Guardianship As A Cultural System: Reflections on the Illinois Guardianship Reform Project

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GUARDIANSHIP AS A CULTURAL SYSTEM:
REFLECTIONS ON THE ILLINOIS
GUARDIANSHIP REFORM PROJECT

Morris A. Fred*

- A woman learned she was under guardianship only when told by her nursing home she could no longer spend money without the permission of the guardian.
- A court had no record of what happened to the $131,000 estate of a ninety-two year old man found ill and alone in a cabin after a couple, described as “friends,” became his guardians.
- A woman recovered from a stroke and returned to her home. She wanted control of her life, she said, but her guardian wouldn’t give it to her. Instead, her guardian obtained an emergency order from the court and had her sedated by a nurse, carried from her home by the county sheriff and placed in a nursing home. Her court-appointed attorney waived a hearing on the order without talking to her.
- A public guardian pleaded guilty to charges of official misconduct and theft after he was accused of investing wards’ money for his own benefit.¹

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I would like to thank my many colleagues throughout the country and in Illinois whose experiences these past few years have allowed me to participate in and observe the challenging tasks of creating a just and effective guardianship system. My perspective on these issues has been enriched by continuous discussions with my colleagues at Equip for Equality, in particular Marsh Koelliker, the Program Director of Public Policy and E.G. Enbar, who as Project Analyst worked closely with me throughout the process. My thanks to both of them and to Zena Naiditch, President and CEO of Equip for Equality, for their thoughtful comments on earlier drafts.

The above scenarios represent only a few of the many stories that filled the pages of newspapers around the country as part of a 1987 six-part series on guardianship abuses. These articles shook official and public complacency and provided the impetus for what became widespread attempts to reform what journalists called an "ailing system." The articles, involving fifty-seven reporters who reviewed 220 probate court files from every state, revealed problems of abuse, neglect, and mismanagement that were reinforced by findings of public hearings conducted by the U.S. House Committee on Aging, Subcommittee on Health and Long-Term Care, as well as a report by the Subcommittee on Housing and Consumer Interests recommending standards to ensure quality guardianship.

Through the newspaper series and Congressional hearings that followed, it was learned that some of the more common deficiencies in state guardianship systems included:

1. a lack of due process protections;
2. an unclear standard to determine incapacity with the result of inappropriately defined guardianships;
3. little or no training or preparation for guardians before assuming their roles;
4. a lack of resources and systems to adequately monitor the performance of guardians; and
5. little or no public awareness of the alternatives to guardianship.

That these problems could no longer be overlooked is recognized by the fact that by the year 2035, it is estimated that one quarter of the population of the United States will be elderly. In addition, the number
of non-elderly individuals with disabilities (e.g. mental illness, developmental disabilities, AIDS) will continue to increase due to improved survival rates of infants born with disabilities and increases in life expectancy. Some of these individuals will require surrogate decision-makers, and the appropriate mechanisms must be in place to ensure that decisions may be made for this growing population. Thus, guardianship will remain a serious issue confronting individuals, family members, government agencies, and the judicial system well into the 21st century.

Confronting these issues in a methodical fashion, the American Bar Association (ABA) sponsored the Wingspread National Guardianship Symposium in July 1988, which was comprised of thirty-eight guardianship experts from across the country. With the goal of producing a set of recommendations for guardianship reform, these experts included judges, attorneys, guardianship service providers, doctors, representatives of senior organizations, mental health experts, governmental officials, a bioethicist, a state court administrator, a judicial educator, an anthropologist, and ABA staff. The resulting publication, providing a summary of the key problems facing guardianship systems throughout the United States, is striking in its similarity to other studies published by researchers and professional associations.6

The ABA’s set of recommendations also provided a blueprint to guide statutory revisions in many states and can be reviewed in the ABA’s annual summaries of these reform efforts.7 What subsequently became apparent was that, while legislative changes were enacted to try to remedy the most egregious problems in state guardianship systems, in actuality, the desired goals were not attained. An example of one such goal was to create fewer plenary and more limited guardianships. Despite legislation establishing limited guardianships as

6. Other influential publications encouraging reform developments throughout the country are: A.B.A. COMM’N ON LEGAL PROBLEMS OF THE ELDERLY & NAT’L JUD. CONF., STATEMENT OF JUDICIAL PRACTICES (Erica F. Wood ed. 1986); COMM’N ON NAT’L PROB. CT. STANDARDS, NATIONAL PROBATE COURT STANDARDS ON GUARDIANSHIP AND PROTECTIVE PROCEEDINGS (1993); UNIF. PROB. CODE §§ 5-101 – 5-105 (8 U.L.A. 321 (1968) as amended 1998); NAT’L CONF. OF COMM’RS ON UNIF. ST. LAWS, UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT ¶ 101-503 (8A U.L.A. 439 (1968), as amended 1998). While these and other works involving recommendations may differ in detail, they are strikingly similar in terms of recognition of problem areas, many if not most of which were also cited by the Task Force of the IGRP.

an option, one study noted that limited guardianships were ordered in only a small minority of cases. Another study concluded that "unless there is a clear prohibition or mandate in the [state] statute, the statutory language has little effect on practice."

This gap between policy and practice, which also exists with other recommended changes in guardianship systems, suggests that other key factors may be at play in obstructing the implementation process. Thus, as the aforementioned study concludes, "[P]erhaps no amount of statutory reform can alter the tendency for attitudes toward aging to overshadow and shape the interpretation and implementation of legislation." Analyzing how values guide the actions of those involved in the guardianship process becomes an important starting point for any reform effort.

THE ILLINOIS PROJECT

"The issues surrounding guardianship in Illinois, and around the country, require a timely and effective response. The Guardianship Reform Project will be highly instrumental in shaping that response."

With these words, Chief Justice Charles E. Freeman of the Illinois Supreme Court, together with Erica Wood of the ABA and representatives from the three foundations supporting the project (The Chicago Community Trust, the Polk Bros. Foundation, and the Field Foundation of Illinois) formally inaugurated the Illinois Guardianship Reform Project (IGRP) in June 1999. The groundwork had been laid for the project by Equip for Equality, a not-for-profit organization designated by the governor of Illinois to implement the federally-mandated Protection and Advocacy System. Equip for Equality President and CEO Zena Naiditch took the initiative to conceptualize and find support for an open and inclusive process that would address the challenges to implementing change in the Illinois guardianship system, as it pertains to guardianship of the person. The IGRP's exclusive focus on guardianship of the person, rather than of the estate, was seen as necessary to ensure that the first phase of making

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10. Id. at 183.
pragmatic recommendations would be completed within approximately one year.

Guardianship has many aspects that, when undertaken carefully, create an ideal mechanism for protecting the rights of persons with decisional impairments. Well-trained and dedicated guardians can be vigorous advocates for those for whom they are responsible. Guardians can protect wards from financial exploitation, obtain services for wards, and guarantee that healthcare decisions are made in a timely and responsible fashion. In an ideal guardianship system, not only are skilled guardians available for persons with decisional impairments, but the court also has the time and resources to supervise the guardians to ensure proper decision-making and the protection of the ward's interests.

Although there is a generally recognized need for guardianship to protect some individuals from personal harm and economic exploitation, the experiences of Equip for Equality and other individuals and organizations involved with addressing guardianship issues revealed problems similar to those in other parts of the country that need to be addressed in the Illinois guardianship system. Research conducted in Cook County during the 1980s raised serious concerns about the guardianship process. Madelyn Iris, Director of Behavioral and Social Science Research at Northwestern University's Buehler Center on Aging, found that despite statutory reform creating limited guardianships, probate judges continued to routinely appoint plenary guardians. A defining experience within the Illinois system occurred in the 1990s when petitions were filed on behalf of thousands of nursing home residents in connection with the federal Omnibus Budget Reconciliation Act (1987). It was then that Equip for Equality witnessed dozens of guardianship petitions processed by the court in just an hour's time. No guardian ad litem was appointed in any case to advise individuals of their rights and in no case was the potential ward present to provide evidence of the need for a guardian. This strongly


12. MADELYN IRIS, THE USE OF LIMITED GUARDIANSHIP AS THE LEAST RESTRICTIVE ALTERNATIVE FOR THE IMPAIRED ELDERLY: AN ETHNOGRAPHIC EXAMINATION OF THE PROBATE COURT AND DECISION MAKING PROCESS (1986). In 2001, subsequent as yet unpublished research has confirmed that this minimal use of limited guardians continues. Recent evaluation by Iris of more than 300 court files of 1998 cases in Cook County revealed that fewer than 10% of personal guardianships were limited ones. Interview with Madelyn Iris, Feb. 4, 2002.
indicated that there was a need for Illinois to comprehensively examine its guardianship system to assure that it corrected the most common systemic problems exposed in the 1987 Associated Press series. Given the census bureau’s data about those in Illinois with any disability (22.7%), those with a severe disability (11.6%), and projected increases in that population, the time was considered ripe to confront the present in order to prepare for the future.

**System Analysis and Attitudinal Change**

Guided by the adage that there is no need to “reinvent the wheel,” I began preliminary work as Project Manager for the IGRP by reviewing the literature on guardianship and conducting discussions with experts throughout the country who had already been involved with reform efforts following the Associated Press series. Here, the most common refrain was that “things have changed, but still remain the same.” Thus, while many abuses were addressed through statutory revisions, those revisions often failed to produce the desired outcomes in terms of the
appropriateness, scope, and monitoring of guardianships. This warning signal about the gap between recommendations for reform and their adoption and implementation as policy was to guide the project’s focus on studying the relationship among various components of the guardianship system as a whole in order to identify the inconsistencies between the goals of the system and what was being done to achieve them.

This systems approach to problem solving for the IGRP was influenced by a cultural perspective that implicitly views that core problems will not be solved only through revising the guardianship statute itself. Rather, problem-solving required changing underlying attitudes and related behavior around aging and disability of key system stakeholders that often prevent implementation of the statute and related programs. As one nationally-renowned expert on guardianship noted at the outset of the project, the Illinois statute, while certainly benefiting from some key revisions, can, in its present form, still provide a foundation for many needed systemic reforms if there were a willingness for such reforms among the key actors in the system. Hence, there was a need from the outset to recognize to what extent these commonly obscured attitudes served as a barrier to acknowledging the individual’s potential for independence and the need to balance that potential with requirements for care and protection. As noted by one commentator reflecting on hurdles to reform in Michigan: “Reform litigation and legislative rewording alone will not alter the underlying public attitudes and deeply ingrained institutional policies which have nurtured reliance on guardianship to serve social welfare ends.”

In concrete terms, this requires consideration of how general cultural attitudes might affect the willingness either to seek alternatives to guardianship or, when guardianship is deemed necessary, to tailor it to an individual’s needs. Even the fact that the term “guardianship” reverberates benignly in our culture can sometimes hinder efforts to fully grasp the implications of removing an individual’s right to make his or her own decisions. In short, in addition to the protection provided, plenary guardianship has also been viewed as taking away more individual liberties than other

17. For an example of systems analysis as it pertains to law, see Lynn M. LoPucki, The Systems Approach to Law, 82 CORNELL L. REV. 479 (1997).
18. Bradley Geller, The Long and Winding Road: Guardianship Reform in Michigan, 1 ELDER L.J. 177, 185 (1994). The author goes on to note that “reform is not a product, but an ever-continuing process. . . . A systematic approach is needed: to evaluate prior work; grasp what is known, determine what we need to know; and develop a strategy to include research, administrative action, legislation, funding and education.” Id. at 196.
legal action, with the exception of imprisonment and involuntary commitment.19

THE DESIGN OF THE IGRP

THE STRUCTURE

The challenge then was to design the IGRP to take into account multifaceted political and professional factors by incorporating, in various forums, the different perspectives of all the key stakeholders and experts. This meant providing the process with a broad-based foundation to undertake a comprehensive examination of guardianship out of which would come recommendations for systemic changes. The recommendations could then be implemented through legislative and other programmatic measures. Seen from an overall cultural perspective, the process required reconciling a wide range of norms and values, both within society at large and between particular professions (e.g. legal, medical, social work, legislative), each with its own distinct organizational culture.

It was particularly important to assemble a wide number of individuals from different professions, since their experiences and expertise could help make up for a common problem in previous efforts, the lack of data to evaluate whether reforms had actually accomplished the anticipated result. It also was clear from other reform efforts that not including the judiciary in the process could have a debilitating effect on any attempt to implement recommendations. The blueprint for making recommendations for the implementation of reforms has rested primarily on the work of a Task Force, chaired by Prof. Mark J. Heyrman of the University of Chicago’s Mandel Legal Aid Clinic and supported by a project manager and assistant. This Task Force, which met monthly from May 1999 through June 2000, was composed of seventeen experts in the fields of law, ethics, gerontology, and disability. The experts’ cumulative professional experience with guardianship matters was critical in overcoming the dearth of existing quantitative data on guardianship issues. The Task Force’s responsibility was to identify problem areas in guardianship in Illinois, to review alternative solutions, and ultimately to reach consensus on a

19. THE CTR. FOR SOC. GERONTOLOGY, supra n. 9 at 1. The literature abounds with variations on this theme. This of course does not deny the utility and importance of guardianship; it merely is used to draw attention to the need for care before and scrutiny after guardianships are ordered by the courts.
model adult guardianship system in Illinois.

In addition to the Task Force, a Senior Review Board, consisting of fifteen state legislators and judges, convened every several months. One of the motivations for the design of the project was derived from the knowledge that many reform efforts across the country were met with resistance by members of the judiciary and bar associations. Including the judges and the President of the Illinois and Chicago Bar Associations in the process was seen as an important way to involve those whose responsibility it would be to implement any reform measures that would be recommended. \(^{20}\) The Senior Review Board’s role was to comment on the feasibility and desirability of key recommendations of the Task Force, from both a judicial and legislative perspective. The original project design contemplated that final approval of recommendations would be left solely to the Task Force. This role was consistent with the request of Cook County judges who stated at the outset that they felt it was inappropriate for them to make recommendations to the legislature.

Together, these two committees, composed of a wide range of professional and geographic perspectives, were viewed as key to ensuring that the final recommendations would be viable and adaptable to the differing conditions in urban and rural Illinois. There is a significant difference between Cook County (and surrounding suburban counties) and those in downstate Illinois. In Cook County, for example, there are four judges who almost exclusively hear guardianship cases within the probate division. In other counties, judges are generalists and may be faced with a guardianship case at 10:00 a.m., a contract dispute at 10:30, and a murder trial soon after. Moreover, many downstate counties lack resources such as a sufficient number of trained physicians to provide mental assessments to determine the need for guardianship. Creating a process for considering this range of experiences was critical if the IGRP was to meet its goal to create a statewide system with various local options, each of which could meet basic standards for guardianship.

Finally, inclusiveness was seen as an important factor in creating a unity of purpose for the project’s implementation phase. Although it was a struggle to reach consensus within a Task Force of experts with vastly different opinions and perspectives, the deliberations required to do so were crucial in ensuring that the final recommendations

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20. To involve the Bar Associations, the Presidents of the Illinois State Bar Association and the Chicago Bar Association were invited to participate or to designate a member of their association for the Task Force. Both chose to serve as Task Force members themselves.
represented a balance of the need to protect and the right to self-
determination. As would be seen throughout the process, revealing
divergent attitudes about disability and aging would force examination
of the underlying and sometimes subconscious values that direct how
the guardianship system functions.

THE PROCESS

Working from a composite of their own experiences and with support
from the preliminary research, the Task Force initially agreed on a
broad range of issues to tackle during its year-long tenure.\(^2\) While
recognizing that not all of these issues could be covered in the limited
time frame for the first phase of the IGRP, the Task Force’s outlining
of the key issues provided it with a holistic portrait of the key elements
of the guardianship system and a foundation for its practical approach
to reform.

The format of the decision-making process was initially to have
members of the Task Force discuss the findings and recommendations
that were presented to them by me as Project Manager, based on my
research on identified issues agreed upon for consideration by the Task
Force. Once the Task Force deliberated and concurred about the
findings and recommendations for the particular issues (often after
several revisions), the draft proposal was presented to the Senior
Review Board for feedback. The Senior Review Board, in turn, made
comments and offered its advice regarding the feasibility and
desirability of key recommendations. The Task Force Chair, who also
presided over the meetings of the Senior Review Board in order to
ensure the efficient channeling of information between the two
committees, would then present the concerns of members of the Senior
Review Board to the Task Force. The Task Force would reconsider
and sometimes revise the recommendations. The resulting document
would represent a consensus of the Task Force, taking into
consideration the diverse perspectives of its members.

A representative example of this process can be seen in the
approach taken to examine the need for monitoring of guardianships
once ordered by the courts. Here, I examined published research and
spoke with practitioners and experts from Illinois and throughout the

\(^2\) For a complete list of issues pertaining to guardianship reform, see Illinois
Guardianship Reform Project: Final Report 142-144 at
Final Report).
country in order to arrive at preliminary findings and recommendations to present to the Task Force for discussion. Because the research indicated that Illinois and most other states lacked an effective statewide system for monitoring the performance of guardians, the initial recommendations for ensuring guardianship accountability included, among other items, the creation of a computerized monitoring system that would take the burden off individual courts. Discussion in both the Task Force and Senior Review Board led to an accord: Rather than mandate a particular system for use throughout Illinois, there was a need first to assess what kind of system would be most cost-effective in guaranteeing protection to wards. The Task Force arrived at the solution to recommend a pilot project to consider both the necessity for monitoring in Illinois and the model best suited for adaptation in different counties.

While the collective knowledge of members of the Task Force and Senior Review Board provided a strong foundation to consider most aspects of the guardianship system, it was planned from the outset that other experiences and viewpoints would be included in the process. To expand the forum to include the perspectives of elderly and non-elderly persons with disabilities, their families, and professionals engaged with the guardianship system, six independently conducted focus groups and three public hearings were held around the state. After these focus groups were held, the market research firm that conducted them prepared a report summarizing the results. The report was then distributed to all members of the Task Force and Senior Review Board for consideration. Additional input came during three public hearings held in the winter of 2000 in Chicago, Carbondale, and Springfield. These hearings were attended by more than 150 individuals, with 50 testifying orally and 15 submitting written statements.22

To encourage involvement in the inaugural event, focus groups, and public hearings, an integrated publicity campaign was developed by Equip for Equality’s public information director.23 The commitment

22. Although not all members of the Task Force and Senior Review Board were able to be present for one or more of the hearings, a video of each hearing was made available. For a complete transcript of the focus groups and hearings, see id. at 88-141. Similar concerns to those in the Illinois hearings and focus groups can be found in a 1993 report of the Virginia Guardianship Task Force, which held ten regional Town Meetings throughout the state. See VA. GUARDIANSHIP TASK FORCE, VIRGINIA VOICES ON GUARDIANSHIP AND ALTERNATIVES: REPORT ON THE TOWN MEETINGS OF THE VIRGINIA GUARDIANSHIP TASK FORCE (1993).

23. Examples of media coverage include: 1) a feature article on the project in Chicago’s legal newspaper by Elizabeth Neff, Disabilities Advocacy Group out for Guardianship Reform, CHI. DAILY L. BULL., July 2, 1999; 2) a twenty minute live business program featuring the IGRP Project Manager and President of Equip for Equality on two
to this campaign underscores the strongly held belief that a key to changing the guardianship system lies in developing public awareness and consciousness about cultural attitudes towards aging and disability and about how these attitudes affect the increasingly significant role of guardianship in American society. It should be of little surprise then that the Task Force chose to recommend a public awareness campaign as part of the IGRP's next implementation phase.\textsuperscript{24}

\textbf{SUMMARY OF RECOMMENDATIONS}\textsuperscript{25}

It is helpful at this point to summarize the Task Force recommendations, which can be divided into five key areas:

I. Assessment

In order to ensure an appropriate determination of the need for guardianship\textsuperscript{26} and to guarantee that guardians are appointed only in those cases in which individuals cannot make or communicate decisions for themselves, and to ensure that guardianships, when ordered, are individualized and limited to the extent required by the individual's actual inability to make or communicate decisions, recommendations include:

- Eliminating the term "developmental disability" from the statute. Whether or not someone needs a guardian should be based upon

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\textsuperscript{24} IGRP Final Report, supra note 21, at 62.

\textsuperscript{25} See id. for a complete list of the Task Force's findings and recommendations. The Report presents: 1) a research-based commentary that begins each chapter and provides background on the particular issue discussed by the Task Force; 2) the Findings and Recommendations of the Task Force; 3) appendices of statutory revisions and model report forms developed by the Task Force; and 4) summaries of focus groups and public hearings. Finally, it should be noted that the Task Force at its last meeting agreed to meet periodically if necessary to support implementation of key recommendations.

\textsuperscript{26} I have elaborated more on this issue than the other four not because it is more significant but rather because it pertains to the initial legislation submitted to the Illinois legislature, the result of which will be discussed in a later section.
his functional capacity to make and carry out decisions that affect his life, not the label that is placed upon a person.

- Encouraging courts to appoint limited guardians more frequently than they do now, rather than plenary guardians. Courts should enter guardianship orders only to the extent necessary to assist an individual who lacks the functional capacity to make decisions about the most important areas of his life. One of the reasons the proposed law requires that more detailed information be provided to the court is so that the court can tailor a guardianship order narrowly to permit the greatest amount of self-determination for every person who is subject to a guardianship order.27

- Adding the “clear and convincing” standard of proof for determining whether or not a person is in need of a guardian.28

- Changing the term “guardian ad litem,” often too easily confused with guardian, to “guardianship investigator,” which more accurately describes its purpose in acting as a neutral fact finder for the benefit of the court. Courts are required to maintain a registry of persons eligible to be a guardianship investigator. Listings on the registry contain information regarding training and experience, including that related to working with people with mental illness, developmental disabilities, and/or the elderly.29

- Adding that the court is permitted to proceed without appointing a guardianship investigator only if both the proposed ward and designated guardian are present in court at the time of adjudication. If either of those individuals is not before the court, a guardianship investigator must be appointed. This was changed to ensure that someone, whether the judge or guardianship investigator, sees the respondent and the proposed guardian before a decision is made on the guardianship petition. The only exception to this requirement is where the Office of State Guardian or a public guardian is the proposed guardian.30

- Clarifying the duties and expanding the role of the guardianship investigator by specifying those duties in greater detail and by providing a guide for the guardianship investigator in the detailed description of the contents of the report that must be filed with the court a week before the guardianship hearing.31

27. 755 ILL. COMP. STAT. 5/11a-3(a, b), a-12 (2001).
31. 755 ILL. COMP. STAT. 5/11a-10(b) (2001).
• Promoting voluntary use of model medical and guardianship investigator report forms to provide the courts with sufficient information to make informed decisions about the need for and scope of the guardianship.

II. Monitoring: Ensuring Guardianship Accountability

In order to enhance the courts’ resources for monitoring guardianships, to ensure that individuals under guardianship are receiving the guardianship services they require, to prevent abuse or neglect from taking place, and to ensure that the guardianship order continues to be appropriate over time, recommendations include:

• Designing a demonstration project for testing a statewide monitoring system;
• Mandating submission to the court of an initial guardianship plan to be submitted by all newly appointed guardians;
• Promoting the use of a standardized annual guardian report form; and
• Establishing a statewide guardianship registry to provide more efficient oversight.

III. Training and Support: Ensuring the Success of Guardians

In order to provide guardians with ongoing support and training to enhance their ability to perform their duties more effectively, recommendations include:

• Encouraging all newly-appointed guardians to take a training and orientation course;
• Developing a manual for distribution to all guardians; and
• Providing the Office of State Guardian with additional funding for expanding, improving, and publicizing its statewide information service that provides information about guardian responsibilities and available community resources.

IV. Public and Private Guardianship Service Programs: Ensuring a Sufficiency of Guardians

In order to provide the public guardianship system with sufficient resources to guarantee its proper functioning and to oversee private
agencies that offer guardianship services, recommendations include:

- Procuring funds for the Office of State Guardian to hire additional caseworkers and other support staff;
- Supporting efforts to expose and resolve cases of financial exploitation and incidents where elders and individuals with disabilities are victims of abuse or neglect; and,
- Developing model standards for certification of professional guardians in Illinois.

V. Public Education and Professional Training: Ensuring the Success of Guardianship Reform

In order to develop effective and efficient mechanisms to train professionals involved in the guardianship process and to disseminate information about guardianship and alternatives to guardianship to seniors and people with disabilities and their families, legal, healthcare and social service professionals, and the general public, recommendations include:

- Developing model guardianship curricula for continuing education in conjunction with professional associations throughout the state for use with different audiences;
- Publicizing and expanding the Office of State Guardian's telephone service and website; and
- Encouraging the public schools to provide information about guardianship and alternatives to guardianship to those students nearing adulthood who are alleged to be decisionally impaired and to their parents.

THE DISTINCTIVENESS OF THE IGRP: EVALUATING PHASE I

The many recommendations stated here, resulting from reform efforts across the country (and the world, as reflected in comparable projects in Europe and Canada\(^\text{32}\)), are variations on similar themes. Likewise, the IGRP's distinctiveness is unlikely to be found in the substance of the final recommendations but rather in the holistic and inclusive approach to problem solving taken from the outset. The unique

\(^\text{32}\) For Canadian and European perspectives on these issues see, OFFICE OF THE PUBLIC GUARDIAN AND TRUSTEE, ONTARIO MINISTRY OF THE ATTORNEY GENERAL, GUIDELINES FOR CONDUCTING ASSESSMENTS OF CAPACITY, (1996); Special Issue: Competency, 20 INT'L J. L. & PSYCHIATRY, No. 1 (1997).
professional and personal experiences naturally influenced the perspectives taken by each member of the Task Force and Senior Review Board. Arriving at a complete picture of the guardianship system required choosing a method to engage disparate perspectives on guardianship, many of which could be placed on a continuum between the two values of protection and self-determination.

The systems approach of the IGRP was useful in several ways. First, the fact that not every item on the original list of issues could be covered by Task Force recommendations became less problematic upon recognizing that each of the areas chosen for consideration are interconnected and have the capacity to create a lasting and far-reaching imprint on the guardianship system as a whole. In fact, the choice of which issue to consider was influenced by its capacity to have an impact on the greatest number of systemic problems.

A second constructive application of the systems approach is the emphasis placed on developing standardized forms for use throughout the guardianship process. This approach evolved out of the realization that there is a gap between statutory revisions and actual policy implementation. If the courts embraced reform, most of the problems could be remedied without major changes to the guardianship statute. However, in light of resistance to reform, it was deemed necessary to offer recommendations for changing and elucidating statutory language. Yet, most of the discussion in the Task Force did not pertain to the statutory language. In fact, because the questions on the forms signified values and norms that direct the practitioner, whether a guardian composing an annual report or a physician determining decisional capacity, creating standard forms provided the Task Force with opportunities to analyze and devise means to guide the behavior of those involved in the guardianship system. Debate over tangible construction of the forms allowed the Task Force to overcome any tendency to drift towards abstract theory by putting the spotlight on concrete methods for guiding the practice of guardianship.

Rather than mandating their use throughout the state, the Task Force considered the standardized forms as drafts to be field-tested and made available as models for voluntary use by the courts. Such pragmatism was manifested in other recommendations that focused on

33. This is not to say that members could be permanently placed at either end of the continuum. Viewpoints of individuals on the Task Force and Senior Review Board were nuanced, as each tried to balance these two important values as their experience dictated for each separate issue.

34. Moreover, it has been noted that statutory changes often do not lead to their intended results in terms of guardianship, as noted by KEITH & WACKER, supra n. 8 at 9.
the key principles for directing pilot projects to test the efficacy of programs in jurisdictions with significant differences in size and economic resources. The pilots, such as those recommended for monitoring, had the added advantage of allowing the Task Force to express principal areas of accord on the need for change without resolving disagreements about every detail.

If one were to highlight a critical challenge encountered by the project, it would be the lack of evaluation or outcomes from other states that have embarked on reforms in the past two decades. There was hardly an expert that I contacted in another state who was not asked at some point during the interview about whether or not there was any data showing that a particular reform had reached its intended results. The relevant data for evaluating the effectiveness of a system was usually unavailable.\(^{35}\) This deficiency continues to contribute to the difficulty in efficiently transferring solutions among the states. Hence, to allow others to build on the experiences of the IGRP, the Task Force consistently promoted the inclusion of evaluations during the project’s implementation phase and recommended that the testing of model programs include cost/benefit analyses. In this way, the branches of government responsible for financing and implementing improvements in the guardianship system would be informed about the fiscal impact of each reform.

Finally, the Task Force struggled with a fundamental problem inherent in those reform efforts. Although accepting the broad principle of encouraging the use of alternatives to ensure that guardianships are used only when necessary, the Task Force became concerned that many of the existing alternatives (e.g. powers of attorney) also had flaws.\(^{36}\) At its final meeting, the Task Force agreed on the need to look closely at the issue of advance directives, as well as any other issue that might come forward during the implementation process, and stated its intention in the following recommendation:

While the Task Force has considered the prospect for encouraging public use of the Illinois Power of Attorney

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35. Efforts are taking place to collect data that can provide a basis for correcting systemic problems. In Florida, revelations that statutory requirements for monitoring were being haphazardly followed (if at all) in some jurisdictions led to a statewide pilot study of monitoring. Vermont is completing an evaluation of every guardianship file in the state as a basis for evaluating its guardianship system.

36. While powers of attorney are often seen as ways in which an individual can ensure that his or her interests are protected, many attorneys in particular expressed concern that the fact that there is no oversight of powers of attorney makes them susceptible to misuse and that guardianships at least have the advantage of remaining under the jurisdiction of the courts.
Act, the Health Care Surrogate Act, the Mental Health Treatment Preference Declaration Act, and others as alternatives to guardianship, the complexity of each alternative has prevented the committee from reaching a consensus during the first phase of the Guardianship Reform Project. Nonetheless, because of the significant relationship of these statutes to many core guardianship issues, the Task Force recommends that alternative measures to guardianship be examined during the project’s second phase.37

THE IMPLEMENTATION PHASE BEGINS

Scott, forty-one, who has cerebral palsy and mild mental retardation, became a ward of his mother and step-brother in a limited co-guardianship case. The court ordered that the guardianship was limited, or restricted, to making decisions for emergency medical issues and residential placement only. The step-brother died and the mother acted as the sole guardian, though she never informed the court of this change.

During the time that Scott was living with his mother and attending a vocational program, she, as his guardian, severely restricted his personal freedom and his right to choose for himself. She informed the vocational program that she was a plenary, or unlimited, guardian, though she never produced the legal documentation and the vocational program never pursued securing a copy. In fact, the guardian even told the Social Security Administration that she was his plenary guardian, when, in fact, her limited guardianship did not include managing his financial affairs. The Social Security Administration also never had the guardianship documentation to prove this.

It was not until Scott appealed to his cousin about his plight that positive change would soon be realized. As the case for co-guardianship was being prepared for court, the extent to which Scott’s

37. That alternatives can have a major impact on guardianships is indicated in a set of interesting statistics from Cook County on the number of petitions presented to the court from 1990-1999 (data on petitions are useful because a high percentage of petitions lead to guardianships). There was a 20% drop in the number of petitions between 1991 and 1992 after the Illinois Health Care Surrogate Act (HCSA) took effect, allowing for certain healthcare decisions to be made without court approval (information on file with author). Because of this, the Task Force wanted to take particular care in ensuring that the HCSA and other alternatives provided adequate protection for the potential wards before advocating the widespread use of these alternatives.
guardian had severely abused her powers of authority came to light. She would not allow him to use the phone, to have friends, have his own money, shop for clothes, go to bed when he wanted, or to have a power wheelchair. His guardian also told the vocational program staff to restrict his choices and activities there as well.

At one point, Scott requested to receive psychological counseling at his day program. The vocational staff asked the guardian for consent, but the request was denied. They provided the counseling anyway. Scott’s case went to court again with the hope that his cousin would be awarded co-guardianship with his mother. The judge granted the co-guardianship. Scott has also moved out of his mother’s house to a temporary placement, and he now has the right to choose where he wants to live. This case clearly shows how an unmonitored guardianship, in which no annual reports were submitted to the court, can have a devastating impact on a person’s life. Court monitoring could have provided earlier intervention to ensure that the guardian acted within the parameters of the limited guardianship.

On March 23, 2001, the Final Report of the IGRP was formally presented to the public. At the press conference, Scott’s case was one of four presented in a press packet to illustrate the types of problems in Illinois that the recommendations were meant to address. In addition to the release of the Final Report, the purpose of the press conference was to announce the beginning of a Public Awareness and Coalition-Building Campaign, funded by the Illinois Council on Developmental Disabilities, about the Task Force recommendations and the need for reform. Initial legislation to be introduced in the Illinois General Assembly was also presented at the press conference.\(^{38}\)

Shortly before the press conference, Equip for Equality received word that the Chicago-area judges were alleging that Equip for Equality was misrepresenting them in Springfield by stating that they supported the statutory changes being introduced when they in fact opposed the revisions. In fact, Equip for Equality had actually told legislators that the judges were taking no official position, as some judges had informed us at the project’s outset.\(^{39}\) Opposition began to

\(^{38}\) The campaign provided principally for the publication and dissemination of materials about guardianship reform in a variety of media formats, for creation of a coalition to build support for reform, and for presentations about the project by me and Task Force representatives at conferences and meetings of both professionals and lay persons.

\(^{39}\) Some discontent on the part of the judges who were members of the Senior Review Board can be attributed to a miscalculation in presenting recommendations and the Final Report. Although it was stated at several points in the Final Report that the Senior Review Board was not responsible for the final recommendations, the fact that their names and biographies (supplied by each member who were informed of their inclusion prior to
spring from other sources as well, including the probate bar committees of both the Chicago and Illinois State Bar Associations. These came as a surprise because both groups had been represented on the Task Force by the presidents of their respective organizations. In addition, both groups had been sent draft legislation several times and asked for feedback. Strong opposition also arose from Voice of the Retarded (VOR), an organization comprised of parents whose children live in state institutions and who oppose de-institutionalization efforts. Representatives from this organization had expressed concern in focus groups and hearings that changes might make it harder for parents to become guardians and might lead to efforts to withdraw their children from institutions.

During the process we had been confronted with a range of viewpoints on improving the guardianship system. We had thought, apparently somewhat naively, that the numerous and significant compromises reached on the final recommendations in the Task Force, while not completely eliminating disagreement, would create an environment for working together to implement fundamental changes necessary for improving the Illinois system. The disappointment was not so much with the opposition to some of the recommendations, but rather with the strident tone of opposition to any systemic change expressed by some stakeholders who had been included in the reform process. Moreover, since it had been decided only to introduce those statutory revisions which seemed least controversial, the impact of the negative reactions brought to the forefront the structural barriers to guardianship reform that had confronted so many throughout the country during the past two decades.

THE BEST LAID PLANS...

Before attempting to offer some explanation for the opposition, it is useful to review the overall approach of the IGRP. Its approach to defining its goals was a dual one that recognized short-term objectives and the need for long-term systemic change.

First, the focus was to provide courts with increased support and improved information in medical, guardian ad litem, and monitor reports so that guardianship would be ordered only after consideration of less restrictive alternatives and maintained only to the extent required; second, to enhance the resources available in the community...
to support guardians and their wards; third, to provide training necessary for those professionals involved in ensuring the effectiveness of the guardianship system; and finally, to revise those provisions of the Illinois Guardianship Statute (755 ILCS 5/11a) related to the various programmatic changes that have been recommended. Here, education efforts about guardianship and its alternatives must reach the general public through effective use of the media.

That education and training were a key component not only of the IGRP recommendations but of both the earlier Wingspread conference and the more recent Wingspan conference, suggests that in order to effectively change the way a guardianship system works, there must be a change in the underlying attitudes and norms which guide the system. The main focus of the IGRP rested on this assumption and is reflected not only in the Final Report, but also in the actual time allotted to discussions by the Task Force. Statutory revisions were seen as equal partners to other key measures. One such measure was the creation of standardized forms whose implicit norms and values would serve to guide participants to reach the goal of ensuring that guardianships would be appropriately ordered and subsequently monitored. Here, there was an underlying recognition that while there were certain provisions of the guardianship statute that could benefit from revision (e.g. creation of a monitoring system and elaboration of the role of guardianship investigator), many of the Task Force recommendations could be implemented within the parameters of the existing statute.

To a degree, opposition to proposed legislation reflected a tactical error on the part of Equip for Equality, whose responsibility it was to carry forward the IGRP’s Task Force recommendations. Instead of focusing entirely on an educational campaign on which to build a groundswell of support for any necessary legislation, we proceeded with what we thought were the least controversial statutory revisions, viewing this process as an integral part of the educational process. What we discovered was that despite the IGRP’s sustained efforts, there was still a lack of consensus about fundamental values and norms on which the guardianship system rested. This must be resolved before

40. In November 2001, after more than a decade since the Wingspread conference, a second national conference was convened to examine from a multidisciplinary perspective what progress had been made in guardianship reform. The conference attendees’ recommendations and the relevant position papers are found at the following: Winsor C. Schmidt, Jr., The Wingspan of Wingspread: What is Known and Not Known About the State of the Guardianship and Public Guardianship System Thirteen Years After the Wingspread National Guardianship Symposium, 31 STETSON L. REV. 1027 (2002).
any statutory change can take place. There had been a mistaken belief that while there might be differences regarding the particulars for change, there was still an overall commitment to change. Hearing from some that the system functions fine as it is certainly jolted us out of any illusion that guardianship reform was to be anything but a long-term effort.

**Law as a Cultural System**

Borrowing from Clifford Geertz, we may speak of law as a cultural system in which law has the capacity to serve both as a model of the world around and as a model for action. As a model of the world, the legal system, including statutes and its organizational components, provides individuals with a set of values. These values provide reference points for framing our worldviews. In this case those reference points are how we are to perceive individuals who may be in need of guardianships.

As a model for action, laws provide a system of norms that guide us in a process that meets the obligations of our model of the world and, in doing so, affirms the reality of that world. The relationship between these two is a dialectical one. Our sense of reality is closely intertwined in a process in which efforts at implementing the law serve either to reinforce or force us to redefine the boundaries of our legal and moral world. As another writer considering the relationship between law and culture has noted, viewing law as culture is "to acknowledge that institutionally legal actors participate in creating culturally specific meaning and that legal symbols embedded in culture feed back into law..." Exemplifying the practical relevance of this perspective is the

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41. Thinking back to the excitement at the project’s inauguration, it is fascinating to see how much misunderstanding existed. I recall after the speech by the Illinois Chief Justice one judge noted being “energized” by the call for reform. As later became apparent, there were different expectations by those involved as to what “reform” itself meant.
42. Seen another way of course one might say that the cultural system of guardianship was essentially a closed one, involving a relatively small number of members of the legal and medical professions. The recommendations opened up the system, suggesting that the values and norms which guide the existing system could be challenged and thus threatening the maintenance of world view and perception that the system is meeting its responsibility to both protect individuals from harm while ensuring their rights to self-determination.
43. See Clifford Geertz, The Interpretation of Cultures (1963).
emphasis placed by the Task Force on revising the definitional framework for determining who is in need of a guardian. No single issue was discussed more by the Task Force. The Task Force began its deliberations by debating the wording of the statute and returned to it in the last session before final approval of the recommendations. This focus on the definitional framework by the Task Force provides an apt illustration of law as both reflecting attitudes and directing behavior.\textsuperscript{46} This perspective guided the Illinois reform effort.

The recommendation of the Task Force pertaining to revising the standard for determining the need for guardianship is as follows:\textsuperscript{47}

755 ILCS 5/11a-1. Developmental disability defined

§ 11a-1. Developmental disability defined. "Developmental disability" means a disability which is attributable to: (a) mental retardation, cerebral palsy, epilepsy or autism; or to (b) any other condition which results in impairment similar to that caused by mental retardation and which requires services similar to those required by mentally retarded persons. Such disability must originate before the age of 18 years, be expected to continue indefinitely, and constitute a substantial handicap.

755 ILCS 5/11a-2. Disabled person Person in need of a Guardian defined

§ 11a-2

"Disabled person Person in need of a Guardian" defined. "Disabled person" "Person in need of a Guardian" means a person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is not fully able to manage his person or estate, or (c) 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, has a mental or physical condition that interferes with that person's ability to understand or responsibly evaluate the risks and benefits of alternative courses of action or to make,

\textsuperscript{46} Present psychological research on attitudes seeks to uncover unconscious preferences and beliefs by distinguishing between conscious and unconscious as well as public and private attitudes on a wide range of subjects, including race, gender, and age. Using such approaches to discover the variations between these explicit and implicit attitudes towards individuals with disabilities may ultimately help elaborate the model presented here by further explaining the divergence between expectations and reality in the guardianship system. For an introduction to Implicit Association Test see http://implicit.harvard.edu.

\textsuperscript{47} IGRP Final Report, \textit{supra} n. 21, at 79.
communicate or implement decisions about essential requirements of
living such as health, safety, self-care or finances.

In the first place, the term "developmental disability" was
eliminated from the statute. This is consistent with Task Force
recommendations. Currently the statute uses the term "disabled
person" to mean someone who has been determined in need of
guardian. This use of disabled person implies that every person with a
disability needs a guardian. For that reason, the term "disabled person"
was changed to "person in need of a guardian."

The new standard for determining whether a person should have a
guardian is whether he has a mental or physical condition that
interferes with his ability to evaluate alternative courses of action or to
make, communicate, or implement decisions about important areas of
his life, such as health, safety, self-care, or finances. The old standards
incorporated labels, such as mental illness or developmental disability,
which were eliminated. The other grounds for appointing a guardian
under the current law, relating to gambling, debauchery, and idleness
were eliminated because they have been encompassed by the functional
definition.\(^\text{48}\)

The above modifications acknowledge that systemic change must
first be grounded in a consensus that guardianship decisions be based
solely on an individual's functional capacity for decision-making.
Thus, the definition serves as a guidepost for practical implementation
of assessment of determining the need for guardianship. The principles
inherent in the changes of the statute's first two provisions also serve as
a model for action. This is represented by the various forms to be used
for assessing the need for guardianship (by the physician and
guardianship investigator) and the form for use by the guardian which
seeks to encourage self-determination, where possible, for the ward.\(^\text{49}\)

\(^{48}\) This summary of key features of the first two provisions of the guardianship statute
is part of material distributed to encapsulate the Task Force recommendations for statutory
revision. The language presented for consideration by the legislature represents
compromises of a diverse group of experts. As a compromise, this definitional framework
has been subject to attack both from those who feel it may make it easier to get a guardian
and those who fear that it may make it more difficult. Nonetheless, without evaluating its
particular strengths and weaknesses, for our purposes here the important point is that the
changes sought to overcome negative stereotypes and stigma associated with disabilities that
can lead to inappropriate guardianships, balancing concerns of protection with those of self-
determination.

\(^{49}\) Guardianship investigator is the term replacing that of GAL—in the final report the
terms used was "court investigator" but just prior to presenting the material for introduction
into the Illinois General Assembly, the term was changed to "guardianship investigator" on
the recommendation of a legislator who suggested that it better represented the role. Change
from GAL was due to confusion with guardian and with other uses of GAL in law where the
Because these definitional provisions in the statute represent the core of guardianship reform, education about them, including the ethical dimension of preventing stigmatization of individuals with disabilities, became a focal point of the public education and coalition-building campaign.  

The guardianship system involves several interconnected and sometimes overlapping cultures, each with its own set of values and norms that defines how one is to behave with regard to individuals with disabilities. In addition to broad American culture, there are various professional cultures engaged in the guardianship system, particularly the relevant divisions of the medical and legal professions. Each of these has values, norms and linguistic codes that interact in such a way so as to lead, first, to a proper determination of the need for guardianship and, second, to an individualized approach to meeting a ward's needs. If the guardianship system is viewed as a cultural system in which attitudes and behavior towards meeting the needs of individuals with decisional impairments are socially constructed, then the IGRP disrupted the process by challenging some of the crucial assumptions on which the dialectic of those who control the guardianship system is based.

It is not within the purview of this paper to detail the features of each of the cultures—professional and public—involved in the guardianship system. I draw attention to them only to emphasize that, when trying to understand guardianship reform efforts, there is a need to have a systemic perspective in which each of these cultural systems—with their worldviews created formally and through experience—is seen to be interrelated. Furthermore, I would suggest that while having an impact on each cultural system is important, they are not equally significant as a focal point for impacting reform efforts.

In fact, it became apparent in discussions with experts nationwide that judges have discretion in most guardianship statutes, including that role is different from that in guardianship where the GAL is to serve as the "eyes and ears of the court."

50. For a succinct analysis of ethical issues involved in guardianship reform, the presentation by Task Force member Dr. Mary Mahowald, entitled Ethical Aspects of Guardianship, at the guardianship symposium held on September 14, 2001 can be found at www.equipforequality.org.

51. The professional language codes are particularly problematic in guardianship law and practice where confusion may arise between the conclusions of a medical assessment and a legal determination of the need for guardianship. This involves a joint effort by the two professions to clarification of their roles, the definitional framework within which they are working with regard to disabilities and decisional impairments and ultimately a transformation/translation of medical assessments regarding an individual's capacity so that judges can determine how to limit guardianships only to the extent necessary.
of Illinois, to bring about many of the systemic changes that have been recommended. This central role of judges in guardianship reform also was recognized in the recommendations about education and training of judges at the recently-convened Wingspan conference. Voting participants included probate judges actively engaged in guardianship systems in their respective states. For this reason, as a way of further illustrating the conceptual framework presented here and understanding the source of the conflicts that arose with the IGRP, it can be important to understand the cultural system in which judges themselves operate.

**JUDICIAL CULTURE**

[Guardianship is not an ordinary type of lawsuit in which the court's role is merely that of fact-finder and adjudicator. It has a much deeper involvement—a much more significant function. 52 This may require the court to go beyond remaining wholly passive until some interested person invokes its power to secure resolution of a matter. 53]

Identifying the somewhat unique aspects of the judiciary's active role in monitoring guardianships may be necessary to encourage court personnel to utilize skills not normally required. 54 There is a growing movement to encourage what has been called the "therapeutic" role of courts. 55 Although this approach has not been explicitly applied to guardianship courts in Illinois, I would suggest that the therapeutic concept may underlie a preference for non-adversarial resolutions to ensure the prospective ward's best interest. 56 The impact of this reality has both ideological and structural dimensions.

As is often the case in family law matters, a judge, in determining

56. The implication for this approach was made apparent at the Wingspan conference during heated discussion about whether or not to recommend "zealous advocacy" on the part of the prospective ward's attorney. On the one side were those who seek protection of an individual's rights to self-determination and seek to ensure that any attorney strongly advocate for the wishes of his client in order that the court get a full view of all issues pertaining to the need for guardianship. On the other side, there were those who feared that zealous advocacy on behalf of an individual in need of some support could ultimately endanger that individual if s/he is unable to get necessary protection from harm.
whether or not an individual is in need of a guardian, is being asked to be both finder of law and, to a certain extent, a social worker. Moreover, for the guardianship system to work well, the court should have a system in which the judge, or official reporting to the judge, can regularly review a ward’s circumstances. This would ensure not only that the guardianship is being properly administered, but also that there is no need to revise the guardianship based on changed conditions of the ward. Such a continued review depends on the existence of an infrastructure for monitoring the treatment of the ward.\textsuperscript{57} The general judicial culture may be considered a reactive one, where cases are brought to the attention of the court, which then—following statutory guidelines—makes enforceable decisions. While the finality and closure of any particular decision may be interrupted by legal procedure (appeals; reversals), the law school classroom provides little guidance for a judge to direct a “legal social work agency.”

In fact, the discretionary power of judges in guardianship cases, enlarged to an extent by a dearth of appellate case law providing a coherence of principles to which a judge may refer, forces each judge to make decisions on the basis of his or her interpretation of relatively flexible statutory categories. This may give more weight to what Schroeder noted in 1918 as the “personal impulses of the judge...determined by the judge’s life-long series of previous experiences, with their resultant integration in emotional tone.”\textsuperscript{58} The influence of personal values and political viewpoints on judicial decision-making, as well as serious efforts to overcome them, appears widely in the literature. In addition, the values and norms inherent in guardianship are mired in cultural contradictions that also present a further challenge to any effort to try to explain difficulties in implementing systemic reform. Mere reference to personal and political explanations fails to provide any satisfactory guidance for pinpointing concrete practical solutions for policy reform. The solution of judicial education, promoted by judges themselves, may be of little value unless the source of the dilemmas facing judges can be identified.

It has been noted that the “judicial function is a vast human practice that can be usefully examined from social, political,
philosophical, economical, psychological and other theoretical paradigms... It is incumbent on us to choose the paradigm that best illuminates the phenomena we seek to understand.\textsuperscript{59} The useful paradigm suggested here is that judges, in making decisions, are not merely deciding particular cases but are engaged in a process of role-construction; and that, while most comfortable in conceiving their role as fact finder, confirming the sense that they are doing their jobs well is dependent on reaffirmation that they are being fair (read “consistent”) in their judgments. The legal system’s demand for some degree of consistency guides the behavior of each judge. Fear of being overruled—represented in what may be viewed as a ritualized adherence to precedence—may also be interpreted as a fear of losing control over one’s construction of self/role. Thus, what is sought after in judicial decision-making is what has been called a cognitive coherence or consistency:

People tend to prevent states of cognitive inconsistency, and when they experience it they engage in efforts to reduce and eliminate it. The most gripping observation made by consistency theories is the tendency to modify the elements that constitute cognitive structures in order to restore consistency.\textsuperscript{60}

Although we have used the example of judicial culture to illustrate the importance of examining attitudes, it should be understood that all individuals are subject to this process of seeking coherence. The focus on this process, as it pertains to judges, derives from the fact that, as they are the single most powerful force in determining the outcome of a guardianship hearing, their skepticism must be overcome for systemic reform to be successful. It may be possible now to examine and suggest reasons why—within this paradigm of cognitive consistency—certain aspects in the guardianship system have not changed despite repeated efforts. This, in turn, may guide decisions regarding how best to effect reform in the future.

THE CASE OF LIMITED GUARDIANSHIPS

Studies by psychiatrists, psychologists, gerontologists, and environmental psychologists provide persuasive evidence that the mental health of many elderly individuals deteriorates greatly when


\textsuperscript{60} \textit{Id.} at 48.
they are denied the opportunity to make their own choices and exert control over their own lives.\textsuperscript{61}

A phenomenon that has puzzled those in the field for some time has been the failure to make any significant headway in creating orders that limit guardianships only to the extent required by the individual's impairments. Particularly distressing is the fact that there seems to be widespread acceptance about the importance of limited guardianships and their underlying principles. Encouraging limited guardianships was one of the original recommendations of the Wingspread conference.\textsuperscript{62} While many states, like Illinois, encourage limited guardianships in their statutes, such provisions seem to have minimal effect on increasing the numbers of limited orders, with the apparent exception of the state of Minnesota.\textsuperscript{63} A recent as yet unpublished study of Cook County found this to be true.

Limited guardianships are particularly interesting because they both symbolize and reveal the concrete difficulties in resolving contradictions between the two goals of self-determination and protection from harm. The most reasons offered for the small number of limited guardianships were that attorneys and judges perceive limited guardianships as time-consuming and hard to administer. Since many individual wards are viewed as having little or no chance for improvement, it is often deemed more efficient to order a plenary guardianship to avoid an unnecessary burden on the court through repeated appearances.\textsuperscript{64} Added to this is the fact that physicians'


\textsuperscript{62} A.B.A. COMM'N ON LEGAL PROBS. OF THE ELDERLY, GUARDIANSHIP: AN AGENDA FOR REFORM 17 (1988).

\textsuperscript{63} THE CTR. FOR SOC. GERONTOLOGY, supra n. 9 at 100-01. On the other hand, Keith noted that in the three states that were a part of her study, "there was some support for the hypothesis that more limited guardianships occurred as a result of statutory changes." KEITH & WACKER, supra n. 9 at 177.

\textsuperscript{64} Countering this efficiency argument is evidence from research about the impact of self-efficacy beliefs on lifestyles and quality of life. What this suggests for guardianships is that, when ordered inappropriately, including to a greater extent than necessary, a guardianship can have the unintended consequence of accelerating the pace of functional decline by influencing self-efficacy beliefs. Teresa Seeman, et al., Self-Efficacy Beliefs and Perceived Declines in Functional Ability: MacArthur Studies of Successful Aging, 54 J. GERONTOLOGY: PSYCHOLOGICAL SCI. 214 (1999). While the focus of this particular study was on elderly persons with physical disabilities, one can draw similar conclusions regarding perception of functional disability and self-efficacy beliefs of those diagnosed with a mental disability. This argument for retaining some self-determination whenever possible also finds support in a Minnesota study that contrasts the degree of personal control exercised by adults with mental retardation with differing substituted decision-making plans. Stancliffe, Abery, Springbord & Elkin, Substitute Decision Making and Personal Control:
reports often fail to either adequately assess or communicate partial incapacity.

Although it is true that the dearth of limited guardianships may be due to a real or perceived notion that they place a heavier burden on the courts than plenary guardianships, there is also a symbolic dimension that must also be understood as standing in the way of limited guardianship. Limited guardianships suggest that the power of decision-making over a ward is only partially transferred from the court to the guardian and that some oversight may be necessary to ensure that constraints on the power wielded are maintained. Equally important, limited guardianships reinforce the fact that the judicial decision lacks the closure that is so much a part of each stage of judicial process. The danger to the court is not only that limited guardianships may overburden their actual human and financial resources, but also that they might overwhelm and disrupt the dialectic of their construction of their authoritative role by the ambiguity inherent in limited guardianships.

Moreover, the imprecision of the medical reports make it extremely difficult for the judge to feel that there is a consistent application of principles in determining whether and to what extent an individual is incapable of making decisions for himself. Demands, then, are both real and symbolic. It is for this reason that so much emphasis should be placed (as it was in the IGRP) on improving the quality of the medical reports so the judge is confident that she or he has a clear sense of how to conduct a continued role in overseeing the guardianship. Without such effective reports, the search for coherence and closure, the instrumental value of judicial decision-making, is threatened.

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65. "A common belief in legal discourse is that closure enhances the acceptability of the decisions whereas openness undermines it." Simon, supra note 59 at 15.

66. There are similar challenges in other areas of the law, as made clear in the comment of one judge who, when asked at a conference about how he makes such difficult decisions based on sometimes weak medical reports, perhaps playfully recontextualized Justice Stewart's oft-quoted remark in answering that he was seldom troubled since he usually knows a need for guardianship when he sees it.

67. This also makes a strong case for the argument that a study of judicial decision-making regarding guardianships may be imperative as a basis for facilitating more effective policy decisions and implementing the recommendations that have been endorsed by expert panels in the past decades. See generally Karen A. Jordan, Empirical Studies of Judicial Decisions Serve an Important Role in the Cumulative Process of Policy Making, 31 IND. L. REV. 81 (1998).
WHAT WENT WRONG—OR DID IT?

What may be termed the "culture of guardianship" consists of a variety of subcultures which, while interconnected and sometimes overlapping, still maintain their own sets of customs, values and norms, developed from both tradition and experience that give meaning to the subcultural category. In addition to the broadest category of the general popular culture, there are distinct professional cultures—legal, medical, social work, each of which can also be divided into specialties. Thus, we have learned members of the Probate and Elder Law Bars who often have different views, based on client experience, on issues pertaining to protection from harm and right to self-determination. Physicians, too, depending on their relationship with patients and disciplinary bias, have different foci when defining and determining lack of capacity. Finally, in terms of those directly affected by the guardianship system—individuals with disabilities and family members—their particular experience determines how they comprehend and react to recommendations for reform.

The IGRP was designed to create opportunities for communication across these groups, providing them with a framework for reaching consensus on recommendations to improve the Illinois guardianship system. Thus, it was with much consternation that, soon after Equip for Equality began working with legislative sponsors to introduce some of the recommended statutory revisions, word reached the staff that a few probate judges were expressing opposition to the legislation and that the local Chicago and state bar associations were planning to enter a slip opposing the legislation. Despite the fact that twenty-seven organizations statewide had signed on to support the legislation, it was apparent that there was little reason to go forward until some fence mending had taken place and a broader support for change had been generated through continued educational efforts.

Post-mortem discussions abound about why reform efforts hit a barrier, despite the effort of the Task Force to compromise in order to reach a consensus about recommendations. The sustained effort to focus on systemic problems failed to prevent some judges and other key figures from interpreting the recommendations as a criticism of their running of the guardianship system. Moreover, the fact that Equip for Equality took the lead in planning for implementation of the Task Force recommendations, including the legislation, opened up the possibility for perceiving the recommendations as those of Equip for Equality rather than a Task Force on which Equip for Equality had a
representative.\textsuperscript{68}

The legislative process had also been seen as part of the Public Awareness and Coalition-Building Campaign in which only the least controversial measures with greatest support would be introduced to build a foundation for continuing reform efforts. What was revealed was that support for these measures had been miscalculated and that there were many who still claim that the Illinois guardianship system at present is well-functioning.\textsuperscript{69} The symbolism of introducing legislation soon after the formal presentation of the Final Report distorted a fundamental premise of the project—that the main problem with the guardianship system, with a few key exceptions, was not with the statute but rather with mechanisms for implementing the statute. What transpired then was opposition to Equip for Equality’s efforts. This led to the temporary withdrawal of legislation and a refocusing of efforts to educate the general public and professionals about the specific recommendations and the general attitudes and behavior that must be confronted if change is to occur.\textsuperscript{70}

The initial sense of failure should, on closer consideration, be replaced by a view of the conflict that occurred as an element in the process of culture change. Coser has written of the various functions of social conflict:

Internal social conflicts which concern goals, values or interests that do not contradict the basic assumptions upon

\textsuperscript{68} Equip for Equality also compromised on its positions in order to reach consensus. Nonetheless, at one meeting, an opponent expressed firm opposition to the legislation by arguing that the recommendations represented Equip for Equality’s “agenda,” no doubt in reference to its role as an organization designated by the Governor to administer the Protection & Advocacy System in Illinois in order to advance the human and civil rights of people with disabilities. The fact that Equip for Equality had initiated the project certainly contributed to continued opposition from Voice of the Retarded, which, despite disclaimers and evidence to the contrary, saw project recommendations emanating from the P&A system as threatening what they referred to as residential choice: “It was...VOR’s position that the guardianship law in Illinois was not broke [sic] and that efforts to fix it were motivated by an ideology that did not support choice in residential options.”

\textsuperscript{69} Discussion about need for research to show how reforms work—this was most frustrating but is necessary and was one of the recommendations of Wingspan conference.

\textsuperscript{70} The opposition of Voice of the Retarded (VOR) to the project in general and the legislation in particular was in large measure due to its suspicion of Protection and Advocacy Systems throughout the country, many of which spearheaded movements to close large institutions for those with developmental disabilities. Despite continuous efforts on our part to convince VOR representatives that institutions were not under discussion in the IGRP, the fact that Equip for Equality had organized the project and had introduced legislation made them fearful that guardianship reform would lead to de-institutionalization. (Note the VOR website, www.vor.net, which refers to the Final Report and to the fact that legislation did not succeed in part because of failure to support residential choice.).
which the relationship is founded tend to make possible readjustment of norms and power relations within groups in accordance with the felt needs of its individual members or subgroups.\textsuperscript{71}

The process of resolving the conflicts can serve to revitalize norms, introduce new ones, and help to produce coalitions among and within groups.\textsuperscript{72} Groups and individuals that share the broad values inherent in guardianship (as represented in a need to balance self-determination and protection from harm) but whose views on how in practice these are to be carried out, will now, through resolution of their conflicts, redefine the parameters of how the guardianship system should work. Rather than reflecting an insurmountable barrier, the present conflict over implementation of the Task Force recommendations represents the culmination of the first phase of systemic change and the beginning of a long process in which attitudes must be closely examined if the gap between expressed goals and reality is to be bridged. In this way, conflict can be channeled to reach positive results.

Some positive results are already forthcoming. This is illustrated in an incident suggesting that at least some of the conclusions and recommendations of the Task Force have been taken seriously, even by those who expressed opposition to formal revisions. An attorney related an experience he witnessed in the courtroom of one of the judges who had opposed the need for statutory change. After reviewing a petition for guardianship brought by an attorney who practiced regularly in the area, the judge asked the attorney if he had considered limited guardianship. "In the five years I have been practicing before you, you have never asked me about limited guardianship," the attorney remarked, loudly enough for everyone in the courtroom to hear. Learning of this incident soon after the failure of the legislative effort provided us with hope that the real impact of the work of the IGRP in changing guardianship culture must be measured through examining manifestations of attitudinal and procedural/behavioral in the court and other settings where guardianship decisions take place.\textsuperscript{73}

\textsuperscript{71} LEWIS COSER, THE FUNCTIONS OF SOCIAL CONFLICT 151 (1956).
\textsuperscript{72} Id. at 154-55.
\textsuperscript{73} Another concrete measure is the recent development of a training video for prospective and appointed guardians by the Guardianship and Advocacy Commission and funded by the Illinois Department of Human Services, Office of Developmental Disabilities. The video provides a concise overview of key issues in guardianship, including an emphasis on the need to balance the needs for independence and protection, turn to guardianship as a last resort, only to the extent necessary, and to seek to restore an individual's rights whenever possible. The potential impact of this video on the behavior of public and key
CONCLUSION: THE FUTURE OF GUARDIANSHIP REFORM

The above analysis of the recent guardianship reform effort in Illinois in a broad cultural framework may be summarized as comprising five related perspectives:

- **Normative:** The professional cultures involved in the guardianship system each had their own set of values and norms which must be mediated for the system to function effectively. Strains were placed on some, such as the judges, who were forced to combine in their role both that of the traditional fact-finder/decision-maker and that of therapeutic social worker seeking to find solutions to continuing problems. Moreover, based on their experiences, parental groups and family members also had different viewpoints depending on the type and degree of disability of their child/family member. Often each individual or group had a different description of the guardianship system, a description that influenced their acceptance or rejection of the Task Force recommendations.

- **Political/Organizational:** In the broadest sense, the opposition to systemic changes can be viewed in terms of viewing the court as a bureaucracy resistant to change and incursion in its area of control, particularly since so many of the reforms would have an impact on how both judges and their staff conduct their daily routine. In addition, the negative reactions to the Task Force's recommendations for statutory revision reflects the realities of political culture and networks both in the state, in Cook County, the state's largest county, and within the probate court where guardianship decisions are made. The reluctance of the stakeholders in the system will be dependent in part on the willingness of the courts and service providers as system gatekeepers to encourage those considering guardianship as an option to view the video after having been appointed guardian, or even better, before actually filing a petition for guardianship.

Task Force representatives from the respective probate bar associations to advocate in support of the recommendations they formally supported after opposition arose from the judges before whom they practiced certainly doomed the success of any initial effort to pass legislation. Finally, one must consider the possibility that opposition to certain recommendations such as changing the name "guardian ad litem" to that of "guardianship investigator" by members of the bar arose from a desire to protect professional boundaries and jobs.

- Ideological: There is a challenge to overcome the contradictions inherent in the two values of self-determination and protection from harm. The example of limited guardianship represents a middle way between these two, and the fact that it is seldom implemented reveals difficulties in reaching the ideological goal.

- Linguistic: This perspective focuses on matters pertaining to the communicative processes among those involved in determining whether or not an individual is in need of a guardian. It involves how judges make decisions, and it is certainly ripe for continued research in the context of guardianship law and practice. A starting point for the analysis should be the relationship between legal and...
medical practitioners, focusing on the efforts of doctors, to communicate a prospective ward’s decisional capacity to judges, and on the judges’ attempts to translate that medical information into a meaningful judicial order that is clear in guiding those who must implement it.

- Symbolic: Events in the courtroom can also be viewed as rituals for resolving dilemmas that arise in attaining both the particular substantive goal of a case and the broad symbolic goal to reinforce community values. Judges must address the issues concerning the extent to which, if any, an individual is in need of a guardian as well as conflicts that may arise over the choice of a guardian. In addition, in reaching a decision, the judges are involved in a process of reaffirming society’s moral order—a moral order that gives credence to a full range of values which may not always be in harmony, such as the rights of adults with disabilities versus society’s aim to make it as easy as possible for parents to continue to care for their children once they become legal adults.

A consequence of efforts to resolve this and other dilemmas is that the process of zealous advocacy that guides the adversarial system common to American law is often superceded by one in which the parties work together to satisfy what is considered to be the ward’s best interest. 77

Most of the initial recommendations of the Wingspread conference as well as those of the IGRP derive from implicit, if not explicit, consideration of one or more of the above perspectives. The same may be said about the Wingspan conference held in November 2001. Sponsored by NAELA, the Stetson School of Law, and the Orchard Center for Law and Aging, the goal of this second national guardianship conference as noted in a website (no longer available) was “to examine what progress has been made since the guardianship recommendations were generated at Wingspread in 1988, becoming ABA policy.” As an invitee, I approached that conference with

77. This is a contentious issue—whether to require attorneys in all cases who should conduct the case with zealous advocacy to ensure that only when needed guardianships are ordered or to seek a more accommodationist approach in which prospective wards’ best interests guide procedure. After much debate, the Wingspan conferees recommended that attorneys, after presenting options and their probability of success, zealously advocate the position taken by the clients.
anticipation that contact with experts from throughout the country would help clarify what was happening in Illinois and would also provide some ideas as to how to proceed. The intensive two-day conference, attended by approximately eighty invited professionals—judges, academics, probate and elder law attorneys—culminated in a series of recommendations that have been published together with position papers from experts in the field. It is hoped that this volume will provide the impetus to stimulate debate and mobilize forces throughout the country for ongoing guardianship reform.

It was gratifying to discover that much of the discussion taking place and many of the recommendations that followed were consistent with those of the IGRP. The number of recommendations pertaining to education and training of professionals and public alike reaffirmed the validity of the IGRP's approach that was founded on the principle that guardianship reform involves both attitudinal and structural changes. To achieve such changes, training and education must not merely entail a presentation of the law and regulations of the guardianship system; rather, it must provide a process which must engage all concerned, including the judiciary, to come to terms with their implicit attitudes which guide their behavior in the system and the relationship of these attitudes to specific actions taken.

Finally, what became clearer as I listened to the intensive discussions both of the IGRP’s Task Force and the national Wingspan Conference was that changing the attitudes and behavior associated with the guardianship process—as is often the case with much in disability law and policy—涉及 confronting how we define the parameters of normality in human beings. Thus, at its core, guardianship concerns both human and legal rights.

What was perhaps missing from the agenda at the Wingspan conference was a discussion as to why, despite the prestigious support of the ABA and a wide consensus among experts regarding the key areas for improving guardianship systems throughout the country, many of the most fundamental changes still have not taken place. Rather than coming up with new recommendations, it is incumbent on those seeking reform to delve deeper into the reasons for impasse in many states. I have here attempted to offer in some cases explanations and in others points of focus for future research. I have argued here that there must be a willingness to scrutinize the attitudes about individuals with disabilities that form the basis of how professionals in the

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guardianship system construct the social reality on which their work is based. The understanding that results from such self-examination can help resolve conflicting views about guardianship that come from an individual's particular experiences and position within the system.

If the new recommendations emanating from Wingspan are to become widely accepted, what must now occur is an analysis of the reasons for the gap between ideals and reality: why there has been so much difficulty in implementing many of the recommendations adopted at the Wingspread conference. This paper should be seen as an effort to begin the conversation that must take place to enable those committed to reform to identify the relationship among features in the culture of guardianship, a prerequisite for implementing systemic change.