THE EVOLUTION OF GUARDIANSHIP LAW IN IOWA: A SEARCH FOR FAIRNESS AND JUSTICE IN GUARDIANSHIP PROCEEDINGS

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The moral test of government is how it treats those who are in the dawn of life, the children; those who are in the twilight of life, the aged; and those who are in the shadow of life, the sick, the needy and the handicapped.[1]

This measure of society and government may also be a gauge of the legal profession.[2]

I. INTRODUCTION

Demographic trends reveal an increasing number of individuals who qualify for guardianships.[3] Guardianships are "the most inclusive method of

1. ERICA F. WOOD & NATALIE E.H. HULL, ABA, GUARDIANSHIP OF THE ELDERLY: A PRIMER FOR ATTORNEYS (1990) (quoting Hubert H. Humphrey, which appears on cover page).
2. *Id.*

substituted decision making for individuals for whom it has been judicially determined . . . cannot act for themselves."[4] The elderly comprise one of the most affected groups.[5] By the year 2035, the elderly will represent nearly one quarter of the population of the United States.[6] Because illness often coincides with old age, the need for guardianships will likely increase.[7] Although age alone rarely necessitates guardianship proceedings, the increased likelihood of accident and illness in the elderly community makes this group particularly important when discussing the guardianship issue.[8]

The elderly, however, form only one of several groups that require consideration when addressing guardianship concerns.[9] The mentally disabled and terminally ill also frequently need guardianship assistance.[10] Furthermore, medical and scientific advances often prolong the dying process, leaving many alive but partially incapacitated and with the need for someone to look after their affairs.[11] As patients live longer and even outlive relatives who care for them, an increased need for guardianships will exist.[12]

The Iowa Code defines guardian as: "A person appointed by the court to have the custody of the person of the ward . . . ."[13] The guardian's primary responsibilities include caring for the ward's personal possessions and medical needs, while allowing the ward as much independence as possible.[14] The nature of a guardianship, however, has far more reaching implications concerning the liberty interests of the ward.[15] A guardianship

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3. COMMISSION ON THE MENTALLY DISABLED & COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, ABA, GUARDIANSHIP: AN AGENDA FOR REFORM iii (1989) [hereinafter AGENDA FOR REFORM].

4. John Parry, *Incompetency, Guardianship, and Restoration, in* THE MENTALLY DISABLED AND THE LAW 369, 370 (Samuel J. Brakel et al. eds., 1985).

5. AGENDA FOR REFORM, *supra* note 3, at iii.

6. *Id.*

7. Anne K. Pecora, *Representing Defendants in Guardianship Proceedings: The Attorney's Dilemma of Conflicting Responsibilities*, 1 ELDER L.J. 139, 141 (1993). It is estimated that 5% to 10% of the population of the United States over age 60 will have Alzheimer's disease by the year 2000. *Id.* (citing LEGAL AWARENESS OF OLDER AMERICANS PROJECT, ABA, EXPLORING ETHICAL ISSUES IN MEETING THE NEEDS OF THE ELDERLY 1 (1987)).

8. WOOD & HULL, *supra* note 1, at 1.

9. AGENDA FOR REFORM, *supra* note 3, at iii.

10. *Id.* The AIDS epidemic makes guardianship issues particularly relevant to younger people. *See* WOOD & HULL, *supra* note 1, at 1. An estimated 1.5 million people are infected with the HIV virus and this number is expected to increase. *Id.* During the later stages of the AIDS illness there can be mental impairments which require an AIDS patient to seek help in decision making via guardianships. *Id.*

11. WOOD & HULL, *supra* note 1, at 1. Examples of life-sustaining technology include: dialysis, artificial nutrition, chemotherapy, and cardiopulmonary resuscitation. *Id.* Because these life-sustaining procedures are commonly performed, the potential for new guardianships also increases. *Id.*

12. *Id.*

13. IOWA CODE § 633.3(19) (1997).

14. *Id.* § 633.635(1).

15. Phillip B. Tor & Bruce D. Sales, *A Social Science Perspective on the Law of Guardianship: Directions for Improving the Process and Practice*, 18 L. & PSYCHOL. REV. 1, 2 (1994). "The legal justifications for placing persons with disabilities into such a restrictive

essentially deprives the ward of the rights to contract, consent to medical treatment, and select a residence.[16] Because these fundamental liberties are at stake, due process provisions must be closely scrutinized to ensure adequate protection of the ward.[17]

To facilitate understanding of the current Iowa guardianship laws, Parts II and III of this Note examine the changing standard for guardianships. Part IV addresses problems and issues dealing with the old and new standards pertaining to guardianship appointment. Additionally, Parts II, III, and IV of this Note focus on the importance of constitutional issues including due process claims and potential abuses thereof.

II. THE IOWA CODE AND CASE LAW PRIOR TO THE *HEDIN* DECISION

A. *General Perspective on Guardianship Law*

The Iowa legislature established several types of guardianships: temporary,[18] standby,[19] and limited.[20] A temporary guardian maintains power for only a limited time,[21] a standby guardianship comes into effect only if a particular event occurs,[22] and a limited guardianship consists of a guardianship limited to certain functions.[23] It is necessary for guardianships to be distinguished from conservatorships because each entails different responsibilities for the guardian. Conservatorships deal only with the ward's property, while guardianships include personal and medical care decisions.[24] A distinction also exists between voluntary and involuntary guardianships.[25] In a voluntary proceeding, an individual consents to the need for management of their affairs by another, while in an involuntary proceeding there is no consent to this need and the court must then make the decision.[26]

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arrangement is rooted in the feudal English doctrine of *parens patriae*, where the English crown assumed the role of parent for its citizens . . . ." *Id.*

16. Pecora, *supra* note 7, at 139-40.

17. *Id.* at 139.

18. IOWA CODE § 633.558; *see* § 633.573 (discussing appointment of a temporary conservatorship).

19. *Id.* § 633.560.

20. *Id.* § 633.635(3). This section specifies that the court must explicitly state which areas of the ward's affairs the guardian will supervise. *Id.* The ward will retain independence over all other areas, but the court may determine that a ward may not contract to marry. *Id.*

21. *Id.* § 633.558.

22. *Id.* § 633.560. A standby guardianship may be created under the same circumstances as a standby conservatorship, such as upon the occurrence of a specified mental or physical health condition. *Id.* § 633.591.

23. *Id.* § 633.635(3).

24. *Id.* § 633.3(7).

25. *Id.* § 633.634, .557.

26. *Id.*

B. *Content of the Iowa Code and Case Law Prior to the* Hedin *Decision*

Any person may file a petition for a guardianship.[27] Once the individual files the petition and the potential ward has been served,[28] the court must then determine whether to grant the guardianship.[29] Prior to the 1997 amendments, the Iowa Code stated that the following test must be satisfied before a guardian may be appointed for a ward other than a minor: "By reason of mental, physical or other incapacity [the potential ward] is unable to make or carry out decisions concerning the proposed ward's person or affairs, other than financial affairs."[30] The guardianship must be terminated if the court determines the ward is capable of managing his or her own affairs and that continuing the guardianship, therefore, would be against the ward's best interest.[31]

Although the Iowa Code addressed numerous important guardianship concerns, it failed to adequately address many critical issues.[32] Issues left unresolved included which specific criteria should be considered when determining whether to appoint a guardian and the correct burden of proof and persuasion.[33] The Iowa Supreme Court attempted to clarify these unresolved issues in the *In re Hedin*[34] decision. In *Hedin*, the court criticized portions of the Iowa Code and established a new test for determining whether to appoint a guardian.[35]

C. *Constitutional Concerns with the Iowa Code Test*

Because the very nature of a guardianship forces the ward to give up fundamental rights, the test a court uses to determine whether or not to implement a guardianship is critical.[36] The test set forth in the Iowa Code requires the court merely to determine whether a ward is capable of making

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27. *Id.* § 633.552.

28. *Id.* § 633.557.

29. *Id.* § 633.556; *see In re* Ankeney, 360 N.W.2d 733, 736 (Iowa 1985) (holding that the court having jurisdiction of a guardianship is a superior guardian, and that the guardian is an officer of the court).

30. *Id.* § 633.552(2)(a). The Code has been amended to read: "Is a person whose decision making capacity is so impaired that the person is unable to care for the person's personal safety or to attend to or provide for necessities for the person such as food, shelter, clothing, or medical care, without which physical injury or illness might occur." Act of May 26, 1997, 1997 Iowa Legis. Serv. S.F. 241, § 5 (West). The new code provisions adopt the language of the *Hedin* test. *See In re* Hedin, 528 N.W.2d 567, 579 (Iowa 1995).

31. IOWA CODE § 633.675(3). One example is when a minor reaches majority. *Id.* § 633.675.

32. Deanna Clingan-Fischer & Gordon R. Fischer, *Guardian Angels?: The Iowa Supreme Court Sets New Standards for Guardianships*, IOWA LAW., Sept. 1995, at 7, 8.

33. *Id.*

34. *In re* Hedin, 528 N.W.2d 567 (Iowa 1995).

35. *Id.* at 578-79; *see also infra* Part III.

36. Pecora, *supra* note 7, at 140.

non-financial decisions concerning the ward's affairs.[37] The Iowa Supreme Court criticized this language as being vague and overbroad.[38] Similarly, in *In re Boyer*,[39] the Utah Supreme Court held that its state guardianship statute was "vague and overbroad" because it focused merely on the ward's "capacity to make or communicate responsible decisions concerning his person."[40] The Utah Supreme Court considered commentary by the United States Supreme Court regarding due process standards:

> It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case.[41]

The Utah statute had "vague and overbroad" language because it failed to specify which decisions the ward must be unable to make.[42] Moreover, the Utah Supreme Court noted that a state lacks an interest in restricting harmless unorthodox behavior.[43] Thus, a state cannot enforce a guardianship simply because a person engages in eccentric behavior.[44]

The *Hedin* court followed the *Boyer* court's analysis in assessing the vagueness and overbreadth of the Iowa statute.[45] The court found the language "unable to make or carry out important decisions concerning the proposed ward's person or affairs," vague like the language of the Utah statute.[46] The *Hedin* court criticized the language for several reasons.[47] First, the language allowed a guardian to be appointed when a person could make satisfactory decisions without harming themselves.[48] Second, the language

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37. IOWA CODE § 633.552(2)(a) (1997). The Code points out that a requisite element in a petition for appointment of a guardian is to show that the proposed ward, "[b]y reason of mental, physical, or other incapacity is unable to make or carry out important decisions covering the proposed ward's person or affairs, other than financial affairs." *Id.*

38. *In re* Hedin, 528 N.W.2d at 578-80.

39. *In re* Boyer, 636 P.2d 1085 (Utah 1981).

40. *Id.* at 1088-89.

41. *Id.* (citing Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966)); *see also* Grayned v. City of Rockford, 408 U.S. 104, 114 (1992) (citing Zwickler v. Koota, 389 U.S. 241, 249-50 (1967)). An enactment may be constitutionally overbroad if "in its reach it prohibits constitutionally protected conduct." *Id.*

42. *In re* Boyer, 636 P.2d at 1089.

43. *Id.* ("[I]t must be remembered that much human progress has resulted from individuals who marched to their own tune and strayed outside usual customs and conventions.").

44. *See id.*

45. *In re* Hedin, 528 N.W.2d 567, 578 (Iowa 1995).

46. *Id.* (reviewing IOWA CODE § 633.552(2)(a) (1995)).

47. *Id.*

48. *Id.* In a related issue involving an involuntarily committed mentally ill person, the court released the patient once he no longer posed a danger to himself or others. B.A.A. v. University of Iowa Hosp., 421 N.W.2d 118, 125 (Iowa 1988); *cf.* Stamus v. Leonhardt, 414 F. Supp. 439, 451 (S.D. Iowa 1976) (holding that patients must pose a threat to themselves before involuntary hospitalization is ordered).

indicated the decisionmaker should focus on the content of the potential ward's decisions rather than on the ward's decision making capacity.[49] Finally, the subjective nature of the language made the standard an "arbitrary and non-uniform" evaluation the standard rather than an objective methodical evaluation.[50] The Iowa Code test, therefore, lacked a satisfactory mechanism to preserve due process rights for potential wards.

Because fundamental liberties and autonomy are taken from a person when a guardian is appointed, it is critical to ensure that a guardianship is necessary. For example, in *Boyer*, relatives of a thirty-nine-year-old mildly retarded woman sought a guardianship.[51] The Utah Supreme Court required a stringent test before appointing a guardian for the woman, because while she was only mildly retarded, her fundamental rights, such as the rights to travel and make decisions, would be taken away.[52] *In re Ruvalcaba*[53] illustrates another example of unfairness to a ward resulting from an overly broad guardianship standard. In *Ruvalcaba*, the guardian filed a petition to dissolve the marriage of the ward.[54] The court determined that the guardian had the right to dissolve the marriage, thus illustrating the broad nature the guardian has over the ward's affairs.[55] Thus, because the guardian's power over the ward's affairs is so pervasive and the potential for abuse of power so great, courts should adopt a more stringent test to determine when the appointment of a guardian is necessary.

In contrast to guardianships, involuntary hospitalization statutes in Iowa require that patients demonstrate a serious threat to themselves or others, proven by a recent act or threat, before they can be committed without violating their due process rights.[56] Ironically, until the *Hedin* decision, such procedural safeguards were not in place when appointing a guardian.[57] Fortunately, the *Hedin* decision modified and dramatically changed the then existing law, forcing guardianship appointments to comport with procedural due process standards.[58] These due process safeguards should help in understanding and interpreting the changes the new law hopes to achieve.

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49. *In re* Hedin, 528 N.W.2d at 578.
50. *Id.*
51. *In re* Boyer, 636 P.2d 1085, 1086-87 (Utah 1981).
52. *Id.* at 1089. The *Boyer* court went on to set aside the incompetency judgment. *Id.* at 1092.
53. *In re* Ruvalcaba, 850 P.2d 674 (Ariz. Ct. App. 1993).
54. *Id.* at 676.
55. *Id.* at 681 (relying on *In re* Marriage of Gannon, 702 P.2d 465 (Wash. 1985)).
56. Stamus v. Leonhardt, 414 F. Supp. 439, 451 (S.D. Iowa 1976).
57. *See In re* Hedin, 528 N.W.2d 567, 575 (Iowa 1995).
58. *Id.*

III. THE NEW STANDARD FOR GUARDIANSHIP APPOINTMENT

A. *The Basic Structure of the* Hedin *Test*

The *Hedin* decision dramatically changed the standard for appointing guardians in Iowa.[59] The new test establishes that a guardian may be appointed only if:

> [T]he ward's . . . decision making capacity is so impaired that the ward is unable to care for his or her personal safety or unable to attend to or provide for such necessities as food, shelter, clothing, and medical care, without which physical injury or illness may occur. . . . [E]vidence must be submitted showing that the ward . . . is unable to think or act for himself or herself as to matters "concerning [the ward's] personal health, safety, and general welfare."[60]

Compared to the prior Iowa Code test, this test requires more specific information regarding the decision making capacity of a potential ward.[61] Due process concerns with the statutory test are therefore remedied with the new *Hedin* test because the language is no longer vague and overbroad.[62] Instead, the *Hedin* test requires the court to consider the ward's ability to provide for specific living requirements—food, shelter, clothing, and medical care—when appointing, modifying, or terminating a guardianship.[63] This language enables an objective evaluation of a ward's decision making capacity; thus, ensuring that the ward receives appropriate due process considerations and minimizes the potential for loss of liberty.[64]

B. *Third-Party Assistance*

The court must consider the possibility of third-party assistance in meeting the needs of a potential ward before appointing a guardian.[65] Other

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59. *Id.*

60. *Id.* at 579 (quoting *In re* Boyer, 636 P.2d 1085, 1091 (Utah 1981)). The *Hedin* court looked to the *Boyer* court in adopting this test. *Id.* *See In re* Boyer, 636 P.2d 1085, 1088-91 (Utah 1981) (defining an impaired decision making process as one where "responsible decisions" which would prevent physical injury or illness were absent); *see also* Fazio v. Fazio, 378 N.E.2d 951, 957 (Mass. 1978) (discussing "responsible decisions" language as used in *Hedin*).

61. *See* IOWA CODE § 633.552(2)(a) (1995).

62. *In re* Hedin, 528 N.W.2d at 577. The 1997 amendments to the Iowa Code adopted this test. *See supra* note 30.

63. *In re* Hedin, 528 N.W.2d at 579.

64. *Id.* at 575.

65. *Id.* "[A] State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." *Id.* at 576 (citing O'Connor v. Donaldson, 422 U.S. 563, 576 (1975)).

jurisdictions impose similar rules.[66] The North Dakota Supreme Court recently determined that a trial court erroneously appointed a guardian where a mildly retarded adult could have benefited from third-party assistance.[67] More specifically, the court referred to an "Alternative Resource Plan" that uses support services to assist the potential ward as an alternative to a guardianship.[68] This third-party assistance allows the least restrictive form of intervention with the potential ward's liberties, thus making it preferable to a full guardianship.[69] The 1997 additions to the Iowa Code include a similar standard.[70]

C. *The Limited Guardianship Option*

A court must also consider the appropriateness of a limited guardianship before appointing a guardian.[71] In the appointment of a guardian, modification, or application for termination of a guardianship, the court must consider whether the limited guardianship option is appropriate under the Iowa Code.[72] The Iowa Code states:

> The court may take into account all available information concerning the capabilities of the ward and any additional evaluation deemed necessary, including the availability of third-party assistance to meet the needs of the ward or proposed ward, and may direct that the guardian have only a specially limited responsibility for the ward.[73]

Additionally, a court must make findings of fact to support the powers granted to a limited guardian.[74] Arizona adopted a limited guardianship rule approximating Iowa Code Section 633.635.[75] The court in *In re Reyes*[76]

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66. *See, e.g., In re* Braaten, 502 N.W.2d 512 (N.D. 1993); *cf. In re* Early, 673 P.2d 209, 212 (Cal. 1983) (holding that a jury is entitled to consider the availability of third-party assistance in conservatorship judgment).

67. *In re* Braaten, 502 N.W.2d at 520-21.

68. *Id.*

69. *Id.* at 521.

70. Act of May 26, 1997, 1997 Iowa Legis. Serv. S.F. 241, § 4 (West) (to be codified at IOWA Code § 633.551A). *In re Hedin* overruled the prior line of cases regarding third-party assistance. *In re* Hedin, 528 N.W.2d 567 (Iowa 1995). *See, e.g., In re* Schrock, 211 N.W.2d 327 (Iowa 1973) (holding that the denial of the termination of a voluntary conservatorship was proper where the ward could not prove his capacity to handle his business affairs without assistance).

71. *In re* Hedin, 528 N.W.2d at 580; *see also* IOWA CODE § 633.635(3) (1997) (discussing the limited guardianship option).

72. *In re* Hedin, 528 N.W.2d at 580.

73. Act of May 26, 1997, 1997 Iowa Legis. Serv. S.F. 241, § 14 (West) (amending IOWA CODE § 633.635(3)); *see also id.* § 4 (to be codified at IOWA CODE § 633.551A(3)) ("In determining whether a guardianship or conservatorship is to be established, modified, or terminated, the district court shall consider if a limited guardianship or conservatorship pursuant to section 633.635 or 633.637 is appropriate.").

74. *Id.*

75. *See* ARIZ. REV. STAT. § 14-5312 (1997).

determined that a limited guardianship was not constitutionally overbroad.[77] By implementing such a standard, the state intrudes only to the extent necessary on the constitutional rights of a potential ward.[78]

D. *Standard of Proof for Appointing a Guardian*

Iowa law now requires the standard of proof for appointing a guardian to be "clear and convincing."[79] The *Hedin* court determined this standard to be appropriate because of the potential for deprivation of the liberty interest of the ward.[80] Moreover, the court noted that the United States Supreme Court had already decided the appropriate standard of proof in civil commitment cases: clear and convincing.[81] The Utah court in *Boyer* also established the clear and convincing standard for guardianship proceedings.[82] The court developed a balancing test analysis, weighing the state's interest and purpose in appointing a guardian, the potential ward's interest in living independently, and the "consequences of an erroneous judgment and potential abuse, either wittingly or unwittingly, by third persons."[83] The *Hedin* court found the reasonable doubt standard too restrictive—potentially making guardianships unavailable to those who needed them—while the preponderance of the evidence standard provided inadequate protection of the potential ward's interests.[84] Thus, the newly adopted clear and convincing standard creates the appropriate compromise in minimizing error without interfering with the purpose of the guardianship statute.[85]

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76. *In re* Reyes, 731 P.2d 130, 131 (Ariz. Ct. App. 1986) (holding that the Arizona statute permitting limited guardianship "by its terms permits [a guardian's] powers to be modified by the trial court" when such a request is received).

77. *Id.* at 131.

78. *In re* Hedin, 528 N.W.2d at 580 (citing the Uniform Guardianship and Protective Proceedings Act, 8A U.L.A. 440-41 (1993)).

79. *Id.* at 581 (Iowa 1995). For application of this standard in Arizona, see *In re* Reyes, 731 P.2d at 131 (applying a clear and convincing standard to make a determination of whether an elderly woman must be admitted to a nursing home or whether she can remain with her husband) and *In re* Ruvalcaba, 850 P.2d 674, 683 (Ariz. Ct. App. 1993) (applying a clear and convincing standard to the divorce of an incompetent person because of the complex personal issues involved).

80. *In re* Hedin, 528 N.W.2d at 581.

81. *Id.* at 580 (citing Addington v. Texas, 441 U.S. 418, 433 (1979)).

82. *In re* Boyer, 636 P.2d 1085, 1092 (Utah 1981).

83. *Id.* at 1091. In other involuntary commitment cases, courts have held that the clear and convincing standard is appropriate. *See, e.g.*, Stamus v. Leonhardt, 414 F. Supp. 439, 449 (S.D. Iowa 1976) (discussing the appropriateness of the involuntary commitment of the mentally ill).

84. *In re* Boyer, 636 P.2d at 1091.

85. *See In re* Hedin, 528 N.W.2d at 580-81 (discussing the analysis in *In re* Boyer, 636 P.2d at 1091-92).

E. *Standard for Terminating a Guardianship*

The *Hedin* court also addressed the burden of persuasion for guardianship termination proceedings.[86] The court essentially decided that a ward who entered into a voluntary guardianship should make a "prima facie showing that the ward has some decision making capacity."[87] After the ward satisfies this burden, the burden shifts to the guardian who must then prove the ward's incompetence by clear and convincing evidence.[88] This burden remains with the guardian during a modification proceeding or during the appointment of a guardian.[89] The *Hedin* court based its reasoning on *In re Sanders*,[90] a recent New Mexico Court of Appeals decision.[91] The *Hedin* court noted that the New Mexico Court of Appeals distinguished guardianship termination proceedings from proceedings designed to appoint an initial guardianship.[92] The court adopted the *Sanders* reasoning and held that because the clear and convincing standard has presumably been met in the original guardianship proceeding, there exists a presumption that the ward's condition continues as it existed when the original guardian was appointed.[93] Therefore, the presumption then goes against the ward in a termination proceeding, and the ward possesses the burden of rebutting the presumption.[94] Once the ward rebuts the presumption of his or her incompetence, the guardian then has the burden of proving by clear and convincing evidence that the ward is incompetent.[95]

IV. UNRESOLVED ISSUES WITH THE NEW IOWA GUARDIANSHIP LAW

A. *Determination of Incompetency*

1. *The Distinction Between Legal and Clinical Competence*

While the *Hedin* court resolved many troubling issues with guardianship law, several contentious issues have yet to be addressed.[96] Determination of incompetency remains one of the more troubling aspects of guardianship

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86. *Id.* at 581; *see also* IOWA CODE § 633.675 (1997) (detailing guardianship termination proceedings in Iowa).

87. *In re* Hedin, 528 N.W.2d at 581.

88. *Id.* This decision overruled contrary case law in *In re Schrock*, 211 N.W.2d 327 (Iowa 1973). *In re* Hedin, 528 N.W.2d at 581. The *Schrock* court held that the burden of persuasion in termination of guardianship proceedings is on the ward. *In re* Schrock, 211 N.W.2d at 329.

89. *In re* Hedin, 528 N.W.2d at 581.

90. *In re* Sanders, 773 P.2d 1241 (N.M. Ct. App. 1989).

91. *In re* Hedin, 528 N.W.2d at 581.

92. *Id.* (citing *In re* Sanders, 773 P.2d at 1244-45).

93. *Id.*

94. *Id.*

95. *Id.*

96. Clingan-Fischer & Fischer, *supra* note 32, at 7.

law.[97] Historically, elaborate mechanisms existed to protect an incompetent's property, not their person.[98] Currently, the trend focuses on the decision making capacity of the potential ward to ensure that both his or her property and person receive adequate protection.[99]

The difference between legal and clinical competency is important in a discussion regarding competency and guardianships.[100] Clinical competency considers "'cognitive functioning . . . or more precisely the extent to which cognitive functioning is "minimally adequate" in the areas of word knowledge, recent and remote memory, perceptual accuracy or reality testing, abstraction, and judgment as it is applied to both the personal and social spheres.'"[101] Legal competency, conversely, relies on whatever the local state standard happens to be.[102] Naturally, when determining one's competence, the legal field borrows many concepts from the clinical definition.[103]

2. *Methods for Determining Incompetency*

The relationship between incompetency and guardianship proceedings remains somewhat intertwined in that incompetency functions as a "judicial status, while guardianship is the primary disposition that arises from that status."[104] No national standard exists, however, for determining whether a person is incompetent.[105] Instead, a myriad of statutory definitions for incompetency exist that include any combination of the following components: (1) disorders and disabilities; (2) decision making and communication impairment; and (3) functional impairment.[106]

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97. *See generally* Tor & Sales, *supra* note 15, at 4-10 (outlining three different approaches states may use in determining incompetency).

98. Parry, *supra* note 4, at 369. This rationale originated in Roman law, continued into English common law, and finally found its way into Colonial America. *Id.* The logic behind protecting the property stemmed from fear of the incompetent person wasting his or her assets before passing them onto heirs. *Id.*

99. *Id.* at 371.

100. *Id.* Many states use the term "competency" while many others use the terms "incapacitated" or "disabled." *Id.* The trend is towards using the term incapacitated because incompetent has an "all-encompassing connotation." STEPHEN J. ANDERER, ABA, DETERMINING COMPETENCY IN GUARDIANSHIP PROCEEDINGS 3 (Nancy A. Coleman et al. eds., 1990). Because the legal implication of a finding of incompetency or incapacity is the same, the terms are used interchangeably in this Note.

101. Parry, *supra* note 4, at 370 (quoting Exner, *Diagnosis Versus Description in Competency Issues*, 347 ANNALS N.Y. ACAD. SCI. 20 (1980)).

102. *Id.*; *see also In re* Hedin, 528 N.W.2d 567, 572 (Iowa 1995).

103. Parry, *supra* note 4, at 371.

104. *Id.* at 378.

105. ANDERER, *supra* note 100, at 4.

106. *Id.* Because the standards can be so varied and fail to include all of the relevant components, the door is opened for vagueness and overbreadth problems with these statutes, as illustrated in *Hedin* and *Boyer*. *See* discussion *supra* Part III. The ABA recommends using all three components in a successful statutory scheme. ANDERER, *supra* note 100, at 4 (taking categories from those specified in ANDERER).

The first component, disorders and disabilities, functions as a safeguard.[107] Courts can deprive an individual of liberty only if the potential ward suffers from a pathological condition.[108] The second component, decision making and communication impairment, focuses on how well a person can make decisions and communicate regarding personal and financial affairs.[109] While this method may appear fair and legitimate on its face, it may actually hinder a constitutional outcome.[110] This situation becomes particularly evident when statutory language such as "responsible" or "effective" decision making is used.[111] Words such as "responsible" essentially allow a judge to focus on the result of the decision making, rather than the decision making process itself.[112] The result can be that eccentric or unpopular decisions by the potential ward may label him or her incompetent, even though the person has judgment capacity.[113] Finally, functional impairment is another common component in determining incompetency.[114] This standard considers whether the needs of a potential ward are met.[115] A presumption exists that some type of harm occurs if these needs are not met, thus justifying state intervention.[116] Constitutional problems can arise if language such as "properly manage their needs" is used.[117] The term "properly" allows for subjective value judgments which may interfere with a person's right to make eccentric decisions, making it harder to determine when a court can legitimately intervene.[118]

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107. ANDERER, *supra* note 100, at 6-7.

108. *Id.* In addition to recognized mental disabilities, some states recognize physical disabilities. *Id.* at 5. This criterion alone suggests inadequacy because a physical impairment may not necessarily lead to a cognitive impairment. *Id.* Additionally, some states consider advanced age a disability. *Id.* at 6. This criterion is questionable because it may lead to prejudice against the elderly. *Id.*

109. *Id.* at 7. The pre-*Hedin* Iowa Code exhibited this component language. The 1993 Iowa Code provided that in petitioning for appointment of guardianship, the proposed ward may be "[b]y reason of mental, physical or other incapacity . . . unable to make or carry out important decisions concerning the proposed ward's person or affairs, other than financial affairs." IOWA CODE § 633.552(2)(a) (1993). *Hedin* improved on the pre-1997 Iowa Code language as discussed in Part II.

110. *See* ANDERER, *supra* note 100, at 7.

111. *Id.* The Uniform Probate Code utilizes language such as "lacks sufficient understanding or capacity to make or communicate responsible decisions." *Id.* Notice that the term "responsible" still allows some focus on the type of decision made, rather than focusing on merely the decision making process. *Id.* (relying on NATIONAL CONFERENCE OF THE JUDICIARY ON GUARDIANSHIP PROCEEDINGS FOR THE ELDERLY, STATEMENT OF RECOMMENDED JUDICIAL PRACTICES 35 (1986)).

112. *Id.*

113. *Id.*

114. *Id.* at 8.

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

3. *Incompetency and the* Hedin *Test*

The new incompetency test established by the *Hedin* court incorporates both the components of decision making and functional impairment.[119] Under the *Hedin* standard, a court must consider the ward's decision making capacity (decision making element) with regard to things such as personal safety, providing food, shelter, and clothing, without which physical injury may occur (functional impairment element).[120] While the *Hedin* incompetency test and the 1997 amendments are improvements over the previous subjective Iowa Code competency test, unanswered questions still pose potential problems.[121]

One major problem involves the standardized approach to determining competency.[122] For example, even with a functional approach, several medical models for determining competency still exist.[123] Additionally, because some states require certification or examination by medical professionals before a person can be declared incompetent, a decision must be made as to which medical professionals can make the competency determination and how standardized their method of determination must be.[124] Moreover, a source of funding must be found to pay for these medical examinations.[125]

Due process problems are further compounded by the lack of required legal counsel for competency hearings in some states.[126] Even in states that require legal counsel, many guardianship proceedings take place without counsel.[127] Lack of counsel is a significant due process violation when considered in light of other procedural problems.[128] A combination of lack of counsel, lack of standardized impairment assessment, and vague statutory language results in a potential ward's liberty resting precariously with a single judge in an overburdened judicial system.[129]

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119. *In re* Hedin, 528 N.W.2d 567, 579 (Iowa 1995).

120. *Id.*; *see also In re* Boyer, 636 P.2d 1085, 1091 (Utah 1981).

121. Clingan-Fischer & Fischer, *supra* note 32, at 8.

122. Tor & Sales, *supra* note 15, at 9-10.

123. Parry, *supra* note 4, at 383. The two main models currently in use are the therapeutic model and the developmental model. *Id.* at 382. While these models are generally used by specialists, general practitioners with less psychiatric disorder training may also state opinions to the court regarding competency. *Id.* (relying on J.M. MAY, A PHYSICIAN LOOKS AT PSYCHIATRY 133 (1958)). Although each medical perspective may be given similar weight in court, the differences in interpretation may become significant when a person faces a finding of incompetency and a subsequent deprivation of due process. *Id.* at 382-83.

124. *Id.* at 382-83.

125. Clingan-Fischer & Fischer, *supra* note 32, at 8.

126. Phillip Tor, Note, *Finding Incompetency in Guardianship: Standardizing the Process*, 35 ARIZ. L. REV. 739, 746 (1993).

127. AGENDA FOR REFORM, *supra* note 3, at 10. An Associated Press study found that 44% of more than 2200 guardianship proceedings nationwide took place without legal representation. *Computer Analysis Yields Portrait of Elderly Wards*, L.A. TIMES, Sept. 7, 1987, at A2.

128. AGENDA FOR REFORM, *supra* note 3, at 10.

129. *Id.*

4. *Developments Following* Hedin

Following *Hedin*, Iowa courts have relied on the *Hedin* analysis in determining competency. For example, in *In re Teeter*[130] the Iowa Court of Appeals followed the *Hedin* analysis to determine that spending money foolishly did not establish incompetence.[131] The *Teeter* court looked at the potential ward's ability to take care of her needs, not to her eccentric or foolish spending choices.[132] The improved language from *Hedin* thus forced the court to consider the potential ward's ability to provide for her basic needs, rather than on the result of a decision some considered unwise.

In *In re Nelson*,[133] the Missouri Court of Appeals determined that an elderly woman needed a conservatorship to handle complex financial affairs, not an appointment of a guardian.[134] While hospitalized, her son changed all of his mother's bank accounts to joint accounts, took the valuables from her home, and arranged for nursing home care upon her release from the hospital against her will.[135] He then began guardianship proceedings.[136] Because Missouri law, like Iowa law, requires the least restrictive option in guardianship proceedings,[137] the court determined that her needs could be met and her liberty preserved with the least restrictive option.[138]

Teeter and *Nelson* demonstrate how courts are beginning to utilize the least restrictive method of guardianship and conservatorship appointment. Guardianships and conservatorships are now being used to protect the person rather than the property.[139] Because an increasing number of people are affected by guardianship proceedings, and the potential for severe deprivation of due process rights is great,[140] the changing standard for guardianship appointment is a positive advance in the judicial system.

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130. *In re* Teeter, 537 N.W.2d 808 (Iowa Ct. App. 1995).

131. *Id.* at 810. This decision involved a conservatorship rather than a guardianship, but the rationale for determining incompetency remains the same. *Id.* at 809.

132. *Id.* at 810; *see also In re* Polin, 675 P.2d 1013, 1016 (Okla. 1983) (holding that the parents of an eighteen-year-old deaf woman who had above-average intelligence could not prove she was incompetent in order to force her to leave a religious group).

133. *In re* Nelson, 891 S.W.2d 181 (Mo. Ct. App. 1995).

134. *Id.* at 188; *see also In re* West, 887 P.2d 222, 231 (Mont. 1994) (holding that a limited guardianship was appropriate for the victim of a car accident).

135. *In re* Nelson, 891 S.W.2d at 183.

136. *Id.*

137. *Id.* at 184 ("Disability and incapacity must be proven by clear and convincing evidence."). "[T]he court, in determining the degree of supervision necessary, shall apply the least restrictive environment principle . . . ." *Id.* at 187 (citing MO. REV. STAT. § 475.075.10 (1993)).

138. *Id.* at 187-88.

139. Parry, *supra* note 4, at 374.

140. AGENDA FOR REFORM, *supra* note 3, at iii.

B. *Notice Requirements*

Ensuring adequate notice in a guardianship proceeding becomes essential in safeguarding due process rights.[141] While Iowa provides for notice to a potential ward,[142] the issues of how presentation of notice should occur and whether additional parties should be notified have not been specifically addressed. The American Bar Association made the following recommendation for adequate notice in a guardianship proceeding:

> A court officer dressed in plain clothes and trained to communicate and interact with elderly and disabled persons should serve the respondent personally and present the information to the respondent in the mode of communication that the respondent is most likely to understand. The written notice should be in plain language and large type. It should indicate the time and place of the hearing, the possible adverse consequences to the respondent of the proceedings and list the rights to which the respondent is entitled.[143]

In addition to the American Bar Association suggestions, notification of a close relative is sometimes also recommended.[144] These recommendations are critical in preserving due process rights because if the potential ward fails to understand or even receive notice, substantial deprivation of liberty may occur.[145]

The issue of proper notice also becomes relevant in jurisdictions that allow the respondent to waive his or her right to be present at the hearing, because such a waiver essentially becomes a means of waiving the potential ward's due process rights.[146] One suggestion to remedy this irreparable harm is for the court to question the potential ward to make sure they understand the consequences of the waiver.[147] Additionally, if appearing in court would cause distress, a meeting in chambers or some other less intimidating place could substitute for a court appearance.[148]

C. *Reporting and Education Requirements*

Because of the immense responsibility which comes with managing the affairs of another, a mechanism for appropriate guardian training should exist.[149] Although the Iowa Code does not require this training, the American

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141. *Id.* at 9.
142. *See* IOWA CODE § 633.554 (1997).
143. AGENDA FOR REFORM, *supra* note 3, at 9-10.
144. Parry, *supra* note 4, at 381.
145. *Id.*
146. *Id.*
147. *Id.*
148. *Id.*
149. AGENDA FOR REFORM, *supra* note 3, at 23.

Bar Association recommends such education for the protection of wards.[150] A system as simple as providing instructional handbooks and videos may help improve the quality of guardians.[151] A "good" guardian should:

> [B]e knowledgeable about housing and long-term care options, community resources, protection and preservation of the estate, accounting, medical and psychological treatment, public benefits and communication with elderly and disabled individuals. A guardian should develop advocacy skills; assume "case management" functions; monitor the ward's living situation; make decisions that are, to the greatest extent possible, in accord with the ward's values; avoid any conflict of interest; and regularly report to the court.[152]

A guardianship plan to care for the ward or the ward's estate provides another avenue to help make the guardianship process go more smoothly.[153] The plan establishes a standard by which the judge can measure the progress of the ward and the guardian, thus ensuring more protection for the ward.[154] An additional concern involves continuing assistance to guardians.[155] Guardians will likely encounter legal and social service questions as they fulfill their duties and will therefore need someone to answer their questions.[156]

Currently, the Iowa Code requires that the guardian provide an initial report regarding the guardianship and report thereafter annually.[157] The report must include the current mental and physical condition of the ward,[158] the ward's present living arrangements,[159] a summary of professional services,[160] a description of the guardian's visits,[161] activities on behalf of the ward,[162] and a recommendation for continuing the guardianship.[163] Although the Iowa reporting system presents a standardized list of questions for the guardian to address, the success of the reporting system depends on how well the court reviews the report and enforces deadlines.[164] Because many courts lack the resources to sufficiently consider the contents of the reports, a dis-

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150. *Id.* The American Bar Association surveyed a small sample of probate judges in 1986 and found that 80% of their jurisdictions did not offer guardianship training. *Id.* The trend is now towards providing some education. *Id.*

151. *Id.* Arizona and Florida provide some training in the form of handbooks and videos. *Id.*

152. *Id.*

153. Tor & Sales, *supra* note 15, at 24.

154. *Id.*

155. AGENDA FOR REFORM, *supra* note 3, at iii.

156. *Id.* at 23. Bar Association programs or pro bono legal volunteers present one potential solution to this type of problem. *Id.*

157. IOWA CODE § 633.669 (1997).

158. *Id.* § 633.669(2)(a).

159. *Id.* § 633.669(2)(b).

160. *Id.* § 633.669(2)(c).

161. *Id.* § 633.669(2)(d).

162. *Id.*

163. *Id.* § 633.669(2)(e).

164. AGENDA FOR REFORM, *supra* note 3, at 24.

honest guardian may be able to abuse the system.[165] Thus, even a good reporting system cannot protect a ward when inadequate reviews of the reports take place.

V. CONCLUSION

With an increasing elderly population and new medical advances that prolong life, guardianship issues are becoming highly relevant. Because a guardianship can deprive potential wards of significant liberties such as their ability to care for themselves and make personal decisions,[166] the existence of sufficient procedural safeguards are essential to protect the potential ward. The new standard established by the *Hedin* court and adopted by the Iowa legislature indicates a trend towards more stringent standards on appointing a guardian.[167]

While the *Hedin* court provides for a stricter incompetency test, consideration of the limited guardianship option, third-party assistance, and a higher standard of proof, unresolved issues still exist and room for improvement remains. For example, non-uniform clinical methods for determining incompetency could still allow potential bias against the potential ward. Additionally, notice requirements, reporting, and education all play an important role in the effectiveness of guardianship proceedings. Although steps toward improvement still need to be made, the substantial improvements accomplished through *Hedin* have set the stage for future changes.

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165. *Id.*
166. Tor & Sales, *supra* note 15, at 11.
167. *See* discussion *supra* Part III.