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From Idiots and Lunatics to Incapacitated Persons and Respondents: The Evolution of Guardianship Law in Rhode Island

Mark B. Heffner*

INTRODUCTION

When its iconic “1984” commercial aired in the third quarter of the 1984 Super Bowl game, Apple announced the availability of the first Macintosh computer. With its graphical user interface replacing the “glowing greenish phosphor”¹ and “surly c:\> prompts”² of the IBM P.C. launched three years earlier, the first “Mac” introduced the intuitive user interface, which we now take for granted.

At the same time a Rhode Islander might be opening his shiny new Mac, another Rhode Islander who was classified as an “idiot, lunatic, or person of unsound mind” could be stripped of her

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1. WALTER ISAACSON, *STEVE JOBS* 95 (Simon & Schuster 2011).
2. WALTER ISAACSON, *THE INNOVATORS* 363 (Simon & Schuster 2014).

personal autonomy. Rhode Island law would have afforded a probate court no statutory standards to decide whether an individual would fall into one of these classifications—or others such as “a habitual drunkard”—which might cause a probate court to appoint a guardian for her. Apart from required personal service, the person who found herself on the wrong end of a guardianship proceeding was afforded no clear procedural rights, including evidentiary standards or right to counsel, under Rhode Island’s guardianship statutes.

As this article will describe, the guardianship law in Rhode Island existing in 1984 was essentially the same that had existed since 1905. And the 1905 statutes represented only a modest modernization of Rhode Island’s guardianship laws that had existed since its colonial era. It would take until 1985—and more fully not until 1992—before the breakthrough of the woman throwing a hammer through glass, literally depicted in Apple’s “1984” commercial, would figuratively occur in Rhode Island’s guardianship laws.

This article will first examine Rhode Island’s guardianship laws during the more than 200 years from Rhode Island’s colonial era until 1985, and label this time as the “Dark Period.” In the next sections, entitled “First Light” and the “Dawn,” this Article will discuss how, after this over 200 year period of relative dormancy, Rhode Island’s guardianship evolved rapidly over the comparatively short period between 1985 through 1996. This article will conclude with a section entitled “After the Dawn,” which will examine what has occurred (and has not occurred) in the twenty years following this period of rapid change.

Rhode Island’s guardianship laws and its changes will be viewed through the prism of two areas: the grounds for the initiation of a guardianship proceeding and the procedural rights of the individual for whom the guardianship is sought. Guardianships, of course, involve many other aspects and requirements; however, focusing on these two significant areas will provide most vivid insight to Rhode Island’s guardianship laws as they once existed and as they now are.

To highlight this evolution, this article will focus on provisions of Rhode Island’s statutes pertaining to guardianship of

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adults.³ For, as the Rhode Island Supreme Court pointed out in *Trustees of House of the Angel Guardian, Boston v. Donovan*, “in this state the probate court derives its jurisdiction wholly from the statute.”⁴ Accordingly, this article will emphasize statutory provisions, discussing reported decisions of the Rhode Island Supreme Court which interpret the enactments of the General Assembly.

The terms used in this article for an individual for whom a guardianship is sought will correlate with the terms generally used by the statutes during the particular period discussed. For example, during what this article will call the “Dark Period,” such an individual will be referred to as the “intended ward.” Similarly, in discussing this statute from the period labeled “First Light” onward, the term respondent will generally be used.

Rather than utilizing the cumbersome “he or she,” the pronouns for gender will be dealt with in a manner also reflective of the time. Because during the Dark Period guardians were generally male, the pronoun “he” will be used when referring to a guardian, with she used to represent the “intended ward.” For the discussion of the period of the First Light onward, this convention will be reversed—i.e., the pronoun “she” will be used for the guardian with “he” referring to the respondent. Exceptions to these conventions will obviously occur when referring to actual parties in a reported case.

I. THE DARK PERIOD 1742–1984

A. *Grounds for Guardianship.*

As described by the Rhode Island Supreme Court in *Tillinghast v. Holbrook*, “[i]n 1742, the General Assembly, for the first time, legislated upon the subject of the appointment of guardians over the persons or estates of persons other than

3. Prior to Public Law 1992, Chapter 493, referred to later in this article as the “1992 Act” guardianships of minors and adults were dealt with in the same statute. Section 5 of the 1992 Act created a new Chapter 15.1 of Title 33 dealing exclusively with guardianships of minors. See R.I. GEN. LAWS § 33-15.1-1-1—40 (2012). Public Law 1946, Chapter 1711 created a new Chapter 16 of Title 33 dealing with veterans guardianships. Both of these Chapters are outside the scope of this article. See *id.* § 33-16-1—35

4. 46 A.2d 717, 718 (R.I. 1946).

infants.”⁵ The court explained that:

The title of the act indicates its general purpose – “An act empowering several town councils of this colony to have the care and oversight of all persons who are delirious, distracted, or *non compos mentis*, and their estates.” It enacts that “it shall be in the power of each town council in this government to take into their care all persons and their estates in each respective town, who are delirious, distracted, or *non compos mentis*, or such who, for want of discretion in managing their estates, are likely to bring themselves and their families to want in misery, and thereby render themselves and their families chargeable to the respective towns in which such persons live.”⁶

The *Tillinghast* court also noted that the power formally vested in the town councils and then in the “several courts of probate . . . suggest another motive, viz.; to save the towns from the burthen of supporting such persons after their estate shall be wasted away.”⁷

In its 1822 Public Laws, the General Assembly refined the 1742 phrase “the persons or estates of persons other than infants” to then empower “the courts of probate, in their respective towns . . . to approve of guardians chosen by minors of fourteen years of age and upward.”⁸ It also made this power more succinct and specific, namely “to appoint guardians of idiots, and all other persons who are non compos mentis or lunatic, or who for want in discretion in managing their estates are likely to bring themselves and families to want and thereby render themselves and families chargeable to such town.”⁹

Thus, the General Assembly’s 1822 enactment replaced the terms “delirious and distracted” of its colonial era predecessor with the terms “idiot” and “lunatic.”¹⁰ The General Assembly, however, hit its full stride in its enactment of the 1844 Public Laws:

5. 7 R.I. 230, 248 (R.I. 1862).
6. *Id.*
7. *Id.* at 249.
8. 1822 R.I. Pub. Laws 245.
9. *Id.*
10. *See id.*

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Whenever any idiot or lunatic, or person non-compos mentis, or any person who for want of discretion in managing his estate, shall be likely to bring himself and family to want, and thereby to render himself and family chargeable, shall reside or have a legal settlement in any town, the court of probate of such town shall have the right to appoint a guardian or person and estate of such person.¹¹

It is perhaps not surprising that an early or mid-nineteenth century General Assembly would classify someone as an “idiot or lunatic or person non-compos mentis,” and further use that characterization as the basis for subjecting such an individual to a guardianship. It may be surprising, as this article will reveal, that these same classifications (with additions such as “habitual drunkard”) would persist with only minor phrasing changes for the next 142 years.

The Rhode Island Supreme Court, in *Jenckes v. Court of Probate of Smithfield*, interpreting the General Assembly’s 1844 enactment, drew a sharp distinction between the statutory phrase “idiot and lunatic and person non compos mentis” and an individual who may be subject to a guardianship based on “want of discretion in managing his estate.”¹² *Jenckes* involved a will contest in which one of the allegations was that the will of Hannah Jenckes should be void because Ms. Jenckes was the subject of a guardianship at the time of the will’s execution.¹³

The *Jenckes* court pointed out that “[t]he order of the Court of Probate states the testatrix was put under guardianship because she wanted discretion in the management of her estate.”¹⁴ The Court stated that “such a want of discretion does not imply that the party was not of a sane mind. If the appointment had been from idiocy, lunacy, or because the person was non-compos mentis, the case would have been different.”¹⁵

In interpreting Section 3 of *An act respecting Guardians* contained in the 1844 Public Laws, the *Jenckes* court asked: “Can it be reasonably supposed that the General Assembly intended to

11. 1844 R.I. Pub. Laws 272.

12. 2 R.I. 255 (R.I. 1852).

13. *Id.* at 255–56.

14. *Id.* at 258–59.

15. *Id.* at 259.

place the last class of persons enumerated on the same footing with idiots, lunatics, or person non compos mentis in reference to their capacity to make a will?"¹⁶ Answering its own question in the negative, the court upheld the Smithfield Probate Court's ruling admitting Ms. Jenckes will to probate, stating the following:

The statute in relation to wills authorizes every person of sane mind to make a will, and is there any reason for saying that a person, who wants discretion in the management of his estate, and is likely to spend it, is not of sane mind? It is not a want of discretion or judgment which disables; it is insanity. The testator has a right to exercise his own discretion in judgment, and, if he is wanting in both, it does not affect the validity of his will if he be sane. The argument makes want of discretion which shall subject a party to be put under guardianship equivalent to the want of sane mind.¹⁷

The *Jenckes* court also reinforced the provisions of the statute that lack of discretion in managing an estate is not itself sufficient grounds for the appointment of a guardian. Rather, the court stated that "the authority to appoint exists only, where the want of discretion is such that the party would be likely to bring himself and family to want and thereby become chargeable."¹⁸ The lack of this element in Ms. Jenckes' case made the Probate Court's order of guardianship "obviously void."¹⁹ Nevertheless, the court found this fact beside the point in its ruling, for even had it been present, Ms. Jenckes would have been not have been proven to lack the "sane mind" required to make a will.²⁰

In *Hopkins v. Howard* the court again held that "lacking in discretion in the management of her estate, is not enough to warrant the appointment of a guardian at the instance of the overseer of the poor of the town. It must also appear that, by reason of such want of discretion, she is likely to become a public

16. *Id.* at 257.

17. *Id.* at 257-58.

18. *Id.* at 259.

19. *Id.*

20. *Id.* at 257-58.

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charge thereon as alleged in the petition.”²¹

The court in *Hopkins* determined the decision to appoint a guardian as “fatally defective” on two grounds.²² First, it found that the alleged ward had sufficient assets to prevent her from becoming a charge on the town.²³ For example, the court noted that:

The proof as to respondent’s indiscretion in the managing of her estate consists mainly of the most ordinary, and in many cases the most trivial, expenditures such, for example, as spending all of the money she had at a given time (in many instances not more than 50 cents or a dollar) for sugar, tea, butter or some other article of everyday use in a family.²⁴

The court found that, despite numerous other instances of this type related in the evidence,

[A]nd, while it appears that she is somewhat eccentric in some of her transactions, [] there is nothing to show that she is wasteful or extravagant, and no evidence that she is likely to become a public charge for want of discretion in managing her estate as to warrant the court placing her under guardianship.²⁵

In *Gardella v. Gardella* the court reiterated its interpretation of the need for a finding of *both* lack of discretion in managing financial affairs *and* the likelihood to become a public charge prior to the proper appointment of a guardian under the statute.²⁶ In an interesting twist relevant in many present day proceedings, the *Gardella* court further found that the prospect of Mr. Gardella’s adult children providing “proof that their perspective inheritances may be lost” is not the same as the prospect of an individual becoming chargeable to the town.²⁷ The *Gardella* court noted that “[t]he statute is not designed to permit adult children to curb the action of a parent of sound mind and legal discretion in the

21. 39 A. 519, 520 (R.I. 1898) (citation omitted).

22. *Id.* at 519.

23. *Id.* at 520.

24. *Id.*

25. *Id.*

26. 146 A. 621 (R.I. 1929).

27. *Id.* at 622.

disposition or management of his estate. It seeks to protect a spendthrift, his legal dependents and the town for his folly.”²⁸

What then of the other grounds for guardianship stated in the statute—i.e., that the individual is purported “idiot or lunatic, or person non compos mentis”? The statute contains no definition of any of these three terms. A modern Rhode Island case notes that “[t]he 1623 James I act used the term ‘*non compos mentis*’—literally ‘not master of one’s mind’—in describing what has evolved into the term ‘unsound mind’ used in § 9-1-19.”²⁹ As it did in the statute of limitations provisions of section 9-1-19 cited by the *Roe v. Gelineau* court, the General Assembly replaced the term “non compos mentis” in the guardianship statutes with the phrase “person of unsound mind.”³⁰

The Rhode Island Supreme Court’s decisions are equally unhelpful regarding the other terms used in the statute. “The terms ‘lunatic, idiot or person of unsound mind,’ used in the statute in their natural and ordinary use, indicate a condition of mental disability and incapacity.”³¹ Looking outside of Rhode Island law for insight to the meaning of the terms “idiot and lunatic”:

English common law distinguished between two types of individuals who suffer from mental incapacity: the idiot and the lunatic. Crudely put, the lunatic was someone who once possessed a sound mind and somehow lost it; the idiot never had one. The idiot’s condition was static. He came into the world with a certain deficient mental apparatus and generally left it in the same way. For the idiot there are no past periods of competency to look back to, no future competency to hope for. The lunatic, on the other hand, had once been competent and now experienced alternating periods of lunacy and lucidity. The very word ‘lunatic’ comes from the Latin ‘lunar’ or moon, and like the moon the insanity of the lunatic waxed and waned. Even a lunatic who appeared permanently insane was presumed potentially curable. He had once

28. *Id.*

29. *Roe v. Gelineau* 794 A. 2d 476, 485 (R.I. 2002) (citations omitted).

30. 1882 R.I. PUB. LAWS 430.

31. *Champlin v. Probate Court of Exeter*, 92 A. 982, 982 (R.I. 1915).

lived his life on equal mental footing with others, and there was always that glimmer of hope that he would do so again.³²

In addition to “want of discretion in managing his estate,” in 1872 the General Assembly added to the list of potential candidates for guardianship to include “any person who from excess drinking, gaming, idleness, or debauchery of any kind” might “render himself or his family chargeable.”³³ Apparently in order to emphasize that when it referred to excess drinking it meant it, the 1872 statutes added a new section authorizing that “[c]ourts of probate are hereby authorized to appoint guardians of the person and estates of individual drunkards”³⁴ as well as the section authorizing “[t]he guardian of any habitual drunkard . . . to commit the ward to any curative hospital.”³⁵ While the separate sections dealing with “habitual drunkards” and their potential commitment appeared again in the 1882 statutes,³⁶ they disappeared with the enactment of the 1909 General Laws, which nevertheless retained the references to “habitual drunkard” and “excess drinking.”³⁷

B. *Conservators*

The Court Practices Act of 1905 introduced a new concept in a section entitled *Conservators of the Property of Aged Persons*, which provided as follows:

If a person by reason of advanced age or mental weakness is unable to properly care for his property the probate court of the town in which he resides, upon his petition or the petition of one or more of his relatives or friends, may appoint a conservator of his property . . . [i]f at the hearing it appears that such person is incapable of properly caring for his property, a conservator shall be appointed, who shall have charge and management of the

32. Louise Harmon, *Failing Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 *YALE L. J.* 1, 16 (1990).

33. 1872 R.I. PUB. LAWS 336.

34. *Id.*

35. *Id.*

36. 1882 R.I. PUB. LAWS 430.

37. 33 R.I. GEN. LAWS § 321-7 (1909).

property of such person subject to the direction of the court.³⁸

In enacting this section the legislature, therefore, introduced at the beginning of the twentieth century two concepts not previously existing in 18th or 19th century Rhode Island statutes—that is a proceeding in which the court would supervise the “charge and management of the property” of an individual based solely on “advanced age or mental weakness.” Moreover, unlike the guardianship proceedings, such a conservatorship proceeding could be initiated upon the petition of the individual herself.

If appointed, the statute also provided that “such conservator shall give bond and file inventory as is required of guardians of estates” and further that “[a]ll provisions of law relative to accounting and the management, investment, sale, lease or mortgage by guardians of estates shall apply to the accounting and to the management, investment, sale, lease or mortgage of estates by conservators.”³⁹

The General Assembly thus introduced an entirely new reason that someone might become subject to the supervision of the probate court—i.e., based solely on “advanced age or mental weakness,” without any requirement that that individual’s purported deficiencies would cause her to become a “charge” upon her town. Moreover, the individual himself could determine that the supervision of the probate court was necessary and initiate this proceeding.⁴⁰ This introduction of conservators became codified in Rhode Island General Laws 1909 Chapter 321 Sections 37 and 38.

In *Whitmarsh v. McGair* the Rhode Island Supreme Court noted that “[i]t is apparent from our statutes and the definition of the word ‘conservator’ and ‘guardian of the estate’ of a person are essentially synonymous.”⁴¹ At the same time the court noted the utility and the distinction between the petition for the appointment of a conservator and that for a guardian:

38. Court and Practice Act of 1905 § 1077 (codified as amended at R.I. GEN. LAWS § 33-15-44 (2012)).

39. *Id.* § 1078.

40. These provisions regarding Conservators subsequently became codified in General Laws 1909 Chapter 321 § 37 and 38.

41. 156 A.2d 83, 87 (R.I. 1959).

A person may himself petition for the appointment of a conservator of his estate. To elderly persons needing help in the care of their property, the word conservator appears to be less offensive and less suggestive of the loss of mentality than the word guardian, but the duties and responsibilities of conservator appear not to differ materially from those of a guardian of the estate.⁴²

Like the statute setting forth the basis for the appointment of a guardian, the statute allowing for the appointment of a conservator remained essentially unchanged from the time of its appearance in 1905 until 80 years later in 1985.

C. *Procedural Rights of the Intended Ward*

In its 1857 Revised Statutes, the General Assembly mandated that “every court of probate shall, before proceeding, give notice to all parties, known to be interested” in particular proposed actions by the probate court.⁴³ Included among actions such as allowing or disallowing wills submitted for probate and accountings of fiduciaries was “the appointment of guardians of minors above fourteen years of age and all other persons other than minors.”⁴⁴ Like Monty Hall giving game show contestants a choice of doors number 1, 2 or 3, the legislature provided that such notice:

[M]ay be given in either of the following modes, at the discretion of the court:—

By causing a citation to be served by some sheriff, deputy sheriff, town sergeant or constable, upon all known parties interested at least seven days previous to proceeding; which citation shall give notice of the subject – matter of the proceeding, and the time and place thereof, and shall be served by reading the same to the parties, if to be found, or by leaving an attested copy thereof at the last and usual place of abode, of each of them;

By advertisement of such notice for fourteen days once a week in some newspaper printed in the State;

42. *Id.*

43. 1857 R.I. PUB. LAWS 353.

44. *Id.*

By causing the clerk of the court to post up such notice in some conspicuous place in his office or at the place at which the court usually meets, and in one other public place within the town, at least fourteen days before proceeding.⁴⁵

In *Angell v. Angell*, the notice to the prospective ward “was by publication only.”⁴⁶ It is not clear from the court’s decision whether “publication” meant newspaper advertisement or posting notice in the office of the clerk of the court; however from the context of the case the publication was most likely via newspaper advertisement.⁴⁷ The Probate Court of the Town of North Providence appointed a guardian for Vashti Angell, despite the lack of personal service on Ms. Angell.

Counsel for Ms. Angell contended that the statute itself “is unconstitutional because under it a person may be deprived of his liberty and property without due process of law by being put under guardianship without actual notice.”⁴⁸ The *Angell* court was unmoved by Ms. Angell’s argument:

Undoubtedly a personal notice to the intended ward would be better and more consonant with the usual course of judicial procedure than notice by publication only . . . but nevertheless our conclusion is that the appointment of the appellant was valid notwithstanding the want of personal notice to the appellee notice having been given as authorized by the statute.⁴⁹

In *Hamilton v. Probate of North Providence* the intended ward Gideon Hamilton appealed the action of the North Providence Probate Court appointing a guardian for him, alleging lack of sufficient notice of the pendency of the petition.⁵⁰ The Court noted that “[t]he only notice given was by serving a citation on the intended ward, and by putting up a notice to all persons interested in the Town Clerk’s office . . . and [n]o notice was posted in any

45. 1857 R.I. PUB. LAWS 354.

46. 14 R.I. 541, 545 (R.I. 1864).

47. *Id.*

48. *Id.*

49. *Id.* at 546.

50. 9 R.I. 204 (R.I. 1869).

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other place.”⁵¹ In dismissing Mr. Hamilton’s appeal for lack of notice, the Court stated that “[t]he Revised Statutes, chapter 152, prescribes the mode of notice in these cases, and this may be, either, 1st, by serving a citation on all known parties interested; 2d, by advertisement in a newspaper; 3d, by causing the clerk of the court to post up such notice in some conspicuous place in his office, or in the place at which the court usually meets, *and in one other public place, etc., etc.*”⁵²

The Court found that while notice was served on the intended ward Mr. Hamilton, the other two options for notice were either absent or deficient.⁵³ Rejecting Mr. Hamilton’s contention that despite personal service, notice was ineffective because his wife and his son were interested parties and were not notified, the Court found that the “citation served on the intended ward constituted sufficient legal notice.”⁵⁴

Until the enactment of the Court Practices Act of 1905, the legislature continued to afford the probate courts this menu of three notice options. In its 1872 general statutes the General Assembly carved out yet a fourth option for “the appointment of the guardian of any inmate of any asylum for the insane.”⁵⁵ The statute directed the process server to:

[A]pply to the physician in charge of the asylum where the person upon whom the notice to be served is confined; and if said physician shall return, upon oath, on the back of such notice that in his opinion it would be injurious to the mental health of such person to have such notice served upon such person, the officer or person charged with the service of said notice shall leave a copy thereof, with physician’s return thereon with the keeper of said insane asylum and shall return said notice to the court which issued the same without further service.⁵⁶

Thus, if the intended ward were an “inmate of any asylum for the insane,” it is possible, and even likely, that she would have

51. *Id.* at 205.

52. *Id.* (alteration in original).

53. *Id.*

54. *Id.*

55. 1872 R.I. PUB. LAWS 370.

56. 1872 R.I. PUB. LAWS 371.

received no notice whatever that she was the subject of a pending guardianship petition. For a process server would have certainly found it easier to get the physician to “sign off” on the notice rather serving it on the intended ward. Similarly, physicians in charge of such institutions would likely have agreed to avoid actual notice on the individual purportedly for her own benefit and to avoid the intrusion of process server within the facility. This potential—indeed likelihood—that certain individuals could be subjected to guardianships without any notice continued unchanged until the 1992 Act.

The Court Practices Act of 1905, for the first time, specifically required that “[n]o person shall be appointed guardian of the person of another, unless notice of the application for such appointment has been served upon the intended ward in person at least fourteen days prior to any action on said application”⁵⁷ The Court Practices Act of 1905, however, continued to provide an exception to this personal service requirement in the instance when “application shall be made to a probate court for the appointment of a guardian of any person confined to an asylum for the insane.”⁵⁸ This revision of the Court and Practices Act of 1905 was codified in the Rhode Island General Laws beginning in 1909.⁵⁹

The Court Practices Act of 1905 continued the “appointment or approval of a guardian” as among the actions delineated for which a probate court was required to give notice before proceeding,⁶⁰ specifying, however, that it “shall be given by advertisement of a notice for fourteen days, once a week, at least, in such newspaper, printed in English and published in the county in which the matter is to be acted upon, as the probate court by general rule or special order may designate for that purpose.”⁶¹ In addition to making this notice by newspaper advertising mandatory, the legislature in the Court and Practices Act of 1905 also made more specific the previous requirement that the advertisement be published “in some newspaper published in the

57. Court and Practice Act of 1905 ch. 50 § 1056.

58. *Id.* ch. 38 § 1077.

59. 33 R.I. GEN. LAWS § 321-16 (1909).

60. Court and Practice Act of 1905 ch. 38 § 764.

61. *Id.* § 769.

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State.”⁶² This mandatory and more specific requirement of newspaper advertising by the Court was also codified in the General Laws revision of 1909.⁶³

In 1982 the General Assembly belatedly addressed the objections made by the appellant Mr. Hamilton 113 years earlier,⁶⁴ by enacting new section 17.1 of Chapter 15, Title 33 entitled *Notice to Children or Heirs-at-Law of Ward*.⁶⁵ Specifically, the legislature provided that “[n]o petition for conservatorship or guardianship shall be heard and no person shall be appointed guardian or conservator of the person or estate of another unless notice of the application for such appointment together with notice of the date, time and place set for hearing has been given to the prospective ward’s children and/or heirs at law.⁶⁶ The 1982 version of this statute required that “[n]otice shall be given by registered mail, return receipt requested to the prospective ward’s children at their last known address, or if there be no children, then to the prospective ward’s heirs-at-law.”⁶⁷

In 1983 the legislature tempered its enthusiasm for the extent of this notice by deleting the requirement of notice to children and heirs-at-law by registered mail return receipt requested instead allowing such notice to be given by “regular mail, postage prepaid.”⁶⁸ However, perhaps an exchange for this downgrading in the type of mailing, the legislature added that this notice be given “at least ten (10) days before the date set forth for hearing on said petition”⁶⁹ In this same enactment, the legislature also required that this ten-day mail notice be given to the prospective ward’s spouse.⁷⁰ In 1987, the General Assembly clarified the meaning of “heirs-at-law” in the statute, by specifying individuals “who would inherit the prospective ward’s estate pursuant to the terms of Section 33-1-1.”⁷¹

In addition to providing no definitions of ‘idiot, lunatic, or

62. *Id.*

63. 32 R.I. GEN. LAWS § 309-5 (1909).

64. *See* Hamilton v. Probate of North Providence, 9 R.I. 204 (R.I. 1869).

65. 1982 R.I. Pub. Laws 1262.

66. *Id.*

67. *Id.*

68. 1983 R.I. PUB. LAWS 374.

69. *Id.*

70. *Id.*

71. 1987 R.I. PUB. LAWS 171.

person of unsound mind' (the term formerly known as non compos mentis) the Rhode Island guardianship statutes provided no standard for a court to determine *how* to determine whether an intended ward met these classifications. For example, was documentary evidence or oral testimony from the intended ward's physician required? What other evidence was needed to persuade a probate court that the individual was an "idiot, lunatic or person of unsound mind?" The reported decisions of the Rhode Island Supreme Court did not reference the types of evidence that was necessary to put an intended ward under guardianship.

Similarly, neither the guardianship statutes nor the reported cases provide any insight to the evidentiary standards to be applied. Specifically, did the probate courts in assessing the evidence before it apply a preponderance of the evidence or a clear and convincing standard?

Moreover, once a guardian had been appointed, there was no statutory mechanism for the then ward to terminate or modify the terms of the guardianship to which she was subjected. Beginning with the 1857 revised statute, the General Assembly provided a mechanism for a court to remove a guardian "who by reason of absence, sickness, insanity or other cause, shall become incapable of executing his trust, or who shall neglect or refuse to do the duties thereof, or who shall waste of estate of his ward."⁷² While this provision for the removal of *the guardian* remained nearly entirely unaltered until the 1992 Act, there existed nowhere prior to the 1992 Act for any mechanism for the termination or modification of *the guardianship* itself.

II. FIRST LIGHT 1985–1988

In 1985, the General Assembly altered the grounds by which a probate court could appoint a guardian. These changes were both substantive and cosmetic. Gone were the grounds based on an individual's purported status as an "idiot, lunatic, or person of unsound mind." Gone also was the ability of a probate court to appoint a guardian based on categories of purported behavior (e.g., "excess drinking, gaming, idleness or debauchery"). Also eliminated was a potential guardianship based on "want of

72. Revised Statutes of the State of Rhode Island and Providence Plantations, 1857, Ch. 152, Sec. 11.

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discretion in managing his estate” which might lead to the individual or his family being public charges.

Inserted in place was a functional standard. Specifically, probate courts could now appoint guardians for an individual “who is unable to manage his or her estate and is unable to provide for his or her personal help and safety as a result of mental/or physical disability.”⁷³ Specifically, such “mental or physical disability as determined by the court on the basis of oral or written evidence under oath from a qualified physician.”⁷⁴

On the cosmetic side, the legislation replaced the phrase “mental weakness” with “mental disability” for the grounds of the probate court to appoint a conservator.⁷⁵ Likewise the description of “an asylum for insane” was replaced by “medical facility.”⁷⁶

The 1985 legislature’s elimination of the potential appointment of a guardian based merely on an individual’s purported status (idiot, lunatic, habitual drunkard, etc.) with a functional standards (unable to manage his or her estate or his or her personal health and safety) provided a glimmer of light to the dark, anachronistic standards which had stood for in Rhode Island’s guardianship statutes since the early to mid-19th century. As did providing an actual evidentiary basis (oral or written evidence under oath from a qualified physician) that the individual’s “mental and/or physical disability” rose to the level which would warrant the appointment of a guardian by the probate court.

In practice, however, such light proved in some ways a false dawn. For in practice it is now meant that petitioners needed only produce a one sentence letter from any “qualified physician.” And such a “qualified physician” could have had the briefest of encounters with the intended ward in order to meet this requirement.

Before 1986 probate courts had the ability to appoint guardians “of the person and estate, or of the person or estate” of an individual.⁷⁷ The statute provided for no nuance or tailoring of the terms of the guardianship to meet the particular needs of an

73. 1985 R.I. PUB. LAWS 260.

74. *Id.*

75. *Id.* at 261.

76. *Id.*

77. 1986 R.I. PUB. LAWS 264.

individual. This changed with Public Law 1986, Chapter 176 by the insertion of the following two paragraphs to [General Laws section to which inserted]:

Within its powers under this chapter the probate court may limit the scope of the powers and duties of a guardian to the terms best suited to assist the ward in handling some but not all of his or her affairs, and may structure such guardianship to properly assist the ward in those areas where the ward may lack decision making ability.

The certificate of appointment issued to said guardian shall clearly state that it is a limited guardianship.⁷⁸

For the first time, therefore, the guardianship statute permitted a court to move beyond the “one size fits all” appointment of a guardian of a person and of her estate. The 1986 legislation also introduced the notion of an individual’s “decision making ability”—the lynchpin to the more significant reforms of the statute to come shortly.

In 1987 the General Assembly further modified the statute enabling probate courts to appoint conservators.⁷⁹ The changes, though seemingly superficial, were actually substantive. Specifically, previously an individual seeking the appointment of a conservator was required to be of “advanced age” or have a “mental disability.” The 1987 legislation eliminated the adjective “mental” before disability as well as the requirement of “advanced age” in order to initiate a conservatorship. Accordingly, an individual could seek the appointment of a conservator based on his or her own “disability” alone.⁸⁰

While the General Assembly was providing some light on the horizon with these revisions to the guardianship statutes, nationally the dawn was beginning to break. The catalyst was a series of articles which appeared in 1987 produced by the Associated Press (“AP”) which resulted from a national study of state guardianship proceedings.⁸¹ The AP’s report entitled

78. *Id.*

79. *See* 1987 R.I. PUB. LAWS 290.

80. *Id.*

81. ROBERT B. FLEMING & LISA NACHMIAS DAVIS, *ELDER LAW ANSWER BOOK* 11-3 (3d ed. 2013); *see* Fred Bayles & Scott McCartney, *Guardians of*

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“Guardians of the Elderly: An Ailing System,” highlighted both procedural and substantive problems in state court guardianship proceedings.⁸²

The AP report sparked the convening of the National Guardianship Symposium in July, 1988 at the Johnson Foundation’s Wingspread Conference Center.⁸³ Participants in this program (hereinafter “Wingspread”) included probate judges, physicians, law professors, attorneys from elder advocacy agencies and private practice attorneys as well as diversity of other members, including a bioethicist and an anthropologist.⁸⁴

Wingspread produced thirty-one recommendations “intended to better safeguard the rights of adult disabled wards and proposed wards [and] . . . to provide for the wards’ needs while maximizing individual autonomy.”⁸⁵ Among these recommendations were the following:

- Encouraging alternatives to guardianship, such use of durable powers of attorney, and “more appropriate uses of guardianship.”⁸⁶
- “Minimum [d]ue [p]rocess safeguards,” such as personal service on a respondent by “[a] court officer dressed in plain clothes and trained to communicate and interact with elderly and disabled persons,” right to counsel, and rights at the guardianship hearing, including to compel the attendance of and to confront and cross-examine witnesses and a “clear and convincing standard of proof.”⁸⁷
- A definition of incapacity focused on, among other elements, that “incapacity is a legal, not a medical, term,” that “incapacity may be partial or complete,” and that “age, eccentricity, poverty or medical

the Elderly: An Ailing System Part I: Declared ‘Legally Dead’ by a Troubled System, ASSOC. PRESS (Sept. 19, 1987), <http://www.apnewsarchive.com/1987/Guardians-of-the-Elderly-An-Ailing-System-Part-I-Declared-Legally-Dead-by-a-Troubled-System/id-1198f64bb05d9c1ec690035983c02f9f>.

82. RECOMMENDATIONS OF THE NATIONAL GUARDIANSHIP SYMPOSIUM AND POLICY OF THE AMERICAN BAR ASSOCIATION, iii (A.B.A. 1989).

83. *Id.* at iv.

84. *Id.* at iv, 35–36.

85. *Id.* at iv.

86. *Id.* at 3.

87. *Id.* at 9–10.

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diagnosis alone should not be sufficient to justify a finding of incapacity.”⁸⁸

Courts “limit the scope of and tailor the guardianship order to the particular needs of the ward” and that the guardian periodically report to the court the guardian’s efforts to “maximize self-reliance, autonomy and independence” of the ward.⁸⁹

III. THE DAWN 1990-1996

A. *Guardianship Commission*

The real transformation in Rhode Island’s guardianship laws began with the approval in 1990 of House Bill 90-H 7925A entitled “Joint Resolution Creating a Special Legislative Commission to Study the Laws on Guardianship.”

In addition to members of the Rhode Island House of Representatives and Rhode Island Senate, and the directors or their designees of various state agencies, this twenty-five-member commission (the “Guardianship Commission”) included a diverse number of stakeholders in legal issues involving the elderly and disabled, including a representatives of a senior citizens’ center, the National Gray Panthers Association, a mental health association, the American Association of Retired Persons, and the Rhode Island Council of Senior Citizens.⁹⁰ Specifically mandated among the two members were to be two “physicians specializing in geriatrics.”⁹¹ There was also to be one probate judge, the chief judge or his designee of the Family Court and two attorneys.⁹² Thus the Guardianship Commission, while tasked with reviewing Rhode Island’s guardianship laws, was designed not to be lawyer-centric.

B. *The 1992 Act*

The Guardianship Commission’s work resulted in House Bill 92-H 9792, which following its approval in July 1992, became 92 Public Law 493 (the “1992 Act”). The 1992 Act eliminated entire

88. *Id.* at 15.

89. *Id.* at 20.

90. H.B. 90-H 7925A (R.I. 1990). The author, in his then capacity as a State Representative, served on the Guardianship Commission.

91. H.B. 90-H 7925A (R.I. 1990).

92. *Id.*

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sections of Chapter 15 of Title 33, replacing them with new provisions. Of those provisions of Chapter 15 not deleted and replaced, the majority were revised.

The intention of the legislature in enacting the 1992 Act was codified in new Section 1 of Chapter 15 Title 33:

The legislature finds that adjudicating a person totally incapacitated and in need of a guardian deprives such person of all his or her civil and legal rights and that such deprivation may be unnecessary. The legislature further finds that it is desirable to make available, the least restrictive form of guardianship to assist persons who are only partially incapable of caring for their needs. Recognizing that every individual has unique needs and differing abilities, the legislature declares that it is the purpose of this act to promote the public welfare by establishing a system that permits incapacitated persons to participate as fully as possible in all decisions affecting them; that assists such persons in meeting the essential requirements for their physical health and safety, in protecting their rights, in managing their financial resources, and developing or regaining their abilities to the maximum extent possible; and that accomplishes these objectives through providing, in each case, the form of assistance that least interferes with the legal capacity of a person to act in his or her own behalf. This chapter shall be liberally construed to accomplish this purpose.⁹³

The lynchpin of the reforms of the 1992 Act was mandating use of a seventeen page “Functional Assessment Tool” (FAT), in place of the potentially one-paragraph physician’s letter as the basis for a probate court’s determination of whether or not an individual required guardianship.⁹⁴ Gone was the potential that someone could be made the subject of a guardianship proceeding based merely on his alleged status as an “idiot, lunatic, person of unsound mind,” or as a “habitual drunkard.” Instead, the individual’s functional abilities and “capacity to make decisions” would be determinative.⁹⁵

93. 1992 R.I. PUB. LAWS 1976.

94. *Id.* at 1978.

95. *Id.*

New Section 4 of Chapter 15 of Title 33 provided in part that:

[T]he court shall authorize the guardian to make decisions for the individual in only those areas where the court finds, based on the functional assessment, that the individual lacks the capacity to make decisions. The court must strike a delicate balance between providing the protection and support necessary to assist the individual and preserving to the largest degree possible the liberty, property and privacy interests of the individual.⁹⁶

New Rhode Island General Laws Section 33-15-4(a) further stated that “[t]he court shall not appoint a guardian or limited guardian if the court finds that the needs of the proposed ward are being met or can be met by a less restrictive alternative or alternatives.”⁹⁷ The mere existence of ostensibly less restrictive alternatives to guardianships such as durable powers of attorney and joint property arrangements, however, do not preclude the appointment by a court of a guardian. Rather, such a less restrictive alternative must be an effective mechanism for alternative decision-making for the respondent.

The 1992 Act incorporated into a revised Rhode Island General Laws Section 33-15-17.1 which enhanced the existing provisions pertaining to notice required to a respondent, as well as that to spouses, children or heirs.⁹⁸ The 1992 Act also prescribed a particular form of, and manner in which, notice must be served on a respondent. Specifically, it mandated that:

This notice shall be in plain language, large type and shall include the time and place of the hearing, the possible loss of liberty if the petition is granted, and shall inform the respondent of his or her rights including: the court appointment of a guardian ad litem, the right to a hearing and to be present at the hearing to confront

96. *Id.* at 1977.

97. *Id.*

98. 33 R.I. GEN. LAWS § 33-15-17.1(e) (West 2006); 1992 R.I. Pub. Laws 1968. The 1992 Act added the additional requirement that notice by mail be provided to “the administrator or any care and treatment facility where the respondent resides or receive primary services [and] . . . any current provider of primary support service and primary medical caregivers.” § 33-15-17.1(e).

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witnesses, present evidence, contest the petition, object to the appointment of a particular individual as guardian, request that limits be placed on the guardian's powers, and the right to counsel.⁹⁹

In addition, "[t]he court officer that serves this notice shall be dressed in plain clothes" and "[h]e or she shall have experience dealing with individuals who may lack decision making ability."¹⁰⁰ Further, the 1992 Act added the requirement that the process server both present and read the notice to the respondent.¹⁰¹

In addition to enhanced notice requirements, other previously unaddressed aspects of due process for respondents were explicitly addressed in the 1992 Act. Specifically, a new section, entitled "Hearing," first made clear that "[n]o limited guardian or guardian shall be appointed until after a hearing on the petition."¹⁰² This section also required that "[t]he respondent shall have the right to be present at the hearing and all other stages of the proceedings."¹⁰³ A respondent was also for the first time specifically "be allowed to (i) [c]ompel the attendance of witnesses; (ii) [p]resent evidence; and (iii) [c]onfront and cross examine witnesses."¹⁰⁴ The 1992 Act also provided that the standard of proof to be utilized in determining whether a guardian should be appointed is that of "clear and convincing evidence" and that "[t]he Rhode Island rules of evidence shall apply."¹⁰⁵

The 1992 Act also introduced another new section to the guardianship statute, mandating the appointment of a guardian ad litem in every petition for the appointment of a guardian.¹⁰⁶ The guardian ad litem was to have both an investigatory and reporting function. Regarding her investigation, the guardian ad litem had four statutory duties:

- (1) Personally visiting the respondent;
- (2) Explaining to the respondent the nature, purpose, and legal effect of the appointment of a guardian;

99. § 33-15-17.1(b); 1992 R.I. PUB. LAWS 1967.

100. § 33-15-17.1(c); 1992 R.I. PUB. LAWS 1968.

101. § 33-15-17.1(d); 1992 R.I. PUB. LAWS 1968.

102. 1992 R.I. PUB. LAWS 1978.

103. *Id.* at 1979.

104. *Id.*

105. *Id.*

106. *Id.*

(3) Explaining to the respondent the hearing procedure, including, but not limited to, the right to contest the petition, to request limits on the guardian's powers, to object to a particular person being appointed guardian, to be present at the hearing and to be represented by legal counsel;

(4) Informing the respondent of the name of the person known to be seeking appointment as guardian.¹⁰⁷

Following her investigation, Rhode Island General Law section 33-15-7(c) requires the guardian ad litem to make the following determinations:

(i) Whether the respondent wishes to be present at the hearing.

(ii) Whether the respondent wishes to contest the petition.

(iii) Whether the respondent wishes limits placed on the guardian's powers;

(iv) Whether the respondent objects to a particular person being appointed guardian, and;

(v) Whether the respondent wishes to be represented by legal counsel.¹⁰⁸

After doing so, the guardian ad litem is then required to "inform[] the court of those determinations."¹⁰⁹

If the respondent wishes to exercise any of these rights, she may be represented by legal counsel.¹¹⁰ If she does not secure her own counsel, the court will appoint legal counsel and, if necessary, bear the cost of securing the counsel.¹¹¹

A key feature of the 1992 Act was to recognize that not only do individuals have different levels of decision making capacity, but also such capacity may change over time for a particular individual. Specifically, the 1992 Act provided that "[i]f, because

107. *Id.* at 1980.

108. 33 R.I. GEN. LAWS § 33-15-7(b)(7) (West 2006); see also 1992 R.I. Pub. Laws 1980-81.

109. *Id.*

110. 1992 R.I. Pub. Laws 1981.

111. *Id.*

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of a change in the partially incapacitated individual's level of decision making ability, the scope and duties of the limited guardianship order no longer meet the needs of the individual and/or fail to afford the individual as much autonomy as possible, modification of the limited guardianship order is required."¹¹²

The 1992 Act provided that such "[m]odification can be accomplished by agreement of the partially incapacitated individual, his or her counsel, if any and the limited guardian."¹¹³ If such agreement is reached, the statute provided that a proposed consent order would be prepared and submitted to the court.¹¹⁴ However, if agreement could not be reached on such consent order, any of the parties—including the individual who was the subject of the guardianship—may request a hearing on such a proposed modification of the guardianship order.¹¹⁵

The potential for modification was to be enhanced by the addition in the 1992 Act of the requirement of an "annual status report."¹¹⁶ The statute also mandated the specific elements of such an annual status report to be the following:

- (1) The residence of the ward;
- (2) The condition of the ward;
- (3) Any changes the limited guardian [or] guardian perceives in the decision making capacity of the ward; and
- (4) A summary of actions taken and decisions made on behalf of the ward by the limited guardian or guardian.¹¹⁷

C. *1994 Act*

Of the stunning changes effected by the 1992 Act to Rhode Island's guardianship laws, the one having the most impact on practice in probate courts was the replacement of the requirement of the (usually one page) physician's letter with a seventeen-page FAT. Although required to be submitted to the court along with the petition for guardianship, the FAT was not required to be

112. *Id.* at 1978.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 1981.

117. *Id.*

completed by a physician; rather, it could be completed by “any professional whose training and experience aid in the assessment of functional capacity.”¹¹⁸

The Guardianship Commission continued its work, focusing on potential modifications to the 1992 Act needed in order to enable these reforms to work most effectively in practice.¹¹⁹ The Commission found that because of its length and complexity, the FAT was often difficult to complete, particularly by physicians. In addition, the then serving Probate Judge of Providence, who also served on the Guardianship Commission, expressed the view that evidence supplied by a physician was of a unique reliability to a probate court.

The continuing work of the Guardianship Commission resulted in the enactment by the General Assembly of 1994 R.I. Pub. Laws Ch. 359 (the “1994 Act”). The major impact of the 1994 Act was a six-page Decision-Making Assessment Tool (DMAT) to replace the seventeen-page FAT.¹²⁰ In addition to its virtue of relative brevity, the DMAT focused on the extent to which an individual possesses decision-making capacity.¹²¹ The 1994 Act also provided that, while additional DMATs could be completed and submitted to a probate court for consideration, “[t]he individual’s treating physician must complete the decision-making assessment tool.”¹²²

The 1994 Act contained other modifications to statutory provisions revised by the 1992 Act which the Guardianship Commission found to be friction points in the effective implementation to reforms desired by the General Assembly in the 1992 Act. Specifically, in order to avoid delays in guardianship hearings, the 1994 Act mandated that the probate courts appoint a guardian ad litem simultaneous with the acceptance by the court of the petition for guardianship.¹²³ Similarly, in order to prevent disparate forms of annual status reports, the 1994 Act

118. *Id.* at 1979.

119. The author, in his capacity as a then State Representative, in 1993 became Chairman of the Guardianship Commission.

120. 1994 R.I. PUB. LAWS 1446.

121. 1994 R.I. PUB. LAWS 1445.

122. 1994 R.I. PUB. LAWS 1446.

123. 1994 R.I. PUB. LAWS 1447.

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created a statutory form of annual status report.¹²⁴ Finally, the 1994 Act deleted the requirement of mail notice of the pendency of a guardianship petition to be provided to “any current provider of primary support services and primary medical caregivers” mandated by the 1992 Act, inserting instead that such notice be given to “any individual or entity known or reasonably known to the petitioner to be regularly providing protective services to the respondent.”¹²⁵

C. Conservatorships

The reforms begun with the 1992 Act introduced to Rhode Island’s guardianship statutes requirements such as a formal assessment of individual’s functional ability by a physician who had examined the respondent, the potential for evidentiary hearings and other features designed to protect the procedural rights of respondents, and the appointment of a guardian ad litem.

But what if an individual *herself* wished to have the supervision of a probate court in the management of her financial affairs? However benign the intention of the initiation of a guardianship petition, with the reforms of 1992 Act the procedure to initiate and establish a guardianship became necessarily adversarial—a petitioner and respondent, service of process, etc. Such mechanisms would be unnecessary and add expense and potential delay for someone who *voluntarily* wished to have a third party, under the jurisdiction of a probate court, manage her finances.

But why would a person subject herself to oversight of her financial affairs by a probate court? Why not simply appoint someone to act as agent under a durable financial power of attorney? One reason might be that the person whom the individual has selected as her fiduciary is only willing to serve in that capacity with the imprimatur and supervision of a court, perhaps due to a contentious family circumstance. Another is that the establishment of certain special needs trusts under 42 U.S.C. § 1396(d)(4)(A) requires the involvement of a court. A conservatorship enables the individual to seek the involvement of a probate court without the inherently adversarial and more

124. 1994 R.I. PUB. LAWS 1449.

125. *Id.*

expensive procedure of a guardianship proceeding.

The Guardianship Commission found that such the mechanism for such a tailored and less restrictive procedure already existed in Chapter 15 of Title 33—specifically in Section 44 allowing a probate court to appoint a conservator for an individual. As noted above, the Rhode Island Supreme Court has pointed out that that the terms conservator and guardian of the estate are essentially synonymous.¹²⁶ To the utility further noted by the *Whitmarsh* Court in 1959 of a conservatorship versus a guardianship proceeding in preserving personal dignity¹²⁷ is now added avoiding the expense and formality resulting from the reforms to a guardianship proceeding. The Guardianship Commission, and ultimately the General Assembly, finding such a tailored and less restrictive already in place in the statute, elected to leave Rhode Island General Law section 33-15-44 intact to serve this function.¹²⁸

D. *Probate Uniformity Act of 1996*

Section 1 of 1996 R.I. Pub. Laws chapter 110 provided as follows:

The General Assembly finds that due to the aging of Rhode Island's population and other societal demands,

126. *Whitmarsh v. McGair*, 156 A.2d 83, 87 (R.I. 1959).

127. *Id.*

128. 33 R.I. GEN. LAWS § 33-15-44 (West 2006). The statute also enables “one or more of his or her relatives or friends” to initiate a conservatorship petition.” *Id.* In view of the sweeping due process protections for a respondent in a guardianship proceeding, such as enhanced notice and hearing rights, as well as the requirement of a DMAT and the report of a guardian ad litem, it is illogical to conclude that the Guardianship Commission and the General Assembly intended to create an “end run” via a conservatorship for such “relatives or friends” to petition a probate court to take over management of a person’s financial affairs absent her overt consent. *Id.* Rather, given the extensiveness of the legislation which arose from the Guardianship Commission’s deliberations and which was enacted by the General Assembly, both the Guardianship Commission and General Assembly, having concluded that a mechanism for an individual to initiate her own petition for a probate court-appointed and supervised fiduciary to manage her estate should remain, did not dive deeply into the language of § 33-15-44 to discover this “relatives or friends” language. In short, the retention of this phrase was an understandable oversight by the Guardianship Commission and the General Assembly in the midst of a virtual re-writing of the procedure for the initiation of guardianships.

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increased demands have been placed on the probate courts of each city and town. Accordingly, in order to provide further guidance to the statutorily created courts to assist them in the prompt and efficient administration of decedent's and guardianship estates, the General Assembly has enacted the following revisions to sections of the Rhode Island General Laws dealing with probate jurisdiction, practice and appeals. These revisions will be known as the Probate Uniformity Act of 1996.¹²⁹

As indicated by that preamble, the Probate Uniformity Act of 1996 (the "1996 Act")—in contrast to the 1992 and 1994 Acts, which dealt exclusively with guardianships—dealt with other chapters of Title 33 of the General Laws, as well as Chapter 8 of Title 9 pertaining to probate courts. Nevertheless, the 1996 Act included significant modification to provisions of Chapter 15 of Title 33, pertaining to guardianships.

The first of these was a requirement that the DMAT be completed by "a physician who has examined the respondent."¹³⁰ The investigatory duties of the guardian ad litem were also expanded by the 1996 Act to include the requirement that the guardian ad litem "[r]eview the decision/assessment making tool(s), petition for guardianship/limited guardianship, and the notice," as well as [i]nterview "the prospective guardian by telephone or in person."¹³¹ The guardian ad litem's reporting duties to the probate court were also expanded to include a determination as to "[w]hether the respondent wishes to be represented by legal counsel."¹³²

In order to avoid the problem that had developed of guardian ad litem reports appearing on the same date as the hearing on the guardianship petition, the 1996 Act added the requirement that "[u]nless waived by the court, at least three (3) days prior to the hearing, the guardian ad litem shall file a report substantially in the form as set forth in section 33-15-47 with the court and shall mail or hand-deliver a copy to each attorney of record."¹³³

In order to ensure a forum for ongoing study and development

129. 1996 R.I. PUB. LAWS 560.

130. 1996 R.I. PUB. LAWS 572.

131. 1996 R.I. PUB. LAWS 574.

132. *Id.*

133. *Id.*

of proposed legislation to continue the modernization of Rhode Island's probate laws, the 1996 Act included a statutorily created commission for that purpose. This commission, officially titled "A Legislative Commission to Study the Feasibility of Modernizing Probate Law and Procedure and to Make Recommendations Therefor,"¹³⁴ has become known as the "Probate Commission."

IV. AFTER THE DAWN 1997–2015

The assimilation by courts and practitioners of the virtual re-writing of Rhode Island's guardianship laws by the General Assembly in the 1992 Act, begun with the 1994 and 1996 legislation continued thereafter, the statutory sections of Chapter 15 receiving the most attention were two of those first introduced in 1992 and 1994—those involving the DMAT and guardians ad litem.

DMAT. As a result of the experience by courts, particularly in contested guardianships, the requirements for the physician completing the DMAT, revised in 1996 Act, was again revised in 2004.¹³⁵ In 2004, the General Assembly deleted the adjective "treating," inserting instead "primary care" in describing the physician required to complete the DMAT, providing further "if the individual's primary care physician is not available or if the individual does not have a primary care physician the decision-making assessment tool must be completed by a physician who has examined the individual."¹³⁶

The General Assembly in 2004 also made a limited exception to the mandate, introduced in the 1992 Act and continuing thereafter, that a DMAT must be filed with any guardianship petition. Specifically, "the probate court may excuse the filing of a decision-making assessment tool only on a petition for temporary guardianship in extraordinary or emergency circumstances and upon the provision of other competent evidence."¹³⁷

In 2007, the General Assembly again revisited which physician should be required to complete the DMAT. In consolidating the notions of both the primary care physician and a

134. 1996 R.I. PUB. LAWS 604.

135. See 2004 R.I. PUB. LAWS 2677.

136. *Id.*

137. *Id.*

physician who had treated the respondent, Rhode Island General Law section 33-15-4(a) was again modified to provide that a DMAT “must be completed by the respondent’s primary care physician, if one exists and is available, otherwise by a physician who has examined and treated the respondent.”¹³⁸

A. *Guardians ad litem*

Given the novelty of the mandated use of guardians ad litem in each guardianship proceeding, it is not surprising that there developed wide variations in the reports of guardians ad litem, the method of their selection by the probate court, fees charged, and perhaps most significantly the views of the individuals tasked with performing this function of their roles in the proceedings.

In 2007, the General Assembly added the requirement that any individual selected to serve as a guardian ad litem “shall have sufficient experience and/or training in dealing with elderly persons and persons with incapacities and/or disabilities and understanding of his or her role as guardian ad litem to be able to properly discharge such duties.”¹³⁹ Each probate court was also mandated to “maintain a list of persons deemed qualified to serve as a guardian ad litem and shall appoint from that list on a rotating basis.”¹⁴⁰

The General Assembly also addressed a problem that had developed in certain instances when guardians ad litem became confused as to their roles. Specifically, some guardians ad litem viewed themselves as advocates for the respondent, rather than as agents of the court whose duties culminate in a report submitted to the court, and would occasionally seek to continue their involvement in the case by morphing into counsel for the respondent or even guardian. The 2007 legislature made clear that the identity of a guardian ad litem and that of potential counsel for a respondent were distinct by stating that “[a]ny guardian ad litem appointed for a respondent shall be ineligible to serve as legal counsel, temporary guardian or permanent guardian for that respondent.”¹⁴¹

138. 2007 R.I. PUB. LAWS 1760.

139. 2007 R.I. PUB. LAWS 1762.

140. *Id.*

141. *Id.*

The intended limitation of the guardian ad litem to an investigatory and reporting role was further made clear in the 2007 legislation by addition of new subsection (g) to Rhode Island General Law section 33-15-7(g). This subsection provides that “[t]he guardian ad litem shall not interfere with interested parties and their counsel in gathering and presenting evidence according to court orders and rules of discovery and evidence.”¹⁴² Section 33-15-7(g) further provides that “[t]he guardian ad litem may be called and confronted as a witness regarding his or her conclusions as submitted by report and the extent of his or her personal knowledge concerning the respondent.”¹⁴³

Finally, the 2007 legislation adopted in statute the practice of many probate courts, adding a new subsection (h) to section 33-15-7, setting a cap of \$400 on the fees of a guardian ad litem, while providing that “[t]he court has discretion to award guardian ad litem fees in excess of the cap if the circumstances warrant.”¹⁴⁴

B. *Probate Commission*

The Probate Commission authorized by the 1996 Act was formed and became active shortly thereafter.¹⁴⁵ For example, the 2004 and 2007 legislation referenced above were derived from deliberations of the Probate Commission.

In 2014, the Probate Commission studied the legislation which sought to enact the Uniform Adult Guardianship and Protection Proceedings Jurisdiction Act (UAGPPJA).¹⁴⁶ While laudable in its goal of dealing with issues arising when more than one jurisdiction is involved in the guardianship of an individual, like most uniform acts, the UAGPPJA required tailoring to operate effectively within a particular jurisdiction—in this case, Rhode Island and its probate courts.

On April 1, 2014, the Probate Commission adopted several proposed revisions to the Senate version of the UAGPPJA legislation, including reaffirming that the existing jurisdictional

142. 2007 R.I. PUB. LAWS 1763.

143. *Id.*

144. *Id.*

145. The author, in his capacity as a then State Representative, served as the first Chair of the Probate Commission, and subsequently, including to the writing of this article, as its Vice-Chair.

146. S. 2548 (R.I. 2014); H.R. 7687 (R.I. 2014).

basis of a Rhode Island probate court to appoint a guardian would remain intact. The General Assembly, considering the Probate Commission's recommendations, adopted a modified version of the UAGPPJA the following year.¹⁴⁷

CONCLUSION

The lack of any major legislation since 1996 may be perceived as a reflection of a "mission accomplished." That is, after the virtual gutting of the existing substantive and procedural requirements for instituting and administering guardianships in Rhode Island which occurred in the mid-1980's through the mid-1990's, and after the necessary fine tuning which occurred in the approximately ten year period thereafter, Rhode Island's guardianship laws can be perceived by some as having largely effected the goal of the reformers.

Another view is that lack of further substantial changes to Rhode Island's guardianship's laws is the result of complacency. For example, since the Wingspread conference in 1988, whose recommendations inspired and informed the reforms of the 1992 Act, the National Guardianship Conference has convened again twice, in each instance producing further recommendations.¹⁴⁸ In addition, the National Guardianship Association (NGA), which adopted the first *NGA Standards of Practice for Guardians* in 2000, has produced new editions of its *Standards of Practice* in 2003, 2007, and in 2013.¹⁴⁹

As evidenced by the diversity of members of the Guardianship Commission formed by the General Assembly in 1990, in order to be effective reform of guardianship laws must take into account the views of a number and a diversity of stakeholders. Reform is a challenging and arduous process requiring significant political will and energy. And such will and energy in turn often require a crisis atmosphere, like that sparked by the AP reports which was the catalysis for the Wingspread Conference, which in turn informed the work of the Guardianship Commission in creating,

147. 2015 R.I. PUB. LAWS 1160, 1254.

148. See *Third National Guardianship Summit Standards and Recommendations*, 3 UTAH L. REV. 1191 (2012); *Wingspan—The Second National Guardianship Conference, Recommendations*, 31 STETSON L. REV. 595 (2001).

149. STANDARDS OF PRACTICE, 2 (NAT. GUARDIANSHIP ASSOC. 2013).

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and the General Assembly in enacting the 1992 Act.

Certainly reports of serious abuse and neglect in guardianship proceedings arise periodically in Rhode Island, as they do on in other states. However, without a critical mass of such cases or analogue to the AP report, it is unlikely that the political will which resulted in the systemic reforms of the 1992 Act will be mustered. For many who consider reforms of the early 1990s, with their continual review by the Probate Commission and periodic revisions by the General Assembly, to be adequate, this is a positive. For those who believe that a more systemic change is again needed, it is not.