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"WHENEVER JUSTICE REQUIRES": EXAMINING THE ELUSIVE ROLE OF GUARDIAN AD LITEM FOR ADULTS WITH DIMINISHED CAPACITY

Donna S. Harkness*

Representation of clients with diminished capacity is an essential component of elder law practice.¹ In cases where an elder law attorney is able immediately to discern the presence of diminished capacity during an initial interview, the representation can be directed so as to regularize the relationship, either through appointment of an attorney-in-fact (if the client still has sufficient capacity to do so) or by petitioning for appointment of a guardian or conservator to make decisions and manage the client's affairs.² Unfortunately, in real life, where litigation is involved, a practitioner is often confronted with either an unexpected and sudden decline in a client's capacity or is asked to step into a lawsuit where an incapacitated client's rights are already at issue and time is of

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1. A. KIMBERLEY DAYTON ET AL., ADVISING THE ELDERLY CLIENT § 2:6 (2006).

2. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2006). The rule authorizes a lawyer to seek appointment of a general guardian in the case of exigent circumstances that may otherwise result in irreparable harm. *Id.* cmt. 9. An attorney may file a petition seeking appointment of a general guardian or conservator for his own client when absolutely necessary to preserve the client's interests. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-404, at 6-7 (1996). However, the attorney may not represent any other party petitioning for such appointment, nor may the attorney himself seek to be appointed as guardian or conservator. *Id.* at 7-8.

the essence.³ In such cases, where the client is incapable of assisting counsel in preparing the case or is unable to make decisions concerning case management, the filing of a petition for conservatorship places the attorney, who is supposed to be litigating on the client's behalf, in an adverse role to the client.

Even if another party, such as a relative, is available to independently pursue the guardianship or conservatorship, such proceedings are still unavoidably cumbersome and lengthy, thus delaying the progress of the already pending litigation.⁴ Examination by at least one physician may be required, which the client may resist.⁵ Pursuit of such proceedings adds to the expense of the representation. Finally, the granting of a conservatorship or guardianship will subject the client to a loss of autonomy that otherwise might have been avoided.⁶

As an alternative to general guardianship, federal⁷ and state⁸ court rules provide for appointment of a guardian ad litem

3. See Joseph A. Rosenberg, *Adapting Unitary Principles of Professional Responsibility to Unique Practice Contexts: A Reflective Model for Resolving Ethical Dilemmas in Elder Law*, 31 LOY. U. CHI. L.J. 403, 408-09 (2000).

4. See, e.g., John E. Donaldson, *Reform of Adult Guardianship Law*, 32 U. RICH. L. REV. 1273, 1274 (1998).

5. See generally A. Frank Johns, *Ten Years After: Where is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L.J. 33 (1999) (discussing guardianship and procedural safeguards that have been incorporated into guardianship proceedings as a result of modern reform efforts). A number of states have enacted versions of the Uniform Guardianship and Protective Proceedings Act (hereinafter U.G.P.P.A.). See U.G.P.P.A. §§ 1-101 to 1-404 (1982), 8A U.L.A. 435 (2003); U.G.P.P.A. §§ 101 – 504 (1997), 8A U.L.A. 301 (2003). Physician examinations are mandatory under the 1982 Uniform Act. U.G.P.P.A. § 2-203 (1982), 8A U.L.A. 478-79 (2003). The 1997 Act makes the evaluation discretionary with the court unless the respondent demands one, in which case the court must order it. U.G.P.P.A. § 306 (1997), 8A U.L.A. 358 (2003).

6. Ellen S. Pryor, *After the Judgment*, 88 VA. L. REV. 1757, 1796 (2002).

7. FED. R. CIV. P. 17(c).

8. Although a majority of the states have adopted the Federal Rule without modification, twenty-three states have made some revision and/or addition. See R. ALA. SUP. CT. 17(d); ARIZ. R. CIV. P. 17(i); ARK. R. CIV. P. 17(b); CAL. CODE CIV. PROC. § 372; IND. R. TRIAL P. 17; KY. CT. R. 17.03; MD. R. CIV. P. 3-202; MICH. CT. R. 2.201; MINN. R. CIV. P. 17.02; MISS. R. CIV. P. 17(c); MONT. R. CIV. P. 17(c); N.Y. C.P.C.R. 1202 (Consol. 2005); N.C. R. CIV. P. 17(b); N.D. R. CIV. P. 17(b); OR. R. CIV. P. 27(B); PA. R. CIV. P. 2053; S.C. R. CIV. P. 17; TENN. R. CIV. P. 17.03; TEX. R. CIV. P. 173.4; UTAH R. CIV. P. 17(b); VA. CODE ANN. 8.01-9 (Supp. 2000); W. VA. R. CIV. P. 17(c); WIS. R. CIV. P. 803.01(3).

for purposes of representing the client within the context of the individual lawsuit only. However, unlike the statutory schemes which govern guardianships and conservatorships, the rules for appointment of a guardian ad litem provide virtually no guidance concerning the process that is to govern such appointments, when such appointments are appropriate, who is qualified to be appointed, the role the appointee is to play in the litigation, and other such critical issues.⁹ This lack of guidance raises concerns about the potential for violation of an elderly, incapacitated person's due process rights in connection with guardian ad litem appointments, as the guardian ad litem is charged with managing the litigation and potentially authorized to compromise and settle the incapacitated person's rights in connection with whatever cause of action is being litigated on that person's behalf.¹⁰

Consider the case of Ms. Oldage, age eighty-two, who accompanied by her niece consults a lawyer. Ms. Oldage is frail and a little confused but still able to coherently relate to the attorney the events that brought her to his office. A lonely widow, with no close relatives, she had become enamored with a fifty-year-old handyman who offered to repair her bathroom fixtures without charge. A few months later, the helpful handyman moved in with the widow, despite the fact that he was already married to a woman his own age (a fact he did not disclose to Ms. Oldage). Soon, the handyman's name was listed beside hers on all of her bank accounts, and he was the one writing all of the checks, most of which were payable to cash or to himself. Finally, when the money in the bank accounts ran out, the handyman took Ms. Oldage to see a friendly real estate investment company, telling Ms. Oldage that she needed to take

9. See FED. R. CIV. P. 17(c); R. ALA. SUP. CT. 17(d); ARIZ. R. CIV. P. 17(i); ARK. R. CIV. P. 17(b); CAL. CODE CIV. PROC. § 372; IND. R. TRIAL P. 17; KY. CT. R. 17.03; MD. R. CIV. P. 3-202; MICH. CT. R. 2.201; MINN. R. CIV. P. 17.02; MISS. R. CIV. P. 17(c); MONT. R. CIV. P. 17(c); N.Y. C.P.C.R. 1202 (Consol. 2005); N.C. R. CIV. P. 17(b); N.D. R. CIV. P. 17(b); OR. R. CIV. P. 27(B); PA. R. CIV. P. 2053; S.C. R. CIV. P. 17; TENN. R. CIV. P. 17.03; TEX. R. CIV. P. 173.4; UTAH R. CIV. P. 17(b); VA. CODE ANN. 8.01-9 (Supp. 2000); W. VA. R. CIV. P. 17(c); WIS. R. CIV. P. 803.01(3).

10. See 25 FED. PROC., L. ED. *Infants and Incompetents* § 59.91 (2006).

out loans against her rental properties and then, several months later, her home. The "loans" turned out to be purchases (at discount prices) of each property, with the investment company representative stating that he had been told by the handyman that Ms. Oldage needed money to pay bills. The helpful handyman then cashed the checks from these sales and disappeared, leaving Ms. Oldage alone to face the action for eviction brought by the friendly real estate investment company. The attorney files suit to enjoin the eviction and seeks rescission of these transactions; he is successful in keeping Ms. Oldage in her home during the ensuing two-year pendency of the proceedings. Now, a settlement offer has been made. The attorney has arranged to meet with Ms. Oldage in his office. The niece, who was in her fifties, regrettably died in the interim.

Ms. Oldage is more frail after two years and no longer can relate the events connected with the financial exploitation as she once could. She has turned to her neighbor across the street, another man in his fifties, who accompanies her to your office. He insists on being present for discussion of the settlement offer, and Ms. Oldage, when asked, confirms that she wants him there. He interrupts repeatedly and discusses Ms. Oldage's exploitation. The attorney cannot discuss the settlement offer alone with his client because she wants the neighbor present and, in fact, wants him to decide whether or not to accept the offer.

What can the attorney do? Can he allow the neighbor to decide? Is it time to withdraw?¹¹ Is it permissible for the attorney to file a petition for general guardianship or conservatorship against his own client?¹² Would appointment of a guardian ad litem to assess the suitability of the settlement offer be appropriate? Can the attorney ask for such

11. See MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 6 (2006) (stating that a client with "severely diminished capacity" may "lack the legal capacity to discharge the lawyer," thus leaving the lawyer to consult Model Rule 1.14 for guidance).

12. See MODEL RULES OF PROF'L CONDUCT R. 1.14 (2006). Although this rule specifically deals with clients with diminished capacity, it provides less than a crystal clear guide for the attorney's behavior. *Id.*

appointment?

An elder law attorney may also find herself appointed as a guardian ad litem, with all its ethical and practical complexities. Consider the case of an elderly prison inmate with Alzheimer's disease who is being sued for divorce. The inmate's interest in marital property and possible allocation of a portion of his pension rights to the wife are at issue. The court appoints you to act as the inmate's guardian ad litem pursuant to your state's version of Federal Rule of Civil Procedure (hereinafter Federal Rule) 17(c).¹³ Are you to function as a substitute for a registered agent for service of process – someone who can accept service of legal papers on behalf of the incapacitated inmate so that the estranged spouse can proceed with her lawsuit? Are you obligated to look after the inmate's best interests? Are you to function as legal counsel so as to defend against the divorce?

These two hypothetical situations, widely divergent as they are, illustrate the difficulties that face elder law practitioners attempting to provide legal representation to clients with diminished capacity. Both of these elderly individuals clearly are in need of assistance even though they have not been formally adjudicated as lacking capacity.

GUARDIANS AD LITEM

Federal Rule 17(c) provides:

Whenever an infant or incompetent person has a representative, such as a general guardian, committee, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. An infant or incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the infant or incompetent

13. See FED. R. CIV. P. 17(c).

person.¹⁴

Most states have enacted a rule patterned after the Federal Rule, some with significant revisions that will be discussed below in the section addressing the qualifications for appointment of guardians ad litem.¹⁵ The Tennessee state civil procedure rule changes the Federal Rule language slightly, substituting the phrase "whenever justice requires" for the "as it deems proper" language of the Federal Rule.¹⁶ Since the court's determination of what is proper presumably is in accord with the requirements of justice, the two versions appear to be equivalent, but the reference to the notion of justice adds a valuable nuance when one considers the proper role of guardians ad litem appointed pursuant to Federal Rule 17. A guardian ad litem who simply functions to facilitate litigation by accepting service of process or signing off on settlements would not seem to be what "justice requires," but such a placeholder concept of the role might suffice for what a court "deems proper."¹⁷

The section below begins by discussing the role of the guardian ad litem within the context of an adversarial legal system. Next, the substantive standards that should be used in deciding when appointment is appropriate are examined, and the procedural due process issues are considered. Qualifications

14. *Id.*

15. See *infra* text accompanying notes 85-92.

16. TENN R. CIV. P. 17.03.

17. In actuality, the Tennessee Supreme Court held that the "whenever justice requires" language in Tennessee's Rule 17.03 does not impose any more rigorous standard than that found in the federal rule. In *Gann v. Burton*, 511 S.W.2d 244 (Tenn. 1974), the court held that the "whenever justice requires" language "places the appointment of the guardian ad litem within the sound discretion of the trial judge." *Id.* at 246. In a case where a minor was represented by counsel, the trial court declined to appoint a guardian ad litem. *Id.* The Supreme Court found that this refusal did not result in any prejudice to the minor and was at most a "hypertechnical" and harmless error. *Id.* at 247. As Professors Banks and Entman have written, the result is "troubling," as it leaves the attorney who is representing the incompetent party with "no responsible party" to look "to make litigation decisions . . . and to protect . . . against overreaching" ROBERT BANKS, JR. & JUNE ENTMAN, TENNESSEE CIVIL PROCEDURE, § 6-1(o) (Matthew Bender 2006). As Banks and Entman say, "[A] more satisfactory reading of Rule 17.03 would be that appointment of some representative other than the litigation attorney is mandatory." *Id.*

required for appointment to the role of guardian ad litem are explored, and the guidelines that exist to govern performance of the guardian ad litem role are surveyed among the states. The final section provides a brief reflection on the models available for substitute decision making.

The conclusion proposes, to the extent that insufficient guidance appears to exist, guidelines derived from what appears to work for those guardians ad litem appointed to represent juveniles and for those appointed to act as guardians ad litem within the context of guardianship or conservatorship proceedings, as well as from policy considerations relevant to the relatively limited context of litigation.

BACKGROUND

The American legal system is predicated on the notion that a contest between fully adversarial parties, forced to confront each other within a system of evenly applied procedural and evidentiary rules before an impartial trier (or triers) of fact, will achieve a just outcome.¹⁸ Obviously, when one of the parties is not capable of pursuing or protecting her legal interests due to impairment, the system is dysfunctional. The concept of a "next friend"¹⁹ or guardian ad litem to substitute for the impaired or incapacitated adversary is necessary to preserve the integrity of the theoretical construct of American jurisprudence.²⁰

Unfortunately, as integral as it would appear to be on a theoretical basis, in practice, the concept has remained elusive and ill-defined.²¹ Professor Joan O'Sullivan has noted that the

18. Robert Gilbert Johnston & Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147, 147-48 (2002); see also Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Roger C. Cramton, *Furthering Justice by Improving the Adversary System and Making Lawyers More Accountable*, 70 FORDHAM L. REV. 1599 (2002) (both providing critical assessments of the adversarial system).

19. Johns, *supra* note 5 at 37.

20. See Jennifer L. Wright, *Protecting Who From What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 ELDER L.J. 53, 55-56 (2004).

21. See Joan L. O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*,

guardian ad litem appointed in cases involving petitions for conservatorship or guardianship "acts as the 'eyes of the court' to further the 'best interests' of the alleged incompetent," but that the role often is "so unclear that the attorney may choose" to define the role as he or she sees fit.²² Professors Lidman and Hollingsworth describe a similar elasticity in the parameters of the guardian ad litem role in child custody cases.²³

Black's Law Dictionary defines a guardian ad litem as "[a] guardian, [usually] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party."²⁴ Under the former Equity Rules that preceded the Rules of Civil Procedure, the focus of such an appointment was clearly to provide substitution for the role of the litigant with the emphasis on defense or prosecution of lawsuits, even for those under guardianship.²⁵ It is here that the rule suggests the appropriateness of oversight by the court itself, stating that while incapacitated persons may sue by "their guardians, if any, or by their *prochein ami*, [this is] subject . . . to such orders as the court or judge may direct for the protection of infants and other persons."²⁶ The Equity Rules have been superseded by the Rules

31 STETSON L. REV. 687, 687 (2002).

22. *Id.* at 688.

23. Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 256-60 (1998). Efforts have been made to address this. See ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES (1996), <http://www.abanet.org/child/repstandwhole.pdf> (last visited Aug. 12, 2006).

24. BLACK'S LAW DICTIONARY 725 (8th ed. 2004).

25. See 28 U.S.C. § 723, Equity Rules Reference Table, at 3255 (1946); Bryant Bros. Co. v. Robinson, 149 F. 321, 330 (5th Cir. 1906) (holding that "the equity rules [adopted pursuant to Rev. St. U.S. § 917] have the force and effect of law"). Equity Rule 70 read as follows:

Guardians ad litem to defend a suit may be appointed by the court, or by any judge thereof, for infants or other persons who are under guardianship, or otherwise incapable of suing for themselves. All infants and other persons so incapable may sue by their guardians, if any, or by their *prochein ami*; subject, however, to such orders as the court or judge may direct for the protection of infants and other persons.

JAMES LOVE HOPKINS, THE NEW FEDERAL EQUITY RULES 301 (8th ed. 1933).

26. E.H. Schopler, Annotation, *Federal Civil Procedure Rule 17(c), Relating to Representation of Infants or Incompetent Persons*, 68 A.L.R.2D 752, 752 n.1 (1959).

of Civil Procedure,²⁷ but the former language is important because it indicates that the problem of adequate protection of and decision-making for those who have diminished capacity within the legal system is of long standing.

Much of the litigation about guardians ad litem, however, revolves around the issue of when and whether the appointment of the guardian ad litem is required.²⁸ Consideration of the actual role played by the guardian ad litem once appointed has received much less judicial treatment,²⁹ but it appears to be no less important in terms of preserving the integrity of the legal system.

WHEN APPOINTMENT IS "PROPER"

Determining the appropriateness of the appointment of a guardian ad litem for an adult is controversial.³⁰ Unlike minors, who as a matter of law are deemed incapable of decision making and are properly within the domain of the state's *parens patriae* authority,³¹ the case for assisting and thus intruding into an adult's life is much less clear, especially when there has been no adjudication of incompetence or diminished capacity.³² The adult's constitutional right to autonomy precludes intervention if the adult is in no way incapacitated.³³

However, as anyone who represents older persons knows, capacity is seldom an all or nothing proposition. Where clients are either totally lacking in decision-making ability or totally competent, the client's status is easily determinable and decisions concerning implementation of protective measures are clear cut.³⁴

27. FED. R. CIV. P. 86(a) advisory committee's note.

28. See Schopler, *supra* note 26, at 753-59 n.12.

29. See, e.g., Schopler, *supra* note 26 (listing no cases that address the guardian ad litem's role in the proceedings).

30. See Wright, *supra* note 20, at 66-67.

31. Marvin Ventrell, *The Practice of Law for Children*, 66 MONT. L. REV. 1, 8-12 (2005).

32. Wright, *supra* note 20, at 55-56.

33. See Johns, *supra* note 5, at 62-63.

34. A.B.A. COMM. ON LAW & AGING & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 20, 21-22 (2005) (hereinafter HANDBOOK FOR LAWYERS).

If the client is in a coma, for example, the need for a guardian ad litem is obvious. The difficult cases involve those that fall within the fluctuating capacity continuum of the client who is able to comprehend some things but not others, and who consequently is capable of making some decisions but not others.³⁵ The client's capacity and decision-making capability may itself be in flux, depending on the time of day, side effects of medications, familiarity with surroundings, stress, and myriad other factors.³⁶

The California Court of Appeals engaged the issue of the proper evidentiary standard to justify appointment of a guardian ad litem in the case of *Kern County Dep't. of Human Services v. Taylor D.* (hereinafter *In re Sara D.*).³⁷ *In re Sara D.* involved a petition for dependency based on two counts of dependency and neglect of Sara D., a six-year-old alleged to be out of her mother's control.³⁸ The mother, Taylor D., was alleged to suffer from bipolar disorder and personality disorder.³⁹ As might be expected, these problems made it difficult for the mother's court-appointed counsel to represent her.⁴⁰ The court-appointed counsel, therefore, asked the court either to allow him to withdraw (making him the second attorney to do so) or to appoint a guardian ad litem.⁴¹ At a conference in chambers, requested

35. *Id.* at 5-9.

36. *Id.* at 27-30.

37. 104 Cal. Rptr. 2d 909 (Ct. App. 2001).

38. Count I asserted that the mother was "unable to control" the child's "extreme behavior," putting the child at risk of "serious harm or illness." *Id.* at 911. The home environment also was alleged to constitute a "health and safety hazard." *Id.* The second count alleged that "Sara has suffered or is likely to suffer serious emotional damage as a result of [her mother's] conduct." *Id.*

39. *Id.*

40. *See id.* at 911. Clients with diminished capacity are not always difficult. Those with Alzheimer's disease or senile dementia may in fact be too malleable, necessitating safeguards to ensure that the client's interests are not subsumed by those of the attorney. *See* A. Frank Johns & Bernard A. Krooks, *Elder Clients with Diminished Capacity: NAELA's Response to Specific Case Applications and Its Development of Aspirational Standards that May Cross Professional Organizational Boundaries*, 1 NAELA J. 197, 199-200 (2005). But when a client is combative, the representation can be extremely frustrating, as the client's failure to understand the issues and to appreciate the need to communicate and cooperate with the attorney undermines the client's case. *See id.* at 205.

41. *In re Sara D.*, 104 Cal. Rptr. 2d, at 911.

and attended only by the attorneys, the court considered a report from the mother's therapist, which diagnosed her as suffering from borderline personality disorder and found it to be consistent with the court's previous observation of the mother's behavior.⁴² The court also considered that a previous attorney had already withdrawn as counsel, that a contested matter concerning jurisdiction was before the court and required resolution, and that it would be in the mother's best interests to have a guardian ad litem appointed to assist the mother's counsel in preparing and explaining the proceedings to her.⁴³ The case was set for a hearing, and the mother, her attorney, and the guardian ad litem were present at this hearing.⁴⁴ However, no proof was presented.⁴⁵ Instead, the mother's attorney notified the court that he consulted with the mother's therapist and the guardian ad litem, who had approved a decision to settle the case.⁴⁶ Because the case had been settled with an agreement to amend some aspects of Count I and to eliminate the allegations of Count II, the attorney did not contest the allegations of Count I relative to the mother's inability to control the child.⁴⁷ Two weeks later, at the conclusion of the dispositional hearing, the court heard testimony from the mother and father, and the court granted both physical and legal custody of the child to the father and supervised visitation to the mother.⁴⁸

On appeal, the mother challenged the appointment of the guardian ad litem on grounds of insufficient evidence and deprivation of due process rights.⁴⁹ The first issue concerned the proper evidentiary standard for such appointments, and the

42. *Id.*

43. *Id.*

44. *Id.* at 911-12.

45. *Id.* at 912.

46. *Id.* The settlement removed the allegations concerning the hazardous conditions of the home from Count I, amended the allegation that the mother was bipolar to reflect instead that she suffered from borderline personality disorder, and eliminated Count II of the complaint against the mother entirely. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

appellant mother argued for imposition of the same standards as those used for appointment of a conservator.⁵⁰ The State argued for use of the standard employed to determine whether a defendant was mentally incompetent to defend against criminal proceedings.⁵¹ The court analyzed California precedent and determined that neither test had been used exclusively, or was mandated for exclusive use by child custody statutes, to determine when appointment of a guardian ad litem was warranted.⁵² The court then held that if a preponderance of the evidence existed in the record to support either standard, then appointment of the guardian ad litem was justified.⁵³ Under the record presented in *In re Sara D.*, the appellate court found that the evidence was not sufficient to support either standard because the court below had relied on the conclusory statements of the mother's counsel.⁵⁴

In re Sara D. is instructive because it highlights the often unspoken divergence in the standards employed when courts determine whether appointment of a guardian ad litem is "proper."⁵⁵ As articulated under California law, the

50. *Id.* The standards for appointment of a conservator under the applicable California statute are either that the person is "unable to provide properly for his or her personal needs for physical health, food, clothing or shelter," CAL. PROB. CODE § 1801(a) (West 2002), or is "substantially unable to manage his or her own financial resources or resist fraud and undue influence," CAL. PROB. CODE § 1801(b).

51. *In re Sara D.*, 104 Cal. Rptr. 2d, at 912-13. The California criminal code states a person "is mentally incompetent . . . if, as a result of mental disorder or developmental disability, the [person] is unable to understand the nature of the criminal proceedings or to assist counsel in the conduct of a defense in a rational manner." CAL. PENAL CODE § 1367(a) (West 2000).

52. *In re Sara D.*, 104 Cal. Rptr. 2d, at 913-14.

53. *Id.* at 914.

54. *Id.* at 919.

55. In the first place, the appointment of a guardian ad litem under Rule 17(c) is not mandatory, but rather it is within the court's discretion. *Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 39 (5th Cir. 1958); *United States v. Noble*, 269 F. Supp. 814, 815 (E.D.N.Y. 1967). Where the interests of the incapacitated litigant appear to be adequately protected, no guardian ad litem appointment is necessary. *Roberts*, 256 F.2d at 39. The Tennessee Supreme Court, in interpreting Tennessee's Rule 17.03, held that the "whenever justice requires" language requires the court to "evaluate the total situation surrounding the infant or incompetent and then, if justice requires, a guardian ad litem must be appointed." *Gann v. Burton*, 511 S.W.2d 244, 246 (Tenn. 1974). Even then, the appointment remains "discretionary." *Id.* at 246-47.

conservatorship standard looks to the person's ability to conduct daily affairs and engage in ordinary decision making.⁵⁶ The criminal competency standard, on the other hand, is directed toward the person's ability to understand and assist in litigation.⁵⁷ The latter approach, with its emphasis on navigating the courtroom environment, actually appears to be the more appropriate standard for a guardian ad litem appointed pursuant to Federal Rule 17(c) or one of the equivalent state rules, and it should be the standard used to inform the court's sound discretion of when appointment is "proper."

WHAT PROCESS IS DUE

In addition to the substantive issue of when appointment of a guardian ad litem is appropriate, procedural due process concerns are raised by a court's appointment of a guardian ad litem.⁵⁸ Federal Rule 17(c) contains no procedure governing such appointments.⁵⁹ As noted above, the Federal Rule simply directs the court to act to make an appointment "as it deems proper" when there is no representative.⁶⁰ Examination of much of the case law indicates that guardian ad litem appointments are often made almost reflexively upon receipt of any assertion of diminished capacity.⁶¹ In *Neilson v. Colgate-Palmolive Co.*,⁶² this lack of procedure resulted in a challenge to the appointment of the guardian ad litem on due process grounds.⁶³ The case illustrates the tension between the client's right to autonomy and need for protection. The plaintiff, Francine Neilson, was a former employee of Colgate-Palmolive (hereinafter Colgate),

56. See CAL. PROB. CODE § 1801(b) (West 2002).

57. See CAL. PENAL CODE § 1367 (West 2000).

58. Johns, *supra* note 5 at 69.

59. See FED. R. CIV. P. 17(c).

60. *Id.*

61. Schopler, *supra* note 26 at 760; *see also* Thomas v. Humfield, 916 F.2d 1032, 1034 (5th Cir. 1990) (psychiatrist selected by defendant determined plaintiff was incompetent).

62. 199 F.3d 642 (2d Cir. 1999).

63. *Id.* at 651-54.

suing under Title VII alleging employment discrimination and retaliation.⁶⁴ During the course of the proceedings, Ms. Neilson's counsel withdrew, referencing a "deteriorating relationship" with Ms. Neilson that was precluding the firm from providing "effective representation."⁶⁵ Several months following the withdrawal, Colgate discovered that Ms. Neilson had been ordered to undergo inpatient psychiatric treatment following her discharge from Colgate.⁶⁶ The employer filed motions under Federal Rule 35, seeking a psychiatric examination of Ms. Neilson, and under Federal Rule 17(c), seeking appointment of a guardian ad litem for her.⁶⁷ Ms. Neilson was unrepresented and appeared *pro se*.⁶⁸ The federal district court granted the motion for psychiatric examination at Colgate's cost, and ordered Ms. Neilson to comply with the order or face dismissal of her lawsuit.⁶⁹ Ms. Neilson complied, and the court-appointed psychiatrist found that she was seriously delusional and suffering from "a severe Chronic Paranoid Disorder."⁷⁰ The psychiatrist recommended that Ms. Neilson "be found incompetent" and noted that she had asked "that a [g]uardian be appointed to pursue the litigation," apparently during the psychiatric examination.⁷¹

The court issued an order setting a hearing date to consider the psychiatrist's recommendation and to decide on the Federal Rule 17(c) motion.⁷² As part of the order, the court extended to Ms. Neilson the option to consent to the appointment of the guardian ad litem in writing.⁷³ Ms. Neilson wrote a letter in

64. *Id.* at 646. Ms. Neilson alleged discrimination based on race and sex. *Id.* Although she was the mother of an adult son, she did not bring suit under the Age Discrimination in Employment Act. *See id.* at 646, 648.

65. *Id.* at 646.

66. *Id.* at 647.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

response, stating that she consented to the "appointment of a guardian ad litem in addition to an attorney."⁷⁴ Ms. Neilson ended her letter by stating that she was "not competent to litigate this case."⁷⁵ On the date originally set for the hearing on the motion for appointment of a guardian ad litem, the court appointed a guardian ad litem and cited the psychiatrist's report, Ms. Neilson's consent, and its own findings as support for the order of appointment.⁷⁶

Assuming that Ms. Neilson was competent to give informed consent to the appointment of the guardian ad litem, it is clear that her consent was conditioned on concurrent appointment of legal counsel. This is an indication that Ms. Neilson recognized her shortcomings as a legal advocate on her own behalf and that she desired the appointment of someone who would aggressively pursue her claims of discrimination. Unfortunately, in general there is no right to free legal counsel in civil cases, even for the indigent.⁷⁷ The record does not suggest that Ms. Neilson was unable to afford counsel. She simply failed to retain substitute counsel to replace the attorneys that had withdrawn.⁷⁸ To the extent that her consent may have been predicated on the misconception that both counsel and a guardian ad litem would be appointed for her, it would seem to be voidable.⁷⁹

The dissenting opinion details attempts Ms. Nielson made to communicate to the court her desire for appointment of legal

74. *Id.*

75. *Id.*

76. *Id.* at 647-48. Defendant Colgate was ordered to pay the first \$10,000 of the guardian ad litem's fees, indicating that it may have been as much in Colgate's interests to have a substitute decision-maker as it was in Ms. Neilson's interests, at least from the standpoint of getting the case resolved. *Id.* at 648.

77. See *Lassiter v. Dep't of Soc. Serv.*, 452 U.S. 18, 25-26 (1981) (limiting an indigent's "right to appointed counsel" to those situations involving the potential for loss of liberty in the event the indigent party does not prevail). Courts may elect to appoint counsel in cases where fundamental rights are at stake, such as deprivation of medical treatment amounting to a violation of the Eighth Amendment, or pursuant to statutory authority. See *Johnson v. Doughty*, 433 F.3d 1001, 1006-07 (7th Cir. 2006).

78. See *Neilson*, 199 F.3d at 648.

79. 49 C.J.S. *Judgments* § 372 (1997).

counsel to represent her.⁸⁰ In a later letter to the court, Ms. Neilson suggested her consent was the product of duress and was issued because she was afraid that her lawsuit would be dismissed unless she agreed.⁸¹ As a consequence, the majority opinion declined to uphold the guardian ad litem appointment on the basis of Ms. Nielsen's consent.⁸² Instead, the court concluded that the procedural defects present in the case, the lack of notice and opportunity to be heard, provided "reasonable" notice,⁸³ and were remedied by the trial court's subsequent monitoring of the guardian ad litem's performance.⁸⁴

The actual performance of the guardian ad litem thus becomes relevant in evaluating the correctness of this holding. The court-appointed guardian ad litem conducted an investigation and determined that Ms. Neilson's case was not "triable" due to her mental illness.⁸⁵ The guardian ad litem engaged in settlement discussions with counsel for Colgate, and within two months an agreement had been reached and was announced to the court by the guardian ad litem and counsel for Colgate at a status conference.⁸⁶ A third lawyer was present, the attorney for Ms. Neilson's son, who had filed a petition seeking to be appointed as general guardian for his mother in state court.⁸⁷ Under state law, once he was appointed as general guardian, the

80. *Neilson*, 199 F.3d at 660-61 (Sotomayor, J., dissenting).

81. *Id.* at 660.

82. *Id.* at 653 n.5.

83. *Id.* at 653.

84. *Id.* at 652.

85. *Id.* at 648. Specifically, the guardian ad litem consulted with the court-appointed psychiatrist, who opined that "Nielsen's paranoid ideation was present early in her employment with Colgate and may have been present all of her life; . . . by 1993, it had consolidated into a full-blown paranoid delusional system; and . . . a delusional psychosis has persisted ever since, centering on Colgate but incorporating into it anyone else who impacts on her life." *Id.* at 648 n.2.

86. *Id.* at 648. The guardian ad litem negotiated a settlement that released all of Ms. Neilson's civil rights claims, including her statutory right to attorney's fees, in return for Colgate's pledge to "cooperate fully and use its best efforts to assist" Ms. Neilson in applying for disability benefits, to pay her \$2,500 per month until she either received such benefits or turned sixty-five, whichever came first, and to fund up to \$50,000 of amounts expended in her attempt to obtain such benefits. *Id.* at 648-49.

87. *Id.* at 648.

son would be the appropriate party to make decisions for his mother pertaining to the lawsuit.⁸⁸ The son's lawyer asked the court to postpone final approval of the proposed settlement until the court proceedings required for appointment of his client as general guardian were concluded.⁸⁹ As further support for this request, an affidavit from Ms. Neilson's former counsel asserted that Ms. Neilson's case was eminently "triable" and that a more favorable settlement than the one being proposed should be considered based on this fact.⁹⁰ Despite this, the court approved the settlement brokered by the guardian ad litem without waiting for the appointment of the general guardian.⁹¹ A general guardian subsequently was appointed for Ms. Neilson (a person other than the son), and the guardian appealed the order approving the settlement.⁹²

The first issue on appeal was whether the guardian had standing to file on behalf of Ms. Neilson.⁹³ The federal appellate court determined that the guardian did have standing under Federal Rule of Appellate Procedure 43 and found that Ms. Neilson had a constitutionally protected liberty interest in both "avoiding the stigma of being found incompetent" and "in retaining personal control over the litigation."⁹⁴ She could not be deprived of these interests without proper procedural due process

88. N.Y. C.P.L.R. § 1207 (Consol. Supp. 2005). In fact, the New York rule does not permit application for settlement by a guardian ad litem; a general guardian or guardian of the property must be appointed in order to pursue settlement on behalf of the litigant. *Id.*

89. *Neilson*, 199 F.3d at 649.

90. *Id.*

91. *Id.* The dissent notes that this holding was in derogation of New York's rule and was apparently based on the trial court's generalized concern that the case would be unduly delayed if the parties were required to wait until a general guardian could be appointed and have time to review the proposed settlement. *Id.* at 664 (Sotomayor, J., dissenting). The dissent further notes that this fear appeared unfounded, since the general guardian was appointed just nine days after the settlement was approved. *Id.* at 664 n.5. In addition, the dissent noted that the guardian ad litem had apparently had "very little interaction with Neilson and thus had virtually no first-hand knowledge of her personal situation or financial means." *Id.* at 664.

92. *Neilson*, 199 F.3d at 649-50.

93. *Id.* at 650.

94. *Id.* at 651.

pursuant to the Fifth Amendment.⁹⁵ In determining what process was due to Ms. Neilson, the court referred to *Mathews v. Eldridge*.⁹⁶ In analyzing the first factor under *Eldridge*, the court apparently agreed that Ms. Neilson's liberty interests were in fact important and compelling.⁹⁷ The third factor, the government's interest, is not specifically discussed, but presumably lies in efficient, expeditious, and low cost administration of the judicial process.⁹⁸ Ms. Neilson's position on appeal was that a formal evidentiary hearing should have been conducted before appointment of the guardian ad litem.⁹⁹ Under the second *Eldridge* factor, which concerns the analysis of "the risk of erroneous deprivation" using the existing procedure versus the "probable value . . . of additional or substitute procedural safeguards,"¹⁰⁰ the court found this level of procedure to be unnecessary in this case.¹⁰¹ In the first place, the court found that because Ms. Neilson was now being represented at the appellate level by a guardian, she could not be heard to challenge as erroneous her status at the trial level as someone "judicially found to be incompetent" for purposes of appointment of a guardian ad litem.¹⁰² Logically, the happenstance of a subsequent appointment of a general guardian for a litigant would not appear to mandate a finding that the litigant was incompetent at any point prior to the appointment. Even more importantly, such a subsequent appointment would not appear to rectify any due

95. *Id.*

96. *Id.* The *Eldridge* Court established a balancing test for determining the constitutional adequacy of procedures intended to satisfy due process. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976). Courts must weigh the following three factors: "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Id.* at 335.

97. *Neilson*, 199 F.3d at 651.

98. *See Eldridge*, 424 U.S. at 335.

99. *Neilson*, 199 F.3d at 651-52.

100. *Eldridge*, 424 U.S. at 335.

101. *Neilson*, 199 F.3d at 654.

102. *Id.* at 652.

process deficits that may have existed in the procedures used by the trial court for appointing a guardian ad litem. Nevertheless, the appellate court treated the lack of due process as a sort of harmless error, particularly since the district court had imposed "post-appointment safeguards" which were sufficient, in the court's opinion, to cure any due process deficits occasioned by the lack of a hearing and deprivation of the right to examine the expert's report, which was being considered by the court as evidence in support of the appointment.¹⁰³ The safeguards contemplated by the appellate court evidently consisted of the district court's ability to remove the guardian ad litem and its oversight in approving the final settlement arranged between the guardian ad litem and Colgate.¹⁰⁴ How these measures could in any way remove the constitutional infringement on Ms. Neilson's right to decide what was in her own best interests is not explained.

In short, the majority's discussion of the *Eldridge* factors and its determination that sufficient due process was afforded to Ms. Neilson simply is not convincing. The dissent took issue with both the quality of the notice provided to Ms. Neilson to alert her to the district court's contemplated appointment of a guardian ad litem and the lack of an opportunity for Ms. Neilson to be heard in opposition to such an appointment.¹⁰⁵ The dissent further noted that the trial court's oversight after the guardian ad litem's appointment did not operate to cure the procedural defects.¹⁰⁶ The dissent argued that at minimum Ms. Neilson should have been "informed that she had a liberty interest at stake . . . that if she was found incompetent and a guardian ad

103. *Id.*

104. *Id.* at 652-56.

105. *Id.* at 659 (Sotomayor, J., dissenting).

106. *Id.* at 660-61. Judge Sotomayor, the author of the dissent, noted that Ms. Neilson repeatedly asked for appointment of counsel, and had she understood that she had a choice with respect to the appointment of the guardian ad litem, she might well have taken different steps that would have preserved her cause of action. *Id.* at 660. Instead, her discrimination claims were jettisoned without any meaningful examination of the merits, particularly with respect to her claim of retaliation. *Id.* at 663, 665-66.

litem was appointed, she would lose all authority to make decisions concerning her own case."¹⁰⁷

The *In re Sara D.* court, discussed above, also observed that no case law set out the proper procedures to be followed in appointing a guardian ad litem.¹⁰⁸ The *In re Sara D.* court found this to be understandable since most appointments are either a matter of law, as when appointments are made for minors, or are consensual.¹⁰⁹ In situations where there is no consent, or there can be no valid consent due to the litigant's alleged diminished capacity, the court found the absence of procedural guidelines to be troubling, since the appointment of a guardian ad litem generally confers "broad powers" on the one appointed.¹¹⁰ The guardian ad litem essentially takes on the decision-making role with power to "control the lawsuit."¹¹¹ Without attempting to issue a ruling that would govern all parental rights cases, the court determined that due process at least required an explanation by the court to the mother of why a guardian ad litem was being sought and required an informal hearing where the litigant for whom a guardian ad litem was being requested could be heard in opposition to the request.¹¹² Even these minimal procedural safeguards were not accorded to the mother.¹¹³ Of course, all litigants, not just those involved in child custody cases, are adversely affected by the loss of decision-making control and the stigma of a finding of diminished capacity.¹¹⁴ Therefore, the absence of minimal procedural safeguards governing the appointment of guardians ad litem pursuant to Federal Rule 17(c) and similar state rules should be rectified to protect the due

107. *Id.* at 659.

108. *In re Sara D.*, 104 Cal. Rptr. 2d 909, 914 (Ct. App. 2001).

109. *Id.*

110. *Id.* These powers include "controlling procedural steps necessary to the conduct of the litigation, making stipulations or concessions with court approval, waiving the right to a jury trial, and controlling trial tactics." *Id.*

111. *Id.*

112. *Id.* at 917-18.

113. *Id.* at 917.

114. See Christy Holmes, *Surrogate Decisionmaking in the 90s: Learning to Respect Our Elders*, 28 U. TOL. L. REV. 605, 610 (1997).

process rights of all litigants whose capacity may be questioned.

QUALIFICATIONS FOR APPOINTED GUARDIANS AD LITEM

In addition to the lack of procedural guidance, Federal Rule 17(c) is bereft of any qualification criteria for those appointed as guardians ad litem.¹¹⁵ This is not entirely true of the state rules. Several states require that guardians ad litem be attorneys,¹¹⁶ and several states require the person appointed be "competent," "responsible" and "discreet."¹¹⁷ Finally, a couple of states impose restrictions designed to preserve impartiality and objectivity,¹¹⁸ and a few states require the posting of a bond by the guardian ad litem where the litigant's financial interests may be impacted.¹¹⁹ This hodge-podge of miscellaneous provisions does not come close to providing any uniform standard.¹²⁰

In an excellent article examining the lack of procedural safeguards that have plagued conservatorship and general guardianship proceedings, attorneys Susan Haines and Jack Campbell point out that even where states have provided for appointment of a guardian ad litem to protect the interests of the respondent in such proceedings, there is generally no requirement that the person so appointed "possess any special skills, knowledge, training, experience, or even that he or she be an attorney."¹²¹ The Uniform Guardianship and Protective

115. See FED. R. CIV. P. 17(c).

116. See R. ALA. SUP. CT. 17(d); MISS. R. CIV. P. 17; VA. CODE ANN. 8.01-9(A) (Supp. 2000); W.VA. R. CIV. P. 17(c).

117. See MICH. CT. R. 2.201(E); N.C. R. CIV. P. 17; S.C. R. CIV. P. 17.

118. See R. ALA. SUP. CT. 17(d) (stating that the guardian ad litem cannot be related by blood or marriage or be nominated by plaintiff's attorney); S.C. R. CIV. P. 17 (stating that the guardian ad litem cannot possess adverse interests or be "connected with" the adverse party's lawyer).

119. See MINN. R. CIV. P. 17.02; MISS. R. CIV. P. 17(c).

120. Amendments to the Federal Rules currently proposed by the American Law Institute also do not address these issues. See Lee H. Rosenthal, *Proposed Amendments to the Federal Rules of Civil Procedure Restyled Rules 1-86*, 42 A.L.I. - ABA 83 (2005) available at Westlaw, SK042 ALI-ABA 83.

121. Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceedings: Are Our Probate Codes Unconstitutional?*, 14 QUINNIPIAC PROB. L.J. 57, 93 (1999).

Procedures Act of 1997 provides a modicum of additional guidance by suggesting that "the court shall . . . appoint a [visitor]," and "the [visitor] must be an individual having training or experience in the type of incapacity alleged."¹²² This suggests that the visitor or guardian ad litem need not be an attorney but must be someone familiar with Alzheimer's Disease, if that were the incapacity involved, or with terminal cancer, if it had led to physical debilitation sufficient to require appointment of a general guardian.¹²³ The comments submitted by the drafting committee recommend that the "visitor" be a "physician, psychologist, . . . nurse, social worker, or individual with pertinent expertise."¹²⁴ Such a requirement is definitely logical within the context of guardianship proceedings and might be desirable within the wider context of all litigation involving an incapacitated party since the difficulty in effectively communicating with the incapacitated adult is generally one of the issues that results in the need for appointment of the guardian ad litem in the first place.¹²⁵ However, unless courts establish permanent paid positions for such individuals, the cost and scheduling difficulty of securing appointments of individuals with this level of qualification would be prohibitive.¹²⁶

In addition, in the absence of legislation or regulation by the various credentialing bodies, imposing a duty upon such individuals to serve, courts would have no authority to appoint doctors, psychologists, nurses, social workers, and others as guardians ad litem without securing contractual agreements with them to do so. In the best of all possible worlds, contract

122. U.G.P.P.A. § 305 (1997); 8A U.L.A. 354 (2003).

123. *Id.*

124. *Id.*

125. See Johns & Krooks, *supra* note 40, at 199.

126. Physicians already are overworked and sleep-deprived. Thomas R. McLean, *The 80-Hour Work Week: Why Safer Patient Care Will Mean More Health Care Is Provided by Physician Extenders*, 26 J. LEGAL MED. 339, 361 (2005). In Tennessee, physicians are exempted by statute from compulsory attendance under subpoena for civil trials and must instead be deposed at their convenience for purposes of providing testimony. TENN. CODE ANN. § 24-9-101(6). Obviously, physicians are too busy to accept routine appointments as guardians ad litem.

physicians, psychologists, nurses, and social workers would be available to the court for appointment as guardians ad litem. In the real world, guardians ad litem will need to be either lawyers or possibly lay persons with sufficient training to be conversant in legal procedures and terminology, so as to fulfill the need for someone who can assist the attorney representing the incapacitated adult in making decisions vital to the case. Alabama's rule, for example, requires that the guardian ad litem possess the qualifications necessary "to represent the minor or incompetent person in the capacity of an attorney or solicitor."¹²⁷ Providing lawyers with continuing legal education on issues of diminished capacity and the types of physical and mental impairments that may be expected to lead to diminished capacity is critical.¹²⁸ Ideally, this might lead to a program of certification for guardians ad litem, the development and implementation of which would enhance the quality of and provide uniformity in the standards of eligibility for those appointed as guardians ad litem.

GUIDELINES FOR PERFORMANCE OF THE GUARDIAN AD LITEM

Federal Rule 17 sets out no specific guidelines to govern the guardian ad litem's performance following appointment.¹²⁹ This is in contrast to the standards set out for guardians ad litem appointed in child neglect, abuse, and dependency cases, which now envision that the guardian ad litem will function as a lawyer, advocating the position of the best interests of the child¹³⁰ or those provided under the Uniform Guardianship and Protective Proceedings Act, which require in-person visits to the respondent, investigation of the respondent's personal and

127. R. ALA. SUP. CT. 17(d).

128. Excellent materials on capacity assessment have already been developed by the American Bar Association in conjunction with the American Psychological Association. *HANDBOOK FOR LAWYERS*, *supra* note 34. These materials could be used on an interdisciplinary basis to educate attorneys and non-attorneys alike.

129. See FED. R. CIV. P. 17(c).

130. See ABA STANDARDS OF PRACTICE FOR LAWYERS WHO REPRESENT CHILDREN IN ABUSE AND NEGLECT CASES, *supra* note 23; see also Andy Shookhoff & Susan L. Brooks, *Protecting Our Most Vulnerable Citizens*, TENN. B.J., June 2002, at 14.

financial circumstances, and issuance of reports and recommendations relating to same.¹³¹

Case law posits that courts that have appointed a Federal Rule 17 guardian ad litem have a "continuing obligation to supervise the guardian ad litem's work."¹³² Any substantive decisions made by the guardian ad litem on behalf of the incapacitated litigant and any settlement recommended by the guardian ad litem are subject to the court's approval.¹³³ In addition, the court that appointed the guardian ad litem can act to remove the guardian ad litem.¹³⁴ In *Neilson*, for example, the district court was called upon to review the guardian ad litem's work and to assess whether or not the guardian ad litem should be removed in accord with the request made by Ms. Neilson and her son's attorney.¹³⁵

Approval and removal are options available to the court and represent the court's responsibility to protect the interests of an incapacitated party by monitoring the performance of the agent that the court has appointed to protect that party.¹³⁶ Neither option provides any specific guidance for the conduct of the guardian ad litem in effectively performing his or her role. Guardians ad litem appointed for minors and those appointed within the context of general guardianship and conservatorship proceedings receive much greater guidance pursuant to statute and/or court rule;¹³⁷ the lack of any corollary guidelines for Federal Rule 17 guardians ad litem is an anomaly that should be corrected.¹³⁸ Since custody of the litigant and control of his or her assets is not at issue in litigation outside of proceedings for guardianship or conservatorship, the plethora of reports that are

131. U.G.P.P.A. §§ 305(c)-(e).

132. *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 652 (2d Cir. 1999).

133. *Dacanay v. Mendoza*, 573 F.2d 1075, 1079 (9th Cir. 1978); *Noe v. True*, 507 F.2d 9, 12 (6th Cir. 1974).

134. *Neilson*, 199 F.3d at 652.

135. *Id.* at 664-66.

136. *Id.* at 652.

137. See Sherrill L. Rosen, *Guardian Ad Litem Practice*, 63 UMKC L. REV. 371, 377-78 (1995).

138. See *supra* notes 21-23 and accompanying text.

required within that context would be superfluous and should not be imposed within the context of Federal Rule 17 appointments.

The Tennessee Supreme Court listed the tasks to be performed by a guardian ad litem as follows: (1) to be responsible for costs and liable for judgment, (2) to be the one against whom the court can make and enforce orders, (3) to be subject to punishment for contempt in the event of disobedience or violation of court orders, (4) and, perhaps most importantly, to look after, take care of, and protect the interests of the incapacitated litigant.¹³⁹ To adequately discharge these duties, Federal Rule 17 guardians ad litem, at minimum, should meet with the incapacitated litigant and with those family members or acquaintances who are familiar with the litigant and conversant with the litigant's background, beliefs, and preferences. To the extent possible, the guardian ad litem should elicit from the litigant as much guidance as the litigant is able to provide concerning the lawsuit and how the litigant would like it to proceed. A summation of the guardian ad litem's findings after this investigation of the litigant's circumstances should be submitted confidentially to the court; should there be questions raised later, the report would establish the information and factors upon which the guardian ad litem will have relied in making his or her determinations on behalf of the litigant.

STANDARDS FOR DECISIONMAKING

Federal Rule 17(c) sets out no specific standard for making decisions on behalf of the incapacitated person.¹⁴⁰ The two available standards for exercising decision making on behalf of another person are best interests and substituted judgment.¹⁴¹ The best interests standard is conservative and works to preserve the status quo concerning personal lifestyle and finances and seeks to implement traditional medical advice when pertinent to safeguard

139. *Rankin v. Warner*, 70 Tenn. 302, 304-05 (1879).

140. See FED. R. CIV. P. 17(c).

141. LAWRENCE A. FROLIK & ALISON MCCHRYSTAL BARNES, *ELDER LAW: CASES AND MATERIALS* 505-06 (3d ed. 2003).

the health and well-being of the individual.¹⁴² The best interests standard also seeks to preserve the assets of the individual so as to maximize security, stability, and financial well-being.¹⁴³ These things obviously are desirable from a fiduciary standpoint and from the standpoint of one to whom the minor's care is entrusted.

Within the context of litigation involving an adult, however, a solely best interests approach may not be appropriate because considerations that may cause someone to bring a lawsuit are not always grounded in the person's best interests. Parties may seek a declaratory judgment and injunctive relief, for example, to rectify a past wrong and to prevent such wrongs in the future, considerations which may not affect the individual party's present best interests at all.

In *Neilson*, discussed above, Ms. Neilson's pursuit of her discrimination claims never may have been in her "best interests," at least from the standpoint of the court-appointed psychiatrist that examined her.¹⁴⁴ The psychiatrist believed that Neilson's allegations were "the product of [her] illness," and continuing to pursue the suit only fueled and strengthened her paranoia.¹⁴⁵ Be that as it may, Ms. Neilson took the initiative to contact an attorney to file a lawsuit prior to her hospitalization, and at least one lawyer from the firm continued to believe in the viability of her legal claims, particularly as to the issue of retaliation.¹⁴⁶ Clearly, Ms. Neilson was at least partially motivated by her desire to vindicate her rights and to redress the wrong she felt had been inflicted upon her by Colgate.¹⁴⁷ This motivation represents a critical component of her personal values and beliefs. In cases involving vindication of personal rights of adults, as was the situation with Ms. Neilson, implementation of a substituted judgment standard seems more appropriate than that of a best interests standard for purposes of decision making on

142. *Id.* at 506.

143. *Id.*

144. *Neilson v. Colgate-Palmolive Co.*, 199 F.3d 642, 648 (2d Cir. 1999).

145. *Id.*

146. *Id.* at 665-66.

147. *Id.* at 646.

behalf of the incapacitated litigant.

As suggested in the previous section, a guardian ad litem should determine the values and beliefs of the incapacitated litigant to approximate the judgments that the person would have made. To accomplish this, he or she should first consult with the litigant (to the extent that the litigant is able to communicate), then interview all available family members, friends, and other associates, and consult with any other sources such as social workers, ministers, and others familiar with the litigant and the litigant's beliefs. Although substituted judgment has been used most often in situations involving health care decision making, the factors that have been developed within that context can easily be adapted to fit the arena of litigation.¹⁴⁸ The guardian ad litem's inquiries to the various information sources concerning the incapacitated litigant should ascertain: (1) her expressed wishes, (2) her religious beliefs, if relevant to the decision, (3) the effect the decisions will have on her close relatives, (4) the risk of adverse impact of the proposed decision versus probability of desired outcome, and (5) the effect this risk/benefit analysis would have had on the litigant's continued wish to pursue the proposed course of action based on her past history of decision making.¹⁴⁹

In most cases, having conducted the investigation, the guardian ad litem will be able to reasonably determine the litigant's wishes and desires for purposes of exercising substituted judgment. Alternatively, if the litigant's wishes or desires either cannot be determined or are irrational, the information obtained will provide a basis for deciding the course that will be in the litigant's best interests.

148. FROLIK & BARNES, *supra* note 141, at 507-08.

149. See M. Garey Eakes et al., *Planning Lessons Learned From End-of-Life Disputes*, 17 NAELA Q. 21, 22 (2004) (citing the substituted judgment factors from *Brophy v. New England Sinai Hospital, Inc.*, 497 N.E.2d 626, 630 (Mass. 1986): "(a) Mr. Brophy's expressed preferences; (b) [h]is religious convictions and their relation to refusal of treatment; (c) [t]he impact on his family; (d) [p]robability of adverse side effects; [and] (e) [p]rognosis – both with and without treatment").

CONCLUSION

Shouldering the responsibility for decision making and safeguarding the interests of an incapacitated client is a daunting task, even within the relatively restricted context of a single lawsuit.¹⁵⁰ Representation of older clients necessarily entails situations of diminished capacity and loss of decision-making ability; when this occurs in the middle of litigation, recourse to appointment of a guardian ad litem pursuant to Federal Rule 17(c) or one of its state equivalents is virtually unavoidable.¹⁵¹ The paucity of guidance for such appointments begins with the Rule itself, which sets only the vaguest criteria for when appointment is appropriate, establishes no procedures for ensuring due process in such appointments, provides no guidance for who should be appointed, and creates no standards for the role itself.

As argued above, the importance of the role of a guardian ad litem for those in need of such protection mandates that these deficits be addressed. Recommendations include amendment of Federal Rule 17(c) as follows: (1) to establish that appointment of a guardian ad litem is only proper when the litigant is unable to understand the nature of the proceedings and is unable to assist in the management of the case, (2) to provide adequate due process procedures to ensure that the litigant is advised of what is going on and of her right to oppose the appointment, (3) to create qualifications for persons appointed as guardians ad litem, so that at a minimum such persons would be required to have training in the law or experience relating to incapacitated persons, (4) to incorporate guidelines for performance by the guardian ad litem, and finally, (5) to explicitly declare the standard to be used for making decisions on behalf of the incapacitated litigant. If such changes are implemented, or similar changes designed to address

150. See James M. Peden, *The Guardian Ad Litem Under the Guardianship Reform Act: A Profusion of Duties, a Confusion of Roles*, 68 U. DET. L. REV. 19, 24 (1990).

151. See Jeanette Zellhof et al., *Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 CARDOZO PUB. L., POL'Y, & ETHICS J. 733, 738 (2004).

the problems that exist, the role of the guardian ad litem may be transformed from one of an elusive and amorphous character to one that truly is what justice requires.
