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## Understanding the Gap Between Law and Practice: Barriers and Alternatives to Tailoring Adult Guardianship Orders

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# **UNDERSTANDING THE GAP BETWEEN LAW AND PRACTICE: BARRIERS AND ALTERNATIVES TO TAILORING ADULT GUARDIANSHIP ORDERS**

ELEANOR CROSBY LANIER\*

## **INTRODUCTION**

Norma is 78 years old and lives in a small bungalow near a commercial area on the edge of town. She worked hard to pay for her home and is fiercely independent but has become increasingly frail and needs help managing her financial affairs, getting to her doctor for appointments and remembering to take medication prescribed for her hypertension, a condition exacerbated by her love of salty fried foods. She has been diagnosed as pre-diabetic but is unwilling to make the recommended changes to her diet, claiming that food is one of her last remaining pleasures. Her closest relative, a niece, lives in a nearby town with teenage children and has a busy work life. Norma stopped attending church when her friend who would drive her passed away. She no longer owns a car. Norma gets a healthy home delivered meal for lunch each weekday from the local senior center and cooks other meals for herself or walks to a nearby diner where she is well-known by staff and patrons. Norma fell recently and hit her head. There was no serious damage, but her doctor is concerned that her blood pressure had spiked due to her forgetting to take her medicine. The doctor wants to put Norma on a strict diet to help with her blood sugar and blood pressure issues.

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Norma is more tired recently and is less interested in housekeeping and other activities so some of her bills have stacked up. In July, her phone service was discontinued for non-payment, and her niece dropped by when she couldn't reach her aunt by phone. Her niece found a stack of unpaid bills and worked with Norma to fill out checks and mail them so that her power wouldn't be cut off during the hot summer. Norma doesn't think she needs any help, and she wants her niece to stay out of her business. She has befriended a young man who is a regular patron at the diner, who often joins her at the counter for meals and has offered to help Norma with chores and bill paying.

While there is no *typical* adult guardianship case, the above example is illustrative of the type of situation that courts commonly address through the guardianship process—when an adult may need some form of assistance with health and/or financial decision-making. It also demonstrates the nuanced nature of guardianship which is often rooted in individual perspectives and tolerance for risk. Does Norma have the legal capacity to make significant responsible decisions for herself? Should her niece take the reins by filing guardianship to protect Norma? Should Norma be allowed to make decisions that might put elements of her personal safety, health or finances at risk?

An overwhelming majority of state laws governing adult guardianship require an inquiry into whether less restrictive alternatives may be available/appropriate and, where guardianship is necessary, that guardianship orders be designed to maximize the independence of the person subject to the guardianship. However, the best available data indicates that most guardianship orders are plenary,<sup>1</sup> removing rights on a wholesale basis rather than individually tailoring the guardianship. To many observers, the imposition of plenary guardianship contradicts the unambiguous statutory language in most states favoring a tailored approach that implements

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<sup>1</sup> See, e.g., Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 219 (2007) (finding that courts ordered limited guardianships in less than 10 percent of cases studied.)

guardianships to maximize an individual's independence and autonomy.<sup>2</sup>

The literature is rife with examples and critiques of the overuse of plenary orders,<sup>3</sup> and other articles have focused on the need to limit or tailor guardianship to address the functional capacity of the person who is purportedly in need of protection and assistance.<sup>4</sup> The purpose of this article is to identify, examine, and better understand existing legal and practical barriers to limited guardianship and to explore and recommend possible alternatives. It falls into the broad category of a second-generation gap study; in that it seeks to “compare law in action with the perceived objectives of law on the books.”<sup>5</sup> The article will first provide a framework for the language of guardianship and then discuss current statutory and case law governing limited guardianship and will address attendant legal barriers. Next, the article will review the data on actual practice and explore the reasons for the gap between law and practice and the feasibility of tailoring guardianship orders. Finally, the article will recommend extrajudicial alternatives to achieve the goal of maximizing independence for adults who need assistance with personal and financial decision making.

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<sup>2</sup> See, e.g., Jalayne J. Arias, *A Time to Step In: Legal Mechanisms for Protecting those with Declining Capacity*, 39 AM. J.L. & MED. 134, 137 (2013) (advocating for mechanisms to address a gradual decline in capacity over a “bright line” standard.)

<sup>3</sup> See, e.g., Nina A. Kohn et al., *Supported Decision-Making: A Viable Alternative to Guardianship?* 117 PENN. ST. L. REV. 1111, 1117–18 (2013).

<sup>4</sup> See e.g., Lawrence Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 741 (2002) (prepared for the WINGSPAN Conference, addressing ways to promote judicial acceptance of limited guardianships); Arias, *supra* note 2 (advocating a tailored approach.)

<sup>5</sup> John Gould & Scott Barclay, *Mind the Gap: The Place of Gap Studies in Sociolegal Scholarship*, 8 ANN. REV. L. SOC. SCI. 324, 327 (2012). It falls in the realm of a gap study because it chronicles the ways guardianships as established may operate in disharmony with the unambiguous language in most guardianship statutes, yet seeks to understand the nature of the gap rather than to identify additional reforms that would bridge it.

## **I. THE GUARDIANSHIP LANDSCAPE**

Guardianship is part of a continuum of legal mechanisms employed to assist individuals with medical or legal decision making. This continuum includes the following: arrangements based on common law agency principles, where decision making authority is retained by the principal and shared with an agent named in the document such as health care and financial powers of attorney; revocable or irrevocable trusts which provide a mechanism for trustee control over financial assets, and direct legal indicia of an individual's intent regarding medical care and treatment such as living wills. Many people use these planning documents to avoid the need for legal intervention through guardianship, and incapacity planning is an important service within an elder law practice. When incapacity planning is ineffective or has not occurred prior to incapacity, or where other alternatives to guardianship such as supported decision making have not been explored, interested parties concerned about an adult may decide to file a guardianship action in court to obtain legal authority to make a range of decisions for a vulnerable adult.

### **A. The Language of Guardianship**

While different terms are used in different jurisdictions, for the purposes of this article the term 'guardianship' is used to encompass judicially ordered personal and financial decision making for an incapacitated adult. A full or plenary guardianship order reduces the individual to the legal status of a child. The primary focus of this piece is on the older individual, but it also addresses collateral issues related to tailoring guardianship for younger adults for whom diminished capacity began prior to reaching the age of majority. Guardianship of minors is outside the purview of this study. Depending on the jurisdiction the person who is purportedly in need of protection and assistance may be called the "person in need of

protection,” the “proposed ward,” a “person in need of guardianship,” an “alleged incapacitated adult,” or another term.<sup>6</sup>

An adult guardianship case requires a court to strike a balance between the protection of an individual’s rights and autonomy, protection of an impaired or incapacitated individual and others from potentially hazardous or harmful choices, and the efficient use of limited court resources.<sup>7</sup> In doing so, courts typically look at personal and financial decision making independently of each other. Adult guardianship can encompass personal decision making, such as establishing one’s residence or making medical decisions, sometimes called guardianship of the person or simply guardianship and financial choices and control over real and personal property, sometimes called guardianship over property or conservatorship. Courts may address an individual’s capacity, order structured support, and grant formal decision-making authority to a guardian in one or both areas. Petitioners may opt to file for guardianship or conservatorship independently or as part of the same action. For this reason, it can be argued this dual system implicitly encourages the tailoring of guardianship. Yet most guardianship petitions request a review of decision-making capacities under both broad categories, and most guardianship orders remove all rights, even where this removal might not be necessary.<sup>8</sup>

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<sup>6</sup> Commission on Law and Aging, A.B.A., *Guardianship and Supported Decision-Making*, [https://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice.html#statelawsandpolicy](https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html#statelawsandpolicy) (last visited Mar. 5, 2018).

<sup>7</sup> See Hannaford & Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 ELDER L.J. 147, 149 (1994) (Discussing the struggle of courts to strike a three-way balance between provision of necessary services, protection against unwarranted restrictions on freedom and autonomy and responsible stewardship of court resources).

<sup>8</sup> See Bayles & McCartney, *Guardianship of the Elderly: An Ailing System*, Associated Press (Special Report Sep. 1987) (describing a system “that regularly puts the lives of the elderly in the hands of others with little or no evidence of necessity”).

## **B. Analysis of Statutory Basis for Limited Guardianship**

A review of statutory language addressing limited guardianship in the fifty states and the District of Columbia showed that guardianship laws commonly contain language either allowing or promoting tailored or limited guardianship orders. While most state statutes authorize limited guardianship orders, a strong statute has not appeared to result in increased use of limited guardianship or tailoring of guardianship orders. This section provides an overview of the most common language included in state statutes in several areas: (a) defining and encouraging limited guardianship; (b) establishing a guardianship only after less restrictive alternatives are considered; (c) including a preference for limited guardianship and requiring information in the petition explaining why limited guardianship is not appropriate; (d) maximizing self-reliance and independence of the person for whom guardianship is sought, (e) promoting a protected person's participation in decision-making after a guardianship is established; and (f) supporting a guardian's efforts to seek restoration of rights, to regain capacity and work in conjunction with the protected person to terminate the guardianship.

The foundation for much of the language relating to limited guardianship found in state laws comes from the Uniform Law Commission, and specifically language in Article V of the Uniform Probate Code (UPC) that integrated language in the Uniform Guardianship and Protective Procedures Act (UGPPA), and was amended in 1982 to first include limited guardianship<sup>9</sup> and to include provisions to implement the other concepts identified above. At the time of this writing significant amendments to UGPPA are pending, and when approved, this new model act will provide additional mechanisms and inspiration for states seeking to further improve and evolve their guardianship laws. Most significant are suggested changes to the model statute and standard orders that would make it

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<sup>9</sup> See generally Uniform Guardianship & Protective Proceedings Act (1997), [http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20proceedings/UGPPA\\_2011\\_Final%20Act\\_2014sep9.pdf](http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20proceedings/UGPPA_2011_Final%20Act_2014sep9.pdf) (last visited Mar. 5, 2018).

much easier to request and order a limited guardianship. If states adopt these changes it would have a significant positive impact on narrowing the gap between law and practice.

### **1. Snapshot of Selected Components of Guardianship Statutes**

For many years, the ABA Commission on Law and Aging (COLA) has provided charts compiling elements of state statutes to the public for use by researchers, advocates, courts, legislatures and others.<sup>10</sup> These helpful charts provide a breakdown of state guardianship provisions including how states define incapacity, address issues related to privacy and representation, notice, conducting, evaluation, findings and monitoring. The ABA COLA chart on state language addressing limited guardianship, updated as part of this research project, provides the basis of the snapshots of state statutory provisions discussed herein. And while the discussion below explores the prevalence of a range of specific provisions commonly found in state law to address limiting or tailoring an order, common law rules of statutory interpretation codified in most states promote textual integrity, deriving the meaning of a singular provision in a statute by reading the entire text.<sup>11</sup> With that caveat, the following section explores the prevalence of some of the most common language found in state guardianship law related to limiting a guardianship to enable a protected person to retain rights, express choice, and work to regain independence through restoration.

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<sup>10</sup> ABA, *supra* note 6.

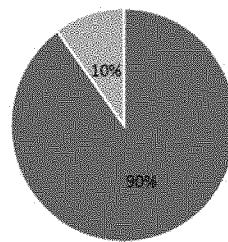
<sup>11</sup> Quinton Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1, 2 (1954) (“the purpose of a statute should be derived from all its words”); *see also* John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank, 114 S. Ct. 517, 523 (1993); *Pavelic & Leflore v. Marvel Entertainment Group*, 493 U.S. 120, 123–24 (1989); *Massachusetts v. Morash*, 490 U.S. 107, 114–15 (1989) (these cases are commonly referenced with respect to textual integrity).



**a. States That Provide for and/or Define Limited Guardianship**

Nine out of ten states follow the lead of UGPAA and explicitly define or otherwise provide for the use of limited guardianship. So theoretically, limited guardianship is legally available to litigants in most jurisdictions. And even in states that do not explicitly provide for or define a limited guardianship, a tailored order is arguably available to courts and litigants where appropriate, given that these statutes typically include language that supports limiting a guardianship, even where it is not defined in the statute.<sup>12</sup>

States with a statute that explicitly provides for limited guardianship and defines it



■ Yes ■ No

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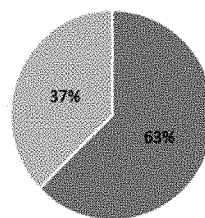
<sup>12</sup> For example, in Arizona the statute does not define a limited guardianship but does contain a preference for limiting. Ariz. Rev. § 14-5303(B) requires that a petition for a general guardianship address why a limited order is not appropriate and provides in § 14-5304 (A) that the court shall encourage development of maximum self-reliance and independence and in § 14-5312 (A)(7) that a Guardian shall encourage the ward's self-reliance and actively work towards terminating the arrangement.

**b. States Encouraging the Development of Maximum Self-Reliance and Independence**

Sixty-three percent of state adult guardianship statutes explicitly contain language that where entered, guardianships either should or shall encourage the development of maximum self-reliance and independence of the protected person. Inclusion of this language in guardianship laws is significant because if implemented authentically, these statutes envision guardianship as a partnership designed to support the highest functioning of the protected person. This language provides an important underpinning for the remaining sections of the law and suggests the need for additional resources including training for guardians who exercise rights on behalf of a vulnerable adult.

Although the fact that thirty-seven percent of states do not appear to embrace this language explicitly might suggest that the concept is not important, these states also typically employ language embracing similar concepts and language found in UGPAA.

States with language encouraging the development of maximum self-reliance and independence

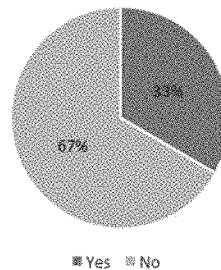


■ Yes ■ No

### c. States That Encourage Participation in Decisions

A smaller number of states (17) build on the above concept of developing maximum self-reliance and independence by including language that encourages a protected person's participation in decisions. This language could be viewed as a springboard for guardians to engage in a court-managed form of supported decision-making, a concept that is considered by many to be the future of guardianship and protective arrangements because it promotes a collaborative mindset in decision-making.<sup>13</sup> This language also dovetails with the use of substituted decision-making as a decision-making standard for guardians, an issue explored by Whitton and Frolik in their survey of state law and standards for guardian decision making discussed above. However, there are practical barriers to achieving this goal, particularly for professional and public guardians, that will be addressed later in this article.

States that encourage a ward's participation in decisions



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<sup>13</sup> See the National Center for Supported Decision-Making, <http://www.supporteddecisionmaking.org> (the center provides funding through a cooperative agreement with Quality Trust for Individuals with Disabilities, which in turn has funded demonstration grants in several states).

And for this provision to have meaning in practice, it is critical that guardians be trained to understand how to best incorporate choice and promote the participation of the protected person. The National Guardianship Association's Standards of Practice require guardians to "identify and advocate for the person's goals, needs and preferences" and further set forth the method by which a guardian can accomplish this.<sup>14</sup>

Supported Decision-Making, an approach which has a foundation in Article 12 of the United Nations Convention on the Rights of Persons with Disabilities, has the support of the Administration for Community Living (ACL) the arm of the United States Department of Health and Human Services (DHHS) responsible for administering federal programs and resources to support older Americans and individuals with intellectual disabilities. Texas and Delaware have enacted Supported Decision-Making statutes that include a statutory form for SDM arrangements and DC has a version geared towards individuals eligible for special education placement and plans and many advocates promote the use of Supported Decision-Making principles in the context of estate and incapacity planning.<sup>15</sup>

**d. States with a Preference for Limited Guardianship or Require a Rationale Addressing Why Limited Order Not Appropriate**

Some states promote limited or tailored guardianship by containing language in the statute expressing a preference for a tailored order or alternatively, to require that a guardianship petition

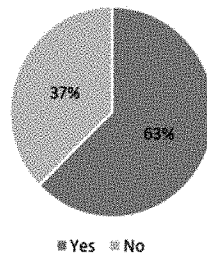
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<sup>14</sup> National Guardianship Association, Standards of Practice, NGA Standard 7, 9, <https://www.guardianship.org/wp-content/uploads/2017/07/NGA-Standards-with-Summit-Revisions-2017.pdf>.

<sup>15</sup> See ABA Center on Professionalism Continuing Education (Webinar July 25, 2017), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/2017\\_mayjune\\_bifocal-1.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2017_mayjune_bifocal-1.pdf); ABA, PRACTICAL Tool for Lawyers: Steps in Supporting Decision-Making, [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/PRACTICALTool.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/PRACTICALTool.pdf).

address why a limited order or less restrictive alternative is not appropriate or available. The statutory review indicates that 37% of state guardianship statutes include such language. Again, since most of guardianships ordered are not limited in any significant way, it appears that this statutory approach does not effectively promote or result in more tailored orders. As the article will discuss later, courts may not have or may not commit sufficient resources to determine whether a petitioner has complied with this aspect of the law, and even if the court record contains sufficient information to support a more comprehensive order, it is unlikely that an appeal on this ground would be successful. The lack of resources and failure to include information in the court record are among the practical barriers to successfully tailored orders that will be addressed later in the paper.

States with a preference for limited guardianship or that require the petition to include a rationale for why a limited order is not appropriate

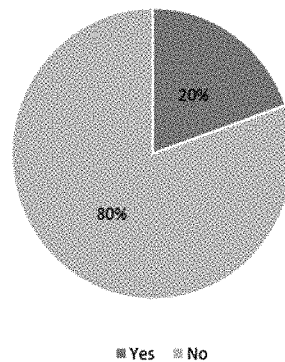


#### e. States that Promote Restoration

Only one-fifth of states include language that where a guardianship is imposed, the guardian should work with the protected person to regain capacity or to terminate the protective arrangement. This language acknowledges the widely-held premise that capacity is not a static concept, that it is variable as to time and task, and therefore can be facilitated or regained in some circumstances, so a

guardian should encourage a protected person to regain abilities to self-direct decisions and work towards the restoration of rights removed by the guardianship process.<sup>16</sup> The National Guardianship Association's Standards of Practice contain an affirmative duty to limit or terminate the arrangement when the person no longer meets the standard under which the protective arrangement was imposed or when there is an effective alternative available.<sup>17</sup>

States with a statute that promotes restoration of rights, regaining capacity, or working to terminate the guardianship



#### f. States that Require Consideration or Exhaustion of Least Restrictive Alternatives

Consideration or exhaustion of less restrictive alternatives codifies long standing constitutional principles addressed in the next section in which courts have held that states may only deprive individual liberty interests to the extent necessary to achieve their legitimate purposes.<sup>18</sup> Recognizing that states have an interest in pro-

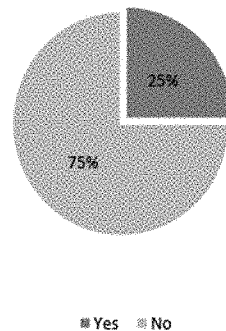
<sup>16</sup> See Charles Sabatino, *Assessing Clients with Diminished Capacity* 22 BIFOCAL 1 (Summer 2001).

<sup>17</sup> *Standards of Practice*, supra note 14, NGA Standard 12H, 21 (containing a preference for limiting a guardianship and requires the guardian to assist the person to regain capacity and terminate the arrangement).

<sup>18</sup> *Shelton v. Tucker*, 364 U.S. 479, 489 (1960).

protecting their citizens from harm, these interests must be met using the least restrictive means feasible. In the context of adult guardianship, depriving an individual of liberty interests to make decisions over one's person and/or property should only be undertaken where there are no less intrusive options available to meet the goal. As the chart below indicates, this language is present in only one fourth of state guardianship statutes. The National Guardianship Association's Standards of Practice directly address less restrictive alternatives in Standard 8 and provide guidance as to how to determine whether less restrictive options may be available. However, at least one court found these standards were not persuasive when a protected person relied on an earlier version of them to argue for restoration.<sup>19</sup>

States that mention the least restrictive intervention



It is unclear whether the foundation in case law of the concept of least restrictive alternative plays a role in the paucity of statutes that include this language explicitly in adult guardianship codes.

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<sup>19</sup> *Estate of Keenan v. Colo. State Bank and Trust*, 252 P.3d 539 (Colo. Ct. App. 2011) (noting these Standards had “not been endorsed by the American Law Institute or any similar body as reflecting the common law.”).

## 2. What the Statutes Tell Us

Nine out of ten states clearly provide for limiting a guardianship, either by including a specific section that defines or authorizes a limited guardianship order, or through inclusion of other language that indicates a preference for a limited order. A significant number (63%) of states have language that where ordered, guardianship should support the maximum independence and self-reliance of the protected person. Other language that could be used to promote limited or tailored orders is less prevalent, with the other provisions examined (encouraging participation in decisions, expressing a preference for a limited order, working towards restoration, consideration or exhaustion of less restrictive alternatives), appearing in fewer than a third of state guardianship codes. Where language supporting limited guardianship is not woven throughout a statute, it constitutes an additional legal barrier to tailored orders.

## II. APPLICATION OF THE LAW/PRACTICES

As an outgrowth of a wave of reforms that were enacted in the mid-1980s to early 1990s, some 63% of state statutes include language requiring that guardianships be ordered in a way that maximizes autonomy and independence. Plus, as noted above, 63% also require some proof that less restrictive alternatives have been explored or attempted before a guardianship may be imposed.<sup>20</sup>

While there remains a paucity of hard data on the number and form of guardianships nationally,<sup>21</sup> reported cases and past surveys can help illustrate the current state of the guardianship system nationally. In the post-reform years<sup>22</sup> scholars and commenta-

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<sup>20</sup> Eleanor Lanier, *State Chart of Guardianship/Conservatorship Statutes*, University of Georgia School of Law Legal Studies Research Paper No. 2016-36 (Nov. 1, 2016).

<sup>21</sup> Lanier, Eleanor, *State Chart of Guardianship/Conservatorship Statutes* (36 University of Georgia School of Law Legal Studies Research Paper No. 2016-36, 2016), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2862690](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862690).

<sup>22</sup> See U.S. Gov't Accountability Off., GAO-04-655, *Guardianships: Collaborations Need to Protect Elderly Incapacitated People* 6 (2004) (detailing the



tors have focused on concerns within state systems, including the definition and evaluation of “capacity” for the purposes of determining the need for guardianship, the lawyer’s role and ethical obligations in adult guardianship representation, due process and procedural protections attendant to the process, appropriate oversight of guardians and conservators to protect against exploitation, and gathering more accurate data about the number and condition of adults currently subject to guardianship or conservatorship.<sup>23</sup>

The reform efforts begun during the late twentieth century have advanced both the conversation and best practices concerning ways to strike the balance between protection, autonomy and resources, and have produced a myriad of tools for courts, guardians and lawyers.<sup>24</sup> A broad range of stakeholders<sup>25</sup> joined forces to create the National Guardianship Network, and the National Guardianship Association developed Standards of Practice for guardians and for agencies and programs that provide guardianship services.<sup>26</sup> Three interdisciplinary conferences brought together experts and stakeholders to advance the conversation and develop recommendations for reform.<sup>27</sup> This movement has continued with the establishment of

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challenge of identifying the number of persons for whom guardians or conservators have been appointed).

<sup>23</sup> Generally considered the period following the groundbreaking Associated Press series in 1988 highlighting problems in the system nationally, *supra* note 8.

<sup>24</sup> See *Wingspan—The Second National Guardianship Conference, Recommendations*, 31 STETSON L. REV. 595, 596, 597, 600–03, 606 (2011); *Third National Guardianship Summit Standards and Recommendations*. 2012 UTAH L. REV. 1191, 1201 (2011).

<sup>25</sup> See National Probate Court Standards §§ 3.3 9, 3.3 10, 3.3 14 (2013) [https://www.guardianship.org/wp-content/uploads/2017/08/Standards\\_of\\_Practice\\_2017.pdf](https://www.guardianship.org/wp-content/uploads/2017/08/Standards_of_Practice_2017.pdf) (last visited Mar 5, 2018); *ABA PRACTICAL Tool*.

<sup>26</sup> Network members include AARP Public Policy Institute, the ABA Commission on Law and Aging, the ABA Section on Real Property, Trust and Estate Law, the Alzheimer’s Association, the American College of Trust and Estate Counsel, the Center for Guardianship Certification, the National Academy of Elder Law Attorneys, the National Center for State Courts, the National Disability Rights Network, the National College of Probate Court Judges and the National Guardianship Association.

<sup>27</sup> Standards of Practice.

WINGS groups in many states, with plans to expand both the scope and focused activities of WINGS in 2017.<sup>28</sup>

While limiting or tailoring a guardianship to retain power based on the capacity of the individual in need of assistance is “the preferred legal outcome,”<sup>29</sup> recent focus has been on improving practices within guardianships so that where ordered, they operate with appropriate safeguards, supervision, and protection of vulnerable individuals.<sup>30</sup> This shift may be an outgrowth or implicit recognition of the gap between law and practice and thus may constitute an effective way to work around the gap.

### A. Lessons from Prior Surveys

Because guardianship is based on individual state law, court procedures and implementation systems, it is difficult to paint a picture of the national landscape and accurately report the number, types and characteristics of guardianships.<sup>31</sup> Data collection at the court level is uneven and challenging. While improved data collection would help advance our understanding of the number and nature of guardianships and better understand the needs and circumstances of those living under court protection, most states do not have or commit sufficient resources to effectively capture this information. Because guardianship cases per se involve vulnerable

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<sup>28</sup> Wingspread conference in Wisconsin (1988); Wingspan Conference: the Second National Guardianship Conference in Florida; Wingspan Implementation Session convened by the National College of Probate Judges (2004); “The National Academy of Elder Law Attorneys, and the National Guardianship Association in Colorado and its resulting action steps, and 2011’s Third National Guardianship Conference in Utah, [http://www.naela.org/NGN/Summits\\_on\\_Guardianship/History/NGN/Summits\\_on\\_Guardianship/History.aspx?hkey=ed8f7a49-dc08-44b0-b9be-b4313011f515](http://www.naela.org/NGN/Summits_on_Guardianship/History/NGN/Summits_on_Guardianship/History.aspx?hkey=ed8f7a49-dc08-44b0-b9be-b4313011f515) (last visited on Mar. 5, 2018).

<sup>29</sup> Leslie Francis, *Preface to the Third National Guardianship Summit: Standards of Excellence*, 3 UTAH L. REV. 1155 (2012).

<sup>30</sup> See, e.g., *Third National Guardianship Summit, Standards of Excellence*, *supra* note 33 (reflecting in the subtitle its focus on post-appointment guardian performance and its resulting Standards and Recommendations from this consensus conference of experts, who are focused on the role and activities of the guardian and the effective operation of a guardianship).

<sup>31</sup> GAO 2004 report, *supra* note 21.

persons, there are privacy concerns and practical barriers to determining both the needs and circumstances of persons under guardianship. On the positive side, courts typically require annual reviews and status reports and endeavor to exercise oversight over guardianship arrangements. And as data management systems improve, aggregate information should become more readily accessible.

### **1. Related National Studies**

A range of surveys have been undertaken to better develop a picture of how the adult guardianship system operates in different states. This section of the paper highlights the findings and recommendations of these efforts,

#### **a. National Center on Elder Abuse (NCEA)**

Because of the lack of hard data depicting the number of persons under guardianship and the types of guardianship imposed, the National Center on Elder Abuse (NCEA) funded a survey conducted by the American Bar Association Commission on Law and Aging to explore the types of data kept at the state level by court administrators related to adult guardianship. In addition to illuminating the extent of any problems, another goal of the NCEA project was to strengthen court collection of information related to case processing, monitoring of guardianship cases, and the prevalence of abuse in adult guardianship cases. An additional goal of this exploratory survey was to identify areas where reforms to policy, practice, and training were indicated. Furthermore, because the fiduciary relationship created through guardianship has the potential to enable or to facilitate a bad actor's exploitation or abuse, a better understanding of incidence of abuse and exploitation in guardianship will help advance the understanding of elder abuse in general.<sup>32</sup>

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<sup>32</sup> Erica Wood, *State Level Guardianship Data, An Exploratory Study* 1, 5 (2006), <https://ncea.acl.gov/resources/docs/archive/State-Level-Guardianship-Data-2006.pdf> (last visited Mar 5, 2018).

The results of this survey indicated there is much room for improvement in data gathering and coding by state courts systems, both at the basic level of knowing the numbers and types of guardianship cases and determining the incidence of abuse or exploitation. For the purposes of this article, these results indicate that from existing data it is difficult to determine the extent to which limited or tailored guardianships are employed throughout the different court systems that hear guardianship cases.

### **b. TASH**

Findings from a 2015 national survey by TASH on guardianship for individuals with intellectual disabilities demonstrates a profound underlying problem that encourages the imposition of plenary guardianship over other, less restrictive options. This survey focused on younger individuals with disabilities who with their families received information from an educational placement rather than on older persons. The TASH survey identified the options and recommendations routinely outlined to families and persons with disabilities who were transitioning from school to adulthood.

The results of this survey were striking. Not only was guardianship the most common recommendation made by educational placements, but the survey found “a consistent pattern of the most restrictive form of guardianship being discussed most frequently.” Furthermore, the survey indicated that school personnel discussed full guardianship 87% of the time and adult service personnel recommended guardianship 79% of the time.<sup>33</sup>

The TASH findings are particularly significant because other studies show that individuals with disabilities are more likely to function better in terms of employment, integration, and quality of life when they are supported in the exercise of self-determination.<sup>34</sup>

Additional national surveys explore other aspects of the guardianship system and support the need for more coordinated data

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<sup>33</sup> Jameson et al., *Guardianship and the Potential of Supported Decision Making with Individuals with Disabilities* 10 (2015), [http://www.tilrc.org/assests/news/publications/tash\\_guardianship\\_study2015.pdf](http://www.tilrc.org/assests/news/publications/tash_guardianship_study2015.pdf)

<sup>34</sup> *Id.* at 1.

collection efforts, training and monitoring. But because these surveys do not directly address tailoring or limiting guardianship they are beyond the scope of this paper.<sup>35</sup>

**c. 2014 Administrative Conference of the United States SSA Representative Payee: Survey of State Guardianship Laws and Court Practices**

This national survey was initiated by the Social Security Administration and conducted by the National Center on State Courts under a contract from the Administrative Conference of the United States. Its purpose was to better understand the laws and practices in different states and to identify best practices for collaboration in cases where a Representative Payee relationship exists concurrently with an adult guardianship.<sup>36</sup> The survey sought information from judges, guardians and court staff working in either a probate or general jurisdiction court in the fifty states<sup>37</sup> and collected information about the extent the courts work with community groups. It yielded interesting results with respect to tailoring a guardianship.

“The most common level of interaction between the courts and community groups/local agencies, according to court respondents, is “from time to time” (41 percent). An almost equal number of respondents stated that “the court has little contact with such groups” (39 percent). Only 14 percent of respondents indicated that the court had developed referral protocols and/or participated in

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<sup>35</sup> For example, the Center for Elders and The Courts conducted a national survey in 2009 to attempt to determine the availability of persons willing to serve as guardians or conservators and to identify successful practices in recruiting, training and retaining guardians and conservators. See C.E.C., *Adult Guardianship Court Data and Issues Results from an Online Survey*, [http://www.eldersandcourts.org/~media/Microsites/Files/cec/GuardianshipSurveyReport\\_FINAL.ashx](http://www.eldersandcourts.org/~media/Microsites/Files/cec/GuardianshipSurveyReport_FINAL.ashx) (Mar. 2, 2010).

<sup>36</sup> Administrative Conference of the United States, *SSA Representative Payee: Survey of State Guardianship Laws and Court Practices*, 1 (Dec. 24, 2014).

<sup>37</sup> *Id.* at 14 (Exhibit 2).

multidisciplinary groups.”<sup>38</sup> These findings are significant to limited guardianship because a strong relationship between the courts and local community resource centers and other service providers could help the court, the guardian, and the person subject to guardianship by providing critical support and resources in individual areas of need. Community resources and programs help maximize autonomy, choice and voice while assuring a level of protection for the vulnerable adult. Furthermore, local service providers can help determine whether with this support, something less than a plenary guardianship, may be a viable option for an individual.

#### **d. Whitton and Frolik: Guardian Decision Making Standards**

In 2012 in conjunction with the Third National Guardianship Summit, Linda Whitton and Lawrence Frolik published the results of a national study that focused on identifying the standards guardians use to make decisions for those under adult guardianship. Specifically, they considered whether guardians relied on a substituted judgment standard, a best interest standard, or some blending of the two.<sup>39</sup> The results of their survey are significant because a substituted judgment standard, while not necessarily involving limited guardianship, can help promote maximization of autonomy by explicitly honoring the choices and values of the person under the guardianship. Furthermore, it is important to the instant analysis because even if a guardianship is not limited it can be implemented to promote and respect the decision making and preferences of the individual subject to the guardianship. This study reviewed guardianship statutes in each jurisdiction to identify relevant provisions related to how a guardian, once appointed, should make decisions<sup>40</sup> and concluded that “(o)f the fifty-two jurisdictions examined, twenty-eight have guardianship statutes with no general decision-

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<sup>38</sup> *Id.* at 38.

<sup>39</sup> Linda S. Whitton & Lawrence A. Frolik, *Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491 (2012).

<sup>40</sup> *Id.* at 1494 (excluding conservatorships, protective services, veteran’s guardianships, public guardianships and special volunteer guardian programs).

making standard for guardians. It found that eighteen have statutes that contain substituted judgment language, most in combination with a best interest component. The statutes in six jurisdictions reference the best interest standard, but without a substituted judgment component.”<sup>41</sup>

## **B. Multi-State Surveys**

This section of the paper looks at relevant lessons for limited guardianship gleaned from surveys conducted in more than one jurisdiction. Often these surveys compare and contrast outcomes and laws in different states to determine the efficacy of different laws and procedural protections. A few of these studies are discussed below.

### **1. Iowa and Missouri**

Twenty-five years ago, Drs. Pat Keith and Robbyn Wacker conducted a longitudinal case file survey in Iowa and Missouri.<sup>42</sup> They reviewed guardianships for persons aged sixty years and older to determine whether statutory provisions related to exhaustion of alternatives and the employment of least restrictive alternatives resulted in fewer plenary and more tailored guardianship orders. They investigated case files both prior to and after reforms were enacted in each state and selected states with different statutory requirements for legal representation, least restrictive alternatives, individual rights retained, and functional assessments, among other things.

At that time, Missouri had enacted more progressive reforms designed to promote autonomy than had Iowa, and Iowa permitted a much broader definition of incapacity than Missouri did. Therefore, the researchers expected to find a larger proportion of tailored orders after the reforms in Missouri than in Iowa. In the 766 cases

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<sup>41</sup> *Id.* at 1494–96.

<sup>42</sup> Pat Keith et al., *Guardianship Reform: Does Revised Legislation Make a Difference in Outcomes for the Proposed Ward?*, 4J. INT’L AGING L. & POL’Y 150 (1992).

reviewed, the study concluded that, for the most part in both states, once a petition was filed requesting particular powers for the petitioner, usually plenary powers, it was likely to be approved. Thus, modification of the type of powers requested in the petition usually was not ordered at the hearing, and there were few petitions for limited guardianships.<sup>43</sup> These authors believe that societal attitudes toward aging play a significant role in the application and interpretation of the statute to individual cases. Twenty-five years later we still seek to better understand the reasons why strong language in state law promoting tailoring and less restrictive alternatives has failed to result in better support for choice and decision making for those who are subject to guardianship.

## 2. Massachusetts, Pennsylvania and Colorado

However, a 2007 study of adult guardianship case files in Massachusetts, Pennsylvania and Colorado found a positive correlation between progressive statutory language promoting self-determination and autonomy and more comprehensive functional clinical evaluations designed to assist courts in tailoring guardianships to maximize choice and decision making. This survey also indicated that for all states studied most of orders were for both guardianship of person and property (i.e., plenary guardianship.) Though in Colorado, a state deemed to have a more progressive statute, only 34% of the cases involved limited or tailored orders. This was most commonly achieved by restricting the guardian's authority to move the person under the guardianship, sell his or her property, or consent to medical treatment.<sup>44</sup>

Another relevant aspect of this study to limited guardianship involves the information included in written clinical testimony in the cases studied. After reviewing six clinical variables, the researchers found that information relating to functional status, social or family

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<sup>43</sup> See *id.*

<sup>44</sup> Jennifer Moye et al., *Clinical Evidence in Guardianship of Older Adults Is Inadequate: Findings from a Tri-State Study*, 47 GERONTOLOGIST 604–12 (2007).



support and prognosis was most likely to be absent from the clinical report. Information about one's functional abilities or capacities paints an important picture of what the individual's actual abilities to care for or make significant responsible decisions for him or herself, with or without accommodation. Evidence of social support helps a court understand available resources and the nature of skills that can be employed to assist the individual, while evidence of a prognosis helps a court assess whether a condition is relatively static, if there exists the potential for a restoration of rights, or to plan for the need for additional support in the future.

### **3. Whitton and Frolik: Guardian Decision Making Standards in Indiana, Georgia, Massachusetts, and South Dakota**

Whitton and Frolik's study of guardianship decision-making standards discussed above also involved an in-depth survey of decision-making in four states representing two common types of statutory standards, strict best interest (Indiana), and hybrid of substituted judgment and best interest (Georgia, Massachusetts and South Dakota.) One significant finding in this multi-state survey was that the majority of guardians in both jurisdictions did not consider prior written direction or conversations with the person before he or she became incapacitated.<sup>45</sup> This is significant for those (author included) who would like to see increased Person-Centered Planning and Supported Decision-Making. This approach can serve both to supplement and add context and direction to planning documents based on agency principles, such health and financial powers of attorney, and it can be used either prior to or in conjunction with guardianship, including planning to avoid guardianship or to assure that if entered, the guardianship is tailored.

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<sup>45</sup> Whitton & Frolik, *Surrogate Decision-Making Standards*, *supra* at 1.

### C. Single State Surveys

Single state surveys present an opportunity for a “deep dive” into the law, process, outcomes and circumstances in a particular jurisdiction and these studies often include specific recommendations for how to improve systems. Comparing the results of single state surveys also provides an increased understanding of the legal and practical barriers to limited guardianship in a range of different state systems.

#### 1. Pennsylvania

In 2013, The Center for Advocacy for the Rights and Interests of the Elderly (CARIE) published the results of an extensive study of adult guardianship in Pennsylvania.<sup>46</sup> Of note is one of the survey questions: “Are all avenues to alternative guardianship explored when 42% of lawyers indicated they had not been asked by the court to demonstrate they had explored alternatives to guardianship?” The study resulted in several recommendations identifying and encouraging practical steps to employ less restrictive alternatives,<sup>47</sup> and further to require proof at the hearing that less restrictive alternatives have been attempted unsuccessfully or are inappropriate to pursue.<sup>48</sup>

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<sup>46</sup> CENTER FOR ADVOCACY FOR THE RIGHTS AND INTERESTS OF THE ELDERLY, THE STATE OF GUARDIANSHIP IN PENNSYLVANIA: RESULTS FROM THE 2012 CARIE STUDY OF GUARDIANSHIP IN THE COMMONWEALTH OF PENNSYLVANIA (2013), <https://www.carie.org/wp-content/uploads/2013/11/CARIE-Guardianship-Study.pdf> (last visited May 2, 2019).

<sup>47</sup> *Id.* at 80. These include continuing education about less restrictive alternatives for judges and lawyers, increased use of mediation to help families resolve conflicts that arise with POAs, funding for AAAs to provide more training on less restrictive alternatives, and a state registry for financial POAs.

<sup>48</sup> *Id.* at 82. The language of Recommendation 3.2 reads: During the hearing, a finding should be made on less restrictive alternatives; a conclusion should be reached that either less restrictive alternatives have been attempted and unsuccessful and/or there is clear and convincing evidence that no less restrictive alternatives to guardianship that can be pursued. This should an issue that is proven and not simply plead.

## 2. Texas

Since the advent of state WINGS groups discussed above, several states have used WINGS as a platform for conducting a state adult guardianship survey both to identify current needs, challenges and strengths and to develop priorities for their WINGS group moving forward. At their first WINGS meeting in 2013, Texas WINGS presented the results of a comprehensive study of over 300 respondents covering all aspects of guardianship in Texas. This study found that services to coordinate alternatives to guardianship consistently ranked among the top three issues of concern for all participant cohorts including attorneys, guardians, advocates and judges.<sup>49</sup>

## 3. Georgia

In 2003 the author, along with colleague Rose Nathan, published the results of two studies of adult guardianship case files in Georgia, each using the same criteria for evaluation.<sup>50</sup> The first case review was conducted in 1995 and the second in 2001–2002 using a weighted representative selection of nineteen counties ranging from large urban to smaller rural courts. Each survey sampled around 500 of the approximately 3000 closed adult guardianship case files closed in the year studied. The purpose of these studies was to develop a clearer picture of adult guardianship practice in the state, including the number of cases filed, the identified role of the typical petitioner, the condition and location of the person for whom a guardianship was sought, the nature of evaluations and court-representation and the number of limited guardianships ordered, among other things. In both surveys, results indicated that plenary guardianship

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<sup>49</sup> Wings Conference at Texas (2001), [http://www.tcdd.texas.gov/strengthening\\_guardianship\\_alternatives/](http://www.tcdd.texas.gov/strengthening_guardianship_alternatives/) (last accessed Jan. 22, 2019).

<sup>50</sup> Eleanor M. Crosby & Rose Nathan, *Adult Guardianship in Georgia: Are the Rights of Proposed Wards Being Protected? Can We Tell?* 16 QUINNIPIAC PROB. L.J. 249 (2003).

was the rule rather than the exception, despite significant efforts to educate the public, bar and judges in the intervening years.<sup>51</sup>

### **III. LEGAL BARRIERS TO LIMITED GUARDIANSHIPS**

This section of the paper will discuss legal barriers to limited guardianship as reflected in reported state and federal case law and identifies six legal barriers that reflected in the reported case law. Before exploring these barriers, the paper will address the legal principles of guardianship identified through reported cases.

#### **A. Basis in Case Law**

To better understand courts' views regarding limiting or tailoring guardianship and building on the work done by members of the National Guardianship Association<sup>52</sup> whose experts produce an Annual Legal and Legislative Review, this project reviewed adult guardianship case law beginning in 1990. The purpose of this review was to identify relevant cases that involve limiting a guardianship and to identify any barriers mentioned by courts when evaluating whether a limited guardianship should be ordered or continued. The review produced several themes, an understanding of which can help elucidate the gap between law and practice related to tailoring guardianship orders. While earlier, post-reform cases exemplify the value of narrowly tailoring orders, more recent cases illustrate several legal barriers to limited guardianship. This section explores these legal barriers, which include the strict standard of review on appeal, lack of clarity in powers granted or retained, a

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<sup>51</sup> *Supra*, page 68 indicating that guardianships were granted in 90% of cases filed in both years surveyed, and that limitations on the guardianship were imposed in only 7% of these cases in both years. Where tailored, the rights retained typically involved the right to manage a small bank account or the right to choose where to live. Under Georgia law the right to make a last will and testament and the right to vote require an independent determination from the probate court.

<sup>52</sup> National Guardianship Association, <http://www.guardianship.org/> (last visited Mar. 7, 2018).

seeming court preference for an “all or nothing” approach, issues related to compensation when challenging a guardianship order and the intersection of guardianship and family law issues as applied to younger adults.

### 1. Constitutional Foundations

Understanding the Constitutional underpinning common in guardianship case law and statutory provisions helps elucidate later case law specific to limited guardianship. *Shelton v. Tucker*<sup>53</sup> is an often-cited case which questioned whether an Arkansas statute violated the constitutional speech and privacy rights of teachers. In *Shelton*, the Supreme Court articulated the principle that where a state seeks to lawfully use its power to infringe on individual rights, it should do so using the least restrictive alternative available. The least restrictive alternative principle has been extended by the Supreme Court to other contexts, including institutionalization.<sup>54</sup> *Shelton* and its progeny recognize that “*even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.*”<sup>55</sup> Thus, while states may lawfully impose restrictions on the fundamental liberties of citizens, these restrictions must be narrowly structured.

In addition to applying the least restrictive principle to an analysis of laws infringing liberties, courts have also required due process protections in such cases. The 1979 case of *Addington v. Texas*<sup>56</sup> established that under the Fourteenth Amendment a “clear and convincing standard” of proof must be applied in an involuntary civil commitment case because it constitutes a “significant deprivation of liberty that requires due process protection.”<sup>57</sup> And some

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<sup>53</sup> 364 U.S. 479, 493–94 (1960).

<sup>54</sup> See *O'Connor v. Donaldson*, 422 U.S. 463 (1975).

<sup>55</sup> *Shelton*, *supra* note 18, at 489.

<sup>56</sup> *Addington v. Texas*, 441 U.S. 418 (1979).

<sup>57</sup> *Id.* at 425.

courts have applied a constitutional analysis to adult guardianship cases and found the liberty interests at stake in adult guardianship are similar enough to the liberty interests in involuntary commitment cases as to require comparable constitutional protections.<sup>58</sup>

## 2. Seminal State Cases

State Supreme Courts have also addressed constitutional challenges to adult guardianship statutes and assessed both the standard of proof required and the due process protections that should be afforded. Notably, *In re Boyer*,<sup>59</sup> a case challenging the constitutionality of Utah's adult guardianship standard found that given the liberty interests at stake in adult guardianship, "a court must consider the interests of the ward in retaining as broad a power of self-determination as is consistent with the reason for appointing a guardian of the person" and further, that "the nature and extent of the powers to be conferred is for the court to decide." And while *Boyer* was not a "limited guardianship" case per se, the *Boyer* court found that the courts in Utah were "authorized to tailor the powers of the guardian to the specific needs of the ward."<sup>60</sup> A 2013 Louisiana case also found the necessity for strict due process in "view of the special nature of an interdiction proceeding."<sup>61</sup>

Three State Supreme Court cases from the 1990s addressing limited guardianship are illustrative. *In re Guardianship of Braaten*<sup>62</sup> involved an appeal from a lower court ruling granting unrestricted powers over the appellant to her family members. The lower court reasoned that plenary guardianship was the least restrictive alternative appropriate and urged the family to give the

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<sup>58</sup> *Infra* at 34, n. 79.

<sup>59</sup> *In re Boyer*, 636 P. 2d 1085 (1981).

<sup>60</sup> *Id.* at 1090.

<sup>61</sup> *In re Interdiction of Velma Agnes Buras Parnell*, 129 So. 3d 690, 692 (2013). In Louisiana, interdiction is the comparable protective proceeding to adult guardianship. The court cited *Doll v. Doll*, 156 So. 2d 275 (La. App. 4th Cir. 1963) and stated "Interdiction is a harsh remedy. A judgment of interdiction amounts to civil death." Other commentators have noted that a guardianship order reduces an adult to the legal status of a child.

<sup>62</sup> *In re Guardianship of Braaten*, 502 N.W.2d 512 (1993).

protected person latitude to make decisions for herself under the guardianship but refused to “place any legal restriction on the powers of the guardian and conservator, recognizing future events may necessitate additional intervention by the guardians.”<sup>63</sup> The *Braaten* Court traced the development of limited guardianship in North Dakota and nationally and outlined limited guardianship as an intermediate status that is more responsive to personal liberties and prerogatives to intervene. In *Braaten*, the court applied the least restrictive standard, considered the actual functional abilities of the appellant and where she needed help rather than on her diagnosis, ordered a limited guardianship, and opined that the guardian and conservator could come back to court should additional powers be necessary.<sup>64</sup> The court’s conclusion was “that the appointment of general guardians for Diane in this case does not conform to the legislative mandate to maximize the autonomy of an incapacitated person by the least restrictive appointment of limited guardians.”<sup>65</sup>

The Iowa Supreme Court’s decision in *Hedin v. Gonzales*<sup>66</sup> contains a lengthy analysis of the development of limited guardianship nationally. It further explores the principle of least restrictive intervention and the requisite standard of proof for ordering or terminating an adult guardianship in the context of a guardianship challenge. *Hedin* involved a dispute over the termination of a guardianship that was voluntarily entered. As in *Boyer*, the court in *Hedin* focused on the protected person’s functional abilities to make decisions rather than on the content of those decisions. Further, the court in *Hedin* considered the availability of third-party assistance in determining whether a limited guardianship was appropriate, finding that “(i)n making a determination as to whether a guardianship should be established, modified, or terminated, the court must consider the availability of third party assistance to meet a ward or proposed ward’s need for such necessities, if credible evidence of such assistance is adduced from any source.”<sup>67</sup>

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<sup>63</sup> *Id.* at 514.

<sup>64</sup> *Id.* at 522.

<sup>65</sup> *Id.* at 516.

<sup>66</sup> *Hedin v. Gonzales*, 528 N.W.2d 567 (Iowa 1995).

<sup>67</sup> *Id.* at 578.

Finally, the Montana Supreme Court in *In re Estate of West* discussed how a limited guardianship can function to maximize independence and self-reliance and held that the lower court did not abuse its discretion in appointing a limited guardian since it was clear that the lower court considered the unique needs of the person for whom guardianship was sought and clearly and narrowly tailored the order. In *West*, “a limited guardianship was appropriate in light of the facts of the case and the stated objective (of the Montana statute) to encourage maximum self-reliance and independence and to promote and protect the well-being of the person.”<sup>68</sup>

### 3. Legal Barriers Identified in Case Law

This section of the paper addresses six different yet related barriers to limiting a guardianship that were identified in the reported cases studied: (a) standard of review; (b) lack of clarity in rights removed or retained; (c) interconnected nature of decision-making (“all or nothing” approach); (d) consensual guardianship; (e) compensation; and (f) conflict with family law doctrine. Alone, any one of these barriers could reduce the number of limited guardianships. Together, they present a real challenge to advocates arguing for limited guardianship on appeal.

#### a. Standard of Review

State appellate courts typically give wide latitude to the trial court’s determination of the underlying need for a guardianship and the range of rights removed or retained and this deference presents a barrier to arguing for limited guardianship on appeal. Two cases from 2008 demonstrate the difficulty of challenging a lower court’s holding that a plenary guardianship was needed on either substantive or procedural grounds. *In re Boatsman*,<sup>69</sup> a Texas case, clearly articulates the standard of review where a protected person seeks to challenge the court’s refusal to create a limited guardianship based

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<sup>68</sup> *In re Estate of West*, 887 P.2d 222, 227 (Mont. 1994).

<sup>69</sup> *In re Boatsman*, 266 S.W.3d 80 (Tex. App. 2008).



on substantive evidence presented. In this case, the protected person argued that a plenary guardianship was not appropriate because there was a less restrictive alternative available (continuing to live in her own home with care provided by social services and her son.) However, the court in *Boatsman* noted that the lower court's ruling should be upheld unless "a reasonable fact finder could not have credited disputed evidence in favor of its finding" and on consideration, the court "must review all the evidence in a light most favorable to the finding."<sup>70</sup> The *Boatsman* court found there was more than sufficient evidence to support the lower court's decision that plenary guardianship was in the best interest of the protected person.

Likewise, in another Texas case from 2008, a plenary guardianship was challenged based on personal jurisdiction and the admissibility of evidence of incapacity that was provided to support the need for a plenary guardianship. Again, the court rejected the challenge and upheld the plenary guardianship, finding that as a matter of law, Parker waived the right to contest personal jurisdiction by making a general appearance before the court on more than one occasion. With respect to the issue raised regarding the admissibility of evidence, the court considered "all the evidence that the fact finder could reasonably have found to be clear and convincing" and used a "clear abuse of discretion" standard, holding that "the court did not abuse its discretion by appointing a full rather than a limited guardianship of Parker."<sup>71</sup> In so ruling, the court relied on *Eddins v. Estate of Sievers*, a guardianship challenge where an appeal was denied and the lower court record contained evidence in support of both a plenary guardianship and to support a limited guardianship. In denying the appeal, the court in *Eddins* stated that "a court's determination of the proper type of guardianship is left to the exercise of its broad discretion and its decision will not be disturbed absent a clear abuse of discretion."<sup>72</sup>

The relatively high standard of review and deference to the trial court articulated in the above cases constitutes a significant

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<sup>70</sup> *Id.* at 85.

<sup>71</sup> *In re Parker*, 275 S.W.3d 623, 629 (Tex. App. 2008).

<sup>72</sup> *Eddins v. Estate of Sievers*, 789 S.W.2d 706, 707 (Tex. App. 1990).

legal barrier to tailoring guardianship, since the data indicates that a tailored order is often not requested or considered at trial. Similarly, the standard of review on appeal makes restoration cases particularly challenging (with a few notable exceptions, most of which involve protected persons who are younger, such as Jenny Hatch, who successfully argued to remove her parents as guardians for a temporary guardianship so she could work on a supported decision-making plan to alleviate the need for and effectively terminate, the temporary guardianship.<sup>73</sup>

#### **b. Lack of Clarity in Rights Retained or Removed**

A second legal barrier is illustrated in a line of cases addressing the need for clarity in a court's order with respect to the rights retained and the rights removed through guardianship. Courts have a range of responses to cases where clarity of scope is at issue. *In re Estate of Alsup* is a Washington State case that addressed whether a protected person under a plenary and later a limited guardianship had the right to make a will and to marry. Mr. Alsup executed his will while under a plenary guardianship and married after his guardianship was modified and limited. After Mr. Alsup died, his family contested the validity of both his will and his marriage. This case cited the general rule that "one otherwise of testamentary capacity can make a valid will, regardless of the fact that he is under guardianship" and explained that testamentary capacity, as developed under common law and codified in state statutes, differs from the capacity to manage day to day decision making which is the subject of state guardianship statutes.<sup>74</sup>

Furthermore, the court held that the challenge to Mr. Alsup's marriage after he had already died came too late, because the fact of his marriage was widely known and no effort to contest it was made during his lifetime.<sup>75</sup> The court in *Alsup* cited language from the

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<sup>73</sup> *Ross v. Hatch*, No. CWF120000426P-03, slip op. (Va. Cir. Ct. Aug. 2, 2013).

<sup>74</sup> *In re Estate of Alsup*, 327 P.3d 1266, 1271 (Wash. Ct. App. 2014).

<sup>75</sup> *Id.* at 1267.

Clerk's Papers in the case that the guardianship "order did not mention any restraint on Mr. Alsup's right to marry or to execute a will."<sup>76</sup>

In *Daves v. Daniel*, a Texas court considered another situation where the guardianship order was unclear as to rights retained and removed. In this case the issue involved whether a protected person under a plenary guardianship order retained the right to hire a lawyer to enforce her divorce decree. While this case related to whether the lawyer who handled the enforcement action should be subject to sanctions since he represented the petitioner in the earlier guardianship case, the appeals court mentioned that the lower court concluded that the protected person lacked the "capacity to do some, but not all, of the tasks necessary to care for herself or to manage her property." The court noted that the lower court's guardianship order "did not define the scope—either full or limited—of the guardian's powers and did not specify the powers granted, as required by the probate code, section 765's presumption that a ward retains all powers not specifically granted to her guardian." The court further held that "it does not follow that a general finding that Carla was an incapacitated person, without more, means that she specifically lacked the capacity to hire counsel and prosecute a lawsuit."<sup>77</sup>

Likewise, in *Whiting v Whiting*, a Florida case resulting from a long-standing family drama that involved conflicting evaluations and control over a trust in a case involving an Order Appointing Guardian upon Stipulated Limited Guardianship, the court remanded the case because the order was ambiguous with respect to whether the protected person retained the power to alter the trust document. The court also noted that it was "not clear whether the guardianship intended by the Guardianship Order was a voluntary or involuntary guardianship." Since a voluntary guardianship requires the court to affirmatively find that the proposed protected person has the capacity to consent to the voluntary guardianship and an involuntary guardianship requires the court to make an adjudication of incapacity, the lack of clarity in the record required a remand to

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<sup>76</sup> *Id.* at 1268.

<sup>77</sup> *Daves v. Daniels*, 319 S.W3d 938, 943 (Tex. App. 2010).

resolve the genuine issues of material fact concerning the interpretation of the lower court's order as it related to the power to alter the trust.<sup>78</sup>

The case of *Rene v. Sykes-Kennedy*<sup>79</sup> addressed the question of whether a revocable trust agreement was superseded by a guardianship. The revocable trust provided for a granddaughter to become trustee in the event of incapacity of the grantor. Later, the grantor's sister filed for guardianship and was named limited guardian. She returned to court for authority to amend the trust so she might access assets for the protected person/grantor. The trial court granted the petition to amend the trust, finding that amending the trust would be in the best interest of the protected person. The court determined that the guardian effectively stepped into the legal place of the grantor and was therefore able to take any action with respect to the trust that the grantor could take had she the capacity to do so. Since the trust was revocable, the court held that the guardian had the right to petition for authority to make changes to the trust.

*In re Zwerdling* involved a dispute surrounding a limited co-guardianship. In *Zwerdling*, the limitation on the co-guardians power to manage the protected person's legal affairs meant simply that they were to "consult" with the protected person in doing so. The case involved whether it was appropriate to pay attorney fees for work done on behalf of the protected person from a trust that was established, and the holding noted that "when authorized, the award of counsel fees is committed to the sound discretion of the court."<sup>80</sup> But *Zwerdling* illustrates a court's power to limit a guardianship to include a requirement of consultation with the protected party, something that is present in some, but not all, state statutes, as will be discussed below.

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<sup>78</sup> *Whiting v. Whiting*, 160 So.3d 921, 924 (Fla. Dist. Ct. App. 2015).

<sup>79</sup> *Rene v. Sykes-Kennedy*, 156 So.3d 518, 520 (Fla. Dist. Ct. App. 2015).

<sup>80</sup> *In re Zwerdling*, No. A-4826-13T2, 2015 N.J. Super LEXIS 1326, at \*7 (N.J. Super. Ct. App. Div. May 27, 2015).

**c. Interconnected Nature of Decision Making (“All or Nothing” Approach)**

However, where the appellant does not identify ambiguities in the guardianship order or allege an abuse of discretion, courts tend to uphold the lower court and deny the appeal. This happened in *In re Guardianship of Tonner*, a Texas case in which the protected person under a plenary guardianship sought to have some of his rights restored. The Court of Appeals stated that “the trial court is not necessarily obligated to impose the least restrictive guardianship possible; rather the decision is controlled by the best interests of the ward and the obligation to protect him from himself and others’ control.”<sup>81</sup> The court in *Tonner* took an *all or nothing approach* to Mr. Tonner’s request for restoration of “his right to marry, apply for and retain government benefits, to determine his residence, to accept employment, to manage his finances and to make routine medical decisions.”<sup>82</sup> The court noted Mr. Tonner’s concession that he remained without capacity to “vote, operate a motor vehicle, contract, sue and defend lawsuits, and hire employees.”<sup>83</sup> In affirming the trial court, the opinion in *Tonner* seems to turn on the interconnected nature of decision making, noting that his concession that he lacked the capacity to contract made his exercise of the right to change his residence, secure employment or manage finances “illogical.”<sup>84</sup> This court, unlike the Iowa court in *Hedin*, was not persuaded by Mr. Tonner’s ability to “engage in rational thought given appropriate support and help from his caretakers.”<sup>85</sup> In fact, the *Tonner* court believed that Tonner’s reliance on support and assistance from third parties was indicative of his continuing need for a protective arrangement rather than evidence that he could make decisions with accommodations and assistance in the form of

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<sup>81</sup> *In re Guardianship and Estate of Tonner*, No. 07-13-00308-CV, 2014 Tex App. LEXIS 10307, at \*246 (Tex. App. Sep. 15, 2014).

<sup>82</sup> *Id.* at \*244.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 245.

<sup>85</sup> *Id.*

support from others.<sup>86</sup> Using this logic, it is difficult to imagine a circumstance in which a limited guardianship might be approved by an appellate court or if supported decision making arrangements could ever be made part of a limited guardianship order on appeal. A petition for review of this decision is pending. If upheld, the tautological rhetoric articulated in *Tonner* would constitute a third legal barrier to tailored guardianship

The lower court in *Conservatorship of the Pers. of Hermans*, displayed similar reasoning by noting that it was “somewhat baffling that a person who cannot freely contract may be found to be able to enter into a marriage, which ideally, [is] a lifetime contract.”<sup>87</sup> In *Hermans*, a young woman sought restoration of some of her rights and the appellate court deferred to the trial court’s determination of the credibility of evidence presented at trial, denying restoration and continuing an arrangement where the protected person would retain the power to control her education and would share with her conservators the power to access medical records and the power to give or withhold medical consent.<sup>88</sup>

#### d. Consensual Guardianship

States that provide for guardianship by consent of the protected person may not require a finding of incapacity. This can pose a barrier to limiting or challenging the Guardianship Order on appeal. A consensual guardianship could also arise in the context of a mediated case, where any resulting agreement would not address the issue of capacity since that is a legal determination made by the court.<sup>89</sup>

And in *Matter of Cooper (Joseph G.)* the person for whom a guardianship was sought consented to the appointment of a limited guardian to assist with his personal and property needs, however the

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<sup>86</sup> *See id.*

<sup>87</sup> *Hermans v. Hermans (In re Hermans)*, No. G047464, 2013 Cal. App. LEXIS 6545, at \*20 (Cal. Ct. App. Sep. 13, 2013).

<sup>88</sup> *See id.*

<sup>89</sup> *See Mary F. Radford, Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 STETSON L. REV. 611, 616 (2002).

court determined that “as the continuing nature of Mr. G.’s inability to recollect his recent past shows no signs of abating, he will require a guardian for an indefinite period of time.”<sup>90</sup> And even though all the parties agreed to limits on the powers to be conferred, the court did not assent. Under New York law, if a person consents to a guardianship there is no need for a finding of incapacity, as once there is consent, the court is free to order guardianship “with the least restrictive powers as may be necessary to accomplish the purpose of the statute.”<sup>91</sup> The court went on to note that “the finding of consent does not encompass the granting of powers” and concluded that “there is no impediment to the court accepting the AIP’s consent to the appointment of a guardian, and then reserving the right to delineate the powers to be given to the guardian.”<sup>92</sup> Here, the court decided that the least restrictive alternative was to order a full guardianship even though the parties had all agreed to a limited order.<sup>93</sup>

#### e. Compensation

Cases involving questions of guardian or attorney compensation illustrate a fifth legal barrier to limited guardianship. Courts are often asked to weigh in on the appropriateness of fees paid for managing financial issues or engaging in litigation related to a guardianship. Contests over fees abound in cases where the protected person has substantial assets and courts are often asked to consider whether the actions taken benefit the protected person or are done in order to drive up fees.<sup>94</sup>

*McKinney v. Rawl (In re Rawl)*<sup>95</sup> illustrates the importance of a protected person having access to funds to pay for legal help, even where that help was not ultimately successful. Mr. McKinney

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<sup>90</sup> *Matter of Cooper*, 996 N.Y.S.2d 508, 513 (N.Y. Sup. Ct. 2014).

<sup>91</sup> *Id.* at 514.

<sup>92</sup> *Id.*

<sup>93</sup> *See id.* at 514–16.

<sup>94</sup> *See, e.g., In re Guardianship of Glasser*, 297 S. W.3d 369 (Tex. App. 2009) (which chronicled extensive and contentious litigation between family members over several years in courts in Texas and New Jersey and in federal court.)

<sup>95</sup> *McKinney v. Rawl (In re Rawl)*, 133 So.3d 1179 (Fla. Dist. Ct. App. 2014).

served as co-counsel for Ms. Rawl and defended against the guardianship, arguing for a limited guardianship instead.<sup>96</sup> After the court granted a plenary guardianship to Mr. Rawl's son, the attorney's fees, including fees for an additional evaluation, were challenged and reduced by the trial court.<sup>97</sup> The appeals court was asked to consider whether the fees were appropriate, given that the attorney could not show that his work benefitted the protected person.<sup>98</sup> The court in *Rawl* found that even though his efforts to limit the guardianship were unsuccessful, there was no competent substantial evidence to support the trial court's discounting of the attorney and evaluation fees.<sup>99</sup>

In *Estate of Keenan v. Colo. State Bank and Trust*,<sup>100</sup> a Colorado appeals court was asked to address whether a protected person who sought restoration of rights should be required to pay conservator fees for a challenge to the restoration or termination of guardianship. In this case the protected person filed for restoration of rights due to significant improvement in his cognitive abilities but later stipulated to a limited guardianship for personal decisions and for a bank to serve as both trustee of his income trust and as conservator.<sup>101</sup> When disputes arose between the protected person and his conservator and limited guardian, the court rejected the protected person's assertion that his conservator had a conflict of interest and approved the fees for the conservator, finding that conservator acted reasonably and in good faith to protect the assets of the estate.<sup>102</sup> The holding in this case resulted in a revision to the law to preclude a guardian or conservator from opposing or interfering with a protected person's petition for restoration but it permits filing a motion seeking further information about the extent a guardian should be involved in a termination proceeding, and if further

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<sup>96</sup> *See id.* at 1180–81.

<sup>97</sup> *See id.* at 1182.

<sup>98</sup> *See id.* at 1184.

<sup>99</sup> *Id.*

<sup>100</sup> *Estate of Keenan v. Colo. State Bank & Tr.*, 252 P.3d 539 (Colo. App. 2011).

<sup>101</sup> *Id.* at 540.

<sup>102</sup> *Id.* at 544.



investigation, appointment of a guardian ad litem, attorney or court visitor is warranted or additional evaluations needed.<sup>103</sup>

#### **f. Guardianship and Family Law Disputes**

A sixth legal barrier to tailored guardianship arises in the interplay between guardianship cases and family law. Some guardianship cases involving questions of limits to the guardian's power unfold in the context of a larger family law dispute and address whether a guardian can impose restrictions on visitation of a parent with a protected person. Two recent cases illustrate this thread.

*In re Vizuite*<sup>104</sup> involved a father's challenge to a guardianship of his daughter, which he claimed fundamentally altered the custodial arrangement in the divorce. At trial, the parents of a young woman with cognitive disabilities filed competing guardianship actions and the young woman's mother was made guardian.<sup>105</sup> The guardianship order did not address the impact of the guardianship on the custodial arrangement of the protected person.<sup>106</sup> The father argued on appeal that the order in effect terminated his parental rights as joint legal custodian, finding that although she was over eighteen, his daughter remained unemancipated because she was still in high school and receiving child support.<sup>107</sup> The appeals court held that because the trial court found she was incapacitated and incapable of self-support, she was still a child under Minnesota law.<sup>108</sup> It further held that because the guardian was granted such a wide range of powers with respect to the daughter, these "guardianship powers closely parallel, if not completely subsume, appellant's status and rights as a joint legal custodian."<sup>109</sup> The court considered the joint custody agreement and found that "because there has been

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<sup>103</sup> See Co. Rev. Stat. Ann. § 15-14-318(3.5)(c).

<sup>104</sup> *In re Vizuite*, No. A12-1279, 2013 Minn. App. LEXIS 606 (July 8, 2013).

<sup>105</sup> See *id.*

<sup>106</sup> *Id.* at \*7.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at \*12.

<sup>109</sup> *Id.* at \*17.

no showing that Heidi's needs are not being met within the current custody arrangement, the guardianship and effective modification of legal custody runs afoul of the statutory requirement that a guardian may be appointed only if the proposed ward's identified needs cannot be met by less restrictive means."<sup>110</sup> The court explicitly stated that it did not intend to imply that a guardian should never be appointed for a person over whom parents exercise custodial rights, it rather remanded the case so that the lower court could consider the impact of the guardianship on the custody arrangement and the needs of the protected person.<sup>111</sup>

*In re Estate of Wertzer*<sup>112</sup> involved a young adult who was declared incapacitated and whose parents had been divorced for several years. At the time of their divorce, the father was granted limited supervision with his daughter.<sup>113</sup> He later filed a petition to modify visitation and the mother subsequently filed for guardianship in anticipation of the daughter's eighteenth birthday.<sup>114</sup> As part of the guardianship proceedings the court issued an order granting the father additional supervised visitation rights.<sup>115</sup> The mother/guardian appealed, arguing that the Probate Court exceeded its authority by imposing the visitation schedule on the now adult daughter/protected person.<sup>116</sup> The appellate court noted that a guardian's powers are not unfettered, but rather under Georgia law the powers and rights granted a guardian are "expressly made subject to the orders of the probate court" and therefore the court has authority to place limitations on the guardianship and determine other provisions that are in the ward's best interests.<sup>117</sup>

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<sup>110</sup> *Id.* at \*19.

<sup>111</sup> *Id.*

<sup>112</sup> *In re Estate of Wertzer*, 765 S.E.2d 425 (Ga. Ct. App. 2014).

<sup>113</sup> *Id.* at 427.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 427–28.

<sup>117</sup> *Id.* at 428. *See also* Linda D. v. Hitchman (*In re Gregory D.*), No. b245533, 2013 Cal. App. LEXIS 9396 (Cal. Ct. App. 2013) (involving both an ongoing battle between the parents of a protected person, and a dispute over attorney and conservator fees).

Given this broad authority, the court was unpersuaded “that the guardian has the sole right to make decisions about who visits with the ward, or that the probate court has no authority to enter an order to protect the ward’s right to visit with persons other than the guardian if the court deems such visitation to be in the ward’s best interest.”<sup>118</sup>

Both of the above cases demonstrate the interplay between aspects of custody arrangements flowing from divorce and the probate court’s role in establishing a guardianship that meets the needs and best interests of the protected person. While these cases illustrate ongoing custodial battles that continue after an intellectually or developmentally disabled child reaches the age of majority, custodial disputes can and do occur in families of other adults, where it can be the children or other younger family members who are fighting over the right to control visits and determine where a protected person, often one with retirement assets, will live.<sup>119</sup>

#### **IV. PRACTICAL BARRIERS TO TAILORED GUARDIANSHIPS IDENTIFIED BY COURTS, PRACTITIONERS, GUARDIANS AND FAMILY MEMBERS**

While prior surveys, case law and state statutes provide objective information about limiting guardianship they do not provide a comprehensive picture of practical and other barriers to limiting or tailoring guardianship orders. The project conducted an opinion survey in an effort to better understand the needs of courts, advocates, guardians and families with respect to limiting guardianship. This online survey was distributed through state WINGS, bar

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<sup>118</sup> *Id.* at 429.

<sup>119</sup> Such high conflict family disputes are the subject of pilot programs established by the Association for Conflict Resolution and the development of Conflict Resolution Guidelines for Eldercaring Coordinators. Sue Bronson, Linda Fieldstone, and Hon. Michelle Morley, *Association for Conflict Resolution Guidelines for Eldercaring Coordinators*, [http://acrelldersection.weebly.com/uploads/3/0/1/0/30102619/acr\\_guidelines\\_for\\_eldercaring\\_coordination\\_11-15.pdf](http://acrelldersection.weebly.com/uploads/3/0/1/0/30102619/acr_guidelines_for_eldercaring_coordination_11-15.pdf) (last visited Mar. 7, 2018).

sections, courts and other online lists during 2016 and 2017 and yielded some interesting results. First, a small group of experienced representatives of different constituencies were interviewed and they were asked to identify existing practical barriers to limited guardianship.

From these interviews, a list of the ten most common barriers was developed.<sup>120</sup> Participants in the online poll were asked to rank the barriers as to significance and given the opportunity to identify additional barriers that were not listed. The online poll was deliberately short and asked respondents to identify their state and the role they play in the guardianship system (for example, advocate, public guardian, judge, family member, etc.) The online poll yielded 566 responses from 29 states. The results of this poll are not generalizable since it was not a controlled survey, but rather includes answers from all those invited who chose to respond. Furthermore, since the number of responses among jurisdictions was uneven, the responses are used here for illustrative purposes only.

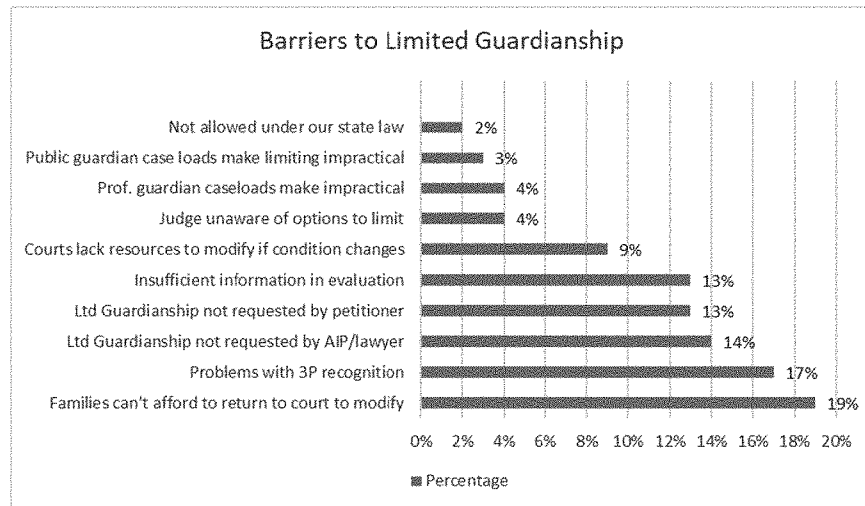
Of note, there was no one barrier that respondents identified as the most significant, and the role played by the respondent did not seem to make a significant difference. But five of the ten listed barriers ranked higher than the other five, with four of these barriers yielding more than double the number of responses ranking it as most significant than did the remaining six. The financial burden on the guardian or family of having to return to court generated the highest ranking of all responses, problems with third party recognition of limited orders ranked second followed by a limited order not being requested by the lawyer for the incapacitated person or by the petitioner, and the lack of a meaningful evaluation of functional capacity on which to base a limited order. Finally, respondents also

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<sup>120</sup> The ten choices identified by the group of experts were: problems with third party identification, limited guardianship not requested by lawyer for or alleged incapacitated person, judge unaware of options to limit, lack of a good assessment/evaluation, families cannot financially afford to come back to court if condition changes, courts do not have sufficient resources (i.e. time, financial) to make adjustments if conditions change, not requested by petitioner, not allowed under our state law, professional guardian caseloads making limiting impractical and public guardian caseloads making limiting impractical.

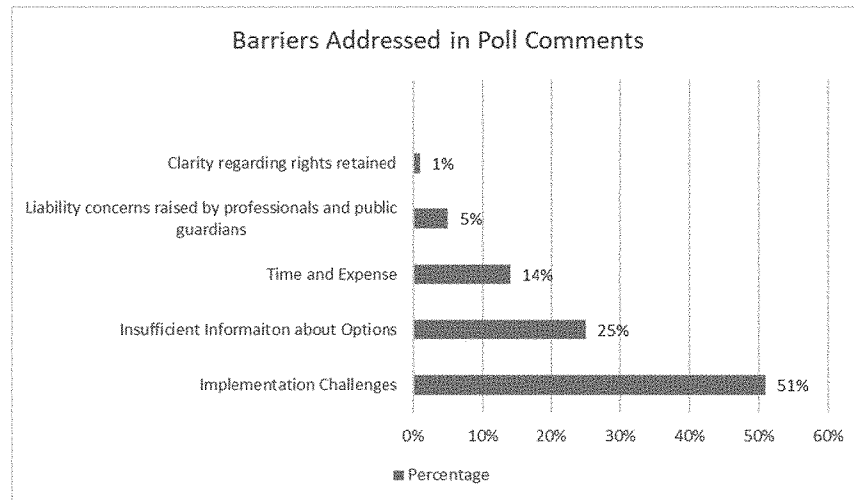
highly ranked the burden on courts to have to make changes to the requested powers if the needs of the protected person change. A summary of the survey responses follows.

### A. Summary of Identified Practical Barriers



### B. Summary of Barriers Addressed in Poll Comments

Providing poll participants an opportunity to identify additional barriers not listed in the ranking question yielded helpful information and expanded perspectives on practical difficulties. Many of the additional barriers tracked the listed options for barriers, but enabling narrative comments resulted in additional detail on both the barriers listed for ranking and on the additional barriers identified. Rather than adding similarly worded additional barriers to the tabulation of the closest identified barrier for ranking, we instead chose to discuss the themes that arose in a separate section.



### 1. Implementation Challenges

The most significant additional barrier mentioned in the comments was “Difficulty in implementation.” The comment below illustrates the difficulty identified by respondents with respect to challenges in implementing a limited guardianship order:

Practically I find limited guardianship to be of limited utility because they are so difficult to implement. If someone lacks capacity to such a degree to make a guardianship necessary, then it is unlikely that they would be able to execute some but not all rights. I find that less restrictive alternatives to guardianship are much more practical than limited guardianships.

This comment, made by an advocate who identified their role as representing health care facilities in guardianship actions, identifies a fundamental practical problem with limited guardianship orders. Courts are often asked to intervene where someone has not made prior legal arrangements to manage their affairs in the event of incapacity, and where someone is alleged to be impaired to the

extent of needing a court intervention, then a limited order may not be appropriate.

## 2. Clarity Regarding Rights Retained

Another comment related to the difficulty of implementing a limited order was made by an attorney who typically represents petitioners in adult guardianship cases. The advocate noted that “(s)ince you have to itemize powers, instead of just saying ‘all powers’—it is a challenge to make them clear, specific, and not omit something you will later need.” This comment reinforces the principle underlying several court holdings discussed earlier that the removal of rights must be clear, and it further reinforces the challenges inherent in returning to court to obtain an additional review and/or increased authority, should the abilities of the protected person wane and his or her need for assistance increase. An additional perspective on the problem of changing needs and declining abilities was expressed as follows. “Petitioners are reluctant to file for fear of financial obligation in cases where it appears the person is in the beginning of a deteriorating condition. Many wait for exploitation to occur before stepping up for this reason.” This comment is a cautionary note for those who seek to use legal constructs such as incapacity planning or court intervention to prevent exploitation, given the challenge of ameliorating harm after it has occurred or recovering funds lost.

An attorney who represents proposed wards in Alaska made the following observation related to practical barriers “Neither professional guardians nor public guardians favor limited guardianship because it makes their job inconvenient, unless the limitations are very clear. [Also, parties generally do not take the time to formulate limited guardianships because they are lazy or they have a hard time imaging what limitations will work in the particular case.”] If adopted by states the standard orders contemplated by the ULC revisions to UGPPA discussed earlier would be an effective remedy to this practical barrier.

### **3. Additional Perspectives Regarding Additional Time and Expense Involved with Limited Orders**

Other respondents voiced specific concerns about the time and expense required for implementing limited guardianship although there were two listed barriers that related to increased time and expense. Here is a comment that is typical of that viewpoint. “As an attorney who advocates for less restrictive alternatives, I am frequently told that it is ‘too much work’ to tailor guardianship to meet the needs of the Incapacitated Person. Washington State courts use a ‘check off’ system to eliminate rights and attorneys and judges find it easier to simply check off all the boxes. The only exception I have seen is the right to vote, which some judges actually consider when divesting persons of their constitutional rights.”

### **4. Liability Concerns Raised by Professional and Public Guardians**

In addition to increased cost and practical issues in implementing limited guardianship, concern about liability was also noted by several poll respondents, particularly by those who serve in the role of professional guardian. The three comments below illustrate concerns about limited guardianships raised by professional guardians, many of whom should be experienced in the challenges of making a limited guardianship work. “Very time intensive which makes them very expensive. Also limited options in the community. We are seeking these for protection and limited guardianship still leaves the ward vulnerable.” Another respondent cited “(g)uardian concern about where liability really begins and ends. Unable to bill time when client needs assistance in areas not covered by guardianship.” Also, “(l)iability can be a deterrent for professional guardians to take on a limited guardianship of a high functioning Incapacitated Person who retains significant control over finances, particularly if the IP is perceived to be a ‘loose cannon.’ If the IP incurs debts, wastes assets, causes a tort, or is exploited while under a guardianship, there is a possibility that the guardian will be held liable



for the loss by the court, angry family members, or Adult Protective Services, even if it was not in the guardian's power to prevent the problem." In considering the tension between protection and autonomy, those responsible for implementing a limited guardianship seem to act in an abundance of caution, giving more weight to the need for protection of both the person under the guardianship and the guardian him or herself.

### 5. Need for Information

Numerous poll comments decried the lack of information and clear forms available to the public to understand the available options and determine whether a limited guardianship would be appropriate. The following are some examples of these concerns. "Applicants and their attorneys do not know what supports and services exist and how they can be used to craft a limited guardianship order." This comment reinforces the finding of the National Center on State Courts Representative Payee survey discussed earlier which found that only 14% of courts had developed protocols for referrals for community services and/or participated in multidisciplinary groups.<sup>121</sup> But most of the additional responses indicated it is challenging to navigate the court system, understand options and forms, and access information and assistance. This informational problem surfaced in the following comments, which were typical of those that discussed the need for information. The lack of information about options surfaced at all levels of the court process. Here, a respondent decries the need for information at the outset. "Families don't even know how to start the process or where to go for help." Similar sentiments were present in other comments with one respondent adding, "There needs to be more information for family members, that are trying to do their best, but really have no help." Other responses mention the need for more information to determine whether a limited guardianship would be an option. This comment was typical of that response. It is "not easy for guardians (if family or attorney) to identify when a limited guardianship would be best."

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<sup>121</sup> See *supra* note 27.

Other responses mention difficulties in getting information about renewing and reporting obligations for guardianship, while others complained about the need for explanation to accompany the forms so parties would understand not only how to complete the form, but which form to use. This response was typical of that complaint. “This is far and away the biggest, and for the most part, the only barrier. Barrier is the lack of forms and instructions for using the forms. We need to know which form to use in a given situation. Often there are only forms but we do not know which one to use.” Some jurisdictions and programs are having good success with check lists, fillable forms with prompts, navigational assistance at the courthouse, guidance for court clerks, and pamphlets. These responses to barriers will be addressed in a later section of the paper.

### **C. Content Analysis of Web Information**

To better understand some of the types and sources of information related to limiting a guardianship available to participants in the adult guardianship system throughout the country the project undertook a content analysis of on-line information in a range of areas. Searches were made to websites that provide free legal information to the public including information about no-cost legal services programs in each state, websites maintained by State Units on Aging<sup>122</sup> information on courts provided at the state level in each state, and State Office of Public Guardian websites, as well as county public guardian site, where applicable. This content analysis was intended to determine how easy it is to find free information on the web about limiting or tailoring a guardianship. Where the websites searched linked to other websites with information, we included that information. We also noted where links were broken or where sites include information about guardianship generally but did not mention or provide information about limited a guardianship. The results of this content analysis appear in the sections below. Finally, we conducted a review of continuing legal education

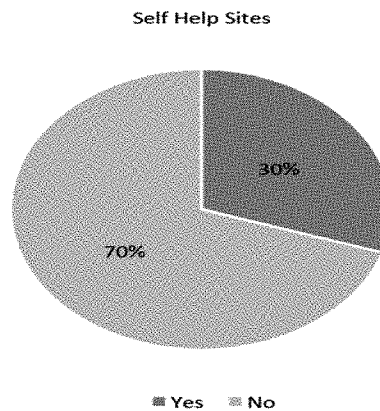
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<sup>122</sup> This is the common term used in the Older Americans Act for the state agency that administers federal funds for services funded under the Act.

offerings by state bar associations and volunteer bar affinity groups and judicial education organizations.

### 1. Public Self-Help Law Sites (non-profit)

Using the Self-Represented Litigation Network website and the map to links for information in each state at LawHelp.org, a search for information on limited guardianship was conducted which indicated that while information on guardianship is available in virtually every state, most sites do not mention limited guardianship. As the chart below indicates, information on limited guardianship was available in some form on 30% (15) websites and not present in 70% of websites (35). Where available, information on the sites typically included forms, videos, pamphlets, articles, and FAQs.



Information on guardianship generally is readily available on the self-help sites, but even where the site includes information on limited guardianship, it is often cursory (for example in Georgia, the public material mentions only that a guardianship can be limited, but does not indicate when it might be appropriate or how to request it).<sup>123</sup> For state sites containing information on limited guardianship, the most common information available was a brochure, typically

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<sup>123</sup> Georgia Legal Aid, <http://www.georgialegalaid.org/issues/family-law-and-domestic-violence/guardianship-and-alternatives-for-adults> (last visited July 14, 2017).

downloadable as a pdf, or a FAQ. For the 15 state sites that address limiting a guardianship in their self-help materials, sites were coded based on the amount of material available. None of the sites offered extensive information, six sites contained a moderate amount of information, and nine states had a small amount of information.<sup>124</sup>

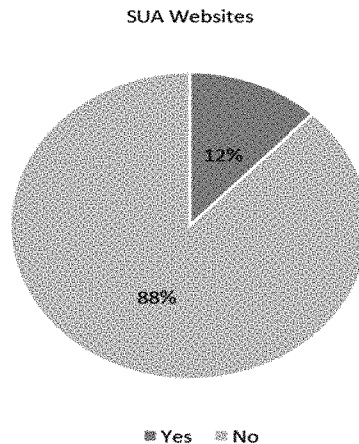
## 2. State Unit on Aging Sites

A content analysis of State Unit on Aging<sup>125</sup> sites yielded even less public information on limited guardianship. Of the 51 sites reviewed, only six sites provided information on limited guardianship. Of states with a medium amount of information, Maine provided the definition of limited guardianship and an example as part of their guardianship information, Texas included a Handbook on Guardianship and Alternatives that provided information on both limited guardianship and surrogate decision-making, and Oregon included information on limited guardianship via a link to a presentation by Disability Rights of Oregon. Nebraska, Kentucky and Iowa sites contained a small amount of information on limited guardianship, usually just a brief mention or a definition in a pdf brochure or on the website itself.

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<sup>124</sup> This coding was based on a word count in the section of the site mentioning limited guardianship. State sites that fell into the “small” category typically had not more than one sentence of information on limiting guardianship. The nine states coded as offering medium amount of information typically contained a definition and examples of when a limited guardianship would be appropriate. No sites contained extensive information, forms or examples.

<sup>125</sup> Units on Aging are the designated state agency to receive and administer federal funds under the Older Americans Act. (42 U.S.C.A. § 3025). This law also requires each state to provide an individual to serve as a State Legal Assistance Developer who is tasked with securing and maintaining the legal rights of older individuals, including “maintaining the rights of older individuals at risk of guardianship.” *See* 42 U.S.C.A. § 3058j.



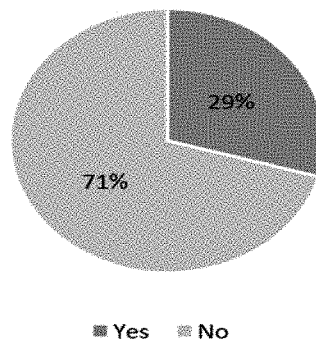
After reviewing State Unit on Aging sites, we reviewed Aging and Disability Resource Center websites to see if any contained information on limiting a guardianship and found that these sites function primarily as a referral mechanism and do not contain background information or other substantive information on topics of interest. This should be remedied. One recommendation might be to provide links to other sites with legal information and guidance so visitors can obtain more information. Another idea would be to provide a resource section on the ADRC sites so that users can locate information on laws and rights at the same time they seek referrals for services.

### 3. State Court Related Sites

Court sites at the state level were likewise reviewed for public content related to limiting a guardianship. Again, finding information on limited guardianship was difficult on most of the sites searched. While many sites contain self-help materials and resources for the public, information on guardianship was not as easy to find, and information on limited guardianship was even more difficult. Fifteen of the fifty-one sites (29%) reviewed contained information on limited guardianship, and where available, this information was likely to be a downloadable PDF brochure,

webpage with definitions, FAQ or explanatory video. Of the 36 sites (71%) that did not include information on limited guardianship, some of these contained links to county court sites that had additional information and resources on guardianship generally.

State Court Sites



In states that have a State Public Guardian or County Public Guardian office or program with a website, these sites often contain substantial information on guardianship and typically include information on limited guardianship. New Hampshire, Florida, and Vermont had brief program descriptions but did not mention limited guardianship. However, there are many states who do not have formal public guardian programs and other sites focus more on case handling than on public education.

#### **4. Training for Lawyers and Judges on Limited Guardianship**

Because lawyer and judicial knowledge of limited guardianship options was identified as a practical barrier, the project conducted an additional content analysis of State Bar websites for Continuing Legal Education topics related to guardianship and where

visible,<sup>126</sup> most state bar associations and judicial councils offered training on the topic, leading to the conclusion that training on limited guardianship, trends in guardianship practice, supported decision making, and screening for less restrictive alternatives to plenary guardianship is readily available through professional organizations such as bar associations, specialty bar groups such as the National Association of Elder Law Attorneys, and judicial training organizations such as state and national judicial education associations, probate judges councils and associations. The review of training topics indicated that there is plenty of information available, so lack of training and information seems less of a barrier than, perhaps, access to information by those who do not specialize in adult guardianship practice.

## V. ANALYSIS AND CONCLUSIONS

### A. Feasibility of Limited Guardianship, Given Barriers

Should it matter that limited guardianship is not widely used as a tool to tailor adult guardianship orders even though most state laws contain language favoring a tailored approach? An argument can be made that the dearth of limited guardianship orders is not important if enough people engage in effective planning for incapacity using alternatives to guardianship or if the Supported Decision-Making movement continues to take hold and it becomes a successful alternative to plenary guardianship or operates in conjunction with and informs court-ordered guardianship. On the other hand, the gap between language and practice regarding tailored orders still exists. Is the gap a salient problem, given the individual rights at stake in adult guardianship, the resultant constitutional protections, and given that guardianship statutes exemplify the search for an effective balance between protection and autonomy? The statutory language related to maximizing autonomy, considering and

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<sup>126</sup> Some sites required entry of a bar number to access training material or training calendars.

employing less restrictive alternatives, including the protected person in decision-making, promoting restoration and permitting limited orders demonstrates a need for individualized ongoing assessment and interaction that may not be practical with available resources, administrative capabilities and priorities within courts handling adult guardianship cases. Also, the gap may be a consequence of the nature and timing of cases presented.

But it can also be argued that the language in guardianship laws is important, if for no other reason than that it personifies the significance of striking the balance between protection and autonomy in a way that protects our fundamental constitutional rights. And the language in the statute also serves as a backstop against infringement on constitutional protections, even where the potential infringement is well-intended as a protected measure.

The “age wave” and projected demographics provide another reason that the statutory language of adult guardianship matters, since the aging of this large group of Americans coupled with increased life-spans, in part due to advances in health care, means that there are more older Americans than at any time in history. While aging and incapacity are not synonymous, and many older persons will live without the need for court intervention, the “age wave” identified by Dychtwald is now being called an “aging tsunami,” and along with longer life spans comes an increased risk of Alzheimer’s disease or other related dementia with the potential need for increased numbers of court-ordered protective arrangements.<sup>127</sup>

Despite this article’s focus on increased autonomy and tailoring of guardianship, there are inherent dangers in this approach. Most significantly, if the balance is tipped away from protection and toward autonomy, there is increased potential that someone with age-related dementia or developmental or intellectual disabilities will be vulnerable to exploitation or the inherent risks of choices dangerous to self or others. The risk of harm theoretically decreases

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<sup>127</sup> See, e.g., Andrew Tisch, *An Aging and Alzheimer’s Tsunami Is About to Hit Us*, <http://www.foxnews.com/opinion/2017/04/06/andrew-tisch-aging-and-alzheimer-s-tsunami-is-about-to-hit-us-heres-what-needs-to-happen-right-now.html> (last visited Mar. 7, 2018).



with a guardian in place making decisions and court oversight of the arrangement. Parents of young adults with intellectual or developmental disabilities and children of older individuals with diminished cognitive capacity understand this concern well. They often seek plenary guardianship to prevent a harm from occurring. A response in the comment section of the practical barriers poll stated the “parents sometimes believe that full guardianship provides more protections for their loved one.” As previously noted, it is unfortunately difficult to accurately estimate the number of adults subject to guardianship, and many courts are challenged to effectively keep up with required reports and accountings. And the court oversight that is a protection and benefit of guardianship may become even more strained if there is an increased use of guardianship as the number of older individuals grows.

Furthermore, a guardianship petition is often filed in response to crisis or triggering event instead of as a routine court process. The need for a critical decision regarding health care or residence, or the need to protect a person’s estate from exploitation could trigger an interested party to file a guardianship petition. In these cases, courts are asked to rule on guardianship for individuals who have already experienced problems. Plus, a petitioner may have explored and exhausted alternatives to guardianship prior to filing the action in court, making a limited guardianship less feasible or viable. Temporary Emergency guardianships could be used to stabilize the situation, providing time for an inquiry into the long-term feasibility of less restrictive measures.

The cost and availability of a functional evaluation that could be used to tailor an order is also a barrier. When state laws moved from a categorical or diagnostic basis of incapacity to a more functional definition due to the reforms of the last century, the need for standards for functional evaluations arose. Thorough functional evaluations are costly and time consuming and may require numerous interviews. Yet without a detailed and thorough evaluation of abilities and needs, it is impossible to effectively tailor or limit a guardianship order to address an individual’s circumstances and abilities. A court provides the forum for an objective inquiry as to whether an individual meets the law’s definition of incapacity, but

the court needs objective information in the form of an evaluation of functional capacity in order to conclude that a limited order would be appropriate.

And the cost of a thorough evaluation is not the only financial consideration for a court or for litigants in guardianship. Because needs and abilities can change over time there may be a need to adapt a limited order to either increase or remove an individual's rights. This can generate the need for additional evaluations, court hearings and oversight, and therefore add both expense and time to the process. Where a protected person has assets, evaluation and legal expenses are typically paid from assets of the estate. But many protected persons do not have sufficient resources to fund an ongoing process and either way, there are increased costs to courts at a time when court budgets are static.<sup>128</sup>

### **B. Promising Extrajudicial Alternatives to Limited Guardianships**

Because of the legal and practical barriers to tailoring guardianship, those interested in striking an effective balance between protection and autonomy might explore and consider non-judicial remedies to better accomplish a tailored approach to decision-making for those with variable or diminished capacities. Extra-judicial "up-stream" planning approaches include customized health care and financial powers of attorney and Supported Decision-Making arrangements and agreements. These vehicles are traditionally flexible and based on common law agency principles and can include language to address common concerns about shared responsibility, such as "springing" language, where the arrangement requires a physician's evaluation, "growth clauses," where the arrangement would be periodically reviewed to determine whether it is still necessary, accountability provisions, where the arrangement

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<sup>128</sup> See, e.g., The National Center for State Courts [http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/Budget\\_Funding.aspx](http://www.ncsc.org/Information-and-Resources/Budget-Resource-Center/Budget_Funding.aspx) (last visited on July 16, 2017) (Survey of Court Administrators from 2012 indicating that most administrators expected that funds for state courts would either "stay the relatively same" or will "get worse.").

names a trusted third party to receive accountings and provide oversight, and provide standing to a trusted third party to enforce terms of the agreement or file a legal action on behalf of the principal, among other provisions. Microboards<sup>129</sup> or incorporated support teams can include supported decision-making concepts in their by-laws and are another example of a creative planning approach. “Up-stream” planning approaches could be designed to address individual needs and goals, include safeguards to protect a vulnerable adult and at the same time save the courts for emergency situations and cases where there was no planning for incapacity. These approaches not only give voice and promote the autonomy, wishes and preferences of individuals, they are designed with “built in” tools to effectuate a person’s wishes.

### **C. Next Steps**

#### **1. Information and Education**

The SSA study found an opportunity for more interaction between courts and organizations providing support in their communities. This study learned that potential litigants do not feel that they have sufficient information to understand when a limited guardianship or no guardianship is appropriate and they do not know how to navigate the court system to argue for a tailored arrangement. There is a need for more readily available information and education to spark planning and to understand options when there is no plan in place.

Information about planning processes and considerations should be readily available in court house self-help offices, senior centers, schools, law offices, medical offices and hospitals and libraries. Everyone, regardless of age or ability should be encouraged to consider, discuss and document preferences and goals, plan for future needs, engage trusted supporters to participate, build in

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<sup>129</sup> A microboard is a person-centered, non-profit entity formed by a small group of committed friends and family members who volunteer to help plan, develop and maintain the ongoing services necessary to support one person with a disability. See <http://www.gamicroboards.org/> (last visited on Sept. 7, 2017).

safeguards, work with third parties to recognize agent and supporter authority, and engage lawyers to carefully construct a document that both reflects and operationalizes individual wishes, preferences, and goals. Supported Decision Making should be studied and evaluated to determine whether less formal arrangements are an effective way to achieve goals and avoid guardianship without increasing risk. Best practices, such as the ABA PRACTICAL tool for lawyers, should be expanded to help other professions screen for alternatives to guardianship.<sup>130</sup>

## 2. Diversion of Cases

Court gate-keepers such as clerks and self-help office navigators could be encouraged to make referrals for less restrictive processes before accepting a petition for guardianship. For example, courts could provide a check list to petitioners, use software or applications such as “Learn the Law,”<sup>131</sup> involve law school clinic students or interested non-profits as generators and updaters of content for sites, and link them to community resources that might help avoid the need for a formal grant of authority. FAQs or Decision-tree software could be available in self-help kiosks at courthouses and could help parties identify supportive services that could help avoid the need for guardianship. In addition, as the TASH study found, schools do not do a thorough job of explaining less restrictive options to parents of children with disabilities who are aging out of the school system. The checklists could be distributed to families by school systems, as well. An example of an effective checklist is the Georgia Guardianship Guide, a seven-page brochure published by the Georgia Advocacy Office and the Governor’s Council on Developmental Disabilities for the public to encourage exploration of less restrictive options.<sup>132</sup> These promising practices could help divert cases where a guardianship is not

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<sup>130</sup> PRACTICAL Tool, American Bar Association [https://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice/practical\\_tool.html](https://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice/practical_tool.html).

<sup>131</sup> See Learn the Law, <https://www.learnthelaw.org/> (last accessed Mar. 7, 2018).

<sup>132</sup> Publications, Georgia Advocacy Office, <http://thegao.org/category/publications/> (last visited Mar. 7, 2018).

necessary. Plus, since legal problems often exist concurrently with other non-legal concerns, a stronger partnership between courts and supportive services could help the community in other ways beyond the guardianship system.

### **3. Address Barriers to Restoration**

Barriers to restoration of rights could be addressed through increased training of guardians about ways to facilitate capacity, provide choices and share decision making. The National Guardianship Network has excellent resources but more resources for guardians could be made available through the courts to help guardians better understand and implement the guardianship as a collaborative partnership. Where supported decision-making arrangements are successful, guardians can help restore rights by showing the court how these arrangements can be designed to protect against harm.

### **4. Reserve Courts for Crisis Situations**

Implementing the above recommendations could save valuable court resources for cases where intervention is necessary and there are no other options. Norma, our example from page one, might not need to see a courtroom or have a judge decide her fate if she is able to identify and structure a less restrictive alternative. The way our guardianship system plays out at present, however, if Norma winds up in court she is likely to have a guardian appointed even if another option might have worked well for her.

## **CONCLUSION**

The gap between the promise contained in the language of guardianship statutes and the resulting loss of rights typical in guardianship orders may be a function of both practicality and resources. By the time a court is involved, less restrictive measures may not be viable. And in many places, the same system and standards apply to individuals with intellectual or developmental disabilities and those with a cognitive impairment concurrent with age

or resulting from a degenerative illness. The tailored approach may not always be feasible or achievable. But these barriers should not stop advocates from trying to bridge the gap. Instead, advocates need to encourage the development and use of extrajudicial legal mechanisms that are flexible and easily tailored to meet individual needs and preferences and adapt to life changes. The goal for these extrajudicial alternatives is the same as the original goal for a limited guardianship: find the “sweet spot” between promoting individual choice and autonomy and protecting vulnerable individuals and others from exploitation and irreparable harm that might flow from the unfettered exercise of choice.

