictive than is necessary. The person subject to guardianship should be free to exercise all of the person's rights that have not been delegated to the guardian or otherwise restricted by the guardianship order. The expressed interest model is able to empower clients to fully and meaningfully exercise their retained rights. Once again, however, the lawyer may deviate from the normal attorney-client relationship under the same circumstances that the lawyer would be free to deviate if the client were not subject to guardianship. For example, the lawyer could be entitled to take protective action if assisting a client who has diminished capacity to exercise a retained right is reasonably likely to place that person at substantial risk of harm.

In the third situation, by contrast, it is unethical for an attorney to help a client to directly exercise a right that has been lawfully delegated to the guardian. Assisting a client to take an action that he or she does not have the legal capacity to do could violate Model Rule 1.2(d), which prohibits an attorney from counseling or assisting a client in fraudulent or criminal conduct.[233] In addition, it might be construed as a violation of Model Rule 3.1, which prohibits an attorney from bringing a claim for which there is no legal basis.[234] In such cases, the attorney can assist the client to exercise the right through the guardian, consistent with the derivative representation model.[235]

In short, maintaining a normal attorney-client relationship is the appropriate model of representation in most situations and can,

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231. *See supra* notes 117–20 and accompanying text.

232. MODEL RULES OF PROF'L CONDUCT r. 1.14(b) (AM. BAR ASS'N 2002).

233. *See id.* r. 1.2(d); Lee, *supra* note 13, at 476.

234. MODEL RULES OF PROF'L CONDUCT r. 3.1.

235. Alternatively, the attorney could represent the person subject to guardianship in seeking restoration of that right through an amendment to the underlying guardianship order.

therefore, be classified as the default ethical standard. Considering the client's best interest is only appropriate when maintaining the normal relationship would put the client at risk of substantial harm. Derivative representation is only appropriate as to matters unrelated to the guardianship itself and only when those matters have been delegated to the guardian.[236]

This proposed framework is consistent with the requirements of due process. As discussed in Section II.C of this Article, what due process requires depends on whether the legal matter is related to the guardianship or not. In matters related to the guardianship, due process requires that the decision-making processes and proceedings allow sufficiently meaningful participation so as to be fair to the person subject to guardianship. In matters unrelated to the guardianship, the primary due process concern is less about fairness of the proceedings and more about the opportunity to meaningfully exercise retained rights. Because these due process considerations differ, our framework distinguishes between representations related to the guardianship and those related to other legal matters.

In addition, the framework is consistent with the underlying purpose of guardianship.[237] By acknowledging the expressed interest model is not appropriate where the person subject to guardianship seeks representation to perform an act that has been delegated to the guardian, the framework allows guardianship to continue to protect at risk, vulnerable persons by delegating decision-making authority to third parties as necessary.

B. A Proposal for Implementing the Framework Through Model Rule 1.14

Because Model Rule 1.14 has been adopted either as is or with minor modifications by almost all states,[238] we focus our final analysis and recommendations for reform on this Rule and its commentary. To the extent our analysis and recommendations apply to other sources of

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236. Even in such situations, however, the attorney may have limited duties to the person subject to guardianship. *See* Lee, *supra* note 13, at 475–79.

237. This is critical not only because both due process and protecting the underlying purpose of guardianship are valuable from a public policy perspective. It is also critical because, although the relevant cases, ethics opinions, and secondary sources may appear divergent and often contradictory, there are some consistent overarching themes. These include concern for due process, the need to protect vulnerable people from harm, and the delegation of authority to the guardian. It is around these three themes that the proposed framework is structured.

238. *See supra* note 121.

ethical guidance, we hope they will inform future amendments to those materials as well.

Incorporating our framework into existing ethical guidelines will not require changing the main text of even a single Model Rule. The main text of Model Rule 1.14 is consistent with the framework proposed in this Article. Paragraph *a* of the Rule instructs an attorney to maintain a normal attorney-client relationship even when a client has diminished capacity.[239] Paragraph *b* describes an exception to this general rule when a client is at risk of substantial harm and is unable to act in his or her own interests.[240] An attorney is then permitted to take reasonably necessary protective action. This narrow exception acknowledges that under some circumstances a person's diminished capacity may pose such a threat to that person's security that protective action is justified, whether or not there is a guardian appointed. The Rule thus strikes the appropriate balance between respecting autonomy and protecting a vulnerable person from substantial harm.[241]

Consistent with the main text of Model Rule 1.14, our proposed framework would have the attorney maintain a normal attorney-client relationship with persons subject to guardianship. This means that the attorney would advocate for the person's expressed interests except in circumstances where the person seeks legal representation to perform an act that has been delegated to the guardian. Thus, as with other clients, the representation would be limited by what the client is legally authorized to do. The proposed framework permits an attorney to take protective action in the circumstances described in Model Rule 1.14(b).[242] Notably, however, since protective action has already been taken in the form of the guardianship itself, situations that warrant additional protective steps by the attorney may be less common than when a client is not subject to a guardianship.

By contrast, revisions to the Comments to Model Rule 1.14 are necessary. As set forth in Part III of this Article, the current Comments to Model Rule 1.14 are internally inconsistent and confusing. Throughout the cases and ethics opinions discussed in this Article are examples of selective application of Comments 2 and 4. At times the decision-makers rely on Comment 2 to hold attorneys to the expressed

239. MODEL RULES OF PROF'L CONDUCT r. 1.14(a).

240. *Id.* r. 1.14(b).

241. Likewise, paragraph *c* of Model Rule 1.14, which simply states the general rule that a client with diminished capacity continues to be entitled to confidentiality, is consistent with the proposed framework.

242. MODEL RULES OF PROF'L CONDUCT r. 1.14(b).

interest standard, while at other times attorneys are held to the derivative representation standard based on Comment 4. The co-existence of these comments creates at best an ambiguous rule and at worst a trap for attorneys representing clients subject to guardianship.

We propose that both Comment 2 and Comment 4 be replaced in favor of a unified comment that explicitly addresses representation of persons subject to guardianship. This new comment should clarify that being subject to a guardianship does not prevent a person from being represented by an attorney. It should also make clear that Model Rule 1.14 applies to all clients with diminished capacity, whether or not a guardian has been appointed. This means that attorneys representing persons subject to guardianship should maintain a normal attorney-client relationship in most cases. Finally, it should outline the exceptional situations in which maintaining a normal relationship is inappropriate, including when doing so would put the client at risk of substantial harm and when the legal matter has been lawfully delegated to the guardian.

To aid the process of revising the comments to Model Rule 1.14, we provide the following suggested language that could be considered for adoption:

> The requirements of the Rule apply to clients with diminished capacity regardless of whether or not a guardian, conservator, or other agent has been appointed to act on the client's behalf. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.
>
> When representing a client subject to guardianship or conservatorship in a matter related to the guardianship or conservatorship (including but not limited to proceedings to modify the terms of the appointment or to restore the client's rights), an attorney should maintain a normal attorney-client relationship with the client unless the attorney reasonably believes that doing so would place the client at risk of substantial physical, financial, or other harm, and the client cannot adequately act in the client's own interest. In such case, the attorney may take reasonably necessary protective action consistent with sections (b) and (c) of the Rule. This reasonable protective action may include recommending to the court the appointment of a guardian ad litem.
>
> Before representing a client subject to guardianship or conservatorship in a matter not directly related to the terms or conditions of the guardianship or conservatorship, an attorney should make a reasonable effort to determine whether the client retains the right to carry out the proposed act. If the attorney

> reasonably concludes that the client retains the right to carry out the act, the attorney should maintain a normal attorney-client relationship unless the attorney reasonably believes that doing so would place the client at risk of substantial physical, financial, or other harm. In such case, the client may take reasonably necessary protective action consistent with sections (b) and (c) of the Rule. If the attorney reasonably concludes that the act has been lawfully delegated to the guardian or conservator, or is otherwise impermissible, an attorney may not directly represent the client in the matter. Instead, the attorney should inform the client of the restriction on the client's rights and, at the client's request, may petition the court to allow the client to carry out the desired act. Any such petitions are subject to Rule 3.1 regarding frivolous claims.
>
> If the lawyer represents the guardian or conservator as distinct from the person, and is aware that the guardian is acting adversely to the person's interest, the lawyer may have an obligation to prevent or rectify the misconduct of the guardian or conservator.

CONCLUSION

Persons subject to guardianship must be able to engage attorneys to represent them in challenging the terms, conditions, and existence of their guardianships if their fundamental due process rights are to be respected. They must also be able to access legal representation to exercise other retained rights. While some lawyers are reasonably concerned that representing such individuals will expose them to potential liability, it is ethical and appropriate for attorneys to enter into a normal attorney-client relationship with persons subject to guardianship to represent them as to matters related to the guardianship and with regard to other retained rights.

Nevertheless, unless the Model Rules of Professional Conduct are clarified, risk-averse attorneys are likely to continue to shun representation of persons subject to guardianship for fear of jeopardizing their licenses to practice. Adopting the simple change to the Comments to Model Rule of Professional Conduct 1.14 could substantially increase clarity with regard to the attorney's role, and thereby encourage attorneys to undertake the representations necessary to ensure that the fundamental rights of persons subject to guardianship—some of the most vulnerable members of society—are truly respected and protected.