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42 U.S.C. § 1983 states:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Enforcing Federal Rights Under Section 1983

Right to Counsel in Guardianship Proceedings

by Elizabeth R. Calhoun and Suzanna L. Basinger

> Counsel shall be appointed for each respondent who does not have counsel, regardless of the respondent's ability to pay. If a respondent wishes to waive counsel and exercise the right of self-representation, the court shall ensure that the waiver is knowing and voluntary and otherwise complies with the laws of that jurisdiction.[1]

More than ten years have passed since participants in the National Guardianship Symposium, sponsored by the American Bar Association's Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly, recommended this in July 1988. The symposium, also known as the Wingspread conference (after the Johnson Foundation's Wingspread facilities in Racine, Wisconsin, where it was held), came on the heels of the 1987 Associated Press series, "Guardians of the Elderly: An Ailing System" and was an opportunity to discuss revamping the guardianship system.[2] In the years

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[1] AMERICAN BAR ASS'N COMM'N ON THE MENTALLY DISABLED & COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, GUARDIANSHIP: AN AGENDA FOR REFORM 10 (1989), *reprinted as Guardianship: An Agenda for Reform; Recommendations of the National Guardianship Symposium and Policy of the American Bar Association*, 13 MENTAL & PHYSICAL DISABILITY L. REP. 271 (1989) [hereinafter GUARDIANSHIP]. Thirty-eight guardianship experts from across the country discussed guardianship issues and recommended the reform of the national guardianship system (National Guardianship Symposium, sponsored by the American Bar Association's Commissions on the Mentally Disabled and Legal Problems of the Elderly, Racine, Wisconsin, July 21–23, 1988). The experts included probate judges, attorneys, service providers, doctors, representatives from the network on aging, mental health professionals, government officials, law professors, a bioethicist, a state court administrator, a judicial educator, an anthropologist, and American Bar Association staff.

[2] Fred Bayles & Scott McCartney, *Guardians of the Elderly: An Ailing System*, Associated Press, Sept. 1987, *available in* LEXIS, News Library, ARCNWS File. In 1987, after numerous stories of abuses of the guardianship system began to appear in the press, the Associated Press conducted a study, culminating in this report, of the nation's guardianship system. Fifty-seven reporters reviewed more than 2,200 randomly selected probate court files from all the states. The study revealed that many guardians were dedicated, caring people and that the system often met the needs of frail and disabled persons. But the study also revealed that guardianship had serious shortcomings: due process rights often were lacking; the standard for incapacity often was unclear; guardians generally had little or no training and often institutionalized their wards; many probate courts lacked the resources to monitor adequately the guardians' activities; and the public needed to be more aware of alternatives to guardianship. The interest of the American Bar Association, which already had been actively involved for ten years in guardianship issues, was catalyzed by this study.

since, state guardianship laws have undergone major revision, as has the Uniform Guardianship and Protective Proceedings Act (UGPPA). The 1997 version of the UGPPA represents the culmination of those changes—two alternative provisions for appointment of counsel:[3]

Alternative 1—The court shall appoint a lawyer to represent the respondent in the proceeding if (1) requested by the respondent; (2) recommended by the [visitor]; or (3) the court determines that the respondent needs representation.[4]

Alternative 2—Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding.[5]

Even with such revisions, many jurisdictions still fail to meet the standards and guidelines suggested by the Wingspread conference.

The right to counsel in a judicial proceeding where a person may be deprived of one or more liberty interests is basic to the American system of jurisprudence. Thanks largely to the pop-culturalization of *Miranda v. Arizona*, Americans know that they have the right to an attorney in criminal cases and that if they cannot afford one, then one will be appointed for them.[6] Many Americans therefore assume that at a hearing to determine whether an individual may be deprived of the legal ability to control his or her own affairs (e.g., where to live, which medical treatment to receive), someone will advocate and defend that individual's right to autonomy. Although a petition for guardianship is an obvious threat to the rights and liberties of the individual in question, some debate remains about the extent to which procedural safeguards are needed. The resulting lack of uniformity among state guardianship laws highlights the conflicting theories that continue to surround guardianship and issues of incapacity.

A complete analysis and discussion of a state's right-to-counsel provisions in guardianship proceedings is complicated by the divergent methods used in implementation. Each state has prescribed its own practice for conducting the hearing and providing procedural protections. Depending on the jurisdiction, the designation of counsel may be automatic, by request, or merely relegated to the discretion of the court.

Not only do the states' methods vary as to when and how counsel is provided to the respondent, but also they differ in the role assigned to the individual selected to safeguard the respondent's interests. Some states appoint counsel *qua* counsel, while others call for a guardian *ad litem* or a court visitor.[7] While all states must adhere to the basic tenets of due process by giving respondents the "right" to counsel in a guardianship hearing, the states are widely divergent in the way they effectuate that right. Surprisingly a few states do not explicitly provide for the right to or appointment of counsel (as opposed to guardian *ad litem*) at all.[8] In an attempt to explain the importance of mandatory appointment of counsel in all guardianship proceedings, we will examine (1) the theories behind the role of counsel; (2) the approaches taken by the states in implementing the right to counsel; (3) perspectives on mandated appointment of counsel and the approach taken by the 1997 version of the UGPPA;

[3] UGPPA (1997 Act) § 305(b).

[4] *Id.*, Alternative 1 (National Conference of Commissioners of Uniform State Laws 1997) (amended 1998).

[5] *Id.* § 305(b), Alternative 2.

[6] Miranda v. Arizona, 384 U.S. 436 (1966).

[7] The role of a court visitor is similar to that of a guardian *ad litem* and may vary by jurisdiction. Comments in the UGPPA define a visitor as the "information-gathering arm of the court." A visitor may be a physician, psychologist, nurse, social worker, or any other person who has training and expertise in the area of alleged incapacity. UGPPA (1997 Act) § 305 Comment.

[8] MASS. GEN. LAWS ANN. ch. 201, § 34 (West 1999); MISS. CODE ANN. § 93-13-255 (1998); N.D. CENT. CODE § 30.1-29-07 (1997).

(4) the issue of the timing of appointment; and (5) the question of who covers the cost of counsel.

I. Role of Counsel

The debate over the mandatory right to counsel is necessarily tied to issues surrounding the role counsel should play in a guardianship proceeding. The two major theories concerning the appropriate role of counsel—"best interests" and "zealous advocate"—color the state guardianship provisions.[9] Some states provide for the appointment of a visitor or a guardian *ad litem* in an effort to evaluate the best interests of the respondent instead of appointing counsel and treating the petition as automatically adversarial.[10] Generally a guardian *ad litem* serves as an informer for the court, evaluating the merits of the petition and recommending what he or she determines is in the best interest of the respondent. The guardian *ad litem*'s report to the court is an impartial assessment of the respondent and his or her particular situation.

The role filled by a guardian *ad litem* is more objective than the traditional role of counsel acting as zealous advocate. For example, Washington State's code makes the following distinction: "Counsel's role shall be distinct from that of the guardian *ad litem*, who is expected to promote the best interest of the alleged incapacitated individual, rather than the alleged incapacitated individual's expressed preferences."[11]

An attorney appointed as counsel in the traditional sense in a guardianship hearing serves two functions. The attorney must ensure that the proper procedures are followed and also advocate the respondent's own position concerning the proposed guardian and the extent and duration of the guardianship.[12] As opposed to a guardian *ad litem* who must recommend to the court what is in the best interest of the respondent, counsel is present to advocate what the client decides is in his or her own best interest.

The position adopted by the Wingspread conferees and endorsed by the American Bar Association favors mandatory counsel. The rationale is as follows: "A mandatory right to counsel recognizes the serious rights involved in any guardianship proceeding. The primary purpose of providing counsel is to ensure that all significant points of view are aired in a hearing at which both sides are represented."[13] With a guardian *ad litem*, no one acts strictly on behalf of the respondent. The petitioner has counsel, and the guardian *ad litem* is responsible to the court, leaving the person whose interests are at stake vulnerable and without an aid to advocate on his or her behalf.

Although the duties of an attorney and a guardian *ad litem* are distinct, the lines are often blurred by both local custom and statutory language. Occasionally a guardian *ad litem* is given the responsibilities of an attorney, but more frequently the attorney is given the powers

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[9] Two views on the role of an attorney representing an alleged incompetent: According to the "best interest" model, if the client is confused, medicated, unable to articulate his or her wishes, or not in touch with reality, the attorney must judge what is in the best interest of the client and represent the client according to that judgment. Critics of the "best interest" model argue that determining what is best for the client is the role of a guardian *ad litem*, and that the role of counsel is to "serve as zealous advocate of the legal interests of [the] client, but not to determine those interests." BRUCE DENNIS SALES ET AL., DISABLED PERSONS AND THE LAW—STATE LEGISLATIVE ISSUES 538 (Joel Feinberg et al. eds., 1982).

[10] Joan L. O'Sullivan, Role of the Attorney for the Alleged Incapacitated Person (Nov. 1998) (unpublished outline prepared for the legal services preconference of the National Academy of Elder Law Attorneys).

[11] WASH. REV. CODE ANN. § 11.88.045(1) (West 1999).

[12] O'Sullivan, *supra* note 10.

[13] GUARDIANSHIP, *supra* note 1, at 11. The symposium's position was not formally adopted by the American Bar Association. However, the official position of the American Bar Association is as follows: "Counsel as advocate for the respondent should be appointed in every case, to be supplanted by respondent's private counsel if the respondent prefers." AMERICAN BAR ASS'N, STATEMENT OF RECOMMENDED JUDICIAL PRACTICES (June 1986).

of a guardian *ad litem*. For instance, the Mississippi code allows for the appointment of a guardian *ad litem* who "shall be present at the hearing and present the interests of [the respondent]," whereas the South Carolina statute provides for the appointment of counsel who "shall have the powers and duties of a guardian *ad litem*."[14] To further complicate matters, these types of provisions are sometimes discretionary. For example, the relevant Alabama law provides that the court shall "appoint an attorney to represent the person in the proceeding. The person so appointed *may be granted* the powers and duties of a guardian *ad litem*."[15]

Each position certainly contributes to the efficiency and reliability of the outcome of a guardianship proceeding, but because of the materially different roles of counsel and guardian *ad litem*, the two jobs must be kept from becoming one. On this point, a New Jersey court made the following observation: "Advocacy that is diluted by excessive concern for the client's best interests would raise troubling questions for attorneys in an adversary system. An attorney proceeds without well-defined standards if he or she forsakes a client's instructions for the attorney's perception of the client's best interests."[16]

In an attempt to keep the jobs separate, the language of some statutes explicitly delineates the duties of counsel and of a guardian *ad litem*. For example, in Wyoming the relevant statute states that the "guardian *ad litem* shall not have the powers of a guardian or conservator nor shall the guardian *ad litem* act as legal counsel for the [respondent]."[17] Other states, such as Missouri, go a step further by listing several duties to be performed by the appointed counsel.[18]

As states have reevaluated guardianship laws, they have instituted safeguarding regimes. Many states have addressed both functions by providing for both a guardian *ad litem* and legal counsel. Statutes most often mandate the appointment of a guardian *ad litem* and then allow for counsel under certain circumstances. This system attempts to provide the best of both worlds. An analysis of the Rhode Island statute is illustrative. First, the guardian *ad litem* is appointed as soon as the guardianship petition is filed with the court.[19] The statute describes the duties of the guardian *ad litem* to include personally visiting the respondent, explaining the nature and purpose of the petition as well as the procedures involved, visiting the proposed guardian, and making an assessment of all the relevant information.[20] The statute provides for appointment of counsel under some circumstances: "If the respondent wishes to contest the petition, to have limits placed on the guardian's powers, or to object to a particular person being appointed guardian, and, if legal counsel has not been secured, the court shall appoint legal counsel."[21]

II. Right to Counsel

A comprehensive look at the states' statutory provisions concerning right to counsel in guardianship proceedings reveals inconsistencies in the manner in which the right to counsel is implemented. Table 1 is an attempt to organize the state provisions into distinct categories using the statutory language as a guide. Columns one through five show the range of statutory provisions for appointment of counsel as zealous advocate, while columns six and seven represent statutory provi-

[14] MISS. CODE ANN. § 93-13-255 (1998); S.C. CODE ANN. § 62-5-303(b) (Law Co-op. 1998). *See also* ALA. CODE § 26-2A-102(b) (1998); N.C. GEN. STAT. § 35A-1107 (1999); MONT. CODE ANN. § 72-5-315 (1997); WIS. STAT. ANN. § 880.33(2) (West 1999).

[15] ALA. CODE § 26-2A-102(b) (1998) (emphasis added).

[16] *In re* M.R., 638 A.2d. 1274 (N.J. 1994).

[17] WYO. STAT. ANN. § 3-1-108(c) (Michie 1999).

[18] *E.g.*, MO. ANN. STAT. § 475.075(3) (West 1999).

[19] R.I. GEN. LAWS § 33-15-7(a) (1998).

[20] *Id.* § 33-15-7(c).

[21] *Id.* § 35-15-7(d).

sions for appointment of a guardian *ad litem*. Most states appear in two columns, one for each group. However, due to the disparate nature of the statutes, some states belong in more than one of the first five columns.

As column one shows, 17 jurisdictions require courts to appoint an attorney to represent an alleged incapacitated person. Arizona, for instance, has a simple, straightforward provision that calls for the appointment of counsel unless the person is already represented.[22]

In some states mandatory appointment of counsel is limited to certain circumstances. In the 11 states listed in column two, counsel must be appointed upon request of the respondent. For instance, Colorado provides as follows:

> If at any time in the proceeding the allegedly incapacitated person requests that an attorney be appointed to represent him or expresses a desire to contest the petition or to object to the appointment of the proposed guardian or his powers or duties or to the creation of the proposed guardianship or the scope or duration thereof, the court shall appoint an attorney to represent such person in the proceeding, where such person does not have an attorney.[23]

In 7 states, shown in column three, the court must appoint counsel if the respondent is unable to obtain counsel on his or her own. The inability to retain counsel under these regimes may stem from either the financial inability to pay for an attorney or from a cognitive inability to employ one. The Connecticut statute is a good example of this type of provision: "If the respondent is unable to request or obtain counsel for any reason, the court shall appoint an attorney."[24]

Column four shows the 15 jurisdictions that provide for the appointment of counsel at the discretion of the court. For instance, Indiana's code states as follows: "Unless an alleged incapacitated person is already represented by counsel, the court may appoint an attorney."[25] New York's statute also provides for the discretionary appointment of counsel.[26] Later in this article we examine in greater detail this complex system for appointing counsel.

Column five shows the 9 states whose codes or statutes include a statement that respondent has a "right to counsel" but, unlike the states in columns one through four, do not include any stronger requirement for counsel. For example, the Arkansas statute merely provides, "At the hearing, the respondent shall have the right to be represented by counsel."[27]

As previously mentioned, a few states do not specifically provide for the "right to counsel."[28] However, a mere "right to counsel" without a requirement for court appointment may mean very little for a respondent who is elderly, frail, and unfamiliar with the legal system.

A number of states address the role of attorneys as guardians *ad litem*. The 13 jurisdictions listed in column six mandate the appointment of a guardian *ad litem*, and the 23 jurisdictions listed in column seven provide for discretionary appointment. Most of these states' statutes utilize and regard attorneys both as zealous advocates and guardians *ad litem*. The two roles intertwine in the statutes and perhaps in practice as well.

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[22] "Unless the alleged incapacitated person is represented by independent counsel, the court shall appoint an attorney to represent that person in the proceeding." ARIZ. REV. STAT. ANN. § 14-5303(c) (West 1999).

[23] COLO. REV. STAT. ANN. § 15-14-303(5)(a) (West 1999).

[24] CONN. GEN. STAT. ANN. § 45a-649(b)(2) (West 1999).

[25] IND. CODE ANN. § 29-3-5-1(c) (West 1999).

[26] N.Y. MENTAL HYG. LAW § 81.10 (McKinney 1999).

[27] ARK. CODE ANN. § 28-65-213(a)(1) (Michie 1997).

[28] MASS. GEN. LAWS ANN. ch. 201, § 34 (West 1999); MISS. CODE ANN. § 93-13-255 (1998); N.D. CENT. CODE § 30.1-29-07 (1997).

Table 1.—Comparison of Statutory Right to Counsel in Adult Guardianship Proceedings

Appointment of Counsel ← Stronger Requirement			→ Weaker Requirement		Appointment of Guardian *Ad Litem*	
1	2	3	4	5	6	7
Court must appoint counsel	**Court must appoint counsel on request of respondent**	**Court must appoint counsel if respondent unable to obtain**	**Court has discretion to appoint counsel**	**"Right to counsel" only (i.e., no greater requirement for appointment of counsel)**	**Mandatory**	**Optional**
Alabama[1]	Colorado	Alaska	Colorado	Arkansas	Colorado	Alabama
Arizona	Illinois	California[5]	Illinois	Delaware	Idaho	Alaska
D.C.	Maine	Colorado	Indiana	Hawaii	Illinois	Arizona
Florida	Minnesota	Connecticut	Iowa	Idaho	Maine[7]	Arkansas[8]
Georgia	New York	Iowa	Nebraska	Michigan	Michigan	Connecticut
Kansas	Ohio[4]	Ohio[6]	Nevada	Montana	New Mexico	D.C.
Kentucky	Oklahoma	Washington	New York	North Carolina	North Carolina	Georgia
Louisiana	Rhode Island		Oklahoma	South Carolina	Oregon	Hawaii
Maine[2]	South Dakota		Oregon	Wyoming	Rhode Island	Indiana
Maryland	Tennessee		Pennsylvania		South Carolina	Massachusetts
Missouri	Wisconsin		South Dakota		Tennessee	Mississippi
New Hampshire			Tennessee		Virginia	Montana
New Jersey			Virginia		Wisconsin	Nebraska
Texas[3]			Washington			New Hampshire
Utah			Wisconsin			North Dakota
Vermont						Oklahoma
West Virginia						Pennsylvania[9]
						South Dakota
						Texas
						Utah
						Vermont
						Washington
						Wyoming

1 Although Alabama requires the court to appoint counsel for the respondent, it also allows the court to assign that same attorney the duties of guardian *ad litem*. ALA. CODE §§ 26-2A-102(b), 135(b) (1998). As a result, becoming an informer of the court may prevent the attorney from fulfilling his or her role as zealous advocate.

2 Maine provides that the court shall appoint a visitor, guardian *ad litem*, or attorney. ME. REV. STAT. ANN. tit. 18A, § 5-303(b) (West 1998).

3 Texas requires the court to appoint counsel for the respondent but also allows the court to assign that same attorney the duties of guardian *ad litem*. TEX. PROB. CODE ANN. § 645 (West 1999). *See supra* text accompanying note 1.

4 Ohio states the requirement in terms of the respondent's right. In practice, this right may be treated as a strict requirement. OHIO REV. CODE ANN. § 2111.02 (Banks-Baldwin 1999) ("The alleged incompetent has... [,] if the alleged incompetent is indigent, upon his request...the right to have counsel...appointed at court expense.").

5 Like Ohio, while California states the requirement to appoint counsel in terms of the respondent's right, in practice, this right may be treated as a strict requirement. CAL. PROB. CODE § 1823(b)(6) (West 1999) (granting respondent the "right to have legal counsel appointed by the court if unable to retain legal counsel").

6 *See supra* note 4.

7 *See supra* note 2.

8 Arkansas seems to make appointment of a guardian *ad litem* discretionary, even though its law expresses it in the negative. ARK. CODE ANN. § 28-65-207(c)(3) (Michie 1997) ("It shall not be necessary that the person for whom guardianship is sought be represented by a guardian *ad litem* in the proceedings.").

9 Like Arkansas, Pennsylvania also appears to make appointment of a guardian *ad litem* discretionary, and expresses this in the negative. 20 PA. CONS. STAT. ANN. § 5511(a)(2) (West 1999) ("It shall not be necessary for the alleged incapacitated person to be represented by a guardian *ad litem* in the proceeding.").

III. Criticism of Mandated Appointment

Mandatory appointment of counsel in all guardianship proceedings can be criticized as a potential waste of resources. Extra procedures may prove costly, and often the state must bear the financial burden of providing counsel. As one advocate for judicial discretion in appointing counsel who recognizes its potential procedural ramifications stated:

> If counsel for the respondent is not mandated and if the respondent is comatose and there is no dispute over who shall serve as guardian, mandated counsel may be a costly and unnecessary requirement that the judge should be allowed to waive. But this discretion can lead to hearings being held without representation.[29]

While this position may be more financially responsible, it necessarily allows a risk to be taken with someone's liberty interests. Allowing a judge the discretion to decide whether a person needs counsel to protect his or her interests may, while saving money, result in a dangerous weakening of due process. Although many petitioners of guardianship have only the best intentions for the respondent, some petitioners have other motivations. Mandatory appointment of counsel for all respondents, even those who are comatose, ensures that the person's best interests are advocated. Americans cannot afford to focus strictly on finances when the quality of life and the ability to make decisions—even for one person—hangs in the balance.

Some states have decided that the extra cost and time inherent in mandatory appointment is warranted by the nature of the proceedings. The comments following the Alabama code section that provides the right to counsel recognize that "the mandatory features of a guardianship proceeding make the procedure somewhat more complex than a protective proceeding . . . seeking the appointment of a conservator."[30] The added procedural protections are justified by the serious nature and potentially serious consequences of the petition. The Alabama comment continues:

> The precautionary procedures tend to reduce the risk that relatives of the respondent may use guardianship procedures to relieve themselves of burdensome but bearable responsibilities for care, or to prevent the respondent from dissipating assets they would like to inherit, or for other reasons that are not in the best interest of the respondent.[31]

IV. Uniform Guardianship and Protective Proceedings Act

The UGPPA underwent substantial revision in 1997. Among the changes was a revision of the language concerning appointment of counsel.[32] The UGPPA includes two distinct alternative provisions on the appointment of a lawyer, set out separately in brackets for a state to decide which it prefers.[33]

Alternative 1 sets out three situations in which the court shall appoint a lawyer: if "(1) requested by the respondent; (2) recommended by the [visitor]; or (3) the court determines that the respondent

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[29] Lawrence A. Frolik, *Guardianship Reform: When the Best Is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347, 353 (1998).

[30] ALA. CODE § 26-2A-10, Comment (1998). Under Alabama law, a guardian is appointed for the person, while a conservator is appointed to handle property interests.

[31] *Id.*

[32] The 1982 Act provided as follows: "[T]he Court shall . . ., unless the allegedly incapacitated person is represented by counsel, appoint an attorney to represent the person in the proceeding. The person so appointed may be granted the powers and duties of a guardian *ad litem*." UGPPA (1982 Act) § 2-203(b), 8A U.L.A. 486 (1993).

[33] UGPPA (1997 Act) § 305(b) (National Conference of Commissioners of Uniform State Laws 1997) (amended 1998).

needs representation."[34] By contrast, alternative 2 makes appointment of counsel mandatory: "Unless the respondent is represented by a lawyer, the court shall appoint a lawyer to represent the respondent in the proceeding."[35] The comments following these provisions reveal that the inclusion of two alternatives resulted from a division among drafters and advocates.[36] While the drafting committee's stated position favored alternative 1, the American Bar Association's Commission on Legal Problems of the Elderly urged inclusion of alternative 2. Nonetheless, the drafting Committee's stated intent is that "counsel for respondent be appointed in all but the most clear cases. . . . A court should err on the side of protecting the respondent's rights and appoint counsel in most cases."[37]

New York is an example of a state that conforms with the UGPPA's alternative 1 and calls for appointment of counsel only in certain situations. Under New York's statute, certain actions by the respondent may trigger the appointment of counsel: if the respondent (1) requests counsel; (2) wishes to contest the petition; or (3) "does not consent to the authority requested in the petition to move the person . . . from where that person presently resides to a nursing home or other residential facility."[38]

The presenting problem as described in the petition may trigger mandatory appointment of counsel. The statute provides that the court shall appoint counsel if the petition either "alleges that the person is in need of major medical or dental treatment and the person alleged to be incapacitated does not consent" or if the petition requests temporary powers.[39] The statute also requires that counsel be appointed if "the court determines that a *possible* conflict *may* exist between the court evaluator's role and the advocacy needs of the person alleged to be incapacitated," and "if at any time the court determines that appointment of counsel would be *helpful* to the resolution of the matter," then counsel shall be appointed.[40]

While this judicial analysis may result in appointment of counsel in a substantial portion of cases, some who need an advocate may go without. Compare New York's scheme with the simplicity of Kansas's statute: "The court shall issue . . . an order appointing an attorney to represent the proposed ward or proposed conservatee at all stages of the proceedings."[41] Kansas and the 16 other jurisdictions listed in column one utilize the clarity of alternative 2 and mandatory appointment of counsel for all respondents.

V. Timing of Appointment

Most of the states provide for the appointment of counsel "in the proceeding" but fail to specify at what point the appointment is to be made. Immediate appointment of either counsel or a guardian *ad litem* for the respondent is required in a handful of jurisdictions. Missouri, New Hampshire, and New Jersey require appointing counsel for the respondent "upon the filing of the petition," while Illinois, North Carolina, Rhode Island, Tennessee, and Virginia mandate the immediate involvement of a guardian *ad litem*.[42] Immediate appointment is beneficial in that it protects the respondent from the earliest step of the proceedings.

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[34] *Id.* § 305(b), Alternative 1.

[35] *Id.* § 305(b), Alternative 2.

[36] *Id.* § 305 Comment.

[37] *Id.* § 305 Comment.

[38] N.Y. MENTAL HYG. LAW § 81.10(c)(1)-(3) (McKinney 1999).

[39] *Id.* § 81.10(c)(4)–(5).

[40] *Id.* § 81.10(c)(6)–(7) (emphasis added).

[41] KAN. STAT. ANN. § 59-3010(a)(3) (1998).

[42] *See, e.g.*, 755 ILL. COMP. STAT. ANN. 5/11a-10 (West 1999); MO. ANN. STAT. § 475.075(3) (West 1999); N.H. REV. STAT. ANN. § 464-A:6 (1999); N.J. R. Super. Tax Surr. Cts. 4:86-4 (West 1998); N.C. GEN. STAT. § 35A-1107 (1999); R.I. GEN. LAWS § 35-15-7(a) (1998); TENN. CODE ANN. § 34-11-107(a) (1998); VA. CODE ANN. § 37.1-134.9 (Michie 1998).

In order to reduce any uncertainty, some states have set a more definite time for appointing counsel. For instance, Florida calls for mandatory appointment of counsel in all incapacity hearings, and each respondent receives notice of appointed counsel as part of the notice of the actual proceeding.[43]

VI. Payment

The method of payment for attorneys and guardians *ad litem* is of prime concern both for those involved in a guardianship proceeding and for advocates in the field who debate mandatory appointment. Approximately 25 jurisdictions make no mention of the source of the funds used to compensate these officials.[44] One might not expect legal fees to be addressed in a statute which provides merely for the "right to counsel," but surprisingly of the 39 jurisdictions with meaningful procedures for appointing counsel (those listed in columns one through four), 10 fail to provide for legal fees.[45]

For those states that do have a payment system in place, the money comes from different sources. Fifteen states assess the cost of counsel to the respondent's estate unless he or she is found to be indigent or otherwise incapable of paying—at which point other resources may be utilized.[46] In Vermont, for example, if the respondent is indigent, then the court appoints counsel from its list of *pro bono* attorneys; failing that, the court refers the matter to a nonprofit legal services agency.[47] In Wisconsin, if the respondent is unable to pay for legal services, the costs are assessed to the county where the legal settlement occurred.[48] The Florida, New York, and Utah statutes assess legal fees to the petitioner if the petition for guardianship is dismissed or found to have been made in bad faith.[49]

VII. Conclusion

The push for representation by counsel in guardianship proceedings was a part of a larger reform movement that began more than ten years ago. Although the states vary widely in the methods of implementation and amount of detail given, at the very least, each recognizes the importance of involving counsel in some way. As the states continue to reorganize and update their guardianship statutes, various options ensure the protection of respondents' liberty rights and interests. While mandatory appointment of counsel upon initiation of the petition is the most desirable and most effective way to protect the interests of vulnerable elderly and individuals with disabilities, it is also the most expensive. In establishing procedures for a guardianship petition, states invariably weigh the goals of due process against the costs incurred in protecting liberty interests. However they weigh these concerns, they should opt for explicit procedures instead of settling for ambiguity.

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[43] FLA. STAT. ANN. § 744.331(1), (2) (West 1999).

[44] American Bar Ass'n Comm'n on Legal Problems of the Elderly, Monograph (Aug. 1999) (unpublished).

[45] These jurisdictions are Alabama, Arizona, District of Columbia, Georgia, Indiana, Kansas, Louisiana, Nebraska, South Dakota, and West Virginia.

[46] These states are Colorado, Florida, Maine, Maryland, Minnesota, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin.

[47] VT. STAT. ANN. tit.14, § 3065 (1998).

[48] WIS. STAT. ANN. § 880.33 (West 1999).

[49] FLA. STAT. ANN. § 744.331 (West 1999); N.Y. MENTAL HYG. LAW § 81 (McKinney 1999); UTAH CODE ANN. § 75-5-303 (1998).