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**GUARDIANSHIP FOR YOUR OWN GOOD:  
IMPROVING THE WELL-BEING OF  
RESPONDENTS AND WARDS**

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## **Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards<sup>1</sup>**

### I. Introduction.

Guardianship seems to be an area of law that is ever in flux, all the while it forever stays the same. What people see when they examine guardianship reflects in large part the beliefs, values and world assumptions that different observers bring to the task. While there is wide agreement on the official goals and purpose of guardianship – to authorize a surrogate decision maker in order to protect the well-being of incapacitated adults who are unable to make decisions for themselves – the definitions of “authorize”, “surrogate”, “protect”, “well-being”, “incapacitated”, and “unable” would all be subjects for passionate debate. Repeated studies of guardianship, its process and products, indicate serious and pervasive problems that directly threaten the goals of guardianship.<sup>2</sup> Legislative reforms and redesigned legal procedures have made some progress in reducing some of these problems,<sup>3</sup> but this progress is fairly modest and leaves much to be desired. The persistence of old ways of doing guardianship, despite changes in substance and procedure in the governing laws, remains a subject for both wonder and concern.<sup>4</sup>

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<sup>1</sup> [star footnote] Jennifer L. Wright, Associate Professor of Law at the University of St. Thomas School of Law, has practiced elder law and represented numerous respondents in guardianship cases for over 20 years, as a legal aid attorney and as a clinical law professor. She has been active in the continuing education of lawyers and judges and in legislative reform efforts in guardianship law, in addition to her scholarly writing on the topic. Professor Wright wishes to express her heartfelt gratitude to Bruce Winick, for his support and his comments on an earlier draft of this paper. She also extends hearty thanks to Jon Sergott and Christina Pilon, whose stellar research assistance made her work possible.

<sup>2</sup> The history of guardianship reform is lengthy and complex. For a thorough in-depth summary, see A. Frank Johns & Vicki Joiner Bowers, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century – A March of Folly? Or Just a Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 41-66 (1997).

<sup>3</sup> Jennifer Moye, Erica Wood, Barry Edelstein, Stacey Wood, Emily Bower, Julie A. Harrison & Jorge C. Amesto, *Statutory Reform is Associated with Improved Court Practice: Results of a Tri-State Comparison*, 25 BEHAV. SCI. & L. 425, 433 – 436 (2007).

<sup>4</sup> See, e.g., Johns & Bowers, *supra* note 1, at 44-66.; Alison Barnes, *The Liberty and Property of Elders: Guardianship and Will Contests as the Same Claim*, 11 ELDER L.J. 1, 9 (2003); Jennifer L. Wright, *Protecting Who From What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 ELDER L.J. 53, 60 (2004).

If guardianship is to be justified on its own terms, we must come to grips with Proteus.<sup>5</sup> Any actual attempt to design and operate a guardianship system must define its terms and defend its definitions, identify and test its assumptions, and be ready to change in accordance with data indicating its failure to achieve its own goals. Over twenty years of representing elders in guardianship proceedings, combined with over ten years of teaching law students how to represent elders in guardianship proceedings, have sharpened my perception of and concern over the lack of fundamental clarity in this important field of law. In this article, I will focus on clarifying the real meaning of “well-being” in guardianship law, procedure and policy. I will use the concepts of therapeutic jurisprudence<sup>6</sup> to help move the discussion toward a practical, defensible, reality-based design for protective proceedings. In Section II, I will briefly describe the background of and justifications for guardianship. In Section III, I will take a summary look at the focus and outcome of guardianship reforms over the past 30 years. In Section IV, I will summarize the available data on how guardianship actually affects the lives and well-being of respondents and wards, and note areas where additional empirical research is desperately needed.<sup>7</sup> In Section V, I will briefly describe the concepts of therapeutic jurisprudence, and outline how they may be applied to a study of guardianship. In Sections VI and VII, I will analyze, respectively, the potential anti-therapeutic effects of guardianship as it currently exists in most states, and the potential therapeutic effects of current guardianship systems. In Section VIII, I will examine some specific guardianship reforms that could help to improve the therapeutic potential of guardianship. In Section IX, I will sum up and conclude.

## II. Why guardianship? Roots in *parens patriae*.

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<sup>5</sup> See *Proteus*, WIKIPEDIA, July 25, 2008, <http://en.wikipedia.org/wiki/Proteus>.

<sup>6</sup> David B. Wexler & Bruce J. Winick, *Introduction to LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE* xvii (David B. Wexler & Bruce J. Winick, eds., 1996) (“Therapeutic jurisprudence is the study of the role of the law as a therapeutic agent. It is an interdisciplinary enterprise designed to produce scholarship that is particularly useful for law reform. . . . Legal rules, legal procedures, and the roles of legal actors . . . constitute social forces that . . . often produce therapeutic or antitherapeutic consequences. Therapeutic jurisprudence proposes that we be sensitive to those consequences, and that we ask whether the law’s antitherapeutic consequences can be reduced, and its therapeutic consequences enhanced, without subordinating due process and other justice values.”).

<sup>7</sup> A note on nomenclature: while different statutes use different terms to identify the participants in guardianship proceedings, I will refer to persons involved in the initial court proceeding to determine whether a guardianship should be established as “Respondents” (the proposed subject of a guardianship) and “Petitioners” (the person proposing that a guardianship be established). I will refer to adults who are subject to an order of guardianship as “Wards”, and the persons appointed to make decisions for the wards as “Guardians”.

Guardianship is an unusual proceeding in American courts. Aside from civil commitment to protect the mentally ill from harm to themselves,<sup>8</sup> it is the only proceeding by which an adult citizen is deprived of rights solely in order to protect his or her own well-being. As such, it bears a heavy burden of justification. Under guardianship, wards lose the right to decide where they will live, whom they will see, what kind of medical treatment they will receive, and a host of other basic human rights.<sup>9</sup> The deprivation of rights is not justified as an attempt to protect others from the ward's harmful actions, nor as a punishment for any wrongdoing by the ward. Rather, the innocent and unthreatening ward is placed under a guardianship solely by virtue of the state's power to protect and care for its citizens who are unable to take care of themselves.<sup>10</sup>

Because the only justification for guardianship is to safeguard the well-being of the ward,<sup>11</sup> and because the state is entitled to take such action only because the ward is mentally incapable of making his/her own decisions,<sup>12</sup> the circumstances under which the state may legally impose a

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<sup>8</sup> See generally Wright, *supra* note 4.

<sup>9</sup> Subcommittee on Health & Long-Term Care of the House Select Committee on Aging, 100<sup>th</sup> Congress, Abuses in Guardianship of the Elderly and Infirm: A National Disgrace (Comm. Print 1987) (prepared statement of Chairman Claude Pepper) ("The typical ward has fewer rights than the typical felon .... By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty .... Guardianship proceedings are often highly adversarial, pitting children against parents, spouses against stepchildren, and siblings against each other. Guardianship proceedings are often commenced for the convenience of state case workers or long-term care facilities, or to relieve adult children of the ongoing need to worry about the risks run by an aging parent attempting to remain independent . . . The issues at stake in an adult guardianship often pose difficult conflicts among highly personal values and priorities, without a clear or objective 'right' answer.").

<sup>10</sup> MARSHALL B. KAPP, GERIATRICS AND THE LAW: UNDERSTANDING PATIENT RIGHTS AND PROFESSIONAL RESPONSIBILITIES 109 (3d ed. 1999) ("Guardianship statutes are an example of the state's inherent *parens patriae* power to protect those who cannot take care of themselves in a manner that society believes is appropriate."); Am. Bar Ass'n Comm. on the Mentally Disabled & Comm. on Legal Problems of the Elderly, *Guardianship: An Agenda for Reform*, 13 MENTAL & PHYSICAL DISABILITY L. REP. 271, 293 (1989) (hereafter, *Wingspread report*) ("The inherent and recurring conflict in guardianship law lies in the balance between the civil liberties of the ward or proposed ward and the state's *parens patriae* power. . . .the constitutional doctrine of the 'least restrictive alternative' should apply in guardianship cases, thereby limiting state paternalism to that necessary for the health and welfare of the individual.... since guardianship always involves a loss of autonomy, judges should attempt to minimize this loss through the effective use of limited guardianship and other less restrictive alternatives.").

<sup>11</sup> Wright, *supra* note 4, at 79.

<sup>12</sup> *Id.* at 66-68.

guardianship are severely limited. The petitioner must prove by clear and convincing evidence that: the respondent is incapable of receiving and understanding relevant information and making decisions based on that information;<sup>13</sup> that this incapacity creates a risk to the well-being of the respondent;<sup>14</sup> and that the proposed guardianship will improve, if not maximize, the well-being of the ward.<sup>15</sup> If any of the three elements (incapacity + risk to well-being + improvement of well-being under guardianship) is absent, the justification for guardianship fails.

In addition, the petitioner must establish the necessary causal connection between incapacity and risk, and between guardianship and improved well-being (i.e., the respondent is making the risky decisions **because of** his/her inability to understand the consequences of his/her actions<sup>16</sup>; and there is no less restrictive means than guardianship to

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<sup>13</sup> Uniform Guardianship & Protective Procedures Act, Article I, §102 (5) (1997) (“‘Incapacitated person’ means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance.”).

<sup>14</sup> *Id.*; see also, CAL. PROB. CODE §1801(a) (2009) (“A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter . . .”); see also FLA. STAT. §744.102 (“‘Incapacitated person’ means a person who has been judicially determined to lack the capacity to . . . meet at least some of the essential health and safety requirements of the person.”); see also N.Y. MENTAL HYG. §81.02(b) (“The determination of incapacity shall be based on clear and convincing evidence and shall consist of a determination that a person is likely to suffer harm because: 1. the person is unable to provide for personal needs and/or property management; and 2. the person cannot adequately understand and appreciate the nature and consequences of such inability.”); see also 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, 261-64 (2003).

<sup>15</sup> Uniform Guardianship & Protective Procedures Act, Article III, §318(c) (“Upon presentation by the petitioner of evidence establishing a prima facie case for termination, the court shall order the termination unless it is proven that continuation of the guardianship is in the best interest of the ward.”); see also, CAL. PROB. CODE §1801(d) (2009) (“A limited conservatorship may be utilized only as necessary to promote and protect the well-being of the individual...”); see also FLA. STAT §744.344(2) (“The order appointing a guardian must be consistent with the incapacitated person's welfare and safety.”); see also N.Y. MENTAL HYG. §81.01 (“[I]t is the purpose of this act to promote the public welfare by establishing a guardianship system which is appropriate to satisfy either personal or property management needs of an incapacitated person in a manner tailored to the individual needs of that person...”).

<sup>16</sup> *Schaefer v. Schaefer*, 52 P.3d 1125, 1128 (Or. Ct. App. 2002) (Stating that in order to impose a guardian, the petitioner must show, “. . . (1) the person to be protected has severely impaired perception or communication skills; (2) the person cannot take care of his or her basic needs to such an extent as to be life-or health-threatening; and (3) the impaired perception or communication skills *cause* the life-threatening disability.” (emphasis original)); see Wright, *supra* note 4, at 65-72 (For a discussion of why there is

achieve the protection of the ward).<sup>17</sup> Although many guardianship petitions focus heavily on risk, risk alone provides no justification for guardianship. Adults who understand the potential costs and benefits of their behavior are legally entitled to make very risky decisions indeed (freeway driving, sky-diving, betting one's life savings on the lottery, e.g.), and are not to be protected by the benevolent state from the ensuing harm. An adult who has experienced a recent decline in cognitive functioning, but who has long demonstrated a consistent choice of behavior despite its risks, cannot necessarily be shown to be at risk **due to** cognitive impairment (an elder who has throughout her adult life indicated that s/he would rather die than go into a nursing home, e.g.).<sup>18</sup> If a cognitively incapacitated adult is at serious risk due to his/her impairment, but there is a means of protecting that person from the risk without deprivation of his/her rights, then there is no basis for guardianship (an elder who cannot understand the need to take the medications essential to preserve her life, but who is willing to take them if reminded, e.g.).<sup>19</sup> Guardianship, as the most restrictive intervention in the lives of innocent, non-threatening adult citizens, may only be approved as a last resort, if there is no other way to prevent the threatened harm.

### III. A long and bumpy history of guardianship reform.

Prior to the 1970s, guardianship had a fairly quiet and peaceful history.<sup>20</sup> Guardianship was seen as a non-adversarial proceeding in which all parties were on the same side in seeking the well-being of the

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a relative dearth of reported cases in adult guardianship and why *parens patriae* civil commitment cases are appropriate and important sources of legal authority in adult guardianship law); see also *In re Estate of Werner*, 133 S.W.3d 108, 110 (Mo. Ct. App. 2004) (A civil commitment case stating that “[a] mental or physical condition alone does not render a person incapacitated. The condition must also interfere with the sufferer's ability to meet essential requirements.”).

<sup>17</sup> Uniform Guardianship & Protective Procedures Act, Comment to Article III, §311 (“A guardian is to be appointed only when no less restrictive alternative will meet the respondent's identified needs.”).

<sup>18</sup> *Schaefer*, 52 P.3d 1125 at 1128.

<sup>19</sup> Uniform Guardianship & Protective Procedures Act, Comment to Article III, §311.; see also N.Y. MENTAL HYG. §81.01 (“The legislature finds that it is desirable for and beneficial to persons with incapacities to make available to them the least restrictive form of intervention which assists them in meeting their needs.”); see also FLA. STAT. §744.344(2) (“The order appointing a guardian . . . must be the least restrictive appropriate alternative.”); see also CAL. PROB. CODE §1800.3(b) (2009) (“No conservatorship of the person or of the estate shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.”).

<sup>20</sup> See Wright, *supra* note 4, at 57-60.

respondent/ward.<sup>21</sup> Guardianship proceedings were historically located in probate courts more accustomed to ensuring the proper handling of estates than the personal well-being of incapacitated persons.<sup>22</sup> More attention was paid to efficiency of resolution and keeping the cost of court proceedings low than to the civil rights of the ward.<sup>23</sup>

This pattern began to change, perhaps as a reaction to the enormous attention directed to issues related to civil rights generally, in the second half of the 20<sup>th</sup> century. A repeating pattern of investigation into the workings of the guardianship system, horror at abuses, and statutory reform began that has continued until the present. Major events, such as investigative reports, scholarly conferences, and public hearings, all focused attention on the serious and continuing failure of the guardianship system to reliably meet its own goals of protecting the incapacitated. Milestones in this historical progression include:

- The ABA Commission on the Mentally Disabled, *Legal Issues in State Mental Healthcare: Proposals for Change--Model Guardianship Statute*, 2 *Mental Disability L. Rep.* 444 (1978);
- The National Conference of the Judiciary on Guardianship Proceedings for the Elderly (1986);
- The Associated Press Special Report - *Guardianship of the Elderly: An Ailing System* (1987);
- The Subcommittee on Health and Long-Term Care of the U.S. House Subcommittee on Aging hearings (Pepper hearings) (1987);
- The Wingspread Report – *Guardianship, An Agenda for Reform: Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, 13 *Mental & Physical Disability Law Reporter* 271 (1989) (symposium in 1988);
- Lauren Barritt Lisi et al., *The Center for Social Gerontology, National Study of Guardianship Systems: Finding and Recommendations* (1994);
- The Uniform Guardianship and Protective Proceedings Act (1997);
- *Wingspan – the Second National Guardianship Conference*, 31 *Stetson Law Review* 573 (2002) (conference in 2001);
- The General Accounting Office, *Report to the Senate Special Committee on Aging – Guardianships: Collaboration Needed to Protect Incapacitated Elderly People* (2004).

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<sup>21</sup> *Id.* at 59-60; see also Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 *U. TOL. L. REV.* 189, 194-95 (1994).

<sup>22</sup> Wright, *supra* note 4, at 57-59.

<sup>23</sup> *Id.* at 62.

Of particular interest were the Wingspread and Wingspan Conferences, which brought together legal scholars, judges, lawyers, doctors, mental health experts, professional guardians, government officials, and advocates for the elderly, to discuss guardianship policy in the 50 states and to make recommendations for best practices to policy makers.<sup>24</sup> The proposals that came out of the Wingspread Conference constituted a general program for guardianship statutory reform including: 1) a preference for seeking alternative means of dealing with problems related to declining capacity other than guardianship;<sup>25</sup> 2) a substantial increase in the due process protections for wards and proposed wards in guardianship proceedings;<sup>26</sup> 3) a focus on functional evaluation as a basis for determining incapacity, as opposed to status-based definitions or evaluation based on the reasonableness of the decisions of the proposed ward;<sup>27</sup> 4) limited, specific guardianships tailored to the specific needs of the individual ward;<sup>28</sup> and 5) improved training and accountability of guardians, judges, attorneys, court visitors, etc.<sup>29</sup>

The major dissention among the Wingspread participants was over the appropriateness of a full adversarial model for guardianship proceedings, and particularly over the need for counsel in all cases to advocate zealously for the expressed wishes of the proposed ward.<sup>30</sup> The minority view on this point at Wingspread, that it is more important to keep the guardianship process simple, friendly, inexpensive, and available to all who need its protections than it is to include strong protection in all cases against invasions of the rights of proposed wards, is probably the majority view among the professional guardians, attorneys, judges and court visitors who participate in most day-to-day guardianship proceedings. This disconnect between the perceptions of most of the regular participants in the guardianship system, and the insights of those who have invested effort in studying the workings of the guardianship system, is one probable source of the difficulty of making actual guardianship practice conform to legislative reforms.

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<sup>24</sup> Wingspread report, *supra* note 10, at 275.; A. Frank Johns & Charles P. Sabatino, *Wingspan – The Second National Guardianship Conference*, 31 STETSON L. REV. 595 (2002) (hereafter, *Wingspan report*).

<sup>25</sup> Wingspread report, *supra* note 10, at 277-81.

<sup>26</sup> *Id.* at 282-87.

<sup>27</sup> *Id.* at 288-91.

<sup>28</sup> *Id.* at 292-94.

<sup>29</sup> *Id.* at 278, 286, 295, 296-300.

<sup>30</sup> *Id.* at 284 (“Despite the strong support this adversarial approach enjoys within the legal profession and in the Model Rules of Professional Conduct, a significant minority of the symposium attendees felt that a mandatory right to an attorney went too far and in certain circumstances might not be in the proposed ward’s best interests. . . . This minority position emphasized that in a number of cases, the appointment of counsel would add a layer of cost that might turn an otherwise cooperative family approach to guardianship into an adversarial proceeding.”).

The Wingspread report did indicate in passing the possibility that even a guardianship conforming to all of the best practices recommended by the conferees might have harmful effects on wards:

Allowing the allegedly incompetent person to retain as much autonomy as possible seems consistent with gerontological findings indicating that the maintenance of opportunity for choice and control are important to the mental health of the elderly. Scientific studies show that the loss of ability – or perceived loss – to control events can lead to physical and/or emotional illness. Indeed, complete loss of status as an adult member of society could act as a self-fulfilling prophecy and exacerbate any existing disability.<sup>31</sup>

This comment, which, if taken seriously, could call the whole purpose of guardianship into serious question, was not followed up on in any detail.

The Wingspan Conference, coming thirteen years after Wingspread, served mainly to illustrate how difficult it has been to put many of the guardianship reforms proposed at Wingspread into effect. As two of the major players at Wingspan put it, “[s]ome guardianship experts submit that, although we have come a long way legislatively, we have moved very little in practice and in bettering the lives of vulnerable wards and proposed wards.”<sup>32</sup> The same basic disagreement that arose at the Wingspread Conference had not dissipated at Wingspan, between a focus on proposed wards’ autonomy and due process, to be achieved through an adversarial process, and on their well-being, to be achieved through a collaborative, therapeutic process.<sup>33</sup> The Wingspan recommendations focus on giving more specifics as to process, and include a strong emphasis on the need to gather and use data to guide guardianship systems and proposed reforms – both through routine systematic data collection and through scholarly research.<sup>34</sup> Wingspan shows some disillusionment with guardianship reform as an end in itself, and the resulting desire to look beyond the formalities of the law to the real world, to find what really works. This process is by its nature messier, more difficult, and likely to result in more various and nuanced answers depending on specific contexts, than a straightforward statutory analysis approach.

One of the interesting aspects of all of this discussion and statutory reform is that they focused almost exclusively on either: 1) serious injuries to individual wards due to a breakdown of the process; or 2) philosophical

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<sup>31</sup> Wingspread report, *supra* note 10, at 293.

<sup>32</sup> Wingspan report, *supra* note 24, at 593.

<sup>33</sup> Marshall B. Kapp, *Reforming Guardianship Reform: Reflections on Disagreements, Deficits, and Responsibilities*, 31 STETSON L. REV. 1047 (2002).

<sup>34</sup> *Id.* at 1054 (2002) (“Another general observation about the 2001 Wingspan Conference is that most significant issues regarding the future of guardianship in the United States probably will have to be resolved in the absence of substantial pertinent data.”).

objection to the deprivation of civil rights without due process. The response to such reports by those practicing within, and upholding, the existing systems was: 1) anecdotal horror stories do not establish that a system needs radical revision, only that some jurisdictions need to pay greater attention to following the rules; and 2) civil rights are all very well in theory, but we are dealing with the real world imperatives of protecting vulnerable people from serious harm at the lowest possible cost to them and to society, and we don't have time or money to worry about speculative and inchoate concerns of "justice" or "liberty". As a result of these responses to guardianship proposed reforms, many actual guardianship systems showed very little change in their day-to-day operations, despite substantial revision of the statutes defining the procedures and protections for the civil rights of respondents and wards.<sup>35</sup>

What the guardianship investigators and reformers did not generally address in any depth is the underlying question of whether guardianship, when it functions exactly as designed, actually meets the goal of increasing the well-being of wards. There are clear difficulties in studying whether incapacitated, at-risk people who are placed under a guardianship have better outcomes on scales associated with human flourishing (physical, mental and spiritual health, longevity, functional capacity, self-reported sense of well-being<sup>36</sup>) than similar people who receive no guardian. Similarly, it is hard to quantify the incidence and costs of guardianships imposed on wards who are not at serious risk or are not incapacitated or both. Virtually all participants in the guardianship system reform endeavor have simply assumed that, if we could only do guardianship right, we could make a positive impact on the lives of incapacitated adults. In order to examine these assumptions underlying the guardianship reform debate, we need to turn to the research, data and insights of other professions.

#### IV. For whose best interests? A much-needed reality check.

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<sup>35</sup> David Hardy, *Who Is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*, 4 NAELA J. 1, 4-5 (2008); Crosby & Nathan, *supra* note 14, at 261-78.; Mary F. Radford, *Is the Use of Mediation Appropriate in Adult Guardianship Cases?*, 31 STETSON L. REV. 611, 642-43 (2002); Guardianship Work Group, *Adult Guardianships in Oregon: A Survey of Court Practices* 6 (1999); *see* Johns & Bowers, *supra* note 1, at 44-66.; *see* Joan L. O'Sullivan & Diane E. Hoffmann, *The Guardianship Puzzle: Whatever Happened to Due Process?*, 7 MD. J. CONTEMP. LEGAL ISSUES 11, 11-13 (1996).; *but see*, Moye et. al., *supra* note 3, at 425-436.

<sup>36</sup> *See generally*, Soleman H. Abu-Bader, Anissa Rogers, Amanda S. Barusch, *Predictors of Life Satisfaction in Frail Elderly*, 38(3) J. GERONTOLOGICAL SOC. WORK 3 (2002).; Martin Pinquart & Silvia Sörensen, *Influences of Socioeconomic Status, Social Network, and Competence on Subjective Well-Being in Later Life: A Meta-Analysis*, 15(2) PSYCH. & AGING 187 (2000).; Bradley J. Fisher, *Successful Aging, Life Satisfaction, and Generativity in Later Life*, 41(3) INT'L J. AGING HUM. DEV. 239, 249 (1995).

The Wingspread report points out one of the sore points in guardianship process – the question of whether, as claimed, the process is motivated solely by an interest in the well-being of the ward or proposed ward.

Too often guardianships are initiated to meet the primary needs of parties other than the proposed ward, such as hospitals, nursing homes, services provider agencies, the families, commercial enterprises, group homes and the state.<sup>37</sup>

Given that the overwhelming majority of guardianships are initiated by someone other than the proposed ward, it is not surprising that the motivations and goals of these third parties play a major, and sometimes a dominating, role in the proceedings. It is reasonable to expect that, in the long run, a system will tend to conform to the interests of those who act and have a voice within that system. In the guardianship system, the actors with the most experience in the system are professional guardians, attorneys for petitioners and respondents, judges, and government and social service agencies and health facilities serving the elderly. Generally, the actors with the greatest stake in initiating a particular proceeding are petitioners, often family members but sometimes agencies or health care providers, who are spurred to initiate the process by dissatisfaction with the status quo. This dissatisfaction is related to, but distinct from, any harm allegedly suffered by the proposed ward. The dissatisfaction may be due to the demands that the elder's declining abilities places on the family member or caregiver. It may be due to the terrible burden of worry and guilt experienced when a family member believes a loved elder is living in a sub-optimal situation or is running undue risks. The dissatisfaction may also be related to the need for busy professionals to be able to systematize their caregiving or services, providing a more efficient "one-size-fits-all" approach to each elder's specific wishes and needs.

A system that will only function as intended when the primary and repeat actors within the system consistently ignore their own interests and act with perfect altruism toward another person, who has little effective voice or role within the system him/herself, is a system that will show the consistent problems demonstrated by the guardianship system. Viewed in this way, it is not surprising that statutes requiring full and participatory hearings, consideration of all less restrictive alternatives, and orders limited and specifically tailored to the current needs of the ward, have largely been ineffective in changing how guardianship proceedings are actually conducted.<sup>38</sup> In order to make real change of any kind,

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<sup>37</sup> Wingspread report, *supra* note 10, at 277, citations omitted.

<sup>38</sup> Lauren Barritt Lisi et. al., The Center for Social Gerontology, *National Study of Guardianship Systems: Finding and Recommendations*, 44, 49, 87 (1994); Crosby & Nathan, *supra* note 14, at 268.; Nancy J. Knauer, *Defining Capacity: Balancing the Competing Interests of Autonomy and Need*, 12 TEMP. POL. & CIV. RTS. L. REV. 321,

guardianship reform must acknowledge the primary role and motivations of these key actors and must: 1) give an equally effective voice and role to the proposed ward; 2) create incentives within the system that reward these other key actors when they act in ways that protect the rights and true well-being of the proposed ward, and that punish the converse; and 3) create and inculcate a culture that takes the primacy of the rights and real well-being of the ward as a universal pre-eminent value. Therapeutic jurisprudence, as discussed in section V below, provides an invaluable analytical lens through which to pursue these goals.

The twin factual assumptions that have underlain and justified the guardianship system for centuries are that when guardians take over the decision-making power of wards, if the system functions as it should, their decisions will be more to the benefit of the wards' well-being than the wards' own decisions would have been, and their control over the wards will not involve excessively high costs to the wards' well-being simply by virtue of pre-empting the wards' decision-making power. Both of these assumptions bear a great deal of closer examination.

The first question, whether guardians make better decisions for incapacitated wards than the incapacitated wards would make for themselves, requires some unpacking before it can be addressed. The key question is how to define "better". There are strong arguments that can be made that the standard for better decisions must be the degree to which the guardian's decisions conform with the personal values and goals of the ward – in other words, a standard of substituted judgment. In substituted judgment, the yardstick for the guardians' decisions is whether they are the decisions that the wards would have made for themselves, if they had the capacity to make them. Many, perhaps most, would agree in theory that substituted judgment is the ultimate goal of guardianship. The problem is that substituted judgment is difficult or impossible to evaluate or measure quantitatively.

In the first place, we need to determine whether, and to what degree, the decisions of incapacitated wards vary from the decisions the elders would have made if they had not been incapacitated. In other words, to what extent does incapacity cause a change in basic life choices regarding such things as health care, living situation, and financial management, that are usually at issue in guardianship? Who is more likely to achieve the best substituted judgment, the incapacitated ward, who generally has some direct access, albeit limited by the degree of incapacity, to his/her own history of values and decisions, or the appointed guardian, who has full judgment capacity, but at best only a limited and indirect knowledge of the elder's rich history of experience? No one has

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337 (2003).; Lawrence Frolick, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 741-44 (2002).

yet proposed a procedure for testing this question in theory. Creative future research may be able to move us forward on this front. At this point, we lack the data to take a strong position on this question. We ignore the voice of the incapacitated ward at our peril.

It might be more useful to measure factors which, while not measures of the true goal of substituted judgment, are: 1) measurable; and 2) broadly accepted as important factors in any standard for well-being. These factors might include measures listed at page 9, note 36, above, such as rates of death, physical illness, depression and other mental illness, loss of function, and subjective report of well-being or its opposite by wards. The assumption that links these measures to substituted judgment is the assumption that elders would, if capable, generally make decisions for themselves that would maximize their longevity, physical and mental health, functionality, and subjective well-being. The problem with that assumption is that all who work with the elderly have observed many occasions when elders, like all adults, make decisions that do none of the above. Among adults with capacity, the right to make such decisions is generally upheld as essential to the pre-eminent value of preserving autonomy. One core area of disagreement among observers, critics and participants in the guardianship system is captured in the following question: If an elder is no longer able, due to loss of capacity, to directly exercise autonomous decision-making, is it more desirable to attempt directly to approximate that elder's prior decision-making process, or to default to a generalized decision-making standard, improving the objective well-being of the elder?

Substituted judgment, while the ultimate goal in theory, is in many cases, going to be simply impossible to achieve. There are situations in which the elder's pre-incapacity choices can be approximated, but there are many situations in which there is simply no way to determine what the elder would choose, under circumstances that the elder may never have experienced while s/he had capacity. While the law should generally defer to an elder's expressed values and choices whenever they are known, unfortunately we often have no choice but to default to a more generalized standard of well-being. At the very least, then, we need to try to ensure that decisions made relative to that standard actually do improve these measures of well-being. Otherwise, the "well-being" standard simply becomes a cover for substituting the values, goals and well-being of the guardian for that of the ward – an outcome which none would openly advocate.

Unfortunately for well-being-motivated advocates of guardianship, the weight of the evidence does not appear to fall on the side of guardianship as currently constituted increasing measurable factors of well-being. As the author discussed at some length in a previous article, many studies

indicate that intervening in the lives of impaired elders has a significant negative impact on their physical and mental health, longevity, ability to function, and reports of subjective well-being.<sup>39</sup> These negative effects on measures of well-being seem largely due to an increased rate of institutionalization among wards.<sup>40</sup> Institutionalization is highly correlated with loss of function, decrease in subjective well-being, and death.<sup>41</sup> Of course, correlation is not to be confused with causation, and it can easily be assumed that those elders who end up as wards in guardianship are likely to be the most severely disabled and therefore the most in need of institutional care, and also therefore the most likely to suffer loss of function and death. However, the one study that actually made the attempt to look at the effects of “therapeutic” interventions into the lives of elders, with a matched control group whose outcomes were tracked but who received no similar intervention, calls into question this comforting assumption.

In 1974, the Benjamin Rose Institute issued a final report on its study, *Protective Services for Older People*.<sup>42</sup> This unusual study<sup>43</sup> looked at the effects of providing intensive social work case management and intervention as deemed necessary to a test group of elders, and contrasted outcomes of the test group with a control group which did not receive these special services (while remaining eligible for whatever other services were generally available to elders in the community, including adult protective services). Both groups were drawn from elders in need of protective services, defined as:

A person 60 years of age or over, living in the community, whose behavior indicates he is mentally incapable of adequately caring for

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<sup>39</sup> Wright, *supra* note 4, at 77-83.

<sup>40</sup> Pamela B. Teaster, Erica F. Wood, Naomi Karp, Susan A. Lawrence, Winsor C. Schmidt, Jr. & Marta S. Mendiondo, *Wards of the State: A National Study of Public Guardianship*, Full Report, 157 (2005).; Lauren B. Lisi et. al., *supra* note 38, at 71-73.; Margaret Blenkner, Martin Bloom, Margaret Nielsen & Ruth Weber, *Final Report: Protective Services for Older People – Findings From the Benjamin Rose Institute Study*, 181-183 (1974) (hereafter *Rose Study*) (copy on file with author).

<sup>41</sup> Paolo Scocco, Monica Rapattoni & Giovanna Fantoni, *Nursing Home Institutionalization: A Source of Eustress or Distress for the Elderly?*, 21 (3) INT’L J. GERIATRIC PSYCHIATRY 281, 285-86 (2006).; Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1834-35 (1992).; Winsor C. Schmidt, *Guardianship of the Elderly in Florida*, 55 FLA. B.J. 189, 190 (1981).

<sup>42</sup> *Rose Study*, *supra* note 40.

<sup>43</sup> *Id.* at 175 (Margaret Blenkner, principal investigator of the Rose Study, had an elegant, concise explanation of why such research is so very rare in the helping professions dealing with people in difficulties. “To be fully committed, the helper must believe in the efficacy of his method yet if he believes in its efficacy he is unlikely to see any need to test it; to him the whole matter is self-evident. Thus, demonstrations are more often conceived in faith than logic.”).

himself and his interests without serious consequences to himself or others and has no relative or other private individual able and willing to assume the kind and degree of support and supervision required to control the situation.<sup>44</sup>

Services available to the experimental group included medical evaluation, financial services, psychiatric consultation, legal consultation, fiduciary or guardianship services, home care, nursing consultation, protective placement, and a variety of social services, including transportation, shopping, friendly visiting, etc.<sup>45</sup> Study participants were randomly assigned to the experimental or the control group.

The researchers hypothesized that the elders in the experimental group would have more favorable outcomes in survival, contentment, behavioral problems, and functional competence.<sup>46</sup> One can imagine their shock and dismay when the study's results indicated that the experimental group were slightly more likely to experience a decline in function and were significantly more likely both to be institutionalized and to die than the control group.<sup>47</sup> The study's conclusions noted that:

. . . the findings on functional competence together with those on death and institutionalization force one to entertain the hypothesis that intensive service of the sort supplied in the project with a heavy reliance on custodial care may actually accelerate decline.<sup>48</sup>

The researchers pointed out the disturbing conclusion, of enormous relevance in the guardianship debate, that:

. . . among the risks the professional . . . must face up to when working with the [elder with diminished capacity] is not only the risk of doing nothing but the risk of intervening, especially when that intervention entails drastic changes in the client's way of life, no matter how deplorable that way of life may seem to the outsider.<sup>49</sup>

While subsequent articles criticized flaws in the study design and questioned many of the conclusions of the Rose Study<sup>50</sup>, researchers agreed that the study raised important questions about the effects of intervention on the well-being of incapacitated elders. However, no one has ever had the inclination, the courage, and/or the resources to mount a similar study. We are left with some very serious questions about the effects of protective intervention on the well-being of impaired elders, and no real answers.

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<sup>44</sup> *Id.* at 10.

<sup>45</sup> *Id.* at 14.

<sup>46</sup> *Id.* at 16.

<sup>47</sup> *Id.* at 181-85.

<sup>48</sup> Rose Study, *supra* note 40, at 183.

<sup>49</sup> *Id.* at 183.

<sup>50</sup> Ruth S. Dunkle, S. Walter Poulshock, Barbara Silverstone & Gary T. Deimling, *Protective Services Reanalyzed: Does Casework Help or Harm?*, 64 J.CONTEMP. SOC. WORK 195 (April 1983).

Other well-trodden fields of psychological research yield important information for this discussion. One of the factors most often cited in psychological studies of well-being among the elderly is “internal locus of control”.<sup>51</sup> Internal locus of control “. . . is characterized by a global belief in personal efficacy and a feeling that one controls personal outcomes.”<sup>52</sup> A related factor often cited is “autonomy”, meaning the external reality of personal control matching the subjective perception of an internal locus of control.<sup>53</sup> The large majority of studies conclude that both internal locus of control and autonomy are among the most significant factors that predict life satisfaction among the elderly.<sup>54</sup>

A famous and ground-breaking experiment in the late 1970s indicated just how powerful the positive effects of control over one’s own life and the negative effects of lack of such control can be. Elderly residents in a

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<sup>51</sup> Reed Larson, *Is Feeling “In Control” Related to Happiness in Daily Life?*, 64 *Psychological Reports* 775 (1989) (“A number of theories lead us to expect that the subjective feeling of being ‘in control’ is related to happiness and well being. At a general level, constructs such as ‘internal locus of control’ (Rotter, 1966, 1975) and ‘self-efficacy’ (Bandura, 1977) are posited as important to psychological adjustment. In theories of intrinsic motivation a sense of mastery, personal causation, or agency is central to positive motivation (DeCharms, 1968, 1976; Hebb, 1955; Hunt, 1965). Perceived control or illusion of control has been related to general well being (Langer, 1975, 1983), ability to cope with stress (Averill, 1973; Folkman, 1984), and tolerate pain (Weisenberg, 1977). Perceived loss of control or learned helplessness is widely seen as a paradigm for depression and other psychiatric disorders (Martin, Abramson & Alloy, 1984; Seligman, 1975).”).

<sup>52</sup> Gayle Fawcett, David Stonner & Harold Zepelin, *Locus of Control, Perceived Constraint, and Morale Among Institutionalized Aged*, 11 (1) *INT’L J. AGING HUM. DEV.* 13 (1980).; *see also*, Abu-Bader, et. al., *supra* note 36, at 6.; *see also* Fisher, *supra* note 36, at 249.; *see also* A.I. Berg, L. B. Hassing, G.E. McClearn & B. Johansson, *What Matters for Life Satisfaction in the Oldest-Old?*, 10 (3) *AGING & MENTAL HEALTH* 257, 258, 262 (2006).

<sup>53</sup> Cory K. Chen, Sheryl Zimmerman, Philip D. Sloan & Ann Louise Barrick, *Assisted Living Policies Promoting Autonomy and Their Relationship to Resident Depressive Symptoms*, 15(2) *AM.J. GERIATRIC PSYCHOL.* 122, 123 (2007).

<sup>54</sup> *Id.* at 126-7.; Berg et. al., *supra* note 52, at 258, 262.; Abu-Bader et. al., *supra* note 36, at 6.; Ute Kunzmann, Todd Little & Jacqui Smith, *Perceiving Control: A Double-Edged Sword in Old Age*, 57B(6) *J. GERONTOLOGY: PSYCHOL. SCI. & SOC. SCI.* 484, 488-89 (2002).; Larson, *supra* note 51, at 775.; Fisher, *supra* note 36.; Ellen J. Langer & Judith Rodin, *The Effects of Choice and Enhanced Personal Responsibility for the Aged: A Field Experiment in an Institutional Setting*, 34 *J. PERSONALITY & SOC. PSYCHOL.* 191 (1976).; Stephen Wolk & John Kurtz, *Positive Adjustment and Involvement During Aging and Expectancy for Internal Control*, 43(2) *J. CONSULTING & CLINICAL PSYCHOL.* 173, 173-77 (1975).; *see also* Bruce J. Winick, *On Autonomy: Legal and Psychological Perspectives*, 37 *VILL. L. REV.* 1705, 1755 (1992) (“ . . . there is considerable psychological value in allowing people to make choices for themselves. By contrast, governmental control, especial over decisions that vitally affect the individual, may be psychologically damaging to those denied the ability to be self-determining.”).

nursing home rated as providing very good care overall were divided into two groups. To one group, the staff emphasized their ability to make choices and control their own environment. Each of these residents was given a plant to take care of. In the other group, the staff emphasized that they would take care of all the residents' needs for them. The residents were given a plant which the staff took care of.<sup>55</sup> The results were dramatic. In the control (no decision-making) group:

. . . 71% were rated as having become more debilitated over a period of time as short as 3 weeks. In contrast with this group, 93% of the people who were encouraged to make decisions for themselves, given decisions to make, and given responsibility for something outside of themselves, actually showed overall improvement. . . they became more active and felt happier.<sup>56</sup>

The researchers were taken aback by the magnitude of the effect of relatively small variations in locus of control on the health and well-being of the residents. "That so weak a manipulation had any effect suggests how important increased control is for these people, for whom decision making is virtually nonexistent."<sup>57</sup> The researchers noted that the lack of control over major life decisions could have a substantial effect on the mortality rate of elders.<sup>58</sup> The researchers attributed this strong effect of loss of control to a variety of factors, going to the heart of what makes us human:

Adler (1930) has described the need to control one's personal environment as 'an intrinsic necessity of life itself' (p. 398). deCharms (1968) has stated that 'man's primary motivation propensity is to be effective in producing changes in his environment. Man strives to be a causal agent, to be the primary locus of, causation for, or the origin of, his behavior; he strives for personal causation' (p.269).<sup>59</sup>

The researchers summed up their findings, emphasizing the wide-ranging effects of loss of autonomy and internal locus of control on the well-being of frail elders:

Objective helplessness as well as feelings of helplessness and hopelessness – both enhanced by the environment and by intrinsic changes that occur with increasing old age – may contribute to psychological withdrawal, physical disease, and death. In contrast, objective control and feelings of mastery may very well contribute to physical health and personal efficacy.<sup>60</sup>

These unexpected findings have repeatedly been corroborated by other researchers. ". . . [M]ore resident control was consistently associated with lower overall depressive symptoms and lower levels of

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<sup>55</sup> Langer & Rodin, *supra* note 54.

<sup>56</sup> *Id.* at 197.

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

<sup>58</sup> *Id.* at 193.

<sup>59</sup> *Id.*, at 191.

<sup>60</sup> *Id.*, at 192-93.

negative mood, rhythm disturbance, and agitation.”<sup>61</sup> “Perceiving that others people have control over one’s personal affairs was shown to be associated with high negative affect and low positive affect. . . Although perceived others’ control may become increasingly realistic as people age, this type of control seems to remain dysfunctional and unpleasant.”<sup>62</sup> “. . . [I]t may be that generalized expectancy for internal control continues through the processes of aging, at least for many individuals. To recommend a life style that appears to contradict such an expectancy, or to intervene as a ‘powerful other’ in the life of the elderly person, would seem to predict conflict both for the elderly client as well as the client-counselor relationship.”<sup>63</sup> “The importance of the experience of control indicates that greater individual participation and influence in planning and implementation of care efforts may increase life satisfaction in the oldest-old.”<sup>64</sup>

[R]epetitive events outside an individual’s control may produce a generalized feeling of ineffectiveness that debilitates performance and undermines motivation and perceptions of competence. Depriving individuals of a sense of control over the outcomes they experience produces feelings of helplessness, hopelessness, passivity and depression.”<sup>65</sup>

In what ways do these important findings from psychological research illuminate the guardianship project? In the first place, they make the findings of the Rose Study somewhat less surprising. If the negative effects of loss of autonomy and internal locus of control are so significant, these effects could outweigh the additional benefits of greater care and more resources in the lives of many elders with impaired capacity. At a deeper level, these studies cleave right to the heart of the autonomy / well-being debate and turn that debate inside out. They lead us to question the automatic presumption that, through guardianship, we can make better choices to ensure incapacitated elders’ well-being than the elders themselves can make. To the extent that infringement of autonomy substantially decreases elders’ well-being, then all of the procedural requirements that make guardianship harder to establish and that limit its reach may serve not only to preserve the elders’ autonomy, but also to improve their well-being. The perceived conflict between the two goals of guardianship, at least to some extent, is false. By taking power away from

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<sup>61</sup> Cory K. Chen, Sheryl Zimmerman, Philip Sloane & Ann Louise Barrick, *Assisted Living Policies Promoting Autonomy and Their Relationship to Resident Depressive Symptoms*, 15(2) AM. J. GERIATRIC PSYCHOL. 122, 127 (2007).

<sup>62</sup> Kunzmann et. al., *supra* note 54, at 489.

<sup>63</sup> Wolk & Kurtz, *supra* note 54, at 177.

<sup>64</sup> Berg et. al, *supra* note 52, at 262.

<sup>65</sup> Winick, *supra* note 54, at 1766. Based on over 20 years of representing elderly clients in guardianship proceedings, I am struck by how accurately and clearly this last description captures the reaction of many elders to the experience of being placed under a guardianship against their will.

elders with impaired capacity, we may be increasing the well-being of their families, their caregivers, and/or the government agencies charged with their protection. However, we likely are not increasing the well-being of many of these elders.

The psychological research into the crucial role that autonomy plays in mental and physical health and psychological well-being reinforces a commitment to autonomy, not only as a contingent good, but as an absolute good in itself. As Bruce J. Winick points out in his excellent article *On Autonomy: Legal and Psychological Perspectives*,<sup>66</sup> deep respect for the importance of human autonomy is built into the foundations of our legal system.<sup>67</sup> The central importance of autonomy is based both on a consequentialist calculation that human beings in fact do better when they are guaranteed a substantial sphere of autonomous choice and action<sup>68</sup>, and on an absolute moral value placed on autonomy as an essential component of respect for the human person.<sup>69</sup> These two bases for valuing autonomy come together upon a showing that the very nature of a human being is such that people do in empirical fact require autonomy as a condition for flourishing.

The core value that must, at a minimum, be upheld if we are to undertake the risks to well-being and rights posed by guardianship is that of respect for the human dignity of the ward. While many thinkers in this field would accept this statement on its face, there is a sometimes unrecognized conundrum built into the quest for human dignity. There is a tendency of many writers (including the author, at times) to equate respect for human dignity with respect for an individual's right to make his/her own choices. However, ". . . dignity is not reducible to choice."<sup>70</sup> While autonomous choice is an extremely important component of human dignity, it is not the whole. Human dignity can remain even when mental incapacity limits or destroys the ability to make autonomous choices. It is very important that we be clear on how we are to maintain respect for the human dignity of wards as the capacity for choice diminishes. The unreflective conflation of dignity and choice has given an unfortunate excuse for ceasing to respect dignity when ability to choose declines. Respect for human dignity is also not reducible to protection of well-being. One can attempt to protect an elder's well-being without extending respect

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<sup>66</sup> *Id.*

<sup>67</sup> *Id.* at 1707-12, 1715-55.

<sup>68</sup> *Id.* at 1714 (" . . . the empirical assertion that a policy of respecting individual autonomy would ultimately maximize the individual's and society's well-being.").

<sup>69</sup> *Id.* at 1714 (" . . . a sphere of autonomous individual sovereignty based on a fundamental conception of the individual as an autonomous agent worthy of respect.").

<sup>70</sup> Martha Holstein, Keynote speech at the University of Minnesota 2009 Summer Institute "Ethical Issues in an Aging Society": Beyond "Vanilla": A Critical Look at Ethics and Aging (June 2, 2009) (notes of speech on file with author).

for the elder's humanity and individuality. This attempt appears to be likely self-defeating in practice, as well as flawed in theory, based on the empirical evidence cited above.

Once again, the great need is for further research into whether, when, how and for whom we can intervene in the lives of impaired elders with a reasonable expectation of actually increasing their well-being. We can no longer simply assume that the loss of autonomy in guardianship as it is currently constituted is offset largely or entirely by the increased well-being brought about by the more rational decisions of the guardian on the ward's behalf. We cannot rely on the presumption that the human dignity or wards will be respected in a system which does not seem to reliably improve either autonomy or well-being. Even when our current guardianship system works exactly as it should, with a caring, benevolent and rational guardian taking over decision-making for a significantly impaired elder living in a risky and unpleasant situation, we may *still* be doing more harm than good to the ward.

#### V. Therapeutic jurisprudence and guardianship.

Given the broad agreement that a great deal of empirical research is needed before we can know which directions to take in guardianship reform, what we need is a framework to help direct and frame that research so that it will be most likely to provide the needed answers. Therapeutic jurisprudence provides an extremely useful lens through which to view the field of policy research in guardianship. Therapeutic jurisprudence is a mode of legal analysis which "seeks to apply social science to examine law's impact on the mental and physical health of the people it affects."<sup>71</sup> While therapeutic values are not the sole concern of the law, they are important and often ignored aspects of legal rules, roles and procedures.<sup>72</sup> Legal rules and procedures are established in order to achieve specific goals – to protect incapacitated adults from harm, or to make sure that adults are not unnecessarily or unfairly deprived of autonomy, for example. However, these rules and procedures, and the roles assumed by the players in the legal system, all can have other effects, often unintended and/or unexamined, on the participants.<sup>73</sup>

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<sup>71</sup> Bruce J. Winick, *THERAPEUTIC JURISPRUDENCE APPLIED: ESSAYS ON MENTAL HEALTH LAW* 3 (1997).

<sup>72</sup> See Wexler & Winick, *supra* note 6 at xvii.; David B. Wexler, *Two Decades of Therapeutic Jurisprudence*, 24 *TOURO L. REV.* 17, 20-21 (2008) ("[T]herapeutic jurisprudence does not seek to promote therapeutic goals over other ones. Rather, its objective is to creatively make the law as therapeutic as possible without offending those other values.").

<sup>73</sup> Patricia C. McManus, *Comment, A Therapeutic Jurisprudential Approach to Guardianship of Persons with Mild Cognitive Impairment*, 36 *SETON HALL L. REV.* 591, 594 (2006).

Therapeutic jurisprudence directs us to examine those consequences, using established social science research methods, and to seek ways to achieve the underlying goals while minimizing the negative psychological, social and physical effects on the participants.<sup>74</sup> The best summary I have found of the focus and strengths of therapeutic jurisprudence describes it as:

. . . a tool for gaining a new and distinctive perspective utilizing socio-psychological insights in to the law and its applications. It highlights the reality that legal rules, legal practices, and the way in which participants in the legal system play out their roles have consequences for the mental health and emotional and physical well-being of a range of persons affected – including litigants, those close to litigants, those representing and assessing them, and those making decisions about them. . . . Therapeutic jurisprudence acts as a facilitator of consciousness and awareness of such outcomes. It is in part a practical orientation toward minimizing adverse outcomes. And it is in part about working with the realities of the broad repercussions of the operation of the law to fashion them as constructively as possible.<sup>75</sup>

Therapeutic jurisprudence originally grew out of the field of mental health law,<sup>76</sup> and its historical origins in that field provide a useful context as we apply therapeutic jurisprudential insights to the field of guardianship reform. Mental health law developed largely in reaction to serious deprivations of the rights of mentally ill people based on a legal system that presumed that psychiatrists had the expertise and the altruistic motivation to identify and achieve the best interests of the mentally ill person.<sup>77</sup> This presumption was challenged by mentally ill people and their advocates, who pointed to the abuses of the rights, and indeed of the well-being, of mentally ill people within this system.<sup>78</sup> “In essence, [mental health law] was part of the anti-psychiatry movement.”<sup>79</sup> Similarly, guardianship was originally conceived of as a system in which wise and altruistic judges and guardians would act to achieve the best

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<sup>74</sup> David Wexler, *Therapeutic Jurisprudence: An Overview*, 17 T.M. COOLEY L. REV. 125, 128 (2000).; Ellen Waldman, *Therapeutic Jurisprudence: Growing Up and Looking Forward*, 30 T. JEFFERSON L. REV. 345, 345 (2008) (“We should . . . aspire to a legal system that plays a positive, therapeutic role in people’s lives. We should draw on the social sciences to better understand human motivation, and our legal rules should be informed by this understanding.”).

<sup>75</sup> Ian Freckelton, *Therapeutic Jurisprudence Misunderstood and Misrepresented: The Price and Risks of Influence*, 30 T. JEFFERSON L. REV. 575, 576-77 (2008).

<sup>76</sup> Wexler, *supra* note 6, at 21.

<sup>77</sup> *Id.* at 23-24 (Citing Samuel Jan Brakel, *Searching for the Therapy in Therapeutic Jurisprudence*, 33 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 469 (2007) & BRUCE J. ENNIS, PRISONERS OF PSYCHIATRY: MENTAL PATIENTS, PSYCHIATRISTS, AND THE LAW (1972).).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 23.

interests of incapacitated wards.<sup>80</sup> The guardianship reform movement developed in reaction to this assumption of the nature and outcome of guardianship, incorporating a great deal of skepticism about the ability and motivation of courts and guardians to identify and to improve wards' well-being.<sup>81</sup>

Another similarity between the developments of mental health law and guardianship law lies in the unusual focus and goal of the proceedings. In most areas of law, the adversarial system grew up primarily as a means of deciding between the competing interests and rights of opposing parties to a dispute. In contrast, both mental health law and guardianship law theoretically focus solely on the well-being of the protected person (leaving aside police power civil commitment proceedings, which also focus on protection of the community from someone whose mental illness may make him/her a threat to others). Unlike other legal proceedings, there is (again, in theory) no mandate to compromise or accommodate the competing interests of others. The interests of the ward should rule supreme. Indeed, the promise of promotion of the well-being of the ward is the only basis of the power of the court to intervene in the lives of wards.<sup>82</sup> (In other words, if guardianship is *not* therapeutic, it has no justification for its own existence.) This single focus contributed to the history in which adversarial proceedings were seen as inappropriate in both guardianship and civil commitment. There were no adversaries in guardianship or civil commitment, but only participants with different ideas of how to reach the common goal. And since one category of participants (proposed wards) were presumed unable to understand or reason properly about their own situation, their voices were generally ignored or suppressed, from the most outwardly altruistic of motives. The serious harm done to the rights and well-being of mentally ill and incapacitated people led to a rejection of this conception of the non-adversarial nature of these proceedings. The conversion to a more adversarial approach was based on the respect for and protection of rights built into the adversarial system.<sup>83</sup> The legal mindset of our justice system in general seems to make it very difficult to take rights seriously and to protect autonomy consistently outside of an adversarial context.

One of the important lessons that guardianship reform can draw from this parallel with mental health law is that it can be counterproductive to throw out the baby with the bathwater. Therapeutic jurisprudence

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<sup>80</sup> Wright, *supra* note 4, at 59-60.; A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L.J. 33, 39 (1999).

<sup>81</sup> Wright, *supra* note 4, at 60-62.; Johns, *supra* note 80, at 55-92.

<sup>82</sup> See note 9, above; Wright, *supra* note 4, at 66-83.

<sup>83</sup> Winick, *supra* note 54, at 1748 ("The adversarial system is premised on the autonomy of the litigants.").

developed in part as an attempt to take scientific insights into the emotional and psychological well-being of mentally ill people and to use these insights to improve the legal systems which were set up to help the mentally ill, instead of using them to deprive the mentally ill of their rights.<sup>84</sup> Guardianship reform needs to do the same – to step back from the debate between “rights” and “well-being” perspectives, and to try to develop the necessary body of knowledge about how to *really* improve well-being of wards and prospective wards, in part by including a serious appreciation for the importance of autonomy to a complete and accurate conception of well-being. In this effort, therapeutic jurisprudence provides invaluable assistance to guardianship reform, in part because of the ability to maintain (for the most part – see discussion at section VII E. at pages 40-41, below) a single focus on the real well-being of the proposed ward. In other areas of law, a rule, procedure, or legal actor’s role might prove therapeutic for one party, but anti-therapeutic for another, leading to difficulties in balancing the well-being of the different parties. In theory, we are free from such needs to weigh and balance competing interests in guardianship, with, at the very least, a pre-eminent focus on the well-being of single party – the elder with diminished capacity.

#### VI. Guardianship and its discontents – anti-therapeutic consequences.

I have discussed at length above one of the most serious anti-therapeutic consequences of the guardianship system as it is currently constituted – that it by its very nature is designed to deprive incapacitated elders of the ability to have a say in the major decisions affecting their lives. Deprivation of autonomy significantly harms those deprived. Lack of respect for the human dignity of wards is unjustifiable as well as harmful. These consequences go to the core of the guardianship project. I make some suggestions in section VIII below, about how we might be able to minimize this anti-therapeutic characteristic of guardianship. In addition to this core issue, there are many other ways in which guardianship as currently constituted results in anti-therapeutic consequences, *even when it functions exactly as it is supposed to function*.<sup>85</sup> I discuss some of the most important anti-therapeutic effects of guardianship proceedings below.

#### A. Shutting down the need to listen

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<sup>84</sup> Wexler, *supra* note 74, at 128.

<sup>85</sup> I do not, in this paper, focus on the serious anti-therapeutic effects of the *failures* of the guardianship process to function as designed – e.g., incorrect findings of incapacity, appointment of guardians who exploit and abuse the ward, etc. There has been a wealth of literature on these failures of guardianship. I do not in any way discount their importance. However, my focus here is on the anti-therapeutic effects of guardianship when it actually works as designed.

Perhaps the most basic component of respect for human dignity is the willingness to listen and to take into account what another persons has to say, particularly on important issues that affect his/her life. One of the single most harmful aspects of guardianship is that it is so often used to avoid the sometimes tedious necessity of communicating with elders with diminishing capacity. As everyone who has worked with this demographic group can attest, it can be very frustrating to try to counsel an elder who insists on making choices or taking actions that are, or appear to be, irrational, self-harmful and/or dangerous. Many elders refuse to acknowledge that they are losing capacity, whether physical or mental. Often this refusal stems in part from the fear that any admission of diminished capacity will result in the loss of all autonomy. Elders insist that there is no risk partly because they fear that they will not be allowed to make risky choices. Elders also refuse to acknowledge the diminishment of capacity to themselves because of the deep fear of losing one's self to the ravages of aging. Elders cling to denial to protect themselves from having to deal with the fears and the realities of diminishing abilities. The more fiercely individualistic and eccentric the elder, the more absolutely crucial autonomy and independence are likely to be to his/her well-being. Unfortunately, stubbornness and eccentricity are personal characteristics that tend to greatly increase the likelihood that an elder will be subject to guardianship proceedings.<sup>86</sup> As incapacity progresses, elders may refuse to accept facts that indicate that their choices are ill-advised because they simply forget the reality that includes those facts – for example, the elder who refuses to move out of her home because she needs to be there when her husband (now deceased) comes back from his business trip.

Even (or perhaps most intensely) for very well-intentioned family members and other care providers or would-be protectors, dealing with this stubbornness and refusal to acknowledge factual limitations can be very painful, frustrating and exhausting. Often family members are caught between the determined choices of the impaired elder and strong pressure from medical and social service professionals to take protective action. Doctors, social workers, and care providers frequently are more likely to see the risks of the elder's choices and actions than the risks of removing the elder's right to choose and act. Medical professionals often equate making decisions that the medical provider sees as incorrect with evidence of incapacity to make reasoned decisions.<sup>87</sup> They also do not

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<sup>86</sup> Madelyn Anne Iris, *Guardianship and the Elderly: A Multi-Perspective View of the Decisionmaking Process*, 28 THE GERONTOLOGIST 39, 42 (1988) (citations omitted).; see also Knauer, *supra* note 39, at 342.

<sup>87</sup> Doctors, including specifically psychiatrists, have been shown to be remarkably inept at assessing whether a patient's cognitive state meets the legal definition of incapacity, even though most doctors could recite the legal definition. Doctors very frequently

experience the same frustration of attempting to reason with the elder, since they see the elder for a much more limited time and in a much more restricted context and generally have far less ongoing interaction with the elder. In addition, the contrast between the elder now and the elder as s/he was in earlier years is often extremely painful for family members to observe. Long established family roles make it difficult to find an acceptable mode of discussion to challenge the elder's decisions. Truly altruistically motivated efforts to consider options to reduce risks may be met with hostility and condemnation by the elder.

It is neither surprising nor a sign of lack of caring that many family members choose to terminate painful attempts to negotiate protective changes in the elder's chosen situation by asking the court for the power to cut the elder out of the discussion. It is often a course of action urged on family members by professionals as a demonstration of their care for the elder. It allows the family members to skip the painful discussions that seem to go nowhere and simply take care of the elder, much as a parent often cuts off discussion and simply announces his/her decisions on behalf of a minor child. The problem is that the incapacitated elder is not a minor child. A child is growing from total helplessness and dependence toward the capacity for autonomy. An elder with diminishing capacity is declining from a lifetime of self-determination toward a greater and greater dependence on the assistance of others. But that lifetime experience of autonomy and control over one's own life decisions demands respect, even as current capacity declines. Even if their mental capacities approximate those of a ten-year-old, elders with diminished capacity are adults whose well-being will be severely diminished by being reduced to the status of a ten-year-old. As difficult as it is, respect for the human dignity of the elder requires that family members, caregivers and/or protectors maintain the conversation with the elder regarding his/her important life choices so long as the elder is able to make any contribution at all. To the extent that guardianship offers the opportunity to cut off this conversation, it will have serious anti-therapeutic effects on the elder.

#### B. Hardening positions

As every guardianship practitioner knows, a guardianship proceeding can sometimes take a difference of opinion between family members, care providers and/or elders and turn it into an all-out war, where each party's position is defended at all costs. The adversarial nature of legal proceedings, including guardianship proceedings, requires each party to state his/her position in the strongest possible terms. Staking out the most

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mistake a patient's disagreement with the doctor as evidence of legal incapacity.; see Lawrence J. Markson, Donald C. Kern, George J. Annas & Leonard H. Glantz, *Physician Assessment of Patient Competence*, 42(10) J.A.M. GERIATRIC SOC. 1074, 1078-79 (1994).

extreme positions may cause the parties to become more strongly wedded to winning their exact goals and less open to discussion, negotiation, and compromise, as they convince themselves of the all-importance of their goals. If an elder believes that his/her ability to think and choose is under attack, s/he may become less likely to be willing to accept any help with decisions and activities, believing that accepting help is conceding loss of capacity. Once an adult child has stated the need for a guardian in the strongest possible terms in a petition, and has seen responses by other parties that may include attacks on the purity of the petitioner's motives for seeking guardianship, that child may feel s/he must win her case in order to prove that s/he really is acting for the parent's best interests. To compromise can be felt as a concession that s/he actually was proposing something harmful to the parent – that s/he was being a bad child.

Another aspect of guardianship that makes working out issues on a collegial basis more difficult is an unfortunate financial peculiarity of guardianship practice as it has evolved in many places. In most states, the successful petitioner can count on his/her attorney's fees being paid from the estate of the ward.<sup>88</sup> (In fact, in most states *everyone* involved in a guardianship proceeding expects to look to the estate of the ward to pay the costs of litigation.<sup>89</sup> See discussion in section VI G., below.) Sometimes the attorney for the petitioner does not require the payment of a retainer but agrees to wait to be paid from the estate of the ward after a guardianship is granted. This arrangement stems from the fact that, in most states, the huge majority of guardianship petitions are granted.<sup>90</sup> Attorneys for petitioners often do not expect to have to litigate the case for guardianship (unless there is a family dispute as to who should be guardian). These attorneys generally do not realize that, when they agree to be paid only from the estate of the proposed ward, they have essentially agreed to take a contingent fee. If the guardianship is not granted, petitioner's attorney will not be able to make the respondent pay for the representation of the petitioner. If the respondent contests the guardianship petition, the attorney for the petitioner is likely to suddenly grasp that, if an agreement is reached between the parties that does not include the imposition of a guardianship, the attorney may not be paid for his/her work. The self-interest of the petitioner's attorney then becomes another barrier to compromise and agreement that might avoid the need for guardianship. These effects of the guardianship proceeding that make it more difficult for the parties to communicate their concerns and goals, to hear each other without barriers, and to accept and work toward a

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<sup>88</sup> Wright, *supra* note 4, at 97-99.

<sup>89</sup> *Id.*

<sup>90</sup> Lisi et. al., *supra* note 38 (94% of guardianship petitions granted).; Erica F. Wood, Guardianship Work Group, *Adult Guardianships in Oregon: A Survey of Court Practices 4* (1999) (91% of guardianship petitions granted).; Hardy, *supra* note 35, at 4.; Crosby & Nathan, *supra* note 14, at 268 .

mutually acceptable solution, are definitely anti-therapeutic for all concerned.

### C. Making the case and shaming the respondent

Another anti-therapeutic effect of guardianship proceedings relates to the push to stake out extreme positions. Specifically, the petitioner must make the strongest case that s/he can that the respondent's capacity has declined so greatly that the elder can no longer take care of him/herself. This case is made in a written document (the petition) which in most states becomes a public court record.<sup>91</sup> At the hearing, the elder must sit and listen while the petitioner and his/her witnesses testify that the elder has lost the ability to think and to make his/her own decisions. This brutal, public portrayal of the elder as no longer able to be in charge of his/her own life and decisions is often extremely hurtful and can lead to serious depression on the part of the elder.

Arguably, forcing the elder to face up to the reality of his/her situation can be therapeutic in the long run. See discussion in section VII A., below. Denial as a psycho-protective strategy has obvious flaws in the long run. Nevertheless, the portrayal of the elder's capacity in the guardianship hearing is not necessarily either honest or accurate. Petitioners scrutinize every action and expression of the elder for possible signs of incapacity, and not surprisingly, find them. How many of our daily actions and statements could be presented, especially out of context, as signs of diminishing mental capacity? Prejudices and age-related biases of judges, attorneys, and other participants in the guardianship process also contribute to the risk of mischaracterization of the respondent's capacity.<sup>92</sup> Finally, in the process of proving incapacity at a contested hearing, it is in the interests of the petitioner to induce and display as much confusion and incapacity as possible when questioning the respondent as a witness. Not only is this aggressive questioning often demeaning, frustrating and harmful to the respondent, it often adds to the risk of an erroneous finding of incapacity. Elders with diminishing capacity (like the rest of us) generally do not present their best, or even their average, abilities in an unfamiliar, frightening and sometimes even hostile environment, such as the guardianship courtroom.

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<sup>91</sup> Court filings are public records, open to the scrutiny of all, unless there is some statutory provision restricting access. Under the Uniform Guardianship and Protective Procedures Act, Article 3, §307 (1997), only the written report of the visitor and any professional evaluation of the respondent are confidential. All other pleadings and evidence offered would be available to the public on the same basis as other court records. Some states provide additional confidentiality protections. *E.g.*, OKLA. STAT. Division II, Part D, Article I, §1-122.

<sup>92</sup> Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 ARIZ. ST. L.J. 121, 134 (1999).

In addition, the petitioner's need to stake out a firm position about the respondent's incapacity can lead to a "self-fulfilling prophecy effect".<sup>93</sup> Once the petitioner asserts and defends publicly that the respondent cannot possibly handle his/her own affairs, the petitioner will act in ways that cause the respondent to confirm that conclusion in the mind of the petitioner. Even more disturbing, this public assertion of incapacity will cause the respondent to begin to believe in his/her inability to make reasoned decisions and life choices, regardless of the accuracy of the assertion.

At some level, stigmatized individuals will come to accept the negative message conveyed by the label and discredit themselves. Perhaps even more debilitating than the reactions of others produced by a deviancy label are the effects of the label on individuals' self-concept and self-esteem and their resulting impact on subsequent behavior.<sup>94</sup>

While it may be important and ultimately therapeutic for elders to face the truth about their diminishing capacities, what they are presented with in the guardianship hearing courtroom is often a poor approximation of the truth.

My discussion of these anti-therapeutic effects of the need to assert strong adversarial positions in a guardianship hearing is not intended to give support to the unfortunately common practice of effectively excluding the respondent from participating in the guardianship hearing at all.<sup>95</sup> There are overwhelming concerns of procedural justice and of the anti-therapeutic effects that arise when respondents are not even given the opportunity to participate in the proceeding that will have such an enormous impact on their lives.<sup>96</sup> However, the anti-therapeutic effects I describe should be noted, and steps should be taken to minimize them where it is possible to do so without sacrificing other important goals. I

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<sup>93</sup> Wexler & Winick, *supra* note 6, at 22 ("This concept posits that the belief of an individual applying a deviance label ('the marker') to another ('the marked') leads the marker to behave in a manner that serves to elicit behavior from the person marked that tends to confirm the belief or prophecy of the marker.") (citations omitted).

<sup>94</sup> *Id.* at 25-26, citations omitted.

<sup>95</sup> Lisi et. al., *supra* note 38, at 49 (72% of respondents were not present at the hearing); Crosby & Nathan, *supra* note 14, at 277-78 (80% of respondents did not attend hearing); Mary Bomgren, Kathleen N. Harris, Barbara W. LeRoy, *The Court Watch Project: A Monitoring of Guardianship Proceedings in Four Michigan Probate Courts, Final Report and Recommendations* (2003) at 19 (82.2% of respondents were not present at the hearing).

<sup>96</sup> *See generally*, JOHN J. ENSMINGER & THOMAS D. LIGUORI, *The Therapeutic Significance of the Civil Commitment Hearing: An Unexplored Potential*, chapter 13 in THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 245 (David B. Wexler, ed. 1990).; Tom R. Tyler, *The Psychological Consequences of Judicial Procedures: Implication for Civil Commitment Hearings*, chapter 1 in LAW IN A THERAPEUTIC KEY: DEVELOPMENTS IN THERAPEUTIC JURISPRUDENCE 3 (David B. Wexler and Bruce J. Winick, eds., 1996).

discuss in section VIII, below, whether the all-or-nothing adversarial approach built into guardianship proceedings in order to protect the due process rights of respondents is always necessary in all its scope.

#### D. Loss of relationships

Related to the staking out of positions and to the shaming effect on the respondent is another anti-therapeutic effect of guardianship proceedings. When a guardianship is contested, whether with the respondent, between family members, or with a caregiver or protective service provider, important relationships are often damaged or destroyed in the process. When a guardianship is imposed on an elder against his/her will, the elder is likely to respond with hostility and resentment toward the guardian. Often, family members seek a guardianship believing that, once they are the guardian, the elder will comply with their decisions. Of course, the judge's order of guardianship does not have any magical effect on the elder's beliefs as to how his/her life should be ordered – if anything, the hardening of the positions and resentment for shaming may make the ward less likely to acquiesce to the decisions of the guardian than before the petition was filed. Instead of removing conflict from the relationship, the guardianship may escalate the conflict. If a guardianship petition is denied after a contested hearing, the elder generally rejects or distances him/herself from the petitioning child or children, even where the petition arose out of sincere concerns about the safety and well-being of the elder. After the guardianship proceeding ends, the elder is left with fewer caring relationships than before. Caring relationships are strongly associated with life satisfaction in old age and successful aging generally.<sup>97</sup>

The same problem may arise when the primary struggle in the guardianship proceeding was between family members with different ideas as to who should be guardian and/or what decisions should be made regarding the elder's living situation. When the subtext of a guardianship context becomes, "who is the good child?", or "who loves Mom best?", the emotions behind that struggle will not subside with the judge's final order. A decision awarding control to one family member may reinforce and exacerbate long-standing family conflicts that pre-date the guardianship issues by decades. Courts often see these conflicts returning in the form of post-guardianship motions – one of the reasons most often cited for judges' consistent reluctance to grant limited guardianship orders.<sup>98</sup> The winning family member may seek to vindicate his/her status by restricting access of other members to the ward, to

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<sup>97</sup> Berg et. al, *supra* note 52, at 262.; Abu-Bader et. al., *supra* note 36, at 4.; Pernilla K. Hilleras, Anthony F. Jorm, Agneta Herlitz & Bengt Winblad, *Life Satisfaction Among the Very Old: A Survey on a Cognitively Intact Sample Aged 90 Years or Above*, 52(1) INT'L J. AGING & HUM. DEV. 71, 73, 84 (2001).; Fisher, *supra* note 36, at 249.

<sup>98</sup> Crosby & Nathan, *supra* note 14, at 269.; Frolick, *supra* note 38, at 744.

“protect” him/her from the perceived negative influence of others. Again, even where the guardian has legitimate concerns that were recognized by the court in the guardianship proceeding, the life of the ward may be significantly impoverished by the loss of important relationships.

Finally, when the dispute giving rise to the guardianship proceeding is between the elder and/or family member(s) and professional caregiving/adult protection entities, the all-or-nothing nature of most guardianship proceedings can deprive the elder of important relationships. Either the professional caregivers may cut off or restrict the elder’s access to those who have the greatest knowledge and closest ties to the elder, or the elder or the family may reject the professional assistance and resources that could be very useful to the elder. An elder whose long-time primary care provider has testified in favor of guardianship often loses confidence and trust in that provider, thereby losing the benefits of the long-term care relationship.<sup>99</sup>

#### E. Making life (too) easy for the caregivers

As noted in section IV, above, often the major motivation for, and effect of, guardianship proceedings is to improve the well-being, not of the ward, but of the ward’s caregivers. The fact that caregivers may find their lives made easier by the guardianship clearly is not in itself anti-therapeutic, but rather the reverse. See discussion in section VII E., below. However, the guardianship process, as currently defined, is supposedly designed only to provide for the needs of the ward. As discussed at pages 10-11, above, the failure of the guardianship system to take into account the needs and goals of other participants in the process is likely one source of the failure of guardianship to achieve its own aims. However, when the needs of others are met, not through an open and regulated process but “under the table”, then the protections and balancing of needs and goals are ignored, potentially leading to some serious anti-therapeutic consequences.

Guardianship is sometimes used by family members, social service, or health care providers to “discipline” elders who are making eccentric choices and not complying with the advice of doctors, social workers, or adult children.<sup>100</sup> Often, the elder’s eccentric choices are long standing

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<sup>99</sup> In my experience, nursing homes have used guardianship to remove the need to deal with family members whose actions the nursing homes find harmful to their provision of care to the elders. Similarly, elder clients of mine have reacted to a guardianship proceeding initiated by adult protective services by becoming terribly suspicious and unwilling to take advantage of any external care resources, much to the elders’ detriment.

<sup>100</sup> In this category, I have observed elders who refused to follow medical advice regarding nursing home placement, chemotherapy, invasive surgery, or other very difficult and complex decisions. I would also include elders who make decisions that affect the inheritance that their children can look forward to, such as giving gifts to friends or charities, traveling, visiting the casino, or remarrying.

and consistent with his/her personality and life choices over many decades. It is only as old age advances that these decisions come to be seen as evidence of incapacity to make rational choices.

One factor singled out in the analysis of the Rose Study's results, showing a higher incidence of loss of function and death among study participants who received intensive case management services, was the inescapable fact that guardianship is highly associated with institutionalization of the ward.<sup>101</sup> By itself, this correlation is not terribly surprising. One of the situations that often precipitates the filing of a guardianship petition is when an elder refuses to move out of a risky living situation into a higher level of care. However, what the Rose Study results underline is that risk itself is not something that can be eliminated by nursing home or other institutional placement. While most people are aware of the danger to a frail elder, with high fall risk and declining short-term memory, of living alone in his/her home, many are unaware of, or discount, the very substantial risks associated with nursing home placement, or any change in living situation, of a frail elder with declining capacity. Caregivers and protectors may *feel* less worried about an elder who has been moved into a care facility as the result of a guardianship order, but the actual risk of harm to the elder may in fact have increased.

Another anti-therapeutic result that may come from guardianship is an acceptance of the ward's decline as normal, inevitable, and to be expected. Guardianship often represents the family's (and even the ward's) acceptance of the fact of age-related decline on the part of the elder. Once this fact has been accepted, the impetus to seek reasons or treatments declines. People become "at peace" with the fact that the elder's capacity is diminishing. As a result, they are less likely to seek out causes and to seek treatments that might slow, or even reverse, that decline. Loss of mental capacity can be due to many factors acting in combination, including (but not limited to) Alzheimer's disease, transient ischemic attacks, cardiovascular disease, urinary tract infections, dehydration, depression, reaction to medication, and the effects of hospitalization. Most of these causes are now treatable, and some are reversible. Acceptance of the fact of decline which leads to conviction of the inevitability of continuing decline is the opposite of therapeutic.

Finally, even a guardianship which provided a necessary and helpful change in the elder's situation is likely, under the current guardianship system, to continue indefinitely, without regard to whether the guardianship continues to improve the well-being of the ward. Most guardianship statutes allow for modification or termination of a guardianship, but for most, the recovery of capacity is the catalyst for

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<sup>101</sup> Rose Study, *supra* note 40, at 182.; *see* note 43.

change in the guardianship order.<sup>102</sup> Given the negative effects of loss of autonomy and internal locus of control, more is needed to justify the continuation of many guardianships. However, it is generally easier for everyone else but the ward to simply continue the status quo. In many states, it is extremely difficult in practice for the ward to access the assistance that might allow him/her to challenge the continuation of the guardianship.<sup>103</sup> The guardian generally has the power to deny access of the ward to attorneys or other advocates or friends who might assist in challenging the ongoing guardianship.

#### F. Lost in the process

Many respondents in guardianship find the process confusing, intimidating and alienating. Many feel that they had no effective say in the decision about the appointment of a guardian, that they were not heard, or were unable to participate in the hearing, and that the judge did not consider all the important facts. Sometimes these problems are due to flaws in the guardianship process, which many scholars have noted – e.g., failure to appoint counsel, failure of counsel to take time to explain the proceedings to the elder, failure of counsel to act as an effective advocate for the elder’s wishes, inability of the respondent to get to the courthouse for the hearing, inability of the respondent to hear what is happening in the proceedings, failure of the judge to listen to all sides without bias or ageism, failure of the judge to explain the basis for her/his decision. Sometimes these problems are built into the structure of state statutes that still do not provide adequate support to ensure that respondents will be effectively heard within the guardianship process.<sup>104</sup> The best practices that have arisen from Wingspread and Wingspan are intended to reduce these failures of the process. In order to maximize therapeutic outcomes,

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<sup>102</sup> Uniform Guardianship and Protective Procedures Act, Article 3, §318(b) (1997).; N.Y. MENTAL HYG. §81.36(a)(1); FLA. STAT. §744.464.

<sup>103</sup> Even in states that follow the alternative in the Uniform Statute requiring a court to appoint counsel for an unrepresented respondent, Uniform Guardianship & Protective Procedures Act, Article 3, §305(b) [alternative 2] (1997), in the author’s experience, courts are much less likely to appoint counsel for the ward in a petition to terminate guardianship. Since the ward generally has lost both control over her/his funds and the ability to enter into valid contracts, the ward is at a prohibitive disadvantage in trying to retain counsel. The Uniform Statute does not require a court to order a professional evaluation at the request of the ward in a petition for termination of the guardianship, unlike in the original guardianship hearing.

<sup>104</sup> As an extreme example, Oregon’s guardianship statute not only does not require the appointment of counsel for the respondent, but the guardianship petition may be granted on a default basis, with no hearing at all, if objections are not filed. OR. STAT. §125.025(3) (b), §125.075 (3). In the author’s experience, the large majority of Oregon guardianships are granted without hearing, partly because, not surprisingly, respondents with some physical or mental impairment find it difficult to obtain a hearing without assistance of counsel.

it is essential that respondents feel that the process is fair and that they have the opportunity to be heard.<sup>105</sup>

#### G. The time and money sink

One problem which has not been improved, and in many cases has been made worse, by years of guardianship reform, is that contested guardianship proceedings can be costly and time-consuming. Due to the fact that everyone in the process generally looks to be compensated out of the ward's funds, a guardianship can serve to seriously deplete a ward's assets that otherwise could be used to support the ward and pay for his/her needs and wants. In addition, especially where a guardianship is contested, it can take a great deal of time to resolve all of the issues. The acute need for assistance may go unmet while the legal struggle goes on. Increased requirements for procedural due process, in addition to benefits they bring, increase the expense and duration of guardianship proceedings. These costs of time and money can have real and substantial effects on the well-being of the respondent or ward, not only while the process is going on, but continuing throughout the rest of the elder's life. Depletion of life savings can force an elder into reliance on public benefits, with an associated loss of freedom to choose medical care and living situation, as well as thousands of spending decisions of less substantial scope, but enormous impact on the daily life of the elder.

#### VII. The balm of guardianship – therapeutic consequences.

With all of these substantial anti-therapeutic effects of guardianship, it might be inferred that a therapeutic jurisprudence analysis would simply condemn the entire system as, at the very best, a sometimes unavoidable evil. However, guardianship, even as currently constituted, has some important therapeutic consequences. For a balanced perspective, we need to examine both sides of the ledger.

#### A. Facing up to the realities of aging

One result of the filing of a guardianship petition can be that the elder may be required for the first time to really discuss his/her situation and need for care. Given the sovereign control that adults normally have over their lives and decisions, the elder's sole decision-making power may be the factor which has suppressed important discussion of the realities of the elder's situation. For some elders, the only way to engage them in

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<sup>105</sup> BRUCE J. WINICK, CIVIL COMMITMENT: A THERAPEUTIC JURISPRUDENCE MODEL 25-36 (2005).; Winsor C. Schmidt, Jr., *The Wingspan of Wingspread: What is Known and Not Known About the State of the Guardianship and Public Guardianship System Thirteen Years after the Wingspread National Guardianship Symposium*, 31 STETSON L. REV. 1027, 1035-1036 (2002).

effective communication about their need for assistance is to confront them with the need for such discussion in a way that they cannot ignore. The filing of a guardianship petition indicates to some stubborn elders that the costs of continuing to refuse to discuss the situation may be high indeed – in fact, their absolute insistence on their right to do as they please without reference to anyone else’s opinion may result in them being stripped of their right to make any significant decisions for themselves whatever. Guardianship may thus remove the elder’s veto power on conversation about the elder’s needs, facilitating useful discussion. Similarly, the filing of a petition may require family members who had resisted such a discussion to grapple with the issues posed by the elder’s declining capacity.

In an odd way, this legal compulsion to engage in discussion about the need for assistance can give some elders “permission” to enter into consideration of topics that they had ruled off-limits, both for others and for themselves.<sup>106</sup> The necessity forcing the acceptance of help is thus conceptualized as coming, not from the elder’s declining abilities, but from the need to deal with legal consequences that might otherwise be forced on the elder. The elder is able both to accept help and to hang on to a outward denial coping mechanism that is (apparently) so essential to his/her mental well-being.

On the other hand, the filing of a guardianship petition may shake an elder, or the elder’s family members, who had been in resolute denial that his/her abilities have declined in any way with advancing years, out of that rejection of reality and force them to deal with the real impact of age-related incapacity. Elders may not have realized, or internalized, how high a cost their insistence on independence has placed on their own well-being and comfort as well as on loving would-be protectors and care providers. The guardianship petition may lay out in clear and objective fashion the risks and disadvantages of the elder’s situation and the burdens that these place on the elder’s family. Often, family members have not been able to articulate their concerns to the elder or to each other as clearly and objectively as they are spelled out in the legal document.

Attorneys for respondents in guardianship will also work to disabuse the elder of the common assumption that the way to preserve maximum independence is to insist on complete non-interference and to reject any concession of diminished capacity. In fact, the elder who can make an objective, accurate assessment of his/her own limitations and risks, and

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<sup>106</sup> I have seen elder clients say, almost with relief, “I guess I need to think about that stupid in-home service – not because I need the help, but to stop my kids from taking over my life.”

who can accept minimally intrusive assistance to protect against the greatest risks, is most likely to maintain maximum legal independence.<sup>107</sup>

## B. Connections to the caring world

Some elders live extremely isolated lives, particularly in our modern American culture, where extended families tend to be widely dispersed geographically.<sup>108</sup> Social isolation is a factor that puts elders at risk of exploitation, abuse, depression, and death.<sup>109</sup> Elders who have no regular communication with anyone who knows and cares about the elder's well-being may find themselves in uncomfortable, unhealthy and/or dangerous circumstances, and may have no idea what to do to improve their situation. Sometimes these elders may find themselves in guardianship proceedings because of the intervention of adult protective services, law enforcement, or community social services workers who observe the elder's unmet needs and seek to ensure that they are met. This concern, when manifested by the filing of a guardianship petition, may unfortunately be experienced by the elder as an alienating, invasive attempt to take over the elder's life, instead of an expression of relational caring. However, the legal action may be an occasion to break the elder's isolation and to put the elder in contact with people and services who can serve the elder's needs for help and for simple human connection. In this way, pressure on family members to take protection action by professional protectors and care providers can spur a family into learning about and acting on a bad situation that the elder may have gotten into without anyone noticing. Family ties may be reestablished and strengthened, especially if the caring attention of the family can be expressed in a way that the elder perceives positively, rather than as simply an attack on the elder's autonomy.

In states where a guardianship petitioner must include a plan of care and/or a description of less restrictive alternatives to guardianship, the petitioner also has an opportunity to break out of a closed situation in which the family or care provider may be feeling overwhelmed and without support. The petitioner must investigate what other options might be

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<sup>107</sup> In my experience, once the discussion becomes, "what shall we do as a care plan to convince the judge that you don't need a guardian", the elder becomes open to evaluating many possibilities for assistance that were simply rejected without consideration prior to the filing of the of the guardianship petition.

<sup>108</sup> Lawrence A. Frolik & Alison P. Barnes, *An Aging Population: A Challenge to the Law*, 42 HASTINGS L.J. 683, 703 (1991).

<sup>109</sup> UNITED NEIGHBORHOOD HOUSES OF NEW YORK, AGING IN THE SHADOWS: SOCIAL ISOLATION AMONG SENIORS IN NEW YORK CITY 4-5 (2005) (citing SOCIAL INTEGRATION IN THE SECOND HALF OF LIFE (Karl Pillemer, et. al., eds., 2000)); Linda M. Woolf, *Elder Abuse and Neglect*, 1998, <http://www.webster.edu/~woolfm/abuse.html#pos>; Abu-Bader, *supra* note 36, at 168, 188-89.

available to serve the elder's needs and must think through what assistance s/he will provide to the elder if appointed guardian. A good petitioner's attorney, or a capable and well-trained court visitor, will have the necessary information and contacts to help petitioners and family members pursue services available to the elder. Bringing in a wide range of new options can have an extremely therapeutic effect on both the elder and those concerned for the elder's well-being, especially in situations where lack of knowledge and lack of communication have served to shut down awareness and consideration of options. In many cases, negotiation between the elder and the petitioner/family member can result in an outcome where the elder is connected with needed services, and the guardianship becomes unnecessary. In this situation, even though no guardianship is instituted, the process of filing the petition will lead to improved therapeutic outcomes.

A petition for guardianship will often be the catalyst for a physical, mental and/or functional assessment of the elder respondent (or sometimes, an assessment may be the catalyst for the petition). It is important to remember that declining capacity: a) can be due to treatable and even reversible causes; and b) can often be ameliorated by functional adjustments in the elder's behavior or environment. A careful and thorough evaluation of an elder's physical abilities and disabilities, cognitive status, and functional capacities may lead to treatments or accommodations that can improve the elder's well-being and ability to live safely and comfortably in his/her chosen situation. As noted at page 31, above, some causes of cognitive decline, such as infection, dehydration, and depression, are quite treatable. With treatment, full cognitive ability may be restored. In addition, an occupational therapy assessment of an elder's disabilities and environment can lead to adjustments that significantly improve the elder's ability to function, despite his/her disabilities. The guardianship process thus can initiate or include assessments of the elder which can play a substantial role in improving the elder's well-being and ability to function safely and effectively.

### C. Speaking up for yourself

One of the advantages of the adversarial process, when it works as designed, is that each side is given the chance for a full and zealous exposition of its position in the case. Procedural due process requirements are designed to ensure that every party gets a full and fair chance to present his/her case and to challenge the case presented against him/her. One of the problems faced by many elders with declining abilities is that their thoughts, values, judgments and preferences are too often ignored by those who assert control over the elders' lives. See discussion in section VI A., above. In a contested guardianship hearing that proceeds according to the requirements of the guardianship statutes,

the elder will have the chance to be fully heard and to challenge the presumptions of those who would take over his/her decision-making. In a proceeding where the respondent is empowered to speak and act on his/her own behalf, with all the necessary support of counsel, witnesses, experts, etc., the elder is likely to experience empowerment and therefore an increased sense of internal locus of control and well-being.<sup>110</sup>

In addition, as research in the civil commitment field indicates, even if the elder loses the guardianship contest, s/he is more likely to accept the result as fair if s/he feels that s/he received a full opportunity to be heard.<sup>111</sup> Wards who do not feel that they were treated fairly in the court process are far more likely to see the result as unjust, and to continue to resist and oppose the resolution imposed by the court and the actions of the guardian. By contrast, wards who see the process as fair are more likely to accept the outcome as just and to comply with the decision of the court and of the guardian. In the author's experience, wards under guardianship may become so resistant to any decision of the guardian that they oppose even needed and otherwise welcomed actions, leading in a vicious circle to greater and greater imposition of control by the guardians, sometimes ending in the confinement, heavy medication, and even death of the wards. A full and fair guardianship hearing and process can help to avoid such serious anti-therapeutic effects.

#### D. Avoiding the freight train

No matter how strongly committed to autonomy and freedom of choice for elders, no experienced advocate can ignore the fact that sometimes elders, through their free choices, get caught in a downward spiral resulting in the catastrophic loss of both autonomy and well-being. Elders who absolutely refuse to accept any assistance or make any changes in living situation sometimes find themselves in a crisis where it becomes impossible to go on as before, but without plans or choices for any viable alternative. This collision of choice and reality often results in the elder's least favored outcome - i.e., immediate nursing home placement in whatever home has an opening at the moment of the train wreck, leading to accelerated decline, depression, and even death. This catastrophic outcome can be triggered by any number of events – eviction, adult protection or law enforcement intervention, condemnation of the home,

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<sup>110</sup> See discussion at pp. 16-19, above.

<sup>111</sup> Bruce J. Winick, *Therapeutic Jurisprudence and the Civil Commitment Hearing*, 10 J. CONTEMP. LEGAL ISSUES 37, 60 (1999); Bruce J. Winick, *Coercion and Mental Health Treatment*, 74 DENV. U. L. REV. 1145, 1157, 1159-60 (1997). The most common complaints I have heard over the years from clients who consult me about terminating or modifying their guardianships are: "I never got a chance to tell the judge what was going on;" "No one listened to my side of the story;" or even "I didn't even get to go to the hearing where they decided what to do with my life."

foreclosure, illness or injury, hospitalization, death or disability of a caregiving family member, or running out of money to pay daily living expenses, among other possibilities.

In some of these cases, the elder may find that an unwelcome, despised intervention in his/her chosen living situation may actually lead to a result that the elder eventually acknowledges that s/he prefers to his/her previous situation.<sup>112</sup> The elder may find that improved nutrition, hydration, personal hygiene, medical care, medication management, and social interaction result in improved well-being, in the elder's own estimation. Sometimes the dreaded change – whether giving up the car keys, moving into assisted living, or accepting in-home services – turns out to be much less negative than expected, and may even come to be seen by the elder as a substantial improvement to the quality of his/her life. Some elders will essentially “choose” the change after the fact, ratifying the outcome by their own *post hoc* autonomous decision. In fact, the capacity for making autonomous choices, which after all presumes the ability to understand the nature of the options presented and their likely results, may actually be increased in the long run by a choice that is forced on the elder by family, social, or economic pressures. This experience is shared by all of us, in all stages of life. Sometimes circumstances, or pressure from a friend or family member, make us leave a familiar rut and make life changes that we would not have chosen and could not have envisioned as desirable. And sometimes, we find that the change is unexpectedly renewing and empowering, opening up new possibilities, improving our well-being and expanding our range of autonomy. Contrary to some conceptions, autonomy is not experienced to its fullest and purest extent in isolation, but in community. Elders are no exception to this rule.

Guardianship proceedings can be one of these catalyst events that force an elder into a situation that the elder can later acknowledge as a preferred outcome. It may appear difficult to reconcile this observation with the data regarding autonomy, internal locus of control and well-being. We need to remember, however, that no psychological study has found that autonomy and locus of control are the *only* determinants of well-being.<sup>113</sup> In some cases, the harm done by deprivation of autonomy can be outweighed by the benefit provided by the intervention, particularly if

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<sup>112</sup> I want to be very clear here that this reaction is not the most common, in my experience. It cannot be counted on by courts or guardians. As discussed in section VII C., above, the opposite occurs at least as often – where the elder fiercely rejects choices that s/he might well have made him/herself, just because they were made by the guardian. But this outcome does happen as well.

<sup>113</sup> Ann Bowling, *Associations With Life Satisfaction Among Very Elderly People Living in a Deprived Part of Inner London*, 31 (9) SOC. SCI. & MED. 1003, 1004, 1009 (1990).; Fisher, *supra* note 36, at 240-42, 243-49.; Berg et. al., *supra* note 52, at 257-58, 261-63.

the elder can *perceive* the outcome as his/her choice after the fact.<sup>114</sup> Of course, this theoretical ability to greatly improve other factors of well-being so as to justify the negative effects of deprivation of autonomous choice is the basis of the entire guardianship project. Many participants in that project have operated on the assumption that it is relatively easy to achieve this positive balance of outcomes in guardianship. Many studies and articles (including this one) have cast serious doubt on that assumption. Still, it cannot be denied that a positive, therapeutic outcome does occur in some guardianships. The real challenge is being able to predict when the elder will come to see the unwanted intervention as a positive addition to well-being.<sup>115</sup> It would be extremely useful to study what steps can be taken after the imposition of guardianship to help wards to perceive and accept any benefits of the change, as well as any ways of predicting when wards will adopt this perspective.<sup>116</sup>

There is the potential for guardianship proceedings to have a stronger therapeutic effect by intervening before the full train wreck is upon the elder. If a petitioner perceives the freight train approaching, and seeks guardianship before all options resolve down to the crisis point, s/he should, in theory, be able to help the elder to make the essential adjustments to avoid the wreck, while still maintaining a wider range of choice overall. It is very hard to know when the time for beneficial intervention has arrived and whether the costs of intervention will outweigh the benefits. Nonetheless, the therapeutic potential exists, and we should seek ways to maximize this possibility in our guardianship systems.

#### E. Making it possible to continue to care

Finally, one therapeutic effect of guardianship proceedings may be lie precisely in that area identified as problematic in sections VII A. and E., above. Sometimes, a guardianship will relieve a family member, care provider or protector of an intolerable burden and make it possible to continue a beneficial relationship with the elder. One of the problems of guardianship as it is currently constituted is that it formally ignores all issues relating to the well-being of anyone but the respondent/ward. Since the process is in practice driven almost entirely by other actors, their

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<sup>114</sup> See generally, Kunzmann et. al., *supra* note 54.; Barbara Felton & Evan Kahana, *Adjustment and Situationally-Bound Locus of Control Among Institutionalized Aged*, 29 (3) J. GERONTOLOGY 295, 299-301 (1974).; Larson, *supra* note 51, at 775-55, 781-83.

<sup>115</sup> I am still bemused by my inability to guess which cases and clients will come out this way. This possibility is an important ameliorating factor for the attorney who loses a hard-fought guardianship contest on behalf of an elder who desperately wants to maintain independence and autonomy.

<sup>116</sup> The only component I can identify from my own experience is that the more the elder felt that his/her point of view was fully heard in the discussions leading up to the change, the more likely that the elder will be able to “adopt” the change as positive and chosen.

goals and agendas actually play a key role in the process, but *sub rosa*, without acknowledgement or examination or formal restraint. It might be more therapeutic for elders and for other actors in guardianship if the system acknowledged and built in some systematic, controlled recognition of and protection for the well-being of others.

Sometimes an elder's autonomous choices may result in a situation which the elder prefers to other possibilities, but which imposes an intolerable burden on third parties. For example, an elder may continue to live in his/her own home without professional caregivers by relying on an adult child to drop everything at any time of the day or night to come to the elder's assistance whenever needed. The adult child may repeatedly rescue the elder from serious harm or simply respond to the elder's momentary needs or desires, to the extent that the adult child's own life is severely and chronically disrupted. This is a situation which is clearly not tenable in the long run. The elder does not have the right to impose his/her choices on others that entail such high costs. Another example might be an elder who, instead of an adult child, calls on emergency medical and police services for similar frequent, routine assistance. Society has a valid interest in preserving expensive and limited emergency services for those who suffer from unexpected and unforeseen needs, not for those whose needs are all too predictable.

In such situations, guardianship proceedings may be the only available means of convincing the elder that the situation is not viable and that change must come. Ideally, the elder might, following the filing of a guardianship petition, be persuaded to consider and discuss alternatives to protect the well-being of all parties, perhaps including less restrictive alternatives to guardianship. In such a case, the caregiver may be able to continue to provide care and assistance, if the burden is reduced to a manageable level. If the elder cannot or will not accept the inevitability of change, in theory, guardianship provides the means to seek the needed change while continuing to acknowledge and promote the well-being of the elder.

VIII. *Really* for your own good – improving the well-being of wards and respondents.

I have described how our current guardianship system, when working as it is designed to do, can result in both therapeutic and anti-therapeutic consequences for elders and for those who care for them. As ably described by many scholars, our current guardianship system often fails to perform as it is supposed to<sup>117</sup>, and these failures can also have significant anti-therapeutic, and even occasionally therapeutic, consequences. My question remains, how can we, using the insights of

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<sup>117</sup> See note 3, above.

therapeutic jurisprudence, reshape the guardianship system to maximize therapeutic consequences and minimize anti-therapeutic ones, without sacrificing the other values of truth, fairness and respect for human dignity that the system is intended to uphold? One of the key insights of therapeutic jurisprudence is that often policy reform does not have the anticipated, desired result, or has other, unintended and undesired results as well.<sup>118</sup> Only by empirical practical research into how ideas for reform really affect people's lives and well-being in practice can we be sure that our reforms will actually improve on the current, admittedly flawed, system.

At this point, my goal is to pull together some promising directions for reform which have been applied either in the guardianship context in some jurisdictions, or in other legal contexts. The preliminary data coming out of these reform efforts indicate that they may hold promise for the possibility that the guardianship system could really be for the overall good of elders and those who care for them. Some of these directions have come out of guardianship research and discussion, and some have not. All of them may be worth fuller trial and refinement in the project of guardianship reform.

#### A. Problem- solving courts

Problem-solving courts are a relatively recent but fast-growing trend owing a great deal to the concepts underlying therapeutic jurisprudence.<sup>119</sup> These courts originated, and largely are still found, in a criminal or quasi-criminal judicial context, including most commonly drug treatment courts, community misdemeanor courts, mental health/civil commitment courts, and domestic violence courts.<sup>120</sup> Problem-solving courts arose in different jurisdictions and different areas of the law in response to certain similar problems, including: breakdowns in social institutions which used to bear some of the burdens now placed on the courts; failure of existing government systems to satisfactorily take up the slack; an extreme rise in demand for court services to a specific population; a growing focus on desired outcomes and on the effectiveness of court systems in reaching them; increased emphasis on therapeutic alternatives to the traditional, more punitive court outcomes; and a shift in societal values and ways of understanding the underlying problems triggering the courts' involvement.<sup>121</sup> These factors would seem to apply

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<sup>118</sup> See discussion at pp. 5-9, above.

<sup>119</sup> Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 *FORDHAM URB. L.J.* 1055, 1062, 1066 (2003).

<sup>120</sup> Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, in *JUDGING IN A THERAPEUTIC KEY: THERAPEUTIC JURISPRUDENCE AND THE COURTS* 73, 74-75 (Bruce J. Winick & David B. Wexler, eds. 2003).

<sup>121</sup> *Id.* at 76.

with some force to the guardianship context. Guardianship systems serve to fill the role that traditionally was played by the extended family, which provided care and supervision to elders as they lost the ability to live independently and make decisions for themselves. As several decades of research, reportage and reform have found, the guardianship systems have largely failed to provide a satisfactory replacement for the close-knit, self-regulated extended family system. The general aging of the population, and the survival of elders with greater disabilities to a much greater age due to medical and public health advances, has created, and will only continue to create, an exploding demand for guardianship services. More and more researchers are examining the failure of existing guardianship systems to meet the goals of protecting the well-being of wards without unnecessarily depriving them of autonomy. A stronger emphasis on the importance of autonomy, both as an important component of well-being and as an essential component of respect for the human person, has sharpened this dissatisfaction with existing guardianship systems.

Problem-solving courts have sought new procedures and concepts in order to achieve more therapeutic outcomes, while still attempting to protect values of impartiality, justice, and individual rights.<sup>122</sup> These courts have attempted to achieve the underlying goals of the particular area of law – reduction of recidivism, recovery from addiction, effective treatment of mental illness, reintegration of offenders into the community, an end to the cycle of domestic abuse, etc. – by looking at the given problem from a more holistic, interdisciplinary, and therapeutic perspective. In problem-solving courts, the parties work collaboratively, under the active leadership of the judge, to plan a program to achieve these goals.<sup>123</sup> While the data are still very incomplete, there is significant evidence that a problem-solving approach can be measurably more effective in achieving desired outcomes than traditional court processes.<sup>124</sup> On the other hand, critics have expressed concerns that problem-solving courts may rely for effectiveness on coercion, depriving participants of due process rights, may destroy the impartiality of the judge and the zealous advocacy of the attorney for defendant/respondent, may involve the judge in clinical

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<sup>122</sup> *Id.* at 78.; but see Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 (4) S. METHODIST U. L. REV. 1459 (2004).

<sup>123</sup> Berman & Feinblatt, *supra* note 118, at 78-79.; Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 96-97 (2006).

<sup>124</sup> Berman & Feinblatt, *supra* note 118, at 80-81.; Steven Belenko, Nancy Wolff & Nicole Holland, *Improving the Evidence Base: Formative Evaluations of Problem-Solving Courts*, CENTER FOR BEHAVIORAL HEALTH SERVICES AND CRIMINAL JUSTICE RESEARCH AT RUTGERS UNIVERSITY (May 2009 Policy Brief).

decisions beyond his/her competence, and may subject participants to the unfettered paternalistic discretion of the judge.<sup>125</sup>

In the guardianship context, a problem-solving court would not focus solely on weighing the evidence on four legal questions: 1) is the respondent legally incapacitated; 2) if so, is a guardian needed; 3) who should the guardian be; and 4) what limitations should be placed on the guardianship. Instead, the court would take a much broader look at the problems which brought the parties into the guardianship process, and would work with medical providers, social services, and counseling services to help the parties work together to find the best way to resolve those problems going forward. The problem-solving court paradigm appears to provide a very attractive way of improving the real well-being of respondents and petitioners alike. In addition, such a court specifically established to make determinations regarding the well-being of elders would ideally be set up to minimize the intimidation factor and to maximize the ability of elders to participate fully in the proceedings.<sup>126</sup>

On the other hand, the risks of a problem-solving approach in guardianship proceedings would lie in the fact that such an approach presupposes that there is a problem that must be solved. In an ordinary contested guardianship proceeding, the respondent has the opportunity to challenge the basis for any interference at all in his/her decision-making. If the petitioner cannot meet his/her burden of proof, the proceedings (supposedly) are over. The question of whether there is even a problem to be adjudicated is very much on the table. When the court begins with a strongly therapeutically-oriented perspective, it will likely address itself to trying to resolve any problems raised by any party, without necessarily respecting the threshold issues of capacity and necessity for guardianship. While an elder might still benefit from the court's problem-solving, the elder must retain the right to decline that benefit, if s/he chooses.<sup>127</sup> And it is fair to question whether a judge who perceives her/his role as primarily helping elders and those concerned for their welfare to work out solutions for those concerns will apply the same objective, impartial legal standards to foundational questions, such as: "Does this elder meet the

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<sup>125</sup> Casey, *supra* note 120, at 1495-1500.; Berman & Feinblatt, *supra* note 118, at 81-85.

<sup>126</sup> H. Patrick Leis, III, *The Model Guardianship Part: A Novel Approach*, 78-Jun N.Y. ST. B.J. 10, 12-13 (2006). Possibilities include: holding proceedings in elders' homes or other less intimidating venues; ensuring that hearing or speech-impaired elders are able to fully hear and participate; accommodating elders' energy and cognitive ebbs and flows due to time of day and/or medication schedules; curtailing the length of court sessions to respect elders' reduced stamina; explaining concepts and procedures in terms accessible to the elders; keeping records and proceedings confidential at the request of the elder, etc.

<sup>127</sup> Casey, *supra* note 120, at 1496 ("Treatment is judged only by efficacy. For example, a treatment is not judged by whether it is fair, or deserved, or proportional. . . Ideas of liability, fault, guilt and fairness are irrelevant in a treatment regime.").

legal standard for incapacity, such that the court has any right to meddle in his/her life in the first place?” While problem-solving courts present a potentially valuable opportunity to improve the well-being of wards and respondents, there is reason to proceed with caution.

An additional concern lies in whether adequate resources will be available to enable a successful problem-solving approach in guardianship. While the problems of rapidly expanding caseload are and will be experienced in guardianship courts, the imposition of a guardian is seen as a solution with a relatively low cost to the court and a relatively low rate of “recidivism”.<sup>128</sup> Wards under guardianship retain the right to return to court to seek modification or termination of the guardianship, but do not necessarily have the right to appointed counsel to represent them in such a proceeding.<sup>129</sup> Without such assistance, wards are unlikely to return to court for a re-adjudication of the issues. Unlike in the criminal context, the costs of a problem-solving guardianship court, in terms of judge time and interprofessional resources, may substantially exceed the costs of the current system, condemning the project to likely failure in a world of budget cutting.

## B. Mediation

Mediation is one alternative way of resolving disputes outside of the traditional courtroom which holds out substantial promise in the guardianship context. Mediation is generally conceptualized as a process whereby interested parties to a dispute work with a trained neutral facilitator to engage in “voluntary, un-coerced negotiation between the parties with the aim of obtaining an agreement that resolved the conflict in whole or in part.”<sup>130</sup> Mediation can be connected to court proceedings, such as when a court refers parties in a lawsuit that has been filed to participate in mediation before proceeding to trial. Mediation can also be wholly separate from the courts, where parties choose to use a mediator instead of, or before, accessing the judicial system.

While relatively little has been written by academic scholars about guardianship mediation, the Center for Social Gerontology (TCSG) has been doing practical field research and developing best practices for adult

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<sup>128</sup> Crosby & Nathan, *supra* note 14, at 269.; Frolick, *supra* note 38, at 741-44.

<sup>129</sup> Uniform Guardianship & Protective Procedures Act §318(c).; N.Y. MENTAL HYG. §81.36.; CAL. PROB. CODE §1860-1863.; *but see*, FLA. STAT. §744.464(2)(e).

<sup>130</sup> Omer Shapira, *Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics*, 8 PEPP. DISP. RESOL. L.J. 243, 244 (2008).

guardianship mediation programs since 1991.<sup>131</sup> TCSG has also undertaken assessment of the organization and structure of various existing guardianship mediation programs, as well of their outcomes.<sup>132</sup> Although the study generated insufficient data to allow a controlled comparison with outcomes in guardianship cases going through the regular court process, it did report some useful conclusions: that administrators and participants believe that mediation is successful and effective in reaching more satisfactory resolutions, compared to court procedures; that participants are generally satisfied with their mediation experience; that most cases are referred to mediation only after a guardianship petitioner is filed; that few guardianship cases were actually mediated in the studied programs; and that lack of understanding, training and awareness, as well as lack of stable integration of guardianship mediation programs into the normal court processes, hindered the effectiveness of the programs studied.<sup>133</sup>

While these findings raise concerns about the practical viability of mediation as a remedy for some of the anti-therapeutic effects of guardianship, its potential remains great.<sup>134</sup> Many of the specific benefits offered by mediation directly address the anti-therapeutic consequences discussed in section VI, above.

[M]ediation reduces the negative psychological effects that are associated with adversarial legal proceedings . . . Mediation enhances the parties' autonomy by encouraging their active participation. . . [T]hey avoid feeling of frustration and disempowerment that characterize litigation. . . Mediation focuses on satisfying the parties' needs, not on their legal rights, and thus can respond to psychological and emotional needs instead of focusing solely on the legal aspects of the dispute. . . [M]ediation can reduce the damage to the parties' relationship . . .<sup>135</sup>

As TCSG's experience in guardianship mediation has shown:

Use of mediation can help families explore alternatives to guardianship, thus avoiding the loss of rights that accompanies court-imposed guardianship. Mediation can help assure retention of maximum possible independence and autonomous control over basic life decisions for older persons, while still addressing their need for assistance. It includes the older person in the decision-making process. It can avoid the trauma of a court proceeding. It encourages consensus building within the family setting. It fosters the preservation of relationships with family and

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<sup>131</sup> Susan D. Hartman, Penelope A. Hommel & Susan Butterwick, ADULT GUARDIANSHIP MEDIATION MANUAL, MODULE ONE, The Center for Social Gerontology, Inc., Ann Arbor, MI, 2002, at 8.

<sup>132</sup> Butterwick, S., Hommel, P., & Keilitz, I., EVALUATING MEDIATION AS A MEANS OF RESOLVING ADULT GUARDIANSHIP CASES, The Center for Social Gerontology, Inc., Ann Arbor, MI, 2001 (cited in Susan D. Hartman, Penelope A. Hommel & Susan Butterwick, ADULT GUARDIANSHIP MEDIATION MANUAL, MODULE ONE at 12-13).

<sup>133</sup> *Id.* at 13.

<sup>134</sup> See generally, Radford, *supra* note 35.

<sup>135</sup> Shapira, *supra* note 128, at 248-49, citations omitted.

friends, critical to ensuring that older persons and other persons with disabilities receive the best and most appropriate support and assistance possible. It can reduce ineffective and inefficient use of court resources. It can also lessen demands on family and community caregivers by making maximum use of all appropriate community support services.<sup>136</sup>

Guardianship mediation also offers a transparent and regulated way to include the important concerns of family members, care providers, and others whose well-being may be at stake.

In addition, guardianship mediation offers these benefits with reduced (though not vanished) concerns for the protection of due process rights, judicial impartiality, and effective and zealous representation by counsel that were raised in the context of problem-solving courts. In a sense, guardianship mediation takes the role assigned to the problem-solving judge and assigns it instead to the mediator. The traditional court procedure remains an option if any of the parties decide that mediation is not working or if a mediated agreement cannot be reached. The mediator, unlike the judge, does not have a potentially conflicting role in the mandatory resolution processes in the court system. The remaining justice concerns in guardianship mediation are to ensure: that the choice to participate in mediation is truly voluntary and that parties are not coerced into achieving settlement; that elders with diminished physical and mental capacity are able to fully participate in the mediation; that an imbalance of power of the parties does not prevent the elder from making free and voluntary decisions; and that elders receive the necessary help to make sure that they understand the proceedings, their options, and the likely results of any agreements.<sup>137</sup>

With all of these potential therapeutic benefits, it is definitely worthwhile to pursue ways to make guardianship mediation more effective and widespread. Unlike the concerns expressed in section VIII A., above, about the increased costs to the court system of problem-solving guardianship courts, guardianship mediation does offer the potential for substantial money savings for both the court system and the respondent/ward. The biggest barrier to widespread adoption of guardianship mediation seems to be the challenge it poses to the traditional understanding of the guardianship system. Judges, attorneys, care providers, social service and protection agencies are all familiar with

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<sup>136</sup> Hartman et. al., *supra* note 129, at 7.

<sup>137</sup> *Id.* at 57. It is important to keep in mind, when examining the risk of violation of due process rights or respect for the autonomy of the elder that the relevant comparison is not necessarily to how the current guardianship system is ideally supposed to function, but rather to how the current system actually functions for most elders. (*See generally*, Radford, *supra* note 35, at 642-43.) However, my focus in this article remains on the therapeutic potential of different guardianship systems and procedures, including consideration of internal contradictions which consistently ensure that a system cannot work as designed, but not focusing in depth on more incidental system failures.

guardianship court proceedings. These proceedings fit into a system which is consistent and comprehensible to these regular participants. Mediation challenges many of these established routines and mindsets. Instead of the presumption that most guardianships will be granted without much discussion,<sup>138</sup> guardianship mediation presumes that “. . . most cases coming to mediation will find an alternative other than guardianship as a solution to the issues that originally brought the parties to the court.”<sup>139</sup> Instead of presuming that respondents in guardianship are generally unable to participate effectively, and don’t even need to attend the hearing,<sup>140</sup> guardianship mediation treats even significantly cognitively impaired respondents as essential parties whose role is central to the proceeding. Instead of setting up a situation where one family member wins, and another loses, guardianship mediation creates the possibility of a win/win outcome, preserving family relationships. Instead of filing the ward away under the category of “incompetent” or “incapacitated”, and leaving the proceeding there, guardianship mediation can work to fashion more flexible plans specific to the capacities and needs of the elder, and can allow revisiting of those arrangements when conditions change. In short, the fact that guardianship mediation, to be widespread and consistently successful, must break up and rearrange the entire mindset that has grown up around guardianship can be seen as an advantage rather than an obstacle in the long run. Just such a radical rethinking of the guardianship project seems to be required in order to maximize the therapeutic potential of guardianship and protect the real well-being of elders. Such sea changes of perspective are possible in the legal world, but they require time and consistent effort on the part of courts, advocates, and scholars to bring them.

### C. Limited orders

Wingspread, Wingspan, and the Uniform Guardianship and Protective Proceedings Act (UGPPA) all adopt the same conclusion – that the preference in our guardianship system should be strongly for limited orders of guardianship.<sup>141</sup> Plenary orders should only be used when they are absolutely necessary and when a showing has been made that all of the powers of guardianship are needed to protect *this* ward from the risks created by his/her incapacity. Despite widespread legislative adoption of this provision, limited orders of guardianship remain more the exception than the rule.<sup>142</sup> There are many factors built into the current guardianship

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<sup>138</sup> See notes 93 & 98, above.

<sup>139</sup> *Id.* at 7.

<sup>140</sup> See note 98, above.

<sup>141</sup> Wingspread report at 290; Wingspan report at 602-03; Uniform Guardianship & Protective Procedures Act, §311(b).

<sup>142</sup> Lisi et. al., *supra* note 38, at 63-64.; Sally Balch Hurme, *Limited Guardianship: Its Implementation Is Long Overdue*, 28 CLEARINGHOUSE REV. 660, 663 (1994).; Lawrence

system that make it likely that judges will be reluctant to make widespread use of limited orders: the need for greater judicial involvement in the details of how to best meet the needs of wards (a la problem-solving courts); the lack of resources and expertise to know what powers the guardian may require in a given case (ditto); the perception, sometimes accurate, that powers not needed now will be needed in the future, as the ward continues to decline in capacity; and the desire for efficiency in dispositions of cases.<sup>143</sup> On the other hand, in at least one state where the UGPPA was adopted (Colorado), a 2007 study found that a third of all guardianship orders were limited in some way, in contrast with states that had not adopted the UGPPA reforms.<sup>144</sup> It is possible, although difficult, to get judges to change how they understand the best way to carry out their duties in the guardianship process.

Many of the courts' justifiable concerns regarding the use of limited orders could be ameliorated by combination of the preference for limited orders with a system that makes substantial use of guardianship mediation. If mediation is available as a lower-cost alternative to the courts when seeking necessary modifications to a guardianship arrangement, judges would presumably have fewer resource-based concerns. In addition, through a guardianship mediation system, many of the limited orders could be voluntary, mutually-worked-out agreements, requiring much less of the courts' time and resources.<sup>145</sup> A well-designed guardianship mediation system would also have access to the full scope of interdisciplinary services available in the community to meet the needs of elders, including social work case management, financial management, occupational therapy, assessment and assistive devices, home-health services, friendly visiting services, etc.<sup>146</sup> The limited order could be worked out in mediation, incorporating the necessary knowledge and resources and be presented to the court for adoption, if it is determined that a formal court order is needed.<sup>147</sup>

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A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 741 (2002).

<sup>143</sup> See generally, Frolik, *supra* note 140.; I have several times had judges comment to me, "If I grant a limited order now, the parties will just be back here in a month or a year, taking up my time again." Since I was generally unable to dispute the likelihood, I was all the more grateful to those judges who, despite the foreseeable burden on their overloaded dockets, nonetheless followed the law and limited the guardianship order.

<sup>144</sup> Moyer et. al., *supra* note 3. On the other hand, most of the limited orders seen in the study were not careful descriptions of the specific powers of the guardian, with all non-enumerated powers reserved to the ward. Rather, they were plenary orders with some specific limitations on the guardians' powers added in.

<sup>145</sup> Frolik, *supra* note 140, at 750.

<sup>146</sup> Hartman et. al., *supra*, note 129, at 7.

<sup>147</sup> Even if all the parties are able to come to an agreement about the duties and limits of a surrogate decision-maker's role, a court order may still be necessary to protect the ward from the legal consequences of his/her decisions (signing contracts, e.g.). Elders can

#### D. Guardianship plans

Both Wingspread and Wingspan called for the use of guardianship plans, as did the ABA Commission on the Mentally Disabled in its Model Guardianship Statute.<sup>148</sup> Guardianship plans are detailed descriptions of the needs of the ward and the means by which those needs will be met over a set time span – usually a year.<sup>149</sup> The plan is supposed to be developed with the participation of the ward and is supposed to address how decision-making will be shared with the ward.<sup>150</sup> The plan is to be submitted to the court for review and approval.<sup>151</sup> While most state statutes require an annual report from the guardian, many do not require a prospective plan prior to the decision to appoint the guardian or annually thereafter.<sup>152</sup>

If petitioners were required to submit a guardianship plan to be incorporated into the final order of the court, they would be required to think through and be prepared to defend the specific actions that they would take if appointed guardian.<sup>153</sup> Many well-meaning family members seek and obtain guardianship first, and only then begin to figure out how the needs of the ward can best be met. If the order of those processes were reversed, more potential petitioners would realize that there are less restrictive alternatives to guardianship available, and more potential wards

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recognize that they need legal protection from themselves and predatory others, as their cognitive abilities fluctuate and decline.

<sup>148</sup> Wingspread Report at 298; Wingspan Report at 590-91; The ABA Commission on the Mentally Disabled, *Legal Issues in State Mental Healthcare: Proposals for Change-- Model Guardianship Statute*, 2 MENTAL DISABILITY L. REP. 444 (1978);

<sup>149</sup> Sally Balche Hurme, *STEPS TO ENHANCE GUARDIANSHIP MONITORING*, ABA Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly, Washington, DC, 1991 at 21-24.

<sup>150</sup> Wingspread Report at 298.

<sup>151</sup> Hurme, *supra* note 127, at 21-24.

<sup>152</sup> Uniform Guardianship & Protective Procedures Act §304.; *but see* Uniform Guardianship & Protective Procedures Act §317(a)(6) (requiring reporting of “plans for future care” in annual guardian’s report after appointment).; N.Y. MENTAL HYG. §81.08, *but see* N.Y. MENTAL HYG. §81.30(b) (requiring a “guardian’s plan” in the initial guardian’s report after appointment) and §81.31(b)(6)(iii) (requiring “the plan for medical, dental, and mental health treatment, and related services in the coming year” in a subsequent guardian’s reports).; CAL. PROB. CODE §§1820, 1821.; FLA. STAT. §744.3201, *but see* FLA. STAT. §744.363 (requiring a detailed initial guardianship plan after appointment) and FLA. STAT. §744.3675 (requiring detailed annual guardianship plans).

<sup>153</sup> I believe this process would have significant value, as I have encountered many petitioners who file for guardianship out of frustration, or at the urging of care providers or social service staff, who have no real notion of how they would actually use the guardianship powers to solve the problems at hand.

would realize that they need to make some reasonable accommodations to the concerns of their family members in order to preserve as much of their autonomy as possible. Requiring a guardianship plan to be submitted before hearing would help to move that step to an earlier point in the proceeding. If the requirement for a guardianship plan were incorporated into a system that encouraged guardianship mediation, it would be a natural for the terms of a plan to be part of the mediation process. Under this conception of guardianship planning, at least some plans would have the formal status of orders of the court or agreements of the parties. Therefore, guardians would presumably need to seek the permission of the court or of the ward, or both, to modify the plan. In this way, the incorporation of a guardianship plan would also serve as a more limited guardianship order.

A guardianship plan could also be an aid to guardians in seeking to use substituted judgment to the extent possible. The plan could require guardians to indicate their understanding of the wards' long-term values and goals, and to discuss how they are incorporating those values and goals into their guardianship plans. Again, one of the principal values of the guardianship plan in this context is to force guardians to sit down and think through this important issue, and to reflect how it should shape their behavior. It also allows opportunities for discussion and input from the ward and other people who are close to him/her about these often-elusive issues.

#### E. Gerontologically appropriate resources for participants

Nearly all those who work in, research, or theorize about guardianship agree that guardianship proceedings could better improve the well-being of wards and respondents if all participants had access to relevant knowledge, training and resources related to the needs and abilities of the elderly. Judges, attorneys for petitioners and respondents, court visitors, petitioners, family members, guardians and elders would all benefit from access to information about crucial issues such as: the nature and possible causes of diminished capacity; how best to communicate with persons with limited capacity; assessment of functional capacity; relative risks related to living situation (e.g., of falls, of abuse, of decline in capacity, of death in community-based living as opposed to institutional living); assistive and protective services available in the community; long-term care resources; and financial benefits programs. These resources could make an enormous difference at many stages in the guardianship process. If family members and elders had access to this information, they often would be able to find alternative solutions to the problems created by the aging process, and would be able to avoid the guardianship system altogether, or to significantly delay the point at which guardianship becomes necessary. If this information were made available to petitioners

upon filing, they might be able to come to agreement on less restrictive alternatives to guardianship and would be better able to devise useful, effective, and autonomy-enhancing guardianship plans. If court visitors had expertise in these areas, they would be better able to advise the court whether a respondent meets the legal definition of incapacity, whether guardianship is necessary in a given case, and whether a proposed guardianship plan should be approved. Attorneys for both petitioners and respondents could use such information to negotiate for limited guardianships or other less restrictive alternatives to guardianship. Judges could make use of these resources to make more accurate determinations of functional capacity and risk to the elder of granting or denying guardianship. They could fashion limited orders that would protect wards' well-being with the fewest necessary restrictions on their autonomy. They could better evaluate guardianship plans and better determine which of multiple candidates would make the best guardian in a given case. They could use this information to more effectively monitor the ongoing well-being of the ward in post-appointment annual reporting. Guardians could use these resources to do the best job possible to improve wards' well-being while minimizing infringement of their autonomy and dignity.

There is no question that appropriate gerontological resources are important and very much needed in guardianship systems. The serious problem in this area is how to finance the needed resources system. Unless regular participants in the system (judges, visitors, attorneys, social and protective service providers, care providers) create an organized demand for such resources, they will be provided only on a spotty and disorganized basis. In order to promote therapeutic outcomes in guardianship, these resources need to be built into the system throughout.

## IX. Conclusion.

Guardianship has endured a long history of trying and failing to meet its own central goal – the protection and improvement of the well-being of incapacitated adults. As our understanding of the key role of autonomy in human well-being has developed in the psychological research, this information has been slow to inform the long-time debate between protection of rights and protection of well-being in guardianship law and practice. As statutory reform has lagged behind psychological research, so has actual guardianship practice lagged behind statutory reform. The changes in attitudes towards elders and their rights to autonomy and dignity have been slow to change the mindset that governs guardianship systems. Ironically, in the name of protection of well-being, guardianship systems have continued to inflict significant harm on respondents and wards, even when those systems function as they are designed to do.

Therapeutic jurisprudence analysis leads us to reject a system that too often fails either to uphold justice and due process or to provide therapeutic outcomes.

This rather sad state of affairs is not due, for the most part, to evil intent or lack of concern on the part of participants in guardianship systems. In many ways, these systems suffer from systematically perverse incentives that make it more difficult for them to achieve the goals for which they were established. Therapeutic jurisprudence leads us to look for the “psycholegal soft spots”,<sup>154</sup> where we can identify significant potential for psychological harm within the legal system, and then attempt to mitigate or eliminate that harm, consistent with other goals and values that the system is intended to serve. As I have argued, we must create incentives in the system that encourage the behaviors that are required in order to improve the well-being of respondents and wards. Respondents and wards must be given an equal and effective voice in the process. Many of the guardianship reforms have focused on achieving this goal (mandating respondents’ appearance at guardianship hearings, requiring appointment of counsel for respondents, mandating that appointed counsel act as advocates for the wishes of respondents, etc.). However, it has remained possible in many jurisdictions for the protections to be ignored. We need to continue to seek incentives to deter such violations of legal protections for respondents. We also need to add legal protections to preserve the voice and ability to be heard of wards after appointment of a guardian, by, among other things, guaranteeing the right of access to counsel after guardianship.

Another important area in which incentives could be readjusted is in regard to who pays for the costs of guardianship proceedings, including attorneys fees. The current system reflects the presumption that guardianship proceedings are for the overall benefit of the respondent/ward, by presuming that all costs will generally be borne by the estate of the respondent/ward. Based on the psychological research that appears to contradict that presumption, we can defend a default presumption that imposition of an involuntary guardianship will be harmful to elders’ well-being, along the lines of the medical imperative, “first, do no harm.” Given this perspective, it would be worthwhile to consider a system in which the costs of legal proceedings are generally expected to be borne by the petitioner, unless and until a court makes a specific determination that the benefit to the elder is such that charging his/her estate for the costs is appropriate, or unless the parties come to an agreement about payment of costs. By turning the current expectation of who pays on its head, we would deter some petitioners from seeking guardianship. Such deterrence might well be overall to the benefit of the

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<sup>154</sup> DENNIS P. STOLLE, DAVID B. WEXLER & BRUCE J. WINICK, PRACTICING THERAPEUTIC JURISPRUDENCE: LAW AS A HELPING PROFESSION, 35 (2000).

well-being of elders, even if it might be detrimental in a particular case. When a guardian is truly needed, the petitioner could still feel confident that s/he would be reimbursed for costs.

We need to educate regular participants in the guardianship process, as well as individual parties, about the need to question our often unthinking assumptions about the benefits of guardianship to the ward. We need to instill a respect for the dignity of elders that incorporates an appreciation of the extraordinary importance of autonomy to well-being. We need to ensure acknowledgement of the need to continue to include the elder's voice in all decisions regarding the elder's life, so long as the elder is able to express a preference, even after a guardianship is established. We need to incorporate incentives to reach for the difficult goal of substituted judgment, continuing to honor and respect the long-term goals and values of elders even as their mental capacity declines. We cannot allow guardianship to be "the end of the line" in our efforts at research and reform. We need to examine and test means of continuing to improve wards' well-being after guardianship is established.

Above all, we need to continue and increase our efforts to study the actual effects of different guardianship reform proposals on the well-being of respondents and wards, in accordance with the precepts of therapeutic jurisprudence. Reform efforts aimed at creating standardized guardianship systems that all incorporate specific important protections have perhaps taken us nearly as far as they can at this point. Now, the focus may shift to the creation and assessment of many different local efforts to create more therapeutic guardianship processes and alternatives. It may be time to "let a hundred flowers blossom"<sup>155</sup> in the quest to improve the real well-being of respondents and wards in guardianship.

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<sup>155</sup> Hundred Flowers Campaign, WIKIPEDIA, Nov. 18, 2009, [http://en.wikipedia.org/wiki/Hundred\\_Flowers\\_Campaign](http://en.wikipedia.org/wiki/Hundred_Flowers_Campaign) ("Letting a hundred flowers blossom and a hundred schools of thought contend is the policy for promoting progress . . .") (Mao Zedong, slogan of the Hundred Flowers Campaign, 1956-57).