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FLORIDA GUARDIANSHIP AND THE ELDERLY: THE PARADOXICAL RIGHT TO UNWANTED ASSISTANCE

*Alison Patrucco Barnes**

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I. INTRODUCTION

Involuntary guardianship of the person and property are devices by which a court substitutes the judgment of a more capable person for the judgment of an impaired individual. A guardian is one to whom the law entrusts the custody and control of an impaired person, the management of that person's property, or both.[1] Guardians of the

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1. *See, e.g.*, FLA. STAT. §§ 744.102-.357 (1988). Every state has statutory procedures for adjudication of incompetency and appointment of a guardianship. *See* ALA. CODE § 1-200 (1975 & Supp. 1987); ALASKA STAT. §§ 13.26.005-.320 (1988 & Supp. 1989), §§ 26-2A-1 to -160 (1986

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property are called curators[2] or conservators;[3] the impaired person is

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& Supp. 1988); §§ 13.26.095, .165 (1972); ARIZ. REV. STAT. ANN. §§ 14-5301 to -5432, 36-547 to -547.09 (1986 & Supp. 1988); ARK. CODE ANN. §§ 28-65-01 to -403 (1987 & Supp. 1988); CAL. PROB. CODE § 1801 (1981 & Supp. 1989); COLO. REV. STAT. §§ 15-14-101 to -432 (1974); CONN. GEN. STAT. ANN. §§ 45-54 to -78 (1981 & Supp. 1988); DEL. CODE ANN. tit. 12, §§ 3914-3928 (1987); GA. CODE ANN. §§ 49-601 to -622 (1979 & Supp. 1987); HAW. REV. STAT. §§ 560:5-101 to -430 (1985 & Supp. 1987); IDAHO CODE §§ 15-5-101 to -432 (1979 & Supp. 1988); ILL. ANN. STAT. ch. 110 ½, para. 11-3 to -6, 11a-1 to -23 (Smith-Hurd 1978 & Supp. 1987); IND. CODE ANN. §§ 29-1-18-1 to -19-18 (Burns 1972 & Supp. 1988); IOWA CODE §§ 633.552-.682 (1964 & Supp. 1988); KAN. STAT. ANN. §§ 59-3001 to -3038 (1983 & Supp. 1988); KY. REV. STAT. ANN. §§ 387.500 to 388.39 (Baldwin 1987); LA. CIV. CODE ANN. art. 389 to 426 (West 1952 & Supp. 1988); ME. REV. STAT. ANN. tit. 18-A §§ 3-601 to -721 (1981 & Supp. 1988); MD. EST. & TRUSTS CODE ANN. §§ 13-101 to -222 (1974 & Supp. 1988); MASS. GEN. LAWS ANN. ch. 201, §§ 6-13A to -48A (West 1981 & Supp. 1987); MICH. COMP. LAWS ANN. §§ 330.1600-:1642 (West 1980 & Supp. 1988); MINN. STAT. ANN. §§ 525.54-.61 (West 1975 & Supp. 1989); MISS. CODE ANN. §§ 93-13-121 to -219 (1972 & Supp. 1988); MO. ANN. STAT. §§ 475.010-.480 (Vernon 1956 & Supp. 1989); MONT. CODE ANN. §§ 72-5-101 to -439 (1988); NEB. REV. STAT. §§ 30-2601 to -2661 (1985 & Supp. 1988); NEV. REV. STAT. ANN. §§ 159.013-.215 (Michie 1986 & Supp. 1988); N.H. REV. STAT. ANN. §§ 464-A:1 to 465:14 (1983 & Supp. 1988); N.J. STAT. ANN. §§ 3B:1-1 to :13A-31 (1983 & Supp. 1988); N.M. STAT. ANN. §§ 45-5-301 to -432 (1987 & Supp. 1988); N.Y. MENTAL HYG. LAW §§ 78.01-.5 (McKinney 1979 & Supp. 1988); N.C. GEN. STAT. §§ 34-1 to -18, 35A-1101 to -125 (1988); N.D. CENT. CODE §§ 30.1-26-01 to -29-32 (1976 & Supp. 1987); OHIO REV. CODE ANN. §§ 2111.01-.48 (Anderson 1976 & Supp. 1987); OKLA. STAT. ANN. tit. 30, §§ 1-116 to 4-804 (West 1976 & Supp. 1989); OR. REV. STAT. §§ 126.003 .413 (1987); 20 PA. STAT. ANN. tit. 20, §§ 5501, 5511-5525 (West Supp. 1988); R.I. GEN. LAWS §§ 33-15-8 to -18-31 (1984 & Supp. 1988); S.C. CODE §§ 62-5-401 to -624 (1987 & Supp. 1988); S.D. CODIFIED LAWS ANN. §§ 30 26-1 to -33-47 (1984 & Supp. 1987); TENN. CODE ANN. §§ 34-1-101 to -7-105 (1984 & Supp. 1988); TEX. PROB. CODE tit. 5, §§ 108-127A, 130A-130(o) (West 1980 & Supp. 1989); UTAH CODE ANN. § 75-5-301 to -433 (1978 & Supp. 1988); VT. STAT. ANN. tit. 14, §§ 3060-3081 (1974 & Supp. 1988); VA. CODE ANN. §§ 37.1.128.01 to .147 (1984 & Supp. 1988); WASH. STAT. §§ 11.88.010-.150, 11.92.010-.185 (West 1967 & Supp. 1988); W. VA. CODE §§ 27-11-1 to -6 (1986 & Supp. 1988); WIS. STAT. ANN. §§ 880.01-.39, .60 (West 1966 & Supp. 1988); WYO. STAT. §§ 3-1-101 to -6-119 (Michie 1977 & Supp. 1988).

Federal legislation has been proposed. *See* H.R. 5266, 100th Cong., 2d Sess. (1988) (introduced by Rep. Claude Pepper, Dem.-Fla.); H.R. 5275, 100th Cong., 2d Sess. (1988) (introduced by Rep. Olympia Snowe, Rep.-Me.).

For somewhat outdated but thorough reviews of statutory provisions, see DEVELOPMENTAL DISABILITIES STATE LEGISLATIVE PROJECT OF THE AMERICAN BAR ASSOCIATION COMMISSION ON THE MENTALLY DISABLED, GUARDIANSHIP & CONSERVATORSHIP STATUTORY SURVEY (1977); Alexander, Brubaker, Deutsch, Kovner & Levine, *Surrogate Management of the Property of the Aged*, 21 SYRACUSE L. REV. 87 (1969).

2. *See generally* FLA. STAT. §§ 747.06-.19 (1987) (appointment and duties of curators).

3. In Florida, conservatorship refers only to guardianship of the property for individuals rendered incapable due to absence from the state. *See* FLA STAT. §§ 747.01-.02 (1987).

The UNIFORM PROBATE CODE and many state statutes use the term "conservator" synonymously with guardian of the property, as will this article. *See* U.P.C. §§ 5-103, -419 (1982); *see, e.g.*, ALA. CODE § 26-7A-1 (1975 & Supp. 1987); MINN. STAT. ANN. § 525.539 (West 1975 & Supp. 1988).

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a ward or conservatee.[4] The appointment of a guardian follows an adjudication of incompetency.[5]

The purpose of a guardianship is to appoint a surrogate decision-maker, with authority to control the ward's decisions, or to make decisions the ward cannot make. A guardianship of the person, and perhaps of the estate as well, is usually established to allow the guardian to authorize medical treatment for which the patient is unwilling or unable to give consent, or to change the ward's residence to one where more or different assistance can be provided.[6] A court is likely to appoint a guardian of the property when an incompetent individual fails to use available resources to meet personal needs or needs of dependents, when he or she appears likely to be victimized by others, or when it appears the individual's use of the assets will in some other way dissipate the estate.[7] Relatives of the incompetent individual or the state file nearly all guardianship petitions.[8]

Florida's guardianship statute has become the focus of controversy. The press has reported the misdiagnosis of mental disorders, inaccurate evidence, sloppy procedures, and guardians who neglect their responsibilities without penalty.[9] Public opinion supporting reform has grown and new legislation is now being studied and debated at national and state levels. In September 1987, the House Select Committee on

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4. *See* FLA. STAT. § 744.102(8) (1987) ("[A] 'ward' is an incompetent for whom a guardian has been appointed."). The term "protected person" also has been used for an individual who has a conservator. *See* U.P.C. §§ 5-103(18), (22) (1982).

5. Since 1973, Florida law requires appointment of a guardian following a declaration of incompetency. FLA. STAT. § 744.331(9) (1987). The U.P.C. would leave the court freedom to enter any other appropriate order. *See* U.P.C. § 5 306(B) (1982).

6. Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 ARIZ. L. REV. 599, 625 (1981).

7. *Id.*

8. *See* Friedman & Savage, *Taking Care: The Law of Conservatorship in California*, 61 S. CAL. L. REV. 273, 280 (1988) (citing a study of guardianship actions in San Mateo County, Cal., during 1982, 1984, and 1986). Demographic data on guardianship participants is scarce, but practitioners' impressions suggest the San Mateo findings are typical of demographics in many jurisdictions.

9. *See* Good & King, *Wards of the Court*, St. Petersburg Times, Dec. 14, 1986, at 1A, col. 1, Dec. 15, 1986, at 1A, col.4, Dec. 16, 1986, at 1A, col.3, Dec. 17, 1986, at 1A, col.2, Dec. 21, 1986, at 1A, col.5; F. Bayles & S. McCartney, Associated Press, six part series released Sept. 20, 1987 (reprinted in part in the Tallahassee Democrat, Sept. 27, 1987, at 1B, and the Tampa Tribune, Sept. 22, 1987, at 1F) (on file); *see also* Final Report of the Grand Jury, Circuit Court of the Eleventh Judicial Circuit of Florida in and for the County of Dade, Nov. 11, 1982 (documenting abuses within the guardianship system) (on file). For a discussion of neglect of supervision of Florida guardianships, see New, *A Proposal for a Guardianship Oversight Commission in Florida*, FLA. B.J., Feb. 1985, at 47.

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Aging, Subcommittee on Health held hearings on guardianship abuses, and the 1988 Florida Legislature created a Guardianship Study Commission.[10] This article will discuss involuntary guardianship, and recommend changes in law and practice, paying particular attention to their impact on elderly persons.

The law and practice of guardianship are significant to older persons and their advocates because over 500,000 elderly persons are wards of the court, and the number will increase.[11] The population of individuals age eighty-five and older, who are most likely of all adults to need guardian assistance, has a growth rate of 25 percent, compared to 5 percent for the under sixty population.[12] In some jurisdictions, including Pinellas County, Florida, 85 percent of wards of the court are ages sixty-five and older.[13]

The appointment of a substitute decisionmaker for an individual impaired by old age is a particularly grievous loss to that individual, and should be imposed with care. Elderly wards typically have led active, autonomous adult lives in which they contributed to society and accrued wealth for their own use and enjoyment. In this respect, they differ from children and developmentally disabled persons, who

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10. Fla. S. 431 (Reg. Sess. 1988, introduced by Comm. on Judiciary — Civil); Fla. H.R. 1343 (Reg. Sess. 1988, introduced by Rep. Liberti). Principal opposition to immediate reform comes from the Real Property, Probate and Trust Law Section of The Florida Bar. *See* McDonald, *Position of the Guardianship Law Committee of the Real Property, Probate and Trust Law Section of The Florida Bar on Guardianship Law Reform*, REAL PROPERTY, PROBATE AND TRUST LAW SECTION ACTION LINE NEWSLETTER, Nov.-Dec. 1987, at 15.

The conflict and compromise in development of guardianship reform in Florida follows the pattern of other states. In California, sole opposition to reform proposals by the state bar Legal Services Committee arose from the Probate and Trust Committee. *See* Alexander, *Who Benefits from Conservatorship?*, in *AGING IN AMERICA* (pt. 4), TRIAL MAG., May 1977, at 32. In Arkansas, passage of reform legislation in 1983 raised vehement objections from the probate law section of the state bar. Implementation of the reform legislation was delayed until passage of a compromise statute in 1985. *See* Brantley, *Guardianship Reform: Five Years of Change*, ARK. LAW., July 1987, at 101-02. For description of the reform process in Minnesota, see *In re* Mikulanec, 356 N.W.2d 683, 686-88 (Minn. 1984).

11. Pepper, *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, Sept. 25, 1987 (Claude Pepper, Chairman, Sub-Committee on Health and Long-Term Care, House Select Committee on Aging) [hereinafter *Abuses in Guardianship*]. The number of guardianship cases in Florida is unknown.

12. Fowles, *The Numbers Game*, AGING MAG., 1987, at 44. In 1986, there were 29.2 million Americans, 12.1% of the population, age 65 or older. *Id.* On the need for guardians in Florida, see Schmidt & Rogers, *Legal Incompetents' Need for Guardians in Florida*, 15 BULL. AM. ACAD. PSYCHIATRY LAW 67 (1987).

13. Friedman & Savage, *supra* note 8, at 279; Good & King, *supra* note 9, at 16A, col.3.

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comprise most of the balance of disabled persons in the population.[14] Depriving an elderly person of independent choice by appointing a surrogate decisionmaker curtails long-held rights and expectations. The special circumstances of these citizens therefore warrant attention as legislators consider new guardianship law.

Florida, like other states contemplating guardianship reform, must decide whether to retain and amend its present statute and practices, or to completely reform the law to correct existing abuses.[15] In either case, the state must weigh rights of the incompetent and interests of society, and choose an appropriate theory and model of guardianship. This article will discuss three basic aspects of guardianship that need reform: the definition of incompetency, the appropriate scope of a guardian's authority, and the level of procedural due process appropriate to the creation and oversight of the guardianship.

II. IDENTIFYING THE WARD

Definitions of incompetency typically require two findings: a diagnosis of mental disorder or impairment, and descriptive proof of behavior or manifestations of that mental status.[16] A diagnosis of mental illness alone fails as a basis for a declaration of incompetency because, without resulting behavior that requires compensation or control, the guardianship serves no purpose.[17] Neither can behavior, without men-

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14. A number of states have created separate provisions governing the legal incompetency of minors. *See, e.g.*, CAL. PROB. CODE §§ 1501-1502 (West 1981) (California procedures for incompetency of minors). On distinctions between legal incompetency of children and disabled adults, see Katz, *Elder Abuse*, 18 J. FAM. L. 695, 716-20 (1979-80).

15. When traditional and reform guardianship models both are available, the reform model rarely is used, so intended reforms are not realized.

16. *See, e.g.*, FLA. STAT. § 744.102(5) (1987) ("An 'incompetent' is a person who, because of minority, mental illness, mental retardation, senility, excessive use of drugs or alcohol, or other physical or mental incapacity, is incapable of either managing his property or caring for himself, or both."); *see also* Note, *The Disguised Oppression of Involuntary Guardianship: Have the Elderly Freedom to Spend?*, 73 YALE L.J. 676, 679 (1964) (proposing the following synthesis of state statutory definitions: A mental incompetent is one "who, by reason of mental illness, mental deficiency, mental infirmities of old age, or any other cause, is unable to manage his own affairs or property or is likely to become the victim of designing persons.").

17. *See* Green, *Proof of Mental Incompetency and the Unexpressed Major Premise*, 53 YALE L.J. 271, 276-78 (1944) (observation of symptomatic conduct of an alleged incompetent is the only way to prove mental disorder requiring supervision).

For civil commitments, courts require behavior with specific characteristics in addition to diagnosis of mental status. *See* Donaldson v. O'Connor, 422 U.S. 563, 574-76 (1975) (initial diagnosis of mental illness alone, without further rendering of treatment, found insufficient for adjudication of incompetency in civil commitment, when patient is not dangerous and is capable of surviving alone or with the help of friends or family); Lake v. Cameron, 364 F.2d 657, 658,

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tal disorder, support a finding of incompetence.[18] Every adult in possession of a sound mind has the right to engage in foolish, risky, or harmful behavior, whether or not that person fully appreciates the risk involved.[19] The law does not restrict such behavior unless it is negligent or criminal.

There has been some confusion in practice as to the two aspects of proof of incompetency. Under traditional statutes, courts conducting guardianship proceedings emphasize the diagnosis of mental disorder. The court receives evidence regarding the respondent's ability to manage tasks necessary for daily living only incidentally; this evidence consists of behavioral descriptions offered to support the diagnosis of mental disorder.[20] As a result, the court determines competency solely on the status of mental illness. Such a determination ignores the requirements for proof of incompetency in typical traditional statutes, relying entirely upon the controversial art of psychiatric prediction.[21]

The court's reliance on diagnosis of mental disorder is the inevitable result of the composition of traditional examining committees, which provide the principal evidence on the issue of competency. In Florida's

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661 (D.C. Cir. 1966) (patient prone to wandering away and being exposed at night, but not dangerous to self or others, is not a proper subject for indeterminate commitment); *In re* Beverly, 342 So. 2d 481, 490 (Fla. 1977) (though evidence was sufficient to show patient was mentally ill, behavior consisting of two violent occasions, quitting a job because of religious beliefs, and having delusions of power from identification with God and Jesus Christ, was insufficient to show civil commitment was necessary). Distinctions between civil commitment and guardianship actions fail to suggest mental status should be sufficient for guardianships only. *See infra* notes 113-14 and accompanying text.

18. *See* 1 W. BLACKSTONE, COMMENTARIES 228 (Chitty ed. 1913) ("When a man on an inquest of idiocy hath been returned an *unthrift* and not an *idiot* . . ., no farther proceedings have been had.").

19. *See* Frolik, *supra* note 6, at 627.

20. *See* Statement of Recommended Judicial Practices, adopted by the Nat'l Conf. on the Judiciary on Guardianship Proceedings for the Elderly, June 1986, at 23-24 [hereinafter Recommended Judicial Practices].

Definitions of incompetency for which medical evidence alone may seem to be dispositive consist of lists of specific disorders and far less specific resulting behaviors. *See, e.g.*, FLA. STAT. § 744.102(6) (1987) (definition of incapacitated person); WASH REV. CODE § 11.88.010(2) (1967 & Supp. 1988) (an incapacitated person is one who "by reason of mental illness, developmental disability, senility, habitual drunkenness, excessive use of drugs, or other mental incapacity [is incapable of] either managing his property or caring for himself or both"); WYO. STAT. §§ 3-1-101(a)(vii, viii) (Michie 1977 & Supp. 1988) (an incompetent is one who is "unable unassisted to properly manage and take care of himself or his property as a result of the infirmities of advanced age, physical disability, disease, the use of alcohol or controlled substances . . . mental illness, mental deficiency or mental retardation.").

21. *See infra* note 29 and accompanying text.

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typical traditional statute, the examining committee includes two physicians and one layman,[22] but no professional with training in functional assessment.[23] Social, mental health, and community health workers routinely conduct such assessments, which are inventories of daily activities, that can provide the court with objective information about the respondent's ability to manage independently or with voluntary assistance. To provide the court with evidence on both aspects of competency, examining committees should include an individual with professional training in functional evaluation to examine every prospective ward.

In contrast with the emphasis on diagnosis found in traditional statutes, reform statutes emphasize functional impairment over mental disorder.[24] This shift in emphasis results primarily from changes in the definition of incompetency, rather than from the addition of functional assessment evidence required by reform statutes.[25] Florida's

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22. FLA. STAT. § 744.331(5) (1987).

23. For a discussion of functional assessments, see Casananto, Saunders & Simon, *Individual Functional Assessment: A Guide to Determining the Need for Guardianship Under New Hampshire Law*, 28 N.H. B.J., Fall 1986, at 13.

24. *See* Mitchell, *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, 52 S. CAL. L. REV. 1405, 1431 (1979).

25. *See* Recommendations of the ABA National Symposium on Guardianship: A Response to the Associated Press Inquiry (July 21-23, 1988) [hereinafter National Guardianship Symposium] (as endorsed by ABA Health Law Delegates Feb. 7, 1989; monograph scheduled for publication Summer 1989) (definitions of incapacity should focus on functional capacity) (copy on file) [hereinafter National Guardianship Symposium].

See, e.g., Fla. S. 196 (Reg. Sess. 1988, introduced by S. Weinstein); Fla. H.R. 347 (Reg. Sess. 1988, introduced by Rep. Tobin) ("An 'incapacitated' person means a person whose ability to understand, evaluate, or respond to people, events and environments is limited to the extent that he [or she] lacks the capacity to manage at least some of his [or her] financial resources or meet at least some of the essential requirements for his [or her] physical health or safety."); *see also* ILL. REV. STAT. ch. 110 ½, para. 11a-3 (1987) ("[A disabled person] lacks sufficient understanding or capacity to make or communicate responsible decisions concerning the care of his person, or . . . is unable to manage his estate or financial affairs."); KY. REV. STAT. ANN. §§ 387.510(9)(10) (Baldwin 1987) (a "mentally ill person" means a person with substantially impaired capacity to use self-control, judgment, or discretion in the conduct of his affairs and social relations, associated with maladaptive behavior or recognized emotional symptoms where impaired capacity, maladaptive behavior, or emotional symptoms can be related to physiological, psychological, or social factors); TEX. PROB. CODE ANN. § 130A(b) (Vernon 1987 & Supp. 1989) ("[An incompetent is one who] because of a physical or mental condition is substantially unable to feed, clothe, or shelter himself, to care for his own physical health, or to manage his property or financial affairs [as evidenced by] recurring acts or occurrences within the preceding six month period and not by isolated instances of negligence or bad judgment."); GUARDIANSHIP AND CONSERVATORSHIP STATUTORY SURVEY AND MODEL STATUTE § 3(1) (Developmental Disabilities State Legislative Project of the ABA Commission on Mentally Disabled, Model

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1988 reform proposals, for example, identify the appropriate ward as "[a person whose] ability to understand, evaluate, or respond to people, events, and environments is limited to the extent that he lacks the capacity to manage at least some of his financial resources or to meet at least some of the essential requirements for his physical health or safety."[26] Under this definition, a prospective ward's mental impairment need be no more specific than a showing of limited ability.

Such a definition represents so broad a range of impairments that it includes behavior that results from idiosyncratic choice rather than from mental disorder. It may be acceptable to reform advocates who are concerned primarily with helping developmentally disabled individuals whose limitations are not disputed. However, this definition threatens to impose "better," i.e., more logical or more conventional decisionmakers on sane, independent, elderly individuals. Thus, this definition of the appropriate ward is unacceptable.

The definition of the appropriate incompetent or incapacitated[27] ward requires both legs — mental impairment and behavioral limitations — on which to stand. Proving this definition requires a functional assessment, without which diagnosis of mental disorder is too uncertain and too tenuous to link mental impairment and behavioral limitations to harmful results. This link is necessary to justify curtailment of individual autonomy. The individual's functional impairment must result from mental disorder, because behavioral assessment alone may result in loss of autonomy for an individual who rationally chooses socially disfavored behavior.

Ironically, traditional definitions of the appropriate ward include both elements. Their phrasing has been so long-abused, however, that they may inadequately convey the two-part concept. To revitalize the

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Statute 1979) [hereinafter ABA MODEL STATUTE] ("Partially disabled persons means adults whose ability to receive and evaluate information effectively and/or communicate decisions is impaired to the extent that they lack the capacity to manage at least some of their financial resources and/or meet at least some of the essential requirements for their physical health or safety without court-ordered assistance or appointment of a limited personal guardian or limited conservator.").

26. Fla. S. 196, § 744.102(12) (Reg. Sess. 1988, introduced by S. Weinstein); *see* Frolik, *supra* note 6, at 604-05 (opposing use of "incapacitated" concept in reform statutes as merely a judgment about the quality of the impaired person's decisions, irrelevant to justify appointment of a guardian).

27. Traditional statutes use the term "incompetent" to describe the ward's legal status. Reform statutes, in keeping with the concept of limited guardianship, use the term "incapacitated." *See, e.g.*, FLA. STAT. § 744 (1987).

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definition of incompetency requires both a restatement of the definition[28] and the addition of functional evaluation to the examining committee report.

A. *Mental Impairment*

Mental disorders are particularly difficult to describe and to limit in the legal proceedings of incompetency.[29] Mental illness usually cannot be identified with the level of certainty similar to diagnosis of physical illness, nor can its identifying characteristics be catalogued or the disease course predicted with similar assurance.[30] Statutes list some useful categories such as alcoholism and drug addiction as conditions of mental impairment.[31] However, two common diagnoses with particular impact on the elderly deserve critical attention: senility and physical impairment.

1. Senility

Senility, as a legal concept, is found in Florida's and in many traditional and reform statutes.[32] Synonymous terms in other statutes include "old age" and "advanced age."[33] In the past, a single term such as senility could more easily serve to describe a variety of related symptoms of chronic, degenerative memory loss and disorientation.

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28. One possible definition, specifying both mental disorders and behaviors, which in combination indicate need for a guardian, is as follows: An incompetent or incapacitated person is one who, because of mental illness, developmental disability, addiction to drugs or alcohol, or other mental disorder, is incapable of understanding and evaluating information to make or communicate decisions necessary in order independently to secure food, clothing, shelter, or medical care, or to manage property or financial affairs. Such incapacity (or incompetency) shall be shown by recurring acts or occurrences within the preceding six month period, and not by isolated instances of negligence or bad judgment, or by refusal of medical care alone.

29. Mental disorder and behavior or symptoms are inevitably bound together in some circular reasoning. That is, erratic or unacceptable behavior indicates some mental illness, diagnosis of which serves as a tool for interpretation of other instances of questionable behavior. *See* Note, *supra* note 16, at 687 (property mismanagement tends to reinforce and itself becomes evidence of mental weakness).

30. *See* Leifer, *The Competency of the Psychiatrist to Assist in the Determination of Incompetency: A Sceptical [sic] Inquiry into the Courtroom Functions of Psychiatrists*, 14 SYRACUSE L. REV. 564, 570 (1984); *see also* Green, *supra* note 17, at 275 (insanity is not an operative legal fact).

31. *See, e.g.*, FLA. STAT. § 744.102(5) (1987) (defining "incompetent").

32. *Id.* § 744.102(5). The infirmities of aging are defined as organic brain damage and advanced age. *Id.* § 415.102(3).

33. Thirty-three states include advanced age as cause for determining incompetence. *See Abuses in Guardianship*, *supra* note 11.

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This was so because deterioration in old age was poorly understood and rarely treated in the course of a short decline before death.[34] Today, gerontological and geriatric studies have identified numerous causes of such symptoms, many of which can be improved or corrected.[35] "Senility" has now become a term indicating ignorance of the conditions causing impairment.

The use of such terms is inappropriate as a basis to appoint a permanent surrogate decisionmaker. Especially objectionable is the extent to which these terms perpetuate the prejudice that mental weakness is likely in old age.[36] The presence of such bias greatly reduces the accuracy of competency determination because it distorts psychiatric diagnosis and prediction.[37] Therefore, the terms "senility," "old age," and "advanced age" have no place in guardianship statutes.

2. Physical Impairment

Many statutes include "physical impairment" as another basis to appoint a guardian. Persistent use of this term is somewhat mystifying, because guardianship theoretically requires some degree of mental impairment.[38] Presumably, a physically impaired but mentally capable individual needs an agent, not a guardian, to affect decisions. A patient who wants assistance in making decisions can voluntarily authorize a guardian or other surrogate decisionmaker.[39] No apparent basis exists in the legal theories of incompetency and guardianship for including physical impairment as a reason for guardianship.

The use of the term "physical impairment" might persist because some wards lack specific mental disorders that can be diagnosed by mental status tests normally used by examining committees.[40] For example, examining committees cannot categorize mental impairment suffered by an extremely physically impaired person, who is perhaps

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34. *See* STAFF OF THE SENATE SPECIAL COMMITTEE ON AGING, 95TH CONG., 1ST SESS., WORKING PAPER ON PROTECTIVE SERVICES FOR THE ELDERLY 7 (Comm. Print 1977) [hereinafter WORKING PAPER].

35. *See* Krauskopf, *The Elderly Person: When Protection Becomes Abuse*, TRIAL MAG., Dec. 1983, at 64.

36. *See* Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569, 573 (1972).

37. *See supra* note 29 and accompanying text (the unreliability of psychiatric prediction).

38. *See* Note, *supra* note 16, at 680, nn.27-28.

39. *See* FLA. STAT. § 744.341 (1987) (voluntary guardianship); *id.* § 709.08 (durable family power of attorney).

40. A mental status test includes assessment of orientation to reality, memory function, and reasoning ability. *See* Leifer, *supra* note 30, at 566-68.

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comatose or delirious from pain, disease or trauma. Similarly, examining committees cannot diagnose the individual who is entirely unable to communicate. These are the most difficult circumstances in which to determine an individual's competency, because only easily misinterpreted actions can reveal the patient's preferences and the nature and severity of any mental impairment.

The appointment of a guardian in such circumstances need not, however, be based on the individual's physical impairments or on the physical inability to communicate. Though the mental impairment may not be categorized with other forms of mental illness, the court logically can infer that mental impairment exists. This inference is based on the individual's inability to participate in decisionmaking by forming preferences because the individual is concentrating on the physical disorder.

Extreme conditions of limited awareness or communication are not the only circumstances in which a court will appoint a guardian for the physically disabled. Courts frequently create such guardianships for elderly persons when communication or concentration is poor in order to promote efficiency in care and property management. Sometimes, the difficulty in communication lies not with the ward's mental capability but with the ward's location in a nursing home, isolated from information about his or her property.

One might consider such a guardianship to be a form of benevolent assistance, relieving the ward of burdensome decisions while maintaining property and care. However, this view represents only half the significance of guardianship for a cognizant individual. Guardianship also deprives the patient of the rights to self-determination enjoyed by all adults.[41] A declaration of incompetence seems particularly unfair because the patient's right to have opinions treated with ordinary regard and to have reasonable preferences carried out is the only area of autonomy remaining in a physically impaired person. Loss of rights to self-determination can be so traumatic that, on learning of a guardianship, wards have deteriorated rapidly and died.[42]

Though formal studies are lacking, there is evidence that a court is far more likely to declare a physically impaired elderly person incom-

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41. *See* Gelfand, *Authority and Autonomy: The State, the Individual and the Family*, 33 U. MIAMI L. REV. 125, 144-50 (1978) (discusses the allocation of power to the individual, family, and state); *see also infra* notes 73-79 (balancing an individual's rights to autonomy and privacy against the state's right to preserve life).

42. Nolan, *Functional Evaluation of the Elderly in Guardianship Proceedings*, LAW, MED., & HEALTH CARE, Oct. 1984, at 210, 217 n.19.

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petent than a similarly impaired young person.[43] Certainly, exception to the severe deprivation of rights involved in guardianship has been raised on behalf of young wards. For example, courts applied limited guardianship statutes initially, and sometimes exclusively, to youthful developmentally disabled persons.[44] Constitutional challenges to the guardianship statutes have primarily been brought on behalf of young physically disabled and retarded wards, presumably because of the higher chances of success.[45] For younger persons, the opportunity to perform all possible normal functions is considered therapeutic,[46] but society places a lower value on self-determination for the elderly. Therefore, efficient property management must often outweigh the elder's autonomy. The imbalance of values is aggravated by the fact that an elder has accumulated a substantial estate more often than a young person. The unequal treatment represents the dominance of the petitioners' interests over elderly respondents' interests.

The term "physical impairment" is not needed in guardianship statutes to provide guardianship assistance to physically impaired individuals whose concentration and communications are so severely limited that the court can make the necessary inference of mental limitation. Other physically disabled persons are not appropriate wards, because their limitations call merely for agents to assist in effecting their decisions, rather than for substitute decisionmakers. Because society undervalues the autonomy and rehabilitation of the physically impaired elderly, the elderly are at a greater risk of being declared incompetent than are younger people. Therefore the term, "physical impairment," creates inequality in application of the law. Legislators should eliminate both "physical impairment" and "senility" from guardianship statutes.

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43. *See* Note, *supra* note 16, at 677 (unequal treatment of elderly); *id.* at 681 (hopes of recovery limit court restraints on youthful respondents).

44. *See, e.g.*, TEX. PROB. CODE ANN. § 130A (Vernon 1983) (providing limited guardianship only for mentally retarded persons under Texas law). Florida's reforms were developed primarily by the Disability Law Committee of The Florida Bar.

45. *See, e.g.*, Katz v. Superior Court, 73 Cal. App. 3d 952, 141 Cal. Rptr. 234 (1977) (the Moonie cases, in which parents' petitions for guardianship of their adult children in order to effect "deprogramming," were rejected by the court on appeal on constitutional grounds). However, even challenges by youthful petitioners are not assured of success. *See generally* Dicker, *Guardianship: Overcoming the Last Hurdle to Civil Rights for the Mentally Disabled*, 4 U. ARK. LITTLE ROCK L.J. 485, 497-505 (due process challenges to guardianship statutes in state and federal courts). Constitutional challenges have been cut off by federal abstention, even when the only state proceeding was the court's continuing jurisdiction over the guardianship. *See* Mitchell, *supra* note 24, at 1428-30.

46. *See* Jost, *The Illinois Guardianship for Disabled Adults Legislation of 1978 and 1979: Protecting the Disabled from Their Zealous Protectors*, 56 CHI.[-]KENT L. REV. 1087, 1098 (1980) (citing S. BRAHEL & R. ROCK, MENTALLY DISABLED AND THE LAW 26 (1971)).

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B. *Functional Impairment*

The incompetent individual must be unable to function in one or both of two broad categories of behavior: property management and self-care.[47] Minimum standards for competent behavior have not emerged from the variety of circumstances found in case law, and are not included in either traditional or reform statutes. Instead, courts judge the quality of the respondent's conduct on an ad hoc basis, assessing the likelihood of undesirable results and imposing a guardian to correct or prevent their occurrence. For elderly respondents, two such results deserve critical attention: dissipation of the estate and self-neglect.

1. Dissipation of the Estate

Cases that limit a ward from spending or dissipating personal property are variants of the "spendthrift" provisions found in some guardianship statutes, which authorize the appointment of a guardian for gamblers or alcoholics.[48] Such a limitation on the owner's right to control personal property represents a judgment of the unworthiness of the intended expenditure and supports the interests that favor preserving the assets.[49] For example, in the case of the gambler, the

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47. *See* FLA STAT. § 744.102(5) (1987); Note, *supra* note 16, at 680-81.

48. *See, e.g.*, CAL. PROB. CODE § 1801(b) (West 1987) ("A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence."); GA. CODE ANN. § 29-5-1 (Harrison 1985 & Supp. 1988) ("[A guardian of the property may be appointed] either because the property will be wasted or dissipated unless proper management is provided or because the property is needed for the support, care, or well being of [the ward] or those entitled to be supported by [the ward]."); ILL. STAT. ANN. ch. 110 ½, para. 11A-2(c) (Smith-Hurd 1987) ("[A guardian may be appointed if an individual] because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering."); MASS. GEN. LAWS ANN. ch. 186-201C, § 8 (West Supp. 1987) ("A person who, by excessive drinking, gaming, idleness, or debauchery of any kind, so spends, wastes or lessens his estate as to expose himself or his family to want or suffering, or causes the department of public welfare to charge or expense for his support or for the support of his family, may be adjudged a spendthrift. The department of public welfare or a relative of the alleged spendthrift may file a petition in the probate court, stating the facts and circumstances of the case and proving that a guardian be appointed. If after notice as provided in the following section, and after a hearing, the court finds that he is a spendthrift, it shall appoint a guardian of his person and estate."); MINN. STAT. ANN. § 525.54(3) (West Supp. 1988) ("Appointment of a guardian or conservator may be made in relation to the estate and financial affairs of an adult person . . . (b) involuntarily, upon the court's determination that . . . (2) the person has property which will be dissipated unless proper management is provided, or that funds are needed for the support, care, and welfare of the person or those entitled to be supported by the person.").

49. *See* Note, *supra* note 16, at 683-84, nn.30-45.

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statute limits the amount the ward can spend on this disfavored activity and protects the financial security of the ward's dependents. It also protects the state's interests by helping to insure the ward and dependents will not become impoverished and rely on the state for support.

The court frequently finds dissipation of the estate when an elderly prospective ward has a new companion of the opposite sex.[50] The relationship often involves costs to the estate for gift-giving and perhaps travel or building a house.[51] The petitioners are the heirs, who seek to choose the guardian for their elderly relative. The appointment of a guardian limits the ward's spending and associations, removes the right to marry, and may prevent the ward from writing a new will.

This fact pattern differs distinctly from the pattern of the gambler. The elderly person has no dependents to make a legal claim on the assets. The behavior, consisting of a sexual or perhaps companionable relationship, poses no apparent threat to orderly society. There is no clear indication the elderly person will become destitute and burden society with the cost of personal care. The only threat is to the probable heirs' hopes of inheriting the estate.

The consistent support in case law for the interest of the proposed ward's prospective heirs suggests that society would like to support such claims.[52] Some statutes specifically identify this common fact pattern as "vulnerability to designing persons."[53] Some states have in-

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50. *See, e.g., In re* Josiah Oakes, 8 Law Rptr. 122, 124-25 (Mass. 1845) (respondent widower could be restrained by the appointment of a guardian, for the safety of himself and others, when he became engaged); *see also* Note, *supra* note 16, at 677-78 (guardianship following respondent's gift to widowed friend). Disapproval of personal, adult relationships for elderly persons also appears in other probate cases. *See* Hoffman v. Kohns, 385 So. 2d 1064 (Fla. 2d D.C.A. 1980) (invalidation of will executed one day after testator married his housekeeper).

51. *See* Note, *supra* note 16, at 682, nn.35-37 (propensity of elderly to spend assets).

52. The courts have been less likely to create a guardianship of the property if the petitioner is a distant relative or if the new partner is of an age and financial position to be a socially acceptable partner for the proposed ward. *See* Note, *supra* note 16, at 677 n.29.

53. *See* Alexander, *On Being Imposed Upon by Artful and Designing Persons: The California Experience with the Involuntary Placement of the Aged*, 14 SAN DIEGO L. REV. 1083 (1977); Alexander, *supra* note 10, at 30 (observing that vulnerability to "artful and designing persons" bases incompetency on behavior of persons other than the prospective ward, which is unacceptable to the petitioner). This description of dissipation was struck in 1977 as unconstitutionally vague, at least as applied to ideas rather than property. *See* Friedman & Savage, *supra* note 8, at 275; Mitchell, *supra* note 24, at 1405-07 (describing challenge to statute in "Moonie" deprogramming cases). The phrase, however, has been replaced by "substantially unable to resist fraud or undue influence," which may in practice be difficult to distinguish from the unconstitutional language. CAL. PROB. CODE § 1801(b) (West Supp. 1987).

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voluntary conservatorship statutes authorizing appointment of a guardian for the vulnerable individual without any adjudication of incompetency.[54]

However, no legal right now arises from an expectation of inheritance. If such a right is to have effect, the court should weigh and carefully balance the nature of any competing interests,[55] including property interests.[56] Claims might arise because the elderly person has maintained grown children in a given lifestyle. Likewise, claims might arise from expectations based either on express promises or on general expectations as to the prospective ward's natural heirs, which produced behavior in reliance on the implied promise. Such claims might be strengthened if the assets were inherited family wealth, rather than the product of the elderly person's endeavors.

The court's findings should balance these claims for property control against the strong presumption that an owner can dispose of unencum-

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54. Several states first adopted involuntary conservatorship statutes in the 1890s, allowing appointment of a guardian of the property without adjudication of incompetency. *See* Rohan, *Caring for Persons Under a Disability: A Critique of the Role of the Conservator and the "Substitution of Judgment Doctrine,"* 52 ST. JOHN'S L. REV. 1, 4-5 (1977-78). Surrogate property management without adjudication of incompetency has not been generally accepted, however. In some states, all conservatorships are voluntary. *See, e.g.*, ARK. CODE ANN. § 28-67-103 (1987); N.H. REV. STAT. ANN. § 464-A:13 (1985). Some states, including Florida, have considered voluntary and involuntary guardianships sufficient, omitting involuntary property management. *But see* Proposal of the Real Property, Probate and Trust Law Section, The Florida Bar (unpublished) (on file).

A number of states adopted involuntary conservatorship when adopting the U.P.C. *See, e.g.*, ALASKA STAT. § 13.26.315 (Supp. 1989); ARIZ. REV. STAT. ANN. §§ 14-5401 to -5432 (1986); COLO. REV. STAT. §§ 15-14-401 to -432 (1973 & Supp. 1976); IDAHO CODE §§ 15-5-401 to -432 (1979 & Supp. 1988); MONT. CODE ANN. §§ 91A-5-401 to -431 (1979); NEB. REV. STAT. §§ 30-2630 to -2661 (1979); N.M. STAT. ANN. §§ 32A-5-401 to -432 (1978); N.D. CENT. CODE §§ 30.1-29-01 to -32 (1976); UTAH CODE ANN. §§ 75-5-401 to -433 (1977).

55. *See* Rohan, *supra* note 53, at 9. Courts now generally appoint family members as conservators, considering it likely that relatives have the greatest interest in the ward's well-being. *See In re* Pfleghar, 31 Misc. 2d 244, 246, 62 N.Y.S.2d 899, 901 (Sup. Ct. 1946) (presumption against reliability of relatives evolves into presumption in their favor).

However, when adverse interests are recognized, the court may refuse such an appointment. *See, e.g., In re* Estate of Gorman, 77 Misc. 2d 564, 354 N.Y.S.2d 578 (N.Y. Sup. Ct. 1974) (son denied conservator status in circumstances in which any expenditure depleted estate).

56. Note, *supra* note 16, at 689. The ward usually is considered to have no interests conflicting with any other individual or with society. Therefore, though guardianship has always been considered as being for the ward's benefit, old statutes and practices frankly function to protect beneficiaries and creditors. *See, e.g.*, 1823 Ill. Laws § 1 (cited in Jost, *supra* note 46, at 1089 n.9) (any creditor or relation a preferred petitioner); *see also* FINAL REPORT, PROTECTIVE SERVICES FOR OLDER PEOPLE, FINDINGS FROM THE BENJAMIN ROSE INSTITUTE STUDY 155-57 (1974) (on file).

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bered property according to personal inclination. It is unlikely the beneficiaries' interest would ever completely negate the elderly person's rights to spend the accumulated assets, as a guardianship of the property usually negates all such rights. A guardianship created for such circumstances would necessarily divide the power to spend between the preferences of the ward and the prospective heirs. The resulting division of spending authority more closely resembles a contractual agreement than the fiduciary relationship of guardianship. Therefore, one must wonder whether a competency proceeding is the appropriate form of action. By balancing these interests, courts would likely discourage eager prospective heirs from misusing guardianship to conserve the property of elderly relatives, while appropriate family guardianships would hardly be affected. Thus, when the fact pattern suggests the possibility of conflicting interests in property, the court should apply the balancing of interests.

One Florida court already has indicated an appropriate balance between the natural heir's interest in conservation and the elder's conflicting interest in spending. In *Bergman v. Serns*,[57] the court refused the guardian's petition to transfer the elderly ward, the guardian's mother, to a nursing home so long as the estate was sufficient to pay for home care.[58] The court found the incompetent elder's interest in remaining at home, expressed only by choices made while competent, sufficient to justify expenditure of the substantially larger sum needed for her twenty-four hour home care.[59] The court favored the emotional security of the home and inferred the ward would choose to remain there, even though she could not articulate such values at the time of the litigation.[60] The court indicated that the presumptive right to live in one's own home rather than in an institution, developed in civil commitment cases, was even more fittingly applied in guardianships in which institutionalization accomplishes no particular treatment goals.[61] These two values, home and autonomy, are the basis of guidelines to be developed in the case law to balance the interests of wards with those who would conserve the estate.

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57. 443 So. 2d 130 (Fla. 3d D.C.A. 1983).

58. *Id.* at 133.

59. *Id.* at 132.

60. *Id.* at 133; *see also* Rosendorf v. Toomey, 349 A.2d 694 (D.C. 1975). In *Rosendorf*, the court held that because the conservator's obligation is to conserve the estate for the use of the conservatee and not to maximize it for potential heirs, the children of the disabled person may not challenge expenditures for the ward's living expenses as excessive. *Id.* at 699-701.

61. *Bergman*, 443 So. 2d at 133.

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The values articulated in *Bergman* should also be incorporated into Florida's guardianship statute. Though the more formal proceedings of civil commitment normally precede placement in a mental hospital,[62] elderly wards receive little benefit because nursing homes to which they are usually removed are not considered to be institutions in this context.[63] Recognizing the potential conflict of interest between guardian and ward over institutionalization as well as the sweeping power granted the guardian, judges in many Florida jurisdictions routinely require guardians to petition for court orders for nursing home placement.[64] Like other states that have standardized their supervision of guardianships through statutory law, Florida should require approval for nursing home placement of any ward.[65]

2. Self-Neglect

The second type of behavior indicating incompetency is failure to care for oneself. Case law has not clearly defined behavior indicating self-neglect, possibly because variations in prospective wards' economic limitations and lifestyles make it difficult for courts to question the petitioner's assertions that some behavior indicates self-neglect amounting to incompetence. When considering whether self-neglectful behavior indicates incompetence, courts have considered whether the prospective ward used to live more conventionally or more safely, rather than applying a minimum level of safe, responsible behavior.[66] Thus, the prospective ward's preference for a new standard of living becomes part of the evidence favoring guardianship.

As with dissipation of the property, the court's ad hoc decisionmaking represents an inarticulate balancing of interests between the prospective ward and the petitioner, who in self-neglect cases is, or represents, the prospective ward's care-giver. The prospective ward typ-

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62. Current Florida law states the guardian shall honor the ward's reasonable preferences as to place of residence, as expressed or demonstrated by the ward either prior to determination of incompetency or as currently expressed. FLA. STAT. § 744.361 (1987). However, neither FLA. STAT. § 744.441 (powers of the guardian on court approval) nor *id.* § 744.444 (powers of the guardian without court approval) includes the power to institutionalize the ward. *Id.* §§ 744.441, .444.

63. *See* Jost, *supra* note 46, at 1090 (the first and sometimes only act of the guardian is to place the elderly ward in a nursing home).

64. Interview with Frank Repensek, Executive Director, Guardianship of Dade, in Miami, Fla. (Jan. 11, 1988).

65. *See, e.g.*, ILL. REV. STAT. ch. 110 ½, para. 11a-14.1 (1987) (residential placement prohibited without court order); 20 PA. CONS. STAT. ANN. § 5536 (Purdon Supp. 1988).

66. *See* Note, *supra* note 16, at 677.

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ically has chosen to adapt his or her lifestyle to accommodate a growing impairment, accepting a lower quality of life through isolation, poor mobility in the home, and lack of transportation in order to maintain independence. The care-giver, whether a family member or a state social services program, has compensated for substantial areas of lost capability by providing meals, homemaker assistance, home health-aide care, financial management, companionship, and emotional support. The financial and emotional costs of maintaining the prospective ward in the community are an increasing burden on the care-giver, who asserts by petitioning the court for guardianship that the prospective ward's quality of life has deteriorated to an unacceptable level. The petitioner has determined the need to reduce service costs and emotional burdens outweighs the prospective ward's right to personal choice of lifestyle. The petitioner intends to reduce costs and restore a sense of order by placing the client in an institution on the grounds of self-neglect.[67]

Florida's courts have already considered a balancing of these interests to define the type and severity of self-neglect sufficient to warrant judicial intervention. In cases construing Florida's Adult Protective Services Act,[68] the statutory authorization for temporary emergency guardianship, the Florida Supreme Court stated that self-neglect consists of behavior producing a substantial risk of life-threatening physical harm because of lack of necessary treatment, care, sustenance, clothing, shelter, supervision, or medical services essential to physical or psychological well-being.[69] The court defined substantial harm as immediate and severe.[70] The court considered only the state's right to preserve life sufficient to balance the individual's right to self-determination and privacy.[71]

No similar definition of self-neglect has been accepted as the standard for guardianship cases, though the impact on the ward far outlasts the five day limitation of Adult Protective Services intervention.[72] The

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67. Observations based on the author's personal experience during four years as social services administrator in Florida community-based care for those elderly at risk of institutionalization.

68. *See In re* Byrne, 402 So. 2d 383 (Fla. 1981).

69. *Id.* at 385-86.

70. *Id.* at 385. Limited guardianship statutes may specify the harmful behavior also must be recurring and recent. *See, e.g.*, TEX. PROB. CODE ANN. art. 5 (Vernon 1987).

71. *Byrne*, 402 So. 2d at 385. One environment the court found sufficiently unhealthy as to threaten life provided no plumbing and dangling wiring, in which the respondents were naked and surrounded by debris and excrement. *Id.* at 383, 386. One resident had fallen to the floor and was unable to rise even with the other's assistance. *Id.* at 383.

72. FLA. STAT. § 415.105(3)(d) (1987).

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unstated distinction between Adult Protective Services and guardianship seems to be the participation of the state in the former. The law recognizes that the state's interest in efficient and effective benevolent care directly conflicts with the individual's right to self-determination. However, the state's interest in managing its social service resources benefits other service recipients by protecting their legitimate claims. These service recipients are protected because several of these individuals can live independently on fractions of the total services needed to maintain one severely impaired individual; thus, the pool of resources is not depleted.

The family guardianship petitioner has interests similar to the state's in resource preservation and quality of life. The resources needed for the elder's care might serve other purposes that benefit several or all family members. Each wants to provide the type of care that satisfies the caregiver's determination of good quality, while prudently protecting the resources.

The state agency might have fewer conflicting interests than the family petitioner because it does not primarily seek control of the prospective ward's resources, but rather a budget of taxpayers' money. The family petitioner's decisions are more likely to be affected by the promise of benefit from conservation of the prospective ward's estate. Both need restraint and supervision by the courts. The standards articulated by the Adult Protective Services Act cases should be adopted for all guardianship actions.

C. *Summary*

In guardianship or conservatorship proceedings, the petitioner must prove both parts of a definition of incompetency: mental impairment and resulting harmful behavior. Neither one alone is sufficient basis for a determination of incompetency or imposition of a substitute decisionmaker. The courts must limit and objectively define each term to apply them equitably to all prospective wards of all ages and types of impairment. Only behavior that poses an immediate and severe threat to life should interfere with an individual's right to self-determination. Courts should recognize petitioners' concerns with the management of the prospective ward's assets or objections to non-harmful eccentricities as conflicting with the prospective ward's rights to self-determination. Additionally, courts should consider and protect any legally recognized interest held by a petitioner or beneficiary. For self-neglect to be the basis of a guardianship, the court should be required to find that the behavior poses an imminent and serious risk of harm to the respondent. Prospective wards who are not incompetent

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should under no circumstances be burdened with guardians or conservators; it is their right to be left alone.[73]

III. SCOPE OF THE GUARDIAN'S AUTHORITY

A. *The Least Restrictive Alternative*

The scope of a guardian's authority is measured not only by potential services but by the ward's loss of fundamental liberty interests as a result of that authority. Every ward endures the stigma of being declared mentally incompetent.[74] Guardianship intrudes on or removes the individual's fundamental right to privacy in personal decisionmaking,[75] while involuntary mental examinations invade private thoughts and beliefs.[76] A ward may lose the right to choose where to live, and who will be available for companionship and assistance.[77] Other constitutional rights that guardianship may take from the ward include the right to wander at will,[78] and to gather in public places for social or political purposes.[79]

Even when the court establishes only a guardianship of the property, and personal decisionmaking powers are not legally removed,[80] the impact on the individual is severe. The conservator can control the ward's choices of lifestyle and associations by economic restraints.[81]

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73. *See* Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

74. *See* Parham v. J.R., 442 U.S. 584 (1979); Addington v. Texas, 441 U.S. 418 (1979) (an individual has a constitutionally protected interest in not being declared mentally ill because such adjudication affects reputation, right to contract and engage in orderly pursuits of free persons, and rights to individual liberty).

In effect, proponents of conservatorship without adjudication of incompetency and of limited guardianship for the largest possible pool of mildly impaired individuals each assert the stigma is lessened by the form of guardianship they propose. When deprivation of autonomy remains, this result seems unlikely in a society that places a high value on individual liberty.

75. *See generally* Roe v. Wade, 410 U.S. 113 (1973) (discussing the right, in conjunction with a freely chosen physician, to decide on proper treatment); WORKING PAPER, *supra* note 34, at 39, 47.

76. *See* Wilkinson & White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563 (1977) (privacy of beliefs).

77. Korematsu v. United States, 323 U.S. 214, 220 (1944); *see also* Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) (the right to one's person may be said to be a right of complete immunity: the right to be let alone).

78. Papachristou v. City of Jacksonville, 405 U.S. 156, 163-64 (1972).

79. Coates v. City of Cincinnati, 402 U.S. 611, 615 (1971).

80. A ward found incapable of managing property cannot make "any gift, contract, or instrument in writing that is binding on him or his estate." FLA. STAT. § 744.331(8) (1987). This does not represent a limitation on voting and exercise of other civil rights.

81. *See* WORKING PAPER, *supra* note 34, at 40 (guardianship of person and property are in practice virtually indistinguishable). However, one commentator disingenuously writes in favor of U.P.C. model conservatorship: "Seldom will there be a need to appoint a guardian for

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Though the conservatee retains the legal right to petition the court if the conservator refuses reasonable wishes, this may be beyond the capacity of an impaired individual and legal assistance may be unavailable.[82] Conservatorship statutes that provide for transfer of property management powers without a declaration of incompetency make only a semantic distinction. When actual autonomy is so restricted, the ward endures all the stigma of incompetent status.

When state action affects fundamental individual rights, the state normally is restrained by constitutional due process protections[83] that require it to achieve its goals[84] by the least intrusive methods.[85] Applying these principles, the assistance provided to a mentally impaired person should have as little impact on self-determination as possible.[86] However, competency proceedings do not seek to identify the least restrictive alternative form of assistance. In many cases, both traditional and reform guardianship concepts remove more of the ward's rights than required to compensate for the ward's diminished capability.

The least restrictive alternative concept should be incorporated into competency determination because of changes in society's values

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an elderly person [who has a conservator] . . . since appointment of a conservator will be adequate in most situations. The conservator's powers are ample to enable him to arrange whatever physical care is necessary, typically nursing home care . . . ." Effland, *Caring for the Elderly Under the Uniform Probate Code*, 17 ARIZ. L. REV. 373, 378-79 (1975). This article, contrary to its purpose, argues strongly against the sweeping powers given the conservator under the U.P.C. by trivializing and dehumanizing the ward.

82. *See* Effland, *supra* note 81, at 384.

83. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

84. Basic rights may be restricted when there is a "compelling state interest," provided the degree of infringement is related to the state's interest in protecting society. *See* Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded for a more specific injunctive order*, 414 U.S. 473, *modified*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated*, 421 U.S. 957 (1975), *judgment reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976).

A number of commentators have observed that neither the interests of the state nor the petitioner are justified in many guardianships. *See, e.g.*, Alexander, *supra* note 10, at 32 (conservatorship is an anachronism applied for inappropriate reasons); Frolik, *supra* note 6, at 617-18, 647-48 (guardianship counters deviant behavior in the elderly and controls the lower class).

85. *See* Dunn v. Blumstein, 405 U.S. 330 (1972); Shelton v. Tucker, 364 U.S. 479, 488 (1960); Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951).

86. *See* Covington v. Harris, 136 U.S. App. D.C. 35, 41, 419 F.2d 617, 623 (D.C.Cir. 1969); *In re* Beverly, 342 So. 2d 481 (Fla. 1977) (citing Lake v. Cameron, 124 U.S. App. D.C. 264, 267, 364 F.2d 657, 660 (D.C. Cir. 1966)); *see also* Recommended Judicial Practices, *supra* note 20, at 4-5.

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and in guardianship itself. Traditionally, guardianship proceedings have been exempt from constitutional due process requirements because they were characterized as primarily benevolent, an action in which the petitioner had nothing to gain and the respondent nothing to lose, except the opportunity to have a guardian. In the absence of significant conflicting interests, courts considered due process standards and identification of the least restrictive alternative unnecessary to reach a fair and accurate result.[87] However, over the past twenty-five years, society has recognized the tension between fundamental liberties and benevolent assistance, and has adopted due process standards as the appropriate form of protection for the disabled individual.[88]

Identification of the least restrictive form of assistance also is timely because guardianships are created today for individuals who are far more aware and capable than wards of the past. Guardianship once was reserved for the severely mentally impaired, whose property needed management while the ward was committed or restrained at home.[89] With the development of psychology and psychiatry, courts extended guardianship to the mentally ill rather than restricting it to the dangerously insane.[90] Individuals capable of managing their per-

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87. *See* Rud v. Dahl, 578 F.2d 674, 679 (benevolence in the form of preventing dissipation of the estate is an adequate substitute for procedural protection). Despite the *Rud* decision, the Illinois Legislature in 1979 amended its guardianship statute to include guardians ad litem, appointed counsel, and other due process protections. ILL. ANN. STAT. ch. 110 ½ (Smith-Hurd 1979); Jost, *supra* note 46, 1087, 1092-93; *see also* Frolik, *supra* note 6, at 609-10.

Actions based on the sovereign's *parens patriae*, its power and responsibility to act as a benevolent parent for a citizen under legal disability, have been distinguished from those based on police power. Exercise of the police power acknowledges the conflict of interest between the individual and the community and requires due process to assure those interests are properly weighed. *See* Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 MO. L. REV. 215, 219-22 (1975) ("*Parens patriae* power [includes] the duty to protect persons under legal disabilities to act for themselves, [a] classic example of this role is [when a state undertakes] to act as the general guardian of all infants, idiots and lunatics." O'Connor v. Donaldson, 422 U.S. 563, 582 (1975)).

88. *See* Mitchell, *supra* note 24, at 1410-12 n.32; *see also* Heyford v. Parker, 396 F.2d 393 (10th Cir. 1968) (notice and counsel); Kendall v. True, 391 F. Supp. 413 (W.D. Ky. 1975) (preliminary hearing and notice); Bell v. Wayne County Gen. Hosp., 384 F. Supp. 1085 (E.D. Mich. 1974) (notice); Lessard v. Schmidt, 349 F. Supp. 1078 (E.D. Wis. 1972), *vacated and remanded on other grounds*, 414 U.S. 473, *on remand* 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated and remanded*, 421 U.S. 957 (1975), *judgment reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976) (hearing and notice); *Developments in the Law — Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190 (1974).

89. *See* M'Elroy's Case, 6 Watts & Serg. 451, 460 (Pa. 1843) (describing the expanding definition of incompetence); Rohan, *supra* note 53, at 4.

90. *See* Note, *supra* note 16, at 678-79, nn.15-24.

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sonal affairs and not in need of restraint could have guardians appointed solely for property management.[91] Reform guardianship statutes include a still larger segment of the population as prospective wards by shifting the emphasis of the definition of incompetency to quality of judgment. These individuals' powers cannot fairly be stripped away in the traditional all-or-nothing guardianship.

Alternatives the court should consider to identify the least restrictive form of assistance for the mentally impaired are described in case law on civil commitment. Civil commitment closely resembles guardianship because it required a declaration of incompetency and provides involuntary services to a mentally impaired individual.[92] In a civil commitment proceeding, a person must have the opportunity to consent to voluntary assistance by having the services conscientiously explained, or the court must find that the person is unable to determine whether the services are necessary.[93] The court must consider assistance of family and friends, and all social and community services to determine whether they are sufficient to meet the person's need, and must specifically find them inappropriate.[94]

These standards are aptly applied to guardianship, perhaps particularly for the elderly person. State and federal government fund social services that enable the elderly to continue living in the community. For many elderly persons, the loss of decisionmaking capabilities is slow or uneven, involving periods of excellent lucidity. Moreover, many older persons have family, friends, and neighbors willing to take some responsibility for their welfare.

1. Limited Guardianship

Traditional guardianship statutes distinguish only two categories of powers: personal decisionmaking and management of property.[95] Regardless of the ward's capabilities, the guardian receives all the ward's delegable powers in one or both of these broad areas. All the ward's nondelegable powers, such as voting, are lost. Such a drastic impact on the ward's autonomy usually is unjustified, particularly for the great many elderly wards who are capable of expressing prefer-

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91. *Id.* at 679-80.

92. *See infra* notes 108-15. *But cf.* Horstman, *supra* note 87, at 231-59 (emphasizing *distinctions* between involuntary commitment based on police power and guardianship based on protecting individuals and safeguarding assets).

93. *See, e.g., In re* Beverly, 342 So. 2d 481, 489 (Fla. 1977).

94. *Id.* at 486.

95. *See, e.g.,* FLA. STAT. § 744.102(1) (1987).

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ences and making some decisions about both property and personal matters.[96]

Limited guardianship more accurately limits the guardian's authority to decisions the ward is incapable of making, by defining areas of the guardian's powers that correspond to the ward's incapabilities.[97] The ward is presumed to be only partly incapacitated, and any authority not specifically transferred to the guardian remains with the ward. However, the limited guardianship concept fails to identify the least restrictive form of assistance because it considers only assistance provided through guardianship.[98] The court is not required to consider alternative forms of assistance that have a lesser impact on the individual's fundamental rights than guardianships.

2. Guardianship Diversion

The service a guardian most commonly provides, financial management, often can be effectively provided without an adjudication of

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96. *See* Regan, *supra* note 36, at 608.

97. *See, e.g.*, ABA MODEL STATUTE, *supra* note 25, at § 12; Fla. S. 196 § 744.331(5) (Reg. Sess. 1988, introduced by S. Woodson and S. Dudley). A survey of over 300 New Hampshire cases revealed 14 common areas in which wards were found to be incapacitated and guardians given the authority to act:

1. Travel, or deciding where to live.
2. Refusal or consent to medical treatment, counseling services, or other professional care where consent is legally necessary.
3. Making contracts.
4. Possession or management of real or personal property or income from any source.
5. Making gifts.
6. Initiating, defending or settling lawsuits.
7. Lending or borrowing money.
8. Paying or collecting debts.
9. Managing or operating a business.
10. Waiving the provisions of a will.
11. Continuing to act as a member of a partnership.
12. Admitting himself/herself to New Hampshire hospital or any other institution or treatment on a voluntary basis.
13. Accessing and releasing confidential records and papers.
14. Making decisions concerning education.

See Cassananto, Saunders & Simon, *supra* note 23, at 15 (citing N.H. REV. STAT. ANN. §§ 464-A:25, -A:26 (1985)).

98. *See* Fla. S. 196, § 744.331(5) (Reg. Sess. 1988, introduced by S. Woodson & S. Dudley). *But see* ABA MODEL STATUTE, *supra* note 25, at § 11 (services may be ordered without adjudication of total incompetency).

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incompetency through guardianship diversion.[99] The court secures from the parties a comprehensive agreement to meet the respondent's needs; the agreement may include the type and frequency of any services necessary for the ward's well being. Such court-ordered financial services provide an opportunity for nonintrusive assistance in housing, social service, and health care decisions. A system of social services exists to meet the special needs of the elderly for living assistance[100] and many elderly have younger family members who are capable of providing care.[101]

The competency proceeding continues to serve an important function in obtaining effective services when guardianship diversion is an option. The court evaluates the appropriateness of the petitioner's proposals, and must find the respondent sufficiently incapacitated to warrant creation of a guardianship in the absence of alternative assistance.[102] The court protects the respondent from being coerced into accepting unnecessary and intrusive services to avoid an adjudication of incompetency. It further provides recourse in the event the agreement fails to secure the services, and must be enforced or revised.[103]

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99. *See* Westbrook, *Alternatives to Guardianship Emerging*, in THE AGING CONNECTION, Oct./Nov. 1987 (notes $800,000 funding of 36-month guardianship diversion program in Los Angeles); GUARDIANSHIP ALTERNATIVE NEWS, Spring 1988, at 1, col.2 (guardianship diversion program began in Florida in 1982 to allow court-ordered guardian).

100. Social services for the elderly are provided primarily through the federal Older Americans Act, (OAA) and Community Block Grant Development funds, and in Florida by Community Care for the Elderly. Service packages include congregate meals, home delivered meals, homemaker and home health aides, assistance, transportation, consumer education, chore service, companionship, counselling, legal assistance, and other services. *See* 42 U.S.C. §§ 1397a-e, 3001-3003 (1986) (supporting services similar to the OAA's, targeted for poor elderly); WORKING PAPER, *supra* note 34, at 48-49 (asserting the state may be required to provide a variety of services, including guardians and community based care).

101. *See* Ricklets, *Adult Children of Elderly Parents Hire Surrogates to Oversee Care*, Wall St. J., May 20, 1988, at 35, col. 3.

102. Wisconsin protective services are provided on the finding that, if no services are provided, the respondent suffers a substantial risk of physical harm or deterioration. *See* Greenley & Zander, *New Legal Protection for Persons with Mental Handicaps*, WIS. B. BULL., Apr. 1986, at 9.

Borderline cases, under current law, might be briefly under the care of a guardianship organization that provides stabilizing financial and personal case management, then petitions to have the ward's competency restored. The steps of temporary incompetency and restoration would be eliminated under a diversion system. Interview with Frank Repensek, *supra* note 63.

103. *See* ABA MODEL STATUTE, *supra* note 25, at § 11 (alternative or diversion services include social and financial services on a contractual basis).

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B. *Summary*

The scope of guardianship services includes a variety of services that can be provided without the creation of guardianship. Guardianship diversion, the provision of financial management and social service assistance to one who without such services would need a guardian, represents a re-adjustment of the law to the variety of services available in our complex society. It assures that those who only need assistance will not have to endure the stigma of incapacity and guardianship.

The objective of a guardianship action should be to provide the impaired individual with the least restrictive alternative form of assistance. This language should be found in the statement of legislative intent in Florida's guardianship statute. Before declaring incompetency and creating a guardianship, the court should determine the respondent is unable to manage personal decisions or property management even with all the assistance available from family, friends, and social service providers. If such assistance is sufficient to meet the respondent's needs, the court may order agreements for regular assistance and retain jurisdiction to monitor service effectiveness. If a guardianship is necessary, the court should transfer to the guardian only those powers the ward is incapable of exercising independently.

IV. THE PROTECTION OF PROCEDURAL FORMALITY

The extent of formality required in any proceeding depends on its usefulness in reaching an accurate result. Components of procedural due process include notice, right to counsel, and hearing rights; these rights facilitate the testing of evidence such as specified burdens and standards of proof, right to cross-examine witnesses, and use of the rules of evidence. The test for the appropriate level of due process includes consideration of the nature of the private interest affected and the risk of error balanced against the effectiveness of additional safeguards. If no fundamental right is affected, the fiscal and administrative burdens to the government providing the procedural protection are considered.[104]

In guardianship actions, the ward's fundamental liberty interests are restricted even when only a guardianship of the property, or conservatorship, is created.[105] Yet, traditional competency proceed-

104. On the test for appropriate procedural due process, see Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in* Mathews v. Eldridge: *Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 48 (1976).

105. *See supra* notes 77-93 and accompanying text.

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ings, including Florida's, have been conducted as informally as possible.[106] The great majority of respondents have no counsel and are not present at the competency hearing. Members of the examining committee rarely are present for cross-examination on the contents of their report. If the committee reports findings of incompetency, the burden of proof shifts to the respondent to refute the petitioner's allegations. The unchallenged presentation of inaccurate evidence and lack of rigorous inquiry produces a substantial risk of error.[107]

Nevertheless, courts are reluctant to apply the standards of criminal due process to guardianship actions because any additional time, costs, and possibilities of an unpleasant adversarial encounter might discourage family members and other benevolent petitioners from seeking guardianships for incompetent persons. While such concerns may be valid, they fail to describe all the likely effects of applying due process protection in guardianship actions.

Due process enables the respondent to resist the allegations in the petition, thus the total number of guardianships would be reduced. Because some petitions request adjudication of competent persons, resistance to the petition logically must reduce the number of guardianships for competent as well as incompetent persons. Unless providing more information to the court produces entirely random results, more competent than incompetent persons would successfully resist adjudication. In addition, the necessity of proving the allegations may discourage borderline or bad faith petitions. A persuasive argument based on more accurate competency determinations and constitutional issues exists for providing due process in guardianship actions despite their benevolent character.

Courts have identified a level of due process appropriate to actions that are of a mixed benevolent and adversarial character. In civil commitment, which the courts have recognized as primarily benevolent,[108] notice that includes only date, time, and place of hearing has been held insufficient.[109] The respondent is entitled to counsel ap-

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106. FLA. STAT. § 744.331(4) (1987) (hearings are to be conducted in as informal a manner as may be consistent with orderly procedure); *see* Gay v. McCaughan, 105 So. 2d 771, 774 (Fla. 1958) (proceedings regarding curatorship and guardianship of the property are not subject to rules governing adversary suit).

107. *See supra* note 9 and accompanying text (press inquiry of results); Katz v. Superior Court, 73 Cal. App. 3d 952, 969, 141 Cal. Rptr. 234, 244 (Ct. App. 1977) (in guardianship that results in restraint of one's person, the test of certainty must be that applied to the criminal law because fundamental rights are at stake).

108. *See In re* Beverly, 342 So. 2d 481, 485 (Fla. 1977) (basis of action in *parens patriae*).

109. *See* Dale v. Hahn, 486 F.2d 76, 79 (2d Cir. 1973), *cert. denied*, 419 U.S. 826 (1974).

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pointed by the court at all stages of the proceeding that may result in detrimental change to liberty.[110] The diagnosis, which provides the principal evidence opposing the respondent's autonomy, must be based on expert testimony.[111] However, even expert testimony cannot substitute for the court's legal conclusions because the judicial system must be accountable for the severe legal consequences.[112] At hearing, strict adherence to the rules of evidence is imperative,[113] and the burden of proof remains with the petitioner. No civil commitment may take place unless "clear and convincing" evidence indicates the action is necessary.[114] These procedural due process standards are considered as cost-effective means to reduce the risk of error.

Courts have distinguished guardianship, which provides decision-making authority to the guardian, from civil commitment, which necessarily results in the respondent's institutionalization. However, many petitioners initiate guardianship proceedings for the elderly specifically to place the prospective ward in an institution such as a nursing home. This involuntary change of residence is sometimes the only substantial service the guardian provides. Thus the principal difference between civil commitment and guardianship is that the patient in the mental institution receives treatment and periodic review on the issue of discharge while the nursing home resident receives none. This reasoning strongly suggests the procedural standards of civil commitment are the minimum that should be required in guardianship actions.

All the components of procedural due process should be available and routinely used in guardianship actions.[115] The particular usefulness of each element, and the most efficient delivery of due process protection for prospective wards is considered below.

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110. *See Beverly*, 342 So. 2d at 489.

111. FLA. STAT. § 394.467(3)(a) (1987).

112. *Beverly*, 342 So. 2d at 484 (quoting Finken v. Roop, 234 Pa. Super. 155, 182, 339 A.2d 764, 778 (Super. Ct. 1975), *appeal dismissed*, 424 U.S. 960 (1976)).

113. *Id.* at 484-85. In civil commitment, the Florida Supreme Court requires that a strict burden of proof be met before the individual's liberty is restricted. *Id.* The threatened deprivation of liberty in civil commitment requires application of due process. *See* Frolik, *supra* note 6, at 625. Guardianship frequently results in institutionalization of the ward in a nursing home, is often initiated particularly for this purpose, and this institutionalization may be the only service the guardian provides to the ward. *See supra* text accompanying notes 108-13; *infra* text accompanying note 114.

114. *See Beverly*, 342 So. 2d at 487-88 (citing State v. Valdez, 88 N.M. 338, 540 P.2d 818 (1975)). The "clear and convincing" standard was defined in Florida in Allstate Ins. Co. v. Vanater, 297 So. 2d 293 (Fla. 1974).

115. *See* National Guardianship Symposium Proceedings, *supra* note 25.

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A. *Notice*

Notice that fails to communicate sufficient information may fail to satisfy due process requirements. When protected liberty and property interests are at stake, as they are in competency proceedings, sufficient information includes an explanation of the nature of the proceedings, the possible consequences, and the respondent's rights.[116] Courts have required such explanations when the proceedings involve persons who, by reason of their disability, may be vulnerable, isolated, and without knowledge of their legal rights.[117]

Florida's statutory requirements for notice of a competency proceeding do not meet these standards. The statute requires only that the respondent receive written notice that an application has been made for an inquiry into either his physical or mental condition, or both, with the time and place of the hearing.[118] Ordinarily, the petition is attached. The notice must be sent to relatives living in the same county as the respondent, if the petitioner knows of any.[119] The court may hold a hearing at any time after service of notice.[120]

Because virtually all prospective wards are impaired, such notice may not convey the nature and significance of the proceeding. An elderly impaired person receiving a copy of the petition with a hearing date may become confused about its meaning and the appropriate response because of unfamiliarity, stress, poor eyesight, or any number of other causes. Because the petitioner may not know the respondent's relatives and friends and has no incentive to help the respondent resist the petition, individuals who might offer the respondent assistance might never receive notice and remain unaware of the action.

Notice that provides the respondent with the information and time to prepare should state in large type and plain language[121] the possible consequences of the competency proceeding and the respondent's rights,[122] as well as the time and place of the hearing. A plainclothes

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116. *See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (type of notice adequate to meet constitutional due process requirements can only be determined by individual circumstances of the proceeding).

117. *See* Covey v. Town of Somers, 351 U.S. 141 (1956) (recipient should be able, from the notice, to understand the nature of the proceedings).

118. Lessard v. Schmidt, 349 F. Supp. 1078, 1092 (E.D. Wis. 1972), *vacated and remanded for a more specific injunctive order*, 414 U.S. 473, *modified*, 379 F. Supp. 1376 (E.D. Wis. 1974), *vacated*, 421 U.S. 957 (1975), *judgment reinstated*, 413 F. Supp. 1318 (E.D. Wis. 1976). For discussion of notice issues, see Frolik, *supra* note 6, at 637-38; Jost, *supra* note 46, at 1094-95.

119. FLA. STAT. §§ 744.331(4), .337(1) (1987); FLA. R.P. & G.P. 5.550.

120. FLA. STAT. §§ 744.331(4), .337(1) (1987).

121. *Id.* § 744.331(4).

122. *See* WORKING PAPER, *supra* note 34, at 39.

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court officer who is familiar with the impairments of aging or other disabilities should personally deliver the information to the respondent. The officer should read the information aloud to provide opportunity for questions and clarification.[123] After service of notice, at least fourteen days should elapse before the hearing.[124]

Notice to friends and relatives is particularly important when their assistance might eliminate the need for guardianship. Notice should be sent by mail to any individuals the prospective ward identifies within three days after the prospective ward received notice that guardianship proceedings have begun. The petitioner also should be required to serve relatives and significant others living outside the county.[125]

B. *Use of Counsel and Guardians ad Litem*

All states allow a prospective ward to have legal counsel[126] and many provide for appointed counsel,[127] but in many jurisdictions, prospective wards routinely waive that right.[128] The arguments against the practice of routinely appointing counsel arise primarily from concerns with cost effectiveness; many courts reach correct adjudications without representation so that additional legal costs are unnecessary.[129] This assumes the ward has no significant information or perspective to present to the court; it assumes the respondent is incompetent.

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123. *See* National Guardianship Symposium Proceedings, *supra* note 25; Recommended Judicial Practices, *supra* note 20, at 3.

124. *See* Recommended Judicial Practices, *supra* note 20, at 3. Statutes provide for 3 to 20 days, while in practice 7 to 90 days elapse between notice and hearing. Twenty-three states had no statutory requirement in 1986. *Id.* at 13.

125. *See id.* at 3. Constructive notice and waiver of notice have been found to be inappropriate to guardianship proceedings. For example, in Texas and Ohio, actual service must be completed for jurisdiction. *See In re* Guardianship of Corless, 2 Ohio App. 3d 92, 440 N.E.2d 1203 (Ct. App. 1982); Dyers v. Walls, 645 S.W.2d 317 (Tex. Ct. App. 1982). Waiver of notice is prohibited under the Uniform Probate Code. U.P.C. § 5-304(d) (1982).

126. WORKING PAPER, *supra* note 34, at 38.

127. *Abuses in Guardianship*, *supra* note 11 (thirty-six statutes, including Florida's, allow for appointed counsel). Routine appointment of counsel raises issues such as small fees and perfunctory representation. *See* WORKING PAPER, *supra* note 34, at 38.

128. Good & King, *supra* note 9, at 1A, col. 2. In civil commitment, a person has a right to effective assistance of counsel at all stages of the commitment process that might result in a detrimental change to the condition of his or her liberty. *See, e.g., In re* Beverly, 342 So. 2d 481, 489 (Fla. 1977). The trial judge must specifically find whether or not the alleged incompetent is represented by counsel in any civil hearing, and whether or not counsel should be afforded. *See In re* Guardianship of Paunack, 355 So. 2d 1195 (Fla. 1978).

129. *See supra* text accompanying notes 87-88 (benevolent nature of guardianship proceedings).

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Resistance to guardianship petitions with the help of legal counsel will reduce erroneous findings of incompetency, and discourage borderline or bad faith petitions.[130] Because the respondent has a right to counsel, and routine use of counsel increases the accuracy of competency proceedings, indigent prospective wards should not be deprived of assistance of counsel. Logically, the court should appoint a lawyer for each respondent who has not retained one. The court should not consider the respondent to have waived the right to counsel unless it determines the waiver is knowing and voluntary.[131]

However, even advocates of the routine use of counsel may hesitate to recommend appointment in every case because of confusion over the attorney's role in guardianship actions. Professional ethics require an attorney to advocate only the client's preferences concerning legal rights, a role that many feel is inappropriate if the client cannot communicate well, or has some preferences beyond the realm of possibility.[132] In such cases, the attorney may needlessly complicate the case with groundless arguments.

On consideration, requiring the court to appoint counsel in every case is more desirable than requiring it to determine from scant prehearing information those few cases in which counsel is inappropriate. Regardless of the prospective ward's condition, the attorney takes the responsibility of the advocacy role that otherwise is neglected. Indeed, the extremely impaired ward is in greatest need of an advocate to preserve any aspect of autonomy he still is capable of independently exercising. Under reform statutes that require limited guardianships, very few wards have no legal rights to preserve.[133] There undoubtedly will be cases in which the attorney's advocacy role is very limited, and the fee correspondingly low.

If the client cannot communicate with legal counsel, a guardian ad litem may provide the most effective way to assure that the respondent's best interests are represented.[134] The guardian ad litem also can determine the respondent's needs when his stated preferences are

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130. *See* Frolik, *supra* note 6, at 631-32.

131. *See* National Guardianship Symposium Proceedings, *supra* note 25.

132. The U.P.C. would appoint an attorney as a guardian ad litem, in effect depriving the prospective ward of legal advocacy. *See* U.P.C. § 5-303(e) (1982). Counsel should be appointed whenever respondent's wishes are in conflict with the recommendations of the guardian ad litem. *See* ILL. ANN. STAT. ch. 110 ½, para. 11a-10(b) (Smith-Hurd 1987).

133. *See* Krauskopf, *supra* note 35, at 63-64 (once having left the role of advocate, the attorney is less likely to challenge expert testimony and will contribute to the routine approval of all guardianships); *see also* Recommended Judicial Practices, *supra* note 20, at 21-22; Frolik, *supra* note 6, at 633-35 & n.250 (distinctly different roles for counsel and guardian ad litem).

134. *See, e.g.*, N.H. REV. STAT. ANN. § 464-A (1985); Frolik, *supra* note 6, at 635-36.

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ill-advised.[135] The professionally trained guardian ad litem, who may be an attorney, can provide objective information to all participants in the guardianship action.[136] Appointing a guardian ad litem to investigate immediately on service of notice can simplify many proceedings that the appointment of counsel cannot.

The court should appoint an attorney for each respondent who lacks counsel. The prospective ward's attorney should be restricted to the traditional role of advocate, advising the client in the language or mode of communication most likely to convey all the options available, as well as the practical and legal consequences of those options and the probability of success in pursuing any one of them.[137] The skills of an attorney serving as guardian ad litem should be available to the court for investigation and assistance to the advocate when the respondent has difficulty communicating feasible preferences. The advocate attorney should pursue the course of action chosen by the client, or by the guardian ad litem if the client cannot choose.[138]

C. *The Examining Committee*

To investigate the alleged incompetent's condition, the court appoints an examining committee. In Florida, the committee includes one responsible citizen and two practicing physicians to serve the court as experts in determination of competency.[139] Such a committee lacks the expertise to conduct the functional assessment necessary to determine the behavioral aspect of the respondent's competency.[140] Current guardianship statutes require neither knowledge of the impairments of aging nor expertise in other areas of alleged disability. The relevant statute describes no procedure for the examination, which may be very brief.[141] The statute requires the committee to report to the court the apparent cause of the respondent's condition, and whether it considers the condition chronic.[142] Terse and conclusory statements, how-

135. *See* Jost, *supra* note 46, at 1094.

136. The guardian ad litem should inform the respondent of hearings and rights to assure fair participation and make recommendations to the court as to the ward's needs, including the need for counsel. *See, e.g.*, Greenley & Zander, *supra* note 102, at 9; *see also* ILL. ANN. STAT. ch. 110 ½, para. 11a-10(b) (Smith-Hurd 1987) (the guardian ad litem consults with the respondent and recommends whether counsel should be appointed).

137. *See* National Guardianship Symposium Proceedings, *supra* note 25.

138. *See id.*

139. On role of the guardian ad litem, see Greenley & Zander, *supra* note 102, at 11; Mozer & Chamberlin, *Guardianships for Disabled Adults*, ILL. B.J., Nov. 1985, 128, at 129-30.

140. *See supra* note 22 and accompanying text (effect of examining committee composition).

141. FLA. STAT. § 744.331(5)(a) (1987); *see* Good & King, *supra* note 9, Dec. 14, 1986, at 1A, col. 1.

142. FLA. STAT. § 744.331(5)(b) (1987).

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ever, are not uncommon; the report generally states a conclusion about the respondent's legal competency.[143]

The determination of competency requires the opinions of a medical doctor to assess physical condition, a psychologist or psychiatrist to assess mental condition, and a social worker or community health professional to assess functional capability. However, because these disciplines each have become quite specialized, every professional may not have the skill and experience necessary to form an expert opinion in a guardianship action. This is particularly true for the aged respondent, because of society's pervasive myths and misinformation about aging.

The examining committee should include expertise in medicine, psychology, functional assessment, and the area of the principal alleged disability. Individual members of the examining committee might possess any combination of these skills, but to ensure a diversity of viewpoints, the committee should never have fewer than three members. Some rural jurisdictions may have to rely on experts from adjoining areas.

Each committee member should be required to examine the respondent in person and report to the court the causes, manifestations, and prognosis for any conditions found. Whenever possible, the examination should be conducted at the respondent's usual residence to minimize the disabling effects of apprehension and fatigue.[144] No committee member should report a conclusion on the respondent's legal competency. The court should weigh the examining committee's report as it would any other expert testimony.

Members of the examining committee should have no interest in the outcome of the proceeding.[145] Conflicts most frequently arise when a committee member's professional autonomy is not maintained free of the influence of the financial and personal care system, or when the member is personally connected with the petitioner and ward.[146] To protect committees from professional compromise, the court should

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143. *See id.*

144. *See, e.g.*, GA. CODE ANN. § 49-606(c)(4) (Supp. 1980) (evaluation shall be conducted with as little interference with the proposed ward's activities as possible).

145. *See* Nolan, *supra* note 40, at 210-11.

146. Practitioners have observed that committees that have the same membership in all cases have sometimes caused the members to depend on routine affirmation of petitions. It has been suggested that a system of rotating participation in examining committees among members of the local bar and medical community would maintain rigorous standards of inquiry. Telephone interview with Leon Whitehead, Member of Florida Bar Committee on the Elderly and experienced practitioner in estate planning (Nov. 1987).

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choose members on a rotating basis from a substantial segment of professionals in the community. If the pool is extremely small, the court should take the initiative to find more professionals who are willing to serve. The committee member most likely to be personally involved is the ward's doctor. Though the respondent's family physician may be an excellent resource, the court should consider the extent to which a report is likely to reflect conflicting interests within the family before appointing the family doctor to the examining committee.

D. *The Competency Hearing*

Under current Florida law and practice, courtroom procedure does little to test and develop the evidence. Many hearings, attended only by the judge and the petitioner, conclude within minutes.[147] Rules of evidence do not apply.[148] Committee members are rarely subpoenaed for cross-examination on the conclusions in the report.[149]

Such practices fail to provide the court with the quality of information necessary to accurately determine competency. Especially with the adoption of a least restrictive alternative standard in limited guardianship, the court must choose the most appropriate among many options for the respondent's well-being. Courts need the opportunity to test the persuasiveness of evidence about the prospective ward's capabilities and impairments.[150]

Courts should conduct guardianship hearings in a way that enables the respondent to participate. The respondent should be present, regardless of where the hearing is held, unless the court specifically determines presence is not in the respondent's best interests.[151] The hearing should be open unless the respondent requests otherwise.[152]

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147. Good & King, *supra* note 9, at 1A, col. 1.

148. Incompetency and guardianship proceedings are subject only to subpoena, deposition, and discovery rules. *See* FLA. R.C.P. §§ 1.280-.410. In all other matters, the proceeding is subject to Rules of Probate and Guardianship. *See* FLA. R.P. & G. §§ 5.010-.180, 5.540-.710.

149. *See supra* notes 106-07 and accompanying text.

150. *See* Jost, *supra* note 46, at 1096; Nolan, *supra* note 40, at 210-11 (a heavy burden is on judges in guardianship proceedings to make determinations with inadequate evidence).

151. *See, e.g.*, ILL. ANN. STAT. ch 110 ½, para. 11a-11 (Smith-Hurd 1987); TEX. PROB. CODE ANN. § 130G (Vernon 1980) (limited guardianship for developmentally disabled); U.P.C. § 5-303(c) (1982) (trauma to respondent should be balanced with preservation of rights). Hearings may be held at locations more accessible and less threatening than that at the courthouse. *See* Recommended Judicial Practices, *supra* note 20, at 17 (recommending that the court allow the respondent to participate by telephone if transportation or a hearing at home is impossible).

152. *See, e.g.*, GA. CODE ANN. § 49-606 (Supp. 1987) (the public may be excluded at the respondent's request); ILL. ANN. STAT. ch. 110 ½, para. 11a-11 (Smith-Hurd 1987); TEX. PROB. CODE ANN. § 130G (Vernon 1988).

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If the respondent's limitations warrant it, the court should consider holding the hearing in the respondent's usual residence. Alternatively, the judge might interview the respondent by telephone.[153] The location should be readily accessible to the handicapped, and waiting should be minimized to preserve the respondent's energy and emotional resources. Special equipment and lighting should be provided for respondents whose hearing or vision is impaired. If appropriate, the judge should instruct all participants to speak slowly and clearly.

The court should consider the validity of the evidence under the rules of evidence that govern other procedures. The respondent's counsel should routinely have the opportunity to cross-examine the committee and anyone presenting evidence favoring the petition.[154] The court should treat the committee report skeptically and scrutinize it for internal inconsistencies.[155] The committee report should support allegations in the petition and the court should give medical testimony no greater weight than it normally gives expert testimony.[156] An unfavorable committee report should not shift the burden of proof from the petitioner[157] to respondent; the burden of proof should remain with petitioner. The burden shifts primarily because the court accepts the report as such strong evidence that it is virtually dispositive of the case. Skeptical treatment of the report should help to correct this error. However, the old-fashioned practice may be more promptly and thoroughly changed by instruction in the court rules.

Most traditional statutes, including Florida's, do not define the standard of proof. However, many limited guardianship statutes adopt the "clear and convincing" standard, which is applied in civil commitment. Florida should adopt the "clear and convincing" standard for guardianship actions.

V. THE ACTIVE COURT: INVESTIGATION AND SUPERVISION[158]

Judicial supervision is one of the principal benefits of guardianship

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153. *See* National Guardianship Symposium Proceedings, *supra* note 25.

154. *See* U.P.C. § 5-303(c) (1982).

155. *See* Recommended Judicial Practices, *supra* note 20, at 24.

156. The party bearing the affirmative of an issue bears the burden of proof in guardianship as in other proceedings. Beck v. Beck, 383 So. 2d 268, 270-71 (Fla. 3d D.C.A. 1980).

157. However, the court may instruct the petitioner to amend the petition, or consider it amended as hearsay. *See, e.g.*, MINN. STAT. ANN. § 525.551(2) (West Supp. 1987) (petition for guardianship may result in conservatorship).

158. In states having probate courts of chancery, guardianships may not be relegated to probate courts. *See, e.g.*, DEL. CODE ANN. tit. 12, § 3914(a) (1987); MISS. CODE ANN. § 93-13-251 (1972); TENN. CODE ANN. § 34-2-101 (1984). Segregating guardianships in probate courts seems inappropriate and perhaps symbolic in that all other business is concerned with

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to the ward.[159] The Florida Supreme Court has observed that many safeguards are placed around guardians' administration of estates,[160] and guardians are held to the strictest accountability as trustees.[161] Such supervision should begin when the petition is filed and continue for the duration of the guardianship. However, the court has little investigatory or monitoring capacity to assure the suitability of guardianship services.[162]

Traditionally, petitions have lacked detail and specificity about the proposed ward and the qualifications of the proposed guardian.[163] Florida's statute requires basic information about the alleged incompetent such as age and address, some statement of the nature of incapacity, the type of guardianship requested, the property involved, and the names and addresses of the petitioner and next of kin.[164] Although convicted felons and persons incapable of discharging the duties of a guardian are disqualified from appointment,[165] no information about the guardian is specifically required. Because the mere filing of a petition produces serious intrusions into the respondent's privacy, the National Guardianship Symposium in July 1988, recommended that the petition include specific information about the physical and mental condition of the proposed ward, along with the reasons for the requested guardianship. The Symposium would require, on a petition form available in every jurisdiction, the qualifications of the individual to serve as guardian, specific information about the steps taken to find less restrictive alternatives to guardianship, and a specific description of the guardianship powers sought.[166]

The court should have resources to investigate the allegations in the petition whenever appropriate. Even in the absence of statutory

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the dead. *See* Friedman & Savage, *supra* note 8, at 275; Note, *supra* note 16, at 676 n.73 (guardian of estate equated to executor).

159. *See also* Recommended Judicial Practices, *supra* note 20, at viii (the court has ultimate responsibility for monitoring the ward's condition and continuing needs).

160. *In re* Guardianship of Krecl, 85 So. 2d 727, 730 (Fla. 1956).

161. *In re* Nusbaum's Guardianship, 152 Fla. 31, 34, 10 So. 2d 661, 663 (1942); McBride v. McBride, 142 Fla. 663, 667, 195 So. 602, 603 (1940).

162. A guardian of the person is required to care for the ward humanely, to honor reasonable preferences as to place and standard of living, and provide the ward with annual physical and mental examinations. FLA. STAT. §§ 744.361, .364 (1987). A guardian of the property must protect and preserve the ward's property and account for it faithfully. *Id.* § 744.377(1)(a).

163. National Guardianship Symposium Proceedings, *supra* note 25.

164. *See* FLA. STAT. § 744.334 (1987).

165. *See id.* § 744.309(4).

166. *See* National Guardianship Symposium Proceedings, *supra* note 25 (procedural due process).

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authority, the court can exercise its inherent power to appoint an impartial investigator and other experts to assure adequate, objective information. Investigation of petitions is appropriately handled by a guardianship officer responsible for the investigation of guardians' activities.[167]

At present, courts lack sufficient information on which to base guardianship investigations. A guardian of the person must file an annual report of the ward's residence, the length of stay of the ward at each place, medical treatment, the guardian's activities, visits with the guardian, a physician's report, and an evaluation of the appropriateness of restoring competent status.[168] A guardian of the property must file an annual return with an account of transactions in the ward's assets.[169] The reports are intended to inform the court of the ward's needs and the appropriateness of the guardianship.

However, the court will not change the ward's circumstances or status in response to the report. The guardian also must file a petition for a court order.[170] The court will not hold a hearing on the information in a return unless an objection is filed.[171] If the guardian fails to file a return, the court shall order filing within fifteen days and after that time cite the guardian for contempt.[172] However, the statute provides no sanctions for a guardian of the person who fails to file a report.[173] In practice, in many jurisdictions, even the filing of reports and returns is supervised very casually.[174]

The court should fulfill its role as safeguard of its ward by establishing a system for the eduction of guardians and supervision of their performance.[175] Initially, courts should establish standards for guardians' performance that provide more guidance than the broad concept of fiduciary duty. In accord with the least restrictive alternative standard of limited guardianship, the court should instruct guardians to

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167. *See, e.g.*, CAL. PROB. CODE § 1851.5 (West 1987).

168. FLA. STAT. § 744.367 (1987).

169. *Id.* § 744.427.

170. *Id.* § 744.371.

171. *Id.* § 744.427(5)-(6).

172. *Id.* § 744.431.

173. Possible causes of action for the competent individual who has been subjected to competency proceedings include malicious prosecution, abuse of process, false imprisonment, and infliction of emotional distress. *See* Krauskopf, *supra* note 35, at 65-67. On appeal of adjudication of incompetency, see Mitchell, *supra* note 24, at 1425.

174. *See* Good & King, *supra* note 9, Dec. 14, 1986, at 16A, col. 2.

175. Professional standards are being developed and can be used by the courts as guides. The National Guardianship Association, 527 S. Wells St., Suite 300, Chicago, Ill. 60607, held a second annual meeting to consider standards in Chicago on Oct. 30-Nov. 2, 1988.

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develop maximum self reliance and independence in the ward.[176] Such activities may require expenditures of the ward's assets that would have been questionable under traditional conservatorship concepts. However, the concept of estate conservation is particularly ill-suited to the circumstances of the elderly ward. The guardian should be encouraged to use the assets humanely to develop the capabilities and satisfy the preferences of the ward.[177]

The guardian and ward to some extent become co-managers of the ward's affairs, a role the court describes in the context of voluntary guardianship. The difficulties of co-management may be the reason voluntary guardianship is seldom used. However, limited guardianship differs from voluntary guardianship in that the ward cannot withdraw the guardian's authority simply by petitioning the court.[178] Because the ward is, in specific matters, legally incompetent, the guardian has authority to proceed in accord with independent good judgment.[179] The courts should educate and encourage guardians to communicate and cooperate with their wards.

To help ensure that guardians fulfill their roles, every circuit should establish the position of guardianship clerk and provide adequate staff. The guardianship clerk, who should be an attorney, should review petitions, annual reports and returns, and make recommendations to the court for investigations and hearings. In the report, the guardian should be required to prove the continuing need for planned services. The court should fine guardians who fail to file their returns or perform other required duties. If the guardian does not pay the fine promptly

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176. *See* Jost, *supra* note 46, at 1099 (citing ILL. ANN. STAT. ch. 110 ½, para. 11a-3(b) (Smith-Hurd 1987)).

177. *Id.* at 1097-1101.

178. Limitations on the guardian's powers raise some concern that third parties would be reluctant to enter transactions where uncertainty exists as to their exact legal authority. Note, *Limited Guardianship: Survey of Implementation Considerations*, 15 A.B.A. REAL PROP. PROB. TR. L.J. 544, 546 (1980). To clarify that authority, Illinois law centers on the limited guardian of the property all powers of estate management not specifically reserved to the ward. *See* ILL. STAT. ANN. 110½, para. 11a-3 (Smith-Hurd 1987); Jost, *supra* note 46, at 1101.

179. *See* Bryan v. Century Nat'l Bank, 498 So. 2d 868, 873 (Fla. 1986). In the context of voluntary guardianship, the court describes the procedure for oversight of new powers and specific acts by a voluntary guardian:

> The approval need not follow a long and drawn-out process. First, notice need be given only to the ward and those specified by the ward. Second, the court need only ensure that the ward is aware of and does not contest the action, that the transaction will not interfere with the ward's maintenance or living expenses, and that, in sum the transaction is in the ward's best interests.

Id.

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from his own funds, the court should collect the amount due when it authorizes the next payment of the guardian's fees. Furthermore, the guardian who fails to fulfill his duties should be removed.[180]

To help ensure understanding of the guardian's role, the court should require each person seeking to serve as a guardian to complete a program of education. To develop such a program, probate court judges should be educated and their responses incorporated into a statewide guardianship education model. The program should be available to attorneys, and required for those who wish to be appointed by the court as advocates in guardianship cases. The training should include information on the rights and procedures applicable in guardianship proceedings, the aging process, societal myths, and stereotypes concerning aging and disability, the skills required for effective communication with disabled and elderly persons, medical and mental health terminology, the effects of medication, and services available in the community.[181]

VI. CONCLUSION

Courts establish guardianships and conservatorships to make involuntary changes in an impaired individual's life. Guardians now have control over the lives of substantial numbers of persons, particularly elderly persons, who retain awareness and capability. The growing number of impaired elderly persons lends special urgency to this area of reform, because their remaining capabilities should be recognized and respected. To deprive them of long-held rights is especially cruel. In every other type of legal action specifically affecting them, disabled individuals have claimed recognition of their rights to self-determination. Because of changes in society and application of guardianship laws, the traditional relationship between guardian and ward represents a great injustice and poses the risk of intentional or negligent abuse. Therefore, guardianship can no longer be managed as a private, informal matter, as it has been for the past century.

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180. The creation and scope of the state-funded public guardian is beyond the scope of this article. However, many low income, isolated, incompetent individuals have no one capable and willing to serve as guardians. Florida has acknowledged its interest and responsibility to provide guardianship assistance by establishing two demonstration public guardian offices, in the second and fifteenth judicial circuits. *See* FLA. STAT. §§ 744.702-.709 (1987). The expansion of the program apparently is limited solely by failure to allocate funds.

181. *See* National Guardianship Symposium Proceedings, *supra* note 25 (procedural due process).

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The specific provisions for a new form of guardianship assistance have been gathered from other states, which already have adopted guardianship systems protecting rights of wards. Where reforms are adopted, they include substantive due process principles that require the least restrictive alternative form of assistance, procedural due process throughout the guardianship action, and a system of supervision that gives meaningful effect to the continuing jurisdiction of the court. The preferred method of assistance is voluntary services without adjudication of incompetency and appointment of a guardian. The next preferable method of assistance is the limited guardianship. Only when the respondent is without capability is a traditional plenary guardianship imposed. Continuing supervision by the court assures the guardianship will provide quality services with the least possible curtailment of individual autonomy.

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