

Legal Guardianship of Individuals Incapacitated by Mental Illness: Where Do We Draw the Line?

“The ward has been under the power of a duly-appointed conservator continually since 1871. He is about 59 years old, and is a man of limited education. His estate . . . amounts to about \$2,000. During the war of the Rebellion he enlisted, and was mustered into the service of the United States as a soldier, and was honorably discharged from such service 38 days after such enlistment Prior to his enlistment he lived with his father on a farm. Since his discharge he has worked about from place to place, caring for himself and doing odd jobs of common work. He is a man of good habits; a member of the church; has been and now is an elector; but in mental capacity is far below the average, simple minded, easily influenced, and has not sufficient ability or mental capacity to manage or control any considerable amount of money, and, if allowed to, would soon waste or squander it.”¹

I. INTRODUCTION

K-M lives at her New Hampshire condominium in the winter and stays at a family camp in Maine in the summer.² Although they were estranged, K-M’s sister Diane petitioned the court for guardianship because she believed K-M was at risk of harm, both physically and financially, due to mental illness.³ K-M claimed to hear voices and believed that others were spying on her and videotaping her.⁴ She assaulted and harassed neighbors and lived without indoor plumbing because she was unable to arrange for home repairs.⁵ In addition to K-M’s personal welfare, Diane was also concerned about her sister’s financial well-being because K-M failed to pay taxes or condominium fees.⁶ An independent appointee of the court visited K-M to serve her with notice of the petition and reported that there was a “paranoid, passive aggressive flavor to her reaction” to his visit and to the court proceeding generally.⁷ Although K-M argued the evidence demonstrated a mere

1. *In re Cleveland*, 44 A. 476, 476 (Conn. 1899) (internal quotation marks omitted) (granting guardianship over Civil War veteran after outlining life history and current mental incapacity).

2. *In re Guardianship of K-M*, 866 A.2d 106, 108 (Me. 2005).

3. *Id.* at 108-09.

4. *Id.* at 109.

5. *Id.*

6. *In re Guardianship of K-M*, 866 A.2d at 109.

7. *Id.* at 109 (reporting K-M was suspicious of “all the legal documents,” but she would not elaborate).

disagreement between Diane and herself rather than incapacity, the court found that K-M lacked sufficient mental capacity to care for herself and thus granted Diane's petition for guardianship.⁸

The situation involving K-M is an example of when guardianship may be warranted due to mental illness; in this case, mental illness left K-M unable to care for herself and manage her financial affairs.⁹ Each guardianship case is unique and presents difficult challenges affecting important rights and fundamental interests.¹⁰ In many ways, the guardian's legal relationship to the incapacitated person (the ward) is similar to a parent's legal relationship to a child.¹¹ When the court appoints a guardian, the ward loses the ability to make unilateral decisions regarding his or her welfare.¹² The purpose of guardianship is to protect vulnerable individuals from harming themselves and operates as the fundamental rationale behind the court's ability to take certain rights and

8. *In re* Guardianship of K-M, 866 A.2d 106, 117 (Me. 2005) (holding evidence sufficient to support finding of incapacity).

9. See OFFICE OF ELDER SERVS. & OFFICE OF ADULTS WITH COGNITIVE & PHYSICAL DISABILITIES SERVS., ME. DEP'T OF HEALTH & HUMAN SERVS., A GUIDE TO UNDERSTANDING ADULT GUARDIANSHIP AND GUARDIANSHIP ALTERNATIVES IN MAINE 4 [hereinafter ME. GUARDIANSHIP GUIDEBOOK], available at <http://www.maine.gov/guardianship/guardianship-guide.pdf> (suggesting guardianship for individuals needing help with "regular activities of daily living"); R.I. DISABILITY LAW CTR., GUARDIANSHIP AND ALTERNATIVES TO GUARDIANSHIP 5 (2008) [hereinafter R.I. GUARDIANSHIP HANDBOOK], available at http://ridlc.org/publications/Guardianship_and_Alternatives_To_Guardianship_Booklet.pdf (recommending guardian when incapable of making decisions regarding healthcare, finances, residence, or relationships); see also CONN. GEN. STAT. ANN. § 45a-644 (West 2007 & Supp. 2011) (defining person incapable of caring for self or managing own affairs); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE 5 (2004) [hereinafter GAO REPORT], available at <http://www.gao.gov/assets/250/243297.pdf> (stating "some elderly adults may become mentally incapable of making or communicating important decisions"); Circuit Court Probate Div., *Guardianship FAQ*, N.H. JUDICIAL BRANCH, <http://www.courts.state.nh.us/probate/guardianshipfaq.htm> (last visited Oct. 3, 2010) [hereinafter N.H. JUDICIAL BRANCH] (describing appropriate circumstances for petitioning for guardianship); VT. OFFICE OF PUB. GUARDIAN, GUARDIAN'S HANDBOOK: A GUIDE TO THE RESPONSIBILITIES OF GUARDIANS OF ADULTS WITH MENTAL DISABILITIES 1 (2010) [hereinafter VT. GUARDIANSHIP HANDBOOK], available at <http://www.ddas.vermont.gov/ddas-policies/policies-guardianship/policies-guardianship-documents/guardians-handbook-2010> (recommending guardianship appointment only when individual unable to make certain decisions independently). Although a significant number of guardianship cases involve elderly individuals, many other cases involve adults who are middle-aged or even younger; generally, the same laws apply to all adults who lack mental capacity. See GAO REPORT, *supra*, at 1 (indicating same laws generally apply to all adult guardianship cases).

10. See GAO REPORT, *supra* note 9, at 5 (stating appointment of guardian generally means ward loses basic rights); ME. GUARDIANSHIP GUIDEBOOK, *supra* note 9, at 5 (describing guardianship as serious step because it significantly affects individual rights and freedoms); BRENDA K. UEKERT, CTR. FOR ELDERLY & THE COURTS, ADULT GUARDIANSHIP COURT DATA AND ISSUES: RESULTS FROM AN ONLINE SURVEY 6 (2010), available at www.eldersandcourts.org/docs/GuardianshipSurveyReport.pdf (asserting appointment of guardian involves loss of individual rights); Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 167-68 (2010) (stating guardianship presents challenges affecting important individual freedoms).

11. ME. GUARDIANSHIP GUIDEBOOK, *supra* note 9, at 5.

12. See *id.* at 22 (listing areas in which ward loses right to make life choices); R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 3 (discussing guardian's authority as substitute decision-maker).

freedoms from certain individuals.¹³

Although the process of appointing a guardian varies from state to state, judges generally bear the responsibility of determining whether an individual lacks mental capacity.¹⁴ Courts frequently struggle to strike a balance between personal autonomy and personal welfare.¹⁵ Judges evaluate mental capacity on a case-by-case basis and are often reluctant to appoint a guardian unless there is a clear reason to do so.¹⁶

This Note focuses on how courts in New England determine when an individual is mentally incapacitated due to mental illness.¹⁷ Part II.A presents a description of the evolution of guardianship laws from solely common-law to statutorily based.¹⁸ Part II.B follows this historical review with a discussion of the possible abuses of the guardianship system and how courts mitigate the risk of such abuse.¹⁹ Next, Part II.C-D describes the adjudication process generally, types of guardianship, and the factors courts consider when assessing capacity.²⁰ Part II.E introduces the concept of supported decision-making, which some countries have implemented to supplement existing guardianship law.²¹

Part III analyzes the effectiveness of instituting a bright-line rule regarding mental capacity.²² This Note recommends implementation of a uniform assessment framework and computerized statewide case-management systems

13. See GAO REPORT, *supra* note 9, at 1 (describing guardian's responsibility to protect ward and ward's loss of decision-making rights); UEKERT, *supra* note 10, at 6 (stating purpose of guardianship as protecting interest of incapacitated adults).

14. See GAO REPORT, *supra* note 9, at 1-2 (indicating states responsible for their own guardianship systems); ERICA F. WOOD, COMM'N ON LAW & AGING, STATE-LEVEL ADULT GUARDIANSHIP DATA: AN EXPLORATORY SURVEY 5 (2006), available at www.ncea.aoa.gov/ncearoot/main_site/pdf/publication/GuardianshipData.pdf (stating judges decide when to appoint guardians); cf. UEKERT, *supra* note 10, at 6 (noting judges appoint guardians, but process varies between judges).

15. See Salzman, *supra* note 10, at 179 (recognizing tension between individual right to autonomy and protecting individual from harm). Historically, the laws of the United States evidence a commitment to principles of personal autonomy, allowing people to make important decisions for themselves and interfering with their choices only when they lack the ability to make decisions in their own best interest. See Bruce J. Winick, *Ambiguities in the Legal Meaning and Significance of Mental Illness*, 1 PSYCHOL. PUB. POL'Y & L. 534, 587 (1995) (introducing concept of governmental *parens patriae* power).

16. See UEKERT, *supra* note 10, at 6 (describing general view of guardianship as option of last resort).

17. See *infra* Part II (setting forth historical perspective, potential risks, adjudication process, factors routinely considered, and alternative models).

18. See *infra* Part II.A (tracing roots of guardianship system from early common law to present day).

19. See *infra* Part II.B (examining rights afforded potential wards during and after guardianship proceedings).

20. See *infra* Part II.C-D (explaining general structure of guardianship systems in New England and nationwide).

21. See *infra* Part II.E (expounding on supported decision-making models implemented in Sweden and Canada).

22. See *infra* Part III (concluding bright-line rule for mental capacity likely ineffective in this nebulous legal area).

to enhance the predictability and efficiency of guardianship proceedings.²³ Finally, this Note proposes an intermediate option for individuals in the grey area between absolute mental capacity and incapacity.²⁴

II. HISTORY

A. *The Evolution of Guardianship Law: From the King to the Courts*

Modern guardianship law is rooted in the notion of *parens patriae*, or “parent of the country.”²⁵ The *parens patriae* power was premised on the inability of a mentally disabled person to protect or care for himself or herself.²⁶ Originally, the King of England exercised *parens patriae* power in order to preserve the property of a person whom he believed to be mentally incapacitated.²⁷ Eventually this power evolved into a broader governmental authority to protect the general welfare of individuals unable to care for themselves.²⁸ In the United States, each state assumed a measure of *parens patriae* power after the American Revolution, and was thus vested with authority to protect the welfare of vulnerable citizens by acting on their behalf.²⁹

Many states, including those in New England, were slow to adopt comprehensive statutory laws regarding guardianship.³⁰ But today, every state has laws relating to the guardianship of individuals incapacitated by mental illness.³¹ Although many New England states significantly reformed their

23. See *infra* notes 131-135 and accompanying text (pointing to Rhode Island statutory rubric as excellent model).

24. See *infra* Part III.B (discussing development and implementation of supported decision-making model).

25. See Salzman, *supra* note 10, at 164 (describing *parens patriae* as western legal tradition); see also Winick, *supra* note 15, at 587 (discussing *parens patriae* as it relates to mental incapacity).

26. See Winick, *supra* note 15, at 587 (providing historical context and commentary regarding *parens patriae* power).

27. See Salzman, *supra* note 10, at 164. Attributing the *parens patriae* power to the English feudal system is important because that system formed the roots of American guardianship law. *Id.* at 164 nn.15-16.

28. See *id.* at 164.

29. See *id.* (contending states focus on protecting society from “those deemed dangerous or merely different”). In the past, states have used the *parens patriae* power as authority for adopting eugenics laws, which were designed to eliminate or isolate those with severe mental impairments. See *id.* However, in the last several decades many laws have been enacted, on both the state and federal level, “to dignify, integrate, and empower people with mental disabilities.” See *id.* at 165.

30. See An Act Concerning Appointment of Conservators, No. 77-446, 1977 Conn. Acts 452 (Reg. Sess.) (codified as amended at CONN. GEN. STAT. ANN. §§ 45a-644 to -689 (West 2007 & Supp. 2011)); An Act to Establish the Maine Probate Code, ch. 540, §1, 1979 Me. Laws 964 (codified as amended at ME. REV. STAT. tit. 18-A, §§ 5-303 to -313 (1998)); An Act Relative to Guardianship Procedures, ch. 370:1, 1979 N.H. Laws 486 (codified as amended at N.H. REV. STAT. ANN. §§ 464-A:1 to :47 (2004 & Supp. 2011)); Act of May 10, 1979, No. 76, § 15, 1979 Vt. Acts & Resolves 409 (codified as amended at VT. STAT. ANN. tit. 14, §§ 3060-3081 (2010); see also *infra* note 32 (detailing dates of recent statutory reforms in New England states).

31. See, e.g., CONN. GEN. STAT. ANN. § 45a-644(c) (noting individuals with mental conditions possibly incapable of caring for themselves); MASS. GEN. LAWS ANN. ch. 190B, § 5-309(a) (West Supp. 2011) (stating

guardianship laws within the last five years, the laws of each state continue to be unique in some areas, including procedures and petition requirements.³² Furthermore, statutory law is often intentionally vague to provide judges with considerable discretion to determine mental capacity on a case-by-case basis.³³ Statutory law is thus used as a springboard from which common law is utilized

appointment of guardian necessitated by mental limitations); VT. STAT. ANN. tit. 14, § 3061(1)(B)(ii) (recognizing individual may be impaired due to mental condition); *see also* GAO REPORT, *supra* note 9, at 2 (stating all states have laws requiring courts to oversee guardianships); WOOD, *supra* note 14, at 9 (indicating every state has adult guardianship laws).

32. *See* GAO REPORT, *supra* note 9, at 11 (providing map of state law variations regarding how often guardians must submit accounting reports); WOOD, *supra* note 14, at 9 (noting most states revised laws in last twenty years and describing some reforms as comprehensive); Salzman, *supra* note 10, at 163, 171 n.38 (characterizing reforms enacted in last two decades as positive for guardianship system); *see also* UEKERT, *supra* note 10, at 6 (indicating guardianship process varies by state); WOOD, *supra* note 14, at 9 (describing ways in which state laws differ). Connecticut, Rhode Island, and Vermont revised their guardianship laws in 2007. An Act Concerning Conservators and Appeals of Conservatorships and Guardianships, No. 07-116, 2007 Conn. Acts 299 (Reg. Sess.); An Act Relating to Probate Practice and Procedure—Limited Guardianship and Guardianship of Adults, ch. 417, 2007 R.I. Pub. Laws 1760 (codified at R.I. GEN. LAWS §§ 33-15-2, -4, -5, -7, -18, -19 (2011)); An Act Relating to Guardianships, No. 186, 2008 Acts & Resolves 460 (codified at VT. STAT. ANN. tit. 14, §§ 3060-3081). Massachusetts enacted significant revisions in 2008, but the reforms were not effective until July 1, 2009. An Act Relative to the Uniform Probate Code, ch. 521, §§ 9, 21, 2008 Mass. Acts 1752, 1754, 1917. *Compare* MASS. GEN. LAWS ANN. ch. 190B, § 5-306, with MASS. GEN. LAWS ANN. ch. 201, §§ 6, 8, 16 (repealed 2008). Although the Maine and New Hampshire guardianship laws were enacted in 1979, they reflect the relatively new limited-guardianship approach recently adopted in the other New England states. *See* ME. REV. STAT. tit. 18-A, § 5-105 (establishing system of limited guardianship); N.H. REV. STAT. ANN. § 464-A:1 (permitting guardianship appointment only to “extent necessitated by functional limitations”); *see also infra* notes 57-61 and accompanying text (comparing full authority traditionally granted with limited guardianship). Over the past two decades, the legal community encouraged states to enact more uniform guardianship statutes; this effort resulted in many states enacting uniform statutes relating only to jurisdiction and venue selection in guardianship proceedings, setting out rules that permit relatives living in a different state to petition for guardianship in the proposed ward’s “home state.” *See* Rebecca C. Morgan, *The Uniform Guardianship and Protective Proceedings Act of 1997—Ten Years of Developments*, 37 STETSON L. REV. 1, 1-3 (2007) (describing adoption and revision of UGPPA by National Conference of Commissioners on Uniform State Laws); *see also* COMM’N ON LAW & AGING, MULTI-STATE GUARDIANSHIP JURISDICTION STORIES SUPPORTING NEED FOR THE UNIFORM ADULT GUARDIANSHIP AND PROTECTIVE PROCEEDINGS JURISDICTION ACT (UAGPPJA) (2009), available at http://www.abanet.org/aging/guardianshipjurisdiction/story_chart_sorted_by_issue.pdf (providing cases throughout nation to support need to enact uniform guardianship statutes regarding jurisdiction); *cf.* Kerry R. Peck, *Uniform Adult Guardianship and Protective Proceedings Jurisdiction*, CBA REC., Feb./Mar. 2010, at 36 (discussing effect of new uniform statute on multi-jurisdictional guardianship cases).

33. *See* UEKERT, *supra* note 10, at 6 (stating guardianship process varies “significantly” by court and judge); *e.g.*, ME. REV. STAT. tit. 18-A, § 5-303 (lacking specific factors for determining incapacity but requiring physician’s report on mental limitations); MASS. GEN. LAWS ANN. ch. 190B, § 5-306 (describing court appointment of guardian for “incapacitated person” as means of providing care and supervision); R.I. GEN. LAWS § 33-15-4 (permitting court appointment of guardian when “individual lacks the capacity to make decisions”). *But see, e.g.*, CONN. GEN. STAT. ANN. § 45a-644 (defining when individual incapable of “caring for himself” and “managing his . . . affairs”); N.H. REV. STAT. ANN. § 464-A:2(XI) (defining incapacity for legal purposes); VT. STAT. ANN. tit. 14, § 3061(1)-(2) (defining “unable to manage his . . . personal care” and “unable to manage his . . . financial affairs”). Differences between individual courts and judges must be investigated on a local level because most states lack a statewide case-management system for guardianship cases. *See* UEKERT, *supra* note 10, at 8; WOOD, *supra* note 14, at 8 (suggesting troubling absence of statistics to evaluate adult guardianship process and reforms).

to flesh out acceptable parameters for mental capacity in that jurisdiction.³⁴

Historically, there were relaxed standards for awarding guardianship, and guardians were given complete authority over wards.³⁵ However, many of the recent statutory reforms provided increased procedural and substantive protection for allegedly incapacitated individuals.³⁶ The new laws stress the desire to allow individuals to retain decision-making authority to the greatest extent possible.³⁷

In this regard, every state in New England has instituted limited-guardianship statutes.³⁸ These limited-guardianship laws focus on assessing an individual's functional abilities, and restrict a guardian's authority to specific areas in which the ward has a proven functional incapacity.³⁹ All of the New England states, except Maine, mandate that less-restrictive alternatives to guardianship be pursued and found ineffective before a guardianship proceeding may commence.⁴⁰ These statutory reforms in guardianship law

34. See GAO REPORT, *supra* note 9, at 13 (noting minimal statutory requirements and more stringent requirements sometimes set by individual courts).

35. See Salzman, *supra* note 10, at 171; see also *supra* note 27 and accompanying text (describing historical roots of modern guardianship system).

36. See Salzman, *supra* note 10, at 173 (opining reforms improved guardianship system by reducing likelihood of unnecessary petitions or appointments).

37. See MASS. GEN. LAWS ANN. ch. 190B, § 5-306 (West Supp. 2011) (articulating purpose of guardianship as encouraging development of "maximum self-reliance and independence of . . . incapacitated person"); N.H. REV. STAT. ANN. § 464-A:1 (2004 & Supp. 2011) (stating purpose of guardianship law to encourage "development of maximum self-reliance in . . . individual"); R.I. GEN. LAWS § 33-15-1 (requiring liberal construction of laws to allow citizens to retain authority to greatest extent possible); VT. STAT. ANN. tit. 14, § 3060 (2010) (asserting purpose to encourage development and maintenance of "maximum self-reliance and independence in . . . individual").

38. See ME. REV. STAT. tit. 18-A, § 5-105 (1998) (authorizing appointment of limited guardian); MASS. GEN. LAWS ANN. ch. 190B, § 5-306 (permitting guardian appointment "only to . . . extent necessitated by . . . incapacitated person's limitations"); N.H. REV. STAT. ANN. § 464-A:1 (imposing guardianships "only to . . . extent necessitated by . . . individual's functional limitations"); R.I. GEN. LAWS § 33-15-2 (2011) (authorizing appointment of limited guardian); VT. STAT. ANN. tit. 14, § 3060 (utilizing guardianship only as necessary to protect individual's well-being and human and civil rights); cf. CONN. GEN. STAT. ANN. §§ 45a-644(a)-(b) (West 2007 & Supp. 2011) (describing conservator of estate or person as sole types of guardianship, though subject to limitation). Connecticut and Massachusetts are the only New England states retaining a statutory distinction between appointments over the ward's person or estate. See CONN. GEN. STAT. ANN. § 45a-644(a)-(b); MASS. GEN. LAWS ANN. ch. 190B, §§ 5-309, 5-416. Today, most jurisdictions generally prefer limited guardianships. See UEKERT, *supra* note 10, at 6.

39. See Salzman, *supra* note 10, at 171 (indicating shift from medical model to assessment of individual's functional capacity).

40. See *id.* at 173-74 (describing denial of guardianship petition when less restrictive alternatives available); R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 4 (stating Rhode Island law requires showing less restrictive alternatives to guardianship pursued); Kate McEvoy, COMM'N ON LAW & AGING, *State Adult Guardianship Legislation: Directions of Reform-2007*, www.narpa.org/ABA_2007_CT_gship_summary.htm (indicating Connecticut courts require consideration of alternatives to conservatorship). Compare CONN. GEN. STAT. ANN. § 45a-644(k) (requiring least restrictive means of intervention in guardianship cases), MASS. GEN. LAWS ANN. ch. 190B, § 5-306(b)(8) (permitting appointment if needs not met by less restrictive means, including appropriate technological assistance), N.H. REV. STAT. ANN. § 464-A:9(III)(c) (allowing appointment if no suitable available alternative option), R.I. GEN. LAWS § 33-15-2(4) (mandating showing of steps taken to utilize less restrictive alternatives), and VT. STAT. ANN. tit. 14, § 3063(8) (requiring explanation of why each

indicate a shift in thinking, moving away from merely viewing a ward as needing a surrogate decision-maker and, instead, taking a person-centered approach allowing retention of autonomy to the greatest extent possible.⁴¹ These laws will have a significant impact in the future because the number of people in the United States requiring guardians is expected to increase considerably in the years ahead as a result of the aging population and an increasing number of younger adults with mental illness, among other factors.⁴²

B. Possible Abuse of Legal Guardianship: Protecting Vulnerable Individuals from Self-Interested Parties

The potential for abuse exists in guardianship proceedings.⁴³ Although the purpose of guardianship law is to protect vulnerable citizens from harm, some judges may require only minimal mental capacity as sufficient to deny guardianship, in an effort to protect individuals from abuse by self-interested parties.⁴⁴ Such abuse may take many forms, including theft, neglect,

alternative to guardianship unsuitable), with ME. GUARDIANSHIP GUIDEBOOK, *supra* note 9, at 9 (stating appropriate alternatives “may delay or prevent appointment of full guardians”). Alternatives to guardianship include, but are not limited to, the following: an advance directive giving instructions for future medical decisions; a durable power of attorney authorizing someone to act on an individual’s behalf regarding financial or health matters, even if that person becomes incapacitated; creation of a trust in which a trustee controls funds for the benefit of an individual. See N.H. REV. STAT. ANN. § 464-A:2(II) (defining “available alternative resource” to include visiting nurses, adult day care, powers of attorney, etc.); ME. GUARDIANSHIP GUIDEBOOK, *supra* note 9, at 13 (providing chart of alternatives to full guardianship); VT. GUARDIANSHIP HANDBOOK, *supra* note 9, at 17-20 (explaining alternatives to guardianship); N.H. JUDICIAL BRANCH, *supra* note 9 (explaining reasoning for denying guardianship if less restrictive alternative exists); see also ME. GUARDIANSHIP GUIDEBOOK, *supra* note 9, at 14-22 (describing appropriate use of alternatives over guardianship appointment through narratives of individuals).

41. See Salzman, *supra* note 10, at 171-72 (noting current focus on narrowly tailored guardianships based on individual’s functional abilities); McEvoy, *supra* note 40 (observing amendments to Connecticut guardianship law reflects “person-centered” approach). However, in many states with limited-guardianship statutes, courts rarely limit the guardian’s authority. See Salzman, *supra* note 10, at 174. Limited guardianship presents certain challenges to the judge; once a person is proved to be mentally incapacitated, it may be difficult for the judge to parse the specific areas over which the person should retain control. See *id.* In addition, limited guardianships pose procedural problems; a guardian may be required to petition the court multiple times for clarification of authority or an expansion of guardianship as the ward’s mental capacity continues to degrade. See *id.* at 174-75.

42. See GAO REPORT, *supra* note 9, at 1 (quoting Census Bureau data estimates); UEKERT, *supra* note 10, at 4 (noting demand for adult guardianships increasing in high percentage of jurisdictions); WOOD, *supra* note 14, at 5 (supplying information regarding demographic trends expected to boost number of guardianship cases in future years). As of 2005, approximately 16.1 million people over the age of fifteen had some type of reported mental, cognitive, or emotional disability; many of these individuals are likely candidates for guardianship. See Salzman, *supra* note 10, at 166 n.24.

43. See GAO REPORT, *supra* note 9, at 8 (cautioning about existing abuse in guardianship system); R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 9 (acknowledging possibility of hardship if inappropriate or uncaring guardian appointed).

44. See GAO REPORT, *supra* note 9, at 8 (asserting oversight of guardians intended to prevent abuse by those designated to protect incapacitated people); Salzman, *supra* note 10, at 179 (articulating state’s desire to prevent exploitation of vulnerable individuals); see also *infra* note 97 and accompanying text (citing cases where guardianship petitions denied for individuals with some mental incapacity).

exploitation, or forced medical treatment against the wishes of the ward.⁴⁵

In an effort to prevent such abuse, states impose restrictions on who may be appointed guardian of a proposed ward.⁴⁶ The law often prohibits those who may seek to profit from a guardianship appointment or physically harm the ward from pursuing appointment as a guardian.⁴⁷ In addition, some courts utilize volunteers or court appointees to provide independent evaluations of the proposed ward.⁴⁸ Furthermore, allegedly incapacitated individuals are usually entitled to be present at guardianship hearings.⁴⁹ Many states also give the alleged incapacitated person the right to be represented by counsel; Connecticut, Maine, and New Hampshire expressly grant this right to proposed wards.⁵⁰

To mitigate the risk of abuse after the appointment of a guardian, state laws require monitoring and oversight of the guardianship relationship.⁵¹ Guardians in every New England state are required to submit reports at least annually

45. See R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 9-10 (acknowledging abuse by guardians may cause hardship to ward); see also GAO REPORT, *supra* note 9, at 8-9 (providing examples of abuse by guardians).

46. See ME. REV. STAT. tit. 18-A, § 5-311 (1998) (noting suitable guardianship appointments subject to court's determination of ward's best interests); N.H. REV. STAT. ANN. § 464-A:10 (2004 & Supp. 2011) (setting forth those eligible for guardianship appointment); R.I. GEN. LAWS § 33-15-6 (2011) (listing qualifications for appointment); VT. STAT. ANN. tit. 14, §§ 3067(d), 3072 (2010) (restricting who may serve as guardian and providing other requirements); *General MUPC Article V Procedural Outline for Guardianship of an Incapacitated Person, Conservatorship of a Protected Person*, MASS. PROBATE & FAMILY COURT DEP'T, <http://www.mass.gov/courts/courtsandjudges/courts/probateandfamilycourt/mupc-article-v-procedural-outline.pdf>, at 24 (July 8, 2009) [hereinafter MASS. PROBATE & FAMILY COURT] (disallowing appointment of prospective guardian charged with causing physical injury or neglecting ward).

47. See ME. REV. STAT. tit. 18-A, § 5-311(c); R.I. GEN. LAWS § 33-15-6(b)(1); VT. STAT. ANN. tit. 14, §§ 3072(2)-(3); cf. N.H. REV. STAT. ANN. § 464-A:10.

48. See ME. REV. STAT. tit. 18-A, § 5-303(c); GAO REPORT, *supra* note 9, at 20 (describing court appointed "visitors" who assess ward's functional capacity through home visits); *infra* note 54 and accompanying text (describing Rockingham County Probate Court's program in which volunteers visit wards).

49. See ME. REV. STAT. tit. 18-A, § 5-303(c); N.H. REV. STAT. ANN. § 464-A:6; R.I. GEN. LAWS § 33-15-5(1); GAO REPORT, *supra* note 9, at 6 (observing proposed wards generally have right to attend guardianship proceedings).

50. See CONN. GEN. STAT. ANN. § 45a-649a(a) (West 2007 & Supp. 2011); ME. REV. STAT. tit. 18-A, § 5-303(b); N.H. REV. STAT. ANN. § 464-A:6; GAO REPORT, *supra* note 9, at 6 (indicating proposed ward generally has right to counsel). The alleged ward has the right to expect the attorney to advocate on his or her behalf by showing, if possible, that no substantial harm will result from the claimed mental incapacity and therefore a guardian need not be appointed. See N.H. JUDICIAL BRANCH, *supra* note 9.

51. See GAO REPORT, *supra* note 9, at 2; Salzman, *supra* note 10, at 173. Although every New England state has a statute providing for state or local court oversight of guardianship appointments, information regarding guardianships is generally not centrally compiled; in fact, Vermont has no case history publicly available regarding guardianship proceedings of adults incapacitated by mental illness. See GAO REPORT, *supra* note 9, at 9; UEKERT, *supra* note 10, at 5; WOOD, *supra* note 14, at 7. Furthermore, many state courts do not maintain information needed for effective monitoring and oversight of guardianships. See GAO REPORT, *supra* note 9, at 9; UEKERT, *supra* note 10, at 4 (concluding quality data on "adult guardianship filings and caseloads generally lacking"). An excellent example of an effective monitoring system is in Rockingham County, New Hampshire, which utilizes a computerized case-management system to monitor guardianships; the system automatically notifies court staff when reports are due for each guardianship case. See GAO REPORT, *supra* note 9, at 18.

detailing the decisions made for the ward during the previous year.⁵² These annual reports must also include an updated evaluation of the ward's mental capacity and an accounting of the ward's finances.⁵³ In New Hampshire, the Rockingham County Probate Court recruits volunteers to visit wards, guardians, and care providers at least annually and to submit reports to court officials regarding these visits.⁵⁴ Connecticut requires hearings at least every three years to determine whether changes need to be made to the guardianship appointment.⁵⁵ In every New England state, the ward may also petition the court for modification or termination of the guardianship order.⁵⁶

C. Guardianship Proceedings: Types of Guardianship and the Guardianship Process

I. Types of Guardianship

There are two conventional types of guardianship: guardianship over the person and guardianship over the estate, also known as conservatorship.⁵⁷ Guardianship over the person gives the guardian authority over the ward's daily

52. See N.H. REV. STAT. ANN. § 464-A:36 (2004 & Supp. 2011); VT. STAT. ANN. tit. 14, § 3076(b)(1) (2010); GAO REPORT, *supra* note 9, at 2-3; MASS. PROBATE & FAMILY COURT, *supra* note 46, at 27-28; VT. GUARDIANSHIP HANDBOOK, *supra* note 9, at 15-16.

53. See N.H. REV. STAT. ANN. § 464-A:35; VT. STAT. ANN. tit. 14, § 3076(b)(2); VT. GUARDIANSHIP HANDBOOK, *supra* note 9, at 15. Some basic elements included in the annual report are the ward's living conditions, place of residence, and the number of guardian visits. See GAO REPORT, *supra* note 9, at 9-10.

54. See GAO REPORT, *supra* note 9, at 3 (detailing "exemplary" court program in Rockingham County). Rockingham County Probate Court goes "well beyond the minimum state requirements for guardianship training and oversight." *Id.* at 16. The court also provides training and informational resources for guardians, including information packets and checklists available at the court and online, instructive videos explaining guardianship, and informal information sessions with a probate judge. *Id.* at 18. The court dedicates extra resources to enforcement activities. *Id.* (noting court actively oversees guardianships and penalizes guardians who fail to fulfill their responsibilities). Rockingham County's computerized case-management system prints a notice to newly appointed guardians requiring an inventory of the incapacitated person's assets to be submitted to the court within ninety days. *Id.* If the inventory is not received on time, the system notifies the court to prepare an inventory default notice. *Id.* The computer system "also tracks the number of new guardianship cases and the total number of active cases." *Id.* Furthermore, the court recruits volunteers from AARP to serve as either visitors or researchers. *Id.* at 20. Researchers compile parties' contact information, case background, and the most recent annual report into a file for review by the court. *Id.* "The visitors then contact the guardian and arrange to visit the incapacitated person," during which "they assess the ward's living situation, finances, health, and social activities, and recommend follow-up actions to the court." *Id.*

55. See CONN. GEN. STAT. ANN. § 45a-660(c); GAO REPORT, *supra* note 9, at 12 (describing requirements of periodic guardianship assessment under Connecticut law).

56. See CONN. GEN. STAT. ANN. § 45a-660 (West 2007 & Supp. 2011); ME. REV. STAT. tit. 18-A, § 5-307 (1998); MASS. GEN. LAWS ANN. ch. 190B, §§ 5-306(c), 5-311 (West Supp. 2011); N.H. REV. STAT. ANN. § 464-A:39(III); VT. STAT. ANN. tit. 14, § 3077(a); MASS. PROBATE & FAMILY COURT, *supra* note 46, at 31 (outlining requirements for post-petition actions, including petition to terminate guardian); McEvoy, *supra* note 40 (asserting Connecticut law allows individual to file writ of habeas corpus at any time); R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 20 (explaining guardian can be removed if ward demonstrates capacity to make decisions).

57. See GAO REPORT, *supra* note 9, at 8.

life; the ward may lose basic rights, including “the right to vote, sign contracts, buy or sell real estate, marry or divorce, or make decisions about medical procedures.”⁵⁸ Conservatorship gives the guardian complete control over the ward’s finances without impacting nonfinancial aspects of the ward’s life.⁵⁹ Traditionally, judges granted guardians and conservators either full authority or none at all.⁶⁰ Today, due to the limited-guardianship statutes in effect, a judge may limit a guardian’s authority over the ward to those areas in which the ward’s incapacity is proved.⁶¹ However, the guardian may still be granted broad authority to oversee the ward’s personal welfare, his or her financial well-being, or both.⁶² Maine and Rhode Island allow courts to limit a guardian’s authority, but may still grant full guardianship.⁶³ Connecticut, Massachusetts, New Hampshire, and Vermont permit judges to grant only limited guardianship.⁶⁴ However, every New England state allows the

58. *Id.* at 5; *see also* CONN. GEN. STAT. ANN. § 45a-656 (outlining duties of conservator over person); UEKERT, *supra* note 10, at 6; Salzman, *supra* note 10, at 167. The right to vote is retained by wards in some states, including Maine. *See* ME. GUARDIANSHIP GUIDEBOOK, *supra* note 9, at 22.

59. *See* CONN. GEN. STAT. ANN. § 45a-644(a); GAO REPORT, *supra* note 9, at 8; *see also* CONN. GEN. STAT. ANN. § 45a-655 (detailing duties of conservator of estate); N.H. REV. STAT. ANN. § 464-A:28 (2004 & Supp. 2011) (requiring guardian to take oath and file certificate before selling any of ward’s property).

60. *See* McEvoy, *supra* note 40 (noting plenary guardianship and conservatorship approach prevalent before statutory reforms).

61. *See* ME. REV. STAT. tit. 18-A, § 5-312 (outlining general power and duties of guardians); *infra* notes 63-64 and accompanying text (listing states allowing full or only limited-guardianship appointment). Limited guardianship effectively eliminates the differentiation between guardianship over the person and guardianship over the estate, leading Rhode Island to eliminate the distinction entirely. *See* R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 6. Maintaining a distinction between the two traditional types of guardianship may result in conflicts if the guardian and conservator are not the same person; in Connecticut, the court resolves such conflicts. *See* CONN. GEN. STAT. ANN. § 45a-657; *see also supra* note 38 (noting, in New England, only Connecticut and Massachusetts differentiate between guardianship over person and estate).

62. *See* N.H. REV. STAT. ANN. §§ 464-A:25, :26 (defining general powers of guardian of person and guardian of estate); GAO REPORT, *supra* note 9, at 5 (describing general authority of guardians); *see also* CONN. GEN. STAT. ANN. § 45a-649 (West 2007 & Supp. 2011) (describing appointment of limited guardian and notice to proposed ward); ME. GUARDIANSHIP GUIDEBOOK, *supra* note 9, at 10 (stating limited guardianships not always offered as option by court); R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 8 (listing decision-making areas to which guardian’s authority may extend); VT. GUARDIANSHIP HANDBOOK, *supra* note 9, at 6-14 (detailing several types of decision-making authority granted to guardians). Although guardianship petitions are filed by concerned parties, usually a family member, these proceedings should not be entered into lightly, and in fact may fracture familial relationships. *See In re Guardianship of K-M*, 866 A.2d 106, 117 (Me. 2005) (explaining petitioner’s evidence as disagreement over necessity of guardian and acknowledging animosity toward sister); ME. GUARDIANSHIP GUIDEBOOK, *supra* note 9, at 5; UEKERT, *supra* note 10, at 6.

63. *See* R.I. GEN. LAWS § 33-15-2 (2011); ME. GUARDIANSHIP GUIDEBOOK, *supra* note 9, at 5. Despite full guardianship being an option of last resort, most guardians in Maine are granted full guardianship. *See* ME. GUARDIANSHIP GUIDEBOOK, *supra* note 9, at 6; *see also supra* note 41 (stating full guardianship granted often though limited guardianship available).

64. *See* MASS. GEN. LAWS ANN. ch. 190B, § 5-306 (West Supp. 2011); N.H. REV. STAT. ANN. § 464-A:1; VT. STAT. ANN. tit. 14, § 3060 (2010); Salzman, *supra* note 10, at 173-74 (describing mandatory limited guardianships as important change in law); McEvoy, *supra* note 40 (stating Connecticut law requires limited-guardianship appointment); *cf.* N.H. REV. STAT. ANN. §§ 465:1 to :14 (2004 & Supp. 2011) (providing separate laws for guardianship of incompetent veterans). Although limited-guardianship laws effectively eliminate the need to distinguish between guardianship and conservatorship, courts in Connecticut and Massachusetts may

appointment of temporary guardians in emergency situations or to protect the ward from imminent harm.⁶⁵

The majority of guardianships are granted to a member of the ward's family, but a professional or public guardian may be employed instead.⁶⁶ Courts typically prefer to appoint a family member to act as guardian over an incapacitated relative.⁶⁷ A public guardian is appointed when no private individual is able or willing to accept guardianship of a proposed ward.⁶⁸ Many states also have departments or agencies designated to deal with guardianship issues, such as the Office of Public Guardian in Vermont and the Commissioner of Social Services in Connecticut.⁶⁹ In addition to providing public guardians, such agencies offer support to proposed wards as well as those considering or pursuing guardianship.⁷⁰

Once guardianship is granted, the ward loses the legal ability to make decisions in the areas prescribed by the guardianship order.⁷¹ Guardians are obligated to make decisions based on the best interests of the ward and have a duty to consider the ward's wishes.⁷² The ward, or a person interested in the ward's welfare, may appeal the guardianship order to request modification of the terms, removal of a particular guardian, or removal of the guardianship

also grant limited conservatorships, as statutory language regarding conservatorships is still in effect. *See supra* notes 38, 61 (noting Rhode Island eliminated distinction between guardianship and conservatorship entirely after enacting limited-guardianship law).

65. *See* CONN. GEN. STAT. ANN. § 45a-654; ME. REV. STAT. tit. 18-A, § 5-310-A (1998); MASS. GEN. LAWS ANN. ch. 190B, § 5-308; N.H. REV. STAT. ANN. § 464-A:12 (2004 & Supp. 2011); R.I. GEN. LAWS § 33-15-8.1; *see also In re Cyr*, 873 A.2d 355, 361 (Me. 2005) (detailing requirements for appointment of temporary guardian by *ex parte* order); MASS. PROBATE & FAMILY COURT, *supra* note 46, at 15 (providing detailed procedure for appointment of temporary guardian); VT. GUARDIANSHIP HANDBOOK, *supra* note 9, at 3-4 (explaining circumstances permitting temporary guardianship proceedings in Vermont).

66. *See* GAO REPORT, *supra* note 9, at 6; R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 7; UEKERT, *supra* note 10, at 4. In 2007, there were approximately 5360 persons under guardianship in New Hampshire; of those wards, 1340 had public guardians, and the other 4020 had either a family member or attorney serving as guardian. *See* N.H. JUDICIAL BRANCH, *supra* note 9.

67. *See* UEKERT, *supra* note 10, at 5-6.

68. *See* CONN. GEN. STAT. ANN. § 45a-651 (West 2007 & Supp. 2011); ME. REV. STAT. tit. 18-A, § 5-601; N.H. JUDICIAL BRANCH, *supra* note 9; *see also* R.I. GEN. LAWS § 33-15-4.1 (qualifying some petitioners as good Samaritan guardians when in ward's best interests).

69. *See* CONN. GEN. STAT. ANN. § 45a-651; VT. STAT. ANN. tit. 14, § 3091.

70. *See* VT. STAT. ANN. tit. 14, § 3096 (2010) (describing assistance offered by Vermont Office of Public Guardian).

71. *See* ME. GUARDIANSHIP GUIDEBOOK, *supra* note 9, at 7; *see also* *State v. Tarcha*, 207 A.2d 72, 74 (Conn. 1964) (stating ward deprived of all power over estate once guardian appointed); VT. GUARDIANSHIP HANDBOOK, *supra* note 9, at 4-16 (describing powers and responsibilities of guardians); *supra* note 11 and accompanying text (analogizing guardian-ward relationship to parent-child relationship). Guardians appointed in Massachusetts have an express duty to protect and preserve the ward's right to freedom of religion and religious practice. *See* MASS. GEN. LAWS ANN. ch. 190B, § 5-313 (West Supp. 2011).

72. *See* N.H. JUDICIAL BRANCH, *supra* note 9; R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 8; VT. GUARDIANSHIP HANDBOOK, *supra* note 9, at 7; McEvoy, *supra* note 40; *see also* *Doe v. Doe*, 385 N.E.2d 995, 1000 (Mass. 1979) (stressing guardian should consult opinion of ward regarding admission to mental-health facility).

order entirely.⁷³ A guardian may be removed when the guardian wishes to resign, is unable or unwilling to continue to fulfill guardianship responsibilities, or if the ward can demonstrate a regained decision-making capacity.⁷⁴

2. Adjudication Proceedings and Procedures

To begin guardianship proceedings, an interested party must file a petition with the probate court requesting guardianship over an individual.⁷⁵ Petitioners are required to notify the proposed ward upon the filing of the guardianship petition.⁷⁶ Petitions must include evidence to substantiate all allegations of incapacity.⁷⁷ This evidence usually includes a medical or psychiatric evaluation, but may also include third-party testimony.⁷⁸ The judge determines whether the individual is incapacitated, and thus in need of a guardian, or whether the individual has sufficient mental capacity, in which case the petition is dismissed.⁷⁹

73. See R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 19; UEKERT, *supra* note 10, at 6; *supra* note 56 (providing statutes or publications in each New England state regarding petitions for termination or modification); *infra* note 74 (citing statutes permitting termination petitions from any person interested in ward's welfare). An "interested person" is defined under Vermont law as "a responsible adult who has a direct interest in a person in need of guardianship," including "the person in need of guardianship, a near relative, a close friend, a guardian, public official, social worker, physician, agent named in an advance directive or in a power of attorney, person nominated as guardian in an advance directive, or member of the clergy." VT. STAT. ANN. tit. 14, § 3061(5). New Hampshire provides a broader definition of "interested person," including "any adult who has an interest in the welfare" of the allegedly incapacitated person. See N.H. REV. STAT. ANN. § 464-A:2(XIII) (2004 & Supp. 2011).

74. See CONN. GEN. STAT. ANN. § 45a-660(a) (West 2007 & Supp. 2011); ME. REV. STAT. tit. 18-A, § 5-307 (1998); MASS. GEN. LAWS ANN. ch. 190B, § 5-311; N.H. REV. STAT. ANN. § 464-A:39; R.I. GEN. LAWS § 33-15-18 (2011); VT. STAT. ANN. tit. 14, § 3077; see also R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 20 (setting forth circumstances when removal of guardian proper).

75. See CONN. GEN. STAT. ANN. § 45a-648; ME. REV. STAT. tit. 18-A, § 5-303(a); MASS. GEN. LAWS ANN. ch. 190B, § 5-404(a); N.H. REV. STAT. ANN. § 464-A:4(I); R.I. GEN. LAWS § 33-15-2; VT. STAT. ANN. tit. 14, § 3063; GAO REPORT, *supra* note 9, at 6 (describing requirements to initiate proceedings); *supra* note 73 (citing Vermont's and New Hampshire's definitions of "interested party" in guardianship context).

76. See CONN. GEN. STAT. ANN. § 45a-649(b); R.I. GEN. LAWS § 33-15-47; VT. STAT. ANN. tit. 14, § 3064 (2010); see also GAO REPORT, *supra* note 9, at 6. Connecticut requires certain other interested parties be notified of the guardianship petition's filing in addition to notifying the proposed ward. See CONN. GEN. STAT. ANN. § 45a-649(a)(3). New Hampshire requires annual notification sent to wards regarding the right to seek alteration or termination of the guardianship at any time. See N.H. REV. STAT. ANN. § 464-A:38.

77. See CONN. GEN. STAT. ANN. §§ 45a-648(a), -650(c); ME. REV. STAT. tit. 18-A, § 5-303(a); MASS. GEN. LAWS ANN. ch. 190B, § 5-404 (West Supp. 2011); N.H. REV. STAT. ANN. § 464-A:4(II)-(III); R.I. GEN. LAWS § 33-15-2(2); VT. STAT. ANN. tit. 14, § 3063; see also *In re DeLuca*, 426 A.2d 32, 33 (N.H. 1981) (discussing evidentiary requirement for guardianship petitions); N.H. JUDICIAL BRANCH, *supra* note 9 (noting petitioner must provide specific examples of proposed ward's alleged incapacity).

78. See MASS. PROBATE & FAMILY COURT, *supra* note 46, at 5, 21; N.H. JUDICIAL BRANCH, *supra* note 9; VT. GUARDIANSHIP HANDBOOK, *supra* note 9, at 1.

79. See Salzman, *supra* note 10, at 242. Courts with jurisdiction over guardianship matters often handle several other kinds of cases as well. See GAO REPORT, *supra* note 9, at 16. In each state, no more than twenty percent of judges who hear guardianship cases spend the majority of their time on them. *Id.* Judges who spend little time hearing guardianship cases usually focus on each case as it appears in the docket and often "find it difficult to devote the time and resources needed to develop an effective guardianship program." *Id.*

Rhode Island is the only New England state providing a statutory form for guardianship petitions and requiring submission of a statutory-assessment form, known as the Decision-Making Assessment Tool (DMAT).⁸⁰ Both the petition and DMAT describe the functional areas most commonly considered by the court in guardianship proceedings.⁸¹ The petitioner may allege that the proposed ward “lacks decision-making ability” in the areas of healthcare, financial matters, residence, or association.⁸² However, the judge is not limited to considering these functional areas; the petition and DMAT allow the inclusion of other areas in which the proposed ward may be impaired.⁸³ In addition, the petition provides a list of alternatives to guardianship from which the petitioner must designate those that were explored and describe why those alternatives were “deemed inappropriate.”⁸⁴ The petition also includes a section vetting the proposed guardian to ensure appointment of appropriate candidates.⁸⁵ Proposed wards are notified of their rights regarding the guardianship proceedings and are given a short description of what happens if the guardianship petition is granted.⁸⁶ The DMAT provides clinicians assessing the proposed ward with a guide for evaluating functional abilities in terms of psychological and social well-being, in addition to a physical examination.⁸⁷

In every New England state, after a petition is filed, a probate judge evaluates the capacity of the proposed ward based on the standard of proof in

80. R.I. GEN. LAWS § 33-15-2 (2011) (requiring support for petitioner’s allegations in DMAT); *see also* R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 15 (mandating petitioner file DMAT completed by ward’s primary care physician or comparable clinician). The statute setting forth the DMAT also includes a format for the petition itself, annual reports, and reports of the guardian ad litem. *See* R.I. GEN. LAWS § 33-15-47; *infra* apps. A-D.

81. *See* R.I. GEN. LAWS § 33-15-47 (requiring description of specific assistance needed because proposed ward lacks decision-making ability); *see also infra* apps. A-B.

82. R.I. GEN. LAWS § 33-15-47; *see also infra* app. A.

83. *See* R.I. GEN. LAWS § 33-15-47 (providing section for “other” areas of concern); *see also infra* apps. A-B.

84. *See* R.I. GEN. LAWS § 33-15-47 (including, *inter alia*, legal documents, such as trusts and powers of attorney, social service programs); *see also infra* app. A.

85. *See* R.I. GEN. LAWS § 33-15-47 (evaluating potential conflicts of interest, criminal background, and ability to fulfill guardianship responsibilities); *see also infra* app. A.

86. *See* R.I. GEN. LAWS § 33-15-47 (2011) (requiring this notification as part of petition served upon proposed ward); *see also infra* app. A.

87. *See* R.I. GEN. LAWS § 33-15-47 (providing scale of functional ability for each functional area assessed); *see also infra* app. B. Both physicians and nonphysician clinicians are permitted to complete the assessment portion of the DMAT. *See* R.I. GEN. LAWS § 33-15-47. The clinician lists not only any diagnosis or medication of the proposed ward, but also his current nutritional status. *See id.* The psychological assessment includes an evaluation of memory, attention, judgment, language, and possible mental illness. *See id.* The clinician assesses the proposed ward’s social abilities in terms of mobility, self-care, presence of supportive relationships, general social skills, and asks whether the proposed ward would be willing to accept assistance if needed. *See id.* After evaluating the proposed ward in these functional areas, the clinician gives a bottom-line judgment of whether the individual needs a substitute decision-maker. *See id.*

that jurisdiction.⁸⁸ In Connecticut, Maine, Rhode Island, and Vermont, incapacity of the proposed ward must be proved by clear and convincing evidence.⁸⁹ In New Hampshire, incapacity must be proved beyond a reasonable doubt.⁹⁰ Massachusetts is the only state requiring the lowest evidentiary standard: preponderance of the evidence.⁹¹

In most jurisdictions, findings of fact supporting guardianship appointment are overturned only for clear error.⁹² Appeals of a guardianship order are usually heard *de novo*.⁹³ However, Connecticut did away with its historical *de novo* review in 2007 and now limits review of guardianship orders to the record created at the probate-court level; the appeals court must affirm the decision of the probate court unless it finds specific circumstances, such as legal error, to have occurred or if the decision was contrary to the evidence presented.⁹⁴

D. Factors Indicating Mental Incapacity: What May Be Beyond the Realm of Normalcy?

In the legal-guardianship context, incapacity generally refers to an individual who has or “is likely to suffer substantial harm due to an inability to provide for his personal needs for food, clothing, shelter, health care or safety.”⁹⁵

88. See *infra* notes 89-90 and accompanying text (stating standards of evidence required in New England states). There is no explicit statutory standard of evidence specific to guardianship proceedings in Massachusetts. See *infra* note 91.

89. See CONN. GEN. STAT. ANN. § 45a-650(a) (West 2007 & Supp. 2011); ME. REV. STAT. tit. 18-A, § 5-304(b) (1998); R.I. GEN. LAWS § 33-15-5; VT. STAT. ANN. tit. 14, § 3068(f) (2010).

90. N.H. REV. STAT. ANN. § 464-A:9(III) (2004); see also N.H. JUDICIAL BRANCH, *supra* note 9.

91. MASS. GEN. LAWS ANN. ch. 190B, § 1-109 (West Supp. 2011).

92. See *In re Appeal of Cleveland*, 44 A. 476, 476 (Conn. 1899) (requiring error of law to overturn findings of lower court); *In re Guardianship of Collier*, 653 A.2d 898, 900 (Me. 1995) (holding factual findings reviewed for clear error); *In re Guardianship of Jackson*, 814 N.E.2d 393, 395 (Mass. App. Ct. 2004) (refusing to set aside findings of fact unless clearly erroneous); *In re Guardianship of Peter R.*, 992 A.2d 541, 542 (N.H. 2009) (declaring findings of fact final unless plainly erroneous).

93. See *In re Guardianship of K-M*, 866 A.2d 106, 112 (Me. 2005) (discussing when court employs *de novo* review); *Willett v. Willett*, 130 N.E.2d 582, 583 (Mass. 1955) (noting appeal opens up all questions of law, fact, and discretion for examination); R.I. GUARDIANSHIP HANDBOOK, *supra* note 9, at 20 (stating appeals heard *de novo* in guardianship cases); see also McEvoy, *supra* note 40 (observing appeals of guardianship orders historically entailed *de novo* review).

94. See McEvoy, *supra* note 40 (describing review process for guardianship appeals in Connecticut after 2007 statutory amendments).

95. See *In re Guardianship of Peter R.*, 992 A.2d at 542 (defining legal incapacity required for guardianship appointment). Connecticut law defines legal incapacity to care for one’s self to mean that a person has a “mental, emotional or physical condition that results in [the] person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to meet essential requirements for personal needs.” CONN. GEN. STAT. ANN. § 45a-644(c) (West 2007 & Supp. 2011). Connecticut law defines the legal incapacity to manage financial affairs similarly such that “the person has property that will be wasted or dissipated unless adequate property management is provided.” *Id.* § 45a-644(d). New Hampshire measures legal incapacity by the proposed ward’s functional limitations likely to result in substantial harm. N.H. REV. STAT. ANN. § 464-A:2(XI); see also N.H. JUDICIAL BRANCH, *supra* note 9 (describing inability to provide for basic needs). Vermont similarly defines legal incapacity as a condition resulting in the inability to manage personal care or financial affairs.

However, only the Connecticut guardianship statute provides specific factors for judges to consider when evaluating guardianship petitions; judges in the other New England states consider many factors, though they are not enumerated in statutory law.⁹⁶

Complete incapacity is not required before a guardian may be appointed.⁹⁷ The court customarily evaluates the medical condition of the proposed ward by considering the individual's medical history, any diagnosis of mental illness, and a psychological evaluation.⁹⁸ The mental state of the proposed ward is evaluated by reviewing the behavior of the individual based on reports by third parties, testimony of the petitioner, and, often, testimony of the ward as well.⁹⁹

VT. STAT. ANN. tit. 14, § 3061 (2010). Massachusetts provides a very precise definition of incapacitation, including only individuals with "a clinically diagnosed condition that results in an inability to receive and evaluate information or make or communicate decisions to such an extent" that he or she cannot meet "requirements for physical health, safety, or self-care, even with appropriate technological assistance." MASS. GEN. LAWS ANN. ch. 190B, § 5-101(9). Maine's definition of an incapacitated person is less specific, including individuals impaired by mental illness to "the extent that he [or she] lacks sufficient understanding or capacity to make or communicate responsible decisions." ME. REV. STAT. tit. 18-A, § 5-101(1) (1998) (leaving open for interpretation meanings of sufficient understanding and responsible decisions). While Rhode Island does not expressly define incapacity, it allows appointment of a guardian only in those areas where the court finds that the individual lacks the capacity to make decisions. *See* R.I. GEN. LAWS § 33-15-4(a) (2011).

96. *Compare* CONN. GEN. STAT. ANN. § 45a-650(g) (providing list of specific factors for judge's consideration), *with* ME. REV. STAT. tit. 18-A, § 5-304, MASS. GEN. LAWS ANN. ch. 190B, § 5-306(6), N.H. REV. STAT. ANN. § 464-A:9(I) (2004 & Supp. 2011), R.I. GEN. LAWS § 33-15-4, *and* VT. STAT. ANN. tit. 14, § 3068. Connecticut requires the court to consider the following factors: the individual's abilities; the individual's capacity to understand and articulate an informed preference about his or her care and affairs; any relevant and material information obtained from the individual; evidence of the individual's past preferences and lifestyle choices; the individual's cultural background; the desirability of maintaining continuity in the individual's life and environment; whether the individual had previously made adequate alternative arrangements for the his or her personal welfare and financial affairs; any relevant and material evidence provided by an interested party; and whether any suitable alternatives to guardianship exist. CONN. GEN. STAT. ANN. § 45a-650(g).

97. *See* *State v. Tarcha*, 207 A.2d 72, 74 (Conn. 1964) (stating capacity to handle small sums of money and purchase necessities does not bar guardianship); *Goddard v. Treat*, 77 A. 959, 960-61 (Conn. 1910) (denying guardianship though proposed ward "somewhat afflicted with senile dementia"); *In re Appeal of Cleveland*, 44 A. at 476-77 (stating individual may retain some capacity for self-care but remain incapable of managing affairs).

98. *See In re Cyr*, 873 A.2d 355, 357 (Me. 2005) (indicating diagnosis of dementia considered in guardianship proceeding); *In re Guardianship of K-M*, 866 A.2d at 110-11 (stating court-ordered psychological evaluation reported proposed ward had significant delusions rendering her incapacitated); *In re Guardianship of Hughes*, 715 A.2d 919, 920-21 (Me. 1998) (describing psychological evaluation indicating delusional disorder interfering with decision-making ability); *In re Guardianship of Collier*, 653 A.2d 898, 900 (Me. 1995) (reviewing history of involuntary hospitalization for mental illness); *Doe v. Doe*, 385 N.E.2d 995, 997 (Mass. 1979) (outlining medical history of depression and diagnosis of schizoid character disorder); *Willett*, 130 N.E.2d at 585 (reviewing results of court ordered psychological evaluation); *In re Guardianship of Jackson*, 814 N.E.2d 393, 396 (Mass. App. Ct. 2004) (detailing prior medical history and court-ordered treatment with antipsychotic medication); *In re Guardianship of Bassett*, 385 N.E.2d 1024, 1026-27 (Mass. App. Ct. 1979) (noting diagnosis of moderate mental retardation and medically evaluated minimal skill level); *In re Guardianship of G.S.*, 953 A.2d 414, 415 (N.H. 2008) (examining prior psychiatric hospitalization and diagnosis of delusional disorder); *In re Guardianship of E.L.*, 911 A.2d 35, 37 (N.H. 2006) (discussing prior court-ordered psychiatric hospitalization and diagnosis of bipolar disorder).

99. *See Goddard*, 77 A. at 960 (indicating proposed ward's testimony "showed much alertness and vigor

In addition, the court considers the living conditions of the individual, including the condition of his or her home and whether the proposed ward is adequately managing his or her financial affairs.¹⁰⁰ Although the court may consider age as a factor in determining mental capacity, guardianship is not granted solely on the basis of age if the individual is otherwise able to care for himself or herself.¹⁰¹ Similarly, guardianship is not granted because of mere poor judgment or eccentricity.¹⁰² Generally, no factor is dispositive; instead, courts look at the evidence cumulatively when determining the legal capacity of the individual.¹⁰³

E. Supported Decision-Making

Professor Leslie Salzman describes supported decision-making as a possible alternative or supplement to existing guardianship laws.¹⁰⁴ An individual participating in supported decision-making “receives support from a trusted individual, network of individuals, or entity to make personal, financial, and legal decisions.”¹⁰⁵ After decisions are made with the designated support person(s), a legal structure gives formal recognition to those decisions.¹⁰⁶

of mind”); *In re Guardianship of K-M*, 866 A.2d 106, 109 (Me. 2005) (considering report by court-ordered visitor indicating proposed ward’s paranoia and passive-aggressive behavior); *In re Guardianship of E.L.*, 911 A.2d at 37 (describing psychiatric hospital’s evaluation of proposed ward’s inappropriate and abusive behavior).

100. See *Goddard*, 77 A. at 960 (stressing proposed ward caring for herself without help and adequately managing finances); *In re Appeal of Cleveland*, 44 A. 476, 476 (Conn. 1899) (stating probate court found ward would squander financial resources if allowed to retain control); *In re Guardianship of K-M*, 866 A.2d at 111 (considering unpaid bills and inability to arrange repairs resulting in home lacking indoor plumbing); *In re Guardianship of Hughes*, 715 A.2d at 921 (describing condition of apartment as so cluttered even toilet barely visible in bathroom).

101. See *Overseers of the Poor of Fairfield v. Gullifer*, 49 Me. 360, 361 (1860) (stating person not incapacitated merely because of old age if adequately caring for self and property).

102. See *Goddard*, 77 A. at 960 (noting family’s concern over marriage to significantly younger man insufficient proof of incapacity); *In re Magro*, 655 A.2d 341, 342 (Me. 1995) (denying petition filed because petitioner unhappy with certain decisions made on behalf of proposed ward); *Pratt v. Court of Probate of Pawtucket*, 48 A. 943, 943 (R.I. 1901) (holding individual’s lack of discretion insufficient to justify guardianship); *Hopkins v. Howard*, 39 A. 519, 520 (R.I. 1898) (stressing poor judgment or eccentricity insufficient to justify guardianship).

103. See, e.g., *Goddard v. Treat*, 77 A. 959, 960 (Conn. 1910) (considering many factors before denying guardianship petition); *In re Guardianship of K-M*, 866 A.2d at 109-11 (evaluating numerous factors in guardianship proceeding); *In re Guardianship of Hughes*, 715 A.2d at 921 (detailing many factors considered by court in guardianship proceeding).

104. See Salzman, *supra* note 10, at 240 (describing supported decision-making as requiring additional research before implementation in United States).

105. See *id.* at 232 (noting third-parties must follow decisions made under this paradigm).

106. See *id.* at 233-34 (outlining range of supported decision-making models developed outside United States). Some supported decision-making models “provide for decision-making outside of a guardianship structure.” *Id.* at 234. Existing models differ in who can serve in a support capacity, the level of “capability” required to appoint one’s own support person or to qualify for a decision assistant, and when the support person can make decisions without the individual’s consent. *Id.* Other types of supported decision-making programs are being developed and tested, and current models continue to evolve. *Id.*

Salzman describes in detail two basic types of supported decision-making models: the legal “mentor” or “friend” model employed in Sweden, and the “Canadian” model.¹⁰⁷

In the legal-mentor or legal-friend model, the court appoints a support person to assist an individual adjudicated incapable of managing his or her affairs.¹⁰⁸ Under this approach, the support person serves as an intermediary between allowing the individual to have absolute autonomy and requiring the individual to surrender decision-making authority to a legal guardian.¹⁰⁹ The support person is generally only appointed to act on the individual’s behalf with the individual’s consent.¹¹⁰ Depending on the court order, the appointed support person may, however, have significant discretion to make decisions for the individual, with or without his or her consent.¹¹¹

Under the Canadian model, individuals employ private contracts, called “representation agreements,” authorizing others to assist with decision-making.¹¹² Canadian law permits an individual to enter into a representation agreement even if he or she does not have the legal capacity to contract generally.¹¹³ Importantly, entering into a representation agreement does not force the individual to “compromise any existing legal capacity.”¹¹⁴ The contract may grant authority as broadly as the parties wish, and may include provisions describing the individual’s preferences, which must be used as a

107. *See id.* at 235-239 (discussing various decision-making models); *see also id.* at 239 n.257 (providing details of Yukon Decision-Making Support Act and noting Act worthy of further study).

108. *See* Salzman, *supra* note 10, at 235 (asserting goal of mentorship to preserve personal autonomy to greatest extent possible); Maths Jespersen, *PO-Skåne-Personal Ombudspersons in Skåne*, www.peoplewho.org/documents/jesperson.decisionmaking.doc (last visited Mar. 29, 2011) (describing current program in Skåne, Sweden).

109. *See* Salzman, *supra* note 10, at 235 (portraying mentor as acting sometimes in “grey zone” between autonomous and substitute decision-making).

110. *See id.* (noting requiring consent preserves great deal of personal autonomy).

111. *See id.* (asserting mentor should involve individual in decision-making process regardless of authority granted).

112. *See id.* at 237 (permitting individual to contract with trusted person or support network for decision-making assistance). This law, known as British Columbia’s Representation Agreement Act (RAA), was enacted in 1966. *See id.* at 229 n.226, 237 (noting enactment and describing scope of RAA). *See generally* Representation Agreement Act, R.S.B.C. 1996, c. 405 (Can.), available at http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/00_96405_01.

113. *See* Salzman, *supra* note 10, at 237 (consenting individual not required to demonstrate “capacity to understand, appreciate consequences, act voluntarily, or communicate decisions”); *see also id.* at 238 n.250 (discussing different levels of capacity required depending on types of decisions covered by representation agreement). Canadian law presumes the individual is capable of entering into a representation agreement unless he is found “incapable of doing so” based on specific criteria. *Id.* at 237-38. The risk of abuse is mitigated in situations where a representative is appointed for financial transactions by requiring that the principal also appoint a trusted individual to monitor the financial representative. *Id.* at 238. In addition, “any person can report irregularities, potential undue influence, or abuse to the Public Guardian and Trustee for investigation.” *Id.*

114. *See id.* (allowing individuals to retain legal capacity when employing representation agreement).

guide by the authorized decision-maker.¹¹⁵ The Canadian model creates a private arrangement between two parties rather than a judicial instrument unilaterally imposed by the court.¹¹⁶

III. ANALYSIS

An inherent tension exists between an individual's right to personal autonomy and the state's interest in protecting vulnerable citizens from harm.¹¹⁷ Courts are generally reluctant to take away fundamental rights, especially in guardianship cases because the possibility for abuse of the guardianship system is a foremost concern.¹¹⁸ Furthermore, the unique nature of each guardianship case would make establishing a bright-line rule for determining capacity ineffective.¹¹⁹ The current system of granting guardianship, however, relies heavily on the discretion of individual judges, thereby creating a system in which decisions are unpredictable and potentially inconsistent.¹²⁰ An accurate evaluation regarding the level of consistency in the disposition of guardianship cases is virtually impossible in New England because most jurisdictions do not aggregate guardianship information.¹²¹

As a nation with a long tradition of honoring the individual's right of personal liberty, the limited-guardianship laws currently in effect are structured to allow an individual to retain control over as many aspects of the individual's life as he or she is functionally able.¹²² While these laws recognize the

115. *See id.* (permitting varying scope of authority and offering individuals opportunity to express wishes and preferences). Safeguards are in place to prevent abuse of this contractual relationship. *See id.* (noting monitoring arrangement and audit requirements for surrogate financial decision-maker).

116. *See id.* at 238-39 (stating decision-maker personally liable for damages resulting from failure to consult with individual).

117. *See supra* note 15 and accompanying text (suggesting difficulty balancing personal autonomy with state's desire to protect personal welfare); *supra* text accompanying notes 28, 37 (portraying personal autonomy and full guardianship as mutually exclusive propositions).

118. *See supra* text accompanying notes 37, 44, 97 (noting minimal mental capacity requirement related to goals of retaining autonomy, mitigating risk of abuse); *see also* Salzman, *supra* note 10, at 178 n.61 (arguing underlying values of personal autonomy and independence trump need for guardianship protection).

119. *See supra* notes 97-102 (excerpting details of several guardianship cases exemplifying unique nature of circumstances); *see also* R.I. GEN. LAWS § 33-15-1 (2011) (recognizing every individual has "unique needs and differing capabilities").

120. *See supra* notes 33-34 and accompanying text (noting judges and courts possess significant discretion in evaluating mental capacity); *supra* note 51 (discussing poor monitoring procedures for guardianship systems in most of New England); *supra* note 79 (pointing to lack of resources dedicated exclusively to guardianship as potential cause of inconsistency).

121. *See* WOOD, *supra* note 14, at 8 (discussing "troubling absence of statistics to evaluate the adult guardianship process" and recent reforms); *supra* note 51 (noting negative impact of failure to centrally compile guardianship information and noting one county's ability to do so). An ABA report evaluating guardianship procedures asserts that "the nation is unable to make informed policy and practice choices without an adequate knowledge base" of current guardianship statistics and trends. *See* WOOD, *supra* note 14, at 8 (depicting absence of statistics as "looking at guardianship 'through a glass, darkly'").

122. *See supra* note 37 and accompanying text (stressing states' goal of preserving each citizen's personal autonomy to greatest extent possible); *supra* text accompanying note 39 (explaining limited-guardianship

complexities of the human psyche, they create uncertainty for potential guardians attempting to discern to what extent an individual must be functionally impaired before the court is willing to appoint a guardian.¹²³ The recent reforms to guardianship laws have not provided a frame of reference to give concerned family or friends a sense of what types of behaviors courts typically consider beyond the realm of normalcy.¹²⁴

A. Recommended Reform to Guardianship Systems: Institute a Basic Statutory Framework for Guardianship Petitions and Functional Assessments

Although individuals are inherently unique, the courts should adopt a basic framework for evaluating mental capacity, with additional factors included on a case-by-case basis.¹²⁵ As state courts routinely analyze certain factors, it would be prudent to enact a statutory framework in order to inform concerned parties of these factors and to have clinical assessments made accordingly.¹²⁶ Because of the fundamental personal-liberty interests at stake in guardianship cases, a rudimentary basis from which to work would benefit all parties by increasing the consistency of the proceedings.¹²⁷ It would be helpful for friends and family to understand where the court begins or focuses its analysis.¹²⁸ A framework would assist judges in analyzing mental capacity and would ensure

statutes restrict authority to specific areas of ward's proven mental incapacity); *see also supra* notes 101-102 and accompanying text (refusing to grant guardianship petitions on sole basis of old age or poor judgment). Many New England states expressly articulate the statutory intent to permit individuals to retain personal autonomy to the greatest extent possible. *See* MASS. GEN. LAWS ANN. ch. 190B, § 5-306 (West Supp. 2011); N.H. REV. STAT. ANN. § 464-A:1 (2004 & Supp. 2011); R.I. GEN. LAWS § 33-15-1; VT. STAT. ANN. tit. 14, § 3060 (2010).

123. *See supra* notes 97, 103 and accompanying text (suggesting unpredictability because no factor dispositive and minimal capacity not bar to guardian appointment); *see also supra* text accompanying notes 33-34 (describing statutory law as springboard from which judges have discretion in case-by-case analysis); *supra* notes 60-61 and accompanying text (tracing authority granted to guardians from formerly absolute to currently limited).

124. *See supra* note 96 and accompanying text (observing New England statutes do not list factors for consideration in guardianship proceedings). *But cf.* R.I. GEN. LAWS § 33-15-47 (providing forms utilizing multiple-choice and fill-in-the-blank structure); *supra* notes 80-85 and accompanying text (expounding on Rhode Island's mandatory statutory-assessment tool for clinicians, available since 1996).

125. *See supra* note 33 and accompanying text (highlighting judges' current discretion to individualize cases as necessary); *see also supra* note 41 and accompanying text (introducing concept of limited guardianships tailored to individual needs).

126. *See supra* notes 95-103 and accompanying text (examining various factors considered in guardianship cases).

127. *See supra* text accompanying note 12 (noting ward's loss of independent decision-making authority in guardianship); *supra* notes 58-59 and accompanying text (detailing rights relinquished by ward upon appointment of guardian or conservator); *supra* note 79 (implying lack of dedicated resources reason for states' inefficient and inconsistent guardianship systems).

128. *See supra* notes 89-90 and accompanying text (detailing differing standards of proof among New England states); *supra* note 95 and accompanying text (noting similar, but not identical, definitions of mental incapacity among New England states); *supra* text accompanying note 96 (highlighting lack of guidance for individual assessment in guardianship statutes); *cf. infra* app. A. (providing petitioner with list of possible areas of mental incapacity).

judges evaluate key factors in all guardianship cases.¹²⁹ Such a framework has the potential to make the analysis of guardianship cases more consistent, while not impairing a judge's authority to look beyond the statutory framework to other functional limitations or issues.¹³⁰

The other New England states should adopt a framework substantially similar to the Rhode Island guardianship petition and DMAT.¹³¹ The Rhode Island DMAT is an effective tool for establishing predictability within the guardianship system because it provides a list of functional areas for the petitioner to consider, a guide for clinical assessment, and a notice to the proposed ward of his or her rights during and after the proceedings.¹³² In addition, the DMAT does not limit a judge's discretion in the factors considered or ultimate disposition of the case; rather, it provides potential guardians with a more comprehensive understanding of how judges analyze mental capacity.¹³³ The importance of establishing a statutory framework, such as in Rhode Island, is to ensure that judges have the same basic information when commencing each guardianship proceeding, thus creating a uniform starting point for assessing an individual's mental capacity, and thereby inevitably creating more consistency in the disposition of guardianship cases.¹³⁴ Furthermore, computerized case-management systems, such as the one in Rockingham County, New Hampshire, should be utilized in every jurisdiction to monitor guardianships.¹³⁵ Guardianship data—including lists of all individuals formerly and currently under guardianship, the functional areas of deficiency, and whether annual reports are up-to-date—should be compiled at the state level to provide an accurate picture of the guardianship system as a whole; such a global perspective would be useful in evaluating the efficacy of

129. See *supra* note 41 (noting potential difficulties setting parameters for limited-guardianship appointment); *supra* note 79 (highlighting difficulty establishing consistent guardianship system because most judges hear relatively few guardianship cases).

130. See *supra* text accompanying notes 81-83 (describing framework used in Rhode Island for analysis of individual's mental capacity).

131. See R.I. GEN. LAWS § 33-15-47 (2011); *supra* text accompanying notes 80-85 (detailing scope of Rhode Island's statute containing forms for guardianship petition and DMAT); see also *infra* apps. A-B. The Rhode Island DMAT provides a fill-in-the-blank type of rubric for petitioners and clinicians to complete while allowing the inclusion of additional information that does not fit into the provided framework. See *infra* apps. A-B.

132. See R.I. GEN. LAWS § 33-15-47 (providing form, guide, and notice); *supra* notes 85-86 and accompanying text (summarizing information included in clinician assessment and notice to proposed ward); see also *infra* apps. A-B (excerpting statutory petition, including notice to proposed ward and DMAT).

133. See R.I. GEN. LAWS § 33-15-47 (illustrating information judges consider when assessing mental capacity); *supra* text accompanying note 83 (noting judge's discretion not limited by DMAT because petitioners may include additional information).

134. See *supra* note 79 (portraying current practice of focusing on individual cases in docket rather than whole guardianship system).

135. See GAO REPORT, *supra* note 9, at 18 (describing computerized case-management system automatically alerting court when monitoring reports due); *supra* note 54 (detailing "exemplary" monitoring program in New Hampshire's Rockingham County Probate Court).

the state's framework and making modifications if necessary.¹³⁶ Improved guardianship data collection would also shed light on any patterns of abuse by guardians and the extent to which guardians protect individuals from abuse.¹³⁷ Consistent guardianship data collection and analysis will only increase in importance in future years, when the number of guardianship appointments is expected to dramatically rise.¹³⁸

*B. Proposed Intermediate Option for Vulnerable Individuals:
Supported Decision-Making*

The current guardianship system should also be modified to add an intermediate option for individuals who may exhibit evidence of some impairment, but not enough to satisfy the burden of proof for guardianship appointment.¹³⁹ A monitoring process or participation in a supported decision-making model should be required after a preponderance of the evidence proves the person is mentally incapacitated in one or more functional areas.¹⁴⁰ There are numerous supported decision-making models that may be employed by the courts.¹⁴¹ The legal-mentor and Canadian models may be effective jumping-off points in the development of a new type of support network for a somewhat incapacitated individual.¹⁴² The state may also choose to create an entirely different intermediate option, such as assigning an officer of the court with whom the individual routinely checks in, or requiring the submission of periodic reports from a clinician to the court over the course of the year following the denial of a guardianship petition.¹⁴³ This form of monitoring would permit the individual to retain personal autonomy while simultaneously allowing the court to be notified if the individual's condition deteriorates to the

136. See *supra* note 51 (distinguishing Rockingham County Probate Court's computerized monitoring system as excellent tool in guardianship system). Expansion of a system similar to the one utilized in Rockingham County to aggregate data statewide would give a more accurate picture of the current guardianship appointments and potentially allow analysis of the consistency of the disposition of cases. See *supra* note 51 (describing difficulty assessing monitoring procedures without data aggregation).

137. See WOOD, *supra* note 14, at 8 (concluding statewide data provides baseline information allowing identification of barriers and development of consistent statistics).

138. See *id.* at 10 (citing U.S. Census Bureau data and relating it to expected increase in mental illness); *supra* note 42 and accompanying text (noting demographic trends expected to sharply boost number of guardianship appointments).

139. Cf. notes 95-98 and accompanying text (indicating possible inconsistencies in guardianship proceedings).

140. Cf. *supra* text accompanying note 79 (depicting black-and-white approach to guardianship, either appointing guardian or denying petition altogether).

141. See *supra* note 106 (noting continued development and evolution of supported decision-making models).

142. See *supra* notes 104-116 and accompanying text (examining models currently used in Sweden and Canada on selective basis by individuals).

143. Cf. *supra* note 106 and accompanying text (requiring legal recognition of decisions made under supported decision-making models rather than mere monitoring).

point at which he or she needs to surrender some or all decision-making authority.¹⁴⁴

IV. CONCLUSION

There is no clearly defined line between mental capacity and incapacity due to mental illness. In the tug-of-war between personal autonomy and welfare, great deference is given to personal autonomy; individuals are allowed to retain control over their own affairs to the greatest extent possible. Enacting a statutory framework for use by petitioners, clinicians, and judges would not interfere with this deferential policy and, in fact, would likely result in a more effective guardianship system. A computerized case-management system would also be beneficial in this regard. Furthermore, instituting a supported decision-making model may be helpful to prevent probable, but not definite, imminent self-harm by vulnerable individuals. With the recent statutory reforms in New England and the population of individuals in need of guardians expected to rise dramatically in the future, now is the ideal time to modify the guardianship system to ensure that our most vulnerable citizens are safe from harm.

Meta S. David

144. See *supra* note 13 and accompanying text (asserting goal to protect vulnerable individuals from harm); *supra* note 95 and accompanying text (describing states' interest in protecting welfare of citizens from substantial harm); cf. *supra* text accompanying note 65 (addressing guardianship appointment in emergency situations, whose need may be reduced with intermediate option).

APPENDIX A. RHODE ISLAND GUARDIANSHIP PETITION¹⁴⁵

PETITION FOR LIMITED GUARDIANSHIP OR GUARDIANSHIP

_____ hereby petitions the Probate Court of the city/town of _____ to appoint
Petitioner City/Town
 a limited guardian/guardian for _____ who currently resides at _____, in the
Respondent Street Address
 city/town of _____, and whose date of birth is _____.
City/Town Date of Birth

Based upon an assessment conducted by _____ on _____ which functional
Assessor Date of Assessment
 assessment reflects the current level of functioning of _____, it has been determined
Respondent
 that _____ lacks decision-making ability in one or more of the following areas as
Respondent
 indicated:

- healthcare _____
Describe specific assistance needed
- financial matters _____
Describe specific assistance needed
- residence _____
Describe specific assistance needed
- association _____
Describe specific assistance needed
- other _____
Describe specific assistance needed

Indicate which of the following less restrictive alternatives to guardianship have been explored and deemed inappropriate as indicated:

- Durable Power of Attorney for Health Care
- Representative Payee
- Living Will
- Money Management
- Power of Attorney
- Single Court Transactions
- Durable Power of Attorney
- Gov't Benefit & Social Service Programs
- Trusts
- Housing Option
- Joint Property Arrangements
- Other

145. R.I. GEN. LAWS § 33-15-47 (2011) (excerpting portions of statutorily provided guardianship petition form). The official online version of this form is available at <http://sos.ri.gov/documents/probate/PC2.3.pdf>.

Please describe the basis for the determination that the alternative will not meet the needs of the respondent for each alternative explored and deemed inappropriate:

The following individual/agency is willing to serve as guardian:

Upon information and belief the above individual/agency has:

- [] No conflict of interest that would interfere with guardianship duties.
[] No criminal background that would interfere with guardianship duties.
[] The capacity to manage financial resources involved.
[] The ability to meet requirements of law and unique needs of individual.
[] Demonstrated willingness to undergo training.

The Respondent has the following heirs at law:

Table with 2 columns: Name, Residence. Includes four rows of blank lines for entry.

DECREE

This cause having come on to be heard after being duly advertised according to law, it is hereby ordered, adjudged and decreed that _____ be appointed guardian of the person and estate of _____, bond to be filed in the amount of \$_____.

Entered as an order and decree of the court on:

_____ Date _____ Probate Judge

This notice should be served at once and returned to the clerk of the court.

NOTICE

To _____

GREETING

A petition for Limited Guardianship/Guardianship has been filed in the Probate Court of the city/town of _____
City/Town

_____ has requested that the Probate Court appoint a limited
Petitioner guardian/guardian for you.

The Petition requests that the Probate Court consider the qualification of the following individual/agency to serve as your limited guardian/guardian:

A guardian ad litem will be appointed by the Probate Court to visit you, explain the process and inform you of your rights.

You have the right to attend the hearing to contest the petition, to request that the powers of the guardian be limited or to object to the appointment of particular individual/agency limited guardian/guardian. If you wish to contest the petition, you have the right to be represented by an attorney, at state expense, if you are indigent.

If the Petition is granted and a limited guardian/guardian is appointed, the Probate Court may give the limited guardian/guardian the power to make decisions about one or more of the following: Your health care; your money; where you live; and with whom you associate.

Copies of this Notice will be mailed to:
The administrator of any care or treatment facility where you live or receive primary services; your spouse, and heirs at law; any individual or entity known to petitioner to be regularly supplying protection services to you.

APPENDIX B. RHODE ISLAND DMAT¹⁴⁶

DECISION-MAKING ASSESSMENT TOOL

Instructions for Completion

This document will be used by a Probate Court to determine whether to appoint a guardian to assist this individual in some or all areas of decision-making.

This document has two parts. Please first complete the part which is right after these instructions, titled Assessment. Then complete the second section, titled Summary.

To a physician completing this document: The individual's treating physician must complete this document. If there is any information of which the treating physician completing this document does not have direct knowledge, he or she is encouraged to make such inquiries of such other persons as are necessary to complete the entire form. Those persons might include other medical personnel such as nurses, or other persons such as family members or social service professionals who are acquainted with the individual. If the physician has received information from others in completing the form, the names of those individuals must be listed on the Summary.

To a non-physician completing this document: Professionals or other persons acquainted with the individual being assessed may also complete this document. If there is information of which a non-physician completing this document does not have knowledge, such non-physician may either leave portions of the document blank, or also make inquiries or do such investigation as is necessary to complete the entire document. Again, the names of any individual from whom information is derived should be listed on the Summary.

The document must be signed and dated by the person completing it. It does not need to be notarized.

A. BIOLOGICAL ASSESSMENT

THE FOLLOWING IS BASED UPON A PHYSICAL EXAMINATION CONDUCTED BY
ME ON _____

Date

1. DIAGNOSIS and PROGNOSIS:

146. See R.I. GEN. LAWS § 33-15-47 (excerpting portions of the clinical assessment form). The official online version of this form is available at <http://sos.ri.gov/documents/probate/PC2.4.pdf>.

2. MEDICATION (PLEASE LIST):

How do the above medications, if any, affect the individual's decision-making ability?
Please explain:

3. CURRENT NUTRITIONAL STATUS:

B. PSYCHOLOGICAL ASSESSMENT

1. MEMORY (CHECK ONE)

- A. Intact
- B. Mild Impairment
- C. Moderate Impairment
- D. Severe Impairment

3. JUDGMENT (CHECK ONE)

- A. Intact
- B. Able to Make Most Decisions
- C. Impaired
- D. Gross Impairment

2. ATTENTION (CHECK ONE)

- A. Intact
- B. Mild Impairment
- C. Shifting/Wandering
- D. Delirium
- E. Unresponsive

4. LANGUAGE (CHECK ONE)

- A. Intact
- B. Sensory Deficits:
Hearing/Speech/Sight
- C. Impairment in Comprehension/
Speech Mild/Moderate/Severe
- D. Completely Unresponsive

5. EMOTION (CHECK ALL THAT APPLY)

A. ANXIETY/DEPRESSION

- 1. None
- 2. History of Anxiety/Depression
- 3. Moderate Symptoms of Anxiety/
Depression
- 4. Severe Symptoms with sleep/appetite/
energy disturbance
- 5. Suicidal/Homicidal

B. OTHER

- 1. Suspicionless/Belligerence/
Explosiveness
- 2. Delusions/Hallucinations
- 3. Unresponsive

If you checked any of the above, other than "A" or "1" for any of the above categories, please explain whether the situation is treatable or reversible, and if so, how:

C. SOCIAL ASSESSMENT

1. MOBILITY (CHECK ALL THAT APPLY)

- A. Intact/Exercises
 B. Drives Car Or Uses Public Transportation
 C. Independent Ambulation in Home Only
 D. Walker/Cane
 E. Requires Assistance

If you circled (C), (D), or (E), is situation treatable or reversible? If so, how?

2. SELF CARE (CHECK ALL THAT APPLY)

- A. No Assistance Needed
 B. Requires Assistance with
 1. Meals
 2. Bathing
 3. Dressing
 4. Toileting/Feeding

If you circled any of (B), is individual aware that assistance is required? _____

Is individual willing to accept assistance? _____

Is individual able to arrange for assistance? _____

3. CARE PLAN MAINTENANCE (CHECK ALL THAT APPLY)

- A. No Active Problem
 B. Initiates Problem Identification
 C. Actively Cooperative
 D. Passively Cooperative
 E. Passively Uncooperative
 F. Actively Uncooperative

4. SOCIAL NETWORK RELATIONSHIPS (CHECK ONE IN "A" AND ONE IN "B")

A. SUPPORT

1. Very Good Supportive Network
 2. Some Support from Family & Friends
 3. No or Limited Support from Family & Friends
 4. Needs Community Support
 5. Isolated/Homebound

B. SOCIAL SKILLS

1. Very Good Social Skills
 2. Good Social Skills
 3. Interacts with Prompting
 4. Isolated

D. SUMMARY

I hereby certify that I have reviewed sections A, B, & C attached hereto and based on such assessments that the individual's decision-making ability is as follows:

1. Please describe as fully as you can the individual's decision-making ability in each of the following areas:

A. FINANCIAL MATTERS: _____

B. HEALTHCARE MATTERS: _____

C. RELATIONSHIPS: _____

D. RESIDENTIAL MATTERS: _____

2. Please indicate your opinion regarding whether the individual needs a substitute decision-maker in any of the following areas: (Check one for each category. If you circle "limited" for any category, please explain.)

A. FINANCIAL MATTERS [] YES [] NO [] LIMITED _____

B. HEALTHCARE MATTERS [] YES [] NO [] LIMITED _____

C. RELATIONSHIPS [] YES [] NO [] LIMITED _____

D. RESIDENTIAL MATTERS [] YES [] NO [] LIMITED _____

E. OTHER: If there are any other areas in which you think the individual lacks decision-making ability or has limited decision-making ability, please explain:

Names and titles of others who assisted in Preparation of this Assessment:

APPENDIX C. RHODE ISLAND ANNUAL REPORT¹⁴⁷

ANNUAL STATUS REPORT FOR LIMITED GUARDIANSHIP OR GUARDIANSHIP

(1) The residence of the ward is: _____

(2) The medical condition of the ward is: _____

(3) I perceive the following changes in the decision-making capacity of the ward: _____

(4) The following is a summary of the actions I have taken and decisions I have made on behalf of the ward during the last year: _____

147. See R.I. GEN. LAWS § 33-15-47 (omitting signature lines from annual report). The official online version of this form is available at <http://sos.ri.gov/documents/probate/PC2.8.pdf>.

APPENDIX D. RHODE ISLAND GUARDIAN AD LITEM REPORT¹⁴⁸

REPORT OF THE GUARDIAN AD LITEM

Now comes _____ for _____ and reports that on _____,
Guardian ad Litem Proposed Ward Date
I personally visited the proposed ward at _____. I explained to _____
Address Proposed Ward
the following:

The nature, purpose, and legal effect of the appointment of a guardian;

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

The name of the person known to be seeking appointment as guardian.

Based on such visit and the respondent's reaction thereto, I make the following determination regarding the respondent's desire to be present at the hearing, to contest the petition, to have limits placed on the guardian's powers and respondent's objection, if any, to a particular person being appointed as guardian:

Based on my review of the petition, the decision-making assessment tool, my interview with the prospective guardian, my visit with the respondent, and interviews and discussions with other parties, I made the following additional determinations:

Regarding whether the respondent is in need of a guardian of the type prayed for in the petition:

148. See R.I. GEN. LAWS § 33-15-47 (omitting signature lines from guardian ad litem report). The official online version of this form is available at <http://sos.ri.gov/documents/probate/PC2.7.pdf>.

Regarding whether the guardian ad litem has, in the course of fulfilling his or her duties, discovered information concerning the suitability of the individual or entity to serve as such guardian:
