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# THE GUARDIANSHIP PUZZLE:

## WHATEVER HAPPENED TO DUE PROCESS?

Joan L. O'Sullivan\*  
Diane E. Hoffmann\*\*

### INTRODUCTION

The imposition of guardianship on adults in Maryland presents a puzzle. The way the system works in practice differs significantly from the way the guardianship statute is written, particularly with respect to the due process rights of the alleged disabled person. The puzzle is this: why is this true?

On one hand, the state has a guardian of the person statute which in many respects is a model of due process for the subject of the proceedings, one which affords the person respect and full due process rights. If the words of the statute are followed, guardianship will only be imposed when the court finds (1) the alleged disabled person<sup>1</sup> to be incompetent based on clear and convincing medical evidence, (2) there is a need for a guardianship, and (3) the petitioner proves that there is no less restrictive means of

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<sup>1</sup> Throughout this article, the acronym "ADP" is used to refer to the alleged disabled person.

resolving the problem short of guardianship.<sup>2</sup> The ADP has the right to an attorney to represent him or her,<sup>3</sup> and full due process rights at the hearing on the matter,<sup>4</sup> including the right to a jury trial.<sup>5</sup> By statute, each order for guardianship of the person must be written so that it is limited to only those powers proven by the petitioner to be necessary.<sup>6</sup> The statute recognizes the undeniable fact that imposition of a guardianship is a serious and permanent deprivation of the civil rights of an adult, and it affords the person the protection inherent in an adversary proceeding to ensure that those rights are not lost casually.

On the other hand, the actual process in most guardianship cases bears little resemblance to the process promised in the statute. Hearings are not always held, or if they are, they proceed by stipulation of the attorneys to all issues and are over in minutes. As discussed in this article, the ADP rarely appears in court and the lawyer representing the ADP frequently agrees to all requests by the petitioner. The lawyer does not advocate for limits to the guardianship order. In fact, orders are seldom limited, and they frequently award all of the powers available to the guardian, whether requested or not.

The proceedings frequently are handled so differently from the way the controlling statute is written that the question must arise: is the statute totally unsuited to the issue that comes before the court, or are there other factors at work? Or phrased

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<sup>2</sup> MD. CODE ANN., EST. AND TRUSTS § 13-705(b) (Supp. 1995). This section provides:

A guardian of the person shall be appointed if the court determines from clear and convincing evidence that a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health care, food, clothing, or shelter, because of any mental disability, disease, habitual drunkenness, or addiction to drugs, and that no less restrictive form of intervention is available which is consistent with the person's welfare and safety.

*Id.*

<sup>3</sup> *Id.* § 13-705(d).

<sup>4</sup> *Id.*

<sup>5</sup> MD. R. R77b.

<sup>6</sup> MD. CODE ANN., EST. AND TRUSTS § 13-708(a) (Supp. 1995).

another way: *Why doesn't the system work as the legislature intended?* This Article outlines the results of two surveys we conducted in Maryland which sought to shed some light on this question. It compares our survey results with those from a national survey on guardianship practices, which confirmed many of our findings.

The first survey we conducted examined guardianship files in four Maryland counties, with special attention to due process issues.<sup>7</sup> The second survey probed the attitudes of circuit court judges toward guardianship in general.<sup>8</sup>

## I. HISTORY OF GUARDIANSHIP AND THE LAW IN MARYLAND

### A. History of Guardianship

Society has long struggled with the problem of what to do with the property and person of adults who are incompetent. Modern guardianship law has its roots in feudal English law, in the *parens patriae* authority of the king. Under that doctrine, the king was literally the "parent of the country," and had a fiduciary duty to protect the property of his subjects who were *non compos mentis*.<sup>9</sup> In 1324, during the reign of Edward II, the statute *De Prerogativa Regis* stated:

[T]he king shall provide, when any, that beforetime hath had his wit and memory happen to fail of his wit, as there are many [*per lucida intervalla*], that their lands and tenements shall be safely kept without waste and destruction and that they and their household shall live and be maintained competently with the profits of the same, and the residue besides their sustenance shall be kept to their use, to be delivered unto them when they come to right mind, so that such lands and tenements shall in no wise be alienated; and the King shall take nothing to his own use . . . .<sup>10</sup>

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<sup>7</sup> See *infra* part III.

<sup>8</sup> See *infra* part V.

<sup>9</sup> Sallyanne Payton, *The Concept of the Person in the Parens Patriae Jurisdiction over Previously Competent Persons*, 17 J. MED. & PHIL. 605, 625-26 (1992).

<sup>10</sup> *Id.* at 618-19.

The law differentiated between idiots, those who were incompetent from birth,<sup>11</sup> and lunatics, those who had lost their reason. A lunatic was defined as one who has had understanding, but by disease, grief, or accident, has lost the use of his reason.<sup>12</sup> A lunatic may have lucid intervals and might be expected to recover his reason.<sup>13</sup>

The king had custody of an idiot, and the profits of his land were paid to the king during the idiot's lifetime.<sup>14</sup> At his death, the king returned the land to the heirs of the idiot.<sup>15</sup> In contrast, the king was merely a trustee for the lands of the lunatic.<sup>16</sup> His duty was to protect and safeguard the land until the person regained his faculties.<sup>17</sup> The profits not used for the care of the lunatic and his family were to be set aside and returned to the lunatic when he recovered. The king must account to the lunatic, or to his heirs after he died, for his management of the property during the period of incapacity.<sup>18</sup>

The king's *parens patriae* authority only became effective after a man was found to be *non compos mentis* in a proceeding before the lord chancellor.<sup>19</sup> The lord chancellor issued a *writ de lunatico inquirendo*, or a *writ de idiota inquirendo*.<sup>20</sup> A jury of twelve men would inquire into the matter; and if they found that the man was a lunatic or an idiot, he would be committed into the care of a relative or friend, called his committee.<sup>21</sup> While it fell to the king to protect the *property* of the lunatic, care of the *person* of the *non compos mentis* was committed to his friends or family.<sup>22</sup> To

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<sup>11</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*302.

<sup>12</sup> *Id.* at \*304.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at \*304-05.

<sup>15</sup> *Id.* at \*303.

<sup>16</sup> *Id.* at \*305.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at \*304. See *Hamilton v. Traber*, 27 A. 229, 230 (Md. 1893) (stating that the King should provide that lands and tenements of lunatics be kept without waste).

<sup>19</sup> 1 BLACKSTONE, *supra* note 11, at \*305.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

prevent "sinister practices," the next heir, having an interest in the lunatic's property after his death, was seldom permitted to be the committee of his person.<sup>23</sup>

Formal proceedings were initiated only for those who owned property and were wealthy enough to pay for them, since the point of the inquiry was to protect the lands of the subject.<sup>24</sup> Poorer people were left to the care of their families.<sup>25</sup>

After the American Revolution, the former colonists through state legislatures assumed the *parens patriae* authority, for although there was general feeling against the authority of the king, *parens patriae* was seen to be benevolent and in keeping with the duty of the state to protect those who could not act for themselves.<sup>26</sup> A Maryland court in *Bliss v. Bliss*<sup>27</sup> quoted with approval *14 Ruling Case Law 544*, section 4:

In this country after the revolution, the care and custody of persons of unsound mind, and the possession and control of their estate, which in England belonged to the King as a part of his prerogative, were deemed to be vested in the people, and the courts of equity of the various states have, either by inheritance from the English Courts of Chancery or by express constitutional or statutory provisions, full and complete authority over the persons and property of idiots and lunatics.<sup>28</sup>

In *Mormon Church v. United States*,<sup>29</sup> the Supreme Court described the *parens patriae* power:

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<sup>23</sup> *Id.*

<sup>24</sup> John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship and Alternatives*, 13 WM. & MARY L. REV. 569, 571 (1972).

<sup>25</sup> *Id.*

<sup>26</sup> *Developments in the Law--Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1208 (1974).

<sup>27</sup> 104 A. 467 (Md. 1918).

<sup>28</sup> *Id.* at 471.

<sup>29</sup> 136 U.S. 1 (1890).

This prerogative of *parens patriae* is inherent in the supreme power of every state, whether that power is lodged in a royal person or in the Legislature, and has no affinity to those arbitrary powers which are sometimes exerted by irresponsible monarchs to the great detriment of the people and destruction of their liberties. On the contrary, it is a most beneficent function, and often necessary to be exercised in the interests of humanity, and for the prevention of injury to those who cannot protect themselves.<sup>30</sup>

This benevolent attitude still extended only to those who owned property. Those who lacked both family and wealth, and who were too old or sick to work, were left to wander the countryside begging for their sustenance, for the state had little apparent interest in providing for their persons.<sup>31</sup>

#### *B. History of Guardianship in Maryland*

In Maryland, the authority of the court of chancery to take charge over the estates and the persons of the mentally incompetent derived from the sixth section of the Act of 1785, chapter 72, which conferred on the Chancellor the full authority to superintend, direct, and govern their affairs, both of person and property, and to appoint a committee or trustee.<sup>32</sup> Early cases in Maryland confirmed the jurisdiction of the equity courts and the disabled person's right to due process in the proceedings.<sup>33</sup> The importance of notice and the right to be heard by the jury was asserted in *Supreme Council of Royal Arcanum v. Nicholson*,<sup>34</sup> in which the court said:

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<sup>30</sup> *Id.* at 57.

<sup>31</sup> Regan, *supra* note 24, at 571.

<sup>32</sup> See *In re Estate of Colvin*, 3 Md. 278, 282 (Ch. 1851) (discussing the authority of the court of chancery in Maryland).

<sup>33</sup> See *id.* (discussing established practices); *Rebecca Owings' Case*, 1 Bland. 290 (Md. Ch. 1827); *Campbell's Case*, 2 Bland. 217 (Md. Ch. 1840); *Hamilton v. Traber*, 27 A. 229 (Md. 1893); *Bliss v. Bliss*, 104 A. 467 (Md. 1918).

<sup>34</sup> 65 A. 320 (Md. 1906).

It is difficult to over-estimate the gravity and seriousness of the consequences to the citizen which necessarily flow from an adjudication declaring him to be *non compos mentis*. He is divested of his property, and may be restrained of his liberty, and incarcerated in an insane asylum. To assert that this can be done, under the general principles of American law, without notice, or opportunity to be heard, is shocking to one's sense of justice and unity. No such general rule of procedure can be recognized by the American courts.<sup>35</sup>

The right to have the case tried by jury was affirmed in *Hamilton v. Traber*:<sup>36</sup>

It is repugnant to the plainest dictates of natural justice that one having no interest in or claim against the estate of another, should still possess the right to procure a decree stripping the latter of the ownership of his property and simultaneously adjudging him a lunatic, without the solemn inquisition of a jury, upon a mere *ex parte* allegation, and substantially *ex parte* proof of the owner's mental infirmity. For such a proceeding no precedent has been cited or can be found.<sup>37</sup>

Laying the groundwork for the current guardianship statute, Maryland courts affirmed that the court has discretion in appointing a committee or trustee, and that two different people may be appointed to oversee the person and the property of the disabled one. In *In re Estate of Colvin*,<sup>38</sup> the court noted progress in the development of the law:

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<sup>35</sup> *Id.* at 322.

<sup>36</sup> 27 A. 229 (Md. 1893).

<sup>37</sup> *Id.* at 232.

<sup>38</sup> 3 Md. 278 (Ch. 1851).

[T]he great and leading object in the selection of persons for the management of the estates of lunatics, and the care and custody of their persons, is to advance their welfare and comfort . . . . [T]he old rule which excluded, as a matter of course, the next of kin of a lunatic from the office of committee of his person, if such next of kin was also his heir-at-law, has been broken down, because, contrary to the presumption which prevailed in barbarous times, the law now supposes that those who stand nearest to the lunatic by the ties of kindred will treat him with more affection and patient fortitude than strangers to his blood; and hence consanguinity, though it confers no positive title, is now considered as a considerable recommendation in the selection of a committee, and a strong ground must be shown before it will be disregarded.<sup>39</sup>

But the court could pass over the next of kin in the exercise of its discretion, such as in cases where the recommended person is experiencing pecuniary difficulties.<sup>40</sup>

Maryland modified the law concerning the person and property of mentally incompetent persons several times after the Act of 1785.<sup>41</sup> In 1957, the statute provided, very briefly, that the equity court had full power and authority to superintend the affairs of "*persons non compos mentis*" (in that year the term lunatic was dropped), including the authority to appoint a committee or trustee to oversee their affairs and their person.<sup>42</sup> In 1957, a separate section of Article 16 provided for the appointment of a conservator of the property for those "who by reason of advanced age, mental weakness (not amounting to unsoundness of mind), or physical incapacity," are unable to properly care for their

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<sup>39</sup> *Id.* at 285-86.

<sup>40</sup> *Id.* at 286.

<sup>41</sup> See *In re Easton*, 133 A.2d 441, 445 (Md. 1957).

<sup>42</sup> MD. ANN. CODE art. 16, § 132 (1957) (repealed 1969).

property.<sup>43</sup> The statute did not define either “unsoundness of mind” or “*non compos mentis*,” leaving the distinction to the courts.<sup>44</sup>

In 1969, the Maryland General Assembly revised the law, drafting Article 93A of the Maryland Code, which for the first time used the term “guardian” to describe the person authorized to oversee the property of a disabled person.<sup>45</sup> The term guardian had previously only applied to those who supervised the property of minors. Now it replaced the use of “committee” and “conservator.”<sup>46</sup> The 1969 revision defined a disabled person as one who cannot manage his property effectively because of physical and mental disability, senility, habitual drunkenness, addiction to drugs, imprisonment, and detention by a foreign power.<sup>47</sup>

### C. *The Reform of 1977*

In 1977, the legislature substantially revised the law again, producing a new title, codified at Estates and Trusts, Title 13, Protection of Minors and Disabled Persons.<sup>48</sup> This statute is still substantially intact; our current guardianship law concerning disabled persons is based on the changes made in 1977.

The reform bill, H.B. 381--Adult Protective Services, was introduced in the Maryland House of Delegates by Delegates Ida Ruben and Joseph Owens. The bill was drafted in large part by Professor John J. Regan, an authority on guardianship and protective services for the elderly, then at the University of Maryland School of Law, and a working group consisting of “professionals from DHR [Department of Human Resources] and de-

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<sup>43</sup> *Id.* § 149 (repealed 1969).

<sup>44</sup> *Greenwade v. Greenwade*, 43 Md. 313 (1875).

<sup>45</sup> MD. ANN. CODE art. 93A, § 101 (1969).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Act of May 26, 1977, ch. 768, §§ 1-5, 1977 Md. Laws 3092, 3093-3103 (adult protective services) (codified as amended at MD. CODE ANN., EST. & TRUSTS §§ 13-101, -207(e), -701 to -710 (1991 & Supp. 1995)).

partments of Social Services and senior citizens in the community.<sup>49</sup> The group had worked over the summer to draft the legislation after a similar bill introduced in 1976 failed.<sup>50</sup>

For the first time, this legislation focused attention on the needs of incapacitated adults apart from protection of their property. It recognized the need for the state to provide *parens patriae* protection for a person who was unable to make decisions about the essentials of daily living, such as medical care, housing, food and clothing, but who had no property. At the time, if a person was living in dangerous conditions, refused to voluntarily accept the services the state offered, and had no family or friend to file for guardianship, there was no way for the state to intervene.<sup>51</sup> The legislative file on H.B. 381 is replete with written testimony from social service agencies detailing their frustration in tragic situations in which disabled adults refused their help.<sup>52</sup>

The bill made four major changes: First, it created the Adult Protective Services Division of the Maryland Department of Human Resources and gave it the authority to intervene in a situation in which an adult is living in dangerous conditions.<sup>53</sup> Second, it provided for the appointment of a *public* guardian of the person, the director of the local department of social services or the office on aging.<sup>54</sup> Third, it established the procedure for an emergency guardianship of the person, to be used when the person is living in conditions which could cause immediate and serious physical harm or death.<sup>55</sup> Fourth, and most pertinent to this article, it established a new subtitle in the Estates and Trusts article which concerned a guardian of the person only.<sup>56</sup>

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<sup>49</sup> *Adult Protective Services: Hearings on H.B. 381 Before the House Ways and Means Comm.*, 1977 Md. Leg. Sess. [hereinafter *Hearings*] (testimony of Del. Ida Ruben).

<sup>50</sup> H.B. 1121, 1976 Md. Leg. Sess.

<sup>51</sup> See *Hearings*, *supra* note 49 (testimony of Del. Ida Ruben).

<sup>52</sup> Legislative History of Bills: H.B. 381 (1977) (on file with the Senate Judicial Proceedings Comm. of the Md. Gen. Assembly).

<sup>53</sup> Act of May 26, 1977, ch. 768, §§ 1-5, 1977 Md. Laws 3092, 3093-3103 (adult protective services) (current version at MD. CODE ANN., EST. & TRUSTS §§ 13-101, -207(e), -701 to -710 (1991 & Supp. 1995)).

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

The legislation is distinctive for its emphasis on the civil rights and due process rights of persons with disabilities. Delegate Ruben, in her written testimony on the bill, highlighted these features of the legislation:

I feel strongly that it is essential that the state not be able to deny arbitrarily a person's freedom and individuality, and we have included many safeguards against abuse or over-use of this program. The bill states that appointment of a guardianship of the person is not evidence of incompetence and does not modify any civil right of that person. Nor does it allow commitment to a state mental hospital without the required commitment procedures. It clearly spells out the authority and duties of a guardian of the person and enumerates the order in which prospective guardians are to be chosen. The director of a local department of social services or the director of the office on aging are the last named as potential candidates and are to be appointed only as a last resort.

Stringent guidelines are set for departmental and court procedures concerning protective guardianship. Any person for whom the court is petitioned to have a guardian is entitled to . . . legal assistance. For a person unable to pay, the state will provide counsel. The basis for emergency intervention before full procedures can be held are also spelled out and limited.<sup>57</sup>

In addition to the points listed by Delegate Ruben, the bill provided such hallmark due process rights for the ADP as the right to be present at the hearing, the right to present evidence, and the right to cross-examine witnesses.<sup>58</sup> The alleged disabled person was entitled to a closed proceeding and a sealed record.<sup>59</sup>

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<sup>57</sup> See *Hearings, supra* note 49 (testimony of Del. Ida Ruben).

<sup>58</sup> Act of May 26, 1977, ch. 768, § 5, 1977 Md. Laws 3092, 3097 (adult protective services) (current version at MD. CODE ANN., EST. & TRUSTS § 13-705(e) (Supp. 1995)).

<sup>59</sup> *Id.* (current version at MD. CODE ANN., EST. & TRUSTS § 13-705(e) (Supp. 1995)).

The bill provided that a court may appoint a guardian of the person only upon a showing of clear and convincing evidence.<sup>60</sup> The grounds for the appointment of guardian of the person were clearly spelled out. A petitioner must show not only that a person is incapacitated, but also that there is no less restrictive alternative to guardianship available consistent with the person's welfare and safety.<sup>61</sup>

An important feature of the bill was the section which described the rights, duties, and powers of a guardian. Section 13-708, Rights, Duties and Powers of a Guardian, provided strict limits on the authority a court may grant a guardian. The bill provided, as does the current statute, that a court "may grant to a guardian of the person only those powers necessary to provide for the demonstrated need of the disabled person."<sup>62</sup> The bill enumerated eight powers which a court may grant.<sup>63</sup> In contrast, guardian of the property sections of the title allow the court to grant broad discretionary powers to a guardian.<sup>64</sup>

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<sup>60</sup> *Id.* at 3096 (current version at MD. CODE ANN., EST. & TRUSTS § 13-705(b) (Supp. 1995)).

<sup>61</sup> *Id.* at 3097 (current version at MD. CODE ANN., EST. & TRUSTS § 13-705(b) (Supp. 1995)).

<sup>62</sup> *Id.* at 3099 (current version at MD. CODE ANN., EST. & TRUSTS § 13-708(a) (Supp. 1995)).

<sup>63</sup> *Id.* (current version at MD. CODE ANN., EST. & TRUSTS § 13-708(b) (Supp. 1995)). The court could order the following: (1) the same rights, powers, and duties that a parent has with regard to an unemancipated minor; (2) the right to the custody of the disabled person and to establish their abode (but not to consent to the admission of the person to a mental institution); (3) the duty to provide for the care, comfort, and maintenance of the person, including recreation, education, and training; (4) the duty to take reasonable care of the clothing and other personal effects of the disabled person; (5) if there is no guardian of the estate, the right to pursue the right to support for the person and to conserve the estate for the needs of the person; (6) if there is a guardian of the estate, the duty to control the custody and care of the person, to receive sums for that care, to account to the guardian of the estate, and to request funds for care and maintenance for third parties; (7) the duty to file an annual report informing the court about the current status of and future plans for the ward, and about the need to continue the guardianship; and (8) the power to give the approval for medical or other professional care, except that which involves a substantial risk to life. *Id.* (current version at MD. CODE ANN., EST. & TRUSTS § 13-708(b) (Supp. 1995)).

<sup>64</sup> MD. CODE ANN., EST. & TRUSTS §§ 13-206(e), -213, -214, -215 (1991).

The idea of a limited guardianship was clearly important to supporters of the bill, for it is mentioned numerous times in written testimony.<sup>65</sup> Advocates of the elderly and disabled were strongly in favor of this provision, because it allowed the court to grant guardianship to address a specific need, while enabling the ADP to retain as much independence, autonomy, and self-respect as possible.<sup>66</sup> Typical are these remarks by Lynn Weinberg, Director of Public Information for the Maryland Association of Retarded Citizens:

At this time, there is no satisfactory method for providing guardianship services to an adult mentally retarded citizen. Guardianship of the persons as it presently exists at law completely strips a mentally retarded individual of his legal capability to make decisions on his own. In fact, a mentally retarded adult may be competent in a number of areas and incompetent in others. The accepted theory of normalization is to foster the development of competency in a mentally retarded individual until he reaches his full potential. During this period of development, there is a need for someone to be legally capable of acting for and with the mentally retarded individual without taking away from the individual, those areas in which he is already competent.

This bill provides one answer to this problem by providing for guardianship of the person in a form which can be individually tailored to meet the needs of the mentally retarded adult.<sup>67</sup>

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<sup>65</sup> See, e.g., Letter from Alice K. Nelson, Director of Social Work, Developmental Disabilities Law Project, to Delegate Benjamin L. Cardin, Chairman, Maryland House of Delegates Ways and Means Committee (Feb. 17, 1977) (on file with the Senate Judicial Proceedings Comm. of the Md. Gen. Assembly in the Legislative History of Bills file to H.B. 381 (1977)).

<sup>66</sup> Letter from Lynn Weinberg, Director of Public Information, Maryland Association for Retarded Citizens, Inc., to Delegate Benjamin L. Cardin, Chairman, Maryland House of Delegates Ways and Means Committee (Feb. 11, 1977) (on file with the Senate Judicial Proceedings Comm. of the Md. Gen. Assembly in the Legislative History of Bills file to H.B. 381 (1977)).

<sup>67</sup> *Id.*

The bill passed the legislature that year and became effective on July 1, 1977.<sup>68</sup> The legislature has made only minor revisions to the guardianship statute since 1977. In 1991, "senility or other mental weakness" was eliminated from the list of conditions which might give rise to an inability to manage one's person or property.<sup>69</sup> With the passage of the Health Care Decisions Act in 1993,<sup>70</sup> the statute was amended to spell out the standards for deciding when a guardian can consent to the withholding or withdrawal of life-sustaining medical treatment for a ward<sup>71</sup> and to conform other sections of the guardianship statute to the new provisions of the Health Care Decisions Act.<sup>72</sup> Other than these and some minor technical changes, the guardianship statute has continued in substantially the same form since 1977.

#### *D. The Maryland Rules*

The guardianship statute operates in coordination with the Maryland Rules of Procedure, Subtitle R, "Minors and Persons Under Disability," and Subtitle V, "Fiduciary."<sup>73</sup> The V Rules set guidelines for all fiduciaries, including procedures for such matters as filing bonds, making an inventory and accounting, and terminating a fiduciary estate. The R Rules establish the procedures for filing a guardianship case, for serving notice, and for setting hearings. For example, Rule R77 provides for a jury trial unless it is knowingly waived by the ADP in guardianship of the person cases.<sup>74</sup> Rule R76 allows a court to appoint an attorney to investigate a guardianship matter and report to the court.<sup>75</sup>

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<sup>68</sup> Act of May 26, 1977, ch. 768, §§ 1-5, 1977 Md. Laws 3092, 3093-3103 (adult protective services) (codified as amended at MD. CODE ANN., EST. & TRUSTS §§ 13-101, -207(e), -701 to -710 (1991 & Supp. 1995)).

<sup>69</sup> See MD. CODE ANN., EST. & TRUSTS §§ 13-201, -705 (Supp. 1995).

<sup>70</sup> Act of May 11, 1993, ch. 372, 1993 Md. Laws 372 (codified at MD. CODE ANN., HEALTH-GEN. §§ 5-601 to -618 (1994 & Supp. 1995)).

<sup>71</sup> MD. CODE ANN., EST. & TRUSTS § 13-711 (Supp. 1995).

<sup>72</sup> *Id.* §§ 13-707(a)(2) to -708(c).

<sup>73</sup> This article refers to these rules as the "R Rules" and "V Rules," respectively.

<sup>74</sup> See MD. R. R77.

<sup>75</sup> See *id.* at R76.

After the enactment of the reform bill of 1977, a conflict arose between the words of the new statute and Rule R76, which predated the revision. That conflict has given rise to much debate and has significantly affected the due process afforded to ADPs. Section 13-705(d) of the Estates and Trusts Article states, "Unless the alleged disabled person has counsel of his own choice, the court *shall* appoint an attorney to represent him in the proceeding. If the person is indigent, the state shall pay a reasonable attorney's fee."<sup>76</sup> As of this writing, Rule R76 states that, "[t]he court in its discretion *may* appoint an attorney who shall investigate the facts of the case and shall report, in writing, his findings to the court."<sup>77</sup> Rule R76 derived from former rules which provided for the appointment of a guardian *ad litem*, or an attorney who was to substitute his judgment for that of the alleged disabled person, and investigate and report to the court.<sup>78</sup> Appointment of a guardian *ad litem* was discretionary with the court.<sup>79</sup> On the other hand, the new provision clearly stated that the court *must* appoint an attorney, and that the attorney should "represent" the alleged disabled person.<sup>80</sup> One can speculate that the drafters of the legislation did not see a conflict with Rule 73(b) since they contemplated the court appointing two different persons to these roles. However, as will be discussed in greater detail below, the common practice has been that the court appoints one attorney to play both roles in most cases, setting up a classic conflict of interest.<sup>81</sup>

A revision to the R rules has been in the works for years. A drafting subcommittee met in the late 1980's and finished its work in 1992. The subcommittee sought to rectify many of the

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<sup>76</sup> MD. CODE ANN., EST. & TRUSTS § 13-705(d) (Supp. 1995) (emphasis added).

<sup>77</sup> MD. R. R76 (emphasis added).

<sup>78</sup> *Id.* at 1384b.2. (1959); *id.* at R76 (1962).

<sup>79</sup> *Id.* at 1384b.2. (1959); *id.* at R76 (1962).

<sup>80</sup> Act of May 26, 1977, ch. 768, § 5, 1977 Md. Laws 3092, 3097 (adult protective services) (current version at MD. CODE ANN., EST. & TRUSTS § 13-705(d) (Supp. 1995)).

<sup>81</sup> For a complete discussion of the questions at issue regarding the proper role of the attorney for the ADP, see Vicki Gottlich, *The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective*, 7 MD. J. CONTEMP. LEGAL ISSUES 191, (1995-96); The Honorable James C. Cawood, *Judicial Perspectives*, 7 MD. J. CONTEMP. LEGAL ISSUES 5 (1995-96).

conflicts between the rules and the statute and to clarify what process is due to the ADP while maintaining efficiency in the proceedings. However, the rules remained with the Rules Committee and were not published for public comment until late November 1995.<sup>82</sup> It was, in part, due to frustration with the delay in the revision of the guardianship rules that the Office on Aging Task Force on Guardianship met to consider whether the guardianship statute was working and what could be done to improve the situation.

## II. SURVEY BACKGROUND

In November 1993, the Maryland Office on Aging organized a task force to consider ways to address problems perceived in the guardianship system. The Office sent a general announcement to those involved at various stages of the guardianship process, and a group of about twenty-five people met in Baltimore. Participants included representatives of the state and local departments of aging, health and mental hygiene, and social services; advocates for the elderly and disabled; circuit court judges who hear guardianship cases; physicians who specialize in geriatrics; attorneys who represent hospitals and nursing homes; law school professors; and members of senior citizen advocacy groups.

At the initial meetings of the task force, participants voiced concerns about the program from their own perspectives. Participants identified the following laundry list of questions for further study:

1. In General—Do present laws provide a clear framework for performing guardian responsibilities?<sup>83</sup>

2. Capacity—Does the current definition of incapacity present problems? Should it be more oriented to functioning rather than to diagnosis?<sup>84</sup>

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<sup>82</sup> In part, publication of the revised Rules was delayed because of additions made to effectuate the Standby Guardian Statute passed in 1994. That Act established procedures for parents who are terminally ill to appoint temporary guardians of their minor children. *See* MD. CODE ANN., EST. & TRUSTS § 13-901 to -908 (Supp. 1995).

<sup>83</sup> Notes of the Maryland Office on Aging Task Force on Guardianship Group Meeting (Nov. 10, 1993) (on file with authors).

<sup>84</sup> *Id.*

3. Types of Guardianship—Are the present statutory provisions for routine and emergency guardianships sufficient?<sup>85</sup>

4. Presence of the Alleged Disabled Person at the Hearing—Would attendance in court change judicial findings or lead to more frequent use of limited guardianships?<sup>86</sup>

5. Role of the Attorney Representing the Alleged Disabled Person at Guardianship Hearings—Should this role be further defined?<sup>87</sup>

6. Do problems occur after private guardians are appointed? Should those cases be reviewed as are public guardianships?<sup>88</sup>

7. Does the present law encourage the use of public rather than private guardianships?<sup>89</sup>

Early on, Task Force members tried to verify their anecdotal evidence about weaknesses in the system. However, they soon discovered that there is very little objective data about guardianship cases kept by the courts or anyone else. The Administrative Office of the Court, which has the responsibility for keeping court statistics, does not keep uniform statistics about guardianship cases. The numbering of guardianship cases varies from circuit to circuit, with some courts giving a special case letter or number to guardianship cases and others not. Some circuits identify guardianship of the property cases separately from guardianship of the person cases.<sup>90</sup> Petitions for guardianship of adults and guardianship of minors are frequently numbered the same way, making an analysis of the numbers of adult guardianship cases filed in one year impossible. When the Task Force began looking for ways to confirm their reports of what happens in guardianship cases, they found a dearth of comparable data.

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<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> For example, in Anne Arundel County, cases which petition for guardianship of the property are filed and kept in the Trust Clerk's office. Cases which request guardianship of the person *and* property are filed there as well. However, cases which ask only for guardianship of the person are filed in the Equity Department and are stored with the equity cases.

Thus, in an attempt to confirm the stories of the task force members, we undertook two surveys to obtain data about what is actually happening in the system. In the first survey, we examined guardianship files in four Maryland counties, gleaning as much information as possible about the process from the written court file. The second survey queried circuit court judges about their attitudes and opinions regarding guardianship proceedings. Survey results follow.

### III. SURVEY OF THE COURT FILES

#### *A. Methodology*

In the spring of 1994, students at the University of Maryland School of Law enrolled in our Legal Theory and Practice class, Legal and Social Problems of the Elderly, reviewed court files in guardianship cases. They examined all adult guardianship cases filed in the six month period from July 1992 through December 1992, in four circuit court jurisdictions: Baltimore City, Anne Arundel County, Howard County, and Carroll County. We selected these political subdivisions because they offered a mix of urban, suburban and rural populations, had courts of various sizes, and were likely to reflect different ways of handling guardianship cases. Students reviewed a total of 214 case files: 162 in Baltimore City, 15 in Carroll County, 10 in Howard County, and 27 in Anne Arundel County. These numbers reflect the actual number of guardianship cases filed in each locale, excluding cases requesting guardianship of a minor.

The students worked with a survey instrument in which they answered sixty questions about information found in each court file. We focused the survey questions on four problem areas identified by the Guardianship Task Force formed by the Maryland State Office on Aging. Those areas were as follows:

1. *Medical Evidence*--The determination that a guardianship is appropriate must rest in large part on medical evidence of the person's incompetence.<sup>91</sup> Task Force members contended that

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<sup>91</sup> See Robert Rocca & Thomas Finucane, *Physicians and Guardianship: A Brief Commentary*, 7 MD. J. CONTEMP. LEGAL ISSUES 239 (1995-96).

insufficient medical evidence was presented in guardianship cases and that the courts frequently relied only on scanty medical certificates filed with the petition to make a determination of incompetence. Further, the current definition of disability relates mainly to the ADP's medical diagnosis, rather than to the person's functional abilities, resulting in mostly negative information being presented to the court.<sup>92</sup>

2. *Role of the Attorney for the ADP*—The proper role of the attorney appointed to represent the ADP has been in great dispute, in part because of confusion between the words of the statute and the Maryland Rules of Procedure. We wanted to find out what role attorneys generally played, that of an advocate for the client or that of a guardian *ad litem* who conveyed objective information to the court.

3. *Due Process Rights*—Members of the Task Force raised several issues related to the due process rights of the ADP: notice to the ADP and interested persons, procedures at hearings, and the presence and testimony of the alleged disabled person. We designed survey questions to determine whether these protections were being utilized.

4. *Limited Guardianships*—Knowing that broad form orders are used in several jurisdictions, we wanted to know how many orders are actually limited, as the statute requires.<sup>93</sup> Surveyors were asked to analyze the guardianship order in each file.

#### B. Data Collection

Initial questions on the survey form asked for demographic data about the alleged disabled person, such as age, gender, marital status, and place of residence. These were followed by questions about the petition and petitioner. Next were questions about timely notice to the alleged disabled person and the interested persons listed in the show cause order. The survey asked whether the guardianship was contested and, if so, on what

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<sup>92</sup> See *id.* at 242; see also Barbara Hopkins, *The Fruit of the Task Force on Guardianship's Labors: Heightened Protection of Autonomy For Aged Persons and Persons with Disabilities*, 7 MD. J. CONTEMP. LEGAL ISSUES 81, 94-95 (1995-96).

<sup>93</sup> MD. CODE ANN., EST. & TRUSTS § 13-708(a) (Supp. 1995).

grounds. Four questions pertained to the required medical certificates and evidence of the ADP's disability: whether the required two physician certificates were filed with the petition; on what medical condition the determination of disability was based; whether the physician provided any additional information about the ADP's capacity or disability; and lastly, whether the file included any evidence of the ADP's competency in the attorney's report, the petition, or the answer.

A series of questions asked about the attorney for the ADP, including whether an attorney was appointed to represent the ADP; whether the order appointing the attorney specified whether the attorney was to represent the ADP, to report to the court, or both; whether there was any indication that the attorney had represented the ADP in the past; whether a report was filed by the attorney for the ADP; whether the attorney's report admitted disability or the need for guardianship; and whether the report included information about the ADP's views about the guardianship.

Questions regarding due process included how much time was given to the ADP and interested persons to show cause; whether a hearing was held; the length of time between the date the petition was filed and the date the hearing was held; whether there was a jury trial, and, if not, whether there was any indication that the ADP waived the right to a jury trial; and whether the ADP was present at the hearing, and, if so, whether he or she testified. The form also asked whether anyone other than the ADP testified and whether the attorney for the ADP advocated for the expressed wishes of the ADP at the hearing or in the pleadings.

Regarding the final order for guardianship, the survey form inquired about what kind of guardianship was granted and who the guardian was. Finally, the survey asked whether the guardian's powers were limited in any way and, if so, how.

### *C. Study Results*

Our study results were significantly limited by the extent and quality of the information in the files. Not every file contained the information we sought; some petitions were much more informative than others. Sometimes there was no information

about notice, and requests for attorney's fees varied widely. Some questions simply could not be answered by looking in the court file. While these discrepancies limited the results, the data we gathered supported many of the concerns expressed by the Task Force.

1. *Demographics*—We found that 59% of the subjects of a guardianship petition were over sixty-five years of age. The most frequent subject of a guardianship petition was between the ages of seventy-six and eighty-five years old (29%). Twelve percent under the age of nineteen.<sup>94</sup> Men and women were equally likely to be the subject of a guardianship petition. Twenty-seven percent of the ADPs were living alone in a private home at the time the petition was filed. Twenty-three percent were living in a private home, with others, and 22% were living in a nursing home.

2. *Petitioners*—Hospitals filed the greatest number of petitions for guardianship—a total of 36% of the cases—but interestingly all hospital petitioners were in Baltimore City, where they filed 46% of all guardianship petitions in the six-month period. The second largest group of petitioners were relatives of the ADP, who filed 32% of the petitions. Table I provides a breakdown of the identity of petitioners.

Table I  
Who Was Petitioner?

	Baltimore City	Carroll County	Howard County	Anne Arundel County	% of Total N=206
Relative of ADP	31	8	8	18	32%
Friend/Neighbor	3	3	0	6	6%
Hospital	75	0	0	0	36%
Nursing Home	2	0	0	0	1%
Dept. of Social Services	37	0	0	0	18%
Local Dept. of Aging	0	0	0	0	0%
State Office on Aging	0	2	0	0	1%
Other Institution	2	1	1	3	3%
Other Public Agency	2	2	1	1	3%

<sup>94</sup> Although an initial screen of cases included those involving minors, these cases were eliminated from the remainder of the study.

3. *The Petition*—Of the total requests for guardianship, 28% requested appointment of a guardian of the person only, 8% requested appointment of a guardian of the property only, and 64% requested both. The immediate need for guardianship in 31% of the cases involved the need for someone to make a medical decision.<sup>95</sup> The second primary reason for filing was the ADP's inability to manage funds (23%). Table 2 provides a breakdown of the reasons for filing the petition.

**Table 2**  
**What was the immediate need for Guardianship?**

	Total	% of Total
Medical Decision	103	31%
Dental Work Only	11	3%
Discharge from Hospital to NH	51	15%
Change of Abode	9	3%
Abuse of Funds	4	1%
Inability to Manage Funds	77	23%
Threat to Own Safety/Unsafe Home	34	10%
Other	<u>47</u>	14%
	336 <sup>a</sup>	

<sup>a</sup> Total does not equal 216 as in some cases there was more than one reason a guardianship was sought.

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<sup>95</sup> The survey scrutinized cases filed before the enactment of the Health Care Decisions Act in 1993, which expanded significantly the kinds of medical decisions which can be made by family members or friends without the need for a guardianship. An interesting follow-up study would be to determine whether fewer guardianship petitions are being filed for medical consent since the passage of the Health Care Decisions Act.

In the large majority of cases (73%), the request for guardianship was not contested. This was more likely to be the case in Carroll, Howard, and Anne Arundel counties. Table 3 reflects this finding.

**Table 3**  
**Was case contested?**  
(N = %)

	Yes	No	Total
Baltimore City	47 (32%)	99 (68%)	146
Carroll County	1 (7%)	14 (93%)	15
Howard County	1 (10%)	9 (90%)	10
Anne Arundel Co.	4 (15%)	23 (85%)	27
<b>TOTAL</b>	<b>53 (27%)</b>	<b>145 (73%)</b>	<b>198</b>

4. *Medical Evidence*—In virtually all cases (97%), two physician certificates were filed with the petition. In the large majority of cases (76%), the determination of disability was based on the mental disability of the ADP. In a few cases, it appeared that the guardianship was based solely on the ADP's physical disability (17%). It is noteworthy that more research would be necessary, however, to verify this finding, as the medical information contained in the case files was often scanty. Thus, in 64% of the cases, the physician certificates were the only medical evidence in the file regarding the ADP's incapacity.

5. *Role of the Attorney*—In virtually all cases, an attorney was appointed to represent the alleged disabled person. While in 54% of the cases the order appointing the attorney specified that the attorney was to represent the ADP, in 46% of the cases the order specified that the attorney was to both represent the patient and report to the court.

In two-thirds of the cases (66%), a report was filed by the attorney for the ADP. In those cases where a report was filed, 80% of the time the attorney's report admitted the disability of the ADP or the need for guardianship. In less than half of the cases (45%) did the attorney's report include information about the ADP's views about the guardianship.

6. *Show Cause and Hearing*—There was a significant difference in the time given to respondents to show cause between Baltimore City and the other three jurisdictions. In 73% of all the cases, respondents were given two weeks or less to answer or respond to the petition. These figures were driven largely by the results from Baltimore City where petitions were often heard on an expedited basis. Table 4 provides a more detailed account of these results.

**Table 4**  
**How much time was given to the Alleged Disabled Person and the interested persons to show cause?**

	Baltimore City	Carroll County	Howard County	Anne Arundel County	% of Total N = 180
1 - 3 days	31	--	--	--	17%
4 - 7 days	48	1	--	1	28%
8 - 14 days	46	2	1	1	28%
15 - 21 days	6	2	1	21	16%
22 - 30 days	1	3	1	2	4%
> 30 days	6	3	2	1	7%
TOTAL	138	11	5	26	100%

A hearing was held in the large majority of cases (78%); however, there was significant variation among jurisdictions. In Carroll County, no hearings were held, while in Baltimore City, according to the case files, a hearing was held in 96% of the cases. This variation may not be significant, for although the files reveal that the Baltimore City cases were scheduled for a hearing before a judge, in many cases no testimony was taken and the case proceeded entirely by stipulations between the two attorneys.

There were no jury trials held in any of the cases reviewed. In eighty-eight of 168 cases there was some indication in the file

that the ADP waived the right to a jury trial. In the remaining cases, however, there was no indication as to whether the ADP had made a knowing and voluntary waiver.<sup>96</sup>

The files did not always contain sufficient information to discern whether the ADP had been present at the hearing. However, in none of the cases reviewed did an ADP testify at a hearing. In only 10% of the cases was some form of testimony taken. Finally, we found that in 70% of the cases there was no indication that the attorney advocated for the expressed wishes of the ADP in the answer or at the hearing.

7. *Limited Orders*—Guardianship was granted in 95% of the cases reviewed. A guardian of the person and property was appointed in 60% of the cases, a guardian only of the person in 32%, and a guardian only of the property in 8%. An order for a limited guardianship was issued in 37% of the cases involving a guardian of the person, and in 7% of the cases involving guardian of the property. In only 33% of the cases was there any indication that the court honored the wishes of the ADP or reflected them in any way in the order.

8. *Timing*—As Table 5 reflects, the time between the date the petition was filed and the date the order was signed was two weeks or less in almost half of the cases (49%).

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<sup>96</sup> A jury trial is an option only available in cases involving guardianship of the person. MD. CODE ANN., EST. & TRUSTS § 13-211(a) (1991); MD. R. 77b. The Maryland Rules also state, "When the relief sought includes the appointment of a guardian of the person of an alleged disabled person and such person has neither consented to the appointment of a guardian of his person nor waived a jury trial, the court shall promptly empanel a jury . . . ." *Id.* A committee note following the rule attempts to distinguish when an alleged disabled person has the capacity to waive a jury trial:

Paragraph (a) is not intended to imply that all disabled persons may waive a jury trial. Certain disabled persons, such as a disabled drunkard or a drug addict, might have sufficient capacity at a particular time to make an intelligent and effective waiver. Capacity to waive is a question to be decided on the facts in each case.

*Id.* committee note. If an attorney thinks that his client is incompetent, he would have no apparent authority to waive a jury trial since his client could not make a knowing and voluntary waiver. These files yielded very little information on whether or not the waiver of the jury trial was a knowing waiver.

**Table 5**  
**What was the time between the date the petition was filed  
and the date the order was signed?**

	Baltimore City	Carroll County	Howard County	Anne Arundel County	Total	%
< 48 hours	5	--	1	3	9	5%
48 hrs - 1 week	43	1	--	1	45	22%
1 - 2 weeks	34	1	--	1	36	18%
2 - 3 weeks	6	--	--	--	6	3%
3 - 4 weeks	4	--	--	3	7	3%
1 - 2 months	10	5	3	6	24	12%
2 - 3 months	9	1	2	3	15	7%
3 - 4 months	14	7	1	1	23	11%
> 4 months	23	8	3	5	<u>39</u>	19%
					204	

#### *D. Discussion of Court File Survey*

Our survey produced mixed results. The findings were limited significantly by the fact that some of the information sought was missing from the file or not evident from the pleadings. This was especially true regarding our efforts to determine the functional disability of the ADP.<sup>97</sup> As a result of these limitations, some of our findings are tentative, but they do raise some significant concerns about due process issues and about whether the law is being applied as the legislature intended.

The Maryland guardianship of the person statute, as we have noted, is a model statute in the many due process protections it provides to the alleged disabled person.<sup>98</sup> The survey of case files revealed that especially in the early stages of a case, these protections are honored and utilized. For example, two doctors' certificates of the incompetency of the ADP accompanied all but four

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<sup>97</sup> Generally, the only pieces of medical evidence in the files were the two doctors' certificates, a form on which physicians list the person's diagnosis and the nature, cause, extent, and probable duration of disability in a few brief phrases. There is generally no information about what functional abilities the person retains. This information is essential in the attempt to determine whether guardianships are being inappropriately granted. Such information would have to be gathered from personal interviews with the ADP, with those involved with the ADP, and a review of medical files.

<sup>98</sup> See *supra* text accompanying note 96.

of the 214 petitions filed. An attorney was appointed to represent the ADP in virtually every case. Proof that the ADP and the interested persons were served with notices was present in the file about 85% of the time.

But process seems to break away from the written statute as the hearing stage approaches, notably in the confusion over the proper role of the attorney for the ADP, the attorney's waiver of rights of the ADP, the absence of and lack of testimony from the ADP, and the failure to tailor court orders to the facts proven by the petitioner.

*1. Role of the Attorney*—The proper role or roles of the attorney appointed to represent the ADP clearly has been in a state of confusion. As discussed above, the Maryland statute provides that an attorney *shall* be appointed "to represent" the alleged disabled person if that person has no attorney of their own choosing.<sup>99</sup> This is consistent with the basic tenets of due process which provide that an indigent litigant has a right to appointed counsel when, if he loses, he may be deprived of his physical liberty.<sup>100</sup> Rule R76 of the Maryland Rules of Procedure muddies the waters, however, by providing that the court, in its discretion, *may* appoint an attorney to investigate and report to the court.<sup>101</sup> It is unclear whether this person is to be the same attorney as the one appointed to represent the alleged disabled person. The seemingly contradictory statute and rule place attorneys appointed in guardianship cases in a particularly confusing position and potentially compromise the rights of the ADP. In a recent case involving the proper role of the attorney for the ADP, heard before the Maryland Court of Special Appeals, Judge Bloom, in a concurring opinion, stated:

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<sup>99</sup> MD. CODE ANN., EST. & TRUSTS § 13-705(d) (Supp. 1995).

<sup>100</sup> *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 26-27 (1980), *reh'g denied*, 453 U.S. 927 (1981); *In re M.R.*, 638 A.2d 1274 (N.J. 1994). See also Gottlich, *supra* note 81, at 198; Frederick R. Franke, Jr., *Perfect Ambiguity: The Role of the Attorney in Maryland Guardianships*, 7 MD. J. CONTEMP. LEGAL ISSUES 223, 235-36 (1995-96).

<sup>101</sup> MD. R. R76.

Having appointed counsel to represent [the ADP] as mandated by statute, the court created an inherent conflict, or at least a potential conflict, by requiring [the ADP's] counsel to serve in another capacity, that of investigator for the court, by ordering him to file an answer and report pursuant to Maryland Rule R76.<sup>102</sup>

Judge Bloom compared the situation to that of an attorney appointed to represent a child in a child custody matter, where a similar question is asked: Should the appointed attorney act as a fact finder, an advocate for the child's wishes, or something in the middle? In *Leary v. Leary*,<sup>103</sup> which raised that question, the court said, "Absent firm guidelines from the Legislature or other sources, the best solution to the question would appear to lie in precise, clear cut orders by the court after input from counsel."<sup>104</sup> Concerning guardianship of adults, Judge Bloom concluded:

Since even a party laboring under a disability such as [the ADP] may have sufficient competence to make a rational choice as to who should be her guardian, there is always at least a potential conflict of interest between the attorney who, pursuant to § 13-705(d) of the Estates and Trusts Article is appointed to represent the alleged disabled person and the attorney appointed under Rule R76 to investigate for and report to the court. I believe, therefore, that the court erred in appointing the same attorney to perform both duties.<sup>105</sup>

Our survey found that attorneys seldom "represented" their client in the traditional sense. A large majority, acting in the guardian *ad litem* role, filed lengthy reports which contained facts

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<sup>102</sup> *In re Adoption/Guardianship* No. 93187050/CE166964, No. 1887, slip op. at 2 (Md. Ct. Spec. App. filed August 16, 1994) (Bloom, J., concurring).

<sup>103</sup> 627 A.2d 30 (Md. Ct. Spec. App. 1993).

<sup>104</sup> *Id.* at 39.

<sup>105</sup> *In re Adoption/Guardianship*, No. 1887 at 4 (Bloom, J., concurring). The order appointing the attorney was not at issue on appeal. *Id.* (Bloom, J., concurring).

supporting the allegations in the petition. The reports frequently admitted the incompetency of the client and recommended that guardianship be granted. We also found that there were few contested cases and that attorneys seldom advocated for a limited order.

2. *Hearings*—Our survey revealed that the hearings held in guardianship cases vary widely from county to county. We noted by observation of several hearings that trials in guardianship cases frequently consist of stipulations by the attorneys to all matters, with each case lasting only a few minutes. Rule R77 of the Maryland Rules has provided that, where the alleged disabled person has neither consented to the appointment of a guardian nor waived a jury trial, the court shall empanel a jury.<sup>106</sup> Where no jury is required, and the petition is not contested, the court may hold “such hearing as in its discretion it deems proper.”<sup>107</sup> The rule further provides that if the petition is contested, the court shall hold a hearing as in any other contested matter.<sup>108</sup> Our study revealed that there were no jury trials in the 214 cases we studied, although fifty-five (27%) of the cases were contested.

Certainly, in today’s world, a jury trial is not necessary or desirable in every guardianship case. In fact, it is the rare case in which a jury would be tactically advantageous to the ADP; and judging by the sheer numbers of cases filed each year in large jurisdictions, a required jury trial in each guardianship case would soon overwhelm the trial system. On the other hand, the present system errs on the side of court efficiency, by not holding hearings at all, or holding only the most *pro forma* on the record proceeding in which no testimony is taken.

3. *Presence of the Alleged Disabled*—The Maryland guardianship statute provides that the alleged disabled person “is entitled to be present at the hearing unless he has knowingly and voluntarily waived the right to be present or cannot be present because of physical or mental incapacity . . . [and] is also entitled to present

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<sup>106</sup> Md. R. R77.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

evidence and to cross-examine witnesses.”<sup>109</sup> Our findings indicated that the alleged disabled person was present at the hearing in only a few cases. In none of the cases reviewed did the alleged disabled person testify. If any testimony was taken, it was usually from the petitioner or from a treating physician.

This failure of the ADP to be heard or even to be seen in the courtroom is a central failure of the present system. Historically, the disabled person clearly had the right to heard. An exception was made only in unusual circumstances:

[I]t is in general, proper, and may, in some cases, be indispensably necessary, that the person alleged to be of unsound mind should be brought before the jury who are convened by the sheriff to ascertain his intellectual condition. . . . But if he is out of the State at the time, or it is impracticable, or, as in this instance, it would be attended with great inconvenience and injury to the afflicted person, to have him brought before the jury, his actual presence may be dispensed with . . . .<sup>110</sup>

The ADP’s voice was not heard by the court in *any* of 214 cases we examined. One could surmise that in all of those cases, the ADPs were so debilitated that it was impossible for them to communicate with their attorney, to come to court or to address the court, but the reports of the attorneys indicate otherwise. One said, the ADP “adamantly refused to consent to surgery for his hernia.” Another said that the ADP did not want her son (petitioner) to be her guardian because he “does not do what she wants and treats her like a daughter. She asked him to buy her stockings and leave her money to purchase snack foods. He has not complied with those requests.” The court appointed the son guardian of her person and property anyway.

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<sup>109</sup> MD. CODE ANN., EST. & TRUSTS § 13-705(e) (Supp. 1995).

<sup>110</sup> Campbell’s Case, 2 Bland. 195, 217 (Md. Ch. 1840).

There is no bright line dividing the competent from the incompetent. The American Bar Association's National Guardianship Symposium in 1989 urged recognition that "incapacity may be partial or complete," and that "[t]he contemporaneous expressed wishes or spoken choice of the ward should be given due consideration."<sup>111</sup> To deny ADPs the opportunity to express to the trial court such opinions as the ones quoted above, denies them their right not to be deprived of life, liberty, or property without due process of law.<sup>112</sup> Given that Maryland's statute so clearly intends that the ADP be present and be heard, the ADP's absence from the proceedings is another missing piece of the guardianship puzzle.

4. *Timing*—The length of time from the filing of a petition to the issuance of the final order varies widely from jurisdiction to jurisdiction. Members of the Task Force complained about both extremes, saying that in Baltimore City the process was too quick, and in outlying counties, it was too long. Both extremes can adversely affect the ADP. If the process does not allow enough time for notice to all parties and for an adequate search for alternatives to guardianship, unnecessary guardianships may occur. If the process takes too long, the ADP can suffer from a medical condition that goes untreated while waiting for a guardian to be appointed who can consent to treatment.

In Baltimore City, we found that the majority of the cases were completed in two weeks or less; in the other three jurisdictions, most cases took three to four months. The numbers in Baltimore City are greatly influenced by the large number of petitions filed by hospitals. These petitions are sparked by the fact that insurance companies and Medicare will not pay for a hospital stay if the patient no longer needs acute care. If the patient is incompetent and has no one to act for her, the hospital cannot discharge her or arrange for her admission into another care facility. In the city, where there are large numbers of

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<sup>111</sup> ABA COMM'N ON THE MENTALLY DISABLED & COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, GUARDIANSHIP: AN AGENDA FOR REFORM (1989), reprinted in 13 MENTAL & PHYSICAL DISABILITY L. REP. 274, 310 (1989).

<sup>112</sup> U.S. CONST. amend. XIV, § 1. See also U.S. CONST. amend. V (as applicable to the federal government).

poor and homeless individuals, this is a frequent occurrence. Hospitals have resorted to filing guardianship petitions in order to effect a quick discharge of a patient, thus avoiding a large bill that the patient cannot pay and the hospital cannot collect, and avoiding the patient's needless exposure to the hospital environment.

The Baltimore City Circuit Court has devised a special expedited process for these cases. One criticism of the system is that it results in large numbers of public guardianships, because public agencies are appointed when there is no friend or relative involved. Another is that the process moves too swiftly for there to be an adequate investigation, a thorough search for surrogate decision makers, or consideration of alternatives to guardianship. A group of judges from the circuit court met with those involved in the Baltimore City guardianship process during 1995 to try to ameliorate these problems. The group devised a comprehensive referral form which hospital social workers are to complete and send to the potential public guardian agency to verify that they have conducted a full investigation and that the guardianship is necessary.

However, this does not address the charges that quick hearings result in due process violations, inadequate representation of the ADP, and premature evaluations of disability. More work needs to be done to ensure that the process is both fair and expedient.

5. *Limited Orders*—The Maryland guardianship of the person statute provides for a limited guardianship order in every case: "The court may grant to a guardian of the person only those powers necessary to provide for the demonstrated needs of the disabled person."<sup>113</sup> We found, however, that in about two-thirds of the cases, the orders were not limited in any way, and that judges generally granted full plenary guardianships, giving the guardian all the powers enumerated in the statute. In fact, in some jurisdictions, the court requires the petitioner to submit the court's form order with the petition. Contrary to the statute, the standard form grants full powers to the guardian of the person whether the petition requests them or not.

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<sup>113</sup> MD. CODE ANN., EST. & TRUSTS § 13-708(a) (Supp. 1995).

#### IV. CONSISTENCY WITH NATIONAL FINDINGS

The results of our study are largely consistent with the findings of the 1994 National Study of Guardianship Systems conducted by the Center for Social Gerontology in Ann Arbor, Michigan.<sup>114</sup> The study examined guardianship practices in 726 cases involving persons over the age of sixty. Data was collected by volunteers who observed hearings, examined court files and interviewed petitioners. The study was conducted in ten states and thirty jurisdictions.<sup>115</sup>

The National Study produced results similar to ours in the areas of (1) the role of the attorney, (2) the use of medical evidence, (3) the conduct of hearings, and (4) the use of limited guardianship orders.

##### *A. Role of Attorneys*

According to the National Study, only about one-third of ADPs were represented by an attorney during the guardianship process, although states such as Maryland, which require legal representation of ADPs, reported a much higher rate of attorney representation, e.g., 97% in Florida. Our findings were consistent, with attorneys appointed in every case we studied.

The National Study found that in cases where the attorney for the ADP was present at a hearing on the guardianship petition, the lawyer spoke 87% of the time.<sup>116</sup> However, the Study found that court-appointed attorneys generally seemed to be less active in representing their clients than counsel obtained directly by the ADP or their family.<sup>117</sup> Authors of the National Study speculated that court-appointed attorneys may not be very active in representing their clients either because the need for appointment of a guardian is so apparent that they do not feel it is useful to participate in proceedings, or because they are unsure of their role when the best interests of the ADP appear to conflict

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<sup>114</sup> LAUREN BARRITT LISI ET AL., CENTER FOR SOCIAL GERONTOLOGY, NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDINGS AND RECOMMENDATIONS (1994).

<sup>115</sup> *Id.* at 7. The 10 states were California, Colorado, Florida, Indiana, Kansas, Michigan, Minnesota, New York, Oregon, and Washington. *Id.*

<sup>116</sup> *Id.* at 86.

<sup>117</sup> *Id.* at 57.

with the ADP's wishes.<sup>118</sup> The authors opined that the relative inexperience of attorneys accepting court appointments or the low rate of compensation paid for court appointments may also be factors in the performance of court-appointed attorneys.<sup>119</sup> A comparison of statements made by ADPs and by their attorneys revealed that the attorneys spoke less often in court about functional abilities or disabilities and the ADP's desires for or opposition to the guardianship than did the ADPs themselves. For example, 10% of attorneys addressed the functional abilities of the ADP versus 43% of ADPs, 12% of attorneys addressed willingness to accept help or guardianship versus 43% of ADPs, and 10% of attorneys spoke about objections to assistance or objections to the guardianship versus 25% of ADPs.<sup>120</sup>

The authors concluded that "attorneys may often be confused or uncertain of the role they are to play, i.e., whether they are advocating for the [ADP's] best interests or the [ADP's] stated desires."<sup>121</sup> But they also pointed out that "it is unclear how widespread this confusion and uncertainty is. It is also unclear whether it stems from appointment of attorneys to cases in which the [ADP] expresses no opinion, or whether it stems from ignorance of the need to play the role of the zealous advocate."<sup>122</sup>

#### *B. Medical Evidence*

Similar to the results of our study in Maryland, the National Study found that medical evidence was present in the court file in most cases, but medical testimony was rarely presented at the hearing; and unless statutorily mandated, few court-ordered medical evaluations were performed.<sup>123</sup> The authors concluded that this lack of medical testimony

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<sup>118</sup> *Id.* at 86.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 87.

suggests that practices in this area are apparently influenced by more than statutory requirements. Although medical evidence is not always statutorily required, courts frequently have such evidence before them. We speculate that it is largely a matter of the individual judge's preference for medical evidence that determines whether such evidence is often present.<sup>124</sup>

### C. Conduct of Hearings

Most significantly, the National Study found that the majority of guardianship hearings lasted no more than fifteen minutes and that 25% of hearings lasted less than five minutes. Cases in which the respondent was present lasted the longest, on average thirty-seven minutes.<sup>125</sup>

In at least two-thirds of the cases, the ADP was absent from the hearing. In only half of the cases was there a discussion at the hearing as to why the ADP was not present.<sup>126</sup> In cases where the ADP was present, he or she testified 77% of the time.<sup>127</sup> Fifty-six percent voiced objections to receiving help, although only 25% explicitly rejected the idea of guardianship.<sup>128</sup> The ADP's presence at the hearing was associated with a lower rate of guardianships, not because of outright denial of the petition, but because the case was more likely to be delayed or proceedings suspended.<sup>129</sup>

Consistent with experience in Maryland, statutory provisions seemed to have little effect on the respondent's attendance at the hearing. The authors speculated that

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<sup>124</sup> *Id.* at 88.

<sup>125</sup> *Id.* at 81.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 83.

<sup>128</sup> *Id.*

<sup>129</sup> Other studies have shown that the presence of the ADP at the hearing did not result in fewer petitions being granted. See *id.* at 83 n.160 (citing Pat M. Keith & Robbyn R. Wacker, *Implementation of Recommended Guardianship Practices and Outcomes of Hearings for Older Persons*, 33 GERONTOLOGIST 81 (1993); Kris Bulcroft et al., *Elderly Wards and Their Legal Guardians: Analysis of County Probate Courts in Ohio and Washington*, 31 GERONTOLOGIST 156, 162 (1991)).

[t]he courts' failure to press for respondent attendance may be rooted in the judges' paternalistic view of the proceedings, along with a belief that most guardianships are warranted, and a desire not to upset or distress the respondent. In addition, the pressure of an overburdened court docket undoubtedly influences the court's decision whether to press for the involvement of the respondent. Anecdotal evidence suggests that many judges have experienced instances when a respondent's attendance at the hearing has proved very disruptive or has contributed little additional or useful information. As demonstrated by our data, the presence of the respondent also greatly lengthens the duration of the hearing.<sup>130</sup>

#### *D. Limited Orders*

The findings in Maryland are very consistent with results of the National Study with regard to limited guardianships. In the National Study, 94% of guardianship requests were granted; in the Maryland study, 95% were granted. The National Study found that "[a]part from New York, no state denied more than 9% of the guardianship petitions filed" and that overall, "only 13% of the guardianships . . . placed limits on the authority of the guardian."<sup>131</sup> In Maryland, a state which requires a limited order in guardianship of the person cases, 37% of orders were limited in those cases and 7% were limited in guardianship of the property cases. The authors concluded that "[t]his data suggests that either petitions for guardianship . . . are rarely filed unless the appointment of a fully-empowered surrogate decisionmaker [sic] is appropriate, or courts are granting some guardianships . . . inappropriately."<sup>132</sup>

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<sup>130</sup> *Id.* at 82-83.

<sup>131</sup> *Id.* at 88.

<sup>132</sup> *Id.*

The National Study found evidence for both of these conclusions. On the one hand, their data showed that many respondents had serious cognitive impairments.<sup>133</sup> On the other hand, their study findings indicated that over 20% of respondents did not need assistance making medical decisions, yet 19% of respondents who understood their medical condition had a full guardian appointed.<sup>134</sup> The fact that at least in one state--Minnesota--plenary guardianships are rarely granted raises questions about the appropriateness of their widespread use in other states. While the nationwide rate for limited guardianships, excluding Minnesota, is 5%, the limited guardianship rate in Minnesota is 54% of the guardianship cases and 33% of the conservatorship cases. The authors attribute this difference to

Minnesota's statutory scheme which encourages use of limited guardianships; petition forms which allow petitioners to request only limited authority; and court order forms which enumerate the separate powers that may be delegated to a guardian, making it easy for the court to check off only those powers it feels the respondent can no longer exercise. The Minnesota data clearly suggests that with some changes in procedures and possibly in judicial attitudes, many more limited guardianships . . . could be granted nationally.<sup>135</sup>

#### *E. Role of Judges*

The National Study prompted us to conduct a second survey, by suggesting that the attitudes of judges play an important role in the way guardianship cases are handled. One of the major conclusions of the National Study was that "judicial practice, rather than state law, most influences the outcome and handling

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<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 89.

of guardianship hearings.”<sup>136</sup> In particular, the authors hypothesized that “paternalism, economic concerns and the pressures of an overburdened court docket seem to foster” the judicial perception that due process protections are unwarranted.<sup>137</sup>

A clear illustration of this is the failure of judges to require the presence of the ADP at hearings which will decide whether to deprive them of all control of their person and property. This is true despite the fact that “legislators and policy makers have widely recognized, through legislation, the importance of having the respondent present at guardianship hearings.”<sup>138</sup> The lack of judicial adherence to the statutes raises questions such as whether the judges hearing these cases “continue to believe that the respondent’s presence is generally unnecessary.”<sup>139</sup> If this is true, legislative changes to guardianship statutes will have little effect on practice.

The findings of both the Maryland and National studies suggest that “judges may often not agree with the need for due process reforms or may agree with them in theory, but fail to institute them due to practical considerations.”<sup>140</sup> Given this possibility, the authors of the National Study have recommended the need for studies of judicial attitudes toward recent guardianship legislative reforms, especially due process reforms. They suggest such studies “may reveal the need to modify existing provisions to remedy problems identified by the judges,” or alternatively, may indicate the need to strengthen existing provisions of guardianship laws and “to work with judges to promote the use of such provisions.”<sup>141</sup> In our effort to answer the guardianship puzzle, we decided to pursue this idea.

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<sup>136</sup> *Id.* at 96.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.* at 83.

<sup>139</sup> *Id.*

<sup>140</sup> LAUREN BARRITT LISI & SHARI BORSINI, CENTER FOR SOCIAL GERONTOLOGY, NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: IMPLICATIONS FOR ADDITIONAL RESEARCH 10 (1994).

<sup>141</sup> *Id.*

## V. THE SECOND SURVEY--JUDICIAL ATTITUDES

By surveying judicial attitudes towards adult guardianship cases, we hoped to test the speculations about judicial attitudes in the National Study and to discern whether the guardianship statute is ill suited to the practical problem presented to the court, or whether other factors are at play.

### A. Data Collection

The sample for the study included eighty-three judges in the state who hear adult guardianship petitions, as identified by court clerks in each of Maryland's twenty-four counties. We composed an initial draft survey form and distributed it to a small number of guardianship judges for their review. We received significant comments from several and made modifications redesigning the survey so that respondents would be anonymous.

The final survey instrument consisted of three parts. Part I set out a hypothetical guardianship case raising several thorny issues a judge might face in deciding guardianship of the person and property matters. The case was specifically designed to focus on issues raised by members of the Maryland Office on Aging Task Force on Guardianship, by our earlier study, and by the National Study. The questions we posed were designed to elicit the views of judges regarding the presence and testimony of the ADP at hearings, the appropriate role of the attorney in representing the ADP, and the extent of medical evidence the responding judge would require in a particular case where the ADP's incompetency was unclear. The facts of the hypothetical were distilled from actual cases heard in various Maryland jurisdictions. The hypothetical we posed to the judges was as follows:

A case for guardianship of the person and property comes before you. The alleged disabled person (hereafter ADP) is a seventy-five year old woman who is living alone in her own home. The local Department of Social Services (hereafter DSS) has filed the petition, which alleges that because of illness and disease, the ADP is no longer able to maintain herself at home. The petition alleges that the ADP has no relatives and lists only social agencies as interested persons. The petitioner asks

1. That a guardian be appointed to consent to the placement of the ADP in an adult foster home or other suitable supervised setting capable of meeting her needs, and

2. To appoint a guardian of the property to handle her Social Security income and her savings (believed to be small), and to sell her property.

A Social Services summary filed with the petition states that the case was referred to the Adult Protective Services Division for assistance with fiscal matters because the ADP was showing signs of Alzheimer's Disease. She has refused the services offered by Adult Protective Services. The summary states that her utility bills have gone unpaid and that her taxes were just recently paid, removing her home from the tax sale list. The ADP keeps a neat and clean home but DSS believes it is becoming too much for her. The report states that the ADP does not want to give up doing for herself. It concludes that she is a strong person and unwilling to let go and accept help from others.

Two doctors' certificates are filed with the petition. The first says that the ADP suffers from "dementia, probably vascular" and that the extent and probable duration of the disability is "indefinite." The other certificate says that the disability is "dementia, possibly Alzheimer's" and that the prognosis is "poor."

The attorney appointed to represent the ADP files an answer denying most of the allegations in the petition, and his report which quotes the ADP as saying that she does not want a guardian, that she can handle her own affairs, and that her nephew can help her. However, her attorney states in the report that in his opinion the ADP is disabled and he recommends that a guardian be appointed.

The case is before you. The attorneys are at the counsel table and the ADP and the DSS social worker who investigated the case are seated in the gallery of the courtroom.

We followed the hypothetical case with a series of nine questions. We asked to what extent, on a scale of one to five,

with one being "agree strongly" and five being "disagree strongly," the judges agreed or disagreed with the following statements:

1. I would allow the attorneys to stipulate to the appointment of a guardian of the person and the property without any testimony.
2. I would require the taking of testimony even if the attorneys agree that it is not necessary.
3. I would ask for testimony from the petitioner (the DSS social worker).
4. I would ask for testimony from the ADP.
5. I would ask for testimony of at least one physician.
6. I would ask for medical testimony or documentary evidence of the ADP's incapacity in addition to the two doctors' certificates filed with the petition.
7. I would ask for medical testimony or medical documentation, such as a geriatric evaluation, regarding the ADP's ability to perform various functions.
8. I believe the attorney for the ADP has properly represented his client.

The ninth question was an open-ended follow-up question which asked what the judge would do if, as in the hypothetical case, the report filed by the ADP's attorney quotes the ADP as saying she does not want or need a guardian, but her attorney states in open court that he believes she needs a guardian and recommends that one be appointed. Options included, "Would you follow the recommendation of the attorney? Question the attorney about the conflict? Question the ADP? Appoint another attorney to advocate for the position of the ADP?"

The last question of Part I asked to what extent the judge would rely on the following to make a decision in this case:

- a. Report of the court-appointed attorney
- b. Testimony of the ADP
- c. Testimony of the petitioner
- d. Medical certificates if they are entered into evidence
- e. Written medical evidence other than the doctors' certificates
- f. Testimony from at least one certifying doctor

Part II of the survey asked judges more general questions related to their own experience in hearing guardianship cases. The first series of questions, for example, asked the judges about their views on the role of the attorney for the ADP in a guardianship case. One question asked whether the judge's order appointing an attorney for the ADP states that the attorney is to represent the ADP, investigate the situation and report to the court, or both. Next, the respondents were asked whether they agreed or disagreed with the following statements:

a. Attorneys who represent the ADP in your court should act as advocates for the ADP and represent and defend the ADP's position.

b. Attorneys who represent the ADP in your court should substitute their judgment for that of the ADP, act as guardians *ad litem* if they disagree with the ADP's assessment of his or her own needs, and report to the court what they feel is in the best interest of the ADP.

c. When the ADP is unable to communicate a position, attorneys who represent the ADP in your court should convey to the court what the attorney believes is in the best interest of the ADP.

The judges were asked whether they generally required an attorney representing an ADP to file a report and to what extent they relied on the information in the attorney's report.

The next series of questions focused on the judge's views about the presence and testimony of the ADP at the hearing:

Assuming that the ADP is physically able and wants to testify, and assuming that such testimony would not hurt the case of the ADP, should the attorney for the ADP call the ADP to testify?

In the guardianship cases you have heard, how often has the ADP appeared in court?

When the ADP has appeared, what was his or her reaction to the experience?

When you have had testimony from an ADP, has it been helpful?

Finally, we asked whether the judge believed that if physically able the ADP should (a) always appear in court, (b) never appear in court, or (c) sometimes should appear in court.

The next group of questions explored practices and views regarding limited guardianship orders. We asked how often judges issue orders in guardianship of the person cases which limit the powers of the guardian to those "necessary to provide for the demonstrated need of the disabled person." The following question listed possible factors which influence a decision not to issue a limited order:

- the request for powers made by the petitioner
- the position taken by the attorney for the ADP
- the requirements of the statute
- the advanced age of the ADP
- the young age of the ADP
- the functional ability of the ADP
- the permanency of the disability which incapacitates the ADP
- the fact that the ADP has a serious mental disability with no physical disability (e.g., mental retardation)

-- the fact that the ADP has a severe physical disability but no mental disability (e.g., Parkinson's Disease)

The judges were asked to agree or disagree with the following statements:

If the court finds that the ADP meets the statutory criteria for guardianship, then the guardian should be vested with full statutory guardianship powers.

Issuing a limited guardianship order will likely cause the case to have to be heard again when a new need arises.

I would write more limited guardianship orders if the evidence demonstrated that the ADP retained some functional abilities.

I would write more limited guardianship orders if forms existed which could be easily tailored to meet the needs of the ADP, such as a list of the powers which a judge could check to grant authority to the guardian, e.g., authority to consent to a specific medical procedure, or authority to change the abode of the ADP to a more restrictive setting.

Next we attempted to discern judicial attitudes in general towards guardianship cases. The National Study suggested that judges harbor a "paternalistic" attitude toward guardianship cases, or a notion that guardianship is generally for the good of the ADP.<sup>142</sup> Several of our questions attempted to probe this area. We asked the judges to agree or disagree, on a scale of one to five, with the following statements:

I believe that most petitioners have the best interest of the ADP at heart and that the petitioners believe that a guardianship is necessary.

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<sup>142</sup> LISI, *supra* note 114, at 82.

In virtually all cases, persons who are the subject of the guardianship proceedings need a guardian.

Where there is no apparent controversy between the parties, a guardianship case should not be conducted as an adversarial proceeding.

We also questioned judges about how the pressures of an overcrowded docket affected the handling of guardianship cases. Judges were asked to what extent they agreed or disagreed with the following statements:

The pressures of an overcrowded docket keep me from devoting more time to guardianship cases.

When my court docket for the day includes a contested custody case, a criminal sentencing, a contested termination of parental rights case, and a guardianship of the person and property petition, I want to get the guardianship case over first because I expect it to be the least controversial and least time consuming matter before me that day.

We sought to assess judicial attitudes toward the elderly and disabled, as some have speculated that such attitudes may contribute to a judge's handling of cases involving these groups. We asked the judges to indicate whether they agreed or disagreed with the following statements:

Mental confusion is an inevitable consequence of old age.

The vast majority of older people are self-sufficient.

After a certain age, typically about age eighty, most people will need assistance with activities of daily living

A person who is generally incompetent may still be able to make decisions about specific matters, such as where they want to live and who they trust to handle their money.

The next questions asked judges to compare the importance of due process protections in guardianship cases to the importance of such protections in criminal cases and involuntary civil commitment cases.

Finally, the last question in Part II asked judges to indicate how helpful certain types of information or training might be to them. The choices ranged from "forms which would allow easy crafting of a limited guardianship order" to "information on the ways that doctors determine capacity."

Part III of the questionnaire asked judges for information about themselves. Two questions related to their experience with close relatives or friends who had mental disabilities or who had become incompetent. Another asked how long the respondent had been a circuit court judge, approximately how many guardianship cases the person had heard in the last two years, approximately how many adult guardianship cases were heard in their circuit in 1994, and how guardianship cases are assigned in their circuit.

Nearly every question left space for the respondent to add written comments or to explain his or her answer.

On August 26, 1995, we mailed a survey form to each of the eighty-three circuit court judges who had been identified as handling guardianship cases. Our cover letter indicated that the questionnaire could be answered completely anonymously. We provided each judge with a self-addressed, stamped, return envelope.

### *B. Results*

Of the eighty-three judges who were sent the questionnaire, only nineteen (23%) responded. This result precludes us from drawing generalized conclusions about the answers. Nevertheless, the responses do provide some information regarding how judges view these cases. We are willing to present the results because so little data about judicial attitudes exists, and because judicial attitudes seem to be central to solving the puzzle of the handling of guardianship cases.

The judges who did respond to our survey represented a significant variation in their length of time on the bench, from two years to twenty-one years, and in the numbers of guardian-

ship cases heard in the last two years, from five to over 100. Based on the numbers of guardianship cases heard in their circuit in 1994, it appears that our respondents came from a variety of jurisdictions within the state. Four respondents answered from 0 to 25 cases, one answered from 26 to 50, two answered from 51 to 100, one answered from 100 to 200, and two answered over 200. Nine judges were unsure of the answer to this question.<sup>143</sup>

*1. Part I: Hypothetical Case*—In response to the hypothetical fact pattern, there was considerable agreement among the respondents that they would not allow the attorneys to stipulate to the appointment of a guardian of the person and the property without any testimony. Seventeen of nineteen respondents said they disagreed with this way of dealing with the case; eleven strongly disagreed. One judge said specifically that a judge who agreed to the stipulation was not judging or exercising discretion but “abandoning” his role to lawyers “and the convenience of the moment.” One judge said he would not do it where the ADP objects and that he would require additional information.

Fifteen of nineteen judges said that they would require the taking of testimony in the case even if the attorneys agreed that it was not necessary. One stated that he would require more information “but not necessarily testimony, it could be in the form of documentary evidence.” Seventeen of nineteen respondents also stated that they would ask for testimony from the petitioner (the DSS worker) and sixteen of nineteen responded that they would ask for testimony from the ADP.

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<sup>143</sup> We believe that judges from jurisdictions hearing a smaller number of cases are probably over-represented in the survey respondents, producing biased results. One judge from Baltimore City, the jurisdiction which hears the largest number of guardianship cases in the state, indicated an unwillingness to respond to the questionnaire because he believed it was inappropriate for judges to answer questions in a survey which required them to prejudge a situation which might later come before them. We received letters from two other Baltimore City judges saying that they were declining to respond to the questionnaire because guardianship cases are handled well in Baltimore City and the survey did not address any of the problems which may exist, but which were being addressed by a special committee of the court. The possible lack of representation of Baltimore City judges is significant because that jurisdiction would have the largest number of cases filed by hospitals and public agencies as opposed to cases filed by family members and other persons interested in the ADP.

Nine of nineteen said that they would generally not ask for the testimony of a physician in a case like the one presented. One who was inclined not to call a physician to testify said that he thought the physician would only say what is in his or her recent report and added—"they [physicians] are busy people." Another said he would not call the doctor unless this was a substantive issue. Eight out of eighteen were unsure whether they would ask for the testimony of at least one physician. A judge said he would ask for the testimony only if a question were raised about the physician certificates. Another said it would depend how the ADP did in his or her testimony. Only two of the nineteen indicated that they would definitely ask for the testimony of a physician in the circumstances presented.

The respondents were much more divided about whether they would ask for medical testimony or documentary evidence of the ADP's incapacity in addition to the two doctors' certificates filed with the petition. Seven said they would very likely or likely ask for such medical testimony or documentary evidence. One of these stated that "if the medical and other evidence were close [as to capacity], I would consider appointing a physician specializing in gerontology to examine the ADP in regard to specific issues before the court. The medical certificates are often very general and describe a condition rather than capacity or limitations." Seven of the judges were uncertain whether they would ask for such testimony and five indicated that they most likely or very likely would not.

Responses were also mixed on the question of whether they would ask for medical testimony or documentation regarding the ADP's ability to perform various functions. Ten judges seemed unsure or indicated that it would depend on how the other testimony turned out. Four stated they would likely or probably ask for such testimony or documentation and five said that they very likely or probably would not.

Several of the judges believed the attorney for the ADP had properly represented his client—eight of nineteen believed that he did. However, five judges were uncertain, two felt strongly that the attorney had not properly represented his client, one

felt that he probably had not appropriately represented his client, and three did not answer, one stating he would not be able to answer until after he considered all of the evidence.

When asked what they would do if, as in the facts presented, the report filed by the ADP's attorney quotes the ADP as saying she does not want or need a guardian, but her attorney states in open court that he believes she needs a guardian and recommends that one be appointed, most respondents said they would question the attorney and the ADP about the conflict. One said he would also question the DSS worker. One stated he would accept the attorney's report but would appoint another attorney to represent the respondent and would insist on a jury trial. Two judges said they definitely would not appoint another attorney--one said he saw no need for another attorney to be appointed except to render an independent recommendation and the other said he would not appoint another attorney unless, after hearing the testimony, he felt that the attorney was not acting in the ADP's best interest. A third judge said he would consider appointing another attorney but would be reluctant to do so because of the delay that it would cause. One judge responded that "the attorney has done his/her job for the client and discharged his obligation as an officer of the court; it is not their job to decide the case."

## 2. Part II

*a. Role of the Attorney*—Regarding the practice of judges in appointing an attorney, a slight majority of judges, ten of the nineteen respondents, stated that their orders do both--state that the attorney is to represent the ADP *and* investigate and report to the court. One who responded that his orders did both said: "The attorneys I appoint have demonstrated a level of professionalism, compassion and concern for ADPs and families that permits me to trust them to do both for the ADP and court." Only two judges indicated that their order of appointment states that the attorney is only to represent the ADP. One of these judges stated, however, that "Rule R76 requires an investigation and the filing of a written report of the attorney's findings." Five stated that they order the attorney to "investigate the situation

and report to the court." Finally, two judges stated that they appoint separate attorneys to represent the person and to investigate and report.

Ten judges said they agreed or agreed strongly with the statement that attorneys for the ADP should act as an advocate four said they were unsure or it would depend on the facts, four said they disagreed or disagreed strongly with the statement, and one did not respond saying it would depend on the ADP's ability to understand and express a position.

There was significant variation in responses to the statement that the attorneys should act as a guardian *ad litem*, but almost half of the judges, nine of nineteen, said they agreed or strongly agreed. One of these said "definitely, in cases where there is ample evidence of the ADP's incompetency." Five responded in the middle of the road--they did not disagree or agree. One who responded in this manner stated that the lawyer "[s]hould report what they feel is the best interest, but protect the rights of the ADP with trial if necessary." Another who responded that he neither agreed nor disagreed with the statement said: "This option is phrased too extremely to permit a helpful response. The reality is a bit more nuanced." Five judges responded that they either disagreed or disagreed strongly with the statement.

There was much greater agreement about the statement, "When the ADP is unable to communicate a position, attorneys who represent the ADP in your court should convey to the court what the attorney believes is in the best interest of the ADP." Sixteen judges agreed with this statement and eleven of them "agreed strongly." One judge who agreed with the statement said, "They [the attorneys] should present the facts of the matter. The facts will ultimately drive the best interest vehicle to the proper destination." One judge did not agree or disagree with the statement and two judges disagreed, although not strongly.

Eighteen of the nineteen judges stated that they always or almost always require an attorney representing an ADP to file a report. One stated that he never did. Of those eighteen who said that they required a report, all said that they relied heavily or quite a bit on the attorney's report. One said "depends on the attorney" and another said "along with the petitioner's information--usually they coincide."

*b. Due Process in Guardianship Cases*—Fourteen of the judges responding felt that due process protections in a guardianship case were just as important as in a case involving a criminal matter in which the defendant is at risk of incarceration. As one judge said, "In both situations the court is depriving a person of their freedom, liberty and independence." One judge stated that he felt due process was less important in guardianship cases, another said it depends on the facts of the case, and a third said that "the cases are not comparable." One judge did not respond to the question. Similarly, fifteen judges said that they thought due process was just as important in a guardianship case as it was in a case for involuntary civil commitment. In support of this position, one judge said, "If a person is confined where he/she doesn't want to be it makes no difference whether it is jail, a nursing home or house arrest." Three judges said that it depends on the facts of the case.<sup>144</sup>

*c. Presence of ADP in Court*—All of the respondents agreed that if the ADP is physically able and wants to testify, the attorney for the ADP should call the ADP to testify. Yet, in the guardianship cases they had heard, eleven of nineteen had never or rarely had cases where the ADP appeared in court. Two, in contrast, stated that the ADP always appeared in their court, although one qualified his answer by stating "always if not confined in a nursing home and never if physically unable to attend." Of those who had the ADP appear in court, eight said that they felt the ADP usually handled it well or very well, and four replied that the ADP was somewhat distressed or confused by the proceedings. Judges were somewhat divided about whether they felt the ADP's testimony was helpful. Nine said they found it helpful and five stated that they found it unhelpful. Those who said it was usually not helpful gave the following reasons: "often the testimony is not really relevant--but merely a recitation of the ADP's wishes for a better world"; "sometimes they are so removed from reality to clearly justify opposing view of their attorney"; and "they usually personalize situation in terms of feelings for or against other family members--court's role is objective."

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<sup>144</sup> One judge did not respond to the question at all.

Those who found the ADP's testimony helpful gave these reasons: "sometimes the ADP can enlighten the court with his/her motives. Court can better assess situation" and "in some cases, a personal appearance by the ADP helps me to better evaluate the need for appointment of a guardian."

As to whether the ADP should appear in court if physically able, ten judges stated that the ADP should always appear in court although some qualified this statement by stating "unless the respondent is adamantly opposed to attending" or "unless would present mental or emotional stress." Nine stated that they should "sometimes" appear in court. None felt that the ADP should never appear in court. One judge said there was no need for the ADP to be present if everyone agrees. Another said, "[U]sually, the greater the evidence for appointing a guardian, the lesser the need for the ADP's personal appearance. An ADP, though physically able to appear may be so incompetent as to cause a disturbance in the courtroom. Additionally, appearing in court may be too upsetting for some ADPs." A third said, "In most contested cases I've heard, it is *who* should be appointed guardian rather than *if* one is to be appointed."

*d. Limited Orders*—Eight judges responded that they never or rarely issue orders which limit the powers of a guardian, and seven responded that they almost always do. One who responded in this latter group stated, "The least restrictive amount of involvement in the ADP's life is what I think the law expects, and leaves the ADP with as much independence (and self worth) as they can handle."

Most judges said the requirements of the statute was the greatest influence on their decision to issue a limited guardianship order--a total of fourteen said that this heavily influenced their decision. The next most influential factors were the functional ability of the ADP. Nine stated this heavily influenced their decision and six said it influenced their decision a good deal. Regarding the fact that the ADP had a serious mental disability with no physical disability such as mental retardation, ten stated that this heavily influenced their decision. Five stated that it influenced their decision a good deal. The next most influential factor was the fact that the ADP had a severe physical disability but no mental disability such as Parkinson's Disease.

Six stated that this factor heavily influenced their decision to issue a limited guardianship order and seven stated that it had a good deal of influence on their decision. Also influential, but less so, were the requests for powers made by the petitioner and the position taken by the attorney for the ADP.

There was significant variation in responses to the statement "If the court finds that the ADP meets the statutory criteria for guardianship, then the guardian should be vested with full statutory guardianship powers." Ten judges agreed with the statement, two of whom strongly agreed. Six judges disagreed and three of these disagreed strongly. Three did not agree or disagree. Eight judges agreed that issuing a limited guardianship order would likely cause the case to be heard again when a new need arose; four others disagreed and six did not agree or disagree.

Fifteen judges said they would write more limited guardianship orders if the evidence demonstrated that the ADP retained some functional abilities. One said they probably would not and two were uncertain. Nine judges said they would write more limited guardianship orders if forms existed which could be easily tailored to meet the needs of the ADP, such as a list of the powers which a judge could check to grant authority to the guardian, such as authority to consent to a specific medical procedure, or authority to change the abode of the ADP to a more restrictive setting. Seven said that even if such forms were available they would probably not or definitely not write more limited guardianship orders.

*e. Impact of Docket*—Only one judge stated that the pressures of an overcrowded docket kept him from devoting more time to guardianship cases. Fourteen said that this fact did not keep them from devoting more time to these cases, and three were uncertain. One did not respond but stated that "the pressures of an over crowded [sic] docket prevent me from considering [these cases] as early as they should be."

Only four judges agreed that when their court docket for the day includes a contested custody case, a criminal sentencing, a contested termination of parental rights case, and a guardianship of the person and property petition, that they want to get the guardianship case over first because they expect it to be the least controversial and least time-consuming matter that day. Nine

said that they did not expect it to be the least controversial and time consuming of these cases. Five judges answered that this question was not relevant to the way guardianship cases were heard or scheduled in their jurisdiction.

*f. Views About Guardianship Cases Generally*—Fifteen of the respondents felt that most petitioners have the best interest of the ADP at heart and that the petitioners believe that a guardianship is necessary. Four judges disagreed with this sentiment. Ten judges believed that in virtually all cases, persons who are the subject of guardianship proceedings need a guardian and four did not. Five were uncertain or did not have an opinion. Twelve judges agreed, six of whom strongly agreed, that where there is no apparent controversy between the parties, a guardianship case should not be conducted as an adversarial proceeding. Six judges disagreed with this view, two of whom strongly disagreed, and one judge neither agreed nor disagreed with the statement.

*g. Attitudes Toward Elderly and Disabled*—Fifteen of the respondents disagreed with the statement that mental confusion was an inevitable consequence of old age. Nine of those judges strongly disagreed with this statement. Two concurred with the statement. Nine thought that the vast majority of older people are self sufficient, whereas three disagreed. It is noteworthy that several judges were unsure of exactly what age “older people” signified. Twelve judges disagreed with the statement that “after a certain age, typically about age eighty, most people will need assistance with activities of daily living.” Two judges agreed and five had no opinion.

Eleven judges agreed with the statement that a “person who is generally incompetent may still be able to make decisions about specific matters, such as where they want to live and who they trust to handle their money.” One judge qualified his answer to this question by stating that “they may be able to make decisions, but they may not be responsible for an informed decision.”

*h. Helpful Information*—Information or training that would be most helpful to respondents included “information about less restrictive alternatives to guardianship, including volunteer and public assistance programs for the elderly and persons with disabilities.” Twelve judges said this information would be help-

ful or very helpful. Eleven judges believed that "forms which would allow easy drafting of a limited guardianship order" would be helpful or very helpful. Finally, regarding "exploration of ways to enhance the presence of the ADP in court," ten judges stated that this would be helpful or very helpful. "Information about the interrelationship of the Maryland guardianship statute and the Maryland Health Care Decisions Act and related Opinions of the Attorney General" was also important to judges, as was information about "tools which could be used in court to enhance communication with the elderly and persons with disabilities." Nine said this information would be helpful or very helpful. Considered least helpful was information about the role of counsel in guardianship proceedings.

*i. Personal Experience*—Thirteen of the nineteen respondents said they had or have had close relatives or friends with mental disabilities or who had become incompetent. Experience in communication directly with persons with disabilities varied significantly. Six judges said they had little or very little experience and seven said they had a good deal of experience with this.

Finally, one judge ended his questionnaire with a lengthy comment about how he handled guardianship cases:

In order to appreciate my answers, maybe my philosophy in ADP matters would help. While you did not ask the age of the judges hearing these matters, it would be interesting to know if judges of differing ages approach these cases from different points of view.

I am 57; both my parents are deceased--neither from any conditions relevant here. My mother-in-law is 82, lives alone with a daytime visiting housekeeper/companion. My wife handles all her business affairs. . . . There were and are judges who competently handle trial and appellate cases in their seventies and maybe some in their eighties.

I treat each of these cases as if this were my own mother or father (or mother-in-law) and ask, what would be best for them if the situation was theirs, and what would they want. As I have gotten older, I also

have to ask myself, would I want some judge doing this to me in 10 or 20 years? If I can answer yes, I do it; If I can't, the golden rule is all the law I need.

### C. Discussion

1. *Role of the Attorney*—The attorney appointed to represent the ADP is key to solving the guardianship puzzle. Depending on the role that attorney plays, the ADP may or may not receive substantial due process in the proceeding which deprives her of her rights as an adult citizen. Under the present system, due process is a hit or miss affair.

Both of our studies confirm that confusion reigns regarding what role the appointed attorney is to play. The study of case files shows that attorneys generally do not take an advocate's role, though the words of the statute and the legislative history indicate that is what the legislature intended. The survey of judges shows that those who responded are divided about or are unsure of the attorney's proper role.

We obtained surprising results when we asked judges which role the attorney should take. The questions were designed with the expectation that the respondent would choose one role or the other; however, only six of the nineteen responding judges did so. Most wanted the attorney to represent the ADP *and* to act as a guardian *ad litem*.

When asked about their orders appointing an attorney for the ADP, slightly over 50% of the judges said their orders state that the attorney is both to represent the ADP and to investigate and report to the court. Twenty-six percent said they order the attorney only to investigate and report to the court, and 10% said they order the attorney only to represent the ADP. However, 95% of the judges said that they always or almost always require an attorney representing an ADP to file a report. Seemingly, all judges want a report from the appointed counsel, regardless of what the order of appointment says, and despite the fact that a full report may contain information contrary to the stated position of the ADP.

In the hypothetical posed in the survey of judges, the attorney files a report which quotes his client's opposition to guardianship, yet he argues for the appointment of a guardian for her in court. Over 40% of the judges thought the attorney in the case study had acted properly in representing his client. Many others were unsure or declined to answer the question. Only 10% felt that the attorney had acted inappropriately.

The evolution of the dual role of the attorney in guardianship cases creates significant questions about the adequate representation of the ADP and due process. The legislature clearly intended that the proceeding would be adversarial, by providing for a hearing, an optional jury trial, and court-appointed counsel. In such a setting, the usual role of the attorney, and the one dictated by the Rules of Professional Conduct,<sup>145</sup> would be to see that a defense, if one is available, is raised; that the client's views are advocated in court; and that the petitioner meets the burden of proof. In short, the attorney would insure that the ADP had his or her day in court. But instead, the role of the ADP's attorney has become that of a court investigator, who provides the court with facts and information that normally would be presented and proven by the petitioner. Why the petitioner has been relieved of the duty to prove his case without assistance from opposing counsel is one of the more puzzling questions surrounding guardianship.

As we noted above, Judge Bloom pointed out in his concurring opinion in *In re Adoption/Guardianship No. 93187050/CE166964*, part of the problem lies with the original order appointing the attorney. When a court appoints one attorney to fill both roles, he opined, "there is always at least a potential conflict of interest."<sup>146</sup>

However, the appointing judge will be hard put to decide which role the attorney should fill until the statute and the Rules of Procedure are in agreement. Both the legislature and the

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<sup>145</sup> See MARYLAND RULES OF PROFESSIONAL CONDUCT Rules 1.2, 1.4 (1995); see also MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7, DR 7-101 (1983).

<sup>146</sup> *In re Adoption/Guardianship No. 93187050/CE166964*, No. 1887, slip op. at 2 (Md. Ct. Spec. App. filed August 16, 1994) (Bloom, J. concurring).

court of appeals, through the Standing Committee on Rules of Practice and Procedure, should act to conform Rule R76 and the relevant statutory provision, Estates and Trusts section 13-705(d), so that the duties of appointed counsel are clearly defined.<sup>147</sup>

Some are fearful that to assign an advocate's role to the attorney will cause there to be protracted and unnecessary hearings in every case, which will clog court calendars, and will put family members who are acting for the best interest of their loved one through a trying, adversarial ordeal. However, to act as an advocate is not a license to raise frivolous defenses or to stand obdurately on procedural points. This is prohibited by Rule 3.1 of the Maryland Rules of Professional Conduct which provides that "[a] lawyer shall not . . . defend a proceeding . . . unless there is a basis for doing so that is not frivolous."<sup>148</sup> The Rule goes on to state however, that "[a] lawyer may nevertheless so defend the proceeding as to require that every element of the moving party's case be established."<sup>149</sup> This is the least the attorney for the ADP should do.

Even the attorney who represents an ADP who unquestionably needs a guardian has a role to play. That attorney can advocate by ensuring that all who are interested have received service of process, that no less restrictive alternative is available, that the proposed guardian is a trustworthy fiduciary, and that the order is tailored to meet the specific needs of the client without unnecessarily depriving her of rights. This can be done in the attorney's investigatory stage and through negotiation with opposing counsel. In fact, an attorney who opposes a guardianship because less restrictive alternatives are available will often persuade the petitioner to dismiss the case because a guard-

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<sup>147</sup> The Office on Aging Task Force drafted a revision of the guardianship of the person statute in which the role of the attorney was clearly spelled out, and more authority was given to the attorney to waive the hearing and jury trial when the ADP was unable to communicate with the attorney. For a more detailed discussion of possible legislative changes, see Hopkins, *supra* note 92. See also W. VA. CODE § 44A-2-7 (Supp. 1995). The recently passed West Virginia guardianship statute lists twenty duties the attorney for the disabled may perform. *Id.*

<sup>148</sup> MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 3.1 (1995).

<sup>149</sup> *Id.*

ianship is not necessary, thus saving the court's time and finding a more expedient, less expensive solution to the problem which prompted the filing of the petition.

Clarifying the proper role of the attorney for the ADP is the first and most important step in solving the due process puzzle, because that attorney can effect better, more equitable results in all aspects of the guardianship proceeding.

2. *Conduct of the Hearing*—The vast majority of judges answering our survey felt that due process protections in guardianship cases were just as important as in cases involving a criminal matter or involuntary civil commitment. Further, there was strong agreement that the pressures of an overcrowded docket did not keep judges from devoting more time to guardianship cases, contrary to the suspicions of the National Study authors. Based on this finding, if more attorneys for the ADP advocated for the wishes of their clients and for more limited orders, these judges would support that stance, regardless of the added time it required in a given case.

However, there was strong agreement among the judges that most petitioners have the best interest of the ADP at heart and believe that the appointment of a guardian is necessary. This may confirm the speculation of the authors of the National Study that judges have a preconceived, paternalistic attitude toward guardianship cases which influences their handling of those hearings. Nevertheless, there did not appear to be bias against the competence of elderly persons, for most judges agreed that mental confusion was not an inevitable consequence of old age, and disagreed that after a certain age, typically about age eighty, most people will need assistance with activities of daily living.

In responding to the hypothetical we posed, virtually all (90%) of the judges said that they would not allow the attorneys to stipulate to the appointment of a guardian without any testimony. There was also considerable agreement that they would require the taking of testimony in the case even if the attorneys agreed that it was not necessary. Almost all stated they would ask for testimony from the petitioner (the DSS worker) and from the ADP.

Judges were divided about whether they would ask for more medical testimony or documentary evidence of the ADP's incapacity and the ADP's functional ability, in addition to the two doctors' certificates filed with the petition in the case study. This finding ties into our hypothesis above that judges are willing to accept the "medical" assessment and report of the ADP's attorney and do not feel the need to delve into the capacity or functional ability of the ADP with additional medical evidence or testimony.

In short, although our responding judges would probably not be opposed to listening to more testimony about the abilities or disabilities of the disabled person, they would not actively seek it out in most cases. In a sense, this issue is not one over which the judge has much control. He or she is presented with evidence and is asked to make a decision based on what is presented. It is the job of the attorney for the disabled person to ensure that the petitioner proves his case by clear and convincing evidence, by presenting adequate medical evidence. It is also that attorney's job to present whatever positive evidence of the person's functional ability exists, and to argue for a limited order which recognizes those abilities.

3. *Presence of the ADP*—All of the judges responding to the survey agreed that ADPs should be called to testify as long as they are physically able, although almost 60% had never or rarely heard cases where the ADP appeared in court. The desire of all the judges to hear from the ADP is surprising in light of our first survey, which found that hearings are almost always very brief, testimony is rarely, if ever, given, and that the ADP did not testify in any of the 214 cases surveyed. The difference in the survey results may be due to the particular characteristics of the ADP described in the case study, who said that she did not want a guardian, that she could handle her own affairs and that her nephew could help her. But the case is not so unusual, for such a response is typical of a person in the early stages of Alzheimer's Disease, or one who is developmentally disabled. Persons who can express their wishes to this extent are often the subjects of guardianship proceedings.

Judges generally accept the attorney's representation that the person cannot be present because of a disability. Undoubtedly, in many cases the ADP is physically unable to rise from her bed or is so mentally unstable that an appearance in court would be pointless. However, as courts have pointed out, there is no bright line dividing those with disabilities from those without disabilities, and many persons with disabilities are able to express their wishes on certain points very clearly.<sup>150</sup>

Again, the role of the attorney is crucial here. Rule 1.14(a) of the Maryland Rules of Professional Conduct makes it clear that the attorney should treat the disabled client as any other to the greatest extent possible.<sup>151</sup> It is the duty of one who is *representing* the subject of a guardianship petition to ask, as any other client would be asked, if she wishes to attend the hearing and "talk to the judge." The attorney should then abide by the decision and arrange for the appearance. Arranging for transportation to court and providing for the person's comfort while in the courthouse can be difficult, and that difficulty may be one reason why more ADPs do not appear; but the opportunity to be present is essential to the client being accorded due process before she is deprived of important civil liberties.

Access to the courthouse for those with disabilities may be a significant problem. The Americans with Disabilities Act requires governments to provide access and accommodation, however.<sup>152</sup> Local courts must ensure that the courthouse is barrier free and accessible for those in wheelchairs.<sup>153</sup> Courtrooms can be made more user friendly for those with disabilities through electronic listening devices for the hearing impaired. Judges and court personnel can be educated about communication with those with mental or physical disabilities.<sup>154</sup>

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<sup>150</sup> See *In re M.R.*, 638 A.2d 1274, 1285 (N.J. 1994); *In re Link*, 713 S.W.2d 487, 496 (Mo. 1986).

<sup>151</sup> See MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1995).

<sup>152</sup> 42 U.S.C.A. § 12132 (West Supp. 1995); 28 C.F.R. §§ 35.101-.190 (1995).

<sup>153</sup> 42 U.S.C.A. § 12132 (West Supp. 1995); 28 C.F.R. §§ 35.101-.190 (1995).

<sup>154</sup> COURT-RELATED NEEDS OF THE ELDERLY AND PERSONS WITH DISABILITIES 43-44 (American Bar Ass'n & National Judicial College eds., 1991).

Given the drastic effects of a guardianship order, in which an adult is reduced to the legal status of child, stripped of the right to make personal choices about her life, it is only fair that she be afforded every opportunity to communicate with the decision maker about her wishes.

4. *Limited Guardianship Orders*—The failure of the courts to order limited guardianships in most cases is one of the most puzzling aspects of the present system. The statute is clear about this requirement,<sup>155</sup> and the legislative history reveals that the drafters cared deeply about this provision of the reform bill of 1977.<sup>156</sup> However, our first study showed that limited orders were issued only in 37% of the cases reviewed. The results in the second survey paralleled this figure: the responding judges were almost equally divided in their practice of issuing limited guardianship orders—42% said they rarely or never issued such orders and 38% said that they almost always do. Others were uncertain or did not respond. Similarly, in response to the question about whether a full plenary guardianship should be granted if the court finds that the ADP meets the statutory criteria for guardianship, 53% of judges felt that such plenary orders should be granted and 32% felt that they should not.

Even if forms were available to make it easier for judges to issue a limited guardianship order, many would not use them. Forty-seven percent said they would issue more limited orders if such forms were available but 37% said they would not. However, there was general agreement with the statement “I would write more limited guardianship orders if the evidence demonstrated that the ADP retained some functional abilities.”

Again, we must look to the court-appointed attorney for help. If the attorney presents evidence about the person’s functional *abilities* as well as her disabilities, and if the attorney then argues for a limited order based on those abilities, at least these judges would be willing to limit the order.

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<sup>155</sup> MD. CODE ANN., EST. & TRUSTS § 13-708(a) (1991).

<sup>156</sup> Legislative History of Bills: H.B. 381 (1977) (on file with the Senate Judicial Proceedings Comm. of the Md. Gen. Assembly).

There are numerous ways that guardianship orders can and should be limited to make the guardianship as unintrusive as possible in the life of the ADP, and to cause the least drain on the court system and social service agencies who become court-appointed guardians. The process should start before the petition is filed by closely examining the need for a guardian. Before filing the petition, the attorney for the petitioner should be certain that there is a real need or a specific situation which cannot be addressed in any other way, for example, the ADP owns a piece of property which cannot be sold to pay for her care because she is not competent to sign the deed. A close examination of the problem and a search for alternate solutions before the petition is filed is the most effective way to limit guardianships.

The Health Care Decisions Act,<sup>157</sup> passed in 1993, eliminates the need for a guardian where medical decisions need to be made. Under the Act, a relative or close friend can make medical decisions for a person determined to be incompetent by two doctors.<sup>158</sup> Before the Act was passed, surrogates could only *consent* to certain kinds of care; thus, a guardian of the person was needed to make medical decisions about *refusing* or *terminating* life sustaining treatment. This is no longer the case, and a surrogate decision maker has all of the authority that a guardian would have to make medical decisions.<sup>159</sup> In fact, a guardian in this situation is at a distinct disadvantage. A surrogate under the Health Care Decisions Act has *more* decision making authority than most guardians. The guardianship statute says that a guardian of the person may not make decisions about life-sustaining care without the specific authorization of the court unless that authority has been granted in the initial court order.<sup>160</sup> Since most court orders do not specify this, and some expressly prohibit it, a relative who is appointed guardian must go back to court to get permission to refuse or terminate life-sustaining

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<sup>157</sup> MD. CODE ANN., HEALTH-GEN. §§ 5-601 to -618 (1994 & Supp. 1995).

<sup>158</sup> *Id.* § 5-605.

<sup>159</sup> *Id.* § 5-605(a)(2).

<sup>160</sup> MD. CODE ANN., EST. & TRUSTS § 13-708(c) (Supp. 1995).

medical treatment. The same relative who is *not* a guardian would not have to go to court, but would be able to make the decision to terminate or refuse treatment in conjunction with the person's doctors. Thus, it is a disservice to a relative and to the ADP to appoint a guardian for the purpose of making medical decisions when a non-guardian could make a quicker decision without the burden of going back to court. Often a petition prays for the appointment of both a guardian of the property *and* a guardian of the person when only a guardian of the property is needed. Both attorneys and the judge should scrutinize each case to be sure that there is not a less restrictive alternative under the provisions of the Health Care Decisions Act.

A less restrictive alternative to a guardian of the property is the Social Security Administration's representative payee program.<sup>161</sup> Under this program a relative, friend, or volunteer is appointed to handle the Social Security funds of a person who is not able to manage money themselves.<sup>162</sup> The procedure works like a mini-guardianship: the person applying to be the representative payee must have a doctor certify that the person cannot handle her monthly benefits; the beneficiary is given notice that her benefits may be handled by another; and once appointed, the representative payee must account to the Social Security Administration annually, as a guardian of the property does to the court.<sup>163</sup> The benefit to appointing a representative payee is that the paper work is less cumbersome, the process is quicker and less costly, for no lawyers or court appearances are involved, and no guardian's fees are subtracted from the funds of the disabled person. When an ADP has only Social Security income, it is overkill to appoint a guardian of the property, and the attorney for the ADP should argue such in court. Even if some property exists at the time of the guardianship hearing and a guardian is required to sell it and use the proceeds for nursing home care, the court order could limit the authority of the guardian so that once the money is expended, the guardian is directed to move to

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<sup>161</sup> 42 U.S.C.A. §§ 405(j), 1383(a) (West Supp. 1995).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

have a representative payee appointed and to have the guardianship dismissed. This would save the court time in processing annual fiduciary reports and would save the money for the ADP, from whose meager Social Security income a guardian of the property can collect a yearly fee for doing what a relative or volunteer could easily do. Even in situations in which the ADP has no relatives or friends to act for her, many nursing homes act as representative payee for their patients; and volunteer representative payee programs exist all over the state for this purpose.

Requiring the guardian to terminate the guardianship when the ADP is a nursing home resident receiving Medical Assistance benefits would save the state money as well. Presently, when a guardian takes his yearly fee from the Social Security funds of a nursing home resident, those funds are unavailable to pay the person's nursing home bill. The Maryland Medical Assistance Program must make up the difference to the nursing home, thus indirectly paying the guardian of the property for an unnecessary service. The court could limit the order so that the guardianship of the property is terminated when the assets of the estate are depleted and the person begins receiving Medical Assistance benefits.

Variations on limited court orders are boundless. They can be crafted in as many ways as creative attorneys and judges can conceive. For example, orders can be written to authorize a specific medical diagnostic procedure and can be scheduled to expire if the results of the test are negative. Guardianships are often sought to consent to dental care for those with developmental disabilities, because those persons often tend to push away a dentist. An order can be crafted to authorize only dental care on an as-needed basis, leaving that person with all other decision making authority intact.

Limited guardianships were clearly important to the drafters of the 1977 reform and are clearly required by the present law.<sup>164</sup> The burden of guardianship on the life of the ADP will be significantly lessened if judges and attorneys take the time and effort to craft each order to the specific needs presented by each situation.

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<sup>164</sup> MD. CODE ANN., EST. & TRUSTS § 13-708(a) (1991).

## VI. RECOMMENDATIONS

Our surveys confirmed many of the guardianship anecdotes told by members of the Office on Aging Task Force on Guardianship. We learned that while the present system does afford the ADP adequate due process in the initial stages of the process, after that point there are significant problems.

Those who defend the present system say that if serious problems existed, more cases would be appealed, overturned, and sent back to the trial courts. However, when a person has been found to be disabled, her ability to appeal a judicial order is greatly compromised. She faces great practical problems, such as how to find a lawyer, how to travel to a lawyer's office, and especially, if a guardian of her property has been appointed, how to pay a lawyer. If her attorney in the original guardianship has taken the position that she is incompetent and her views should therefore be disregarded, her demands for an appeal will fall on deaf ears.

These practical problems are minor compared to the legal hurdle raised by some, who argue that once a person has been found to be disabled, she no longer has the ability to retain a lawyer or to contract for services. Thus, even if an appeal is taken, these persons argue, it should be dismissed because the attorney bringing it has no standing, having been retained by one who has no legal competency to contract. This argument was raised by opposing counsel and by both the trial and appellate courts in *In re Adoption/Guardianship No. 93187050/CE166964*.<sup>165</sup>

If this reasoning is taken to its logical conclusion, it would mean that once a circuit court issues a final order in a guardianship case, the disabled person can never hope to overturn it.

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<sup>165</sup> *In re Adoption/Guardianship No. 93187050/CE166964*, No. 1887, slip op. at 4 (Md. Ct. Spec. App. filed August 16, 1994) (Bloom, J. concurring).

There are no Maryland cases on point, and the statutes address it indirectly,<sup>166</sup> but at least one state court has rejected the argument.<sup>167</sup>

Given the legal and practical barriers a person faces after she has been found to be disabled, the paucity of appellate cases does not mean that the system is working well.

The implications of our findings lead us to make several recommendations:

First, we believe it is imperative that Subtitle R of the Maryland Rules be revised to conform it to the guardianship statute and to correct the confusion concerning the role of the attorney for the ADP. As we stated above, Rule R76 allows the court to appoint an attorney to investigate and report to the court.<sup>168</sup>

Second, revisions to the statute should be made in several areas. The law should be amended to accommodate the court's strong desire for an independent information report. Some states send a court visitor, a court evaluator, or a guardian *ad litem* to investigate each case and file a report. This person may or may not be an attorney. In some states the visitor is a trained volunteer, in others an employee of the state.<sup>169</sup> The important element is that the reporter is independent of an attorney appointed to represent and advocate for the ADP.

Further, the petitioner should be required to provide the court with more information in the petition and in the doctors' certificates about the functional abilities of the alleged disabled person

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<sup>166</sup> Nowhere does Maryland law explicitly prohibit an appeal nor does it explicitly provide that one found to be disabled cannot contract. Section 13-706(b) of the Estates and Trusts Article states that appointment of a guardian of the person is not evidence of incompetency of the person and "[d]oes not modify any civil right of the disabled person unless the court orders, including any civil service ranking, appointment, and rights relating to licensure, permit, privilege or benefit under any law." MD. CODE ANN., EST. & TRUSTS § 13-706(b) (1991). Section 13-709(j) does specifically allow the disabled person to appeal the emergency appointment of a temporary guardian of the person. *Id.* § 13-709(j). Estates and Trusts § 13-221 and Maryland Rule R80 allow the disabled person to petition for termination of a guardianship, but on the basis that the disability has ceased. *Id.* § 13-221; MD. R. R80.

<sup>167</sup> *In re Estate of Thompson*, 542 N.E.2d 949, 952 (Ill. App. Ct. 1989).

<sup>168</sup> See *supra* note 101 and accompanying text.

<sup>169</sup> See, e.g., D.C. CODE ANN. § 21-2033 (1981); ME. REV. STAT. ANN. tit. 18A, § 5-311(B) (West 1981 & Supp. 1995); N.Y. MENTAL HYG. LAW § 81.09(b)(1) (Consol. Supp. 1996); TENN. CODE ANN. § 34-11-107(a)(1) (Supp. 1995).

and about the specific need for guardianship. Next, the authority of the attorney to waive important rights of the alleged disabled person when she cannot communicate and clearly needs a guardian should be clarified. And last, the right of the disabled person to retain an attorney and to appeal the appointment of a guardian should be articulated in the statute.

Third, it is important that attorneys appointed to represent the ADP receive training about the importance of due process protections for their clients and about their role in the proceedings. Such training should also cover alternatives to guardianship, the benefits and elements of functional assessments of those with disabilities, and ways to work with clients of questionable competence.

Fourth, judges need more information about resources for the elderly and persons with disabilities. This includes material about less restrictive alternatives to guardianship, such as representative payees for public benefits and surrogate decision makers for medical decisions, volunteer and public agency assistance programs for the elderly and persons with disabilities, forms that would allow easy crafting of a limited guardianship order, ways to enhance the presence of the ADP in court, and tools and techniques for communicating with the elderly and persons with disabilities.

Fifth, legislators and policy makers should search for creative ways to provide for those in need without resort to the drastic effects of guardianship. New York, and Texas, for example, have programs in which panels of professional volunteers make major medical decisions for incompetent persons, thus avoiding formal court proceedings.<sup>170</sup> Sweden has replaced the use of guardians with personal support services such as mentors, administrators, "kontakt" persons, and personal assistants. The emphasis there is on collaborative personal planning which recognizes that the supported person needs assistance but that he or she can contribute to decisions in every area of life.<sup>171</sup>

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<sup>170</sup> See Hopkins, *supra* note 92, at 118, 138 n.267.

<sup>171</sup> Stan S. Herr, *Maximizing Autonomy: Reforming Personal Support Laws in Sweden and the United States*, 20 J. ASS'N FOR PERSONS WITH SEVERE HANDICAPS 213 (1995).

## CONCLUSION

The due process puzzle is missing several pieces, and the question remains: should action be taken to bring actual practice into conformity with the written statute, should the written statute be amended to conform to actual practice, or more likely, should both the written statute and the actual practice be modified to find a fair and equitable middle ground? Those involved in the system need to work collaboratively to craft answers to the guardianship puzzle which meets the needs of all.

## AFTERWORD

While this article was being edited, the Maryland Court of Appeals published for comment the long-awaited revisions to the Maryland Rules governing guardianships.<sup>172</sup> The proposed Rules, if adopted in their proposed form, will go a long way to clarifying the problems described in this article.

In particular, the troubling Maryland Rule R76, concerning the appointment of an attorney to investigate and report to the court has been completely rewritten.<sup>173</sup> The proposed Rule 10-106(a) provides for the appointment of an attorney to represent an alleged disabled person who does not have counsel of his or her own choosing.<sup>174</sup> The Reporter's Note describes the conflict between the present Rule and the statute, and states that the Rule does not describe the lawyer's role, for that is governed by Rule 1.14 of the Maryland Rules of Professional Conduct and is a matter of substantive law.<sup>175</sup>

In a separate section, Rule 10-106(c) states that the court may appoint "an independent investigator to investigate the facts of the case and report written findings to the court."<sup>176</sup> The Reporter's Note states that the Rule does not require that the investigator be an attorney.<sup>177</sup>

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<sup>172</sup> 22:24 Md. Reg. P-16 (Nov. 24, 1995) (proposed Nov. 6, 1995).

<sup>173</sup> *Id.* at P-20 (Proposed MD. R. 10-106).

<sup>174</sup> *Id.* (Proposed MD. R. 10-106(a)).

<sup>175</sup> *Id.* at P-21 (Proposed MD. R. 10-106(a) reporter's note).

<sup>176</sup> *Id.* (Proposed MD. R. 10-106(c)).

<sup>177</sup> *Id.* (Proposed MD. R. 10-106(c) reporter's note).

Reading the proposed Rule with the language of Estates and Trusts section 13-708(a), it should be clear that an attorney appointed to represent an alleged disabled person is to represent the client, not to investigate and report to the court. If the court desires a report, a separate investigator should be appointed. This important change should have a direct impact on the quality of representation which ADPs have in guardianship cases, for their attorneys will be free to let the petitioner prove the case and the court to decide it, without having to make a recommendation which may be against their client's wishes.

The period for public comment on the proposed changes ended on January 12, 1996. However, the revision of Subtitles R and V of the Maryland Rules of Procedure are part of a larger package of revised and proposed rules. The court has not yet set a schedule for public hearings on any of the proposed changes, and we can only speculate as to the date of their final adoption by the court. We urge the court to act on the revisions of Subtitles R and V quickly, in order to remedy many of the problems we have described here.