

1-18-2017

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Recommended Citation

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**Finding Autonomy: The Impact of Judicial Discretion for Disabled Individuals in
the American Guardianship System**

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January 18, 2017**

Abstract

This study examines the conflict between guardianship and the American disability rights movement, specifically the shift from a medical to a capability model of disability. Legal guardianship presents judges with a dilemma of favoring individual autonomy or societal protection. This dichotomy manifests in the construction of state statutes where legislators can influence judicial discretion and sway decisions. Through analysis of state statutes, case law, and interviews with judges in Connecticut and Minnesota, this study found that higher levels of discretion do not necessarily translate to increased protection of individual autonomy or the use of alternatives to guardianship. The research points to the conflict between respect for autonomy and factors of legal inertia as reasons why these alternatives are not used in practice regardless of discretion level. This study prescribes education on these less restrictive alternatives as a possible way to bridge the gap between guardianship and disability rights.

Introduction: Guardianship – What it is and why it is problematic

When an individual turns eighteen they become a legal adult, an integral change in status in terms of legal responsibilities and accountability. Included in this definition of adulthood is the presumption that the person in question has full ability to express and utilize their legal capacity. Courts define legal capacity as essentially the ability to make decisions for oneself without help. This definition oversimplifies what decision-making truly represents. Nandini Devi, quoting Gerald Quinn, articulates the term as “providing the legal shell through which to advance personhood in the life-world. Primarily, it enables persons to sculpt their own legal universe — a web of mutual rights and obligations voluntarily entered into with others...Legal capacity opens up zones of personal freedom.”¹ The removal of these personal freedoms by the American legal system can only occur in one of two ways: incarceration and guardianship.

Guardianship proceedings determine legal capacity; if an individual is found to be incompetent or to have become incompetent, the court can remove their right to legal capacity and appoint an individual or institution to make certain decisions in their stead. Guardianship of adults applies to two main groups: the elderly and the disabled, the latter of which will be the subject of this study. Guardianship arrangements can be entered into voluntarily or involuntarily depending on whether the subject of the proceeding, often called the respondent or the ward, petitions for the arrangement themselves or another entity petitions the Court. During the proceedings, the Court determines the scope of the

¹ Nandini Devi, “Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities,” *Journal of Law, Medicine & Ethics* 41, no. 4 (Winter 2013): 792, doi:10.1111/jlme.12090.

guardianship and what decisions the person will be allowed to make and which decisions will be ceded to the guardian. All-encompassing plenary guardianships or full guardianships are the most widely utilized type of arrangement despite the fact that limited or partial guardianships, which only removes the bare minimum of rights necessary for decision-making better protect the respondent's civil liberties.² Limited guardianship is underutilized due to a combination of factors such as the lack of awareness around, and the general difficulties associated with them in terms of emergency medical and financial decisions, which cannot be made in a timely manner with these arrangements in place.³ This forces judges to confront the realities of guardianship from the standpoint of balancing individual rights with what is practical.

Guardianship as a concept is rife with dualities: "protective and oppressive... beneficent but also controlling."⁴ Ideally, guardianship or its related equivalent for financial affairs, conservatorship, is only entered into when the Court believes that not doing so will jeopardize the safety of an individual, an individual's property, or society. The Courts themselves are often referred to as courts of "last resort" due to restriction of individual rights that could be imposed.⁵ Despite the acknowledgment by the court system and society that these arrangements represent a severe encroachment on rights,

² Lawrence A. Frolik, "Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform," *Arizona Law Review* 23 (1981): 599.

³ *Ibid.*

⁴ Mary Joy. Quinn, *Guardianships of Adults: Achieving Justice, Autonomy, and Safety*, Springer Series on Ethics, Law, and Aging; Springer Series on Ethics, Law, and Aging. (New York: Springer Pub. Co., 2005), 47, Table of contents
<http://catdir.loc.gov/catdir/toc/ecip052/2004024858.html>.

⁵ Brenda K. Uekert and Richard Y. Schaffler, "Caseload Highlights: The Need for Improved Adult Guardianship Data," Examining the Work of the State Courts (Court Statistics Project, November 2008), 1,
http://www.courtstatistics.org/~media/Microsites/Files/CSP/Highlights/15_2_Adult_Guardianship_Data.ashx.

they are surprisingly commonplace. While there is no definitive statistic for the number of adults under plenary or limited guardianship in the United States, it was estimated in 2011 to be 1.5 million people a number that has tripled since 1995.⁶ Guardianship is regarded philosophically as something that should be avoided wherever possible and the law itself does provide safeguards about how these arrangements should be used. Nevertheless, there is a divide between theory and practice that not only demonstrates a conflict within the system itself but also a clash with the larger disability rights movement.

For judges, adult guardianship unavoidably means limiting the freedom of individuals, through the machinery of the state, in order to protect them, while seeking to advance their rights as far as possible--both through the protections themselves and by restraining the state when possible. Due to this tension, the modern American guardianship system takes on a very different posture from where much of the American disability rights movement has been, with its univocal emphasis on inclusion and autonomy. In order to boost individual autonomy, some judges have the option of ordering petitioners to seek less restrictive alternatives to guardianship but these alternatives may not necessarily be applicable to intellectually disabled individuals in the same way that they could be applicable to the elderly or other individuals under guardianships. There are alternatives to plenary guardianship, including supported decision making, a concept that retains the right to make decisions with the disabled individual but which currently lacks broad statutory support or general awareness. This

⁶ J. Matt Jameson et al., "Guardianship and the Potential of Supported Decision Making With Individuals With Disabilities," *Research and Practice for Persons with Severe Disabilities* 40, no. 1 (March 1, 2015): 36–51, doi:10.1177/1540796915586189.

study asks why judges use plenary guardianship as much as they do, or put another way why they are constrained in their use of available alternatives. While statutory reform can direct judges towards certain goals, it is possible that individual judges also have the ability to sway the system towards the larger disability movement through judicial discretion, specifically how their decisions shape the types of guardianship used (if necessary) and the requirements for guardians within individual cases.

This paper will trace the roots of the conflict between the American disability rights movement and the modern guardianship system and presents judicial discretion as a possible way to bridge this conflict. It will focus on two jurisdictions, Connecticut and Minnesota states that represent high and low discretion, respectively. By exploring these differences in discretion the paper analyzes the similarities and differences in how judges make their decisions within the umbrella of state statutes, and how these decisions shape the larger narrative around the autonomy/protection dichotomy.

Guardianship in America

Models of Disability and the American Disability Rights Movement

The history of the disability rights movement in the United States helps to elucidate how a shift towards autonomy occurred in other areas of life of disabled individuals and points to directions for the future of guardianship. Movements surrounding individuals with different types of disabilities have existed in the United States beginning as early as the mid nineteenth century when social reformers such as Dorothea Dix advocated for better treatment of disabled individuals confined to

institutions.⁷ However, it was not until the 1960s and 70s that a collective social movement around disability formed and began to truly effect policy.⁸

This movement is connected to various models of disability that emerged over time as society tried to determine how to address disabled individuals. Early paradigms included the “Treatment” or medical model of disability and the “Compensation and Rehabilitation Model,” which focused on biological and economic perspectives respectively.⁹ The paradigm that emerged in the 1960s and 70s departed from these former definitions into a variety of what are called “social models” of disability. Social models of disability center around the idea that “it is society’s treatment of impairments, not the impairments themselves, which limit people.”¹⁰ Within this paradigm of social models of disability is a specific American version referred to by Vaughn as the “Civil Rights Model,” due to the way supporters of this model helped galvanize political action regarding the disabled in multiple arenas of American life.¹¹ It encouraged both political activism among disabled individuals themselves and recognition at the government level that led to policy implementation. Integral to this shift in paradigms was the emergence of what Richard Scotch refers to as the “‘disability rights movement’ rather than simply a ‘disability movement,’” one that focused on the disabled as a cohesive group of

⁷ Jacqueline. Vaughn, *Disabled Rights: American Disability Policy and the Fight for Equality* (Washington, D.C.: Georgetown University Press, 2003), 33, Table of contents <http://catdir.loc.gov/catdir/toc/fy037/2002013813.html>.

⁸ Maya Sabatello and Marianne Schulze, *Human Rights and Disability Advocacy*, Pennsylvania Studies in Human Rights; Pennsylvania Studies in Human Rights. (Philadelphia: University of Pennsylvania Press, 2014), 13.

⁹ Vaughn, *Disabled Rights*, 7,8.

¹⁰ Kevin Barry, “Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights,” *Berkeley Journal of Employment and Labor Law* 31, no. 2 (2010): 203.

¹¹ Vaughn, *Disabled Rights*, 9.

individuals rather than as different groups defined by their specific disabilities.¹² The civil rights model of disability thus treats the disabled as a class of individuals, an approach designed to mimic the laws' treatment of race and sex. The main message of this model states, "Because our attitudes and institutions exclude certain people based on their impairments... we have a moral obligation to alleviate that exclusion."¹³ This movement saw the emergence of the rhetoric "Nothing About Us Without Us!," essentially a rallying cry that the best way to implement policy for the disabled would be to actually ask them what would be best for their needs.¹⁴ This America-specific model will hereby be referred to as the capability model of disability as it focuses on how society can best support the capabilities of disabled persons. The capability model remains important to the guardianship system today and has brought many to question the validity of a legal arrangement that removes individuals' rights based on perceptions of impairment, which falls in line with former models of disability rather than the modern one.

The emergence of federal law on the subject of disability echoed the shift in paradigm from medical to capability focused and provides the grounds on which statutes concerning guardianship have been written and revised. The first major piece of legislation linked to the paradigm shift was the 1973 Rehabilitation Act, specifically Section 504, which addressed discrimination in any programs that received federal

¹² Ibid., 71.

¹³ Barry, "Toward Universalism," 212.

¹⁴ Frédéric Mégret, "The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?," *Human Rights Quarterly* 30, no. 2 (2008): 14, doi:10.1353/hrq.0.0000.

funding.¹⁵ Section 504 of the Rehabilitation Act essentially acted as a precursor for the Americans with Disabilities Act of 1990 (ADA), often considered the cornerstone of disability rights legislation. The Americans with Disabilities Act of 1990 represented the culmination of efforts of various members of the disability rights movement including nongovernmental organizations, disabled individuals and key congressional contacts. These congressional contacts spanned party lines and included disability rights attorney Evan Kemp a Republican insider who served as a speechwriter for President George H.W. Bush, the President himself, Iowa Senator Tom Harkin, and Massachusetts Senator Edward Kennedy.¹⁶ All of these individuals had personal connections to disabled individuals, and Kemp actually had a form of muscular dystrophy. These personal connections helped to bridge party lines on the issue and eventually led to the passage of the ADA despite business opposition. The ADA definition of disability was subject to multiple lawsuits and led to the narrowing of the definition of disability by the Supreme Court. The ADA was amended in 2008 to address this narrowing, “providing nearly universal nondiscrimination protection... [that] reliev[ed] people of the need to show that they are different because of the way their impairments limit them. Now all they need to show is that *others* limited them because of their impairments.”¹⁷ Despite court decisions and general rhetoric moving American disability law closer to the capability model, guardianship and the grounds on which legal capacity is determined remains in conflict with this forward shift.

¹⁵ Vaughn, *Disabled Rights*, 60.

¹⁶ *Ibid.*, 102–03.

¹⁷ Barry, “Toward Universalism,” 283.

The evolving American political landscape around the disability rights movement is integrally connected to the concept of guardianship both in terms of reform for how guardianships are approached and in assessing the shortcomings of the current system. The models of disability that emerged during the 1960s and 70s coincided with movements for community living, inclusion, and deinstitutionalization of disabled individuals. Horror stories from families about the abuse, neglect, and poor treatment disabled individuals were subjected to in government institutions led to a change in philosophy. Essentially society began to consider the effects of placing disabled individuals out of sight, and out of mind and how this treatment was beneficial for no one. Amended guardianship laws that protected the rights of the individual to a greater extent along with this change in philosophy allowed disabled individuals to become active members of their communities where they previously would not have been. In describing how guardianship fits into the larger narrative of the American disability rights movement, it is important to articulate how many courts determine which individuals should be placed under guardianship and how the concepts' history fits into the larger discussion.

Guardianship and Alternatives

As individuals who may require help or are deemed incapable of making the types of decisions that exercising legal capacity requires, guardianships represent the widespread norm for action. The concept is especially prevalent among individuals with intellectual disabilities, a group that receives their own category in Connecticut state law. The American Association on Intellectual and Developmental Disabilities (AAIDD)

defines intellectual disability as a “disability characterized by significant limitations in both intellectual functioning and in adaptive behavior, which covers many everyday social and practical skills.”¹⁸ Intellectual functioning here refers to general mental capacity including learning and problem solving while adaptive behavior relates to conceptual, social, and practical skills such as personal care, language and literacy, and interpersonal skills.¹⁹ This definition encompasses a wide scope of individuals, many of whom the Court may determine as requiring a guardian to supervise their care. While the guardianship system of appointing and determining what to do with these individuals has changed over time it still attempts to answer the same basic societal question. This question asks “what to do with the property and person of adults who are incompetent.”²⁰

American guardianship law and guardianship law more generally emerged from an eight hundred year old concept known as *parens patriae* or “father of the realm,” which essentially allows the state to intervene and protect individuals deemed incapable of caring for themselves and their assets.²¹ Royal courts appointed “committees” of a person, property, or both and were charged with monitoring these committees to prevent any action done at the expense of the incapable individual.²² This format of appointing

¹⁸ American Association on Intellectual and Developmental Disabilities, “Definition of Intellectual Disability,” *American Association on Intellectual and Developmental Disabilities*, 2013, <http://aaid.org/intellectual-disability/definition#.V-rXa5MrKRt>.

¹⁹ *Ibid.*

²⁰ Joan L. O’Sullivan and Diane E. Hoffman, “The Guardianship Puzzle: Whatever Happened to Due Process?,” *Maryland Journal Of Contemporary Legal Issues* 7, no. 11 (1995): 3.

²¹ Payton S, “The Concept of the Person in the Parens Patriae Jurisdiction over Previously Competent Persons.,” *The Journal of Medicine and Philosophy* 17, no. 6 (1992): 606.

²² Terry Carney and David Tait, “Adult Guardianship: Narrative Readings in the ‘Shadow’ of the Law?,” *International Journal of Law and Psychiatry* 21, no. 2 (1998): 147.

individuals or institutions to make decisions for those found to be legally incompetent continues today in the American guardianship system with certain notable modifications. The capability model that emerged in the 1970s brought philosophical and logistical changes regarding both how we see guardianship and the system itself, leading to a less paternalistic model. As Carney and Tait elucidate, “the object has been to confine guardianship to an institution of last resort, and to replace an excessively paternalistic philosophy with a genuine respect for individual autonomy and due process.”²³ The Americans with Disabilities Act has become a model for international legislation and helped spawn the creation of the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), a treaty that takes the guardianship system a step further in terms of legal and civil rights for the disabled. While this international dimension will not be discussed in detail here, a brief articulation of its importance to modern guardianship, specifically, alternatives to guardianship provide a useful lens for the American system.

Proponents of alternatives to guardianship advocate for a system closer to that found in the UNCRPD in order to create arrangements that better respect the philosophy of “nothing about us, without us.” Some legal scholars interpret Article Twelve of the UNCRPD “Equal Recognition Before the Law” as calling for an alternative to guardianship where courts’ truly see guardianship proceedings as a court of last resort. Article Twelve has five main tenets, two of which some believe are not satisfied by the traditional model of guardianship often referred to as the substitute decision-making model. The text of these provisions is as follows, “States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects

²³ Ibid., 148.

of life...States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity”.²⁴

Essentially, rather than simply having courts determine whether or not individuals are capable of making legal decisions for themselves, Article 12 instead asks courts to determine how society can support these individuals in exercising their legal capacity and making decisions for themselves.²⁵ Just as requiring an elevator in a building makes that building accessible for individuals who require physical help to climb a staircase, the law should provide similar supports for individuals who require help to make legal decisions.

These supports come in the form of an alternative model to guardianship referred to as supported decision-making. Decision-making in general hinges around the idea of legal capacity or the “right to make decisions for oneself.”²⁶ In the traditional paradigm of substitute decision-making, the court appoints a guardian to act on behalf of the disabled individual and to make decisions in that person’s best interest, essentially acting as a surrogate for that person’s legal capacity. Devi defines supported decision-making in the following way:

Supported decision-making is a process by which a third party (e.g. a support person or a peer support group) assists or helps a person with the intellectual disability to make legally enforceable decisions by themselves, without substituting their decisions for the person supported.²⁷

²⁴ “Convention on the Rights of Persons with Disabilities,” accessed March 15, 2016, <http://www.un.org/disabilities/convention/conventionfull.shtml>.

²⁵ Michael Bach and Lana Kerzner, “A New Paradigm for Protecting Autonomy and the Right to Legal Capacity” (Law Commission of Ontario, October 2010), 83, <http://www.lco-cdo.org/disabilities/bach-kerzner.pdf>.

²⁶ Devi, “Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities.”

²⁷ *Ibid.*, 792–93.

Proponents of supported decision-making believe that this form of guardianship should be seen as a last resort and a disabled persons' inability to communicate in a traditional way should not prevent them from exercising their legal capacity. Bach and Kerzner describe two factors that determine the type of decision-making, if any, that a person should fall under:

1. Whether or not a person's particular decision-making abilities means that they need another person to help communicate and represent their will or intention to others;
2. Whether or not a person meets the minimum threshold as defined above – where at least one other person can reasonably understand the person's will and/or intention, and communicate that to others for the purposes of a decision-making process.²⁸

In jurisdictions where supported decision-making is employed, the disabled individual works alongside a close family member or friend who knows them best and can ascertain their wishes as to how they would like to be cared for. The crux of this substitute to guardianship lies with the idea that a disability does not always render a person legally incompetent or incapable. While guardianship courts using a substitute decision-making model often do utilize many of the same individuals as supported decision-making when looking for suitable guardians, supported decision-making allows the disabled person to exercise their legal capacity with help as opposed to removing their right to do so entirely.

The United States has not yet ratified the UNCRPD and it is not subject to any provisions of the treaty including supported decision-making. Nevertheless, some pressure exists both internationally and domestically through non-governmental organizations, lobbyists, and politicians for supported decision-making to become the

²⁸ Michael Bach and Lana Kerzner, "A New Paradigm for Protecting Autonomy and the Right to Legal Capacity," 83.

new framework for guardianship. The justification for this pressure to make supported decision-making the norm in the United States comes from many of the same organizations that helped cause the ratification of the ADA. A variety of national and international groups including the Human Rights Watch, the American Civil Liberties Union (ACLU), and the Arc supported this move towards ratification.²⁹ They support supported decision-making on grounds that traditional guardianship represents an extreme deprivation of liberty that often is not necessary.³⁰ Texas is the only state that has supported decision-making in state statutes, the result of the passage of the Supported Decision-Making Agreement Act in June of 2015.³¹ This single state acknowledgment of a specific alternative to guardianship relates to the piecemeal nature of the American guardianship system. This fragmented structure, a result of federalism, has created some variation between state guardianship systems in practice excluding the impact of judicial discretion.

How Guardianship Works in the U.S.

The American guardianship system falls into the umbrella of probate jurisdiction regardless of state location. These probate jurisdictions look somewhat different depending on the state, specifically what matters fall into probate jurisdiction in a particular state. Nonetheless, generally all probate courts handle cases that concern adult

²⁹ “United States International Council on Disabilities - CRPD Supporters,” accessed September 1, 2016, <http://usidc.org/template/page.cfm?id=252>.

³⁰ American Civil Liberties Union, “Legal Guardianship,” *American Civil Liberties Union*, accessed October 2, 2016, <https://www.aclu.org/issues/disability-rights/integration-and-autonomy-people-disabilities/legal-guardianship>.

³¹ Judith Zaffirini, Jose Rodriguez, and Charles Perry, *Supported Decision-Making Agreement Act, Texas Estates Code*, 2015, <http://www.statutes.legis.state.tx.us/Docs/SDocs/ESTATESCODE.pdf>.

guardianships, and matters concerning the developmentally and intellectually disabled.³² Fifteen states have separate probate courts that handle cases that fall in probate jurisdiction while the remaining thirty-five states and the District of Columbia handle these cases under the general jurisdiction of trial courts with judges rotating rather than being elected or appointed to the position of probate judge.³³ The Uniform Probate Code, an act drafted by the National Conference of Commissioners on Uniform State Laws in the hopes that all fifty states would use it to standardize probate laws across the country has been adopted by fifteen states in full with other states adopting some parts of the code as it has been updated (See Appendix A for Map).³⁴ For example, the Adult Guardianship and Protective Proceedings Jurisdiction Act has been ratified in forty-seven U.S. jurisdictions including Puerto Rico and the District of Columbia to date leaving only five states and the Virgin Islands without ratification.³⁵ While these forty-seven jurisdictions will have the same codes when looking at the provisions of the act, their statutes might not look the same in other areas. One notable example of this is a 2009 Massachusetts statute change designed to protect autonomy of the individual through a variety of updates to the probate code. It uses the term “incapacitated” as is consistent with UPC

³² “About NCPJ | National College of Probate Judges,” *National College of Probate Judges*, accessed October 31, 2016, <http://ncpj.org/about-ncpj/>.

³³ Richard Van Duizend and Brenda K. Uekert, “National Probate Court Standards” (National College of Probate Judges, 2013), 7, <http://nsc.contentdm.oclc.org/cdm/ref/collection/spcts/id/240>.

³⁴ Legal Information Institute, “Uniform Probate Code,” *Legal Information Institute*, 2015, <https://www.law.cornell.edu/uniform/probate>.

³⁵ The National Conference of Commissioners on Uniform State Laws, “Adult Guardianship and Protective Proceedings Jurisdiction Act,” *Uniform Law Commission - The National Conference of Commissioners on Uniform State Laws*, 2016, <http://www.uniformlaws.org/Act.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act>.

states as its statutes do not define disabled persons as a separate group within guardianship proceedings. Massachusetts General Law Section 5-309 states:

A guardian shall exercise authority only as necessitated by the incapacitated person's mental and adaptive limitations, and, to the extent possible, shall encourage the incapacitated person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage personal affairs. A guardian, to the extent known, shall consider the expressed desires and personal values of the incapacitated person when making decisions, and shall otherwise act in the incapacitated person's best interest and exercise reasonable care, diligence, and prudence.³⁶

This change requires a much higher standard for appointed plenary guardians; effectively creating a system that favors limited guardians, forces guardians to consider the incapacitated person's desires as well as best interests, and requires the guardian to encourage the incapacitated individual to actively participate in the decision-making process where applicable.³⁷ It requires an approach heading towards the capability model of disability given its choice to enforce the due process rights of the disabled individual first and foremost before guardians are appointed. Other jurisdictions including Connecticut, one of the subjects of this project, do not have guardianship laws that require judges to utilize this type of vetting process for determining the capacity of a disabled individual. Conservatorships of the person and estate are often held to the "least restrictive means" standard, which allows more respect to due process rights similar to

³⁶ Massachusetts General Legislature, *Protection of Persons Under Disability and Their Property, Massachusetts Uniform Probate Code*, vol. 190b, 2009.

³⁷ Erickson, "Expanded Rights and Protections for Adults with Disabilities | Massachusetts Guardianship Association (MGA)," *Massachusetts Guardianship Association*, accessed November 1, 2016, <http://www.massguardianshipassociation.org/information/guardianship-of-an-adult-2/expanded-rights-and-protections-for-adults-with-disabilities/>.

those described in the Massachusetts statute.³⁸ Massachusetts has adopted the Uniform Probate Code in full only slightly modifying it to fit state specific application in cases like that described above.

Another example of this phenomenon of differences across states that complicates guardianship proceedings is the various definitions of incapacity. Mayhew articulates that states combine three key concepts to form their statutory definitions of incapacity: disabling condition, functional behavior, a test of whether a person can provide for basic personal needs, and cognitive abilities, an evaluation of whether a person has the “mental ability to understand or the capacity to make responsible decisions”.³⁹ These definitions may or may not apply to the intellectually disabled depending on whether state statutes considers the disabled a unique category in adult guardianship, a topic that will be expanded upon when discussing case studies for this thesis. Within both the definitions of incapacity and disability there can be provisions that call for “appropriate technological assistance” to be considered when assessing legal capacity however not all states have these requirements.⁴⁰ Thus, despite probate jurisdictions in the United States handling cases involving similar parties and situations there can be vast variation due to statutory differences. These statutory differences, however, do not account for the role judicial discretion can play in guardianship and how judges might favor autonomy or protection of society and allow their own philosophies to factor into their decisions.

³⁸ Probate Court Administrator, State of Connecticut, *Probate Court User Guide For Conservators* (Office of the Probate Court Administrator, State of Connecticut, 2016), 7–8, <http://www.ctprobate.gov/Documents/User%20Guide%20-%20Conservators.pdf>.

³⁹ Michael Mayhew, “Survey of State Guardianship Laws: Statutory Provision for Clinical Evaluations,” *Bifocal: Bar Associations in Focus on Aging and the Law* 27, no. 1 (October 2005): 2.

⁴⁰ *Ibid.*

One problem that plagues guardianship courts is that of lack of statistics on guardianships. Despite calls for reform from the federal government and tales of abuse and neglect guardianship data remains somewhat lacking due to a variety of factors.⁴¹ In 2008, the National Center for State Courts' Court Statistics Project compiled data on adult guardianships and conservatorships finding that few states report complete statewide data, a lack of distinction between guardianships and conservatorships, and a general lack of cohesion among the fifty states due to differences in filing.⁴² These issues of distinction also extend to disabled individuals as not all jurisdictions distinguish between guardianship of incapacitated adults in general and guardianship of the intellectually disabled in their statutes meaning that these cases would be included with guardianship of elders. A 2010 report on guardianship statistics found that 14 states report adult guardianship findings annually and that the median number of incoming adult guardianship cases per 100,000 adults is 87.⁴³ As guardianship cases might remain open for many years, this number gives us very little idea about how many cases are actually open in a given moment. Only four of the fourteen jurisdictions that report statistics (Vermont, Arkansas, Ohio, and the District of Columbia) differentiate between active cases, and incoming cases.⁴⁴ While there have been efforts to work on this lack of data and effective case management, most notably the 2014 SSA Representative Payee:

⁴¹ Uekert and Schauffler, "Caseload Highlights: The Need for Improved Adult Guardianship Data," 3.

⁴² Uekert and Schauffler, "Caseload Highlights: The Need for Improved Adult Guardianship Data."

⁴³ Brenda K. Uekert and Richard Van Duizend, "Adult Guardianships: A 'Best Guess' National Estimate and the Momentum for Reform," *Future Trends In State Courts 2011* (National Center for State Courts, 2011), 108, <http://www.eldersandcourts.org/~media/Microsites/Files/cec/AdultGuardianships.ashx>.

⁴⁴ *Ibid.*, 109.

Survey of State Court Guardianship/ Conservatorship Procedures and Practices, the overall quality of data remains sorely lacking. The survey was conducted by the National Center for State Courts on behalf of the Administrative Conference of the United States in conjunction with the Social Security Administration, the agency that originally petitioned for the study. The SSA Payee survey does present some useful findings about how and whether forms are standardized and the makeup of guardian type. According to the survey, 75 percent of all guardians are friends, family, or acquaintances of the incapacitated person. Public guardians account for 12 percent of all guardianships with Professional guardians accounting for 9 percent of guardianships of the person and 12 percent of guardianships of the estate.⁴⁵ This author is unaware of any available statistical data for either Connecticut or Minnesota.

Despite this general lack of data there is some research regarding the proliferation of alternatives to guardianship in the U.S. Jameson et al. conducted a national survey on guardianship of disabled persons targeting individuals and parents of individuals with disabilities through the connections of the TASH Human Rights Committee and the Alliance to Prevent Restraint, Aversive Interventions, and Seclusion (APRAIS).⁴⁶ The survey had a total 1,225 respondents who completed the entire survey from 48 states, the District of Columbia, and some from outside of the states, which the authors note is only a fraction of the 1.5 million Americans who are under guardianship although this statistic does not filter out for disabled individuals. Of these respondents only one hundred fifty-

⁴⁵ “SSA Representative Payee: Survey of State Guardianship Laws and Court Practices” (Administrative Conference of the United States, December 24, 2014), 3–4, https://www.acus.gov/sites/default/files/documents/SSA%2520Rep%2520Payee_State%2520Laws%2520and%2520Court%2520Practices_FINAL.pdf.

⁴⁶ Jameson et al., “Guardianship and the Potential of Supported Decision Making With Individuals With Disabilities,” 40.

six reported they were a person with a disability and 1,069 were a parent of a person with a disability. The researchers attempted to answer four questions: “What is the prevalence of guardianship among people with disabilities? What information was presented to respondents on the range of adult support options for people with disabilities? What influence did the disability label have related to what guardianship alternatives were discussed? Did educational placement have any impact on guardianship recommendations?”⁴⁷ They found that individuals with disabilities are much more likely to have plenary guardians with 37% of respondents indicating that they had or were legal guardians, furthermore the data showed that school personnel, adult or social service personal, and attorneys first suggest guardianship in more than 50% of the cases. Many of the respondents had received no training or education on guardianship and this included school personnel. Despite utilizing the 14 disability categories present in the Individuals with Disabilities Education Act (IDEA), the authors found that regardless of these categories or the level of inclusion in educational classes (special education or inclusive) full guardianship was the most discussed option by all parties with supported decision-making the least discussed in training situations. While this survey represents only a small percent of the disabled population, its results are telling in that alternatives to guardianship have very little prevalence in the American system.

A final important point about alternatives to guardianship in practice comes from legal academics who have argued that traditional guardianship, especially plenary guardianship, conflicts with the ADA. Jameson et al. explicate that “overreliance on formal systems of substituted decision making (i.e. guardianship) can hinder or prevent

⁴⁷ Ibid., 47.

inclusion, self-determination, and community integration, in conflict with the intent of the Americans With Disabilities Act (ADA 1990) and other federal laws.” According to Salzman, the conflict arises when looking at the integration mandate found in Title II of the ADA, which focuses on public integration and requires “that states provide services, activities, and programs in the most integrated and least restrictive setting appropriate to the needs of qualified persons with disabilities.”⁴⁸ Salzman argues that this clause combined with the Supreme Court’s decision in *Olmstead v. L.C.* provides disabled individuals with the basis to claim guardianship as a form of discrimination thus making it violate the ADA. The *Olmstead* case involved two individuals with disabilities named L.C. and E.W. who were found by their physicians to “no longer require institutional treatment... [and] sued the state under Title II of the ADA, alleging the state’s failure to place them in a community-based treatment program deemed medically appropriate by their physicians violated the anti-discrimination and integration mandates of the ADA.”⁴⁹ The Court concluded that the “unjustified isolation of people with disabilities in institutions constitutes disability-based discrimination” and also determined that “institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life.”⁵⁰ Salzman articulates that guardianship constitutes

⁴⁸ Leslie Salzman, “Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act,” *University of Colorado Law Review* 81, no. 157 (Winter 2010): 160.

⁴⁹ *Ibid.*, 187.

⁵⁰ *Ibid.*, 188.

unjustified isolation, perpetuates unwarranted assumptions about disabled individuals and therefore could be considered discrimination.⁵¹

In discussing the role of discretion in guardianship this project explores whether judges are able to move and are moving the American guardianship system towards the capability model of disability through emphasis on individual autonomy in their decisions.⁵²

Theories and Application of Statutory Interpretation and Judicial Discretion

The interplay between what state statutes permit and how judges interpret these statutes given certain situations forms the crux of judicial discretion. Judges in guardianship cases generally have fairly broad room for discretion as necessitated by the cases they see. This discretion does have notable limits when certain phrases or standards are evoked in the language of the statute. Lawrence M. Solan describes the impact of legislative language on judicial discretion in guardianship statutes in “Legislative Style and Judicial Discretion: The Case of Guardianship Law,” demonstrating how different states construct laws to allow for different outcomes depending on the aspect of guardianship law being articulated.⁵³ Solan’s article acts as a policy prescription for legislators wanting to model legislation to favor autonomy or societal protection for individuals deemed incapable of managing their own affairs. In his discussion of different

⁵¹ Ibid., 188.

⁵² Office of the Probate Court Administrator State of Connecticut, *Probate Court User Guide: Persons With Intellectual Disability* (Probate Court Administrator, State of Connecticut, 2015), 2, <http://www.ctprobate.gov/Documents/User%20Guide%20-%20Persons%20with%20Intellectual%20Disability.pdf>.

⁵³ Lawrence M. Solan, “Legislative Style and Judicial Discretion: The Case of Guardianship Law,” *International Journal of Law and Psychiatry* 35, no. 5–6 (September 2012): 464–72, doi:10.1016/j.ijlp.2012.09.013.

models of legislation, Solan provides a statutory justification for the differences in guardians' power over protected persons in different jurisdictions despite a general move towards autonomy overall. This illustrates how statutory construction can either endorse or hinder the capability model of disability in its relation to guardianship.

Solan's taxonomy of guardianship legislation provide an integral lens with which to view guardianship statutes in this project as it describes some of the most commonly used language in the statutes and whether this language promotes higher or lower levels of guardianship (See Table 1 below for comparison of models). An example of a high discretion model of statute is what Solan calls "standard-driven" statutes, which utilize exceptionally vague definitions or standards that provide judges with ample leeway in making their decisions. Depending on the beliefs of the judge, the respondent may or might not receive adequate protection of their autonomy when these statutes are present.⁵⁴ Two phrases used in all guardianship statutes that fit this standards mold is the "best interest standard" and the "least restrictive alternative" standard. In discussing the best interest standard Solan writes, "[it] says very little about what in the real world meets this requirement, leaving it up to the decision maker's discretion based on unarticulated criteria."⁵⁵ Similarly, while least restrictive alternatives often appear in guardianship statutes as something required for judges and guardians alike to consider, this phrase lacks a triggering mechanism for when it is appropriate for the Court to consider it. Essentially, vague language creates the possibility of conflict between judicial interpretation and legislative intent. Solan articulates that legislators must become aware

⁵⁴ Ibid., 469.

⁵⁵ Ibid.

of how to use different styles of legislative drafting as a way of remedying this potential issue.

Standards represent the most flexible end of the legislative drafting spectrum with rules exemplifying the most rigid and therefore the area where the least judicial discretion can be applied. While standard-driven statutes allow judges to hold broad flexibility and could compromise legislative intent, fear of overreaching by legislators can lead to stricter statutes that fall victim to the opposite problem one where judges are not afforded enough discretion for anomalous situations. These rigid “rule-driven” statutes include the requirements the Court must find to trigger the appointment of a guardian often in the form of definitions. Solan gives the example of a West Virginia statute defining incapacitated person’s that was updated in 2012 to include further protection of the respondent. The original version represents a standard as it uses the language “to manage the person’s personal affairs or the person is unable to manage the person’s estate or financial affairs,” without defining what “personal affairs” or “estate or financial affairs” actually means.⁵⁶ The 2012 update remedies this issue by actually defining these terms with a list of specific criteria, giving judges guidance on what legislative intent was.

Solan also describes two other drafting techniques in between the two extremes of standards and rules called prototypes and mental models respectively. These two drafting options do give room for discretion but only under specific circumstances. He explicates that prototype legislation is “more restrictive than legislation by standards, but permits the decision maker the discretion to deviate from the norm when the situation

⁵⁶ Ibid., 468.

demands it.”⁵⁷ The words “good cause” appear in many of these prototype statutes for the purpose of allowing judges to account “unusual circumstances.”⁵⁸ The types of unusual circumstances discussed here include matters of timing where if for one reason or another a hearing cannot occur in the allotted time, a judge may exercise discretion and move it. In mental model or model-driven statutes, legislative intent is clear but these statutes “do not pretend to decide all cases once and for all. The need for discretion at the margins is admitted in advance.”⁵⁹ Solan gives an example of these types of statutes by looking at a Michigan law concerned with the duties of a guardian ad litem: “explaining to the individual the hearing procedure and the individual’s rights in the hearing procedure, including, but not limited to.”⁶⁰ The phrase “included, but not limited to” gives judges a list of what the legislature had in mind when the law was drafted without restricting judges to only the criteria listed.

Finally, Solan presents laws that use a combination of all four drafting styles and can allow “different degrees of flexibility within the same statute.”⁶¹ Solan here presents a South Dakota statute on the necessity of a bond that gives the Court discretion for whether or not to require one while giving specific criteria about how the monetary amount should be determined with a section on “best interests” if the bond needs to be modified.⁶² Solan’s taxonomy of guardianship laws and their construction provides an ideal way of determining what statutes provide the most room for discretion and what this might mean for protected persons.

⁵⁷ Ibid., 465.

⁵⁸ Ibid., 469.

⁵⁹ Ibid., 470.

⁶⁰ Ibid., 471.

⁶¹ Ibid.

⁶² Ibid., 471.

Table 1: Solan’s Taxony from Low to High Discretion

Low Discretion	Circumstantial Discretion	High Discretion
<p>Rule-Driven – involves listing specific criteria, essentially the definitions part of statutes. Legislative intent very clear.</p>	<p>Prototype – Can deviate from the norm when necessary. Includes language like “unusual circumstances.”</p> <p>Model-Driven – Legislative intent is clear but acknowledges the necessity of discretion. Uses language such as “included, but not limited to”</p>	<p>Standard-Driven – language often includes the “best interest” or the “least restrictive means” with very little definition for what this looks like in practice. Legislative intent only somewhat clear.</p>

While Solan’s statutory taxonomy demonstrates how legislators can ensure their intent is well understood when drafting legislation, it does not provide a framework for how judicial discretion operates, especially, in unusual circumstances found in prototype-driven or mental-driven standards or when standard-driven legislation makes intent unclear. H. Miles Foy, III presents a discussion of statutory interpretation while proposing his own theory for how judges can justify their discretion in “On Judicial Discretion in Statutory Interpretation.” The article pays specific attention to what Foy calls “refractory cases,” or situations where conventional theories do not provide an adequate reason, “for preferring one interpretation of a statute over the others.”⁶³ These types of refractory cases represent the culmination of unusual circumstances combined

⁶³ H. Miles Foy, “On Judicial Discretion In Statutory Interpretation,” *Administrative Law Review* 62, no. 2 (2010): 292.

with lack of guidance from the principles that comprise the conventional theories of statutory interpretation. Foy explicates that there are three principles found in conventional theories of statutory interpretation that judges will often try to apply: “legislative intent...objective meaning... [and] the notion that preexisting law influences the legal meaning and the legal consequences of legislative action.”⁶⁴ All three of these conventional principles have some bearing on how judges articulate their decisions in cases where they provide clear guidance. I will briefly articulate how judges use these principles and what they mean for guardianship.

As explicated by the discussion of Solan’s work above, legislative intent is very important in the crafting of guardianship law and how that law is interpreted. Foy articulates the conundrum of legislative intent present in law in his discussion of how judges see the concept. Foy explicates that judges who rely on legislative intent find the concept “philosophically problematic” yet the “ultimate purpose of statutory interpretation is to align judicial action with legislative will.”⁶⁵ Based on Solan’s taxonomy, rule-drive statutes provide judges with strict guidance for intent, but for the other models including the hybrid judges have to overcome the “temptation to hijack the legislature’s work under guise of interpretation.”⁶⁶ Given that judges can operate with views that do not necessarily align with legislative intent, not all judges might be inclined to behave in a manner according with this principle. Foy presents objective meaning as another possible principle for judges to operate under one where judges utilize the interpretation that “a reasonably intelligent reader would attribute the statutory text...

⁶⁴ Ibid., 293–294.

⁶⁵ Ibid., 294.

⁶⁶ Ibid.

This objective meaning may or may not coincide with the meaning the legislature actually intended at the time of enactment.”⁶⁷ Judges who operate under this second principle would be able to avoid the temptation of using interpretation as a way to hijack a legislative agenda but they could still fall victim to interpretations that might not lead to higher levels of protection for individual rights simply because the text of the statute does not clearly point in this direction. Foy’s final conventional principle, one that relies on the influence of preexisting law for the interpretative process itself articulates that new law must be reconciled with legal precedent and that this “ambient law,” which extends beyond the legislative process must be taken into account regardless of whether you focus on legislative intent or objectivism.⁶⁸ This principle presents less of an issue in guardianship law, as regardless of whether judges focus on intent or the object of a statute previous cases are used as grounds for guidance in present cases. Foy articulates that generally judges over the last twenty years have developed an appreciation for both objectivism and legislative intent in their decision making finding a middle ground between the two in that the text of the statute should represent legislative intent adequately for them to make a decision.⁶⁹

When the middle ground approach fails and none of these principles provide judges with an adequate justification for making their decision, Foy proposes the following alternative theory of justification:

The court could declare that there are two plausible interpretations of the statute, *A* and *B*, and that the court finds no persuasive conventional reason to prefer *A* over *B* or *B* over *A*. The Court could then hold that the statute creates a framework

⁶⁷ Ibid., 294.

⁶⁸ Ibid., 295.

⁶⁹ Ibid., 296.

for judicial choice among legally permissible alternatives... and the court could make a prudent discretionary choice between the permissible alternatives.⁷⁰

Given the nature of guardianship cases where there can be multiple interpretations of a particular statute, this alternate proposal is particularly useful. As will be explored later, when statutes are vague as is common with best interest standards, judges go to great lengths to legitimize their decisions with opinions that describe how they chose to weigh certain factors over others. This also applies to clearer cases where judges have an inclusive list of facts to consider such as in mental-driven statutes. Here, it is important that in issuing their opinions judges cite distinctions about why certain factors were restricted or considered permissible. This is particularly applicable to powers of guardians.

Also key to understanding guardianship law and judicial discretion is scholarship on judicial discretion as it relates to other types of law. In “Criminal Sentencing Guidelines and Judicial Discretion,” Miceli describes the possible conflicts between the goals of the legislature and the goals of individual judges making criminal sentencing decisions and how sentencing guidelines influence these goals.⁷¹ Miceli describes a “balancing [of] competing social values” explicating “legislatures are in a better position to further the goal of deterrence [through sentencing guidelines]... judges are better suited to pursue fairness because they are able to take into account the circumstances of specific cases.”⁷² In guardianship cases as Solan articulates, there is potential for conflict not only between autonomy and protection but also between legislative intent and judicial

⁷⁰ Ibid., 318.

⁷¹ Thomas J. Miceli, “Criminal Sentencing Guidelines and Judicial Discretion,” *Contemporary Economic Policy* 26, no. 2 (April 2008): 207–15, doi:10.1111/j.1465-7287.2007.00065.x.

⁷² Ibid., 207.

opinion. Where there are vague statutes or refractory cases that provide multiple permissible options the legislation whether by design or due to the construction of the statute leave the judges in a position to further either societal end. Similar to criminal sentencing, judges may be better suited to further protection of society over autonomy of the individual, something that legislatures have a stronger power to protect through more restrictive statutes.

The problem of conflicting social values and the clash between the legislature and judicial discretion also applies in juvenile justice courts as described by Alexes Harris in “Diverting and Abdicating Judicial Discretion: Cultural, Political and Procedural Dynamics in California Juvenile Justice.” Harris concludes that courtroom dynamics have changed to reflect “punitive ideology” and that “any judicial efforts to resist this transformation and retain a commitment to individual assessments and rehabilitation render work group relations and environments adversarial.”⁷³ In these cases, the legislature and other actors have succeeded in pushing an agenda that calls for greater use of punitive punishments for juvenile offenders. Both the law and the work environment places tight restrictions on the power judges hold in terms of using case-by-case discretion. These juvenile courts represent a more rule-like structure one that you do not see as often in guardianship. Nonetheless, different jurisdictions might emphasize either autonomy of the individual or protection of society leading to certain restrictions in statutes. Concurrently, while judges must abide by statutes and consider the facts of individual cases they do not operate in a vacuum. Judges have opinions about what

⁷³ Alexes Harris, “Diverting and Abdicating Judicial Discretion: Cultural, Political, and Procedural Dynamics in California Juvenile Justice,” *Law & Society Review* 41, no. 2 (2007): 424.

should be done and these opinions can lead to certain leanings in terms of the decision they make.

A final example of judicial discretion that might have some applicability to guardianship decisions is corporate bankruptcy. Corporate bankruptcy allows more room for discretion than sentencing guidelines and as elucidated by Gennaioli and Rossi in “Judicial Discretion in Corporate Bankruptcy” can lead to outcomes that “vary enormously across bankruptcy judges, sometimes favoring debtors, other times favoring creditors.”⁷⁴ The authors’ present a way to make adjudication “more efficient” through a supply-and-demand model that takes into account “judicial incentives” leading to fewer instances of “pro-debtor uses of judicial discretion.”⁷⁵ Bankruptcy courts compete to attract large firm cases and this competition can lead to a systemic pro-debtor bias, one that works against judicial discretion.⁷⁶ Debtors have the ability to choose where they file their bankruptcy cases and this allows them to find judges whose biases would benefit them the most. Judicial discretion in bankruptcy courts is tied to career goals and reelection primarily that judges who attract larger cases can boost local revenue, “which results in lower social pressure on the judge from his local community, and even in a greater probability of reelection.”⁷⁷ The authors’ assert that getting judges to act in a more pro-creditor way takes into account these incentives by limiting other factors such as debtor shopping for courts. Many judges who handle cases in probate jurisdiction are elected. In Connecticut, probate judges are elected for a four-year term. In Minnesota,

⁷⁴ Nicola Gennaioli and Stefano Rossi, “Judicial Discretion in Corporate Bankruptcy,” *The Review of Financial Studies* 23, no. 11 (2010): 4079.

⁷⁵ *Ibid.*, 4104.

⁷⁶ *Ibid.*, 4080.

⁷⁷ *Ibid.*, 4086.

district court judges are elected for a six-year term. These judges may base some of their decisions on what the public calls for. Public pressure for alternative forms of guardianship could potentially lead to more cases decided in this way despite the confidential nature of these cases.

The construction of statutes and how judges interpret them are integral to the outcomes of guardianship cases. Societal pressure, legislative intent, and judicial bias all can play a role in how judges decide their cases.

Methods and Terminology

To determine the role judicial discretion plays in American guardianship courts and how this relates to autonomy and the capability model of disability, I focused on two jurisdictions: Connecticut and Minnesota. Ideally, in a project that attempts to discuss the scope of an entire system, data and interviews could be obtained from all jurisdictions. Unfortunately this was not possible for this project due to time constraints and the inability to conduct interviews with individuals outside of an immediately accessible area. Nevertheless, the two states discussed should provide a somewhat complete picture of the American guardianship system as their statutes are representative of both high and low levels discretion afforded to judges. As discussed in the introductory section all guardianship cases in the American court system falls under probate jurisdiction. Minnesota and Connecticut structure this jurisdiction differently, which provides a useful lens for looking at the country as a whole. Connecticut falls into the category of the 15 states that have a separate court system dedicated to probate court. In Minnesota, probate matters are handled in district courts. The Minnesota probate court system is in some

ways more indicative of the practices used more widely throughout the country. Many states with separate probate court systems have districts based on county where Connecticut has a town centric system. These specialized courts are also sometimes called different names such as Surrogate's Court in New York and Orphan's Court in Maryland, however, they deal with almost entirely the same matters as traditionally found in probate jurisdictions with some ceding certain juvenile cases or mental health cases to family or district courts.

Minnesota is one of the fifteen states that have adopted the Uniform Probate Code in entirety. While there can still be differences in how individual judges interpret this code, from a statutory perspective, Minnesota state probate statutes represent a portion of the country's guardianship system. The Connecticut system can help to shed light on jurisdictions that have adopted the UPC in a piecemeal fashion rather than in its entirety. These differences lead to statutory comparisons that are especially useful for gaining further insight into the guardianship system in practice. The main statutory differences in legislative construction between the two jurisdictions will be discussed later in the data section and again in the discussion of the results.

The decision to choose two states despite the fact that guardianship statutes do vary across the country means that all statutory variations and judicial perspectives cannot be accounted for. However, all of these laws allow courts to appoint a surrogate to make decisions on behalf of a disabled or incapacitated individual. Probate jurisdictions do perform the same tasks overall irrespective of statutory differences and the impact of different judges.

Both the legislative and judicial branches impact guardianship law as both construction and interpretation of law is key to how guardianship works in practice. The methods utilized by this study focused on judicial impacts through three methods of data collection: statutory analysis, semi-structured interviews, and judicial opinion analysis. The study used Solan's legal taxonomy as a way of determining the amount of discretion statutes are designed to afford judges through the use of certain discretion granting phrases such as the best interest standard. The study also looked for language consistent with the capability model of disability, supported decision-making, inclusion, and autonomy of disabled individuals in the statutes themselves. Semi-structured interviews and a discussion of judicial opinions provided a lens for what this discretion yields in practice. By talking to judges and reading their opinions, the study attempted to see how judges themselves see the law and their role in guardianship cases. I interviewed four judges in total; three probate judges in Connecticut and one appeals court judge in Minnesota. The interviews conducted in Connecticut utilized a slightly different set of questions than those conducted in Minnesota. While the focus of the project shifted from discussing international dimensions and pressure on domestic courts to an exploration of judicial discretion, the answers judges gave to these questions still provided valuable insight especially in terms of alternatives to guardianship and due process rights. The questions covered a variety of topics related to guardianship including statutory limits on discretion, the current state of guardianship, the UNCRPD, supported decision-making and directions for the future. The questions for the interviews as well as the methodology was approved by the Social Science Institutional Review Board earlier this year and included provisions to safeguard judges' confidentiality due to the nature of the topic.

Opinions from Connecticut probate judges provided an additional look into how judges see and use their discretion and also pointed to certain influential cases and sections of the probate code. The unpublished opinions of Minnesota Appeals Court Judges also provided a lens into why district court judges' rulings would be overturned and how these judges see discretion in guardianship. Using all three categories of data allowed for a much broader understanding of the guardianship system and how it works not only in these two jurisdictions but also across the country.

Comparison of specific state statutes will occur later in this project, however, a brief discussion of terminological differences between the two jurisdictions will be helpful for analysis. Probate law in different jurisdictions often use different terms to describe the same concept. In Connecticut, a person for whom a guardianship petition has been filed is called a "respondent" and if a guardian is appointed they are then referred to as a "protected person."⁷⁸ For conservatorships, the person is again called a "respondent" when a petition has been filed but is later referred to as a "conserved person" if a conservatorship is put in place.⁷⁹ In Minnesota the term "ward" is used for guardianships and "protected person" for conservatorships.⁸⁰ In addition to these terminological differences, the structure of the systems is somewhat different. In Connecticut, guardianships and conservatorships are separated out into more types than those found in Minnesota. In Minnesota, these proceedings are based on findings of incapacity that do not differentiate between intellectually disabled adults and findings of old age that

⁷⁸ Office of the Probate Court Administrator State of Connecticut, *Probate Court User Guide: Persons With Intellectual Disability*, 2.

⁷⁹ Probate Court Administrator, State of Connecticut, *Probate Court User Guide For Conservators*, 1.

⁸⁰ Minnesota Conference of Chief Judges, "Con," 2016, 2, <http://www.mncourts.gov/mncourtsgov/media/CourtForms/GAC101.pdf?ext=.pdf>.

necessitate a guardianship or conservatorship. Essentially, Minnesota clumps the elderly and the disabled into one category of incapacitation utilizing a three-pronged test to determine the necessity of a guardian or conservator. The Court looks at impairment, functional capacity, and decisional capacity or a person's ability to which a disability or medical condition affects decision-making skills, a person's ability to meet or take action to have personal needs met, and a person's ability to understand, make, and communicate responsible personal decisions to make sure needs are met.⁸¹ The evaluation to determine incapacitation based on these factors involves multiple dimensions including an intelligence assessment, a medical assessment, a behavioral assessment, the ability of the ward to complete activities of daily living, and a social history that includes the opinions of the ward and the ward's family about the best course of action.⁸² Importantly, Minnesota state statutes do not use an Intelligence Quotient (IQ) assessment as the main basis to determine incapacitation for intellectually disabled individuals.

In contrast, Connecticut does have a separate category for disabled individuals. Only intellectually disabled individuals can be appointed guardians. Elderly individuals or disabled adults that do not fall under the definition of intellectual disability fall under conservatorships of the person. Connecticut narrowly defines intellectual disability as a "significant limitation in intellectual functioning existing concurrently with deficits in adaptive behavior that originated during the developmental period before eighteen years of age." In order to fall into this category a person must have an intelligence quotient of

⁸¹ Ibid., 13.

⁸² Ibid., 13.

69 or less and the disability must manifest within the developmental period.⁸³ This creates a gap in regards to certain disabled adults who may display a higher IQ or manifest their disability after 18 years of age in which case petitioners must apply for a conservatorship of person. A conservator of the person has the authority to “supervise the personal affairs of an individual who is found by the court to be unable to meet essential requirements for personal needs. These may include, but are not limited to, food, clothing, shelter, health care, and safety.”⁸⁴ These needs are basically identical to those that a guardian of an intellectually disabled individual might have authority over. Other jurisdictions define intellectual disability with either a slightly higher or lower threshold. This can lead to different gaps in different jurisdictions; however, all the jurisdictions that utilize an IQ score as the main test of capability will have a similar gap. It is critical to note that a person’s status as intellectually disabled does not necessarily mean they will fall under guardianship or have all of their rights taken away.

There are two types of guardianships of the intellectually disabled that one can apply for in Connecticut, a plenary guardianship and a limited guardianship. Where a plenary guardian “supervises all aspects of the care of a protected person,” a limited guardian “supervises only certain specified aspects of a protected person's care.”⁸⁵ Care refers to “physical health or safety” and in the case of a plenary guardianship relates to all of the following duties: “Residence outside the family home. Specifically designed educational, vocational or behavioral programs. The release of clinical records and

⁸³ Office of the Probate Court Administrator State of Connecticut, *Probate Court User Guide: Persons With Intellectual Disability*, 1.

⁸⁴ Probate Court Administrator, State of Connecticut, *Probate Court User Guide For Conservators*, 1.

⁸⁵ Office of the Probate Court Administrator State of Connecticut, *Probate Court User Guide: Persons With Intellectual Disability*, 3.

photographs. Routine, elective and emergency medical and dental care. Any other specific services necessary to develop or regain to the maximum.”⁸⁶ Minnesota utilizes either limited or full guardianships depending on how many of the wards rights are restricted. The Court determines the necessity of either of these guardianships after a process of medical and psychological evaluation of the respondent in question as well as guardianship hearings. Connecticut’s tests of incompetence are similar to the tests in Minnesota but with more of a focus on IQ.

Both Connecticut and Minnesota separate control of a person’s financial affairs into a procedure called conservatorship. A conservator of the estate is appointed “to supervise the financial affairs of an individual who is found by the court to be incapable of doing so... to the extent that property will be wasted unless adequate property management is provided. This may include, but is not limited to, actions to manage assets, income and public assistance benefits.”⁸⁷ Conservatorship of the Estate in Minnesota works essentially the same way in that the respondent has to be proven to be incapable of managing his or her own financial affairs. The statute determining an incapacitated individual in the state of Minnesota reads as follows:

An individual who, for reasons other than being a minor, is impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible personal decisions, and who has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety, even with appropriate technological assistance (Minnesota Statutes section 524.5-102, subdivision 6)⁸⁸

⁸⁶ Office of the Probate Court Administrator State of Connecticut, *Probate Court User Guide: Persons With Intellectual Disability* (Probate Court Administrator, State of Connecticut, 2015), 3, <http://www.ctprobate.gov/Documents/User%20Guide%20-%20Persons%20with%20Intellectual%20Disability.pdf>.

⁸⁷ Probate Court Administrator, State of Connecticut, *Probate Court User Guide For Conservators*, 1.

⁸⁸ Minnesota Conference of Chief Judges, “Con,” 2.

Both the Minnesota and Connecticut statutes require “clear and convincing” proof of incapacitation in respect to financial affairs and articulate the need for a judge to find that conservatorship is the “least restrictive means” of intervention. One difference between Minnesota and Connecticut and other jurisdictions are those that make guardianship and conservatorship fall under the same proceeding. When someone applies for guardianship they are theoretically able to gain authority over the protected person’s care and finances without having to go through a second procedure. Dual procedures act as a safeguard on a disabled individual’s autonomy. As of 2011, Massachusetts restructured their guardianship courts to also mandate petitioners file guardianships of incapacitated individuals and conservators of the estate separately as a way of protecting financial assets and limiting the powers of guardians to only what is necessary.⁸⁹

Neither Connecticut nor Minnesota has voluntary guardianship procedures, which allows a person who has not been formally deemed incompetent by the Court to request assistance in managing his or her estate⁹⁰ or affairs depending on the jurisdiction.⁹¹ Connecticut also has voluntary conservatorships, a process by which an individual may apply for a conservator of either the estate the person to help them manage his or her affairs with court oversight.⁹² Instead of these procedures, the Minnesota guide to

⁸⁹ Massachusetts General Legislature, *Protection of Persons Under Disability and Their Property*.

⁹⁰ Florida Courts, “Guardianship,” *Florida Courts*, August 5, 2014, <http://www.flcourts.org/resources-and-services/family-courts/guardianship.stml>.

⁹¹ Vermont Division of Disability and Aging Services, “Voluntary Guardianship — Division of Disability and Aging Services,” *Vermont Division of Disability and Aging Services*, 2016, <http://www.ddas.vermont.gov/ddas-programs/programs-guardianship/programs-guardian-addl-webpages/programs-guardianship-voluntary>.

⁹² Probate Court Administrator, State of Connecticut, *Probate Court User Guide For Conservators*, 4.

Conservatorship and Guardianship suggests a variety of least restrictive alternatives for both guardianships and conservatorships such as an individual plan, and power of attorney. In both court systems judges have the obligation to determine whether a guardianship or conservatorship is necessary in the first place and might suggest some of these alternatives if they find these proceedings unnecessary.

The following section presents a few differences in definitions in Minnesota and Connecticut state statutes that are notable in their application to guardianship. In Connecticut, except for the definition of intellectual disability the statutes that pertain to guardianship and conservatorship are found in the General Statutes of Connecticut Volume 12 Title 45a - Probate Courts and Procedure. In Minnesota, these laws are found in the Minnesota State Statutes Chapter 524 - The Uniform Probate Code.

The Uniform Probate Code of the Minnesota State Statutes only mention disability in the following context “[Disability] means cause for appointment of a conservator as described in section 524.5-401, or a protective order as described in section 524.5-412.”⁹³ The statutes do contain a definition of developmentally disabled but this definition does not apply to guardianship in general. In the Connecticut General Statutes the term has a much more specific definition that is important to guardianship (see Appendix B). Essentially, Conn. Gen. Stat. § 1-1g. defines intellectual disability in a narrow way through IQ, as discussed previously. Minnesota instead uses the larger definition of “incapacitated person” which importantly uses the term “appropriate technological assistance.” (See Appendix C)⁹⁴ The definition is essentially the same for conservatorship but with appropriate changes added to pertain to financial decisions.

⁹³ Minn. Stat. § 524.1-201 (2016).

⁹⁴ Minn. Stat. § 524.5-102 (2016).

Connecticut states statutes have similar provisions (See Appendix D) when defining the role of Conservators of the Person and Estate but the term “appropriate technological assistance” is notably absent in the statutes referring to the intellectually disabled.⁹⁵

Data and Analysis

The following section presents data and analysis of the key findings of this study. While Connecticut and Minnesota represent very different probate jurisdictions in respect to guardianship, the way judges articulate both their role and what state statutes permit rests on very similar but often conflicting principles. Judges and the statutes they base their decisions on do genuinely try to respect the autonomy of the individuals under these arrangements. Concurrently, their ability to respect autonomy is qualified by legal inertia. This includes the way state statutes are constructed in terms of language and clarity of intent, the fact dependent nature of guardianship cases, and the assurance of accountability once these arrangements are put into effect. In answering the question of how judicial discretion operates in practice in the American guardianship system and why judges are or are not considering alternatives, these factors explain why judges act the way they do.

Respect for Autonomy

Individual autonomy is one factor inherent to guardianship decisions and is something judges are required to respect under state statutes. While this requirement can and does restrict discretion, the research in both states points to a general desire by judges

⁹⁵ Conn. Gen. Stat. § 45a-644 (2015).

to honor individual autonomy wherever possible. This is notable for Connecticut judges because the guardianship statutes allow for more discretion through their looser standard-driven construction. All judges interviewed in Connecticut stressed the importance of will and autonomy with one pointing to the statutory requirement of both “respect to elicit disabled person’s preferences and what is overall in the best interest.”⁹⁶ This is consistent with how the best interest standard is constructed in the state of Connecticut for plenary and limited guardianships. In Conn. Gen. Stat. § 45a-676 - Appointment of a Plenary Guardian or Limited Guardian the statute requires that the Court, in selecting a plenary or limited guardian, “shall be guided by the best interest of the respondent, including but not limited to, the preference of the respondent as to who should be appointed as plenary guardian or limited guardian” (See Appendix E).⁹⁷ This use of statutory construction combines a standard-driven statute with a model-driven statute by using “included but not limited to” language that both restricts what judges can do and allows room for discretion where necessary.

Opinions from both states also demonstrate this judicial respect for autonomy. In a discussion of limited guardianship, the 2003 Opinion of the Connecticut Probate Court: *In Re [Respondent] Probate Court, District of Stratford, November 12, 2003* describes the necessity of limited guardianship when an individual is shown capable of managing certain aspects of his or her affairs. The case involved application by the Respondent’s parents for limited guardianship of an intellectually disabled individual along with the appointment of the parents as conservators of the estate. The Respondent in question was

⁹⁶ Connecticut Judge 1, Interview With Connecticut Judge 1, Written Transcript, July 5, 2016.

⁹⁷ Conn. Gen. Stat. § 45a-676 (2015).

described by the Court as “the highest functioning person this Court has met during its 25 years of considering such applications,” and as such the Judge desired to respect this individual’s “considerable talents,” while determining what would be best.⁹⁸ The judge granted both applications to the Respondent’s parents but very specifically limited what rights the parents would have in regards to medical care as is consistent with limited guardianship. Furthermore, in commenting on the nature of limited guardianship as a concept specifically the construction of the statute, the judge acknowledged the difficulty in creating these types of arrangements as all powers not specifically granted to the Respondent’s parents remain with the Respondent. He stated the following:

The Court is quite aware that these grants of authority are not precisely and cleanly defined. They cannot be. That is the primary reason that the State Legislature had such difficulty in crafting the present statute regarding the appointment of limited guardians. If a dispute or medical crisis should arise, due to the unclear nature of this Decree, the Court will entertain an application for clarification as quickly as circumstances warrant, possibly including ex parte proceedings. However, it encourages the parties themselves, who love and respect one another, to work out for themselves a protocol for dealing with the many varied issues which are likely to arise and to select, in advance, a method for dealing with them on a voluntary basis.⁹⁹

This opinion not only demonstrates the importance for judges in acknowledging that certain individuals deemed disabled may be fully capable of making certain decisions but also why limited guardianships are not as desirable as plenary ones. For the aforementioned reason of medical emergency certain parties may not be interested in having to go to Court whenever such situations arise and judges may be inclined to act more conservatively in these situations. This opinion demonstrates a societal protection dimension of constraint on a judges’ ability to respect autonomy.

⁹⁸ Paul F. Kurmay, “Opinion of the Connecticut Probate Court: In Re: [Respondent], Probate Court, District of Stratford, November 12 2003,” *Quinnipiac Probate Law Journal* 18, no. 54 (2004): 56.

⁹⁹ *Ibid.*, 58.

In the unpublished opinion, *In Re Guardianship of: Sharon Kowalski, Ward* the Minnesota Appeals Court reversed and remanded the appeal from the District Court, St. Louis County in regards to an appellant lesbian partner who challenged the judgment of the District Court of St. Louis County's decision to deny the lesbian partner petition for guardianship of the ward. While this ward would not be considered intellectually disabled by Connecticut standards, Minnesota lacks a different set of statutes in regards to disabled individuals under guardianship and the protections for the ward applied here would presumably be applied in subsequent cases. It is also important to note that the "best interest" standard articulated in this case Minnesota Statute § 525.551, was repealed in 2003 with the adoption of the Uniform Probate Code.¹⁰⁰ The Appeals Court found the trial court violated the grounds of their discretion on three counts: First the trial court failed to adequately take into account the preferences of the ward who in this case was found able to express her preferences for living arrangements, second the trial court failed to acknowledge the suitability of the ward's chosen guardian as stated by the ward's caretakers and doctors and finally the trial court did not adequately vet the guardian they imposed nearly to the same extent as the ward's chosen guardian.¹⁰¹ The appellate judge here expressed the statutory importance of oversight of guardians as well as the need to acknowledge the preferences of the ward.

Besides a general judicial reverence for the rights of the individual, statutes can steer judicial behavior towards this end through their construction. This is clearest in the strictest construction of statutes, rule-driven statutes, where judges have a clear idea of

¹⁰⁰ Jack Davies, *In Re Guardianship of: Sharon Kowalski, Ward.*, No. C2-91-1047, LEXIS 1196, 6 (Minn. Ct. App. 1991).

¹⁰¹ *Ibid.*

legislative intent and standards such as the best interest are clearly defined. Minnesota has a definitive list of the rights called the Bill of Rights for Wards and Protected Persons that are either protected or can be taken away during a guardianship or conservatorship hearing (See Appendix F).¹⁰² Connecticut does not have this type of safeguard for disabled persons except in cases of limited guardianship where the respondent retains any rights not removed by the Court. The Minnesota Bill of Rights for Wards and Protected Persons essentially acts as an addition layer of protection, something that also helps to reign in the power held in best interest standard. This particular statute is specific to Minnesota and not found in other UPC jurisdictions.

Another example of Minnesota law that protects individual autonomy not involving the best interest standard comes in the case *In the Matter of the Guardianship of: Michael Timothy O'Brien, Ward*. The Minnesota Court of Appeals reversed and remanded the district court's declaratory judgment regarding the appellant's mental capacity to marry. The burden of proof in the right to marry for those under a guardianship lies with those challenging the ward's competence something that involves expert testimony. The appellant court determined that the declaratory judgment that the ward did not have the competence to marry lacked this expert testimony and due to insufficient findings required more evidence.¹⁰³ Regardless of the judges' thoughts on the competence of the ward, the relevant statutes require a burden of proof that was not met thus protecting autonomy.

¹⁰² Minn. Stat. § 524.5-120 (2016).

¹⁰³ Judge Smith, *In the Matter of the Guardianship of: Michael Timothy O'Brien, Ward*. No. A13-1348, LEXIS 55, (Minn. Ct. App. 2014).

Interestingly, the best interest standard in Connecticut as it applies to minors and is sometimes extended to disabled persons utilizes a more rule-like and thus restrictive construction with a very specific list of factors that defines best interest (See Appendix G).¹⁰⁴ One Connecticut judge articulated what this looks like adding that there is some “commonality between a minor and disabled persons” but that there is a fundamental “difference in paternalistic attitude.” This difference relates to the need to take into account a different context that concerns disabled individuals particular abilities, which are case dependent and the differences in the best interest standard between minors and disabled persons. Both Connecticut and Minnesota construct statutes regarding sterilization with the best interest standard, however, both of these states utilize list based rule-driven statutes for these procedures as they represent such a massive intrusion on civil rights. These statutes also utilize less intrusive means language as a way to offer further protection something the statute has in common with the constructive of Connecticut conservatorship statutes (See Appendix H).¹⁰⁵

The best interest standard is rarely used in Connecticut conservatorship cases only in the context of conservator conflict with the court and the use of conserved person’s money for charity.¹⁰⁶ Conservatorship cases in Connecticut do, however, use strict statutes in the form of inclusive lists such as those found in prototype and model-driven state statutes. For example, the statutes define specifically what judges should consider when deciding whether or not to appoint a conservator in an involuntary proceeding (See

¹⁰⁴ Conn. Gen. Stat. § 46b-56 (2015).

¹⁰⁵ Conn. Gen. Stat. § 45a-690 (2015).

¹⁰⁶ Conn. Gen. Stat. § 45a-655 (2015).

Appendix I).¹⁰⁷ This is in stark contrast to the way the best interest standard is applied surrounding the guardianship of intellectually disabled individuals especially given the consideration here for technological assistance. Nevertheless, in making the same decision regarding evidence for a plenary guardian the Court primarily relies on the opinions of a team from the Department of Developmental Services (DDS) who serves a function similar to the Court Visitor in Minnesota. The DDS performs an assessment of the respondent and helps the Court determine which type of guardianship is necessary regardless of what the petitioner filed for.

While conservatorships in Connecticut do not necessarily use the best interest standard as often as the language is used in guardianship, the “least restrictive means” language is another standard-driven statute used instead. Connecticut defines this concept as:

Intervention for a conserved person that is sufficient to provide, within the resources available to the conserved person either from the conserved person’s own estate or from private or public assistance, for a conserved person’s personal needs or property management while affording the conserved person the greatest amount of independence and self-determination.¹⁰⁸

Clearly least restrictive means is meant to preserve individual autonomy and civil rights as much as possible as it is constructed in these statutes.

Least restrictive means language is not used in Connecticut guardianship statutes, however, the least restrictive environment is still considered important in determining suitable living options as exemplified by *In Re: Mary Anne A.* Court of Probate, District of Watertown. The Court considered the involuntary placement of Mary Anne, a 26-year-old impaired adult. The Department of Mental Retardation (DDS) argued for the

¹⁰⁷ Conn. Gen. Stat. § 45a-650 (2015).

¹⁰⁸ Conn. Gen. Stat. § 45a-644 (2015).

placement of the respondent in a group home facility while her guardian maintained that the home was the least restrictive environment. The Court sided in favor of the guardian while warning that the guardian must change certain behaviors deemed inappropriate towards the respondent. These types of cases are held to the “clear and convincing proof standard.” This standard as articulated by the judge is used...

Where the wisdom of experience has demonstrated the need for greater certainty, as where this high standard is required to sustain claims which have serious consequences or harsh or far-reaching effects on individuals... to justify an exceptional judicial remedy, or to circumvent established legal safeguards¹⁰⁹

As the DMR could not prove that a “residential placement is the least restrictive environment available for the respondent... [and] that the guardian can no longer provide adequate care for Mary Anne” the Court was forced to rule in favor of the non-moving party with imposed restrictions in mind to prevent guardian abuse.¹¹⁰ Here the Court demonstrates a protection for the individual in question that while not necessary surrounding respect for their autonomy to make their own decisions does demonstrate the basis on which the least restrictive environment is determined. Essentially, this type of restrictive and defined legislation makes it clear to judges that respect for the individual should be paramount.

While the judges described above and the statutes with clear legislative intent that call for respect for individual autonomy do often lead to this in practice, the pushback of societal protection inherent to guardianship combined with other factors of legal inertia

¹⁰⁹ Robert K. Killian, Jr., “Opinions of the Connecticut Probate Court: In Re: Mary Anne A. Court of Probate, District of Watertown,” *The Quinnipiac Probate Law Journal* 14, no. 1 (1999): 4.

¹¹⁰ *Ibid.*, 30–31.

prevent this respect from overriding other considerations.

Legal Inertia

The language used to construct statutes and the clarity of intent places a check on the respect for autonomy judges have and can exercise when using their discretion. The best interest standard represents arguably the most integral piece to the statutory construction of guardianship law in both Minnesota and Connecticut, holding more significance in the latter jurisdiction. Best interest language is used more often in Connecticut than in Minnesota with notable differences in how the statutes are constructed. Judges have the most discretion when the phrase “best interest” is not clearly defined. For the appointment of a plenary guardian, where Connecticut utilizes the model-driven statute discussed earlier, Minnesota uses a best interest standard with more limitations. The phrase is used in the context of a larger list of priorities for who should be selected as a guardian making it similar to a rule-driven statute (see Appendix J).¹¹¹ Minnesotan judges thus have less discretion when determining what the best interest is than their Connecticut counterparts. This is exemplified in the Minnesota Appeals Court case *In re Public Guardianship of: Tiffany Marie Jakubek, Public Ward (A08-1346)*. In this case the preferences of the ward were overridden, and the appellate court affirmed the decision of the district court finding that despite the respondent’s stated preference for her father as successor guardian, a public guardianship would better suit her situation.¹¹² While Minnesota has a much more restricted conceptualization of the best interest

¹¹¹ Minn. Stat. § 524.5-309 (2016).

¹¹² Kalitowski, *The Guardianship of the Person of: Tiffany Marie Jakubek, Ward (A08-649), In re Public Guardianship of: Tiffany Marie Jakubek, Public Ward (A08-1346)*, No. A08-0649, A08-1346, LEXIS 136, 9, (Minn. Ct. App. 2009).

standard for guardianships of incapacitated persons which includes a statutory preference for the desires of the ward, the appellant court determined that the ward's desired guardian did not know enough about the ward's situation nor were there other family members or less restrictive options. In this particular case, the respect for autonomy for an individual under guardianship to have their preferred guardian was overridden by a clause in the statutes.

Similarly, in Connecticut case *In re Cindy Maria Garcia (Guardianship)* – New Haven Probate Court, the Court determined an appropriate guardian for a respondent and mentioned legislative construction of the relevant statute as part of this determination. The judge cites the findings of the 1994 Connecticut Supreme Court case *Oller v. Oller-Chiang* in discussing the best interest standard. In *Oller v. Oller-Chiang*, the Supreme Court clarified the provisions of the Guardians of the Mentally Retarded Persons Act, General Statutes § 45a-668 through 45a-684 with respect to the mandate of the respondent's presence at their own guardianship appointment hearing and the grounds around determining respondent preference.¹¹³ The Court determined that the Superior Court failed in two important respects regarding the respondent's rights.

First, the court allowed the attorneys to waive the respondent's presence at the hearing, without making any finding on the record concerning whether she had made a knowing, voluntary and intelligent decision to waive that right. Second, the court failed to determine, or to take reasonable steps to determine, the respondent's preference before appointing the defendant as her limited guardian.¹¹⁴

In regards to respondent's preference the Court in *Oller* also acknowledged that it “may be difficult for a court to fulfill its statutory obligation to ascertain the preference of

¹¹³ J. Berdon, *Oller v. Oller-Chiang*, 230 Conn. 828, 830–831 (Supreme Court 1994).

¹¹⁴ *Ibid.*, 230: 853.

the respondent” and that the Court must make reasonable efforts to do so as determined by the facts of the case.¹¹⁵ This decision in *Oller* pertains to re Cindy Marie Garcia in terms of the construction of the best interest standard. The Court in *Oller* determined this statute to mean that while the preference of the respondent is important, it can be outweighed by other relevant factors. In re Cindy Marie Garcia, the judge articulated that while family is considered important especially if this aligns with the preference of the respondent, the statute is constructed differently from the statute pertaining to temporary limited guardian, which expresses a parental preference stipulation. The judge explains that this lack of parental preference language in both limited and plenary guardianship statutes demonstrates that “the legislature did not want a parental preference standard to apply in section 45a-676, or else it would have written the statute the same way that it wrote the temporary limited guardian statute.”¹¹⁶ The judge here does yield to the importance of respondent preference as necessitated by *Oller*, but as the respondent was found here to not be able to express a preference, the judge merely determined what was in the best interest of the respondent, which turned out to be joint guardianship by her parents. Respect for autonomy in this case while noted as important is essentially ignored, as the Judge is unable to determine the preferences of the respondent.

In terms of the clarity of legal intent, the restrictive nature of Minnesotan statutes allows for less discretion but this does not always lead to the desired outcome of the legislature. In Minnesota the least restrictive means language is not defined in statutes and rarely appears, however, the creators of the UPC, the National Conference of

¹¹⁵ *Ibid.*, 230:851.

¹¹⁶ John A. Keyes, “Opinion of the Connecticut Probate Court: In Re Cindy Marie Garcia (Guardianship) - New Haven Probate Court,” *Quinnipiac Probate Law Journal* 26, no. 219 (2013): 221.

Commissioners on Uniform State Laws explicate in their comments that the structure of the statutes is designed to further a philosophy of least restrictive environment and limited guardianship wherever possible. For example in discussing the construction of the definition of an “incapacitated person” the Commissioners state the following:

This definition is designed to work with the concepts of least restrictive alternative and limited guardianship or conservatorship – only removing those rights that the incapacitated person cannot exercise, and not establishing a guardianship or conservatorship if a lesser restrictive alternative exists.¹¹⁷

The legislative intent of the UPC involves least restrictive alternatives for both guardianships and conservatorships despite the use of the best interest standard for some provisions. Despite this spirit the legislators are attempting to convey, the UPC drafters more recently have acknowledged that there is less compliance by judges in using these alternatives in practice than they would prefer.¹¹⁸

This lack of use of alternatives and less restrictive forms of guardianship such as limited guardianship stems from the factors of legal inertia discussed previously. Beginning with clarity of legislative intent, lack of clarity can lead to judges not utilizing alternatives to guardianship. Connecticut judges all discussed the importance of discretion in their decision-making partially due to the unique facts of guardianship cases. As the disability spectrum is varied, so too are the facts of every case. As one Judge articulated, there are “unique situations which require flexibility” and involve action in

¹¹⁷ Unif. Probate Code § 5-102 (Amended 2010) 495.

¹¹⁸ Nina A. Kohn and David English, “Memo Re: Revision of the Uniform Guardianship and Protective Proceedings Act Prepared for the 2016 Annual Meeting of Uniform Law Commission” (National Conference of Commissioners on Uniform State Laws, June 1, 2016), http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/2016AM_RevisedGuardianship_Issues%20memo.pdf.

the “spirit of the law” when the law does not give direct guidance.¹¹⁹ In a case specific example of this, *In re: The Guardianship of Z*, the Court was faced with a decision to appoint a plenary guardian for a respondent with divorced parents where the matter was contested. While both parents agreed that a plenary guardian was necessary and the respondent was found by the Court to require one, the father petitioned for a joint guardianship while the mother desired to be sole plenary guardian. The judge sided in favor with the mother granting her sole plenary guardianship over Z. In discussing the requirements for the appointment of a plenary or limited guardian under Connecticut state statutes, the judge explained the following:

Our statutes provide no explicit guidelines to aid the Court in determining what is in the best interest of an intellectually disabled adult when plenary guardianship is contested... this category of adults is unique; while they are entitled to the vast majority of civil rights conferred on adults, the reality of their condition requires them to be treated like children in terms of their daily care... it is likely that the vast majority of these adults will not change so much as to no longer need a plenary guardian. However, as they age, they may well mature in certain aspects of their life so as to be able to express a preference with respect to what they want to do and with whom they would like to spend their time.¹²⁰

The judge here is faced with an unusual case and later utilizes a specific interpretation of precedent in order to explain how she construed best interest. Furthermore, the judge acknowledges the importance of respondent preference as articulated in *Oller*. As the *Guardianship of Z* involved divorced parents, the judge looked to a previous appeal from an earlier case, *Buchholz*. In *Buchholz*, the Probate Court awarded sole legal custody to the mother of an intellectually disabled minor. The father later appealed this case, and the Appellate Court held that it was within the father’s legal rights to appeal the Probate Court’s decision “because of the special affinity existing between parent and child, a

¹¹⁹ Ibid.

¹²⁰ Lisa K. Wexler, “Opinions of the Connecticut Probate Court: *In Re: The Guardianship of Z*,” *Quinnipiac Probate Law Journal* 29, no. 18 (2015): 24.

parent of a mentally retarded adult should enjoy the same legally protected rights and status as the parent of a minor.”¹²¹ Based on this ruling, the judge utilized the application of the best interest standard for minors to the best interests of Z, which unlike the statute regarding the intellectually disabled includes a comprehensive list of factors for judges to consider. Importantly, the judge draws a line between the best interests of a child and the best interests of an intellectually disabled person, explicating that “a parent is not the same as a plenary guardian, because a minor is not the exact same as an intellectually disabled adult.”¹²² As legislative intent in this case was unclear, the judge utilized precedent in a similar case to determine a course of action. What differentiates this case from that of alternatives to guardianship, specifically supported decision-making is this lack of precedent.

Guardianship cases are highly fact dependent due to the scope of disability judges see and must address in their decision-making. Connecticut judges articulated that it is important to be able to consider everything in a given case and this influences the judgments that are made. As one judge explicated there is a push for “giving the person as much freedom as possible,” however, when exercising discretion a judge must “consider the entire thing” and this restrains what can be done.¹²³ For example, one Connecticut judge pointed to voluntary conservatorships as a way to respect autonomy but stressed that the individual has to be “capable to ask for voluntary conservatorship.”¹²⁴ Under current statutory definitions, nonverbal individuals and many

¹²¹ *Ibid.*, 24–25.

¹²² *Ibid.*, 27.

¹²³ *Ibid.*

¹²⁴ Connecticut Judge 2, Interview with Connecticut Judge 2, Written Transcript, July 26, 2016.

others would not be able to request these types of arrangements. In a related set of comments, the Minnesota Appeals judge listed two important factors for why district court judges might not utilize alternatives to guardianship even when it is possible that they are permissible under the least restrictive alternatives spirit of the UPC. These two factors are that “No one wants to get reversed” as it leads to further legal proceedings for the parties involved and that district judges must work within the grounds of legislative intent where it is clear and “the law is not sufficiently developed” yet to include these alternatives.¹²⁵ Judges must respect legislative intent and some may read a lack of alternatives in states statutes as clear evidence that the legislature does not want these alternatives to be utilized in practice. While Connecticut judges do have more discretion in terms of what they can implement for alternatives with slightly less fear of reversal by superior court, the matter of statutory development still holds.

The Connecticut judges all had different reactions to the concept of supported decision-making, which only one of them was vaguely aware of. Two judges discussed the similarities between guardianship arrangements and supported decision-making in terms of the individuals selected to be supporter or guardian and the preference for a family member or close friend. Despite some hesitance around the concept, one of these judges stressed the societal aspect of inclusion for disabled individuals in daily life articulating that “laws that address people with disabilities helps everyone,” and when asked about due process and the future of guardianship the judge stated that “passing the UN CRPD” would be an ideal next step.¹²⁶ The other judge who pointed out the

¹²⁵ Minnesota Judge 1, Interview with Minnesota Appeals Judge, Written Transcript, November 30, 2016.

¹²⁶ Ibid.

similarities questioned whether the current system is “true substitute decision-making” in that much of the same criteria that goes into choosing a supporter in a supported decision-making agreement also goes into a choice of guardian or conservator.¹²⁷ The judge explained that the reality, at least in his or her own jurisdiction is that the “way the system works” is in line with the philosophy of supported decision-making.¹²⁸ In other words most individuals seem to be placed with the people the judge thinks he or she would prefer making decisions for them. In further discussion of supported decision-making the judge also stressed considerations for what is “realistic” for the disabled individual given their capacity.

The final Connecticut judge’s concern regarding supported decision-making is one about oversight and a general worry about “neutrality” towards the individual, specifically a fear that they might not aid the disabled person properly. The Minnesota judge pointed to this fact as a reason that district judges are currently reluctant to implement supported decision-making specifically as there are a distinct lack of protections in place in terms of the person who is the supporter. A report by Thomas F. Coleman of the Spectrum Institute, an organization with an affiliated project around preventing abuse of disabled individuals explains some of these concerns. Coleman explicates that supported decision-making should not be adopted in the United States until there are legal safeguards for all involved which includes some sort of judicial oversight and protection for undue influence.¹²⁹ While supported decision-making might represent the least restrictive arrangement possible, one that best respects autonomy,

¹²⁷ Connecticut Judge 3, Interview with Connecticut Judge 3.

¹²⁸ Ibid.

¹²⁹ Thomas F. Coleman, “Supported Decision-Making: A Critical Analysis” (Spectrum Institute, March 17, 2016), 5–6, <http://spectruminstitute.org/sdm/sdm-report.pdf>.

judges are uncomfortable with the prospect of an arrangement that currently has no precedent, or assurance against abuse.

Despite the findings presented above that demonstrate why judges often must consider factors other than respect for autonomy despite a genuine interest in honoring this, the Minnesota Appeals judge revealed valuable trends that point to alternatives in the near future. The judge asserted that less restrictive alternatives to guardianship, including supported decision-making are on the horizon given that the use of less restrictive, more flexible arrangements are consistent with other trends in law including institutionalization and trusteeship. The judge characterized this as a move from “formality to flexibility.”¹³⁰ When asked if it would be possible for a district court judge to suggest a supported decision-making agreement if the attorney provided that this was the least restrictive option, the judge articulated that this could genuinely be possible especially given the direction of the Uniform Probate Code. The code is currently being redrafted and especially if a lawyer were to point to these changes as being in near future the Appeals Court would be less likely to reverse the decision as out of scope of discretion. Finally the Judge pointed to the capacity for “social norming” within uniform laws in that they are designed to be amendable with different societal changes.¹³¹

While Connecticut represents a state with higher discretion afforded to judges in guardianship cases and Minnesota a state with lower discretion due to construction of statutes, judges in both states face similar challenges. Though more clearly defined in Minnesota statutes, respect for autonomy is a key factor for judges in all guardianship cases. Nevertheless this factor often clashes with questions of legislative intent, the facts

¹³⁰ Minnesota Judge 1, Interview with Minnesota Appeals Judge.

¹³¹ Ibid.

of guardianship cases, and the need for oversight when judges consider alternatives. Although these alternatives might embody the least restrictive way to proceed, a district judge or probate judge must contend with the fear of being reversed and the need to maintain the status quo unless pushed to do otherwise.

Discussion and Policy Implications

Judges across the country who hear guardianship cases all make similar decisions related to competency. In making these decisions, they must balance the divergent notions of individual autonomy and societal protection, the construction of state statutes, and the level of discretion in their jurisdictions. Variations across states can lead to higher or lower levels of judicial discretion as exemplified by the differences between the uses of the best interest standard in Connecticut and Minnesota. Connecticut's best interest standard for intellectually disabled individuals' can parallel the best interest standard's treatment of guardians of minors despite differences in how these two groups are treated under the law. Based on statutory analysis alone, judges appear to have more discretion in Connecticut than in Minnesota despite the fact that both jurisdictions utilize the best interest standard. Where Minnesota and the UPC defines the best interest standard with clarity through listing of those rights retained by wards and a general spirit of least restrictive alternatives, Connecticut's state statutes for disabled individuals provides a very vague definition only including respondent preference, a provision that can be overridden. These statutes and the levels of discretion they provide lead to an initial proposal that higher discretion would lead to greater respect for autonomy through the use of alternatives to guardianship. Instead the opposite is more likely to be true with

lower discretion states such as Minnesota providing the best protection of autonomy. However, while statutory analysis could lead to the conclusion that these states would use alternatives more often in practice, the reality of the situation is that judges in both states essentially act the same. The comments of the Connecticut judges and the statutes of both states demonstrate respect for the autonomy and will of the protected person but alternatives to guardianship and even limited guardianships are rarely used in favor of plenary arrangements. The drafters of the more restrictive UPC have encountered problems of compliance for least restrict means language unless the evidence clearly points to something other than plenary guardianship. Lack of awareness about these alternatives is one factor that might contribute to this phenomenon.

Only one judge interviewed in Connecticut was aware of the UNCRPD/Supported Decision-Making as an alternative to guardianship although the judge was not compelled to use it. When the process was described to another judge, this judge mentioned how the process for choosing a guardian is similar to the criteria used when a person enters a supported decision-making agreement. Yet exposure to the concept does not capture other legitimate concerns regarding it, specifically fears regarding oversight. Without clear statutory guidance a judge might not push the boundaries of the law when they have discretion for two reasons. The first is that reluctance for use may indicate a way of keeping their discretion acceptable to the Appeals Court. Connecticut judges clearly value their high level of discretion as all judges interviewed stressed the importance of adapting law to the idiosyncrasies of guardianship cases. Given outlier cases instances such as the Guardianship of Z, this desire makes sense. There is also awareness among judges that their decisions can be reversed and this is a highly

undesirable outcome for everyone involved in the guardianship process. The second reason relates to not wanting to go against legislative intent regardless of whether that intent is unclear or absent in the statute. Status quo rulings and rulings that rely on some precedent prevent judges from overstepping their bounds or making a premature judgment on what society wants to have in place.

Minnesota State statutes are much more strict in allowing judges discretion. The few standard-driven statutes used in guardianship procedures are combined with the Bill of Rights for Wards to create a system that should favor limited proceedings wherever possible, and if cases are not contested the paperwork will go through without a hearing. In terms of education, Minnesota offers a handbook for both judges and those applying for guardianship that articulates a variety of less restrictive alternatives to guardianship and encourages viewing guardianship as a last resort. Still despite the higher exposure to alternatives given to these district judges, they act similarly to their Connecticut counterparts. There is a hesitance by these judges towards alternative frameworks to guardianship due partially to the role of appeals court. Alternatives not strictly articulated in Minnesota state statutes are prone to appeal. Unless the judge in question made the case that this type of agreement did truly represent the least restrictive possible arrangement as opposed to a limited guardianship it is likely to be reversed.

The fears surrounding oversight cited by Connecticut judges also contribute to this reluctance in practice for alternatives to guardianship. There are very clear standards in guardianship cases for those attempting to impose restrictions on respondents and wards as demonstrated by the Minnesota Appeals Court cases and the importance of burden of proof. The Minnesota Appeals Court is unlikely to uphold district court

decisions exceeding its limited discretion. As mentioned, this works against alternative conceptions of guardianship, as there is very little room for suggestion. Concurrently, the Appeals Court works in favor of protecting the ward's individual autonomy and civil liberties providing an extra layer of oversight. Similarly, Connecticut states statutes also rely on high burdens of proof especially for procedures such as sterilization. These burdens of proof as well as the standards required for supporters in a supported decision-making agreement have no statutory precedent in either state's statutes. It is unknown whether judges could rely on the standards used to appoint guardians and limited guardians because despite the similarities between the choice for guardian and the choice for supporter, the two arrangements represent a fundamentally different conception of where legal capacity rests.

Along these lines the statutes, opinions, and comments of Connecticut judges demonstrate that judges do in fact consider the respondent's preferences important as is the statutory requirement when the respondent is able to clearly express these opinions in a manner the Court can understand based on statutes. This normally includes either verbal expression or written expression. It is thus unknown whether they would extend the same courtesy to nonverbal individuals despite one judge's recognition that nonverbal individuals may, in the future, be able to express preferences in a way the Court can utilize.

The situation in Uniform Probate States is on cusp of significant change. The National Conference of Commissioners on Uniform State Laws is currently in the processes of amending the Uniform Guardianship and Protective Proceedings Act (UGPPA). Most importantly, the amendments will include language focused on the

“facilitation and encouragement of less restrictive alternatives,” which will require that “neither guardianship nor conservatorship is appropriate where the person’s needs could be met with technological assistance or decision-making support.”¹³² Essentially the new UGPPA will include supported decision-making and provisions forcing judges to use it when it is deemed appropriate. This author is unsure how the appropriateness of this measure will be determined but imagines it will look similar to how limited guardianships and other alternatives are suggested currently. Within these amendments there are also provisions for “enhanced procedural rights for respondents,” including a narrowing of the exception “to the general rule that the respondent must be present at the hearing... [and] a requirement that explicit findings be made before certain fundamental rights are removed.”¹³³ The amended draft will also address the lack of compliance “with limited guardianship and conservatorship requirements” by forcing petitioners “seeking a full guardianship or conservatorship to do more to justify that approach.”¹³⁴ In line with the capability model of disability, amendments will work to update the language used to focus more on the individual rather than their disability in line with a social of disability. Furthermore, for those who still would not fall into the category of alternatives, a focus on “person-centered planning” will be used for guardianship and conservatorship, which should force an emphasis on what the individuals actually desire rather than the scope of their disabilities.¹³⁵ Whether or not these amendments lead to outcomes in practice that mirror their legislative intent remains to be seen. It is impossible to know now how these

¹³² *Ibid.*, 2.

¹³³ Kohn and English, “Memo Re: Revision of the Uniform Guardianship and Protective Proceedings Act Prepared for the 2016 Annual Meeting of Uniform Law Commission,” 1.

¹³⁴ *Ibid.*, 2–3.

¹³⁵ *Ibid.*, 3.

changes will effect UPC states and other states that adopt the UGPPA at least in part and should be the subject of future research. Nevertheless, the direction of the UGPPA amendments could point judges towards using plenary guardianship significantly less than it is currently administered.

As the system stands currently, the policy recommendations of Jameson et al. that further education and training on the concept of guardianship are echoed in this policy prescription. The handbook on Conservatorship and Guardianship in Minnesota published by the Minnesota Conference of Chief Judges and other guides like it represents one place where this education might start while waiting for the UGPPA to be amended. The Minnesota handbook has a comprehensive and detailed list of alternatives, which the Connecticut Probate Court handbooks do not provide. Supported decision-making could be listed as an option for judges and other individuals trying to determine the appropriateness of a guardianship arrangement. This would ideally include the individuals that suggest guardianships to the parents of disabled minors such as school counselors and attorneys. Absent statutory changes like that found in Texas or amendments to current laws that would offer greater consideration of alternatives, the lack of awareness of these alternatives by all involved in the guardianship process makes it difficult to see discretion as an avenue for change.

Education may unfortunately not be enough to bring these alternatives into practice throughout the country as the law stands now. Changes to the UGPPA are one step towards progress in UPC states, but for other states like Connecticut who do not adopt the UGPPA or only adopt it in pieces, there might not be statutory changes. Furthermore, despite attempts by legislators to force judges to utilize least restrictive

alternatives, it remains to be seen whether the UPC efforts will produce greater compliance. Grassroots initiatives can provide pressure for judges to at least attempt to push the boundaries of their discretion but without assurance of clear legislative intent, a path for oversight, and how alternatives will play out on a case-by-case business it is difficult to imagine judges departing from the status quo. Connecticut and Minnesota represent two very different ways to legislate the same problem of what to do with individuals who are considered unable to make decisions for themselves. While at first glance the statutory provisions that provide for more or less discretion could each lead to a larger respect for autonomy, judges in both states are forced to temper this respect with other considerations. Thus, even with education efforts only time will tell whether alternatives to guardianship, specifically supported decision-making, will be used in practice and whether there will be a decline in the use of plenary guardianship.

The conclusions of this project apply to the two jurisdictions studied and there are certainly limitations to this approach. Minnesota is only one example of a Uniform Probate Code state and Connecticut is only one example of an independent system state. The limitations of this study while somewhat generalizable to the country at large requires that more research be done on all of the UPC jurisdictions' specific statutes and their counterparts in independent systems. It would also be useful to explore what would happen if the individual applying for the guardianship were to bring alternatives to court whether judges would consider or try to implement them. As a way to look at supported decision-making in practice a study of how the policy is fairing in Texas where it is enshrined in statutes would be particularly helpful. Nevertheless, the two jurisdictions studied do represent a large portion of what American guardianship looks like in practice.

From a statutory perspective both of the states studied appear to be vastly different simply due to the discretion afforded to judges and what this discretion is supposed to promote. This led to an initial hypothesis that more discretion would lead to more autonomy. While this prediction was proven to be incorrect, what is more important is that the guardianship practice is essentially the same regardless of discretion level. This could be applied to the guardianship system as a whole especially with further research.

In order to broaden the scope of the study further exploration would require interviewing judges at the district/probate and appellate levels in both jurisdictions as a way to gain as much perspective as possible into the issue in these states. With more time an additional UPC state and independent court state, ideally Texas would also be explored. It is important to note an upside to the findings that guardianship appears to be applied the same way across the country. Consistency while not always providing disabled individuals with the arrangement that best suits their individual needs at least prevents vast differences among states leading to a more homogenized country. Guardianship proceedings in America and the judges who oversee them are still trying to answer a basic question of what to do with individuals that seem unable to care for themselves or their property. While the implications of this study demonstrate that the path forward remains unclear, considering this path is nonetheless important not only for disabled persons but also for determining how the law constructs any individual. From a macro lens, this study discusses how law constructs the individual and how this construction can have harmful or beneficial social consequences. As demonstrated by the *Olmstead* case judges understand that certain arrangements can perpetuate unwarranted assumptions about disabled persons and their capabilities. In the guardianship system

these assumptions can lead to massive restrictions of autonomy. The widespread use of plenary guardianship can be seen as an effect of these long held assumptions, which social movements and legislative amendments are currently attempting to address. Despite the lack of certainty for what the American guardianship system will look like in the future, the UPC amendments represent one way that assumptions may begin to change, which in turn can lead to changes in guardianship practice.

Bibliography

- “About NCPJ | National College of Probate Judges.” *National College of Probate Judges*. Accessed October 31, 2016. <http://ncpj.org/about-ncpj/>.
- American Association on Intellectual and Developmental Disabilities. “Definition of Intellectual Disability.” *American Association on Intellectual and Developmental Disabilities*, 2013. <http://aidd.org/intellectual-disability/definition#.V-rXa5MrKRt>.
- American Civil Liberties Union. “Legal Guardianship.” *American Civil Liberties Union*. Accessed October 2, 2016. <https://www.aclu.org/issues/disability-rights/integration-and-autonomy-people-disabilities/legal-guardianship>.
- Barry, Kevin. “Toward Universalism: What the ADA Amendments Act of 2008 Can and Can’t Do for Disability Rights.” *Berkeley Journal of Employment and Labor Law* 31, no. 2 (2010): 203–83.
- Berdon, J. *Oller v. Oller-Chiang*, 230 Conn. 828 (Supreme Court 1994).
- Carney, Terry, and David Tait. “Adult Guardianship: Narrative Readings in the ‘Shadow’ of the Law?” *International Journal of Law and Psychiatry* 21, no. 2 (1998): 147–62.
- Coleman, Thomas F. “Supported Decision-Making: A Critical Analysis.” Spectrum Institute, March 17, 2016. <http://spectruminstitute.org/sdm/sdm-report.pdf>.
- Conn. Gen. Stat. § 45a-644 (2015).
- Conn. Gen. Stat. § 45a-650 (2015).
- Conn. Gen. Stat. § 45a-655 (2015).
- Conn. Gen. Stat. § 45a-676 (2015).
- Conn. Gen. Stat. § 45a-690 (2015).
- Conn. Gen. Stat. § 46b-56 (2015).
- Connecticut Judge 1. Interview With Connecticut Judge 1. Written Transcript, July 5, 2016.
- Connecticut Judge 2. Interview with Connecticut Judge 2. Written Transcript, July 26, 2016.

Connecticut Judge 3. Interview with Connecticut Judge 3. Written Transcript, August 18, 2016.

“Convention on the Rights of Persons with Disabilities.” Accessed March 15, 2016.
<http://www.un.org/disabilities/convention/conventionfull.shtml>.

Davies, Jack. In Re Guardianship of: Sharon Kowalski, Ward., 791, (Minn. Ct. App. 1991).

Devi, Nandini. “Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities.” *Journal of Law, Medicine & Ethics* 41, no. 4 (Winter 2013): 792–806. doi:10.1111/jlme.12090.

Erickson. “Expanded Rights and Protections for Adults with Disabilities | Massachusetts Guardianship Association (MGA).” *Massachusetts Guardianship Association*. Accessed November 1, 2016.
<http://www.massguardianshipassociation.org/information/guardianship-of-an-adult-2/expanded-rights-and-protections-for-adults-with-disabilities/>.

Florida Courts. “Guardianship.” *Florida Courts*, August 5, 2014.
<http://www.flcourts.org/resources-and-services/family-courts/guardianship.stml>.

Foy, H. Miles. “On Judicial Discretion In Statutory Interpretation.” *Administrative Law Review* 62, no. 2 (2010): 291–327.

Frolik, Lawrence A. “Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform.” *Arizona Law Review* 23 (1981): 599.

General Definitions, n.d.

Gennaioli, Nicola, and Stefano Rossi. “Judicial Discretion in Corporate Bankruptcy.” *The Review of Financial Studies* 23, no. 11 (2010): 4078–4114.

Harris, Alexes. “Diverting and Abdicating Judicial Discretion: Cultural, Political, and Procedural Dynamics in California Juvenile Justice.” *Law & Society Review* 41, no. 2 (2007): 387–427.

Jameson, J. Matt, Tim Riesen, Shamby Polychronis, Barbara Trader, Susan Mizner, Jonathan Martinis, and Dohn Hoyle. “Guardianship and the Potential of Supported Decision Making With Individuals With Disabilities.” *Research and Practice for Persons with Severe Disabilities* 40, no. 1 (March 1, 2015): 36–51. doi:10.1177/1540796915586189.

Kalitowski. *The Guardianship of the Person of: Tiffany Marie Jakubek, Ward (A08-649), In re Public Guardianship of: Tiffany Marie Jakubek, Public Ward (A08-1346)*, No. A08- 0649, A08-1346, LEXIS 136, 9, (Minn. Ct. App. 2009).

Keyes, John A. “Opinion of the Connecticut Probate Court: In Re Cindy Marie Garcia (Guardianship) - New Haven Probate Court.” *Quinnipiac Probate Law Journal* 26, no. 219 (2013): 219–23.

Killian, Jr., Robert K. “Opinions of the Connecticut Probate Court: In Re: Mary Anne A. Court of Probate, District of Watertown.” *The Quinnipiac Probate Law Journal* 14, no. 1 (1999): 1–34.

Kohn, Nina A., and David English. “Memo Re: Revision of the Uniform Guardianship and Protective Proceedings Act Prepared for the 2016 Annual Meeting of Uniform Law Commission.” National Conference of Commissioners on Uniform State Laws, June 1, 2016.
http://www.uniformlaws.org/shared/docs/Guardianship%20and%20Protective%20Proceedings/2016AM_RevisedGuardianship_Issues%20memo.pdf.

Kurmay, Paul F. “Opinion of the Connecticut Probate Court: In Re: [Respondent], Probate Court, District of Stratford, November 12 2003.” *Quinnipiac Probate Law Journal* 18, no. 54 (2004): 54–58.

Legal Information Institute. “Uniform Probate Code.” *Legal Information Institute*, 2015.
<https://www.law.cornell.edu/uniform/probate>.

Massachusetts General Legislature. *Protection of Persons Under Disability and Their Property. Massachusetts Uniform Probate Code*. Vol. 190b, 2009.

Mayhew, Michael. “Survey of State Guardianship Laws: Statutory Provision for Clinical Evaluations.” *Bifocal: Bar Associations in Focus on Aging and the Law* 27, no. 1 (October 2005): 1–2, 13–19.

Mégret, Frédéric. “The Disabilities Convention: Human Rights of Persons with Disabilities or Disability Rights?” *Human Rights Quarterly* 30, no. 2 (2008): 494–516. doi:10.1353/hrq.0.0000.

Miceli, Thomas J. “Criminal Sentencing Guidelines and Judicial Discretion.” *Contemporary Economic Policy* 26, no. 2 (April 2008): 207–15.
doi:10.1111/j.1465-7287.2007.00065.x.

Michael Bach, and Lana Kerzner. “A New Paradigm for Protecting Autonomy and the Right to Legal Capacity.” Law Commission of Ontario, October 2010.
<http://www.lco-cdo.org/disabilities/bach-kerzner.pdf>.

- Minnesota Conference of Chief Judges. “Con,” 2016.
<http://www.mncourts.gov/mncourtsgov/media/CourtForms/GAC101.pdf?ext=.pdf>
- Minnesota Judge 1. Interview with Minnesota Appeals Judge. Written Transcript, November 30, 2016.
- Minn. Stat. § 524.1-201 (2016).
- Minn. Stat. § 524.5-102 (2016).
- Minn. Stat. § 524.5-120 (2016).
- Minn. Stat. § 524.5-309 (2016).
- Office of the Probate Court Administrator State of Connecticut. *Probate Court User Guide: Persons With Intellectual Disability*. Probate Court Administrator, State of Connecticut, 2015. <http://www.ctprobate.gov/Documents/User%20Guide%20-%20Persons%20with%20Intellectual%20Disability.pdf>.
- O’Sullivan, Joan L., and Diane E. Hoffman. “The Guardianship Puzzle: Whatever Happened to Due Process?” *Maryland Journal Of Contemporary Legal Issues* 7, no. 11 (1995): 11–80.
- Payton S. “The Concept of the Person in the Parens Patriae Jurisdiction over Previously Competent Persons.” *The Journal of Medicine and Philosophy* 17, no. 6 (1992): 605–45.
- Probate Court Administrator, State of Connecticut. *Probate Court User Guide For Conservators*. Office of the Probate Court Administrator, State of Connecticut, 2016. <http://www.ctprobate.gov/Documents/User%20Guide%20-%20Conservators.pdf>.
- Quinn, Mary Joy. *Guardianships of Adults: Achieving Justice, Autonomy, and Safety*. Springer Series on Ethics, Law, and Aging; Springer Series on Ethics, Law, and Aging. New York: Springer Pub. Co., 2005. Table of contents <http://catdir.loc.gov/catdir/toc/ecip052/2004024858.html>.
- Sabatello, Maya, and Marianne Schulze. *Human Rights and Disability Advocacy*. Pennsylvania Studies in Human Rights; Pennsylvania Studies in Human Rights. Philadelphia: University of Pennsylvania Press, 2014.
- Salzman, Leslie. “Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act.” *University of Colorado Law Review* 81, no. 157 (Winter 2010): 158–245.

Smith, Judge. *In the Matter of the Guardianship of: Michael Timothy O'Brien, Ward*. No. A13-1348, LEXIS 55, (Minn. Ct. App. 2014).

Solan, Lawrence M. "Legislative Style and Judicial Discretion: The Case of Guardianship Law." *International Journal of Law and Psychiatry* 35, no. 5–6 (September 2012): 464–72. doi:10.1016/j.ijlp.2012.09.013.

"SSA Representative Payee: Survey of State Guardianship Laws and Court Practices." Administrative Conference of the United States, December 24, 2014. https://www.acus.gov/sites/default/files/documents/SSA%2520Rep%2520Payee_State%2520Laws%2520and%2520Court%2520Practices_FINAL.pdf.

The National Conference of Commissioners on Uniform State Laws. "Adult Guardianship and Protective Proceedings Jurisdiction Act." *Uniform Law Commission - The National Conference of Commissioners on Uniform State Laws*, 2016. <http://www.uniformlaws.org/Act.aspx?title=Adult%20Guardianship%20and%20Protective%20Proceedings%20Jurisdiction%20Act>.

The National Conference of Commissioners on Uniform State Laws. "Probate Code." *Uniform Law Commission*, 2016. <http://www.uniformlaws.org/Act.aspx?title=Probate%20Code>.

Uekert, Brenda K., and Richard Van Duizend. "Adult Guardianships: A 'Best Guess' National Estimate and the Momentum for Reform." *Future Trends In State Courts 2011*. National Center for State Courts, 2011. <http://www.eldersandcourts.org/~media/Microsites/Files/cec/AdultGuardianships.ashx>.

Uekert, Brenda K., and Richard Y. Schauffler. "Caseload Highlights: The Need for Improved Adult Guardianship Data." *Examining the Work of the State Courts. Court Statistics Project*, November 2008. http://www.courtstatistics.org/~media/Microsites/Files/CSP/Highlights/15_2_Adult_Guardianship_Data.ashx.

"United States International Council on Disabilities - CRPD Supporters." Accessed September 1, 2016. <http://usidc.org/template/page.cfm?id=252>.

Van Duizend, Richard, and Brenda K. Uekert. "National Probate Court Standards." *National College of Probate Judges*, 2013. <http://ncsc.contentdm.oclc.org/cdm/ref/collection/spcts/id/240>.

Vaughn, Jacqueline. *Disabled Rights: American Disability Policy and the Fight for Equality*. Washington, D.C.: Georgetown University Press, 2003. Table of contents <http://catdir.loc.gov/catdir/toc/fy037/2002013813.html>.

Vermont Division of Disability and Aging Services. "Voluntary Guardianship — Division of Disability and Aging Services." *Vermont Division of Disability and Aging Services*, 2016. <http://www.ddas.vermont.gov/ddas-programs/programs-guardianship/programs-guardian-addl-webpages/programs-guardianship-voluntary>.

Wexler, Lisa K. "Opinions of the Connecticut Probate Court: In Re: The Guardianship of Z." *Quinnipiac Probate Law Journal* 29, no. 18 (2015).

Zaffirini, Judith, Jose Rodriguez, and Charles Perry. *Supported Decision-Making Agreement Act. Texas Estates Code*, 2015.
<http://www.statutes.legis.state.tx.us/Docs/SDocs/ESTATESCODE.pdf>.

Appendix A: From the Uniform Law Commission

<http://www.uniformlaws.org/Act.aspx?title=Probate%20Code>

Appendix B: **Sec. 1-1g. “Mental retardation”, “intellectual disability”, defined**

[intellectual disability] means a significant limitation in intellectual functioning and deficits in adaptive behavior that originated during the developmental period before eighteen years of age... a significant limitation in intellectual functioning and deficits in adaptive behavior that originated during the developmental period before eighteen years of age.

Appendix C: **524.5-102 DEFINITIONS. Subd. 6. Incapacitated Person.**

an individual who, for reasons other than being a minor, is impaired to the extent of lacking sufficient understanding or capacity to make or communicate responsible personal decisions, and who has demonstrated deficits in behavior which evidence an inability to meet personal needs for medical care, nutrition, clothing, shelter, or safety, even with appropriate technological assistance.

Appendix D: **Sec. 45a-644. (Formerly Sec. 45-70a). Definitions. (c), (d)**

(c) “Incapable of caring for one’s self” or “incapable of caring for himself or herself” means that a person has a mental, emotional or physical condition that results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to meet essential requirements for personal needs.

(d) “Incapable of managing his or her affairs” means that a person has a mental, emotional or physical condition that results in such person being unable to receive and evaluate information or make or communicate decisions to such an extent that the person is unable, even with appropriate assistance, to perform the functions inherent in managing his or her affairs, and the person has property that will be wasted or dissipated unless adequate property management is provided, or that funds are needed for the support, care or welfare of the person or those entitled to be supported by the person and that the person is unable to take the necessary steps to obtain or provide funds needed for the support, care or welfare of the person or those entitled to be supported by the person.

Appendix E: Sec. 45a-676. (Formerly Sec. 45-328). Appointment of plenary guardian or limited guardian.

(f) In selecting a plenary guardian or limited guardian of the person with intellectual disability, the court shall be guided by the best interests of the respondent, including, but not limited to, the preference of the respondent as to who should be appointed as plenary guardian or limited guardian.

Appendix F: 524.5-120 BILL OF RIGHTS FOR WARDS AND PROTECTED PERSONS.

The ward or protected person retains all rights not restricted by court order and these rights must be enforced by the court. These rights include the right to:

- (1) treatment with dignity and respect;
- (2) due consideration of current and previously stated personal desires, medical treatment preferences, religious beliefs, and other preferences and opinions in decisions made by the guardian or conservator;
- (3) receive timely and appropriate health care and medical treatment that does not violate known conscientious, religious, or moral beliefs of the ward or protected person;
- (4) exercise control of all aspects of life not delegated specifically by court order to the guardian or conservator;
- (5) guardianship or conservatorship services individually suited to the ward's or protected person's conditions and needs;
- (6) petition the court to prevent or initiate a change in abode;
- (7) care, comfort, social and recreational needs, training, education, habilitation, and rehabilitation care and services, within available resources;

(8) be consulted concerning, and to decide to the extent possible, the reasonable care and disposition of the ward's or protected person's clothing, furniture, vehicles, and other personal effects, to object to the disposition of personal property and effects, and to petition the court for a review of the guardian's or conservator's proposed disposition;

(9) personal privacy;

(10) communication and visitation with persons of the ward's or protected person's choice, provided that if the guardian has found that certain communication or visitation may result in harm to the ward's or protected person's health, safety, or well-being, that communication or visitation may be restricted but only to the extent necessary to prevent the harm;

(11) marry and procreate, unless court approval is required, and to consent or object to sterilization as provided in section 524.5-313, paragraph (c), clause (4), item (iv);

(12) petition the court for termination or modification of the guardianship or conservatorship or for other appropriate relief;

(13) be represented by an attorney in any proceeding or for the purpose of petitioning the court;

(14) vote, unless restricted by the court; and

(15) execute a health care directive, including both health care instructions and the appointment of a health care agent, if the court has not granted a guardian any of the powers or duties under section 524.5-313, paragraph (c), clause (1), (2), or (4).

Appendix G: Sec. 46b-56. (Formerly Sec. 46-42). Orders re custody, care, education, visitation and support of children. Best interests of the child. Access to records of minor child by noncustodial parent. Orders re therapy, counseling and drug or alcohol screening.

(c) In making or modifying any order as provided in subsections (a) and (b) of this section, the court shall consider the best interests of the child, and in doing so may consider, but shall not be limited to, one or more of the following factors: (1) The temperament and developmental needs of the child; (2) the capacity and the disposition of the parents to understand and meet the needs of the child; (3) any relevant and material information obtained from the child, including the informed preferences of the child; (4) the wishes of the child's parents as to custody; (5) the past and current interaction and relationship of the child with each parent, the child's siblings and any other person who may significantly affect the best interests of the child; (6) the willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court orders; (7) any manipulation by or coercive behavior of the parents in an effort to involve the child in the parents' dispute; (8) the ability of each parent to be actively involved in the life of the child; (9) the child's adjustment to his or her home, school and community environments; (10) the length of time that the child has lived in a stable and satisfactory environment and the desirability of maintaining continuity in such environment, provided the court may consider favorably a parent who voluntarily leaves the child's family home pendente lite in order to alleviate stress in the household; (11) the stability of the child's

existing or proposed residences, or both; (12) the mental and physical health of all individuals involved, except that a disability of a proposed custodial parent or other party, in and of itself, shall not be determinative of custody unless the proposed custodial arrangement is not in the best interests of the child; (13) the child's cultural background; (14) the effect on the child of the actions of an abuser, if any domestic violence has occurred between the parents or between a parent and another individual or the child; (15) whether the child or a sibling of the child has been abused or neglected, as defined respectively in section 46b-120; and (16) whether the party satisfactorily completed participation in a parenting education program established pursuant to section 46b-69b. The court is not required to assign any weight to any of the factors that it considers, but shall articulate the basis for its decision.

Appendix H: **Part VI Sterilization Sec. 45a-690. (Formerly Sec. 45-78p). Definitions.**

(4) "Best interest" shall include all of the following factors: (A) Less drastic alternative contraceptive methods have proved unworkable or inapplicable, (B) the individual is physiologically sexually mature, (C) there is no evidence of infertility, (D) the individual has the capability and a reasonable opportunity for sexual activity, (E) the individual is unable to understand reproduction or contraception and there exists the likely permanence of that inability, (F) the physical or emotional inability to care for a child, (G) the proponents of the sterilization are seeking sterilization in good faith and their primary concern is for the best interests of the respondent rather than their own convenience or the convenience of the public, and (H) in the case of females, procreation would endanger the life or severely impair the health of the individual.

Appendix I: **Sec. 45a-650. (Formerly Sec. 45-70d). Hearing on application for involuntary representation. Evidence. Appointment of conservator. Limitation re powers and duties. Probate bond**

g) When determining whether a conservator should be appointed the court shall consider the following factors: (1) The abilities of the respondent; (2) the respondent's capacity to understand and articulate an informed preference regarding the care of his or her person or the management of his or her affairs; (3) any relevant and material information obtained from the respondent; (4) evidence of the respondent's past preferences and life style choices; (5) the respondent's cultural background; (6) the desirability of maintaining continuity in the respondent's life and environment; (7) whether the respondent had previously made adequate alternative arrangements for the care of his or her person or for the management of his or her affairs, including, but not limited to, the execution of a durable power of attorney, springing power of attorney, the appointment of a health care representative or health care agent, the execution of a living will or trust or the execution of any other similar document; (8) any relevant and material evidence from the respondent's family and any other person regarding the respondent's past practices and preferences; and (9) any supportive services, **technologies** or other means that are available to assist the respondent in meeting his or her needs. Sec. 45a-650. Hearing on application for involuntary representation. Evidence. Appointment of Conservator. Limitation re powers and duties, Probate bond.

Appendix J: **524.5-309 WHO MAY BE GUARDIAN: PRIORITIES.**

(a) Subject to paragraph (c), the court, in appointing a guardian, shall consider persons otherwise qualified in the following order of priority:

(1) a guardian, other than a temporary or emergency guardian, currently acting for the respondent in this state or elsewhere;

(2) a health care agent appointed by the respondent in a health care directive that does not include limitations on the nomination of the health care agent as a guardian and is executed pursuant to chapter 145C;

(3) the spouse of the respondent or a person nominated by will or other signed writing executed in the same manner as a health care directive pursuant to chapter 145C of a deceased spouse;

(4) an adult child of the respondent;

(5) a parent of the respondent, or an individual nominated by will or other signed writing executed in the same manner as a health care directive pursuant to chapter 145C of a deceased parent;

(6) an adult with whom the respondent has resided for more than six months before the filing of the petition;

(7) an adult who is related to the respondent by blood, adoption, or marriage; and

(8) any other adult or a professional guardian.

(b) The court, acting in the **best interest of the respondent**, may decline to appoint a person having priority and appoint a person having a lower priority or no priority. With respect to persons having equal priority, the court shall select the one it considers best qualified.

(c) Any individual or agency which provides residence, custodial care, medical care, employment training or other care or services for which they receive a fee may not be appointed as guardian unless related to the respondent by blood, marriage, or adoption.