

Spring 2023

Legally Alone: The Redeemability of Guardianship and Recommendations Toward Equitable Access

Patrick Hecker

Northwestern Pritzker School of Law, Patrick.hecker@law.northwestern.edu

Follow this and additional works at: <https://scholarlycommons.law.northwestern.edu/njlsp>



Part of the [Disability Law Commons](#), [Elder Law Commons](#), and the [Family Law Commons](#)

Recommended Citation

Patrick Hecker, *Legally Alone: The Redeemability of Guardianship and Recommendations Toward Equitable Access*, 18 *Nw. J. L. & Soc. POLY.* 74 (2023).

<https://scholarlycommons.law.northwestern.edu/njlsp/vol18/iss2/3>

This Note or Comment is brought to you for free and open access by Northwestern Pritzker School of Law Scholarly Commons. It has been accepted for inclusion in Northwestern Journal of Law & Social Policy by an authorized editor of Northwestern Pritzker School of Law Scholarly Commons.

Legally Alone: The Redeemability of Guardianship and Recommendations Toward Equitable Access

Patrick Hecker*

ABSTRACT

American adult guardianship needs reform. Thankfully, there is a small but dedicated reform movement that sheds helpful light on problems of underfunding, inattention, and abuse. While the movement's efforts are needed, this Note argues it is a mistake to focus solely on the ways the guardianship system is sometimes harmful to people who already have access to guardianship. Few reformers consider the needs of people who would benefit from a guardian but do not have anyone to petition the court on their behalf.

This Note first argues that guardianship, despite its detractors, is redeemable. It can be part of a beneficial legal response to the problems of mass-incapacity and loneliness in America. This is especially true for the unbefriended and incapacitated population living in long-term care facilities—a frequently mistreated population.

Second, the Note describes how the current legal structure surrounding public guardianship creates a market failure that incentivizes long-term care facilities to petition the wrong residents—residents who would benefit from alternative arrangements. Medicaid billing regulations, expenses related to the petitioning process, and the state of many public guardianship programs all contribute to the market failure. This leaves the unbefriended and incapacitated population without the benefits of a reformed guardianship system and exposes residents who would benefit from alternatives to abuse. The Note closes with recommendations on how to reform the incentive structure to create a cost-neutral petitioning process and a more humane and caring public guardianship service.

Keywords: guardianship, public guardianship, equity, unbefriended, long-term care facility, nursing home, Medicaid, incapacity, guardianship reform movement, Britney Spears, petitioning

Table of Contents

INTRODUCTION

I. AN OVERVIEW OF GUARDIANSHIP

II. PROBLEMS WITH GUARDIANSHIP (WHY MANY BELIEVE GUARDIANSHIP IS IRREDEEMABLE)

III. THE UNBEFRIENDED AND HOW GUARDIANSHIP CAN HELP

A. *The Unbefriended*

B. *How Guardianship Can Help*

IV. EXAMINING THE INCENTIVE STRUCTURE FOR LONG-TERM CARE FACILITIES

A. *Disincentives*

B. *Incentives*

V. WHY THE CURRENT REFORM MOVEMENT SHOULD ADDRESS ISSUES AROUND INCREASING ACCESS TO GUARDIANSHIP FOR UNBEFRIENDED RESIDENTS OF LONG-TERM CARE FACILITIES

A. *The Reform Movement*

B. *Why Advocating for Increased Access to Guardianship is Worthwhile*

V. PROPOSED SOLUTIONS

A. *Make Petitioning for Guardianship Cost-Neutral*

B. *Ensure Alternatives to Guardianship Address the Long-Term Care Facilities' Financial Needs More Adequately than Petitioning*

C. *Create a System Providing Quality Guardians with an Incentive Structure that Prioritizes Building a Relationship over Efficiency*

CONCLUSION

INTRODUCTION

Most people fear death. Most people fear loneliness. This Note focuses on the intersection of the two—a population dying alone: the dying unbefriended.¹ This subset of Americans lives without a single substantive human connection. Many have no friends or family. They are wholly alone.

This Note focuses on the subgroup of the dying unbefriended who face the degrading reality of needing the American guardianship system. This population is not only dying alone, but they are also dying in such a way that they have lost the capacity to make informed decisions about their assets, medical care, and just about everything else. Friendened people in this situation often benefit from a relative who acts as their legal guardian, but, for the unbefriended, no relative is available. One clinician described the plight of such people as “unimaginably helpless.”²

This Note has a two-part thesis. The first addresses whether guardianship is an adequate mechanism by which to protect and serve people who are unbefriended and incapacitated. Despite its detractors, I argue guardianship is redeemable; with proper management and funding, guardianship can serve the unbefriended and incapacitated population’s needs. Suggestions for reform should consequently consider ways to increase access to the legal mechanism. The second part analyzes the regulatory structure around

* Special thanks to the experts and practitioners who provided needed feedback for this Note: Wendy Cappelletto, Charles Golbert, Joseph Monahan, Erica Wood, Sally Hurme, Pamela Teaster, Thaddeus Pope, Rebecca Pryor, and my supervisor Thomas Geraghty.

¹ For a discussion on terminology and why this Note uses terms such as “unbefriended” rather than different terms, *see* discussion below.

² Thaddeus Pope, *Unbefriended and Unrepresented: Better Medical Decision Making for Incapacitated Patients Without Healthcare Surrogates*, 33 GA. ST. U. L. REV. 923, 925 (2017) (citing Winsor C. Schmidt, *Guardianship for Vulnerable Adults in North Dakota: Recommendations Regarding Unmet Needs, Statutory Efficacy, and Cost Effectiveness*, 89 N.D. L. REV. 77, 83 (2013)).

guardianship petitions in nursing homes,³ showing how the law incentivizes long-term care facilities to petition the wrong residents—people who would benefit from alternatives to guardianship—while ignoring the unbefriended. The Note closes with a series of proposed reforms to alter the incentive structure so nursing homes will more equitably petition the incapacitated and unbefriended while channeling those who would benefit from less-invasive alternatives toward substitutes.

Particularly, I suggest (1) creating Medicaid billing codes to remunerate agencies whose medical providers conduct capacity assessments; (2) ending the practice of including guardianship fees as a part of an incapacitated person's countable income when calculating Medicaid benefits; (3) adopting Article V of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act to free up space in public guardianship programs for people who genuinely need guardianship services; and (4) improving public guardianship by increasing funding or else initiating a program modeled on the Court Appointed Special Advocates Program (CASA) first pioneered in the foster care system.

Peggy's story demonstrates guardianship's beneficial potential.⁴ Peggy was an eighty-five-year-old, unbefriended nursing home resident diagnosed with moderate-stage dementia. Peggy could communicate, but she required the level of care provided by a nursing home. When her geriatrician determined that she had lost significant decision-making capacity, her nursing home petitioned the county court for guardianship. The court found Peggy was incapacitated and appointed a pro bono non-attorney guardian trained and certified to make the complicated legal, financial, and ethical decisions guardians face. In the previous years that Peggy lived in the nursing home, no one took the time to look into Peggy's records to find her family or figure out why no one visited. Peggy's guardian was the first.

The guardian discovered that Peggy had a living daughter with whom she had not communicated in more than twenty years. With Peggy's advice and consent, the guardian reached out to the daughter. After several conversations, Peggy's daughter decided that she was unwilling to rekindle their relationship. The guardian also reached out to Peggy's adult grandchildren, who understood the relationship dynamics differently. They expressed interest in meeting their grandmother. The guardian facilitated several supervised visits. Over time, the family developed a caring relationship that continued through Peggy's end-of-life hospice care. While the grandchildren were unwilling to take on the guardianship—with its attendant financial and medical decision-making responsibilities—they were willing to regularly visit Peggy and even introduce her to her great-grandchildren. The guardianship allowed Peggy's family to relate to Peggy as a person and not as a legal or financial chore. When the COVID-19 pandemic struck, the guardian facilitated the use of Peggy's funds to purchase an iPad so that Peggy could keep in touch with her family. Unfortunately, Peggy contracted the virus and passed away at the age of ninety-three. Her granddaughter had recently visited and held her hand.

³ “Long-term care facilities” and “nursing homes” are not synonymous terms. However, this Note uses the two interchangeably to ease readability.

⁴ “Peggy” is not her real name. All details concerning Peggy in this paragraph and subsequent paragraphs come from: E-mail from Rebecca Pryor, President, Creative Approaches to Adult Guardianship & Case Mgmt. Servs., to author (Apr. 12, 2022, 13:30 CST) (on file with author).

Peggy did not die as an unbefriended person, but without her court-appointed guardian, she likely would have. Her story demonstrates how guardianship can be an invaluable service that helps incapacitated and unbefriended nursing home residents. More than just helping to contact Peggy's family, the guardianship provided Peggy with someone who cared and was competent to help make end-of-life decisions.

Peggy's story represents the ideal experience. Guardianship does not always function this way. Some advocates go as far as arguing that guardianship is so invasive that it should be abolished.⁵ Such advocates often refer to stories of guardianship abuse. For example, a 2015 New York Times article highlighted the experience of Lillian Palermo, a New York resident who assigned power of attorney to her husband should she become incapacitated.⁶ In 2010, Lillian was diagnosed with dementia and entered a nursing home unable to make financial or medical decisions.

In 2015, the nursing home had a disagreement with Lillian's husband after he disputed the nursing home's medical charges. Mr. Palermo then asked Medicaid to recalculate the portion the couple owed. Rather than waiting for Medicaid's recalculation or respecting Mrs. Palermo's desire to make Mr. Palermo her surrogate decision maker, the nursing home petitioned the court to rescind Mr. Palermo's power of attorney and assign Lillian a guardian. After Medicaid finished its recalculation and lowered the amount the Palermos owed, Mr. Palermo paid the facility, and the nursing home miraculously withdrew the guardianship petition. The petition acted as a weapon to coerce the Palermos and not as a tool to help.

Peggy's and Lillian's stories demonstrate the advantages and challenges of guardianship today. The task for reform is to incentivize guardianship petitions for people like Peggy while disincentivizing unscrupulous actors from recreating Lillian's story.⁷

The law, as it stands, fails to create such an incentive structure. Instead, under the current regulatory system, medical providers are usually unable to bill for time spent evaluating people's capacity, nursing-homes lose needed funds once a guardian is appointed, and court appointed guardians often provide substandard care.⁸ Facilities resort to petitioning their residents only when their expenses are recouped. This occurs when a facility can use guardianship to access Medicaid for a client or, as in Lillian's situation, when the petitioning process strongarms a resident. Neither of these motivations is based in the reason guardianship exists—to care for the people who cannot care for themselves. In the meantime, no one petitions unbefriended and incapacitated residents whose financial situation does not present an appetizing prospect for nursing homes. These residents are forgotten.

Part I provides a general overview of guardianship. Part II describes guardianship's many problems and why some believe that guardianship is either irredeemable or that reform efforts should focus exclusively on increasing due process protections to impede unscrupulous actors. Part III provides (A) an overview of the unbefriended population

⁵ Sara Luterman, *Abolish Guardianship, Preserve the Rights of Disabled People, and Free Britney*, NATION (Mar. 6, 2021), <https://www.thenation.com/article/society/guardianship-britney-spears/>.

⁶ Nina Bernstein, *To Collect Debts, Nursing Homes are Seizing Control Over Patients*, N.Y. TIMES (Jan. 25, 2015), <https://www.nytimes.com/2015/01/26/nyregion/to-collect-debts-nursing-home-seizing-control-over-patients.html>. All subsequent details in this paragraph come from this source.

⁷ Reformers also need to ensure that a caring and attentive guardian is even available. See discussion *infra* Part VI.

⁸ See discussion *infra* Part IV.

living in nursing homes and (B) a description of how guardianship is well-suited to address many of the challenges this population faces. Part IV analyzes long-term care facilities' funding structure to demonstrate how the law (particularly Medicaid policy) incentivizes long-term care facilities to petition the wrong residents (the Lillian Palermos of the world). With this context laid out, subpart V(A) describes the current guardianship reform movement and why it ignores issues of access to guardianship. Subpart V(B) addresses the first part of the Note's thesis: why increasing access to guardianship for the unbefriended is worthwhile despite guardianship's problems. Part VI then addresses the second part of the thesis: providing a series of recommendations on how to change long-term facilities' incentive structure while addressing the need to ensure quality guardians exist should the incentive structure change.

* * * * *

A note on terminology: As in other fields, academics debate which terminology to use when discussing guardianship issues. Instead of “unbefriended,” some prefer the term “unrepresented,” while others use “adult orphan.”⁹ I use “unbefriended” because it captures some of the emotional content of this issue in a way “unrepresented” does not, while allowing the term “orphan” to apply exclusively to those who have lost their caregivers.

I sometimes treat the terms “unbefriended person” and “unbefriended person in need of a guardian” synonymously, although it is possible to be unbefriended and not incapacitated. I made this choice because the context surrounding each usage should indicate to whom I am referring.

Also, it is better to use person-centered language, i.e., “person with an incapacitating disability or illness,” “person subject to guardianship,” or “person under guardianship,” rather than “incapacitated person” or “ward.” The term “ward” is also antiquated.¹⁰ The Note tries to use person-centered language when possible. Still, I use the term where appropriate for ease of readability.

I. AN OVERVIEW OF GUARDIANSHIP

Guardianship is based on the state's *parens patriae* power, or its authority to protect those who are unable to protect themselves.¹¹ While guardianship over adults has evolved throughout American history,¹² it exists in two primary forms today: estate guardianship and person guardianship.¹³ Both begin after an interested party petitions the court to find that an alleged ward is incapacitated.¹⁴ In estate guardianship, the court appoints a guardian over an incapacitated person's finances after a finding that the alleged incapacitated person is unable to manage his or her estate.¹⁵ Under person guardianship, the court grants

⁹ Pope, *supra* note 2, at 925.

¹⁰ ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 508 n.63 (11th ed. 2022).

¹¹ *Parens patriae*, BLACK'S LAW DICTIONARY (10th ed. 2014).

¹² A. Frank Johns & Vicki Joiner Bowers, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century - A March of Folly? Or Just A Mask of Virtual Reality?*, 27 STETSON L. REV. 1, 19–20 (1997).

¹³ *Your Guide to Being a Guardian*, ILL. STATE BAR ASS'N, <https://www.isba.org/public/guide/guardian> (last visited Dec. 19, 2022); *see also Guardianship Fact Sheet*, ILL. GUARDIANSHIP & ADVOC. COMM'N, <https://gac.illinois.gov/osg/guardianship-fact-sheet.html> (last visited May 6, 2022).

¹⁴ *Guardianship Fact Sheet*, *supra* note 13.

¹⁵ *Id.*

guardianship over a person’s assets, medical treatment, residential placement, and social service provision; it requires a more demanding finding of near-plenary loss of capacity.¹⁶

The court usually appoints the petitioning body (often a family member) as the guardian.¹⁷ If no one is available, the court will appoint a local attorney or the state through an office of the public guardian.¹⁸ Most states allow some form of intermediary guardianship between the two standard forms. Intermediary guardianships are tailored to the specific incapacities of each person—granting powers only over those decisions that the court deems that the ward is no longer able to make.¹⁹ While they are not required to do so, guardians often build relationships with the wards under their care. One survey found that this was the most frequent activity in which guardians engage.²⁰

It is hard to overstate the power of person guardianship. After a finding of incapacity, these people lose their ability to contract, make medical decisions, and—in most states—they even lose the right to vote.²¹ Commentators describe people under guardianship as “legally dead” and an “unperson.”²² They are essentially children in the eyes of the law. With such a total loss of rights—and unilateral transfer of power to the guardian—the capacity for abuse is unsurprising.²³

Guardianship law varies from state to state. For example, California does not use the term “guardian”—which it reserves for children—and instead prefers the term

¹⁶ *Id.*

¹⁷ Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 STETSON L. REV. 941, 952–54 (2002).

¹⁸ *Id.* at 958. For a chart on various jurisdictions’ guardian selection laws, see PAMELA B. TEASTER, WINSOR C. SCHMIDT JR., ERICA F. WOOD, SUSAN A. LAWRENCE, & MARTA S. MENDIONDO, PUBLIC GUARDIANSHIP: IN THE BEST INTERESTS OF INCAPACITATED PEOPLE? 194–201 (2010) [hereinafter BEST INTERESTS].

¹⁹ Eleanor Lanier, *Understanding the Gap Between Law and Practice: Barriers and Alternatives to Tailoring Adult Guardianship Orders*, 36 BUFF. PUB. INT. L.J. 155, 160 (2019).

²⁰ MASON BURLEY, WASH. STATE INST. FOR PUB. POL’Y, PUBLIC GUARDIANSHIP IN WASHINGTON STATE COSTS AND BENEFITS 17 (Dec. 2011), https://www.wsipp.wa.gov/ReportFile/1097/Wsipp_Public-Guardianship-in-Washington-State-Costs-and-Benefits_Full-Report.pdf.

²¹ Naomi Doraisamy, *Out of Mind, Out of Sight: Voting Restrictions Based on Mental Competency*, 56 IDAHO L. REV. 135, 136 (2020); Matt Vasilogambros, *Thousands Lose Right to Vote Under ‘Incompetence’ Laws*, PEW CHARITABLE ARTICLE: STATELINE (Mar. 21, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/03/21/thousands-lose-right-to-vote-under-incompetence-laws> (“The states that do not have similar restrictions are Colorado, Idaho, Illinois, Indiana, Kansas, Maine, Michigan, New Hampshire, North Carolina, Pennsylvania and Vermont.”).

²² Pamela B. Teaster, Erica F. Wood, Susan A. Lawrence, & Winsor Schmidt, Jr., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 196 (2007) [hereinafter *Wards of the State*].

²³ Jocelyn Wiener, *The Britney Effect: How California is Grappling with Conservatorship*, MERCURY NEWS (July 22, 2015, 5:30 AM), <https://www.mercurynews.com/2015/07/22/the-britney-effect-how-california-is-grappling-with-conservatorship/> (“‘Having a situation with very little oversight where one person has extraordinary control over another person is just a recipe for abuse,’ said Brennan-Krohn of the ACLU.”); U.S. GOV’T ACCOUNTABILITY OFF., GAO-04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE 8 (2004), <https://www.gao.gov/assets/gao-04-655.pdf> [hereinafter GUARDIANSHIPS: COLLABORATION NEEDED] (“[T]he incidence of elder abuse involving persons assigned a guardian or representative payee is unknown . . .”).

“conservator” for adults.²⁴ Confusingly, “conservator” refers to a guardian over children in other states.²⁵

More than in mere terminology, guardianship laws vary in substantive respects.²⁶ These include, *inter alia*, the amount of due process protections courts afford alleged wards, the amount of court supervision wards receive post-appointment, the statutory definition of “incapacity,” and the extent of guardians’ authority over wards’ medical decisions.²⁷

It is almost impossible to know how many people are under guardianship.²⁸ There is no national system for collecting data.²⁹ Only some states require courts to maintain and provide records.³⁰ Independent academics have conducted two national surveys on public guardianship—guardianship run by the state—most recently in 2004.³¹ The federal government has also commissioned several reports that admit to less-than-ideal response rates.³² As a result of the dearth of information, in an era of data-informed decision making, academics have no up-to-date statistics by which to inform a national conversation on

²⁴ Scott Schomer, *Conservatorship vs. Guardianship in California*, SCHOMER L. GRP. (Mar. 29, 2017), <https://www.schomerlawgroup.com/conservatorship-in-california-2/conservatorship-vs-guardianship-california/>.

²⁵ The Source, *Understanding Conservatorship and Guardianship in Texas*, TEX. PUB. RADIO (July 14, 2021, 5:35 PM), <https://www.tpr.org/podcast/the-source/2021-07-14/understanding-conservatorship-and-guardianship-in-texas>.

²⁶ A.B.A. COMM’N ON L. & AGING, *GUARDIANSHIP REFORM: 2021 ADULT GUARDIANSHIP LEGISLATION SUMMARY*, 6–7 (2021), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2021-guardianship-leg-summry.pdf.

²⁷ For example, California has a specific process to award a restrictive form of guardianship called a “Lanterman-Petris-Short conservatorship.” In this system, guardians/conservators can place wards in locked facilities. See *LPS (Mental Health) Conservatorship*, SUPER. CT. OF CAL. CNTY. OF SANTA CLARA, https://www.sccscourt.org/self_help/probate/conservatorship/conservatorship_lps.shtml (last visited May 6, 2022); for comparisons by state, see Morgan Whitlatch, *Guardianship Laws by State*, HENNY HATCH JUST. PROJECT, http://jennyhatchjusticeproject.org/50_state_review (last visited May 6, 2022); for a contrast to California, see *Matter of Gardner*, 121 Ill. App. 3d 7, 11 (Ill. App. 4 Dist., 1984) (holding guardians cannot consent to admission to a mental health facility on behalf of a nonconsenting ward).

²⁸ Pamela Teaster, Erica Wood, Sally Hurme, & Carlisle Shealy, *Literature Review of Guardianship Abuse and Fraud*, NAT’L INST. JUST. (forthcoming) (manuscript at 28–32) (on file with author).

²⁹ NAT’L GUARDIANSHIP NETWORK, *FOURTH NATIONAL GUARDIANSHIP SUMMIT: MAXIMIZING AUTONOMY AND ENSURING ACCOUNTABILITY, RECOMMENDATIONS ADOPTED BY SUMMIT DELEGATES 6* (May 2021), <https://www.guardianship.org/wp-content/uploads/Fourth-National-Guardianship-Summit-Adopted-Recommendations-May-2021-1.pdf> [hereinafter *MAXIMIZING AUTONOMY*].

³⁰ ERICA WOOD, A.B.A. COMM’N ON L. & AGING, *STATE-LEVEL ADULT GUARDIANSHIP DATA: AN EXPLORATORY SURVEY 7* (Aug. 2006), <https://ncea.acl.gov/NCEA/media/docs/archive/State-Level-Guardianship-Data-2006.pdf>; Teaster, Wood, Hurme, & Carlisle Shealy, *supra* note 28, at 20.

³¹ William G. Bell, Winsor Schmidt, & Kent Miller, *Public Guardianship and the Elderly: Findings from a National Study*, 21 GERONTOLOGIST 194 (1981); BEST INTERESTS, *supra* note 18.

³² U.S. GOV’T ACCOUNTABILITY OFF., *GAO-04-655, HIGHLIGHTS, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE* (2004), <https://www.gao.gov/assets/gao-04-655-highlights.pdf> (“All states have laws requiring courts to oversee guardianships, but court implementation varies. Most require guardians to submit periodic reports, but do not specify court review of these reports . . . Most courts responding to our survey did not track the number of active guardianships, and few indicated the number of incapacitated elderly people under guardianship.”).

guardianship.³³ Policymakers must rely on ad hoc reports that give a partial description of the contemporary national landscape.³⁴

With this important caveat in mind, the few studies that exist estimate there are roughly 1.3 million people currently under guardianship in the United States.³⁵ Because of the lack of data, speculating about further demographic information is difficult.³⁶ One study of public guardianship found an even split among men and women.³⁷ Also, 30–33% of such incapacitated persons are people of color.³⁸ The majority of people under the care of a public guardian are indigent or else live in an institutional setting like a nursing home or state hospital.³⁹

Because guardianship is so invasive, it best serves as a legal instrument of last resort.⁴⁰ Various jurisdictions have wisely adopted creative means to dilute the need for guardianship. These include setting up mechanisms for establishing a durable power of attorney,⁴¹ facilitating advanced healthcare planning, and finding surrogate decision makers for people living in nursing homes.⁴²

Despite these alternatives, the need for guardianship still arises.⁴³ A person may simply have failed to plan for the loss of capacity and never assigned a surrogate.⁴⁴ Family

³³ Teaster, Wood, Hurme, & Shealy, *supra* note 28, at 28–30. Stephanie Chamberlain, Sol Baik, & Carole Estabrooks, *Going it Alone: A Scoping Review of Unbefriended Older Adults*, 37 CAN. J. ON AGING 1, 3–7 (Mar. 2018) (“Our scoping review of unbefriended older adults revealed an exceptionally small body of peer-reviewed and grey literature.”).

³⁴ U.S. S. SPECIAL COMM. ON AGING, ENSURING TRUST: STRENGTHENING STATE EFFORTS TO OVERHAUL THE GUARDIANSHIP PROCESS AND PROTECT OLDER AMERICANS 29 (Nov. 2018), https://www.aging.senate.gov/imo/media/doc/Guardianship_Report_2018_gloss_compress.pdf.

³⁵ GUARDIANSHIPS: COLLABORATION NEEDED, *supra* note 23, at 23; NAT’L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 17 (Mar. 22, 2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf; *see also* Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A “Best Guess” National Estimate and the Momentum for Reform*, FUTURE TRENDS IN STATE CTS. 107, 109 (2011), https://www.eldersandcourts.org/_data/assets/pdf_file/0017/5435/adultguardianships.pdf (finding 1.5 million pending or open guardianship cases).

³⁶ A.B.A. COMM’N ON L. & AGING, *supra* note 26, at 7 (describing how the study on Public Guardianship published in 2007 and cited previously in this Article, *see* BEST INTERESTS *supra* note 18, remains the most comprehensive study available on public guardianship).

³⁷ BEST INTERESTS, *supra* note 18, at 122. I am unaware, at this time, of any equivalent data for persons with non-public guardians.

³⁸ *Id.* In contrast, racial and ethnic minorities made up 20 percent of the older adult population in 2010. The disparity seems to indicate that racial inequalities lead to an over-representation of people of color in the public guardianship system. This issue deserves more attention. *See* ADMIN. FOR CMTY. LIVING, 2021 PROFILE OF OLDER AMERICANS 5 (Nov. 2022), <https://www.nrmlaonline.org/wp-content/uploads/2023/02/2021-Profile-of-Older-Americans.pdf>.

³⁹ *Id.*

⁴⁰ Pope, *supra* note 2, at 930.

⁴¹ Debra Kroll, *Symposium, Aging in the US: The Next Civil Rights Movement?: To Care or Not to Care: The Ultimate Decision for Adult Caregivers in a Rapidly Aging Society*, 21 TEMP. POL. & CIV. RTS. L. REV. 403, 410–15 (2012).

⁴² Pope, *supra* note 2, at 936–38, 964–72 (describing how New Mexico, Pennsylvania, Delaware, New York, and Louisiana have expanded their default surrogate lists (for people without advanced directives), while Tennessee, West Virginia, Colorado, and Hawaii have provided a measure of physician discretion in choosing who makes medical decisions).

⁴³ Barnes, *supra* note 17, at 951.

⁴⁴ *See* source cited *infra* note 106, at 1246–48.

members often put off these difficult conversations in the early stages of cognitive degeneration, preferring to make do with informal methods of ensuring consent for medical treatment and managing finances.⁴⁵ The desire to put off these conversations is abetted by a wider American ethos that avoids conversations about death.⁴⁶ Forms of dying that are slow and degrading, like dementia, compound the difficulty.⁴⁷ Dementia decreases psychological insight, rendering many people unaware of their own slipping functionality.⁴⁸ Those suffering from dementia may regard a discussion on the need for a surrogate decision maker as a degrading insult rather than a candid admission that functional ability is more fragile than one would like to admit.

II. PROBLEMS WITH GUARDIANSHIP (WHY MANY BELIEVE GUARDIANSHIP IS IRREDEEMABLE)

This Part will review the problems associated with guardianship to provide context for the first of the Note's two theses: why guardianship—despite the problems outlined in this section—is redeemable.

Lillian Palermo's story is no aberration.⁴⁹ The guardianship system has consistently earned a poor national reputation, leading to successive waves of statutory reform over the past several decades.⁵⁰ These reforms have succeeded in increasing the array of due process protections and creating better definitions of capacity.⁵¹ They have made the process of appointing a guardian more adversarial, expensive, and less appealing for prospective abusers hoping to take control of their victims' estates.⁵² Despite the reforms, issues not

⁴⁵ See *Refusing to Take Action*, ALZHEIMER'S SOC'Y: UNITED AGAINST DEMENTIA, <https://www.alzheimers.org.uk/dementia-together-magazine/aug-sept-2017/it-ok-hide-someones-medication-their-food-or-drink> (last visited Dec. 19, 2022).

⁴⁶ Jan Ellen Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1848–59 (Aug. 1992).

⁴⁷ Wendy Mitchell, *5 Things to Do and Say When a Person is Diagnosed with Dementia*, ALZHEIMER'S SOC'Y: UNITED AGAINST DEMENTIA (May 22, 2018), <https://www.alzheimers.org.uk/blog/5-things-say-do-after-dementia-diagnosis>; see also Sarah Brown, *Why Many Doctors Still Find It Difficult to Talk About Dying with Patients*, 191 CMAJ E22, E22–E23 (Jan. 7, 2019).

⁴⁸ See *What is the Difference Between Denial and Lack of Insight?*, ALZHEIMER'S SOC'Y: UNITED AGAINST DEMENTIA, <https://www.alzheimers.org.uk/get-support/help-dementia-care/what-difference-between-denial-and-lack-insight> (last visited May 7, 2022); see also THE FATHER (F comme Film, Trademark Films, Cine@, AG Studios, Film4, Orange Studio, Canal, & Ciné+ 2020).

⁴⁹ See GUARDIANSHIPS: COLLABORATION NEEDED, *supra* note 23 (describing the extent of known abuses); Bernstein, *supra* note 6.

⁵⁰ A.B.A. COMM'N ON L. & AGING, STATE ADULT GUARDIANSHIP LEGISLATION SUMMARY: DIRECTIONS OF REFORM – 2019, at 1 (2019) https://www.americanbar.org/content/dam/aba/administrative/law_aging/2019-final-guardianship-legislative-update.pdf (stating that since 2011, states have enacted at least 328 guardianship bills). Similar reform waves happened in the 90's. See WOOD, *supra* note 30, at 88.

⁵¹ See generally Jenny B. Davis, *Guardianship Battles in the Spotlight Spark New Calls for Reform*, A.B.A. J. (Dec. 1, 2021, 3:00 AM), <https://www.abajournal.com/magazine/article/guardianship-battles-in-the-spotlight-spark-new-calls-for-reform>. For an example of the ongoing need for due process protections, see Winsor C. Schmidt, Pamela B. Teaster, Marta Mendiondo, Jennifer Marcum, & Tenzin Wangmo, *Program and Ward Characteristics and Cost Savings of Public Guardianship: An Evaluation of the Florida Public Guardianship Program*, 28 U. FLA. J.L. & PUB. POL'Y 329 (2017).

⁵² Davis, *supra* note 51.

only persist, but continue to dominate the national conversation.⁵³ Problems include unwillingness to fund oversight mechanisms, the infrequency with which courts restore rights to recuperated wards, imprecise methods of determining capacity, conflicts of interest between the ward and guardian, and underfunding for public guardianship.

There is a gulf between states' statutory ambitions—which are often noble—and what actually happens on the ground.⁵⁴ The disparity is partly due to the chronic lack of funding for institutions related to guardianship. For example, all states require financial audits to ensure that guardians carry out their fiduciary responsibilities in service of the incapacitated person's best interest.⁵⁵ However, the majority of states do not provide funding to actually carry out the audits.⁵⁶ For whatever reason, state legislatures have not mustered the political will necessary to use state resources to robustly fund monitoring.⁵⁷ Without the requisite funding to pay for forensic accounting, guardians experience significant temptation to embezzle.⁵⁸ Having a mechanism in place and allocating funds to pay for the mechanism's implementation are simply two different issues—only one of which has been addressed.⁵⁹

Academics generally agree that it is difficult to restore the rights of someone who has regained capacity—for example, after someone recovers from a stroke.⁶⁰ The most famous example is Britney Spears. Despite murky circumstances, the court appointed Ms. Spears's father, Jamie, as her guardian. Jamie then managed Ms. Spears' finances with questionable fidelity to his fiduciary duties.⁶¹ Several documentaries describe Ms. Spears'

⁵³ LastWeekTonight, *Guardianship: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (June 4, 2018), <https://www.youtube.com/watch?v=nG2pEffLEJo>; I CARE A LOT (Netflix 2020).

⁵⁴ See Linda Susan Ganski, *Public Guardianship for Adults: The Rhetoric of Reform and the Realities of Implementation* (1994) (Ph.D. dissertation, Northwestern University) (ProQuest), <https://www.proquest.com/docview/304100500?pq-origsite=gscholar&fromopenview=true>.

⁵⁵ Catherine Seal & Spencer Crona, *Standards for Guardian Fees*, 2012 UTAH L. REV. 1575, 1575 (2012); GUARDIANSHIPS: COLLABORATION NEEDED, *supra* note 23, at 9.

⁵⁶ GUARDIANSHIPS: COLLABORATION NEEDED, *supra* note 23, at 9.

⁵⁷ Kimberly Guilfoyle, *Protect Grandma, Not Just Britney, From Conservatorship Abuse*, REALCLEAR POLS. (July 30, 2021), https://www.realclearpolitics.com/articles/2021/07/30/protect_grandma_not_just_britney_from_conservatorship_abuse__146165.html.

⁵⁸ GUARDIANSHIPS: COLLABORATION NEEDED, *supra* note 23, at 8–9; see also ADMIN. CONF. OF THE U.S., SSA REPRESENTATIVE PAYEE: SURVEY OF STATE GUARDIANSHIP LAWS AND COURT PRACTICES 1, 4 (Dec. 24, 2014), https://www.acus.gov/sites/default/files/documents/SSA%2520Rep%2520Payee_State%2520Laws%2520and%2520Court%2520Practices_FINAL.pdf (“[77 percent] stated that at least some of the financial accounting forms are subject to audits or a similar type of evaluation. In those cases, court staff and judges are most likely to be responsible for the auditing task.”).

⁵⁹ *Wards of the State*, *supra* note 22, at 221 (“Not surprising, and similar to the findings in the 1981 study, was the assertion by virtually every program in every state of a critical lack of funding, which translated into circumscribed services for wards and inadequate staffing to meet wards' needs. This remains the overarching threat to effective public guardianship programs, particularly as demographic shifts portend more individuals needing guardianship services.”).

⁶⁰ ERICA WOOD, PAMELA TEASTER, & JENICA CASSIDY, A.B.A COMM'N ON L. & AGING WITH THE VA. TECH CTR. FOR GERONTOLOGY, RESTORATION OF RIGHTS IN ADULT GUARDIANSHIP: RESEARCH & RECOMMENDATIONS 6 (2017), https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf.

⁶¹ Samantha Stark & Liz Day, *Framing Britney Spears*, N.Y. TIMES (Nov. 2, 2021), <https://www.nytimes.com/article/framing-britney-spears.html>.

fight against a guardianship that lasted thirteen years despite evidence that she was no longer incapacitated—if she ever was.⁶² Ms. Spears’ case, while not representative of most situations because of the amount of money involved, brought much needed attention to the plight of incapacitated persons contesting their guardianship.⁶³ Scholars generally believe that restoration happens too infrequently.⁶⁴ Without empirical data though, any discussion of how widespread Ms. Spears’s situation may be is speculative.⁶⁵

Academics frequently point out the need for increased judicial education.⁶⁶ Guardianship inherently forces judges to make legal decisions based on a medical provider’s clinical finding about a person’s capacity.⁶⁷ This may lead to an over-abundance of plenary guardianship grants in cases where more tailored grants would be more appropriate.⁶⁸ As with all other problems in guardianship, without sufficient data, no one can make an empirical judgment about how widespread the practice is.⁶⁹

Conflicts of interest between the ward and the guardian are a problem of particular importance.⁷⁰ Conflicts even arise when the guardian is a supposedly disinterested third party like the state.⁷¹ For example, in thirty-three states, when no guardian is available, the court appoints a social service agency that doubles as a service provider for the ward.⁷² This shaves costs by allowing the same organization that provides services—like home visits and case management to also make the ward’s decisions.⁷³ However, this model creates a conflict of interest as no one is capable of advocating for a redress of wrongs if the service provider delivers inadequate services or abuses the ward.⁷⁴

⁶² *Id.*

⁶³ See, e.g., BRITNEY VS. SPEARS (Netflix 2021).

⁶⁴ WOOD, TEASTER, & CASSIDY, *supra* note 60, at 37 (“While each state statute sets out a procedure for restoration of rights, the process appears little known and little used . . .”).

⁶⁵ *Id.* at 6 (“It appears that an unknown number of adults languish under guardianship beyond the period of need . . .”); see also “Abuse of Power: Exploitation of Older Adults by Guardians and Others They Trust:” Hearing Before the U.S. S. Special Comm. on Aging, 115th Cong. 2 (2018) (statement of Nina A. Kohn, Associate Dean for Research & Online Education & David M. Levy, Professor of Law), https://www.aging.senate.gov/imo/media/doc/SCA_Kohn_04_18_18.pdf [hereinafter Statement of Kohn & Levy].

⁶⁶ Leslie Salzman, *Guardianship for Persons with Mental Illness — A Legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 279, 286, 288–89 (2011).

⁶⁷ George P. Smith II, “Just Say No!”: *The Right to Refuse Psychotropic Medication in Long-Term Care Facilities*, 13 ANNALS OF HEALTH L. 1, 32 (2004) (“[T]he law is struggling to decide whether it is better social policy to have judges make quasi-medical decisions or to have doctors make quasi-judicial ones?”) (quoting Loren H. Roth, *The Right to Refuse Psychiatric Treatment: Law and Medicine at the Interface*, 35 EMORY L.J. 139, 150 (1986)).

⁶⁸ Salzman, *supra* note 66, at 300–01; Pat M. Keith & Robbyn R. Wacker, *Guardianship Reform: Does Revised Legislation Make a Difference in Outcomes for Proposed Wards?*, 4 J. AGING & SOC. POL’Y 139, 139 (1993).

⁶⁹ See discussion *supra* Part I. It should be noted that the incentive structure described in Part IV disincentivizes limited guardianship; see Lanier, *supra* note 19, at 201.

⁷⁰ Rein, *supra* note 46, at 1829, 1861 (“Viewed in [the light of how finances are divided among interested parties], the semicovert promotion of interests adverse to a proposed ward in proceedings theoretically designed for the ward’s sole benefit [is] inevitable.”).

⁷¹ *Wards of the State*, *supra* note 22, at 236–37.

⁷² *Id.* (“At stake is the inability of the public guardian program to effectively and freely advocate for the ward.”).

⁷³ Eleanor B. Cashmore, *Guarding the Golden Years: How Public Guardianship for Elders Can Help States Meet the Mandates of Olmstead*, 55 B.C. L. REV. 1217, 1238 (Sept. 23, 2014).

⁷⁴ *Id.*

Inadequate funding for offices of the public guardian is one of the most significant problems facing people who are unbefriended and incapacitated. Sources of funding vary from state to state, but none are adequate.⁷⁵ Inadequate financing leads to wide discrepancies in the quality of services.⁷⁶ For example, one study reported that in 2004, the Office of the State Guardian in Illinois had a ward-to-staff ratio of 132:1, a situation in which employees would not likely know the personal needs of each ward.⁷⁷ Staff reported problems like warehousing wards in inadequately-staffed nursing homes, a general disinterest in pursuing restoration cases, and channeling incapacitated people into specific homes based on relationships with certain nursing home administrators.⁷⁸ By comparison, Virginia caps the ward-to-staff ratio at 20:1; by limiting caseloads, the Virginia model provides better quality services but creates a significant waitlist.⁷⁹

To summarize, guardianship is a system riddled with problems. These include the high potential for abuse, incidences of actual abuse, lack of funding for guardianship institutions, and poor data collection leading to a general unawareness about the nature and extent of each of the other problems. The institution faces so many challenges that most academics believe that public guardianship for unbefriended people should be limited because “[p]oorly executed public guardianship does greater harm than no public guardianship at all.”⁸⁰ Considering the dire situation of many people in need of guardianship, this statement amounts to a frank admission that many people may be better off dying alone with no one to make particularized decisions on their behalf rather than suffering the risks of the current state of guardianship.

III. THE UNBEFRIENDED AND HOW GUARDIANSHIP CAN HELP

Having reviewed guardianship’s flaws, this Note will now (A) provide an overview of the unbefriended population. The Part will then (B) describe how guardianship—at its best and despite the problems outlined in the previous Part—can faithfully respond to the challenges this population experiences in long-term care facilities.

⁷⁵ *Wards of the State*, *supra* note 22, at 232; Schmidt, Teaster, Mendiondo, Marcum, & Wangmo, *supra* note 51, at 333.

⁷⁶ BEST INTERESTS, *supra* note 18, at 127–30.

⁷⁷ *Wards of the State*, *supra* note 22, at 226.

⁷⁸ BEST INTERESTS, *supra* note 18, at 52–54. The situation may not be better in jurisdictions that appoint an attorney as a guardian.

⁷⁹ *Wards of the State*, *supra* note 22, at 214; Zoom Interview with Erica Wood, Former Assistant Dir., A.B.A. Comm’n on L. & Aging & Sally Hurme, Elder L. Expert (Mar. 31, 2022) (both interviewees estimated that Virginia—a state with a legally designated 20:1 ward-to-staff ratio—would have a budget in fiscal year 2023 for roughly 300 incapacitated people, leaving roughly 400 people on the waitlist).

⁸⁰ Schmidt, Teaster, Mendiondo, Marcum, & Wangmo, *supra* note 51, at 334 (quoting Pamela B. Teaster & Karen A. Roberto, *Living the Life of Another: The Need for Public Guardians of Last Resort*, 21 J. APPLIED GERONTOLOGY 176, 182 (2002)).

A. *The Unbefriended*

A person can become unbefriended for many reasons.⁸¹ Degenerative illnesses often take a toll on a person's personality and cause aggressive behaviors that weaken relationships.⁸² Many people simply outlive their relatives.⁸³ Others lose friends to the harsh realities of American ageism,⁸⁴ racial inequalities,⁸⁵ and the West's general apathy toward the elderly and disabled.⁸⁶

For whatever reason, thousands of such people live in America's nursing homes—although it is difficult to quantify the exact number.⁸⁷ One scholar estimates that 70,000 unbefriended persons live in long-term care facilities.⁸⁸ In contrast, a recent California proposal to fund a team of surrogate decision makers estimated the state is home to as few as 2,500 unbefriended nursing home residents.⁸⁹ If that estimate is accurate and all else is equal, there would be as few as 21,000 unbefriended and incapacitated nursing home residents in the U.S.⁹⁰ This estimate is probably low. A 2012 needs assessment in North Dakota found that state was home to 349 unbefriended residents of long-term care facilities who need a guardian.⁹¹ If the North Dakota estimate is accurate and other factors are

⁸¹ Aradhana Verma, Alexander K. Smith, Krista L. Harrison, & Anna H. Chodos, *Ethical Challenges in Caring for Unrepresented Adults: A Qualitative Study of Key Stakeholders*, 67 J. AM. GERIATRICS SOC'Y 1724, 1727–28 (May 6, 2019) (“We’re talking about people who had illegal drug use problems, people who are homeless. Why are they unrepresented? People who are ostracized from their family because of their criminal history, ostracized from their family because of their LGBT status, and so forth. If there’s ever a population of patients that is subject to potential discrimination or biases . . . it’s this population.”).

⁸² MARK P. MATTSON, *Aggression in Brain Injury, Aging, and Neurodegenerative Disorders*, in NEUROBIOLOGY OF AGGRESSION: UNDERSTANDING AND PREVENTING VIOLENCE 151, 151 (2003).

⁸³ Jeff Kunerth & Tribune Newspapers: The Orlando Sentinel, *Seniors Outliving Family, Becoming Elder Orphans*, CHI. TRIB. (Oct. 9, 2003, 12:00 AM), <https://www.chicagotribune.com/news/ct-xpm-2003-10-09-0310090090-story.html>; Paula Span, *Near the End, It's Best to be 'Friended'*, N.Y. TIMES (Sept. 25, 2015), https://www.nytimes.com/2015/09/29/health/near-the-end-its-best-to-be-friended.html?_r=0.

⁸⁴ Sharon Shiovitz-Ezra, Jonathan Shemesh, & Mary McDonnell/Naughton, *Pathways from Ageism to Loneliness*, in 19 CONTEMPORARY PERSPECTIVES ON AGEISM 131, 131–147 (Lily Ayalon & Clemens Tesch-Romer eds., Springer Nature 2018).

⁸⁵ Margaret Franckhauser, *Racial Disparities in Aging: The Benefits of Longevity Are Not Distributed Equally*, JOHN SNOW, INC., <https://www.jsi.com/racial-disparities-in-aging/> (last visited May 7, 2022).

⁸⁶ Rein, *supra* note 46, at 1848–59. The sparse data available on the unbefriended seems to demonstrate socioeconomic status is an important factor. See Chamberlain, Baik, & Estabrooks, *supra* note 33, at 7 (“Our findings suggest a grim picture of unbefriended older adults. They are more likely to be single, childless, have fewer siblings, and limited financial resources when compared to older adults with a family or friend guardian.”).

⁸⁷ An investigative report conducted by the Associated Press in 1987 found there were approximately 400,000 unbefriended older adults living in the US at that time, many of whom do not live in long-term care facilities. See Chamberlain, Baik, & Estabrooks, *supra* note 33, at 2.

⁸⁸ Pope, *supra* note 2, at 944.

⁸⁹ OFFICE OF LONG-TERM CARE PATIENT REPRESENTATIVE, ANALYSIS OF PROBLEM 3 (Apr. 1, 2021), https://esd.dof.ca.gov/Documents/bcp/2122/FY2122_ORG4170_BCP4520.pdf.

⁹⁰ Dividing the total U.S. population by the Californian population and then multiplying by 2,500. *Quick Facts: California*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/CA> (last visited Aug. 4, 2022); *Quick Facts, United States*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/fact/table/US/PST045221> (last visited Aug. 4, 2022). The proposal admitted that the actual number is “unknown.” ANALYSIS OF PROBLEM, *supra* note 89, at 2.

⁹¹ Winsor C. Schmidt, *Guardianship for Vulnerable Adults in North Dakota: Recommendations Regarding Unmet Needs, Statutory Efficacy, and Cost Effectiveness*, 89 N.D. L. REV. 77, 83 (2013).

equal—which is admittedly unlikely—then California should expect 18,000 unbefriended and incapacitated nursing home residents—not 2,500.⁹²

What is undisputed is that the number of unbefriended older Americans is going to grow as baby boomers age.⁹³ One survey conducted for the National Social Life, Health, and Aging Project estimated that nearly 8% of older adults do not have a preferred surrogate decision maker.⁹⁴ If that is true, policy makers should expect a spike in the demand for guardianship.

Nursing home abuse is a particularly important issue for unbefriended residents. An unbefriended person cannot grant power of attorney to a loved one and does not benefit from the increased attention befriended residents enjoy when relatives advocate to facility staff on their behalf.⁹⁵ Despite substantial regulation, elder abuse in facilities is common.⁹⁶ For example, the *New York Times* recently estimated that one in nine nursing home residents is “diagnosed” with schizophrenia.⁹⁷ Schizophrenia, however, has an onset date for most people in their twenties and affects less than one percent of the population.⁹⁸ Unfortunately, unscrupulous facilities use schizophrenia diagnoses to prescribe psychotropic medications that keep demented patients docile.⁹⁹ These drugs place the patients in a dehumanizing stupor—staring blankly at a wall—and often cause hypersalivation (drooling).¹⁰⁰ The problem is endemic to nursing homes. Human Rights Watch estimates nursing homes administer antipsychotics to as many as 179,000 people every week.¹⁰¹ Because of unbefriended residents’ lack of social resources, they are particularly susceptible to this kind of mistreatment.

⁹² See *Quick Facts, North Dakota*, U.S. CENSUS BUREAU, <https://www.census.gov/quickfacts/ND> (last visited Aug. 4, 2022).

⁹³ America Counts Staff, *2020 Census Will Help Policymakers Prepare for the Incoming Wave of Aging Boomers*, U.S. CENSUS BUREAU (Dec. 10, 2019), https://www.census.gov/library/stories/2019/12/by-2030-all-baby-boomers-will-be-age-65-or-older.html?utm_campaign=20191210msacos1ccstors&utm_medium=email&utm_source=govdelivery.

⁹⁴ Andrew B. Cohen, Darcé M. Costello, John R. O’Leary, & Terri R. Fried, *Older Adults Without Desired Surrogates in a Nationally Representative Sample*, 69 J. AM. GERIATRICS SOC’Y 114, 114 (2020).

⁹⁵ As one practitioner put it, “in nursing homes, the squeaky wheel gets the grease.” Telephone Interview with Rebecca Pryor, President, Creative Approaches to Adult Guardianship & Case Mgmt. Servs. (Apr. 7, 2022).

⁹⁶ Catherine Hawes, *Elder Abuse in Residential Long-Term Care Settings: What is Known and What Information is Needed?*, in NAT’L RSCH. COUNCIL OF THE NAT’L ACADS., ELDER MISTREATMENT, ABUSE, NEGLECT, & EXPLOITATION IN AN AGING AMERICA 446–500 (Richard Bonnie & Robert Wallace eds., 2003), https://www.ncbi.nlm.nih.gov/books/NBK98802/pdf/Bookshelf_NBK98802.pdf.

⁹⁷ Katie Thomas, Robert Gebeloff, & Jessica Silver-Greenberg, *Phony Diagnoses Hide High Rates of Drugging at Nursing Homes*, N.Y. TIMES (Oct. 15, 2021), <https://www.nytimes.com/2021/09/11/health/nursing-homes-schizophrenia-antipsychotics.html>.

⁹⁸ *Schizophrenia*, NAT’L INST. MENTAL HEALTH, <https://www.nimh.nih.gov/health/statistics/schizophrenia> (last visited May 8, 2022).

⁹⁹ See generally HANNAH FLAMM, MEGAN MCLEMORE, BETHANY BROWN, DIEDERIK LOHMAN, BRIAN ROOT, & JOSH LYONS, HUMAN RTS. WATCH, “THEY WANT DOCILE:” HOW NURSING HOMES IN THE UNITED STATES OVERMEDICATE PEOPLE WITH DEMENTIA (Feb. 2018), https://www.hrw.org/sites/default/files/report_pdf/us_nursinghomes0218_web.pdf.

¹⁰⁰ Oliver Freudenreich, *Drug-induced Sialorrhea*, 41 DRUGS OF TODAY 411, 411–12 (2005).

¹⁰¹ FLAMM, MCLEMORE, BROWN, LOHMAN, ROOT, & LYONS, *supra* note 99, at 1.

B. How Guardianship Can Help

Despite the problems outlined in the previous Part, *attentive* guardians still provide superior services when compared to alternatives for three reasons. First, attentive guardians provide the best estimate of an incapacitated person's desires concerning their health care among surrogacy options. Second, a caring guardian provides additional needed services beyond the required fiduciary and legal oversight—including socialization and advocacy for needed medical care. Finally, a caring guardian is one of the few legal mechanisms available for unbefriended people in need of financial management.

Concerning consent for medical services, guardianship is more individualized than its alternatives. The alternatives available vary from state to state.¹⁰² Some jurisdictions deputize individual physicians to make decisions on behalf of a person incapacitated by illness, others require an independent second physician, and some require an interdisciplinary team.¹⁰³ While these protections cost less than guardianship,¹⁰⁴ they are also less personalized. For instance, the most protective option—an independent interdisciplinary team—is bound to its hosting institution. To me, this creates a new problem whenever an unbefriended person transfers to a more appropriate facility. The transferee loses the relationship with the decision-making body once the transfer is initiated. Additionally, such committees are not responsible to the incapacitated person but to their institutions. As a result, they likely struggle to develop individual relationships with patients. These relationships are necessary to truly understand an incapacitated person's interests around sensitive medical topics.

Thankfully, unbefriended residents can still benefit from advanced healthcare directives.¹⁰⁵ But many unbefriended residents never complete this legal document.¹⁰⁶ One study found that only one in three older Americans has a living will or directive.¹⁰⁷ Until significantly greater numbers of people fill one out, guardianship will continue to serve as a regrettable but necessary Plan B.

Guardianship's potential benefits are not limited to providing consent for health care. The Florida Department of Elder Affairs commissioned a state-specific survey that found guardians often provide a number of non-required services.¹⁰⁸ Such services include advocating that wards receive needed medical care, arranging for an incapacitated person's funeral, reconnecting wards to their faith communities, and—as with Peggy—re-establishing relationships with incapacitated persons' families.¹⁰⁹

¹⁰² Smith, *supra* note 67, at 4.

¹⁰³ Pope, *supra* note 2, at 930.

¹⁰⁴ *Id.* at 976.

¹⁰⁵ Medical instructions to follow in the event of incapacitation.

¹⁰⁶ Kuldeep N. Yadav, Nicole B. Gabler, Elizabeth Cooney, Saida Kent, Jennifer Kim, Nicole Herbst, Adjoa Mante, Scott D. Halpern, & Katherine R. Courtright, *Approximately One In Three U.S. Adults Completes Any Type Of Advance Directive For End-Of-Life Care*, 36 HEALTH AFFS. 1244, 1246–48 (July 2017), <https://www.healthaffairs.org/doi/epdf/10.1377/hlthaff.2017.0175>.

¹⁰⁷ *Id.*

¹⁰⁸ Schmidt, Teaster, Mendiondo, Marcum, & Wangmo, *supra* note 51, at 349.

¹⁰⁹ *Id.* at 343.

Guardians also provide regular socialization for people suffering from degenerative disease and loneliness.¹¹⁰ One study showed this was the most common service guardians provide.¹¹¹ Residents with attentive volunteer guardians can even enjoy a visit as frequently as once a week.¹¹² In contrast to a committee that makes healthcare decisions through an institution, a quality guardian develops a relationship with the ward, follows the person no matter where they live, and provides a measure of human connection.¹¹³ The benefits cannot be overestimated. One national poll on healthy aging conducted by the University of Michigan found that people with a caring and attentive companion live longer than those without.¹¹⁴ This little appreciated element of guardianship may be the most important.

Finally, if a person who is unbefriended and incapacitated has an estate in need of management, a guardian is necessary to oversee the funds. A quality guardian prevents financial exploitation.¹¹⁵ Financial management can make the difference between life and death. The ability to allocate resources toward a higher quality nursing home and visits from a companion care service have been shown to make a tremendous difference in health outcomes.¹¹⁶

IV. EXAMINING THE INCENTIVE STRUCTURE FOR LONG-TERM CARE FACILITIES

Having reviewed how quality guardianship benefits the unbefriended in the previous section, this Note will now describe how state Medicaid regulations create a lopsided incentive structure for long-term care facilities to petition residents for guardianship. This legal structure has created a market failure, and legal reform is necessary to change it.

¹¹⁰ WASH. STATE INST. FOR PUB. POL'Y, PUBLIC GUARDIANSHIP IN WASHINGTON STATE: COSTS AND BENEFITS 1, 16–17 (Dec. 2011), https://www.wsipp.wa.gov/ReportFile/1097/Wsipp_Public-Guardianship-in-Washington-State-Costs-and-Benefits_Full-Report.pdf. While providing socialization is important, it does not justify guardianship alone. Loneliness is endemic, but there are less invasive ways of caring for the infirm and the lonely besides mass-guardianship. For a description on the benefits of social relationships on people with Alzheimer's memory, see Ya-Sin Hsiao, Chih-Hua Chang, & Pow-Wu Gean, *Impact of Social Relationships on Alzheimer's Memory Impairment: Mechanistic Studies*, 25 J. BIOMEDICAL SCI. 1, 1 (Jan. 11, 2018).

¹¹¹ WASH. STATE INST. FOR PUB. POL'Y, *supra* note 110, at 16–17.

¹¹² E-mail from Rebecca Pryor, *supra* note 4.

¹¹³ *Id.* For resources on what constitutes a “quality guardian,” see CTR. FOR GUARDIANSHIP CERTIFICATION, RULES AND REGULATIONS REGARDING CERTIFICATION AND RECERTIFICATION OF NATIONAL CERTIFIED GUARDIANS (NCG) (Aug. 6, 2020), <https://guardianshipcert.org/wp-content/uploads/2020/08/NCG-Rules-Regulations.pdf>.

¹¹⁴ NAT'L POLL ON HEALTHY AGING, UNIV. OF MICH., LONELINESS AND HEALTH 2 (Mar. 2019), https://deepblue.lib.umich.edu/bitstream/handle/2027.42/148147/NPHA_Loneliness-Report_FINAL-030419.pdf?sequence=3&isAllowed=y (“Research shows that chronic loneliness can impact older adults’ memory, physical well-being, mental health, and life expectancy. In fact, some research suggests that chronic loneliness may shorten life expectancy even more than being overweight or sedentary, and just as much as smoking.”).

¹¹⁵ *Id.*

¹¹⁶ David C. Grabowski, Zhanlian Feng, Richard Hirth, Momotazur Rahman, & Vincent Mor, *Effect of Nursing Home Ownership on the Quality of Post-Acute Care: An Instrumental Variables Approach*, 32 J. HEALTH ECON. 1, 12 (2013); *Non-Profit vs. For-Profit Homes: Is there a Differences in Care?*, CTR. FOR MEDICARE ADVOC. (Mar. 15, 2012), <https://medicareadvocacy.org/non-profit-vs-for-profit-nursing-homes-is-there-a-difference-in-care/> (summarizing research).

A. Disincentives

The primary disincentive impeding long-term care facilities from petitioning unbefriended residents is the cost.¹¹⁷ The petitioning body must pay for a medical evaluation of the alleged incapacitated person's functional abilities, the court's filing fees, and a lawyer's time to prepare and argue the petition. Some jurisdictions also require an additional attorney to act as guardian *ad litem*—a person appointed by the court as a neutral investigator to discover the best interest of the allegedly disabled adult.¹¹⁸ For institutions that cannot afford to retain an in-house attorney, petitioning the court to appoint a guardian can cost over \$10,000.¹¹⁹

A functional assessment is one of the most expensive parts of the process. Most states require a functional assessment to find incapacity.¹²⁰ But paying for a medical provider's time to write an assessment for a resident is expensive. Despite the fact that medical providers can bill Medicare to help clients write an advanced healthcare plan, Medicare does not provide an equivalent billing code to conduct a functional assessment for an allegedly incapacitated person.¹²¹ Similarly, Medicare does not provide a billing code for providers to testify in court in the event such a testimony is necessary to evaluate capacity.¹²² While some jurisdictions cut costs by allowing non-doctor medical providers—like social workers—to conduct functional assessments, the process is still time consuming and costly.¹²³ If the evaluation is not a part of the client's diagnostic needs, then the provider cannot always bill for that time.¹²⁴

Assuming the long-term care facility goes through with the process, in some states, the result harms the facility's bottom line. Medicaid budgeting methodologies in states like

¹¹⁷ Bernard A. Krooks, *How Much Does it Cost Appoint a Guardian*, LITMAN KROOKS LLP: SPECIAL NEEDS PLAN. BLOG (June 2, 2015), <https://www.specialneedsnewyork.com/2015/06/how-much-does-it-cost-to-get-a-guardian-appointed/>.

¹¹⁸ Pope, *supra* note 2, at 976. *But see* IND. ADULT GUARDIANSHIP STATE TASK FORCE, WHO'S OVERSEEING THE OVERSEERS? A REPORT ON THE STATE OF ADULT GUARDIANSHIP IN INDIANA 78 (Feb. 2012), <https://www.in.gov/courts/iocs/files/ad-guard-2012-full-report.pdf> [hereinafter OVERSEEING THE OVERSEERS] (“Indiana law does not require a functional assessment, or for that matter any determination of incapacity by a trained medical professional.”).

¹¹⁹ Krooks, *supra* note 117.

¹²⁰ Neha Patel, Note, *The Homeless Mentally Ill and Guardianship: An Assessment of Current Issues in Guardianship and Possible Application to Homeless Mentally Ill Persons*, 11 GEO. J. ON POVERTY L. & Pol'y 495, 513–15 (2004) (discussing various methods courts use to assess capacity).

¹²¹ See 42 CFR § 440.210 (1995) (demonstrating a State's legal floor of Medicare it must provide under its State plan.) Some jurisdictions do allow for providers to bill Medicaid. See discussion *infra* Part V.

¹²² § 440.210. Some jurisdictions allow the estate of the alleged incapacitated person to pay fees related to its own petitioning, subject to court approval. For an example, see *The Guardianship Process: A Practitioner's Guide to Adult Guardianship in Illinois*, ILL. GUARDIANSHIP & ADVOC. COMM'N, <https://gac.illinois.gov/osg/pg-proc.html> (last visited Aug. 4, 2022).

¹²³ See KAN. DEP'T FOR CHILD. & FAMS.: PREVENTION & PROT. SERVS., DECISION-MAKING AND FUNCTIONAL ASSESSMENT: CRITERIA FOR LEGAL IMPAIRMENT A MULTI-DISCIPLINARY TOOL (Jan. 2017), http://www.dcf.ks.gov/services/pps/documents/ppm_forms/section_10000_forms/pps10610.pdf.

¹²⁴ For example, see *List of CPT/HCPCS Codes*, CMS.GOV (Nov. 18, 2022), https://www.cms.gov/medicare/fraud-and-abuse/physiciansselfreferral/list_of_codes (click “List of codes effective January 1, 2023, published December 1, 2022”; then click “Accept” on the License Agreement; then open the zip file once downloaded; then click the excel sheet file titled “2023_DHS_Code_List_Addendum_12_01_2022” to look through which assessment-related services are currently billable).

New York deduct the guardian's compensation from the facility's reimbursement, leaving the facility with a shortfall that grows month by month.¹²⁵ The fact that most nursing homes operate on thin margins makes this an unappetizing prospect.¹²⁶

Outside of the above quantitative factors, qualitative disincentives also hamper institutions' willingness to petition unbefriended residents in need. For example, even if the court appoints a guardian, the court cannot always guarantee such a guardian will either be attentive or adhere to the ward's best interest in complicated ethical situations.¹²⁷ As described above, public guardianship offices struggle with chronic underfunding, causing high ward-to-staff ratios and poor quality.¹²⁸

A court-appointed attorney is not likely a better solution. Lawyers can only bill for providing fiduciary and legal services.¹²⁹ Their incentive structure prioritizes the cold end-of-life decisions and financial management aspects of guardianship over the clinical relationship-building that is central to effective guardianship.¹³⁰ One recent survey reported that many surrogate decision makers feel demoralized as they try to figure out the wishes of people under their care.¹³¹ Even if an attorney is attentive to non-legal needs, not all attorneys are trained to make the complicated end-of-life medical decisions around finances, forgoing medical interventions (or not), and how to prioritize independence in a medically complicated context.¹³² All that is to say: finding a guardian who cares and finding a guardian who is trained to navigate the ethical terrain are separate issues. Among court appointed attorneys, it is rare that a court can find the former and even rarer that they find the latter.¹³³

Another disincentive for nursing homes is that appointing a guardian would only impair a nursing home's ability to prescribe unnecessary medication.¹³⁴ In South Carolina, for example, physicians have unilateral authority to determine a patient's capacity and then prescribe medication so long as the doctor determines "healthcare is necessary for the relief of suffering . . ."¹³⁵ While this system provides many cost-cutting advantages, it also provides a hospitable environment for overprescribing psychotropics. Unless the resident protests or, if the resident is friended and the friend protests, the nursing home can do what it wants unchecked. A guardian would only impair this luxury.

¹²⁵ New York is one such example. See Nancy Levitin, *Nursing Home Petitioners and Guardianship*, N.Y. ST. B. ASS'N J., 54, 55 (Sept. 2015) (describing New York law).

¹²⁶ Harris Meyer, *Nursing Homes' Flawed Business Model Worsens Covid Crisis*, AARP: FAM. CAREGIVING (Dec. 7 2020), <https://www.aarp.org/caregiving/health/info-2020/covid-19-nursing-homes-failing-business-model.html>.

¹²⁷ See Daniel Leinung, *Reforming New York State's Guardianship System: It's Time for A Change (Again)*, 2 ALB. GOV'T L. REV. 677, 701 (2009) ("New York is . . . in desperate need of a better public guardianship system . . . the current process of appointing lawyers, who have very little interest in their client's well-being and few practical skills necessary to be an effective guardian, is unfair to the vulnerable individuals who need appropriate guardianship services.").

¹²⁸ See discussion *supra* Part II.

¹²⁹ Seal & Crona, *supra* note 55, at 1590.

¹³⁰ *Id.* See also Barnes, *supra* note 17, at 957; Zoom Interview with Erica Wood & Sally Hurme, *supra* note 79 (both describing the attenuated connection between appointing a lawyer as guardian and a lawyer's skill in building clinically complex relationships).

¹³¹ See Verma, Smith, Harrison, & Chodos, *supra* note 81, at 1727.

¹³² *Id.*

¹³³ GUARDIANSHIPS: COLLABORATION NEEDED, *supra* note 23, at 8.

¹³⁴ See discussion *infra* Part IV.

¹³⁵ Pope, *supra* note 2, at 987 (quoting S.C. CODE ANN. § 44-66-50 (2016)).

Finally, guardianship increases wards' access to the courts, potentially harming the nursing home's interests. Long-term care residents struggle to represent their wishes in the legal system.¹³⁶ Facilities often impede residents' access to medical records, phones, funds, computers, and informal support systems.¹³⁷ It is difficult for someone with these kinds of limitations to access the court in the event of abuse.¹³⁸ Providing a trained guardian addresses the problem of court access for wards; a prospect that can only harm the facility.

In sum, the factors disincentivizing long-term care facilities from petitioning its residents for guardianship include both quantitative and qualitative costs. Quantitative costs include the expense of a medical provider's time assessing functionality and testifying in court, paying for the lawyer's time, and losing income in the event Medicaid funds are diverted to pay for guardianship fees. Qualitative costs include the dearth of attentive and experienced guardians and the low motivation by over-stretched nursing homes to welcome eager guardians advocating on behalf of their clients.

B. Incentives

Despite the above-described disincentives, long-term care facilities have some incentives to petition residents for guardianship. As the story of Lillian Palermo demonstrates, a primary motivation for nursing homes is to ensure payment.¹³⁹ Although in Lillian's case the relationship between her and her institution was abusive, the motivation for petitioning is not always nefarious. For example, many residents need legal help to ensure Medicaid eligibility—the primary way to pay for nursing home care.¹⁴⁰ In many states, only the resident or a legal representative/guardian can access private records required to apply for Medicaid.¹⁴¹ Under this scheme, guardianship acts as one of the few legitimate means to access records and help an incapacitated and unbefriended resident stay in the facility.¹⁴²

The profits from the process of petitioning can outweigh the expenses. Clients with the ability to contribute to the cost of their care are an important part of nursing-homes' financial plan.¹⁴³ Medicaid payment schemes examine the assets of each resident and determine if the person has the ability to contribute.¹⁴⁴ Because the median per diem rate for a semi-private room in a nursing home is \$77,380 a year, coercing a resident with assets, like Mrs. Palermo, to contribute can overcome the costs associated with petitions.¹⁴⁵

The final incentive for a long-term care facility to petition an unbefriended resident is that—in the event a caring and attentive guardian is available—the resident will gain an

¹³⁶ Alison Hirschel & Lori Smetanka, *The Use and Misuse of Guardianship by Hospitals and Nursing Homes*, 72 SYRACUSE L. REV. 255, 273 (2022).

¹³⁷ *Id.* at 273.

¹³⁸ *Id.*

¹³⁹ *Id.* at 269–71.

¹⁴⁰ Levitin, *supra* note 125, at 55.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ Jan Clement, *Value and Nursing Home Profitability*, 29 HEALTH SERVS. MGMT. RSCH. 62, 63 (2016).

¹⁴⁵ Maggie Flynn, *Median Skilled Nursing Margin Breaks Even, But 'Long-Term Financial Viability is Uncertain'*, SKILLED NURSING NEWS: FIN. (Jan. 8, 2020), <https://skillednursingnews.com/2020/01/median-skilled-nursing-margin-breaks-even-but-long-term-financial-viability-is-uncertain/> (describing how skilled nursing facilities barely break-even).

advocate. While my previous subpart adopted a cynical view that nursing homes are motivated by schemes to avoid increased attention, reality is more complicated. Some nursing home staff genuinely want what is best for their clients. Many staff at nursing homes are doing their best to help their residents despite an incentive structure that discourages optimal care. As in Peggy’s story, staff occasionally overcome the lopsided disincentives described in the previous subpart to help clients receive a caring guardian. Such staff exist and should be applauded.

In sum, the incentive structure of guardianship is lopsided. Quantitative and qualitative disincentives outweigh the incentives. Quantifiable disincentives include the legal costs associated with petitioning, paying for medical providers’ assessments/testimonies, and the cost of Medicaid reimbursing the guardian’s time at the expense of the facility. Incentives include aiding residents to obtain Medicaid or else coercing residents who have assets to contribute to the nursing home’s costs (neither of which is rooted in improving the quality of care to the resident or obtaining consent for treatment). The fact that many nursing home staff have genuine concern for their residents may counterbalance the disincentives, but a particular staff’s compassion is not likely going to lead to many additional petitions for unbefriended residents, partly because finding an attentive and competent guardian is not always possible.

V. WHY THE CURRENT REFORM MOVEMENT SHOULD ADDRESS ISSUES AROUND INCREASING ACCESS TO GUARDIANSHIP FOR UNBEFRIENDED RESIDENTS OF LONG-TERM CARE FACILITIES

Building on the above context, this Part address the first part of the Note’s thesis: why addressing equitable access to guardianship is necessary despite guardianship’s many flaws. Subpart A will describe the guardianship reform movement and why it has ignored issues of access. Subpart B will then respond by showing why guardianship is both necessary and, at its best, uniquely helpful—justifying a concern for equitable access.

A. *The Reform Movement*

The guardianship reform movement has recommended a wide range of improvements. These include recommendations to increase research and data-collection, heighten the due process protections for people allegedly incapacitated by illness, standardize the methods by which judges determine capacity, improve court access for guardians in need of restoration proceedings, and avoid guardianship altogether through bolstering alternatives.¹⁴⁶

The movement is epitomized by its flagship legislative effort: the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA).¹⁴⁷ The bill incorporates essentially every major proposal of the reform movement. The model bill drafters received input from—*inter alia*—the AARP, the American Bar Association,

¹⁴⁶ MAXIMIZING AUTONOMY, *supra* note 29, at 2–9.

¹⁴⁷ Erica Wood, *New Uniform Act Boosts Guardianship Reform*, 39 A.B.A. COMM’N ON L. & AGING (Oct. 15, 2018), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol--39/issue-1--october-2017-/new-uniform-act-boosts-guardianship-reform/#:~:text=Seven%20states%20have%20passed%20the,more%20have%20enacted%20specific%20provisions.

and the National Academy of Elder Law Attorneys.¹⁴⁸ Nineteen states have partially enacted the bill; nine have passed it in full.¹⁴⁹ The bill addresses many of the problems outlined in Part II. Its reforms include providing decision-making standards for guardians, incentivizing limited guardianship, increasing protections to combat unscrupulous actors, and enhancing monitoring mechanisms.¹⁵⁰ Because of the comprehensive ways in which the UGCOPAA addresses problems faced by people who are already subject to guardianship, the Act is considered the gold standard.¹⁵¹

While the UGCOPAA is needed, it focuses exclusively on issues faced by people who are either already subject to a guardianship or who should avoid guardianship altogether. It does not address people who need guardianship but cannot access it. Put differently, the reform movement is most concerned about issues faced by people already under guardianship's care—such as people contesting their guardianship or people abused by their guardian.¹⁵² While the plight of such people is unobjectionably important, the movement and the Act overlook issues of *access* to guardianship for the thousands of people who need it, including the unbefriended and incapacitated.¹⁵²

Given the potential for abuse, the inattention paid to issues of access is at least somewhat understandable.¹⁵³ Guardianship is an inherently paternalistic system ripe with the potential to abuse the very people it is meant to protect.¹⁵⁴ Even if it were possible to increase access to guardianship, there is no guarantee that enough competent guardians are

¹⁴⁸ Katie Robinson, *Uniform Guardianship Act Recommended for Enactment by Senate Committee*, UNIF. L. COMM'N: BETTER LS., STRONGER STATES (Dec. 6, 2018, 3:09 PM), <https://www.uniformlaws.org/committees/community-home/digestviewer/viewthread?MessageKey=62fffa0e-c746-49ea-9d84-7d2303788433&CommunityKey=d4b8f588-4c2f-4db1-90e9-48b1184ca39a&tab=digestviewer>.

¹⁴⁹ UNIF. L. COMM'N: NAT'L. CONF. OF COMM'RS ON UNIF. STATE LS., THE UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT: A SUMMARY, <https://www.guardianship.org/wp-content/uploads/2018/04/UGCOPAA-Summary-Oct-2017.pdf> (last visited Dec. 20, 2022); *Guardianship, Conservatorship, and Other Protective Arrangements Act*, UNIF. L. COMM'N (2017), <https://www.uniformlaws.org/committees/community-home?communitykey=2eba8654-8871-4905-ad38-aabbd573911c&tab=groupdetails> (click on the “enactment history” tab, the furthest right tab directly above the map of the United States, to see which states have passed which version of the bill).

¹⁵⁰ Statement of Kohn & Levy, *supra* note 65, at 3. A minority of scholars are more radical. For example, one proposal recommends combining guardianship proceedings with proceedings for involuntary hospitalization so that there is one specialized *parens patriae*-based mental health court which would hopefully cut costs. See Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 ELDER L.J. 53, 53 (2004). Others hope to create an administrative agency that acts as a special master for the court and cuts costs by taking on uncontested and less controversial cases. Johns & Bowers, *supra* note 12, at 1.

¹⁵¹ A.B.A., RESOLUTION 112C (Feb. 5, 2018), <https://www.americanbar.org/content/dam/aba/directories/policy/2018-midyear/2018-mm-112c.pdf> (the House of Delegates approving the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act).

¹⁵² See generally NAT'L CONF. OF COMM'RS ON UNIF. STATE LS., UNIFORM GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT (July 9, 2018), https://www.guardianship.org/wp-content/uploads/2018/09/UGCOPPAAct_UGPPAct.pdf [hereinafter UNIFORM GUARDIANSHIP] (the act as a whole not adequately addressing the issue of those who need access to guardianship).

¹⁵³ See Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347, 350–51 (discussing how the guardianship reform movement often misses issues occurring on the ground).

¹⁵⁴ See discussion *supra* Part II.

available to respond to the need.¹⁵⁵ In light of the underfunded state of public guardianship discussed in Part II, the idea of expanding access to guardianship is a frightening prospect.¹⁵⁶ After all, as stated previously, “[p]oorly executed public guardianship does greater harm than no public guardianship at all.”¹⁵⁷

B. Why Advocating for Increased Access to Guardianship is Worthwhile

While guardianship has issues, the reform movement’s singular focus on the pursuit of decreasing the number of guardianships out of a desire to stymie abuse does little to help those in need of a caring guardian.¹⁵⁸ Despite the misgivings of the reform movement, access to guardianship deserves attention. The reality is that the need for caring guardians is simply too massive to ignore. This subpart describes the need for guardianship in order to highlight why issues of access deserve attention.

Diseases, accidents, endemic loneliness, and the general unpreparedness of Americans toward death are currently unchanging facts of American life. These factors consistently generate demand for guardianship. For example, dementia kills over 250,000 Americans a year in an unbearably slow and degrading way.¹⁵⁹ This says nothing of the people who suffer from strokes, severe Bipolar I, traumatic brain injury, extreme major depression, debilitating schizophrenia, and severe intellectual and development disabilities. No matter what due process protections the reform movement enacts, the need—based squarely in the cold realities of American disease and suffering—will continue unabated.¹⁶⁰ What available data exist bear this out. One of the few national studies conducted on public guardianship concluded there is an “unmet need” for more guardians in the nursing home context.¹⁶¹ Given the previously described American discomfort around death and incapacity, this is unsurprising.

A historical example further proves why we, as a society, need guardianship and cannot afford to ignore issues of access. In the 1990s, the guardianship reform movement succeeded in ensuring the right to an attorney in all jurisdictions in the event an alleged incapacitated person contests their petitioning.¹⁶² The reformers sought to give those who did not want or need guardians the power to resist. Despite this victory, the number of total

¹⁵⁵ Leinung, *supra* note 127, at 681 (discussing the problems associated with court-appointed attorney guardians).

¹⁵⁶ See discussion *infra* Part II.

¹⁵⁷ BEST INTERESTS, *supra* note 18, at 144.

¹⁵⁸ See Frolik, *supra* note 153, at 350 (“[N]ot appointing a guardian causes measurable harm to the incapacitated person.”).

¹⁵⁹ Ellen A. Kramarow & Betzaida Tejada-Vera, *Dementia Mortality in the United States, 2000-2017*, 68 NAT’L VITAL STATS. REPS. 1, 1 (Mar. 14, 2019), <https://pubmed.ncbi.nlm.nih.gov/31112120/#:~:text=Results%2DIn%202017%2C%20a%20total,reported%20in%20the%20United%20States>.

¹⁶⁰ Frolik, *supra* note 153, at 349.

¹⁶¹ BEST INTERESTS, *supra* note 18, at 55.

¹⁶² Barnes, *supra* note 17, at 965. It is worth noting that not all statutes use the same language. Nevada has had recent success decreasing overall guardianships by mandating that an attorney be assigned in all guardianship cases, even if no one contests. See Ronnie Green, *Guardians’ Abuses Persist as One State’s Easy Fix Goes Unmatched*, BL (Mar. 10, 2023), 4:01 AM, <https://news.bloomberglaw.com/us-law-week/guardians-abuses-persist-as-one-states-easy-fix-goes-unmatched?context=search&index=0>.

wards in the country did not significantly decrease.¹⁶³ Adding what is arguably the most important and expensive due process protection that exists—the right to an attorney—did not make a dent. Guardianship proved too necessary for due process provisions to make a significant change in the frequency of its use. The challenges that mass-incapacity and loneliness presented were too endemic for lawyers to make much of a difference. While the reform movement tried to decrease the total number of guardianships, their efforts proved helpful for outlier cases only. The great preponderance of allegedly incapacitated people still needed a caring guardian.¹⁶⁴

There is no reason to think there is less need for guardianship today than in the 1990s. Long-term care facilities are home to thousands of unbefriended people dying alone—often drooling because staff have unnecessarily prescribed medications.¹⁶⁵ The scope of the problem, and the lack of an individualized and humane response, is a shroud over the nation. Ignoring the plight of the unbefriended out of a well-placed fear that malevolent actors will take advantage of guardianship does not do justice to those who need the legal mechanism. We are failing to remember the concept of *parens patriae* that initially motivated guardianship in the first place: that we as a society bear the responsibility to care for those who are unable to care for themselves.¹⁶⁶ We must not fail to advocate for the unbefriended and incapacitated, and we should not forget the compassionate elements of why government and guardianship exist.

So, while the reform movement and the UGCOPAA are necessary, helpful, and occasionally successful at passing legislation that curbs abuse, there is a need to improve access to quality guardianship for those who need it—especially the unbefriended.

V. PROPOSED SOLUTIONS

With the case made for creating more equitable access to guardianship despite its many problems, this final section will now propose solutions for state legislatures to correct the incentive structure described in Part IV.

Three changes are necessary: (A) alter Medicaid’s billing system to correct for the lopsided incentive structure and create a cost-neutral system; (B) preempt the financial need for nursing homes to rely on guardianship by providing alternative avenues for accessing Medicaid funding and therefore opening up space in public guardianship programs for people with real need; and (C) reinforce or else develop a compassionate public guardianship system to respond to the increased demand.

A. *Make Petitioning for Guardianship Cost-Neutral*

As previously discussed, hard quantitative factors net-disincentivize petitioning. Change requires addressing each of the most important expenses: functional assessments;

¹⁶³ Barnes, *supra* note 17, at 965–66 (“The unavoidable conclusion is that guardianship reform has had quite limited success in achieving its goals. Extensive anecdotal evidence and limited research data show that the positive effects that were anticipated are not widespread.”).

¹⁶⁴ Frolik, *supra* note 153, at 348.

¹⁶⁵ See discussion *supra* Part III.

¹⁶⁶ For a biting description of the failure to live up to our ideals and principles of *parens patriae*, see Johns & Bowers, *supra* note 12, at 6 (describing at length how “[t]he American guardianship system is a joke”).

medical providers' time testifying in court; in certain states, Medicaid billing schema; and attorney's fees.¹⁶⁷

Concerning the functional assessment, state legislatures should reformat their Medicaid billing structures to allow medical providers to charge for time spent assessing clients' functionality. Seven states already structure their Medicaid scheme this way.¹⁶⁸ A highly respected conference of practitioners recommended that Medicare allow for the same practice.¹⁶⁹ Inasmuch as obtaining consent for medical treatment is an inherent requirement of medical care, medical billing systems should support guardianship as one avenue to obtain the needed consent. Pursuant to this logic, doctors can already bill for time spent writing advanced healthcare directives with their clients through Medicare and—in some states—Medicaid.¹⁷⁰ Allowing doctors to bill for time spent in the petitioning process is an extension of the same motivating impulse. Both advanced healthcare directives and guardianship solve the consent issue and should be treated similarly for the purposes of billing and Medicaid policy.¹⁷¹

Doctors who testify in a probate hearing about functional ability should also be able to bill for their time. Doctors can already charge Medicare for advanced care planning conducted in in-home non-facility settings.¹⁷² This reasoning applies equally to medical providers going to a courthouse to testify in a guardianship hearing. Both advanced care planning and guardianship respond to the issue of consent for medical treatment. Doctors' time is expensive. Asking medical providers to donate half a day commuting to a courthouse, waiting to testify, and then testifying, is a strong disincentive impairing access.¹⁷³ Allowing doctors to bill for time spent helping their patients secure guardianship will counteract this powerful deterrent.

Another problem is that Medicaid in certain states compensates court-appointed guardians from funds previously directed to the long-term care facility.¹⁷⁴ Rather than leaving nursing homes with a shortfall that grows each month, states should emulate

¹⁶⁷ Unfortunately, a discussion of guardians *ad litem* is outside the scope of this Note—this topic should deserve its own essay. See Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceeding: Are Our Probate Codes Unconstitutional*, 33 REAL PROP. PROB. & TR. J. 215, 248–60 (1998).

¹⁶⁸ *Wards of the State*, *supra* note 22, at 233.

¹⁶⁹ The conference is widely recognized as “Wingspread,” based on the name of the Wisconsin conference center where it took place. There have been three Wingspread conferences that provide authoritative recommendations on guardianship reform. OVERSEEING THE OVERSEERS, *supra* note 118, at 72.

¹⁷⁰ CTR. FOR MEDICARE & MEDICAID SERVS. & MEDICARE LEARNING NETWORK, MLN FACT SHEET: ADVANCE CARE PLANNING 3 (Oct. 2020), <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/AdvanceCarePlanningText-Only.PDF> [hereinafter MLN FACT SHEET]; Wendy Fox-Grage, *State Strategies to Promote Advance Care Planning in Light of the Pandemic*, NAT'L ACAD. FOR STATE HEALTH POL'Y (Apr. 19, 2021), <https://www.nashp.org/state-strategies-to-promote-advance-care-planning-in-light-of-the-pandemic/>.

¹⁷¹ Creating a billing code for medical professionals to recoup nursing home costs when assessing a client should not go as far as incentivizing petitions by making the process lucrative. The goal is to remove disincentives, not create new incentives. By removing barriers, changing the law can make petitioning the court cost-neutral, rather than making it into an income stream. The former stands a chance of increasing equity, while the latter carries the risk of ensconcing a pernicious nursing-home-to-guardianship pipeline that is rightfully terrifying.

¹⁷² MLN FACT SHEET, *supra* note 170, at 3–4.

¹⁷³ Telephone Interview with Charles Golbert, Cook Cnty. Pub. Guardian (Jan. 2, 2022).

¹⁷⁴ See discussion *supra* part IV.

Massachusetts.¹⁷⁵ Massachusetts deducts guardianship fees from the Medicaid recipient's countable income to ensure the nursing home's bottom line is unaffected.¹⁷⁶ The state then makes up the shortfall created by the deduction.¹⁷⁷ By ensuring that Medicaid calculates total income to exclude guardianship payments from countable income the nursing home can be protected without compromising access to guardianship.¹⁷⁸

This leaves the cost of the petitioning lawyer's time. In for-profit nursing home chains with salaried lawyers on staff, this is a sunk cost. Those firms already employ attorneys for their legal needs, petitioning being just one. Most nursing homes follow this model.¹⁷⁹ For those agencies that need to contract out, the cost of litigating a contested guardianship can cost several thousand dollars.¹⁸⁰ While it is beyond the scope of this Note to address access to justice issues for financially strapped organizations with benevolent intentions, it is worth mentioning that practitioners have reported success using pro bono attorneys.¹⁸¹ In addition, H.R. 878 proposes creating an income-based tax credit up to \$5,000 to help pay for legal expenses associated with establishing guardianship.¹⁸² While the bill has not advanced past committee, it shows a measure of bipartisan support for addressing this critical issue.¹⁸³

B. Ensure Alternatives to Guardianship Address the Long-Term Care Facilities' Financial Needs More Adequately than Petitioning

The law should free up space in public guardianship offices for those residents of long-term care facilities who genuinely need the service. As it stands now, nursing homes in many jurisdictions need guardianship for the sole purpose of enrolling their residents in Medicaid.¹⁸⁴ A financially driven decision like that should never justify guardianship.¹⁸⁵ The law must provide the long-term care facilities with an alternative means of enrolling wards in Medicaid.

There are alternatives. Article V of the UGCOPAA calls for the creation of judge-made protective arrangements whereby a court grants a limited order allowing nursing homes to acquire the paperwork needed for Medicaid applications without resorting to plenary guardianship.¹⁸⁶ Currently only nine states have enacted the UGCOPAA in its

¹⁷⁵ For a similar system, see *Guardianships - Deductions to Participation, Room and Board*, WASH. STATE HEALTH CARE AUTH. (June 13, 2018), <https://www.hca.wa.gov/free-or-low-cost-health-care/i-help-others-apply-and-access-apple-health/guardianships-deductions-participation-room-and-board>.

¹⁷⁶ 130 MASS. CODE REGS. 520.026 (2023).

¹⁷⁷ E-mail from Wendy Cappelletto, Dir. Pol'y & Benefits, Off. Pub. Guardian of Cook Cnty., to Patrick Hecker (Mar. 4, 2022, 14:37 CST) (on file with author).

¹⁷⁸ *Id.*

¹⁷⁹ Janet Nguyen, *I've Always Wondered . . . The Economics of Nursing Homes (and Paying for One)*, MARKETPLACE (Feb. 11, 2021), <https://www.marketplace.org/2021/02/11/the-economics-of-nursing-homes-and-paying-for-one/> ("I think it's pretty rare now to have just one nursing home owned by one small company . . .").

¹⁸⁰ Krooks, *supra* note 117.

¹⁸¹ Telephone Interview with Rebecca Pryor, *supra* note 95.

¹⁸² H.R. 878, 112th Cong. (2021).

¹⁸³ *Id.*

¹⁸⁴ See discussion *supra* Part IV.

¹⁸⁵ Pope, *supra* note 2, at 929 (describing the universal agreement among scholars that guardianship should act as a "last resort").

¹⁸⁶ UNIFORM GUARDIANSHIP, *supra* note 152, at 213–221.

entirety.¹⁸⁷ However, even in those states that have enacted the law, no one knows the extent to which nursing homes use Article V—the lack of data makes it difficult to evaluate.¹⁸⁸

In recommending the increased use of guardianship alternatives, this Note aligns with the existing reform movement’s emphasis on substitutes. The Note simply adds a realistic perspective that unbefriended residents often need—and would benefit from—access to a compassionate form of guardianship.

C. Create a System Providing Quality Guardians with an Incentive Structure that Prioritizes Building a Relationship over Efficiency

On its own, making guardianship cost-neutral for nursing homes would, depending on the jurisdiction, channel unbefriended residents into the care of underfunded public guardians’ offices, pseudo-interested court-appointed attorneys, or else put them on a waiting list for public guardians in a state that caps the staff-to-ward ratio.¹⁸⁹ Thankfully, there are several possible paths to providing attentive and caring public guardianship. This subsection explores two.

The first is to create a system modeled on the Court Appointed Special Advocates program (CASA) first pioneered in the foster system. Under a CASA-styled approach, nonprofits would train non-lawyer volunteer guardians to meet regularly with wards and provide the relational support central to guardianship. The volunteers then work closely with accountants and attorneys employed by the nonprofit to respond to the financial and legal dimensions of care. The volunteer only takes on responsibilities related to providing medical consent and regularly visiting.¹⁹⁰ Such a system is already in place in Colorado and Indiana, but no empirical study yet exists to monitor the program’s effectiveness.¹⁹¹ However, one of the organizations that trains volunteers in Indiana has produced internal data that looks promising.¹⁹² Their report estimated that total costs would not exceed \$9.2 million to provide services for the whole state.¹⁹³ Furthermore, volunteers, courts, and

¹⁸⁷ See *supra* text accompanying note 149.

¹⁸⁸ Levitin, *supra* note 125, at 55 (“Different judges take different approaches to the problem of low-asset incapacitated nursing home residents needing, but lacking the capacity to pursue, Medicaid coverage.”).

¹⁸⁹ See discussion *supra* Parts III, IV.

¹⁹⁰ CASA stands for “Court Appointed Special Advocates.” They are community volunteers who are trained and “appointed by a judge to speak for the best interests of a child who has been adjudicated as abused, neglected, and/or dependent by the juvenile court system.” *What is a CASA Advocate?*, CASA OF DUPAGE CNTY., <https://dupagecasa.org/casa-advocate/#:~:text=What%20is%20a%20CASA%20Volunteer,by%20the%20juvenile%20court%20system> (last visited Aug. 4, 2022). CASA act “as the eyes and ears of the judge in speaking for the child’s best interest.” *Id.* They are assigned to a particular family, visit regularly, develop a relationship with the child, and attend court dates to advocate on behalf of the child. *Id.*

¹⁹¹ Pope, *supra* note 2, at 980–81.

¹⁹² OVERSEEING THE OVERSEERS, *supra* note 118, at 27–29 (“The programs are considered by the courts they serve to be a tremendous asset in that they accept guardianship cases where the incapacitated person has no means or other suitable person to serve as the guardian. The programs are also highly rated by the hospitals and nursing homes in their communities. As the guardian, the programs are able to make appropriate and timely medical decisions for their wards which, in turn, saves the facilities funds in wasted staff time and Medicaid/Medicare and insurance reimbursements. Lastly, the programs are highly rated by the volunteers who donate their time to be advocates.”).

¹⁹³ *Id.* at 29.

nursing homes all conveyed enthusiastic support for the program through qualitative feedback mechanisms.¹⁹⁴ Most wards in this system receive a higher quality of attention than they would even if they lived in a state that mandates a low staff-to-ward ratio.¹⁹⁵ One practitioner stated the majority of the wards in the program are visited once a week.¹⁹⁶ By comparison, even programs with low-staff-to-ward ratios often visit their clients as infrequently as once a month.¹⁹⁷

A CASA-based system would also align the incentive structure of service providers with the needs of the people who are incapacitated. Rather than assigning wards to lawyers—who are untrained in bedside manner and are not incentivized to build a personal relationship with their client—volunteers are presumably incentivized by compassion. In my opinion—and considering the amount of time most guardians spend engaged in informal relationship-building—compassion meets the personal needs of the unbefriended in a more humane way than an attorney motivated by guardianship fees. In a CASA-based system, the incentive structure aligns the ward’s needs with the services provided.

The other possibility is to increase funding for state offices of the public guardian. This solution relies on the changing tides of political will in each jurisdiction. Some scholars are optimistic, thinking that the increased attention on elder issues that baby boomers will bring may result in concomitant increases in funding.¹⁹⁸

Many solutions exist. The point is to ensure that quality trained, caring, and attentive guardians attend to incapacitated persons’ needs. Without this crucial step, the suggestions made in the previous section will only justify the concerns of those who argue guardianship reform should focus solely on guardianship alternatives to the exclusion of meeting the legitimate need for guardianship that unavoidably exists—especially for the unbefriended. We can do better.

CONCLUSION

Mahatma Gandhi is famously misquoted as saying “a civilization is measured by how it treats its weakest members.” The actual quotation comes from Pearl Buck, a Nobel prize winning author. Buck originally said, “Our society must make it right and possible for old people not to fear the young or be deserted by them, *for the test of a civilization is the way that it cares for its helpless members.*”¹⁹⁹ Buck was right. Nowhere is this truer than in the context of how our society treats the unbefriended and incapacitated.

The guardianship reform movement, as epitomized in the UGCOPAA, contributes many valuable suggestions; however, it has a critical blind spot when it comes to access. It is true that guardians can and sometimes do misuse their power. But responding to guardianship abuse does not justify a singular focus on decreasing the total number of guardianships in light of the unmet need for caring guardians. Nowhere is this truer than

¹⁹⁴ *Id.*

¹⁹⁵ Telephone Interview with Rebecca Pryor, *supra* note 95.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ See Wright, *supra* note 150, at 99. I am doubtful of this idea because I suspect American apathy toward the aged will only increase as the aged population grows older.

¹⁹⁹ Alexander Atkins, *Famous Misquotations: A Civilization is Measured by How It Treats Its Weakest Members*, ATKINS BOOKSHELF (Feb. 21, 2018), <https://atkinsbookshelf.wordpress.com/2018/02/21/famous-misquotations-a-civilization-is-measured-by-how-it-treats-its-weakest-members/>.

when considering the situation of unbefriended people in nursing homes. Because of the overreliance on psychotropics, many of these people spend their last years staring blankly into space, medicated into a stupor.²⁰⁰ In spite of its problems, guardianship is redeemable and can be part of the legal response.

This Note makes several suggestions that, along with the UGCOPAA, can help move guardianship to a more equitable and humane place. Concerning the petition process, cost neutrality is the goal. States can achieve this goal by changing Medicaid's billing structure to eliminate expenses related to medical evaluations and guardianship fees. States should also consider other ways to remove disincentives, like providing a tax rebate to compensate those businesses that contract out for legal services. As a precondition to reform, states should develop public guardianship systems that properly incentivize guardians to take on and prioritize the personal and care-based elements of an effective guardianship. A CASA-based model would align the incentive structures of caregivers with incapacitated people so that the volunteer builds a relationship with the ward and responds to their interpersonal needs. Creating a compassionate, relational, and equitable public guardianship system is possible, and it is a duty we owe to the unbefriended. Anything less speaks volumes about who we are as a society. As it stands now, our civilization fails Buck's test. We can do better. We must do better.

²⁰⁰ Nathanael J. McKeown, James H. Bryan, & B. Zane Horowitz, *Catatonia Associated with Initiating Paliperidone Treatment*, 11 W. J. EMERGENCY MED. 186, 186–187 (2010).