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GUARDIANSHIP LAWS: REFORM EFFORTS IN VIRGINIA

*Harriette Haile Shivers**

During the decade following 1978, six statewide initiatives addressed the need for reform in the Virginia guardianship system. In 1988, the General Assembly established a joint subcommittee to evaluate the status of guardianship in the Commonwealth and to make recommendations to enhance the existing program to ensure the protection of citizens who entrust their lives and property to the guardianship system. Additionally, prompted by the urgent need for a public response to the shortage of available guardians, the General Assembly directed the Department of Social Services to examine the possibility of reserving public guardianship for use only as a last resort. In January of 1990, the Department presented the results of that study and proposals for an appropriate legislative response to the Governor and the General Assembly in Senate Document Number Twenty-three, *Public Guardianship: Program Design Options for Virginia*.¹ However, the 1990 Session of the General Assembly took no action on the proposals.

This article examines the guardianship system as it exists in Virginia, and throughout the nation, and will focus on gaps where the present laws do not adequately address the particular needs of the situation. The serious effects of these gaps on persons subjected to guardianship inspired a strong movement to reform guardianship laws. This article, therefore, also addresses the general issues of reform proposals, including both procedural and substantive due process concerns. Finally, the article analyzes the reform movement in Virginia by considering the recommendations of the Joint Subcommittee Studying Legal Guardianship and the recommendations of the National Guardianship Symposium. Virginia's statutes

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1. See PUBLIC GUARDIANSHIP: PROGRAM DESIGN OPTIONS FOR VIRGINIA, S. DOC. NO. 23 (1990) [hereinafter PROGRAM DESIGN OPTIONS].

pertaining to appointment of a guardian are evaluated with respect to these recommendations, and deficiencies in the present system are identified. The last portion of the article explains the status of pending efforts to provide some type of public guardian system in Virginia. Finally, the conclusion recommends clarification of the role of a guardian *ad litem* in a guardianship proceeding, and proposes a model for establishing a program of public guardianship in the Commonwealth.

I. INTRODUCTION

John is a fifty-year-old man suffering from diabetes and depression who has been hospitalized with a fever and a foot ulcer. Previously, he lived on his own and independently managed his affairs without difficulty. The hospital staff gave him appropriate medical treatment, but his fever persists and his ulcer worsens. At times, staff members notice that he appears confused. A psychiatrist determines that although John is depressed and slow to respond to questions, he is fully oriented and cognitively intact.

The law in general presumes that patients are competent, and nothing in this situation would warrant a court assessment of John's competency. However, John develops a delirium. Soon after, his foot infection worsens, requiring an urgent surgical procedure. The staff now seeks the psychiatrist's opinion whether the patient is competent to consent to continuing diagnostic and treatment procedures.²

The Congressional Office of Technology Assessment gives another example:

Robert is in the early stages of Alzheimer's disease. Even though he experiences fewer and fewer moments of lucidity, he knows what illness he has and what will eventually happen to his mind and his body. He talks about it with his wife and children, expressing his horror at being kept alive beyond his ability to be aware of life. Robert also has a chronic kidney condition that worsens and finally causes his hospitalization. An examination results in the medical conclusion that Robert must be operated on in order to save his life from imminent renal failure. Robert is told about the medical decision, but he refuses to give permission for the operation. The spe-

2. PRINCIPLES OF MEDICAL PSYCHIATRY, 463-64 (ALAN STROUDEMIRE & BARRY S. FOGEL eds., 1987).

cialists, however, appeal to his wife and children for permission to operate; they also refuse, stating that they feel Robert has made a rational decision. . . . [The surgeons] ponder the consequences of going ahead with the operation declaring Robert incompetent to make the choice. Robert has executed a durable power of attorney, naming his wife attorney-in-fact, but laws in his State of residence are unclear as to whether attorneys-in-fact can make critical care decisions.³

Until recently, the law required that medical professionals seek the appointment of a guardian to avoid legal liability for treating patients like John, who have a questionable ability to give *informed* consent to medical treatment, or Robert, a patient similarly situated who refused medical treatment altogether. Guardianship is a legal relationship in which one individual, the guardian, becomes a "substitute decisionmaker" for another, the ward.⁴

II. GUARDIANSHIP AS A MEANS OF SUBSTITUTE DECISIONMAKING

Because the substitute decisions made by guardians frequently cover all legal decisions that arise in the ward's life, guardianship is an extremely inclusive method of substitute decisionmaking.⁵ In Virginia, guardianship proceedings require a court to find that the proposed ward is incapacitated by impaired health, physical disability, mental illness or retardation.⁶ Then, acting under the state's

3. OFFICE OF TECHNOLOGY ASSESSMENT, U.S. CONGRESS, *LOSING A MILLION MINDS: CONFRONTING THE TRAGEDY OF ALZHEIMER'S DISEASE AND OTHER DEMENTIAS* 169 (1987) [hereinafter *LOSING A MILLION MINDS*].

4. 39 AM. JUR. 2D *Guardian and Ward* § 1 (1968). For the purposes of this article, the definition of guardianship will be restricted to the guardianship of incapacitated adults.

5. JOHN PARRY, *Incompetency, Guardianship and Restoration, in THE MENTALLY DISABLED AND THE LAW* 370 (1985).

6. VA. CODE ANN. §§ 37.1-128.1, 132 (Michie Repl. Vol. 1990). A distinction must be made between legal incompetency and legal incapacity under Virginia law. Incompetency refers to the status of a person adjudicated under § 37.1-128.02 to be mentally incapable of caring for his person or handling and managing his estate. *Id.* § 37.128.01. It includes incompetency under Title 24.1, which governs the right to vote. *Id.* If an individual is adjudicated incompetent, a "committee" is appointed, and the incompetent person loses all legal rights. Both practical and legal consequences flow from this distinction. An adjudication of incapacity under § 37.1-128.1 or § 37.1-132 based on "mental" or "physical" condition requires appointment of a guardian. If the individual is adjudicated to be incapacitated, he keeps the rights not specifically taken away in the court order. Kenneth C. Grigg, *Guardianship and the Elderly Ward*, 38 VA. LAW., Nov. 1989, at 30-31. This article focuses on the role of the guardian rather than the committee, although the committee is also a surrogate decisionmaker for health care purposes and much of the discussion is equally relevant to a committee.

parens patriae power, the court will appoint a surrogate decisionmaker for persons who meet these criteria.⁷

A guardianship proceeding begins when a petition is filed in the state circuit court. The alleged incapacitated person must receive notice of the hearing and of his or her right to be present. Additionally, the court must appoint a guardian *ad litem* to represent the allegedly incompetent person, charging the costs and fees against the proposed ward's estate. The court may also order a local mental health authority or facility to perform a comprehensive evaluation, again charging the expenses to the proposed ward's estate as costs of the proceeding. In the alternative, the court may consider other evidence of the abilities of the alleged incapacitated person. The proposed ward retains the right to have a jury trial at which incapacity must be proved by clear and convincing evidence.⁸

Through court involvement, guardianship ensures an incapacitated person substantial legal protection, but it is costly and increases the demand on the judicial system. Further, use of a guardianship offers no guarantee that guardians will definitely make decisions in the best interests of the incapacitated person or in accordance with the ward's wishes.⁹

III. CONCERNS REGARDING GUARDIANS AS SUBSTITUTE DECISIONMAKERS

A. *Increased Awareness*

Persons subject to guardianship proceedings are "perhaps the least visible of all minorities."¹⁰ As such, these persons need the protection of our society as much as the poor, the mentally disabled, or to some extent, the elderly.¹¹ Surprisingly, however, other

7. John Regan, *Protecting the Elderly: The New Paternalism*, 32 HASTINGS L.J. 1111, 1114 (1981).

8. See Grigg, *supra* note 6, at 31.

9. LOSING A MILLION MINDS, *supra* note 3, at 178.

10. Professor John Regan, Address at Twelfth Annual Symposium on Mental Health and the Law (March 1989) (transcript available from author). The Annual Symposium on Mental Health and Law is sponsored by the University of Virginia's Institute of Law, Psychiatry and Public Policy, the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services, and the Office of the Attorney General. Professor Regan is the Jack and Freda Dick Distinguished Professor of Health Care Law at Hofstra Law School, in Hempstead, New York. He was also a member of the initial Commission on the Legal Problems of the Elderly of the American Bar Association.

11. *Id.*

minority groups receive the benefit of protective legislation not offered to persons subject to guardianship proceedings.¹² Professor John Regan of Hofstra Law School suggests that state legislatures address the need for reform of guardianship laws to protect these persons whose liberty is or may be restricted by the appointment of a guardian.¹³ Society finds it extremely difficult, however, to consider this group "victimized" by the current guardianship system because benevolent instincts fuel the system and provide the impetus for intervention.¹⁴ Perhaps because wards are perceived as a small and uninfluential constituency, lawmakers and society have continually failed to address their needs.¹⁵

In recent years, federal and state legislators have begun to recognize the need for reform in the area of guardianship law. Professor Regan cites at least three reasons for the current trend toward reform: (a) the general aging of the population, particularly those living in nursing homes, requires more frequent intervention decisions; (b) the increased insight gained by experts into the nature of aging and the nature of incapacity in the aging process; and (c) the increased frequency of health care decisionmaking in acute care settings, especially with regard to life-sustaining treatment, accentuates the need for an organized system to allow for substitute decisionmaking.¹⁶

B. *The Affected Population*

A forty-two year old man is four times more likely to become disabled within a given year than he is to die.¹⁷ He bears a greater

12. *Id.*

13. *Id.*

14. "Social service providers are likely to feel that the focus on individual rights has led to delay in treatment and protection. On the other hand, the critics of the use of guardianship see it as . . . doing harm." See, e.g., Winsor C. Schmidt et al., *A Descriptive Analysis of Professional and Volunteer Programs for the Delivery of Public Guardianship Services*, 8 PROBATE L.J. 125, 127 (1988).

15. Regan, *supra* note 10.

16. *Id.* Surrogate decisionmaking of health care decisions occurs in different settings. These differences prompted reform efforts that initially may seem contradictory, but upon closer examination can be justified. There is pressure for more court involvement in guardianship proceedings to insure protection of the due process rights of the affected party. At the same time, there is a call for less court involvement (and consequently, fewer guardianships) in decisions to terminate life sustaining treatment, even for persons who are no longer capable of authorizing the decision personally. *Id.*

17. J. RODNEY JOHNSON, SEMINAR SPEECH ON THE USE OF DURABLE POWER OF ATTORNEY IN ESTATE PLANNING, reprinted in Committee To Study Guardianship in the Roanoke Valley, in SPEAKER'S SOURCEBOOK at 1 (1988).

than sixty percent chance of suffering a disability of at least a ninety day duration before reaching the age of sixty-five.¹⁸ Any competent lawyer would advise the forty-two-year-old man to develop an estate plan, yet many would fail to recommend that he execute a durable power of attorney. This could be used to identify a substitute health care decisionmaker to act if he becomes incapacitated and is unable to give informed consent for his own medical treatment.¹⁹

Within forty-five years, almost one quarter of the population of the country will be considered elderly. By the year 2040, fifty percent of all Americans will reach the age of eighty-five.²⁰ The federal government's Administration on Developmental Disabilities estimates that 3.9 million persons in the U.S. live with developmental disabilities.²¹ These numbers continue to increase as survival rates improve for infants born with disabling conditions. State mental hospitals admit more than 340,000 persons in any given year; a greater, though unknown, number of people suffering from chronic mental illness live outside institutions, often in boarding homes.²² Most of these people need, or will soon need, surrogate decisionmakers for their personal and financial affairs.

In addition, as we near the end of the century, experts predict that the number of persons carrying the AIDS virus will rise dramatically beyond the estimated 1.5 million currently infected.²³ Many AIDS patients experience significant mental impairments, especially in the later stages of the disease. Accordingly, they will need temporary and indefinite surrogate decisionmaking alternatives.²⁴ Thus, the roots of guardianship reform spring both from the needs of elderly persons as well as the needs of younger, temporarily disabled persons.

18. *Id.*

19. Many seriously ill hospital patients are incapable of making health care decisions on their own because of such factors as trauma, disease, pain, medication, or old age. Mark Fowler, *Appointing an Agent to Make Medical Treatment Choices*, 84 COLUM. L. REV. 985 (1984).

20. Mark Reislser, *The Local Area Agency on Aging: A Vital Community Resource*, 38 VA. LAW., Nov. 1989, at 20.

21. ABA Commission on the Mentally Disabled and Comm. on Legal Problems of the Elderly, *GUARDIANSHIP: AN AGENDA FOR REFORM* iii (1989) [hereinafter ABA COMMISSION].

22. *Id.*

23. *Id.*

24. *Id.*

C. *The Guardianship Dilemma*

The movement for reform of guardianship law received added impetus by a 1987 Associated Press report involving fifty-seven reporters who reviewed 2200 probate court files from every state.²⁵ The report identified the following serious shortcomings in the guardianship system: (1) insufficient attention to procedural due process rights; (2) an unclear standard for determination of incapacity; (3) guardians with no training who often institutionalize their wards;²⁶ (4) probate courts without the resources to monitor the activities of guardians; and (5) a lack of public awareness of the alternatives to guardianship.²⁷ Following the publication of the AP report, the U.S. House Committee on Aging, Subcommittee on Health and Long Term Care, chaired by the late Congressman Claude Pepper, reacted by initiating a series of hearings on the crisis.²⁸

IV. A NEED FOR REFORM

A study conducted by the New York City Bar Association's Committee on the Elderly in 1987-88 also documented the need for urgent reform.²⁹ The findings present a "sorry composite" of the situation regarding guardianship in many jurisdictions of the coun-

25. D.W. Page, *Guardians of the Elderly: An Ailing System*, ROANOKE TIMES AND WORLD NEWS, Oct. 6, 1989, at B1, B2. In Virginia the Joint Subcommittee Studying Legal Guardianship in 1989 discussed the Associated Press survey of more than 200 guardianship files opened between 1980 and 1987 in Virginia. The report disclosed that, "besides a court order, the only document that was part of every file was a medical statement[,]" which is often found to be inadequate by gerontologists and psychiatrists. *Id.*

26. A study in New York reported that guardianship serves primarily the interests of third persons and institutions. Persons receiving enriched protective services, including guardianship, bore "a higher rate of institutionalization and death than did the control group whose members received referral agency services or no services." Schmidt et al., *supra* note 14, at 129. For other disadvantages of guardianship, see also BRUCE VIGNERY, DECISION-MAKING, INCAPACITY, AND THE ELDERLY 67 (1987); ABA COMMISSION, *supra* note 21, at 3.

27. REPORT OF THE JOINT SUBCOMMITTEE STUDYING LEGAL GUARDIANSHIP TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA, S. DOC. NO. 23, 13 (1989) [hereinafter REPORT OF THE JOINT SUBCOMMITTEE].

28. ABA COMMISSION, *supra* note 21, at iii. Two pieces of federal legislation developed following Congressman Pepper's hearings. The "National Guardianship Rights Act of 1989" and the "Guardianship Rights and Responsibilities Act of 1988" each focused on the concern for a lack of due process afforded persons subject to guardianship proceedings. See H.R. 372, 101st Cong., 1st sess. (1989); H.R. 1702, 101st Cong., 1st sess. (1989); S. 235, 101st Cong., 1st sess. (1989).

29. Julia C. Spring & Nancy N. Dubler, *Conservatorship in New York State: Does It Serve the Needs of the Elderly?* 45 REC. ASS'N. B. CITY N.Y. 288 (1990).

try and serve as a backdrop for further discussion of guardianship reform.³⁰ The study considers due process issues which raise concerns of violations of the individual constitutional rights of persons subjected to guardianship proceedings.³¹

Procedurally, the New York study noted the following significant abuses: (1) average delays of three-and-one-half to ten months before court hearings on guardianship or conservatorship;³² (2) the notice to the alleged incapacitated person is often a "formal" document, which reveals little about what will happen to the person at the hearing;³³ (3) in less than three percent of the cases is the alleged incapacitated person present in the courtroom — it is a paper proceeding;³⁴ (4) the presence of the allegedly incapacitated person is often waived by the petitioner, not by the affected person's counsel;³⁵ and (5) there is no appointment of counsel to represent the alleged incapacitated person, the only lawyer is a guardian *ad litem* who acts as an arm of the court in the potential ward's best interest, but not as an advocate who would represent the potential ward's individual interest.³⁶

Substantive due process concerns presented in the New York study proved equally distressing. According to the study, the criteria used to determine incapacity and the need for guardianship in New York, as in many other states, were a collection of cause and effect analyses.³⁷ Statutory requirements dictate that the court identify certain underlying diagnostic conditions, such as mental illness, mental retardation, drug addiction, or advanced age, which result in an inability to manage one's affairs.³⁸ Another aspect of the statutory criteria evaluates the capacity of the subject based on whether he or she makes "responsible" decisions. This vague terminology encourages courts to appoint a guardian for persons who

30. Regan, *supra* note 10.

31. See Spring & Dubler, *supra* note 29. "Conservator" is used interchangeably with "guardian" in some jurisdictions. See LOSING A MILLION MINDS, *supra* note 3, at 178.

32. Spring & Dubler, *supra* note 29, at 312.

33. *Id.* at 295-96.

34. *Id.* at 308.

35. *Id.* at 318.

36. *Id.* at 319.

37. For example, some jurisdictions focus on particular conditions or categorical impairments, thus, a person of "advanced age" or with a "mental illness" could be found incapacitated, almost without a showing of whether the condition resulted in an inability to function in society or to care for self and property. See, e.g., ABA COMMISSION, *supra* note 21, at 15; PARRY, *supra* note 5, at 371, 382; VIGNERY, *supra* note 26, at 73.

38. Advanced age is very suspect as a diagnostic criterion.

make eccentric decisions that the particular judge determines to be irresponsible.³⁹

Typically, to show these substantive criteria have been met, the petitioner submits the examining physician's affidavit, alleges the incapacitated person's medical condition and states the legal conclusion that the person is unable to manage his affairs.⁴⁰ This affidavit, rather than the physician, is presented in the courtroom, thus prohibiting any opportunity to cross-examine the doctor, even if counsel were available to do so.

According to Professor Regan, in fifty percent of the cases examined by the New York study the guardian *ad litem* reported to the court that the alleged incapacitated person retained residual capacity in some areas. The court, nonetheless, appointed a plenary guardian with no preservation of self-determination for the ward.⁴¹

A potential conflict of interest between the guardian and the ward is common. For example, nursing homes have developed guardianship as a "creditor's remedy" to secure payment for services.⁴² New York, like most states, enforces only limited accounta-

39. See, e.g., *In re Boyer*, 636 P.2d 1085 (Utah 1981), where a thirty-nine-year-old mildly retarded woman challenged as unconstitutional overbroad and vague the criterion of "making or communicating responsible decisions concerning one's person." The court held that a finding of incompetence "may be made only if the putative ward's decision-making process is so impaired that he is unable to care for his personal safety or unable to attend and provide for such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur." *Id.* at 1089.

40. See REPORT OF THE JOINT SUBCOMMITTEE, *supra* note 27 (documenting that the experience of courts in Virginia is similar).

41. Regan, *supra* note 10. In Virginia, the Joint Subcommittee Studying Legal Guardianship addressed this problem by recommending the use of a model form or court order similar to that found in the HANDBOOK FOR JUDGES AND CLERKS IN VIRGINIA. A standard form or order would insure that the specificity required under the Virginia Code is met and that the orders are not "merely a cursory statement." REPORT OF THE JOINT SUBCOMMITTEE, *supra* note 27, at 5-6.

42. Regan, *supra* note 10. Similarly, prepaid or managed health care plans, where the provider has a financial incentive to reduce the level of services, set the stage for abuse if a guardianship can be obtained by the provider of the care. See George J. Annas, *Legal Aspects of Ethics Committees*, in INSTITUTIONAL ETHICS COMMITTEES AND HEALTH CARE DECISION MAKING 51 (Ronald E. Cranford and A. Edward Doudera eds., 1984). The author cites a Massachusetts case involving a comatose woman who could be kept alive indefinitely on a ventilator but her expensive care had the potential to literally "break the bank" of the prepaid medical care group each year she survived. The physicians believed that the respirator should be removed. They also believed the patient would have wanted the respirator removed, even though she had never indicated her wishes. Contrary to the situation of *In re Quinlan*, 355 A.2d 647 (N.J.) cert. denied 429 U.S. 922 (1976), where the doctors had no

bility of guardians. Courts rarely review a finding of incapacity. Consequently, once the plenary guardianship is imposed on the ward, he or she is virtually stripped of all private and individual rights and fundamental freedoms. Furthermore, the ward faces the prospect of remaining in that status for the duration of his or her life.⁴³

V. VALUES TO DEFINE PARAMETERS OF GUARDIANSHIP LAWS

Having identified the nature of the issues raised by the reform movement, this article turns to a consideration of the values that shape and define a system of guardianship law.

A. *Paternalism*

The philosophical justification and legal basis for guardianship laws is found in the paternalistic doctrine of *parens patriae*. This doctrine provides that the state may assume the role of protector or "parent" when the government determines that an individual needs the state's care and protection.⁴⁴ Similarly, the state, through exercise of its police power, may restrict the liberty of a person who presents a danger to himself or others as a result of incapacity.⁴⁵

B. *Informed Consent*

At common law, the actions of trespass and battery served to protect a person's interest in the integrity of his body and allowed freedom from unpermitted physical contact.⁴⁶ From this tradition, the Anglo-American legal system developed the doctrine of "informed consent," based on the premise that a person has the right to "knowingly" and "voluntarily" permit or refuse medical treat-

financial incentive to remove the patient from the respirator, the doctors in this case faced loss of personal income and the bankruptcy of their program.

43. Regan, *supra* note 10.

44. PARRY, *supra* note 5, at 370; see *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (classic example of historic *parens patriae* power when State undertakes to act as "general guardian of all infants, idiots and lunatics" (quoting 3 WILLIAM BLACKSTONE, COMMENTARIES 47 (1803))).

45. Amie L. Bruggeman, Comment, *Guardianship of Adults with Mental Retardation: Toward a Presumption of Competence*, 14 AKRON L. REV. 321, 329-30 (1980); see also *O'Connor v. Donaldson*, 422 U.S. 563, 582 (1975) (Burger, C.J., concurring) ("state may confine individuals solely to protect society from anti-social acts or communicable diseases").

46. Fowler, *supra* note 19, at 988.

ment.⁴⁷ The legal right to refuse treatment is part of the common law right of self-determination, which in recent years has gained additional judicial recognition as a right embodied in the constitutional right to privacy.⁴⁸ Consequently, any uncertainty regarding a patient's mental competency brings into question his or her ability to give "informed consent" for treatment. The doctrines of informed consent and substitute decisionmaking may inconvenience service providers involved in care of the patient or client. However, informed consent and substituted decisionmaking comprise an integral part of one of society's most cherished values, individual autonomy. In the context of medical decisionmaking, as in other endeavors, the law favors the free exercise of idiosyncratic behavior over paternal involvement.⁴⁹

C. *Self-Determination and Personal Autonomy*

The judicial determination that a person is incompetent or incapacitated brings forth an exploration of such fundamental issues as an individual's right of self-determination and the ability of a surrogate to make decisions for another human being. Competence and liberty weave together inextricably; competent individuals are

47. Annina M. Mitchell, *Involuntary Guardianship for Incompetents: A Strategy for Legal Services Advocates*, 12 CLEARINGHOUSE REV. 451, 460 (1978).

48. The United States Supreme Court has tied the right to control over one's body to the fundamental right to privacy. *See, e.g., Roe v. Wade*, 410 U.S. 113, 163 (1973); *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965); *see also* George J. Annas and John E. Densberger, *Competence to Refuse Medical Treatment: Autonomy v. Paternalism*, 15 U. Tol. L. Rev. 561, 565-67 (1984). In *Cruzan v. Director, Missouri Department of Health*, 110 S. Ct. 2841 (1990), the U.S. Supreme Court found that an incompetent adult patient has a constitutionally protected liberty interest based on the Fourteenth Amendment to refuse unwanted medical treatment, including the refusal of artificially delivered food and water. The court held that the right is not absolute and must be balanced against the state's interest at stake, and that a state law requiring a finding based on clear and convincing evidence that the patient had expressed his or her wishes regarding the medical treatment decision is permissible. *Id.*

Several state courts have read the constitutionally protected right to privacy to include an incompetent person's right to refuse treatment. *See, e.g., In re Conroy*, 486 A.2d 1209 (N.J. 1985); *In re Quinlan*, 355 A.2d 647, (N.J.), *cert. denied*, 429 U.S. 922 (1976); *Leach v. Akron Gen. Medical Ctr.*, 68 Ohio Misc. 1, 12 (1980). However, when the Florida Supreme Court decided *In Re Guardianship of Browning*, 568 So.2d 4 (Fla. 1990), it did not rely on *Cruzan*, but instead found a right to privacy in its state constitution that governs an individual's choices and includes the right to refuse medical treatment. The Massachusetts Supreme Court held that a person who had never been competent had a right to refuse treatment, through a substitute decisionmaker, based on common law. *Superintendent of Belchertown Sch. v. Saikewicz*, 370 N.E.2d 417, 427 (Mass. 1977). ("[W]e recognize a general right in all persons to refuse medical treatment in appropriate circumstances.")

49. PARRY, *supra* note 5, at 435, 461.

at liberty to make their own medical treatment decisions and incompetent persons are not.⁵⁰ Two values dominate this area of discussion: respect for a person's well-being and respect for a person's right of self-determination.⁵¹ The statutes governing incompetency and surrogate decisionmaking allow courts to use a variety of approaches when determining competency or incapacity. A Congressional Office of Technology Assessment report divides these varying standards into three types: (1) the causal link standard; (2) the Uniform Probate Code (UPC) standard; and (3) the therapeutic approach.⁵²

The causal link refers to a standard which diagnoses the condition (the cause) responsible for creating the socially improper behavior displayed by the ward.⁵³ Although it no longer remains the most popular standard, many courts still use the causal link standard. This standard does not provide guardianship hearings for individuals who are capable of caring for themselves and their property but choose not to do so.⁵⁴ When using this approach, courts require a showing of "cause" before imposing guardianship.⁵⁵

The Uniform Probate Code standard emphasizes the health, well-being, and safety of the individual over his management of property. With this standard, the critical factor is "the individual's ability to make and communicate responsible decisions."⁵⁶ Some states vary the UPC standard by requiring a finding that the potential ward's incapacity endangers his health and safety.⁵⁷

The therapeutic approach, increasingly favored by gerontologists and mental health professionals, defines a potential ward's incapacity in legal rather than medical terms. This standard measures the capacity of the individual by the functional limitations he ex-

50. Annas and Densberger, *supra* note 48, at 367-68.

51. See *LOSING A MILLION MINDS*, *supra* note 3, at 171; *In re Drabick*, 245 Cal. Rptr. 840, 855, *cert. denied*, 488 U.S. 958 (1988).

52. *LOSING A MILLION MINDS*, *supra* note 3, at 171.

53. *Id.*

54. *Id.*

55. *Id.* One problem with the causal link standard is that a number of states require that an individual be diagnosed as senile, physically disabled or as a spendthrift to be found incompetent. See PARRY, *supra* note 5, at 373.

56. *LOSING A MILLION MINDS*, *supra* note 3, at 171. For a discussion of a constitutional challenge to the UPC approach, see Mitchell, *supra* note 47.

57. See *LOSING A MILLION MINDS*, *supra* note 3, at 171.

hibits and requires evidence of specific dysfunction before classifying the subject as incapacitated.⁵⁸

D. *Protection of the Health Care Delivery System*

The values discussed thus far focus on the patient and potential ward. In addition, societal values impact the expectations placed on the medical personnel who are involved when treatment decisions are made.⁵⁹ A system of surrogate decisionmaking that strips health care providers of their ability to protect life would jeopardize the availability of health care treatment services for the entire society. A medical profession which accepts assisting death as part of its role may soon lose its soul.⁶⁰

Another consideration aimed at the needs of health care providers is the weighty legal and ethical burden they face when no provision is made for substitute decisionmaking for patients who cannot give informed consent.⁶¹ Society shares this burden, as evidenced by its willingness to provide court authorization for substituted decisionmaking.⁶²

58. *Id.* For example, the Connecticut statute includes a person who is "incapable of caring for one's self," requiring that the person must have "a mental, emotional or physical condition resulting from mental illness, mental deficiency, physical illness or disability, advanced age, chronic use of drugs or alcohol, or confinement. The condition must make the individual unable to provide for his or her own medical, nutritional, or clothing needs, . . . safe, adequately heated and ventilated shelter [, and] . . . protection from abuse." CONN. GEN. STAT. ANN. § 45a-644(c) (West Supp. 1991). The inability must result in "endangerment to such person's health." Furthermore, at the hearing the court receives evidence that "shall contain specific information regarding the disability and the extent of its incapacitating effect." *Id.* § 45a-650(a) (West Supp. 1991). For a general overview of statutory approaches, see generally PARRY, *supra* note 5, at 373.

59. See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, *PRINCIPLES OF BIOMEDICAL ETHICS* 141 (1989); see also Rebecca Dresser, *Life, Death and Incompetent Patients: Conceptual Infirmities and Hidden Values in Law*, 28 ARIZ. L. REV. 373, 397-404 (1986).

60. Gilbert Meilander, *The Confused, the Voiceless, the Perverse: Shall We Give Them Food and Drink?*, 2 ISSUES IN L. & MED. 133, 141 (1986) ("[A]nti-paternalism tends to overlook those additional professional responsibilities above and beyond respect for liberty. . . . [S]imple respect for patient autonomy, . . . cannot capture the positive duties of caregivers to serve the well-being of their patients. . . ." (quoting W. MAY, *THE PHYSICIAN'S COVENANT: IMAGES OF THE HEALER IN MEDICAL ETHICS* 51-62 (1983))).

61. See Fowler, *supra* note 19, at 1004-05.

62. See *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417, 435 (Mass. 1977) ("[S]uch questions of life and death seem to us to require the process of detached but passionate investigation and decision that forms the ideal on which the judicial branch of government was created.").

E. *Conflict of Interest*

There are also values which determine the function of the surrogate decisionmaker. A person with a financial stake in the outcome of the medical treatment faces competing interests, and therefore, may be inappropriate as a guardian. Also, the alternative standards for surrogate decisionmaking, "substituted judgment" or the "best interests" of the patient, are based on different values.

The substituted judgment standard allows the decisionmaker to make the decision that the patient would have made if he or she were capable. In order to apply this standard the decisionmaker needs to know the patient's wishes regarding the specific treatment at issue. At the very least the surrogate must have a sufficiently close relationship with the patient so that he or she knows the values and beliefs that would govern the patient's decision.⁶³ The surrogate must also have at least as much medical information upon which to base a decision as the patient would have.⁶⁴

The alternative standard is for the surrogate to make the decision in the "best interests" of the patient.⁶⁵ Historically, courts often applied the best interests analysis in the absence of, or sometimes even in spite of, an express statement written by the patient before becoming incapacitated. Now, consistent with an increased recognition of the value of personal autonomy and the fundamental right to self-determination, advocates of the reform movement prefer the substituted judgment criterion.⁶⁶

63. For a discussion of whether or not those in a close family relationship can be presumed to be the best surrogate, see Fowler, *supra* note 19, at 1002-03 (noting that in some instances, a strict rule giving the next-of-kin power to decide gives the power to a person whose interests are directly adverse to the patient).

64. Charles Jarrett, *Moral Reasoning and Legal Change: Observations on the Termination of Medical Treatment and the Development of Law*, 19 RUTGERS L.J. 999, 1009 n.43 (1988) (quoting *In re Conroy*, 486 A.2d 1209, 1231 (N.J. 1985)).

65. "The best interests test is essentially what others think would benefit or protect the welfare of persons without decisional capacity. It purports not to consider the individual's particular viewpoint at all." VIGNERY, *supra* note 26, at 116. *But see* Jarrett, *supra* note 64, at 1010-11 (stating that the court in *Conroy* defines "best interests" to include consideration of the prospective pain and pleasure of the patient with or without the treatment, without regard for state's interest or patient's minor children or the tax burden of its citizens as a group).

66. PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 136 (1983). A recent Illinois Supreme Court decision upheld the application of the substituted judgment standard for a public guardian acting as surrogate for the patient when it could be established by clear and convincing evidence that the decision was in accord with the patient's interest, (even though there was a conflict between a guardian's decision that was to

F. *Role of the Attorney*

The increased focus on self-determination is also reflected in the changing attitudes about the role of the attorney in the guardianship proceeding. In times past, the paternalistic approach allowed for a guardian *ad litem* to decide arbitrarily what should happen based on a best interest analysis. Today, experts urge that an independent attorney whose only role is to represent the ward's wishes be a part of the proceeding.⁶⁷

G. *The Least Restrictive Alternative*

The doctrine of the least restrictive alternative expresses the high value society places on personal liberty. Guardianship restricts rights such as the right to marry, the right to vote, the right to convey and hold property, and the right to contract and be involved in business.⁶⁸ It also sharply curtails the ward's right to privacy. The powerlessness of wards as a class, coupled with the radical restrictions on fundamental liberties resulting from guardianship, provide forceful reasons for courts to apply the "least restrictive alternative."⁶⁹

The values enumerated above provide a framework for development of a responsive and humanistic approach to guardianship.

VI. REFORM IN VIRGINIA

A. *Introduction of Reform Efforts*

The book *Public Guardianship and the Elderly* contains several specific proposals for guardianship reform that illustrate the need for increased protection of due process rights.⁷⁰ This protection for the proposed ward includes: "notice, presence at hearing, cross-examination, aggressive counsel, the right to [a] jury trial, the right to appeal, the presumption of competency, and the imposition of stringent standards of proof."⁷¹ The authors suggest that courts

be guided by the best interest of the ward). *In re Estate of Greenspan*, 558 N.E.2d 1194 (Ill. 1990).

67. ABA COMMISSION, *supra* note 21, at 10.

68. See Bruggeman, *supra* note 45.

69. Roger B. Sherman, *Guardianship: Time for A Reassessment*, 49 FORDHAM L. REV. 350, 371 (1980).

70. WINSOR C. SCHMIDT, ET AL., PUBLIC GUARDIANSHIP AND THE ELDERLY 18 (1981).

71. *Id.*

use functional assessments of incapacity, based upon behavioral competencies, rather than diagnostic terms (i.e., the therapeutic approach). They also recommend that courts order limited or partial guardianships specifically related to the abilities and needs of the individual. Further, the authors call for the creation of guardianships of limited duration with mandated periodic review. Finally, the authors argue that anyone who has a business relationship with the ward, such as a nursing home administrator, should be prohibited from serving as guardian.⁷²

B. *Reform Efforts in Virginia*

In the years between 1978 and 1988, six statewide initiatives addressed the need for reform in the guardianship system and identified the following problems in the current guardianship process: "(1) over-utilization of plenary/full guardianship; (2) inadequate supply of persons available to serve as guardians — a problem especially acute for indigent adults; and (3) insufficient monitoring of the activities of the guardian throughout the duration of the guardianship."⁷³

The 1988 Session of the Virginia General Assembly established a joint subcommittee to evaluate the status of Virginia's guardianship system.⁷⁴ Judge Kenneth Trabue, a member of the Joint Subcommittee, summarized the results of the evaluation as follows: (a) data is not available to accurately reflect the number of individuals in Virginia who currently need guardianship services (estimates ranged from 2000 to 7000 people); (b) statutes furnish very little guidance regarding significant aspects of the guardianship system; (c) courts provide very little supervision of appointed guardians, except when the Commissioner of Accounts periodically reviews financial matters; (d) use of the sheriff as the guardian of last resort for persons without family or friends is highly unsatisfactory; and (e) most citizens are unaware that alternatives to guardianships

72. *Id.* at 18-19.

73. PROGRAM DESIGN OPTIONS, *supra* note 1, at 3. This is not an exhaustive list of problems cited in the report.

74. REPORT OF THE JOINT SUBCOMMITTEE, *supra* note 27, at 3. The General Assembly directed the Joint Subcommittee to recommend measures which would enhance the existing guardianship system, ensuring protection of the citizens who entrust their lives and property to the system. To accomplish its mission, the Joint Subcommittee reviewed applicable statutes in the Virginia Code, conducted public hearings, and surveyed judges throughout the state.

may serve many of the same purposes and are far less restrictive and less expensive.⁷⁵

The Joint Subcommittee recommended:

1. a statutory scheme prescribing the specific responsibilities of guardians *ad litem*;

2. a system of judicial oversight, including:

- a. standardized procedures for appointment of guardians;
- b. forms for guardianship proceedings for all judges to use;
- c. strengthened evidentiary standards;
- d. increased accountability to the courts by the guardian;
- e. a system for review of guardians through the court (including a provision to reopen the proceeding if changes need to be made);
- f. collection of data through the court clerks' offices to identify the number of individuals presenting under guardianship in Virginia;

3. discontinuing the use of sheriffs as guardians of last resort;

4. training for Department of Human Services employees on guardianship issues; and

5. public education efforts regarding alternatives to guardianships.⁷⁶

Another area to which the Joint Subcommittee devoted significant attention concerned the need for a public guardianship program to provide for the guardianship needs of persons who have no family or friends. In 1990, the Joint Subcommittee asked the Department of Social Services Task Force on Guardianship to prepare a report for the Governor and General Assembly with recommendations for addressing this need in Virginia. The Joint Subcommittee also considered ways to secure funding for court appointed guardians *ad litem* who continue to be involved with the ward after an adjudication of incapacity and who regularly report to the court regarding the ward's situation. Furthermore, the committee proposed the creation of an ombudsman position within the court staff.⁷⁷

75. Judge Kenneth Trabue, Public Address, Salem, Virginia (Oct. 12, 1989).

76. *Id.*

77. *Id.*

Amendments to the Virginia Code enacted by the 1989 Legislature addressed some of the primary concerns raised by the Joint Subcommittee Report. One amendment removed "advanced age" as a basis for a finding of incapacity.⁷⁸ In proposing the 1989 amendment, the Joint Subcommittee Studying Legal Guardianship cited a 1986 survey by the ABA Commission on Legal Problems of the Elderly which found a "tendency among judges in states where old age is grounds for a finding of incompetence to view the terms as similar."⁷⁹ The Subcommittee report further stated:

[c]ourts have often invoked only the criterion of "advanced age" to determine the future of these persons, seemingly out of context with the spirit of statutory provisions. To clarify this, advanced age is a proper criterion for consideration *if* the advanced age results in either mental or physical incapacity so that the ward cannot manage his or her person or affairs. Medical personnel cite the fact that age and function are not necessarily linked and that function should be the only criterion used to determine guardianship.⁸⁰

Another 1989 reform measure provided that competency can be restored upon an appeal of the order of guardianship, when any party to the original proceeding petitions for reinstatement of the case to the docket.⁸¹ This may occur even if the time for appeals has expired.⁸²

Additionally, lawmakers created two surrogate health care decisionmaking procedures that operate without the appointment of a guardian. The non-judicial approach, embodied in section 37.1-134.4 of the Code of Virginia ("the Code"),⁸³ is reserved for non-protesting persons in need of or receiving treatment by a licensed physician. Rather than going to the court for a determination of incapacity, a treating physician who doubts the patient's capacity to give informed consent may refer the patient to a psychiatrist or clinical psychologist for a determination of capacity. Once the psychiatrist or psychologist certifies that the patient is incapacitated, the treating physician looks to a statutorily designated surrogate decisionmaker, who is then required to act in accordance with the

78. See, e.g., VA. CODE ANN. §§ 37.1-132-134.2 (Michie Repl. Vol. 1990).

79. REPORT OF THE JOINT SUBCOMMITTEE, *supra* note 27, at 9.

80. *Id.*

81. VA. CODE ANN. § 37.1-134.3 (Michie Repl. Vol. 1990).

82. *Id.*

83. *Id.* § 37.1-134.4(B) (Michie Cum. Supp. 1991).

religious beliefs or basic values of the person unable to make a decision.⁸⁴

The judicial approach, found in section 37.1-134.5 of the Code,⁸⁵ allows anyone to seek authorization for medical treatment from a general district court judge, juvenile and domestic relations district court judge, special justice or circuit court judge for a person incapable of giving consent. The treatment may be for either a mental or physical disorder. Prior to authorizing treatment, the court must address two key issues. First, the court must determine that the treatment is in the best interests of the patient. Second, the court must refuse to authorize treatment proven by a preponderance of the evidence to be contrary to the person's religious beliefs or basic values, *unless* such treatment is necessary to prevent death or serious irreversible condition.⁸⁶

Several issues, however, have yet to be addressed legislatively in Virginia. These include the duties of the guardian *ad litem* in guardianship proceedings;⁸⁷ a system of judicial review or oversight of guardianships, including regular evaluations of the ward;⁸⁸ and the use of a model form of court order to detail all aspects of the proposed ward's condition and to record the exhaustion of other alternatives to a guardian, in accordance with the principle of "the least restrictive alternative."⁸⁹ This last recommendation incorporates the present statutory requirement that the order "be as de-

84. *Id.* The statute, as further amended by the 1991 Session, prescribes selection of a surrogate from a prioritized list beginning with a person appointed under a durable power-of-attorney, if the power includes health care decisionmaking. The next choice is a person named by the patient under the Virginia Natural Death Act, if the patient's condition meets statutory criteria, followed by a guardian or committee, then a spouse, an adult son or daughter, a parent, an adult sibling, or finally, any other relative in descending order of blood relationship. *Id.*

85. *Id.* § 37.1-134.5 (Michie Cum. Supp. 1991).

86. *Id.*

87. As a part of comprehensive reform in the guardianship process in Michigan, the duties of the guardian *ad litem* were specifically enumerated. MICH. COMP. LAWS ANN. § 700.433(a) (West 1980 & Supp. 1991).

88. The Colorado legislature amended its guardianship process by including a role for court visitors. The court visitor recommends to the court whether or when review of the guardianship is necessary. COLO. REV. STAT. § 15-14-303 (1987 & Supp. 1990).

89. At least three states, Arizona, Michigan and Oklahoma, specify by statute the contents of the guardian's report. Oklahoma includes report forms within the statute and requires the guardian to file guardianship plans with the court. OKLA. STAT. ANN. tit. 30, §§ 3-120, 122 (West 1991); ARIZ. REV. STAT. ANN. § 14-5315(c) (1956 & Supp. 1990); MICH. COMP. LAWS ANN. § 700.443(5) (West 1980 & Supp. 1991); OKLA. STAT. ANN. tit. 30, § 3-108 (West 1991); see Comm. on Legal Problems of the Elderly, Am. Bar Assoc., *State Guardianship Legislation: Directions of Reform*, 10 (1989) [hereinafter *State Guardianship Legislation*].

tailed as possible with regard to all aspects . . . and not merely a cursory statement."⁹⁰

Although the 1990 General Assembly took no action toward a program of public guardianship, a task force operating under the aegis of the Virginia Department for the Aging was formed and continues to pursue the reform effort.⁹¹

C. *A Critique of Virginia's Guardianship Laws*

The Joint Subcommittee and many other groups concerned with guardianship reform relied heavily on the set of recommendations produced by the American Bar Association's National Guardianship Symposium ("Symposium").⁹² The group of experts who attended the Symposium developed thirty-three recommendations that were later adopted by the American Bar Association House of Delegates as Association policy.

For example, the Symposium recommended the incorporation of these minimum due process safeguards (Recommendation II-B) into all state statutes and guardianship proceedings:

Right to Notice — A court officer dressed in plain clothes and trained to communicate and interact with elderly and disabled persons should serve the respondent personally and present the information to the respondent in the mode of communication that the

90. REPORT OF THE JOINT SUBCOMMITTEE, *supra* note 27, at 37. According to the American Bar Association's Commission on the Legal Problems of the Elderly, judges will be inclined to grant a plenary guardianship unless statutes specify a preference for a limited guardianship. *State Guardianship Legislation*, *supra* note 89, at 8-9. Therefore, revision of state law in Utah includes the preference for a limited guardianship, requiring the court to make a specific finding that nothing less than a full guardianship is adequate in those cases where the appointment is not limited. UTAH CODE ANN. § 75-5-304(2) (1975 & Supp. 1991).

91. The Task Force on Guardianship is currently developing legislative proposals that will specify more clearly the Hearing and Notice Rights of potential wards. Telephone Interview with Virginia Dize, Chairperson of the Task Force on Guardianship (Aug. 27, 1991). The Task Force on Guardianship sponsored a bill before the 1992 Session of the Virginia General Assembly which would amend the Virginia Committees and Trusts statute, VA. CODE ANN. §§ 37.1-128.02-128.1 and 37.1-132 (Repl. Vol. 1990). This amendment would give better notification of proceedings to persons alleged to be incapacitated or incompetent, and their families, and to clarify their rights at guardianship hearings. Also, the bill proposes a new subsection which would specify the hearing rights of the proposed ward. S. Bill 149, H. Bill 407, 1992 Reg. Sess., ___ 1992 Va. Acts ____.

92. The Symposium in July, 1988, jointly sponsored by the Commissions on the Mentally Disabled and on Legal Problems of the Elderly of the American Bar Association, included among the participants judges, attorneys, service providers, advocates for the elderly, governmental officials and law professors. ABA COMMISSION, *supra* note 21, at iv.

respondent is most likely to understand. The written notice should be in plain language and large type. It should indicate the time and place of the hearing, the possible adverse consequences to the respondent of the proceedings and list the rights to which the respondent is entitled. A copy of the petition should be attached. Unless the court orders otherwise, at least fourteen (14) days' notice should be given before the hearing takes place.

Mandatory Right to Counsel — Counsel shall be appointed for each respondent who does not have counsel, regardless of the respondent's ability to pay. If a respondent wishes to waive counsel and exercise the right of self-representation, the court shall ensure that the waiver is knowing and voluntary and otherwise complies with the laws of that jurisdiction.

Hearing Rights — The respondent shall receive a hearing before an impartial decisionmaker in which he or she:

- (a) is present at the hearing and all other stages of the proceedings;
- (b) may compel the attendance of witnesses, present evidence and confront and cross-examine all witnesses; (c) is entitled to a clear and convincing standard of proof; and (d) may appeal any adverse orders or judgments.⁹³

The Symposium recommendations agree substantially with the findings of the New York study discussed earlier.⁹⁴ In his comments on the study, Professor Regan stressed the importance of giving notice to the alleged incapacitated person in understandable language. He also stated that the person is entitled to be present, and that the doctor's evidence should be subject to cross-examination by the attorney representing the proposed ward.⁹⁵

The Virginia statutes authorizing the appointment of a guardian provide for "any person" to petition the circuit court which will hold a "hearing" "after reasonable notice" to the alleged incapacitated person of the hearing and of his "right to be present."⁹⁶ The court, or jury "if one be requested," can determine, based on "clear and convincing" evidence, that the person is incapacitated.⁹⁷ A guardian *ad litem* is then appointed to "represent the interest of

93. *Id.* at 9-10.

94. *See supra* notes 29-37 and accompanying text.

95. *Id.*

96. VA. CODE ANN. §§ 37.1-128.1, 132 (Michie Repl. Vol. 1990).

97. *Id.*

the person."⁹⁸ The proposed ward "shall be present at the hearing" if he or the guardian *ad litem* requests.⁹⁹ Finally, the person has the right of appeal to the Supreme Court if he or she is determined to be wholly or partially incapacitated.¹⁰⁰

The most notable difference between Virginia's procedure and the reformation proposals appears in the issue of notice. In Virginia, notice may be very formalized, and in some instances can be fairly perfunctory. The Symposium recommendation, on the other hand, has far more stringent notice requirements. Under the Symposium recommendation, if the individual cannot understand the document, and consequently does not attend the hearing, the notice could be considered defective and the proceedings may be void or voidable.¹⁰¹ Where mental or physical incapacities are involved, and in communities with a high number of adults who do not speak English, the notifying officer should communicate the information in a way the respondent will understand.

Virginia's statutes, like those in many other states, do not specify a waiting period between service of notice and the hearing. Even if the respondent understands the legal documents and realizes that his or her liberty rights are at stake, the respondent may not have sufficient time to acquire an attorney and adequately prepare for the hearing.¹⁰²

In Virginia, there is no mandatory right to appointed counsel to represent the client's wishes. The statutes do require appointment of a guardian *ad litem*. However, as illustrated by a subsequent recommendation from the Symposium, the role of "zealous advocate" for the respondent and the role of guardian *ad litem* remain

98. *Id.*

99. *Id.*

100. *Id.*

101. See 39 AM. JUR. 2D *Guardian and Ward* § 41 (1968 & Supp. 1982), cited with approval in PARRY, *supra* note 5, at 381. The National Conference of the Judiciary on Guardianship Proceedings for the Elderly adopted an example of a model form for notice to the respondent based on a Missouri statute. Commission on the Legal Problems of the Elderly, ABA, STATEMENT OF RECOMMENDED JUDICIAL PRACTICES 5 (Erica Wood, ed., 1986) [hereinafter STATEMENT]. Legislative proposals before the 1992 General Assembly would require the notice to be in plain language and large type as well as inform the proposed ward of the place and the time of their hearing, their rights, and of appointment of a guardian *ad litem*. See S. Bill 149, H. Bill 407, 1992 Reg. Sess.

102. PARRY, *supra* note 5, at 381. See S. Bill 149, H. Bill 407, 1992 Reg. Sess. regarding legislative proposals before the 1992 Session of the Virginia General Assembly which would amend §§ 137.1-128.02, -128.1, and -132 of the Code of Virginia to require a five-day notification of hearing to family members, custodians and the proposed committee or guardian.

clearly distinguishable.¹⁰³ The attorney, who zealously advocates for the client's desires, regardless of the attorney's perception of the client's best interests, may need to seek the appointment of a guardian *ad litem* for the client, if the attorney believes that the client is severely impaired and cannot make the important decisions about his or her own legal representation.¹⁰⁴ The guardian *ad litem*, on the other hand, chooses a course of action on the proposed ward's behalf and makes the decision for the client, based on the client's "best interests" rather than what the particular individual may desire under the circumstances. The Symposium recommends that the respondent's attorney should never act as guardian *ad litem*.¹⁰⁵

As the Symposium emphasized, "[a] mandatory right to counsel recognizes the serious rights at stake in the proceeding."¹⁰⁶ The respondent, as well as the petitioner, must be represented at the hearing to ensure that all significant points of view are given due regard.¹⁰⁷ Even if the issue of capacity appears clear, the adversarial approach provides a mechanism for resolving other impor-

103. ABA COMMISSION, *supra* note 21, at 12 (Recommendation II-C).

104. *Id.* Florida's statute specifically provides that court appointed counsel for the proposed ward represent his or her expressed wishes, rather than act as a guardian *ad litem* who determines the best interests of the person. FLA. STAT. ANN. § 744.331(2) (West Supp. 1991).

105. ABA COMMISSION, *supra* note 21, at 12. The Symposium recommendation requires: counsel, along with a full hearing, in all guardianship cases. . . . Due to a concern that the cost of counsel might place an undue burden on the ward's estate . . . counsel should be appointed regardless of the respondent's ability to pay. . . . [S]ince the state, or a petitioner acting through the state, usually decides to intrude upon the respondent's constitutionally protected rights, it would be unfair to require respondents to hire their own lawyers.

Id. at 11.

The fundamental fairness argument for appointed counsel is supported by the court in *Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) (reasoning that a cost requirement, valid on its face, may offend due process because it operates to foreclose a particular party's meaningful opportunity to be heard). It is notable that the American Bar Association has not taken a position on this particular Symposium recommendation. Commission on Legal Problems of the Elderly, ABA, STATE GUARDIANSHIP LEGISLATION: DIRECTIONS OF REFORM 4 (1989).

106. ABA COMMISSION, *supra* note 21, at 11.

107. Some commentators argue that a constitutional right to an appointed attorney exists based on the due process clause of the Fourteenth Amendment. *See, e.g., SHERMAN, supra* note 69, at 362 (arguing that because of the imbalance of experience and expertise between the parties to a guardianship proceeding where a healthy petitioner faces a disabled person, the mandatory right to counsel that is available in other proceedings where serious liberty loss is at stake also exists). The fact that the state does not have an attorney involved in the proceeding seems to frame an open question on the contention.

tant matters, such as the identity of the guardian or the standards to be used in making decisions.¹⁰⁸

The Virginia statutes conform to the Symposium recommendation with respect to hearing rights, except for the right to confront and cross examine witnesses. Presumably, Virginia statutes contain no bar to cross examination;¹⁰⁹ however, the statutory language is ambiguous on that point. The Symposium report emphasizes that the rights at issue for the proposed ward carry just as much weight as those of an individual facing civil commitment. Thus, a competency hearing uses more stringent due process safeguards than those used in a typical civil case, while falling short of the requirements in a criminal case.¹¹⁰

1. Defining Incapacity

The Symposium's thirty-three recommendations included within their scope a number of substantive due process issues.

Addressing the controversy over the criteria used by courts to determine incapacity, the Symposium proposed a definition of incapacity:

Elements of Definition — The definition of incapacity should focus upon but not be exclusively limited to the following elements: (a) incapacity may be partial or complete; (b) incapacity is a legal, not a medical, term; (c) a finding of incapacity should be supported by evidence of functional impairment over time; (d) the finding of incapacity should include a determination that the person is likely to suffer substantial harm by reason of an inability to provide adequate personal care or management of property or financial affairs; and (e)

108. ABA COMMISSION, *supra* note 21, at 11.

109. See *Schmidt v. Goddin* 224 Va. 474, 297 S.E.2d 701 (1982) (at a hearing to restore competency and discharge, committee court allowed a narrow exception of "good cause" for not permitting presentation of witnesses, confrontation, or cross-examination where attorney for patient was present throughout but the patient was excluded from the hearing during testimony of one of the doctors); *Wolfrey v. Swank*, 184 Va. 922, 37 S.E.2d 17 (1946) (report of an *ex parte* examination by medical officers of Veteran's Administration was inadmissible as evidence of incompetency where patient had no opportunity to cross-examine the officers).

110. ABA COMMISSION, *supra* note 21, at 12; see also *Addington v. Texas*, 441 U.S. 418, 424 (1979) (case involving involuntary commitment of person to state mental hospital, holding that "clear, unequivocal and convincing" standard of proof is applicable where important individual rights are at stake, whether civil or criminal).

age, eccentricity, poverty or medical diagnosis alone should not be sufficient to justify a finding of incapacity.¹¹¹

The Symposium also recommended that the National Conference of Commissioners on Uniform State Laws redefine the term "incapacity" presently contained in section 1-201(7) of Chapter V of the Uniform Probate Code.¹¹² As it stands now, the UPC definition does not measure the individual's ability to function in society, and the standard judging an individual according to whether he makes "responsible" decisions is overly vague.¹¹³

While the two Virginia statutes that authorize appointment of a guardian, sections 37.1-128.1 and 37.1-132 of the Code,¹¹⁴ are worded slightly differently, each establishes basically the same set of criteria for a finding of incapacity. Section 37.1-128.1 applies to a person who "by reason of mental illness or mental retardation has become incapable, either wholly or partially, of taking care of himself or his estate."¹¹⁵ Section 37.1-132 applies to a person who "by reason of impaired health or physical disability, has become mentally or physically incapable of taking care of himself or his estate."¹¹⁶ Under these statutes, therefore, there must be an underlying medical diagnosis to account for the incapacity, in addition to a showing of functional disability.¹¹⁷ This standard most closely comports with the "causal link" definition put forth by the Congressional Office of Technology Assessment report discussed earlier.¹¹⁸ The weakness in the causal link approach, as pointed out by Professor Regan, is that a finding of incapacity may be based on nothing more than a "conclusory opinion that in the physician's judgment the person is unable to manage his affairs."¹¹⁹

The Symposium cautioned that: (1) the legal term "incapacity" should not be measured according to a medical diagnosis alone, but

111. ABA COMMISSION, *supra* note 21, at 15 (Recommendation III-A).

112. *Id.*

113. *Id.*

114. VA. CODE ANN. §§ 37.1-128.1, -132 (Michie 1990).

115. *Id.* § 37.1-128.1.

116. *Id.* § 37.1-132.

117. Judge Clifford R. Weckstein stated that a "petition for appointment of guardian must include medical documentation of diagnosis, including the extent, duration and nature of the disability." Judge Clifford R. Weckstein, Address to the Virginia Public Forum, Roanoke, Va. (Sept. 12, 1989).

118. LOSING A MILLION MINDS, *supra* note 3, at 171; *see also supra* text accompanying notes 52-55.

119. Regan, *supra* note 10.

that the diagnosis should be related to a legal standard or to the respondent's ability to function; (2) because "incapacities often change, a finding of incapacity should be supported by evidence of functional impairment over time;" and (3) viewing incapacity at only one or two points in time can result in a misleading conclusion.¹²⁰

Because the Virginia statutes require the court to include the "nature and extent of the person's incapacity" as well as the definition of the powers and duties of the guardian, apparently the court will consider the functional abilities of the proposed ward.¹²¹ Virginia statutes do not require that the court consider the changes in the person's functional ability over time, or that there be a showing that the person is likely to suffer "substantial harm by reason of inability," as recommended by the Symposium.¹²² The Joint Subcommittee Studying Legal Guardianship recommends that the courts, in conjunction with physical and mental health care professionals, develop a standardized assessment to use for determining incapacity.¹²³ Hopefully, once this is done, a further refinement of the definition will be forthcoming.

2. Restoration of Capacity

The Symposium addressed the standards for restoration of legal capacity in its recommendation that "court[s] should respond promptly to a ward's request for a redetermination of status."¹²⁴ The Symposium also recommended imposing the burden of proof on those seeking to continue the guardianship.¹²⁵ Generally, the law presumes that when a person is found to be legally incapacitated, he remains in that condition. In order for a ward to regain his competent status, he generally must initiate a separate judicial proceeding to prove his capacity.¹²⁶

120. ABA COMMISSION, *supra* note 21, at 15.

121. Sections 37.1-128.1 and -132 of the Code require the court order to define the powers and duties of the guardian "to permit the incapacitated person to care for himself and manage his property to the extent that he is capable." VA CODE ANN. §§ 37.1-128.1(a)(ii), -132 (Michie Repl. Vol. 1990).

122. ABA COMMISSION, *supra* note 21, at 15 (Recommendation III-A).

123. REPORT OF THE JOINT SUBCOMMITTEE, *supra* note 27, at 6.

124. ABA COMMISSION, *supra* note 21, at 18 (Recommendation III-F).

125. *Id.*

126. PARRY, *supra* note 5, at 392.

The 1989 amendment to section 37.1-134.3 of the Code, which allows reinstatement of any matter resulting in a determination of incapacity,¹²⁷ was a legislative attempt to facilitate access to the courts for persons seeking reconsideration of their status. Nevertheless, the statute allowing for restoration of legal capacity, section 37.1-134.1, places the burden on the ward to "present evidence that the person has substantially regained his ability to care for his person and manage and handle his estate."¹²⁸

The experience of Marguerite Van Etten, as discussed in the AARP News Bulletin, graphically illustrates the difficulties faced by a person seeking restoration of competency.¹²⁹ Marguerite, who described herself as a thoroughly competent person, president of two organizations and vice-president of another, was seriously injured in an automobile accident in 1983. While she was in a coma, her daughter successfully petitioned a local court to appoint her as Marguerite's guardian. When Marguerite regained her health a few months later, she discovered a harsh reality:

As a ward, she could not own a house, marry or divorce, vote, drive a car — nor could she manage her own money.

. . .

It took only a few minutes for a judge to put her under a guardianship, . . . but a great deal of persistence — and thousands of dollars — to end it.

. . .

[Lawyers] told her she needed statements vouching for her competency from the psychiatrist, doctor and minister who had signed the original guardianship petition.

Once the statements were in hand, [she] pushed for a court hearing to argue her competency. . . . [N]early one year after her accident, she was once again declared competent.¹³⁰

127. VA. CODE ANN. § 37.1-134.3 (Michie Repl. Vol. 1990).

128. The Supreme Court of Virginia has held that §37.1-134.1 of the Code does not require the additional findings enunciated in the statutes addressing the initial adjudication of legal incapacity. *Schmidt v. Goddin*, 224 Va. 474, 297 S.E.2d 701 (1982) (children of long-term patient in sanatorium who unsuccessfully sought restoration of capacity appealed the decision arguing that the trial court was required to make additional findings).

129. Barbara Coleman, *Dubious Protection*, 29 AARP NEWS BULLETIN 2 (1988).

130. *Id.*

3. Least Restrictive Alternatives

The Symposium raises another substantive issue regarding the use of limited guardianship and other less restrictive alternatives. The chapter of the Symposium report addressing judicial practices includes the following recommendation:

Use of Limited Guardianship — In the absence of statute, judges should use their inherent or equity powers to limit the scope of and tailor the guardianship order to the particular needs of the ward. The petition and order should include detailed statements of the respondent's functional capabilities and limitations. If practical, the court order should require the guardian to attempt to maximize self-reliance, autonomy and independence. Finally, the guardian periodically should report these efforts to the court.¹³¹

The Symposium further emphasized the importance of including "the least restrictive alternative doctrine" and practical ways to tailor guardianship in continuing legal education for judges and court personnel.¹³²

An inherent and recurring conflict in guardianship law arises from the tension between the civil liberties of the ward and the state's *parens patriae* power. Legal scholars contend that the constitutional doctrine of the "least restrictive alternative" should apply in guardianship cases, limiting state paternalism to action necessary for the health and welfare of the individual.¹³³

The Supreme Court established the "least restrictive alternative" doctrine in 1960 when it stated:

Even though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same purpose.¹³⁴

The United States Court of Appeals for the District of Columbia Circuit first applied the doctrine to the area of civil commitment in

131. ABA COMMISSION, *supra* note 21, at 19 (Recommendation IV-B).

132. *Id.*

133. *Id.*

134. *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

*Lake v. Cameron*¹³⁵ when it found that an elderly woman could not be committed to an institution indefinitely without an exhaustive exploration of all possible alternatives for her care and treatment in the community. Numerous courts have followed the *Lake* holding that the least restrictive alternative doctrine applies to commitment cases.¹³⁶ Furthermore, applicable law in Virginia includes the Fourth Circuit Court of Appeals case of *Thomas S. v. Morrow*.¹³⁷ In *Thomas S.*, the court found that a young man whose liberty had been restrained by the appointment of a guardian and inappropriate placement in a hospital and a detoxification facility was entitled to the treatment recommended by a team of professionals which offered the possibility of alternatives less restrictive to his fundamental freedom.¹³⁸

The Joint Subcommittee Studying Legal Guardianship expressed a favorable opinion over the application of the least restrictive alternative doctrine in Virginia guardianship proceedings. According to the Subcommittee, "the principle of 'least restrictive alternative' as found in case law should be formalized to the extent that the court order covers all points including exhaustion of all other alternatives prior to the appointment of a guardian."¹³⁹

Various legal alternatives short of guardianship do exist in Virginia. If an individual receives education and advice prior to becoming incapacitated, he or she can execute a durable power of attorney, a health care power of attorney, a "living will" or an *inter vivos* (living) trust. Also, a direct deposit or joint bank account and assignment of a representative payee provide effective alternative mechanisms for persons who are not capable of managing their finances.

A power of attorney is perhaps the least restrictive alternative because the individual exercises complete control over the selection of the person who will "stand in his or her shoes" to make decisions in the event of incapacity.¹⁴⁰ Virginia law allows for "durable" powers, which survive incapacity, and for "springing" (or con-

135. 364 F.2d 657 (D.C. Cir. 1966).

136. ABA COMMISSION, *supra* note 21, at 20.

137. 781 F.2d 367 (4th Cir.), *cert. denied*, 476 U.S. 1124, and *cert. denied* 479 U.S. 869 (1986).

138. *Id.* at 376.

139. REPORT OF THE JOINT SUBCOMMITTEE, *supra* note 27, at 6.

140. A power of attorney is the written expression of an agency agreement and the law of agency is generally applicable. VIGNERY, *supra* note 26, at 3.

tingent) powers, which do not become effective until a specified time or event has occurred (such as when disability develops).¹⁴¹ In addition, Virginia also recognizes a special power of attorney specifically authorizing another person to make decisions regarding all health care matters.¹⁴² To insure that the individual obtains a decisionmaker or agent of his own choosing, both a secondary and primary agent may be named. In the event that the primary agent is unable or unwilling to continue, the secondary agent takes over. The "power" may be written with specific information about the person's choices, including wishes concerning medical treatment in the event of a non-terminal illness rendering the person unable to communicate or make decisions about his or her care. The individual also may specify the kind of medical treatment he or she considers to be "heroic" or "extraordinary," and whether he or she considers artificial nutrition "medical treatment" or "comfort and care."¹⁴³ A carefully written power of attorney can protect the individual's right to self-determination, and comply with his or her best interests, without a need for court intervention.

The Virginia Natural Death Act¹⁴⁴ although not intended to be alternative to guardianship, nevertheless provides a method of allowing a surrogate decisionmaker to act when an individual person may no longer be capable of making personal decisions. However, Virginia's "living will" act¹⁴⁵ applies only in cases where the indi-

141. VA. CODE ANN. §§ 11.9-1 to 4 (Michie Repl. Vol. 1989).

142. *Id.*

143. M. Garey Eakes, *An Introduction to the Elder Law Practice*, VA. LAW., Nov. 1989, at 27. The 1991 Session of the General Assembly amended the Virginia Natural Death Act to clarify that artificially supplied food and hydration are considered life-prolonging procedures under the Act, making it even more important that an individual whose own personal values dictate that the administration of food and hydration does not constitute an artificial life prolonging procedure specify his or her exact wishes in that regard. VA. CODE ANN. § 54.1-2982 (Michie Repl. Vol. 1991). Justice Brennan addressed this type of conflicting values in his dissenting opinion in the *Cruzan* case:

In few areas of health care are people's evaluation of their experiences so varied and uniquely personal as in their assessments of the nature and value of the processes associated with dying. For some, every moment of life is of inestimable value; for others, life without some desired level of mental or physical ability is worthless or burdensome. A moderate degree of suffering may be an important means of personal growth and religious experiences to one person, but only frightening or despicable to another.

Cruzan v. Director, Mo. Dept. of Health, 110 S. Ct. 2841, 2878 (1990) (Brennan, J., dissenting, quoting from the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research).

144. VA. CODE ANN. §§ 54.1-2981 to 54.1-2992 (Michie Repl. Vol. 1991).

145. *Id.* § 54.1-2982.

vidual suffers from a "terminal illness. Furthermore, the physician or any other person is not legally compelled to honor the "living will."¹⁴⁶ Nevertheless, a "living will" written by a subsequently incapacitated person may avoid the necessity of court intervention to authorize the termination of life-sustaining treatment in accordance with the prior stated wishes of the patient. Again, the right to self-determination regarding medical treatment is preserved.

Other alternatives to guardianship include court interventions involving a single decision. For example, a recently enacted Virginia statute allows for judicial authorization of treatment.¹⁴⁷ Another alternative is embodied in the companion legislation authorizing non-judicial substitute decisionmaking for non-protesting patients, allowing the family to make a decision without resorting to appointment of a guardian.¹⁴⁸

A final less restrictive alternative is the appointment of a limited guardian rather than a plenary guardian. As noted in the New York study, courts seem to resist the effort of tailoring the guardianship to fit the particular needs of the individual ward.¹⁴⁹ In a "limited guardianship," the guardian is assigned only those duties

146. REPORT OF THE JOINT SUBCOMMITTEE, *supra* note 27, at 12. *But see* Gail McKnight, *Bill Would Force Honoring of Right To Die*, THE TENNESSEAN, April 19, 1991, at B1, Col. 1. (reporting on proposal before Tennessee legislature that would force treating physicians to honor "living wills" in cases where the patient's condition meets statutory criteria, including a coma or persistent vegetative state).

147. VA. CODE ANN. §§ 37.1-134.5 (Michie, Repl. Vol. 1990). Contrasting the recent amendment to Maryland guardianship law with Virginia's alternative, in 1990 the Maryland legislature expanded the guardianship duties and powers which a court may order to include the power to withhold or withdraw medical or other professional care, counsel, treatment or service, *unless* it would involve substantial risk to the life of a disabled person, in which case it is necessary to seek court authorization. MD. EST. & TRUSTS CODE ANN. §§13-708(b)(8)-(c) (Michie Supp. 1991). The Virginia statute for judicial authorization of specific medical treatment, including the withholding or withdrawal of treatment, specifically excludes from those it is intended to serve persons for whom a guardian or committee has been appointed. VA. CODE ANN. § 37.1-134.5(G)(1) (Repl. Vol. 1990).

148. *Id.* § 37.1-134.4. Family members are the most common surrogate decisionmakers. The President's Commission endorsed decisionmaking by the family in consultation with the physician and other health care professionals. In addition a Virginia Appellate Court case, *Hazelton v. Powhatan Nursing Home, Inc.*, 6 Va. App. 414 (Va. Ct. App. 1986) recognizes the right of family members to make decisions.

Professor Regan emphasizes that patients need the protection of (a) a *formal* procedure, preferably involving a second physician's opinion that the patient meets the criteria of incapacity *and* that the illness is terminal with no prognosis for recovery, and (b) valid *notice* to the patient that a decision is being made regarding his/her capacity, and that a surrogate decisionmaker is being appointed who will make a decision regarding his/her treatment. *See* Regan, *supra* note 10.

149. ABA COMMISSION, *supra* note 21, at 21.

and powers that the individual is incapable of exercising. The Virginia statutes specify that the guardianship order shall "define the powers and duties of the guardian so as to permit the incapacitated person to care for himself and manage his property to the extent that he is capable" and "specify whether the determination of incapacity is perpetual or limited to a specific length of time."¹⁵⁰ In other words, the law in Virginia favors limited guardianship. Obviously, there is room for judicial discretion, and in Virginia, as elsewhere, the tendency of courts to appoint plenary guardians is a concern.¹⁵¹ Certainly, the words of the statute imply a presumption that a limited guardianship is all that is available in Virginia, because the statute requires that "[c]lear and convincing evidence shall be presented in the hearing to support each provision in the court's order of appointment."¹⁵² Shifting the presumption away from a plenary appointment to a limited appointment increases the likelihood that courts will use only the degree of guardianship power clearly warranted by the ward's specific incapacity.¹⁵³

4. Conflict of Interest

A number of recommendations in the Symposium's report address potential conflicts of interest between guardians and wards. The recommendations also emphasize the need for closer judicial supervision of guardians, requiring accountability of the guardians of the person as well as guardians of the property.¹⁵⁴ Virginia, however, requires no monitoring of non-financial decisions made by guardians.¹⁵⁵ Although the Virginia Joint Subcommittee recommended development of a standardized accounting form to be used

150. VA. CODE ANN. § 37.1-128.1 and 134 (Michie Repl. Vol. 1990).

151. Judges Weckstein and Trabue have publicly affirmed their commitment to the statutory preference for appointment of limited guardianship. Weckstein, *supra* note 117 and Trabue, *supra* note 75. *But see* ABA COMMISSION, *supra* note 21, at 21 (a 1985 study concluded that "generally, the most, rather than the least restrictive protective arrangement is employed").

152. VA. CODE ANN. § 37.1-128.1 (Michie Repl. Vol. 1990).

153. Regan, *supra* note 10. Limited guardianships are statutorily required in the states of Utah and Michigan. UTAH CODE ANN. § 75-5-304(2)(1978); MICH. COMP. LAWS ANN. § 700.444(2) (West Supp. 1991). Both laws require the court to make a specific finding that nothing less than a full guardianship is adequate, if it does not grant a limited guardianship.

154. ABA COMMISSION, *supra* note 21, at 23-27 (Recommendations V-A through F). Guardianship orders may specify a guardian's power over property or may be limited to the person. Traditionally, some accounting of the ward's property is required, but in the case of guardians of the person, there is often no mechanism that allows or encourages any review of the guardian's performance in respect to the ward. *Id.* at 24.

155. PROGRAM DESIGN OPTIONS, *supra* note 1, at 30.

by local Commissioners of Accounts to more closely scrutinize the activities of guardians, no legislative action has been taken to insure closer supervision of guardians.

VII. A PUBLIC GUARDIANSHIP PROGRAM FOR VIRGINIA

Another aspect of guardianship addressed by the reform movement is the plight of persons, usually elderly nursing home patients or persons in state mental institutions, who have no family or friends to serve as a guardian when the need arises. In order to preserve self-determination and personal autonomy for these persons, some system must be devised where the government or a private individual provides guardianship services. But nowhere is the tension between the state acting in its *parens patriae* capacity and the efforts of civil libertarians to preserve self-determination more pronounced than when discussion turns to a system of public guardianship. Professor Regan aptly identifies two aspects of the controversy when he contrasts the image of a "super state welfare official" who takes charge of a particular class of persons (such as the poor) against the present system which, in the absence of a public guardian, allows for exploitation, particularly of the elderly and the disabled.¹⁵⁶

In 1981, the Administration of the Agency on Aging funded the publication of a study of public guardianship programs in the United States.¹⁵⁷ At that time, thirty-four states had enacted some statutory provision for public guardianship services.¹⁵⁸ The guardianship services across the states could be classified into four different models: the court model, the independent state office model, the social service agency model, and the county model. Also, the research noted that states without public guardianship laws employed a number of methods to deal with persons needing guardians: benign neglect, de facto guardians, assignment of a relative or friend, commitment to a mental hospital, private attorneys, banks, nonprofit organizations (usually with a religious affiliation), county

156. Regan, *supra* note 10; see also SCHMIDT, *supra* note 70, at 9 (discussing Nicholas Krittrie's description of a "new hybrid system of social control" known as the therapeutic state).

157. SCHMIDT, *supra* note 70, at 167. A public guardian is an agent of the government who serves when (1) there are no family members or friends willing to take responsibility of guardianship and (2) where the money in the estate is insufficient to attract attorneys, banks, or similar entities.

158. *Id.* at 8.

level social service programs utilizing volunteers, and citizen groups serving as a guardian bank.¹⁵⁹

Though public guardians generally operate under the same laws as other guardians,¹⁶⁰ it is clear that the potential wards of a public guardianship program are likely to be even more vulnerable than other members of the least visible minority. Public wards lack family or friends to help protect their interests, therefore, the laws should provide them with even more stringent due process protections.

A primary concern of critics of public guardianship programs is the issue of a conflict of interest between the public guardian and the ward.¹⁶¹ When the guardianship agencies function as both guardian and direct service provider, there is an inherent conflict, primarily because the public guardian's role is to challenge service provider agencies that are not providing proper services. Of particular concern are the programs in which the public guardian is an appointed official from within a pre-existing social service agency. Commentators refer to this type of program as a conflict of interest model.¹⁶²

In response to these concerns, the Symposium recommended the appointment of independent public guardians, to insure that they were free to objectively evaluate and advocate for their wards' needs, and if necessary, challenge inadequate or inappropriate services.¹⁶³ Using a nonprofit, nongovernmental, independent agency as public guardian allows the guardian to avoid undue influence by other state interests, such as protecting society; reducing expenditures, or serving as a case manager.¹⁶⁴

The Virginia General Assembly began to study the need for a public guardianship program in response to a serious shortage of people willing to serve as guardians.¹⁶⁵ Another serious problem is

159. *Id.* at 149.

160. PARRY, *supra* note 5, at 390.

161. *Id.* See e.g., SCHMIDT, *supra* note 70, at 60; ABA COMMISSION, *supra* note 21, at 29-30.

162. SCHMIDT, *supra* note 70, at 60; see also ABA COMMISSION, *supra* note 21, at 30.

163. ABA COMMISSION, *supra* note 21, at 30 (Recommendation IV-A).

164. PARRY, *supra* note 5, at 390.

165. For example, directors of social services agencies and advocates for the elderly reported situations where elderly persons waited as long as eleven months for appointment of a guardian when there were no family members in a position to serve as guardians. This was the case for an eighty-year-old Chesterfield woman whose health had deteriorated to the point that she needed more care than could be provided by the social workers coming to her

that many Virginia nursing homes will not accept even Medicaid-eligible patients unless they are signed in by a responsible person. This usually means that the responsible person must submit a statement of financial responsibility, which frightens relatives.¹⁶⁶ Apparently, even relatives often do not want to bear the responsibilities or kinds of decisions they would have to make as guardians.¹⁶⁷

The urgent need for a public response to the shortage of available guardians, coupled with the unsatisfactory statutory provision of the local sheriff as the guardian of last resort, led the General Assembly in 1988 to direct the Department of Social Services to examine the concept of reserving public guardianship as a service of last resort. The results of that examination and proposals for an appropriate legislative response were presented to the Governor and the General Assembly in January, 1990.¹⁶⁸

The proposal to the legislators included five design options, or models, that could be established to provide the needed public guardianship services in Virginia. One particular model was recommended for adoption to serve as a pilot project, in order to begin the data collection that would be required for long-range planning. The Virginia public guardianship program targets a population described as the most vulnerable "incapacitated adult recipients of Adult Protective Services."¹⁶⁹ To be eligible for Adult Protective Services, the statute requires a finding of abuse, neglect or exploitation.¹⁷⁰ The proposal included the following components deemed necessary to safeguard the rights of persons who would become wards of the public guardian:

Emphasis on Alternatives [to guardianship] . . . ;

home and her only brother was also elderly and unable to act in the role of guardian. ROANOKE TIMES & WORLD NEWS, Feb. 21, 1989, at B3.

166. A decision to admit an incompetent person to a nursing home is a health care decision. The practice of requiring the "signature of a 'responsible party' in addition to or in lieu of the signature of the [patient]. . . may very well violate federal and state laws governing Medicaid-funded facilities and/or deceptive trade practices." VIGNERY, *supra* note 26, at 121.

167. ROANOKE TIMES & WORLD NEWS, *supra* note 165, at B3.

168. See PROGRAM DESIGN OPTIONS, *supra* note 1, at i.

169. *Id.* at 11. This target population is consistent with other states that have enacted public guardianship programs. See IND. CODE ANN. § 4-28-17-21 (West Repl. Vol. 1990).

170. VA. CODE ANN. § 63.1-55.4 (Michie Repl. Vol. 1987).

Eligibility Criteria Based on Need — and without regard to age, cause of disability, community based or institutional living arrangement or income;

Multi-Disciplinary Assessment/Reassessment Process . . . ;

Defined Roles of Human Service Agencies — utilize available services and collective expertise in serving . . . [the wards] . . . ;

Use of Volunteers — to provide alternative services . . . [and] to enhance the quality of the public guardianship system;

Due Process Protections . . . ;

Ongoing Case Monitoring — to assess the performance of the guardian and the well-being of the ward;

Minimum Standards of Performance [for the guardian] . . . ;

Public Education and Professional Development . . . [and];

Advisory Board — to function as a planning, coordinating and problem-solving focus for the public guardianship program.¹⁷¹

The five design options presented the legislators originated in designs used in other states, including 1) a public guardianship program administered by the Department of Social Services; 2) state initiated contracts for public guardianship services; 3) a free-standing public guardianship agency; 4) a volunteer guardianship program; and 5) a guardianship program administered by the court.¹⁷² Each structure would require the General Assembly to establish a legal base, provide authority for promulgation of regulations and implementation of the design, and to allocate funds for the program. The department considered the advantages and disadvantages of each model. The proposal recommended that the Department of Social Services implement a pilot project in one of its seven regions using the local departments of social services to provide casework, with public guardianship provided at the regional office level.¹⁷³ The pilot project would operate for two years and serve approximately eighty Adult Protective Services clients at

171. PROGRAM DESIGN OPTIONS, *supra* note 1, at 12.

172. *Id.* at 13.

173. *Id.* at 16.

any one time. Primarily the pilot project would gauge the effectiveness of the public program and estimate the number of persons who would benefit, as well as the annual cost of providing the service.¹⁷⁴

The Department of Social Services model would employ a state-level guardianship administrator with overall administrative/supervisory/monitoring responsibilities, and two regional public guardians to provide guardianship services to the wards. Referrals would come through local Adult Protective Services programs. Local social services departments would maintain open files on all adults served by the regional public guardian and would retain responsibility for ongoing case management.¹⁷⁵

This recommended design falls prey to criticism as a classic example of the "conflict of interest" model of provision of public guardianship services.¹⁷⁶ Problems include the difficulty of distinguishing between the role of the public guardian and that of a general protective services agent, and the conflict created when the public guardian is employed by an agency whose main purpose is the efficient distribution of financial and social assistance. However, this model carries the advantage of building on the delivery system already in place to serve the target population. It also promotes a multi-disciplinary approach to assessment which the proponents anticipate would minimize the potential conflict of interest, using the expertise of Area Agencies on Aging, Community Service Boards, and other local agencies serving specialized populations.¹⁷⁷ As a two year pilot project, the program would be subject to adaptation and restructuring based on results of evaluation and data collection.

Because of difficulties inherent in situations requiring appointment of a public guardian, many commentators worry that public guardian programs will only extend the abuses which occur in private guardianships.¹⁷⁸ Nonetheless, most people writing on the subject, as well as those who work in the field, favor the establishment of public guardianships, despite their drawbacks.¹⁷⁹

174. *Id.* at 18.

175. *Id.* at 19.

176. *See supra* text accompanying notes 161-62.

177. PROGRAM DESIGN OPTIONS, *supra* note 1, at 14.

178. SCHMIDT, *supra* note 70, at 15.

179. *Id.* at 15, 76.

However, some commentators adamantly oppose guardianship in any form. One writer states that: "In a society which venerates liberty, conservatorship is an anachronism. Neither the interest of potential beneficiaries nor the interest of the state in having a better management position vis-a-vis the ward is justified."¹⁸⁰

Questioning the assumption that social interventions benefit the individuals involved, critics see potential harm in guardianship because it is often applied for inappropriate reasons according to invalid standards.¹⁸¹ One writer even refers to the appointment of a guardian as "an initiation rite for the entry of the poor and inept into the managed society."¹⁸²

This "abolitionist" position, as it is referred to in the literature, is premised on the notion that there is no such condition as mental incompetency, there is only behavior that deviates from society's norms for acceptable conduct.¹⁸³ The abolitionist would allow the law to punish only behavior actually, objectively, and physically harmful to society. However, the abolitionists do not address ways in which society should deal with the extreme cases of self-neglect that often lead to the appointment of a guardian.¹⁸⁴ Since it lacks an affirmative policy to address the vacuum that would exist without guardianship, the abolitionist position makes only a minimal contribution to the reform movement.

VIII. CONCLUSION: A CALL FOR REFORM IN VIRGINIA

The Bill of Rights does not distinguish between competent and incompetent persons.¹⁸⁵ Entitlement to due process rights before the deprivation of life, liberty or property applies equally to persons when they are conscious or unconscious, competent or incompetent.

180. Regan, *supra* note 7, at 1128 (quoting George J. Alexander, *Who Benefits from Conservatorship?*, TRIAL, May 1977, at 32).

181. For example, a board and care provider may require a guardian's signature to authorize the use of restrictions to ensure that residents (former mental hospital patients) do not leave the facility, and if there is no guardian, the resident cannot remain at the facility. Mitchell, *supra* note 47, at 462; see also SCHMIDT, *supra* note 70, at 127.

182. Mitchell, *supra* note 47, at 466.

183. Regan, *supra* note 7, at 1128-29.

184. *Id.* at 1129.

185. See, e.g., Superintendent of Belchertown State Sch. v. Saikewicz, 370 N.E.2d 417, 423 (Mass. 1977).

The state acting under its *parens patriae* or its police powers cannot restrict fundamental freedoms of either competent or incompetent persons except by the least restrictive alternative means available. When any persons's mental capacity to make personal decisions is in question, that person is entitled to the protection of his or her constitutional rights.

Virginia lawmakers made significant strides in recent years to better ensure that all citizens have full protection of the laws whenever they need a substitute decisionmaker. Still, much needs to be done to see that judges incorporate the policy changes espoused by the Joint Subcommittee Studying Legal Guardianship. Medical caregivers and social service providers need to implement alternatives to guardianship in place of reliance on a court appointed guardian as its sole option to substitute decisionmaking.

The duties of guardians *ad litem* should be clearly identified either legislatively, or by judicial decree, to assure that an appointed guardian *ad litem* fulfills a specified role in the guardianship proceeding. The guardian *ad litem*'s duties should include provision of a follow-up report detailing for the court the guardian's plan for treatment of the ward and an update on the ward's status at a particular point in time (perhaps, six months) after the guardian's appointment. Moreover, funding should be allocated by the legislature to provide for the increased expectations of the court appointed guardian *ad litem*.

The urgent need to develop a system that protects the rights of self-determination and personal autonomy of incapacitated persons with no friends or family mandates the necessity of additional funds and authorization for the establishment of a public guardianship program. The Public Guardianship Program ("the Program") should be established as an independent state agency, funded separately under the Secretary of Health and Human Resources. Only by creating a separate free-standing agency to provide the public guardianship services can the legislators appropriately address the critical need of this group of constituents who are acutely vulnerable to abuse and neglect.

The Program must maintain a separate identity in order to preserve its ability to act on behalf of the clients, persons without friend or family to serve as guardians. Otherwise, the conflict of interest inherent in a system where the Program is attached to a pre-existing state agency, such as the Department of Social Ser-

vices or the Department for the Aging, becomes an issue of great concern. These other agencies bear direct responsibilities to provide services to the persons who will be wards of the public guardian. The public guardian will have a duty to challenge the provision of services by state and federal agencies when the situation requires such a challenge. A public guardian, who is also a member of the staff of the state agency, stands in a position too compromised to adequately protect the client's interests.¹⁸⁶

The Program, as an independent agency, can be structured after the Virginia Department for the Rights of Virginians with Disabilities (DRVD). The DRVD advocates on behalf of disabled persons in Virginia, providing legal assistance to secure services to which the clients are entitled by law. The Governor appoints a director, and the department is assigned to the Secretary of Health and Human Resources. The department operates apart from all other agencies. The effectiveness of the DRVD depends on the agency's independence and distinction from other service-providing agencies, because the DRVD must advocate on behalf of its clients for improved services from one of the other state agencies.¹⁸⁷

The Program would serve many of the same clients that are served by the Departments of Health, Social Services, Rehabilitation, Visually Handicapped, and Aging. The Program should be directed by a multi-disciplinary Board, and its charge should include a mandate requiring inter-agency planning and service provision by signed agreements. In communities where the services needed by the ward are available from private agencies, the Program should develop cooperative agreements between the public sector and the private agencies to provide the services that would benefit the ward. This method contains the costs of operating the Program and minimizes the expansion of state government bureaucracy. The Program structure should allow for a de-centralization of staff; there should be a state-level program administrator and at least one public guardian for each Health Department region throughout the Commonwealth (until the data collection process provides the statistics revealing how staff could be better allocated).

Referrals to the regional public guardian could be made by Adult Protective Services staff, the Mental Health agencies, case managers for elderly and disabled persons, local Departments of

186. STATEMENT, *supra* note 101, at 5.

187. VA. CODE ANN. § 51.5-36 (Michie Repl. Vol. 1990).

Social Services, Health Department personnel, and others. The public guardian would be appointed by the circuit courts to serve the ward through the statutory guardianship process and should be accountable to the court for the ward's treatment.

The primary objections to the independent agency model for the Public Guardianship Program are the cost and the unnecessary expansion of state government. Although there will be an incremental expansion of state government, such expansion may not be unnecessary. Appending the program to a pre-existing department endangers the individual rights of the wards because the program cannot function with sufficient independence to properly serve the wards' needs. Moreover, an independent agency may not even be more costly than a program that operates as a part of a pre-existing department, because each requires the same number of public guardians. Hiding the cost figures in the budget of another department does not necessarily insure a less expensive program. Overall, the critical need for the Program compels a legislative decision emphasizing justice and compassion over the minimal variations in cost between the independent model and the conflict of interest model.

