Revisiting the Visitor: Maine's New Uniform Probate Code & the Evolving Role of the Court-Appointed Visitor in Adult Guardianship Reform

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Cover Page Footnote

J.D. Candidate, University of Maine School of Law, Class of 2022. I am grateful to my Comment advisors, Professors Deirdre Smith and Jessica Feinberg, for guiding my research and encouraging my intellectual growth; to Karen Sutherland for her devoted mentorship during my rural practice fellowship; to Professors Sara Wolff, Angela Arey, and Christine Dulac for helping me hone my legal writing, citation, and research skills; to my Maine Law Review family for hours of editing and cite-checking this work; and to my wonderful parents and loving husband, Alex, for being my copy editors and greatest fans. Finally, I would like to thank Judge Sean Ociepka, Sharon Peavey, and Judy Nealley for appointing me as a visitor for the Waldo County Probate Court, which ignited my interest in guardianship and elder law and inspired me to select this topic for my Comment.

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REVISITING THE VISITOR: MAINE’S NEW UNIFORM PROBATE CODE & THE EVOLVING ROLE OF THE COURT-APPOINTED VISITOR IN ADULT GUARDIANSHIP REFORM

Lisa Kay Rosenthal

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Lisa Kay Rosenthal*

ABSTRACT

A judge may appoint a guardian for an adult who does not have the capacity to make decisions affecting their own health or welfare. However, the power of the guardian—while intended to serve a protective function—potentially invites financial, physical, and emotional abuse of the most vulnerable members of society.

To help a probate judge understand the circumstances of a guardianship and the need for protection, probate courts in Maine appoint a “visitor” to interview both the person allegedly in need of a guardianship and the proposed guardian. The visitor submits a report to the court which contains the visitor’s observations, assessments of cognitive and physical capacity, and recommendations about the appropriateness of guardianship or of less restrictive alternatives. The visitor’s critical role in a guardianship proceeding may be pivotal.

This Comment begins by tracing the history and purpose of guardianships and the problems that may surface when guardianships are granted too readily and monitored inadequately. It then uses Maine as a case study in guardianship reform by examining the ways probate courts have implemented the Maine Uniform Probate Code. Finally, it explores the legal issues involved in evaluating an individual for capacity, the civil rights implicated when a person is appointed a full guardian, and the benefits of alternatives to guardianship. It concludes by suggesting a path forward for Maine to strengthen its protections for individuals subject to a guardianship petition, including developing a comprehensive visitor training program and expanding the statutory requirements for the visitor. Elevating the importance and gravity of the role of the court-appointed visitor will further implement the policy aims of the Maine Uniform Probate Code to protect and preserve, as much as possible, the civil rights, liberty, and autonomy of vulnerable adults.

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INTRODUCTION

The late Hon. James E. Mitchell, former judge of probate in Kennebec County, Maine, once proclaimed: “[i]mposition of guardianship based on incapacity is the most severe restriction the law can place on a person short of imprisonment.”

Generally, adults have the right to make decisions about how to manage their own lives and affairs. Sometimes an adult may not have the capacity to make decisions that support his or her activities of daily living, medical care, and financial management needs. If that is the case, the adult may require a guardianship. A guardianship is the legal process by which another person becomes the decision-maker for the person with diminished capacity. Guardianship law and the appointment of guardians is primarily a function of state law, adjudicated in probate or other state or local courts. Inherent in the legal procedures of guardianship is “the deprivation of civil rights and autonomy of the protected person.”

In recent decades, elder and disability rights advocates in the United States have been promoting Supported Decision-Making (SDM) as a preferred alternative to guardianship. Such advocacy culminated in 2017 when SDM was included in the Uniform Probate Code (UPC), a comprehensive model code for guardianship reform promulgated by the Uniform Law Commission (ULC).

In 2018, the Maine Legislature boldly adopted the ULC’s Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA), becoming the first state in the union to do so. Among other provisions, the UGCOPAA requires courts to exhaust all possible alternatives for protecting the individual’s property and personal affairs before granting a guardianship. As such, Maine is a pioneer in the effort to promote a progressive culture shift in perceptions about capacity, autonomy, and civil rights.

A probate judge, tasked with ultimately determining the appropriateness of a guardianship, limited guardianship, conservatorship, supported decision-making, or dismissing a petition entirely, works in concert with a team of other professionals to assess an individual’s capacity and need for protection. Medical professionals and attorneys are the most common professionals that a judge relies upon to gather and present facts pertaining to the case, but some states—including Maine—also employ

3. Supported decision-making involves “assistance from one or more persons of an individual’s choosing in understanding the nature and consequences of potential personal and financial decisions, which enables the individual to make the decisions, and in communicating a decision once made if consistent with the individual’s wishes.” UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT § 102(31) (2017).
5. UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT § 301 cmt. (UNIF. L. COMM’N 2017) (“[If the adult’s needs could be met by providing the individual with support for decision making, adaptive devices, caregiving services, or a wide variety of other interventions that remove fewer rights than guardianship, the court may not impose a guardianship on an adult.”).
6. See discussion infra Section I.B.
7. See discussion infra Section II.C.2.
a court-appointed visitor. The visitor is not required to have specific legal or medical training but serves the important function of acting as the eyes and ears of the judge in a guardianship proceeding.

In Maine, the visitor interviews the petitioner (the person who alleges someone else needs a guardian), the proposed guardian (who may or may not also be the petitioner), and the respondent (the individual allegedly in need of a guardian). The visitor then compiles a report for the court, which includes: (i) factual findings relating to capacity, medical needs, values, preferences, and family history; (ii) recommendations as to whether an attorney should be appointed for the respondent; and (iii) whether, in the visitor’s opinion, some form of a guardianship is necessary. If someone is alleged to require a guardian and waives the right to—or otherwise cannot—attend the hearing, the visitor may very well be the only person that interacts with the respondent face-to-face to evaluate capacity and need for guardianship. Tasked with advising the court as to whether an individual’s autonomy and civil rights should be legally removed, the visitor’s role in a guardianship proceeding is critical.

Section I of this Comment will survey the concept of guardianship in a historical and comparative context. This will establish the foundation for the guardianship reforms of the late 20th and early 21st Centuries, with particular emphasis on the legal issues involved in evaluating an individual for capacity and the civil rights that are implicated when a person is appointed a full guardian.

Section II will then examine the social, political, and legal impetus for Maine’s enactment of the UGCOPAA. It will explore (i) the process of obtaining a guardianship in Maine, (ii) the requirement that probate judges exhaust all possible alternatives to guardianship before granting a guardianship petition, and (iii) issues surrounding the Maine Legislature’s rejection of the ULC’s recommendation that probate courts mandate the appointment of an attorney in all adult guardianship proceedings to protect the interests of the respondent. As a result, respondents must often rely on court-appointed visitors to accurately reflect their legal capacities, relay their preferences and concerns, and recommend whether or not they are able to retain the fundamental liberty to make their own decisions.

Finally, Section III will argue that reimagining the role of the court-appointed visitor in adult guardianship proceedings is not only consistent with the policy goals of the UPC, but is vital to ensuring that older adults and adults with disabilities are afforded due process and given the opportunity to maintain their civil rights and autonomy, if appropriate for their situations. In Maine’s current probate system, wherein the appointment of an attorney is not yet mandatory in an adult guardianship proceeding, a robust visitor program is one of the only ways to ensure that alternative methods of meeting an individual’s needs have been exhausted before resorting to the appointment of a guardian.

9. Id.
10. Id.
11. See AM. BAR ASS’N, COMM’N ON L. & AGING, supra note 4, at 3 (“A visitor or guardian ad litem may be the only party with a clear view of the case from all sides, and the court may rely heavily on their report.”).
I. GUARDIANSHIP: PAST, PRESENT, AND FUTURE

A. Guardianship in Historical Context

As human beings have experienced varying degrees of capacity in their lives throughout history, the concept of guardianship is ancient. The prevailing view during the Golden Age of Greece was that a person experiencing mental disabilities was possessed by demons, and “the cure was magic.”\textsuperscript{12} One of the earliest recorded guardianship proceedings took place during the decline of Greek civilization. While Sophocles was writing his famous play \textit{Oedipus at Colonus}, his sons sought to gain control over his fortune and brought a proceeding against him before the court on a charge of dementia.\textsuperscript{13} To prove their father’s incompetence, the sons “cited his preoccupation with the play.”\textsuperscript{14} In his defense, Sophocles read an excerpt from the play to the judges, who proceeded to cheer in approval, dismiss the case, and declare him competent.\textsuperscript{15}

Codified Roman law emerged in 449 B.C. with the Twelve Tables—the “first body of the city’s law that can be reconstructed with any certainty.”\textsuperscript{16} The Twelve Tables provided: “[i]f a person is a fool, let this person and his goods be under the protection of his family or his paternal relatives, if he is not under the care of anyone.”\textsuperscript{17} This law only applied to the male head of a family because he was the one with legal authority over the family’s affairs and property.\textsuperscript{18}

The transition to English conceptions of guardianship came “through the decay of the Western empire during the fifth century, following the law of Germanic tribes.”\textsuperscript{19} The Visigothic Code, drafted between 466 and 485 A.D., and followed in Spain and France, established that “[a]ll persons who are insane from infancy, or indeed from any age whatever, and remain so without intermission, cannot testify, or enter into a contract, and, if they should do so, it would have no validity.”\textsuperscript{20}

These historical perspectives on mental capacity and the concept of guardianship focused on the authority of others over an allegedly incapacitated individual. The more modern concept of guardianship as a “duty” emerged in 14th Century England with the enactment of the statute \textit{De Praerogativa Regis} (the royal prerogative), which “recognized guardianship as a duty of the King to protect his

\begin{footnotes}
\item 12. A. Frank Johns, \textit{Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?}, 7 \textit{Elder L.J.} 33, 40 (1999). While Hippocrates (460-370 B.C.), the father of medicine, made some attempt to persuade society that “mental disabilities were a natural phenomena . . . [l]egally, little regard was given to the idea that mental disability was primarily a medical problem rather than a religious one.” \textit{Id.}
\item 14. \textit{Id.}
\item 15. \textit{Id.}
\item 17. Quinn, supra note 13.
\item 18. \textit{Id.}
\item 19. Johns, supra note 12, at 48.
\end{footnotes}
This statute served as the foundation for the doctrine of *parens patriae*, in which “the King, and later the state, serv[ed] as benevolent parent, taking care of those unable to care for themselves.”

Early concepts of capacity and guardianship remind us that lack of knowledge about how the mind works and fear of the unknown can be a dangerous combination leading to the erosion of civil rights and autonomy. As knowledge about mental health and capacity increased with advances in medicine, so too did the movement to preserve the autonomy of individuals when possible. Of course, the availability and affordability of appropriate resources to enable the preservation of autonomy proved to be challenging in the United States, both during the emergence of mental health laws in the 19th Century and continuing today.

Reform of commitment laws was a precursor to guardianship reform. The 1960s brought broad social change, and the emphasis on human and civil rights gave rise to a deinstitutionalization movement. In lieu of institutionalized care, “community-based mental health care was developed to include a range of treatment facilities, from community mental health centers and smaller supervised residential homes to community-based psychiatric teams.” In the 1970s, there were three landmark state cases concerning the process by which courts may constitutionally confine a mentally ill individual. These cases established the precedent for mandating procedural constitutional safeguards when a person’s liberty and civil rights are at stake, including “requirements for notice, right to be present at the hearings, and right

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22. *Id.*
23. *See id.* In Colonial America, and later in the United States, “the *parens patriae* doctrine allowed states the power to protect those unable to protect themselves.” *Id.* But this model did not translate well to the colonies—in the absence of the infrastructure required to provide support, “it was commonplace for persons with mental disabilities to land in jail, as vagrants, or to be taken into almshouses.” *Off. of the Chief Med. Officer, Substance Abuse & Mental Health Servs. Admin., Civil Commitment and the Mental Health Care Continuum: Historical Trends and Principles for Law and Practice* 1, 3 (2019).
24. In 1848, the Supreme Judicial Court of Massachusetts heard a landmark case concerning a man who was confined in a mental hospital without due process and later deemed to be “insane.” *Hallett v. Oakes*, 55 Mass. 296, 296-300 (1 Cush. 1848). The court held that the confinement was improper because, “at the time the plaintiff was retained, the defendant was restrained of his liberty, without warrant of law, that is to say, without legal process; and there was ample room for supposing, that he was not insane, and, of course, was unlawfully restrained of his liberty.” *Id.* at 299.
25. Throughout the second half of the nineteenth century, Dorothea Dix and others advocated for broad mental health reform, resulting in a body of mental health law. Manon S. Parry, *Dorothea Dix (1802-1887)*, *Am. J. Pub. Health* (2006), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC1470530 [https://perma.cc/A2XD-CN96]. In fact, “Dorothea Dix played an instrumental role in the founding or expansion of more than 30 hospitals for the treatment of the mentally ill. She was a leading figure in those national and international movements that challenged the idea that people with mental disturbances could not be cured or helped.” *Id.*
27. *Id.*
to present evidence and cross examine witnesses.”

These cases paved the way for advocates to call for the extension of procedural due process and other safeguards in the context of guardianship.

B. Modern Concepts of Guardianship

The parameters, requirements, and legal processes of guardianships and conservatorships are now determined by state law and enforced by state and probate courts. Under Maine law, “[a]ll adults are presumed to have full capacity, unless adjudicated otherwise by a court of law.”

If an adult is unable to take care of herself or himself due to mental illness, disease, or incapacity, a court-ordered guardianship and/or conservatorship may be necessary. According to the Maine Uniform Probate Code (MUPC), an “individual for whom appointment of a guardian or conservator or a protective arrangement instead of guardianship or conservatorship is sought” is called a respondent.

While most states define guardianship as protection of a person’s affairs and conservatorship as a protection of a person’s estate, some states use the terms interchangeably and others have different terminologies entirely.

In most states, including Maine, guardianship is the legal process or arrangement by which one individual becomes “authorized to make all significant decisions” affecting another individual’s well-being, including “physical custody, education, health, activities, personal relationships, and general welfare.” If an individual has significant assets, the court may order a conservatorship, granting the appointed conservator the right to generally manage the “property and affairs” of the respondent.

Unless a conservator has been appointed and vested with such powers, a person appointed as a guardian may effectively manage the respondent’s assets by “apply[ing] for or receiv[ing] money, personal effects or benefits for the support of the adult and apply[ing] the money for support, care and education of the adult.”

As such, this Comment will primarily use the term guardianship to refer to the protection of an individual’s general personal and financial affairs.

In some states, including Maine, a judge may order a limited guardianship, which restricts the powers of the guardian. A probate judge will ultimately determine which powers are granted to the guardian in the context of a limited guardianship. The judge’s understanding of the context of the guardianship petition will be informed by medical providers, the court-appointed visitor, a GAL, and/or other interested parties during the course of the proposed order and hearing.

The probate judge is tasked with the ultimate responsibility of deciding “in a manner that balances well-being and rights” whether an individual’s capacity is

29. QUINN, supra note 13, at 20.
30. 10-149 C.M.R. ch. 5, § 15.02(A) (2021).
33. 18-C M.R.S. § 5-401(2) (2021). Certain additional powers, including but not limited to the right to sell certain property, create a trust, and to “make, modify, amend, or revoke” the individual’s will, require additional court approval. Id. § 5-414(1)(B), (E), (I).
34. Id. § 5-314(1)(A).
35. Id. § 5-301(2).
36. Id.
diminished to such a degree that guardianship is necessary. The judge strives to “[p]romote self-determination[,] [i]dentify less restrictive alternatives to guardianship[,] [p]rovide guidance to guardians[,] [m]ake determinations of restoration[,] [and] [c]raft limited guardianship when appropriate.” If a judge determines that an individual is incapacitated, the judge will appoint a guardian and write an order that sets forth the scope and duration of the guardian’s powers and responsibilities.

Importantly, the court also “has the authority to expand or reduce guardianship orders, remove guardians for failing to fulfill their responsibilities, and terminate guardianships and restore the rights of persons who have regained their capacity.”

C. Overuse, Misuse, Abuse, and Calls for Reform

The civil rights and liberties implicated by a full guardianship are vast. The legal procedure involved requires a petition, notice, and hearing, followed by a judicial finding by “clear and convincing evidence that the respondent lacks the ability to meet essential requirements for physical health, safety or self-care.” As such, the relationship between the guardian and the person deemed to have diminished capacity is a fiduciary one—that is, a relationship in which one person “is required to act for the benefit of another person on all matters within the scope of their relationship.”

When someone is appointed as a person’s guardian, they are vested with the power to make decisions about that person’s medical care and treatment, where and with whom the person will live, and the form and function of activities of daily living and recreation. Under the MUPC, a guardian is granted the power to “apply for or receive money, personal effects or benefits for the support of the adult[,] . . . establish the adult’s place of dwelling[,] . . . [and] [c]onsent to medical or other care, treatment or service for the adult.” Essentially, the adult under guardianship becomes like a child, under the care, control, and direction of the guardian.

While the vast majority of guardians are family members or friends of the respondent, people that designate themselves as private professional guardians may also be appointed to serve as a person’s guardian. Private professional guardians may have backgrounds in law, social work, financial management, or health care. There are no educational or licensure requirements to serve as a private professional guardian and, consequently, “any adult with little or no experience in the field could

38. Id.
40. BRENDA K. UEKERT, ADULT GUARDIANSHIP COURT DATA AND ISSUES: RESULTS FROM AN ONLINE SURVEY 6 (2010).
41. 18-C M.R.S. § 5-301(1)(A) (2021).
42. Fiduciary, BLACK’S LAW DICTIONARY (11th ed. 2019).
44. Id. § 5-314(1)(A)-(C).
be appointed.” Therefore, great caution should be taken before appointing a private professional guardian. The ULC warns that the “appointment of a professional is likely not to be consistent with the adult’s wishes.” Furthermore, “extensive literature on surrogate decision-making shows that people typically prefer to have decisions made by close family members.” Additionally, a private professional guardian is employed at a significant cost to the respondent, who—by nature of exhibiting limited capacity which warrants the guardianship in the first place—may not be in a position to appreciate the financial consequences such an arrangement presents.

Undoubtedly, a tremendous amount of trust is involved in the guardianship-respondent relationship. Before a full or limited guardianship is granted, the probate court overseeing the proceeding should take every precaution to ensure that the petitioner for guardianship has the best interest of the respondent in mind.

1. Overabundance of Guardianships

While guardianships are sometimes very much needed, they can also be granted too readily, placing an individual in the care and control of someone that may have nefarious intentions. When this occurs, the processes and procedures in place to protect individuals under guardianship from abuse are limited. Because legal capacity is something that can be misunderstood and also change within even a short time frame based on health and circumstances, some courts are quick to grant a guardianship when less-restrictive alternatives would be effective to manage the person’s needs and affairs.

Guardianship “became a rubber-stamp procedure over the years,” according to Indianapolis Probate Judge Victor Pfau, a leader in a judicial reform movement. Indeed, despite documented concerns about the prevalence of abuse by guardians, an overwhelming majority of guardianship petitions are nevertheless granted. An optimistic view would be that the percentage of guardianship petitions granted roughly correlates with the percentage of guardianships actually needed. But proponents of guardianship reform have argued that the system is weighted against respondents. According to Judge Pfau, “[t]he attorney (for the guardian) wants the judge to just sign his name. He doesn’t want notice (to the proposed ward), he

46. QUINN, supra note 13, at 11.
47. UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 309 cmt. (UNIF. L. COMM’N 2017).
48. Id.
49. AM. BAR ASS’N, COMM’N ON L. & AGING, supra note 4, at 22 (“Payment of guardian fees and attorney fees, as well as court fees and costs, is a significant factor in bringing a guardianship proceeding. Moreover, guardian fees can be substantial, and fee disputes have been frequent.”).
51. See generally Converse, supra note 1, at 25.
52. Bayles, supra note 50.
53. Id. (“[I]n 94 percent of cases . . . the petition for guardianship was approved.”).
54. Id.
doesn’t want a 14-day wait, or a visitors program . . .”55 The judge continued, “[i]f I’m too tough on attorneys, I’m not going to get elected again.”56

Clearly, one of the reasons for an overabundance of guardianships is the ease with which they are granted once an individual files a petition to become someone’s guardian. In 1994, the Center for Social Gerontology conducted a national study that examined the guardianship process in ten states.57 The study revealed that the “majority of hearings lasted no more than 15 minutes and 25 percent of hearings lasted less than 5 minutes, thus raising questions as to whether there was opportunity for meaningful due process.”58 The study further found that 94% of the guardianship petitions were granted, and only 13% of those granted limited powers to the guardian.59 The Utah Ad Hoc Committee on Probate Law noted that “[t]he appointment of a guardian or a conservator removes from the person a large part of what it means to be an adult: the ability to make decisions for oneself.”60 Yet, “[w]e terminate this fundamental and basic right with all the procedural rigor of processing a traffic ticket.”61

2. Elder Abuse and Neglect by Guardians

Unfortunately, because of the lack of safeguards and the sheer number of guardianship petitions that land on a probate judge’s desk each year, elder abuse at the hands of guardians is rampant.62 The “casual and informal atmosphere of most guardianship proceedings is deceptive,” and the unceremonious and routine treatment of guardianship petitions can result in inappropriate guardianship appointments.63 Such appointments can lead to “poor decision-making, financial abuse, theft, self-dealing, making inappropriate gifts, and a general failure to carry out the responsibilities of a guardian.”64

There is no national database that tracks the extent of elder abuse by guardians because guardianship petitions, proceedings, and data monitoring occur at the state level.65 Additionally, elder abuse in general is often vastly underreported.66

55. Id.
56. Id.
58. Id.
59. Id. at 86.
60. UTAH STATE CTS. AD HOC COMM. ON PROB. L. & PROC., FINAL REPORT TO THE UTAH JUDICIAL COUNCIL (Salt Lake City: Administrative Office of Courts, 2009).
61. Id.
65. See U.S. GOV’T ACCOUNTABILITY OFF., ELDER ABUSE: THE EXTENT OF ABUSE BY GUARDIANS IS UNKNOWN, BUT SOME MEASURES EXIST TO HELP PROTECT OLDER ADULTS 6 (2016).
66. ELDER JUST. PARTNERS, ABUSE AGAINST THE ELDERLY AND VULNERABLE ADULTS: POTENTIAL LEGAL REMEDIES 1 (2010) (“Victims are often unable to report the crime themselves because they are too afraid to tell someone. This is just one of many reasons elder abuse cases go unreported or are uncovered too late.”).
Especially in the guardianship context, the “elder may feel that the abuser—oftentimes a family member, trusted neighbor, or caregiver—is somehow entitled to their share of the financial pie for providing companionship or performing basic physical care or household tasks.”

In 1987, the Associated Press conducted an extensive investigation into courts granting guardianships across all fifty states and the District of Columbia, examining more than 2,200 guardianship court files. Many disturbing stories emerged. In one case, a woman was unaware that she was under a guardianship until a nursing home employee informed her that she could no longer spend money without her guardian’s permission. In another, a ninety-two year old man was found alone and unwell in a cabin after a couple, described as “friends,” became his guardians—the court had no record of what happened to the man’s $131,000 estate. Another case involved a woman who recovered from a stroke and returned home from the hospital. Because she had a guardian during her period of incapacity, and the guardianship was not terminated upon her recovery, the guardian still had control over her life. The guardian ignored the woman’s wishes to regain control over her own life, obtained an emergency order from the court, and had the woman sedated by a nurse and placed in a nursing home. The woman had a court-appointed attorney who waived a hearing on the order without consulting with her first.

Thirty years after the Associated Press study, the New Yorker published an article that uncovered the exploitation that occurred at the hands of paid, professional guardians. The author wrote that guardians neglected to properly attend to the needs of the person they were appointed to protect, housed them in inadequate facilities, charged unreasonably high rates for their services, unnecessarily isolated individuals from their families, and profited from selling their assets without permission or notice.

These stories of financial, physical, and mental abuse highlight the critical importance of judicial scrutiny when a guardianship petition has been filed. While careful examination of the respondent’s capacity and the proposed guardian’s suitability will not protect against all unscrupulous guardians, it can certainly reduce the number of unnecessary guardianships and, therefore, the likelihood of exploitation.

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68. Bayles, supra note 50.
70. Id.
71. Id.
72. Id.
73. Id.
74. Id.
76. Id.
3. Modifying Guardianships

It is important not only to ensure that a guardianship is needed in the first place, but also that the appointed guardian truly has the respondent’s best interests in mind. An abusive guardian may exert influence over the individual’s affairs to strictly limit his or her ability to speak to family and friends, seek legal counsel, or otherwise communicate with the outside world.

The challenge of amending a guardianship once it has been adjudicated has come to the forefront of media attention lately due to the conservatorship77 of pop star Britney Spears and her $57.4 million estate.78 In 2008, the singer was placed under a legal conservatorship that gave her father, Jamie Spears, control over her finances, career, and life.79 In 2019, a judge granted Mr. Spears’s request to step down as the conservator of her person but retain his status as conservator of her estate.80 Ms. Spears’s lawyer indicated that Ms. Spears “strongly opposed” the appointment of her father as her conservator and would refuse to perform if he were to remain in control of her career.81 Addressing Ms. Spears’s situation and the civil rights and liberties implicated by her conservatorship, the American Civil Liberties Union (ACLU) commented:

Judges are very reluctant to lift conservatorships . . . [a]nd in many cases, it is virtually impossible for a person to access the courts, especially if their conservator doesn’t agree that the conservatorship should be lifted. How would the person— who cannot choose where they live or where they go or who they associate with— figure out how to get before a judge to challenge that they cannot make these decisions? It can be a Catch-22. As a general matter, it’s much easier to get into conservatorships than to get out of them.82

Importantly, unless a court specifically orders otherwise, a person subject to a conservatorship retains certain personal rights, including the right to marry, vote, receive visitors, express their opinions and complaints about the level and type of protection, and ask the court for a review.83 In California, to “ensure that the conservatee is aware of these rights, courts will periodically send a court investigator

77. What California calls a conservatorship is what most states refer to as a guardianship. CAL. PROB. CODE § 1801 (West 2021) (“A conservator of the person may be appointed for a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter . . . .”).
80. Id.
81. Id.
(visitor) to visit and speak with the conservatee, advise them of their rights, and inquire about their treatment and circumstances.”

While the details of Ms. Spears’s arrangement are mostly private, it underscores the importance of a court investigator in evaluating the appropriateness of a particular protective arrangement even after one has already been granted by the adjudicating court.

4. Terminating Guardianships

Ms. Spears’s conservatorship has drawn national media attention and garnered public support for ending potentially unnecessary conservatorships and guardianships. The movement—known as the #FreeBritney movement—advocated for the termination of Ms. Spears’s conservatorship on the grounds that she was being held against her will and financially exploited by her father. On November 12, 2021, Judge Brenda Penny ruled that Ms. Spears’s conservatorship was “no longer required” and thus “terminated.” This ended a thirteen-year conservatorship that her father originally sought during her “very public mental health struggles and possible substance abuse amid a child custody battle.” Ms. Spears gave an emotional testimony during the termination hearing, during which she “said she did not know that she could file to end the arrangement altogether.”

A guardianship may be terminated if an incapacitated person regains capacity and either personally files or has a third person file a petition in the court that created the guardianship to terminate it. In Maine, for example, either the individual subject to guardianship or a person interested in their welfare may file a petition for termination of guardianship if the basis for the original appointment no longer exists, “termination would be in the best interest of the adult, or for other good cause.”

While all states have similar provisions for termination of guardianship, “it is rare that a person with a guardian will see their rights restored in court.” Individuals wishing to terminate their guardianship may face an initial hurdle of finding an attorney willing to represent them “due to legal and ethical concerns” because the person has already “been determined by a court to lack the ability to make their own decisions and engage in legal transactions.” Of course, the ABA’s Model Rules of Professional Conduct provide that an attorney may represent a client with diminished capacity and “shall, as far as reasonably possible, maintain a normal

84. Id.
86. Id.
87. Id.
88. Id.
89. Id.
90. 18-C M.R.S. § 5-319(1)(A) (2021).
91. Id.
93. Id. at 2.
The client-lawyer relationship.

But, this rule governs the attorney’s appropriate behavior after they accept representation and does not mandate that they represent a client with diminished capacity in the first place.

The statutory language of guardianship termination provisions can have significant ramifications for an individual seeking to terminate a guardianship depending on the burden of proof that is required. For example, under California law, the burden is on the person petitioning for termination to prove to the court that the “conservatorship is no longer required or that grounds for establishment of a conservatorship of the person or estate, or both, no longer exist.” In contrast, some states only require that the petitioner present a prima facie case for termination of guardianship and then the burden shifts to the opposing party to prove that the basis for appointment is met. Generally speaking, the greatest hurdle that an individual wishing to either amend or terminate a guardianship may face is the reluctance of a judge to overturn their initial determination.

Given the vast civil rights that are impacted by guardianship, the potential for physical abuse and financial exploitation at the hands of guardians, and the challenges respondents face when seeking to amend or terminate a guardianship, various advocates, interest groups, and policy-makers have successfully encouraged many states to reform the laws and procedures surrounding guardianships.

II. MAINE: A PIONEER IN GUARDIANSHIP REFORM

For years, Maine has held the distinction of having the oldest population in the nation. It also has one of the lowest birth rates in the country and simultaneously struggles with a shortage of caretakers across the medical and social service industries. This is a dangerous recipe for Maine’s baby boomers, who are retiring and aging in a country with advances in medical care that allow for longer lives. There will be increasing pressure on probate courts as more and more guardianship petitions are filed, and judges will have less time to evaluate each petition individually.

Given that background, Maine is an interesting case study in guardianship law. On one hand, Maine struggles with having a scattered, de-centralized probate court system in which all of its sixteen counties’ probate courts are at the mercy of county
governments for setting their budgets. This creates disparities between counties in resources that are available for things like court-funded counsel for indigent respondents, visitor programs, and guardianship monitoring. Because each probate court operates independently, they inevitably have different interpretations of the MUPC and procedures regarding adult guardianships. On the other hand, Maine is ahead of the curve insofar as the Legislature’s recent overhaul of the MUPC.

A. Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act

In 2010, the Maine Legislature created the Probate and Trust Law Advisory Commission (PATLAC) to review the existing probate code and the latest version of the UPC and to develop legislative recommendations in the form of a report to the Joint Standing Committee on Judiciary. As a result of the recommendations in the PATLAC Report and the advocacy of many public and private organizations and individuals, Maine was the first state in the country to adopt the UGCOPAA, which the ULC approved in July 2017. Specifically, the Maine Legislature adopted, with some modifications, Articles 1 and 3 through 5 of the UPC. The adoption of the new MUPC took effect on September 1, 2019.

B. Obtaining a Guardianship in Maine

In Maine, the process of obtaining a guardianship for an adult begins by filing a petition for the appointment of a guardian in the probate court in the county in which the respondent resides. Following the adoption of the Maine Constitution in 1819,
probate courts were established and administered by judges and registers of probate.\textsuperscript{111} Maine’s probate courts exercise jurisdiction over specialized subject matter including guardianships, conservatorships, adoptions, name changes, trusts, wills, and estates.\textsuperscript{112} There are sixteen probate courts and judges in Maine—one for each county.\textsuperscript{113} The probate judges are part-time, elected officials.\textsuperscript{114} Because it is a part-time position, a probate judge “usually has a busy law practice as his or her primary job.”\textsuperscript{115} The “basic structure of Maine’s probate courts has remained unchanged since 1855,” and they operate independently without any central administrative authority or substantial connection to the state court system.\textsuperscript{116}

If a probate judge determines a guardianship is necessary, he or she will appoint a guardian in a statutorily defined order of preference: the first preference is a current guardian acting for the respondent in a different jurisdiction, followed by the respondent’s preference including an individual serving as power of attorney or other legal relationship, then a spouse or domestic partner, then an adult child, and then other family members.\textsuperscript{117} The court retains the right to use its discretion in assigning a guardian, notwithstanding the above guidelines.\textsuperscript{118} The MUPC outlines various factors that the court may consider in the process of determining the best qualified person to serve as guardian:

\begin{quote}
[R]elationships with the respondent, the higher priority person’s and the potential guardian’s skills, the expressed wishes of the respondent and the extent to which the person with higher priority and the potential guardian with lower or no priority have similar values and preferences as the respondent and the likelihood that the potential guardian will be able to satisfy the duties of a guardian successfully.\textsuperscript{119}
\end{quote}

One of the reasons guardianships require a subjective inquiry is because they are guided by an individual’s right to self-determination—in other words, the right to develop and exercise preferences concerning medical decisions, financial decisions, and where and with whom to live. Such decisions may be influenced by factors such as an individual’s religious, political, and cultural beliefs; military background; history of abuse; and more. These “[c]ore values may affect the individual’s preference for who is named guardian” as well as the decisions the guardian may ultimately make for the individual.\textsuperscript{120} Because a surrogate decision-maker is tasked with making decisions that the respondent would ideally make for themselves if they

\begin{footnotes}
\item[113] Smith, supra note 102, at 49-50.
\item[114] Id.
\item[115] Id. at 47.
\item[116] Id. at 47, 50.
\item[118] Id. § 5-309(3) (“The court, acting in the best interest of the respondent, may decline to appoint as guardian a person having priority under subsection 1 and appoint a person having a lower priority or no priority.”).
\item[119] Id.
\item[120] Am. Bar Ass’n Comm’n on L. & Aging et al., supra note 37, at 5.
\end{footnotes}
had full capacity, the importance of shared values and preferences between the proposed guardian and the respondent is essential in order to uphold the underlying purpose of the guardianship.\textsuperscript{121}

C. Alternatives to Guardianship

Among other significant changes, the new MUPC establishes Supported Decision-Making (SDM) as a preferred alternative to guardianship,\textsuperscript{122} and thereby changes the role of the court-appointed visitor in that process. In fact, before granting a guardianship petition, the probate court must find—by clear and convincing evidence—that the respondent’s needs cannot be met through less-restrictive alternatives to guardianship.\textsuperscript{123} As such, under the MUPC, the court is vested with the power to grant the guardian:

\begin{quote}
[O]nly those powers necessitated by the limitations and demonstrated needs of the respondent and enter orders that will encourage the development of the respondent’s maximum self-determination and independence. The court may not establish a full guardianship if a limited guardianship, protective arrangement instead of guardianship or other less restrictive alternatives would meet the needs of and provide adequate protection for the respondent.\textsuperscript{124}
\end{quote}

Therefore, to effectively perform the visitor responsibilities, the visitor must understand the legislative preference for less-restrictive alternatives to guardianship, understand what they are and how they work, and recommend to the judge whether they are feasible and provide adequate protection in a particular respondent’s situation.

1. Discrete Responsibilities

The formal and public court process of guardianship is only one of many legal approaches available in order to manage the personal and financial affairs of an individual with diminished capacity. There are representative payees, durable powers of attorney, health care surrogacy, living wills and trusts, joint checking accounts, case management, and other private and public arrangements that provide protection and support to an individual.\textsuperscript{125} Importantly, these are arrangements that an individual can make proactively and independently in order to preserve their autonomy. Even if the arrangement grants decision-making power to someone else, the individual is deciding for themselves who should be granted that power.

2. Supported Decision-Making

Another alternative to guardianship is SDM. SDM is “a series of relationships, practices, arrangements, and agreements of more or less formality and intensity

\begin{itemize}
\item \textsuperscript{121} See Nina A. Kohn, Matched Preferences & Values: A New Approach to Selecting Legal Surrogates, 22 SAN DIEGO L. REV. 399, 399-400 (2015).
\item \textsuperscript{122} See 18-C M.R.S. § 5-301 (2021).
\item \textsuperscript{123} \textit{Id} § 5-301(1)(A).
\item \textsuperscript{124} \textit{Id} § 5-301(2).
\item \textsuperscript{125} NAT’L COUNCIL ON DISABILITY, supra note 57, at 124.
\end{itemize}
designed to assist an individual with a disability to make, and communicate to others, decisions about the individual’s life.” SDM has been endorsed and promoted by the American Bar Association, the National Guardianship Association, the Department of Education, the Department of Health and Human Services, and the National Council on Disability. SDM encourages autonomy, self-determination, dignity, and skill-building, with an ultimate focus on working collaboratively with an individual to achieve as much independence as possible.

The identification of situations that warrant using SDM over guardianship can preserve an individual’s basic freedoms while ensuring their needs are met with appropriate supports. This is particularly germane for individuals with intellectual disabilities and autism, whose abilities are often underestimated. On a national scale, approximately 33% of people with intellectual disabilities have a full guardian. In Maine, the rate of guardianship of adults with intellectual disabilities is 60%—almost double the national average. Implementing SDM as an alternative to guardianship can, therefore, have profound impacts on promoting the self-determination of Mainers with intellectual disabilities:

The presence of one supporter (as compared to a single guardian) can serve as an important safeguard against abuse, neglect, exploitation, and conflicts of interests. People who use SDM have reported that it results in greater community inclusion, improved decision-making skills, and increased social and support networks. In contrast, people under guardianship are more segregated from their communities—they are less likely to choose where they live, less likely to have a job in the community, and less likely to have friends.

In 2018, Disability Rights Maine (DRM) was involved in a pilot project to promote SDM and successfully terminated the guardianship of a forty-two year old man in Knox County in favor of SDM in a case that made headlines due to the then-looming overhaul of the probate code. When considering the ongoing necessity

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128. DISABILITY RTS. ME., SUPPORTED DECISION MAKING: A USER’S GUIDE FOR PEOPLE WITH DISABILITIES AND THEIR SUPPORTERS 9-10 (2019) (“When considering the barriers to independence, ask whether they can be lessened by measures like assistive technology, training, opportunities to socialize, role-playing, and other means. Consider the person’s communication methods, mental state, access to stimulating environments, adequacy of supports, and side effects from medication before deciding that an individual is unable to make decisions.”).
129. Converse, supra note 1, at 25.
130. NAT’L CORE INDICATORS, IN PERSON SURVEY (IPS) STATE REPORT: MAINE (ME) REPORT, 19 tbl.27 (2018-19).
131. Id.
for a full guardianship, “[t]he Knox County Probate Court agreed that by utilizing supports and services as well as chosen supporters, Mr. Strong is now able to effectively manage his affairs and no longer requires a guardian.”¹³⁴ The respondent, Joshua Strong, reflected on his newfound independence: “It’s been a goal of mine for four years, and it’s super awesome that now it’s official. I won’t have to ask permission for things anymore, and will use my best judgment in making decisions with the help of my supporters.”¹³⁵

Determining whether the needs of an adult may be met with SDM or other tools besides a guardianship requires a nuanced understanding of capacity. Furthermore, diminished capacity is not something that follows a straight line throughout someone’s life. For example, a young adult with autism may be able to take care of all of his or her activities of daily living (dressing, toileting, etc.) while needing some support with the instrumental activities of daily living (managing health and financial matters). However, after some years with such support, the same adult may no longer need assistance with the instrumental activities of daily living. In contrast, an adult diagnosed with Alzheimer’s disease is unlikely to regain capacity with time once their capacity is diminished.¹³⁶ As such, it is important for a court-appointed visitor and probate judge to appreciate the nature of the individual’s diminished capacity and determine whether SDM is best suited to the specific situation.

D. Access to Justice

Of course, if someone has an attorney to be a zealous advocate for their interests, they are much less likely to be the subject of an unnecessary guardianship. Furthermore, even if a person’s level of capacity is not at issue, they may wish to dispute whom to appoint as their guardian. To further the aim of maximizing self-determination and independence, the ULC strongly recommends that states adopting the UPC mandate the appointment of an attorney in all circumstances, regardless of the respondent’s ability to pay.¹³⁷ Maine rejected this approach when adopting the MUPC, which states that the statute is preserving the “current practice of appointing an attorney if requested by the respondent, recommended by the visitor, or deemed necessary by the Court.”¹³⁸ This approach is inherently problematic, because each

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¹³⁵. Id. (internal quotation marks omitted).

¹³⁶. AM. BAR ASS’N COMM’N ON L. & AGING & AM. PSYCH. ASS’N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 1 (2d ed., 2006) [hereinafter ASSESSMENT OF OLDER ADULTS] (“New drug therapies are emerging to slow the progress of Alzheimer’s, but it remains incurable and irreversible.”).

¹³⁷. UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT § 305 cmt. (UNIF. L. COMM’N 2017). The ULC notes that if a state chooses the discretionary approach, rather than mandating the appointment of an attorney, “courts should err on the side of protecting the respondent’s rights by finding, absent a compelling reason otherwise, that the respondent needs representation.” Id. Furthermore, the ULC states that states may adopt the provision that provides for “mandatory appointment of counsel . . . in the interest of providing full due process to respondents.” Id.

of these intended safeguards have limitations and none involve a zealous advocate for the respondent.

Amending this section of the MUPC to adopt the ULC’s preferred policy has been presented to the Legislature several times but has not yet been passed into law.\(^{139}\) Maine’s rejection of the mandatory appointment of an attorney for the respondent places an even greater burden on the visitor to investigate the guardianship, evaluate the respondent, and recommend whether a guardianship is necessary or a less-restrictive alternative is appropriate.\(^{140}\) It also places a greater burden on the visitor to accurately determine and communicate to the judge whether the respondent wishes to be represented by counsel and/or whether the visitor recommends so.\(^{141}\) In fact, most opponents of the bill cited the visitor as one of the primary safeguards rendering the need for the mandatory appointment of an attorney unnecessary.\(^{142}\) The question remains whether so much trust should be placed in the hands of a visitor that is appointed without any mandatory training or oversight.

III. THE VISITOR

A. The Visitor’s Role in Guardianship Proceedings

From 1990 through 1997, the American Association of Retired Persons (AARP) conducted a National Guardianship Monitoring Project with funding from the State Justice Institute, a non-profit organization that supports justice reform in state courts.\(^{143}\) The initiative connected AARP members with state probate courts so that individuals could volunteer as court visitors in adult guardianship cases.\(^{144}\) The project had a ripple effect, and, shortly thereafter, fifty-five courts adopted similar

139. See L.D. 480 (130th Legis. 2021); L.D. 531 (129th Legis. 2020); see also 18-C M.R.S. § 5-305 (2021). The statute sets forth the circumstances that would require the court to appoint an attorney for the respondent, but it is not yet mandated in every guardianship proceeding.

140. UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT § 305 cmt. (NAT’L CONF. OF COMM’RS ON UNIF. STATE L. 2017) (“Alternative A relies on the use of a ‘visitor,’ who can be chosen or selected to provide the court with advice on a variety of matters other than legal issues.”)

141. See 18-C M.R.S. § 5-305(B) (2021).

142. An Act To Establish a Presumption of Entitlement to Counsel for a Person Who Is the Subject of an Adult Guardianship, Conservatorship or Other Protective Arrangement Proceeding: Hearing on L.D. 480 Before the J. Standing Comm. on Judiciary, 130th Legis. (2021) (testimony of Kathleen G. Ayers, Register of Probate for Kennebec County and President of the Maine Association of Registers of Probate) (“Part of the Court Visitor’s duties are to find out if the person objects to any aspect of the impending guardianship.”); An Act To Establish a Presumption of Entitlement to Counsel for a Person Who Is the Subject of an Adult Guardianship, Conservatorship or Other Protective Arrangement Proceeding: Hearing on L.D. 480 Before the J. Standing Comm. on Judiciary, 130th Legis. (2021) (testimony of Stephen Gordon, President of the Maine County Commissioners Association) (“Under the current system, attorneys are appointed to represent individuals before the Probate Court when any objection or limitation comes to the Court’s attention by the court-appointed ‘visitor,’ and it is part of the court visitors [sic] responsibilities to determine if such an objection or limitation exists. This system has worked to ensure that legal counsel is available when needed.”).

143. NAOMI KARP & ERICA WOOD, GUARDING THE GUARDIANS: PROMISING PRACTICES FOR COURT MONITORING 65 (2007).

144. Id.
volunteer programs, ranging from informal visits with incapacitated persons to structured court-appointed visitor programs codified in state probate codes.

1. Neutral Fact-Finder or Opinionated Advisor

Because probate laws vary from state to state, so too does the role of the visitor. Some states’ probate codes mandate the appointment of a visitor in all guardianship proceedings, some leave it to the discretion of the probate judge, and others require the appointment of a visitor only under certain circumstances such as when the respondent waives the right to attend the hearing. Some states employ visitors on a strictly volunteer basis, while others pay an hourly rate for the visitor’s time and services. Some states do not even have the equivalent of a visitor.

States that do have a visitor differ greatly in how they define the role. In some states, such as Utah, the court visitor explicitly “[d]oes not give an opinion on the respondent’s capacity but reports on observable facts.” In other states, such as Oregon, the role of the visitor is to

[Interview persons who are familiar with the circumstances of the alleged incapacitated person for whom the appointment of a guardian has been requested, including interviewing the alleged incapacitated person, and provide a report to the court which includes factual findings and a recommendation regarding the appropriateness of the requested guardianship.]

A later section will take a closer look at the visitor programs in various states to evaluate the implications of the visitor as neutral fact-finder, advisor, advocate, and/or monitor.

2. Role of Visitors in the Maine Uniform Probate Code

In Maine, a visitor is a person appointed by a local probate judge and tasked with evaluating the respondent and submitting a report to the court with his or her findings and recommendations. The visitor “must be an individual having training or experience in the type of abilities, limitations and needs alleged in the petition,” but the scope and extent of training or experience is left to judicial discretion. Visitors in Maine include attorneys, social workers, retired medical providers, law students, and other community volunteers. Maine probate courts currently compensate a visitor for three hours of time associated with interviewing the respondent and proposed guardian and preparing a report to the court at a rate of

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145. Id.
146. See AM. BAR ASS’N, COMM’N ON L. & AGING, supra note 4, at 3–4.
147. STATE OF UTAH JUD. COUNCIL, COURT VISITOR PROGRAM ORIENTATION HANDBOOK 16 (rev. 2020).
149. See discussion infra Section III.B.2.
151. Id.
approximately $50 per hour depending on the particular county’s budget and procedures.¹⁵²

When first appointed, the visitor receives from the probate court an Order of Appointment of Visitor, a judicial order outlining the scope of his or her duties, shown below.¹⁵³

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**STATE OF MAINE**

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<th>COUNTY PROBATE COURT</th>
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**ORDER OF APPOINTMENT OF VISITOR**

The Court hereby appoints the Visitor to act as Visitor in a probate proceeding under 18-C M.R.S. § 5-304(1), 18-C M.R.S. § 5-405(1)(2) and/or § 5-506.

The nature of this proceeding is: ________________________________

The reasons for this appointment are: ________________________________

Payment for the Visitor’s services will be made by: ________________________________

The Visitor shall serve the Petition and notice of hearing personally on the Respondent, and shall interview the Respondent in person, and, in a manner the Respondent is best able to understand:

A. Explain to the Respondent the substance of the petition, the nature, purpose and effect of the proceeding, the Respondent’s rights at the hearing and the general powers and duties of a guardian/conservator;

B. Determine the Respondent’s views, preferences or values about the appointment or with respect to the order sought, including views about a proposed guardian/conservator, the guardian’s/conservator’s proposed powers and duties and the scope and duration of the proposed guardianship/conservatorship;

C. Inform the Respondent of the Respondent’s right to employ and consult with an attorney at the Respondent’s expense and the right to request a court-appointed attorney;

D. Inform the Respondent that all costs and expenses of the proceeding, including the Respondent’s attorney’s fees, may be paid from the Respondent’s assets; and

E. Interview the Petitioner and proposed guardian/conservator.

In addition, the Visitor shall:

- Visit the Respondent’s present dwelling and any dwelling in which it is reasonably believed the Respondent will live if the appointment is made;
- Review financial records of the Respondent, if the Visitor recommends that an attorney should be appointed to represent the Respondent;
- Obtain information from any physician or other person known to have treated, advised or assessed the Respondent’s relevant physical or mental condition;
- State whether the Respondent’s needs could be met by a less restrictive alternative, including a protective arrangement instead of conservatorship and, if so, identify the less restrictive alternative;
- Investigate the allegations in the petition and any other matter relating to the petition as the Court directs; and
- Other:

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The Visitor is then required to file a report with the probate court at least ten days before any hearing on the petition.154 The report must include:

A. Whether or not the respondent wishes to contest any aspect of the proceedings or to seek any limitation on the proposed guardian’s powers;

B. A recommendation whether an attorney should be appointed to represent the respondent;

C. A summary of the respondent’s medical conditions, cognitive functioning, everyday functioning, preferences and values and a summary of self-care and independent living tasks the respondent can manage without assistance or with existing supports, could manage with the assistance of appropriate supportive services, technological assistance or supported decision making and cannot manage;

D. Recommendations regarding the appropriateness of guardianship, including whether a protective arrangement instead of guardianship or other less restrictive alternatives for meeting the respondent’s needs are available and, if a guardianship is recommended, whether it should be full or limited and, if a limited guardianship, the powers to be granted to the guardian;

E. A statement of the qualifications of the proposed guardian and whether the respondent approves or disapproves of the proposed guardian;

F. A statement whether the proposed dwelling meets the respondent’s needs and whether the respondent has expressed a preference as to residence;

G. A recommendation whether a further professional evaluation under section 5-306 is necessary;

H. A statement whether the respondent is able to attend a hearing at the location court proceedings typically are conducted;

H-1. A statement whether the respondent wishes to attend the hearing under paragraph H after being informed of the right to attend the hearing, the purposes of the hearing and the potential consequences of failing to attend;

I. A statement whether the respondent is able to participate in a hearing and that identifies any technology or other form of support that would enhance the respondent’s ability to participate; and

J. Any other matter as the court directs.¹⁵⁵

As a provider of social services for the State, a court-appointed visitor in Maine is considered to be a mandated reporter.¹⁵⁶ Maine law requires mandated reporters to immediately report suspected child abuse or neglect and/or suspected abuse, neglect, or exploitation of an incapacitated or dependent adult to the Maine Department of Health and Human Services.¹⁵⁷

The responsibilities of a visitor are extensive and critically important, especially when compared with the single requirement that a visitor be “an individual having training or experience in the type of abilities, limitations and needs alleged in the petition.”¹⁵⁸ If someone volunteered at a nursing home in college, does that qualify them to evaluate the cognitive functioning of an elderly person subject to a guardianship petition and recommend the appropriateness of the guardianship to a probate judge in a legal proceeding?

Despite the critical importance of these responsibilities, there is no formal interview process to become a visitor in Maine. A background check is not required. There are no formal education requirements. And there is no formal training process by which a visitor may learn the current probate law, the policy reasons for seeking alternatives to guardianship whenever possible, ways to evaluate and determine legal capacity, when and why an attorney ought to be appointed for the respondent, or what rights are at stake for the individual they are visiting.

3. The Medical Provider and the Visitor

There are two reports with determinations and recommendations regarding an individual’s capacity that a probate judge receives in preparation for a guardianship hearing: that of a medical professional and that of the court-appointed visitor.¹⁵⁹

Many states require physician statements as part of a guardianship petition, while others, including Maine, require a medical provider to evaluate the respondent’s capacity at least ten days prior to the guardianship hearing.¹⁶⁰ In 2019, the Legislature amended the MUPC by expanding the list of professions permitted to evaluate the cognitive and functional ability of a respondent in an adult guardianship matter from a “licensed physician or psychologist” to a “medical

¹⁵⁵. Id.
¹⁵⁹. Id. §§ 5-304, 5-306 (discussing appointment of visitor and professional evaluation, respectively).
¹⁶⁰. Id. § 5-306.
The latter includes a licensed physician or licensed clinical psychologist, but also includes a registered physician assistant, a certified psychiatric clinical nurse specialist, and a certified nurse practitioner among those qualified to evaluate the individual’s abilities. Under the MUPC, the medical provider’s report must contain:

1. A description of the nature, type and extent of the respondent’s cognitive and functional abilities and limitations;
2. An evaluation of the respondent’s mental and physical condition and, if appropriate, educational potential, adaptive behavior and social skills;
3. A prognosis for improvement and recommendations for the appropriate treatment, support or habilitation plan; and
4. The date of the examination on which the report is based.

The court-appointed visitor is also tasked with submitting a report that includes several evaluations of the respondent’s capacity. These include a “summary of the respondent’s medical conditions, cognitive functioning, everyday functioning, . . . recommendations regarding the appropriateness of guardianship, . . . [and a] recommendation whether a further professional evaluation under section 5-306 is necessary.” The visitor’s lack of required legal knowledge or training in assessing capacity presents concerns when the visitor is not simply a neutral, fact-finding entity, but one who evaluates capacity and recommends actions impacting an adult’s basic civil rights and liberties.

The individual with the most training and experience in determining medical capacity, the medical professional, is inherently disconnected from the policy issues surrounding legal capacity and alternatives to guardianship. In contrast, the visitor, with no required training in evaluating capacity, may have a disproportionate influence on the determination of legal capacity and the ultimate outcome of a guardianship petition.

4. Evaluating Legal Capacity

One way of safeguarding against predatory guardians is to ensure that a guardianship is necessary in the first place. The first step in determining whether a person needs a guardian is to determine whether they have capacity. The ultimate determination of capacity is a legal inquiry rather than a medical one. As such, the probate judge ultimately retains the authority to determine an individual’s legal

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162. Id.
163. Id.
164. Id. § 5-304.
capacity, informed by reports from both a medical provider and the court-appointed visitor.

Definitions of legal capacity “have evolved to reflect modern understandings of brain dysfunction, functional abilities, and the law.”¹⁶⁵ Capacity is task-specific, can fluctuate over time, and is specific to the situation and context of each individual.¹⁶⁶

Some states focus on an individual’s mental capacity, while others focus on functional limitations.¹⁶⁷ Most judges require specific information about the disabling medical condition, cognitive or functional, including whether it is temporary and/or reversible.¹⁶⁸ In addition, outdated concepts of incapacity, such as old age without signs of mental or physical ailment affecting capacity, are mostly obsolete.¹⁶⁹ For example, an Oklahoma court held that old age alone was insufficient to show that the respondent could not manage his or her own affairs.¹⁷⁰

Cognitive functioning is an important element of capacity. Cognitive functioning “includes alertness or arousal, as well as memory, reasoning, language, visual-spatial ability, and insight. Neurological as well as psychiatric or mood disorders may impact information processing.”¹⁷¹

Capacity also involves the ability to perform activities of daily living (ADLs) and instrumental activities of daily living (IADLs).¹⁷² ADLs include grooming, toileting, eating, transferring, and dressing.¹⁷³ IADLs include managing finances, health, and functioning in the home and community.¹⁷⁴ Historically, the everyday functioning tests prescribed by state laws were subjective and open to interpretation based on the judge’s assessment of the reasonableness of the individual’s behavior.¹⁷⁵ Many states now have a “higher and more objective bar for weighing functional behavior,” which focuses on the ability of an individual to provide for his or her essential needs, including medical care, nutrition, clothing, shelter, and safety.¹⁷⁶

Importantly, “[t]he mere existence of a physical disability should not be grounds for a guardianship, since most physical disabilities can be accommodated with appropriate medical, functional, and technological assistance directed by the individual.”¹⁷⁷ The level of supervision “must match the risk of harm to the individual and the corresponding level of supervision required to mitigate that risk.”¹⁷⁸ For example, if a respondent lives with caring family members, has affordable and reliable in-home medical care, and has regular social visitors, he or

¹⁶⁵. AM. BAR ASS’N COMM’N ON L. & AGING ET AL., supra note 37 at 1.
¹⁶⁶. Id.
¹⁶⁷. ASSESSMENT OF OLDER ADULTS, supra note 136, at 7.
¹⁶⁸. Id. at 7-10.
¹⁶⁹. Id. at 7 (“[O]nly a few states still include the pejorative term ‘advanced age’ in their definition [of diminished capacity].”).
¹⁷². Id.
¹⁷³. Id.
¹⁷⁴. Id.
¹⁷⁵. Id.
¹⁷⁶. Id.
¹⁷⁷. Id. at 5.
¹⁷⁸. Id.
she may be at lower risk than an individual who lives alone, cannot drive or access medical care without assistance, and does not have family or friends nearby.

The determination of capacity is a complicated endeavor with far-reaching consequences for the respondent in a guardianship matter. Changing perspectives on capacity over the last several decades has been “marked by an increasing respect for individual civil rights, an increased understanding of human functioning, and the desire to legally intrude as little as possible in the lives of people with diminished capacity.”

A guardianship is only appropriate if, among other requirements, “[t]he respondent is unable to receive and evaluate information or make or communicate decisions” even with supports in place. It is necessary to parse the grammatical structure of this language in order to evaluate the legislative intent. Importantly, there is no word that modifies the word “decisions,” such as good or healthy. Indeed, “it is not the quality of decision making but whether the individual can make a rational decision . . . Older persons have the right to make ‘bad’ decisions without being considered incapacitated.”

A Tennessee judge was faced with evaluating a woman who appeared to be “lucid and apparently of sound mind generally,” but seemed to be “incapable of recognizing facts which would be obvious to a person of normal perception” when it came to a severe deterioration of her feet that doctors warned would have a 90-95% likelihood of resulting in death without medical intervention by amputation. The woman adamantly wanted to live but also wanted to keep her feet. The judge wrestled with the question of capacity, ultimately concluding that:

If . . . this patient could and would give evidence of a comprehension of the facts of her condition and could and would express her unequivocal desire in the face of such comprehended facts, then her decision, however unreasonable to others, would be accepted and honored by the Courts and by her doctors.

In other words, if she understood and was willing to face the inevitability of death as a result of keeping her deteriorated feet without amputation, then she would be deemed to have legal capacity and be free to make such a decision. An individual’s ability to make decisions depends upon his or her: “(i) ability to communicate a choice, (ii) ability to understand relevant information, (iii) ability to appreciate the nature of the situation and its likely consequence, and (iv) ability to manipulate information rationally.”

Another reason for prolific guardianships is a systemic misunderstanding of capacity, especially as relates to the determination of capacity for individuals with intellectual disabilities. There are a number of nonprofit and advocacy organizations and public agencies throughout the state working to advance elder rights, inform the

179. QUINN, supra note 13, at 49.
183. Id. at 210.
general public about supported decision-making, and prevent the abuse of
guardianships for personal gain. These include Legal Services for the Elderly,
Disability Rights Maine (DRM), Elder Abuse Institute of Maine, Maine Counsel on
Aging, the Southern Maine Agency on Aging, and others. Staci Converse, a
Managing Attorney at DRM, noted: “[I]n our decades of work representing people
with disabilities, DRM has seen many families place their loved ones with disabilities
under guardianship—often based on the recommendation of schools, service
providers, or professionals—without having any information about less restrictive
alternatives.”

5. Socioeconomic Bias: Poverty v. Incapacity

Poverty is a significant risk factor for the imposition of guardianship. When a
visitor goes to the home of an individual to determine if they “meet essential
requirements for physical health, safety, or self-care,” the visitor is tasked with a
complex analysis of what level of physical health, safety, or self-care is adequate.
The visitor may visit a home that is in disrepair and has a cluttered living space and
interpret those observations as indicators of the individual’s lack of capacity for self-
care, when it may be a product of socioeconomic factors. The visitor should
therefore be required to have a background in social work and/or states should
implement comprehensive visitor training programs to ensure that the visitor avoids
implicit and explicit bias in capacity evaluations.

B. The Visitor’s Role in Guardianship Proceedings

1. Visitor Reform at the National Level

According to the National Center for State Courts (NCSC), there are
approximately 1.3 million adult guardianship cases in the United States and $50
billion of assets under guardianship. A recent study published by the organization
found that, because of the sheer number of existing guardianships, “[F]ew courts
regularly monitor the condition of the incapacitated person[s].” As a result,
“Without specialized staff and devoted resources, guardianship monitoring is likely
to remain insufficient.” Guardianship reform is continuing to evolve as states

185. Converse, supra note 1, at 25.
186. 18-C M.R.S. § 5-301(1)(A) (2021).
187. Nicole Shannon et al., Defending Older Clients in Guardianship Proceedings, MICH. BAR J. 30, 32 (2020) (“A bare cupboard or home in disrepair may be attributed to a decline in mental capacity due to age instead of other problems: poverty, physical disability, lack of access to physical and mental health care, and a lack of a social safety net. Low-income older adults may not have the resources to pay for access to common alternatives to guardianship like help with drafting powers of attorney or patient advocate designations.”).
189. UEKERT, supra note 40, at 5.
190. Id.
codify and implement safeguards against emotional, physical, and financial abuse of adults with diminished capacity that are particularly susceptible to exploitation.\textsuperscript{191}

After all, these individuals are navigating the complexities of the probate court system while they are simultaneously in need of immediate or ongoing care due to illness, disability, or impairment.

In 2018, the United States Senate Special Committee on Aging, chaired by Senator Susan Collins, issued a report on the current state of guardianship laws nationwide.\textsuperscript{192} Among its recommendations, the Committee called for an increase in “Volunteer Visitor Programs” and “[s]upport for individuals who help to inform the court about the status of the respondent before a guardian is appointed and periodically throughout the guardianship.”\textsuperscript{193} The report also calls for all parties related to the guardianship proceeding to receive training on “guardian responsibilities and on the signs of abuse.”\textsuperscript{194} The report led Collins to introduce the Guardianship Accountability Act of 2019.\textsuperscript{195} The Act called for, among other things, the creation of a National Resource Center on Guardianship to encourage the collection and distribution of data on guardianships and the allocation of at least 5% of Department of Health and Human Services grant funds for state programs to support guardianship monitoring efforts.\textsuperscript{196} While there was widespread support for the bill across interest groups, it never went to a vote during the 116th Congress and died on the floor.\textsuperscript{197} However, there is a growing awareness of the need for increased monitoring of guardianships before, during, and after an appointment.\textsuperscript{198} Such court monitoring is the “only way to ensure the welfare of wards, discourage and identify neglect, abuse, or exploitation of wards by guardians, and sanction guardians who demonstrate malfeasance.”\textsuperscript{199}

Visitors are one safeguard courts use as an investigatory tool in an adult guardianship proceeding, but some states use GALs. GALs are attorneys or qualified mental health professionals who typically represent the best interests of the respondent.\textsuperscript{200} Their duties differ by state, and there is sometimes confusion about whether their role is to serve as a neutral investigator or to advocate for the best interests of the respondent.\textsuperscript{201} It can also be difficult to distinguish the role of the GAL from the roles of the visitor and attorney for the respondent.\textsuperscript{202}

The visitor is uniquely situated in a role that is neither exclusively legal nor exclusively medical but investigates the respondent’s situation from an interdisciplinary framework. Furthermore, state probate courts either pay a modest

\begin{itemize}
  \item \textsuperscript{191} See generally AM. BAR ASS’N, COMM’N ON L. & AGING, supra note 4.
  \item \textsuperscript{192} U.S. SENATE SPECIAL COMM. ON AGING, supra note 188, at 28.
  \item \textsuperscript{193} Id.
  \item \textsuperscript{194} Id.
  \item \textsuperscript{195} Guardianship Accountability Act of 2019, H.R. 4174, 116th Cong. §§ 2, 5 (2019).
  \item \textsuperscript{196} Id.
  \item \textsuperscript{197} Id.
  \item \textsuperscript{198} See generally AM. BAR ASS’N, COMM’N ON L. & AGING, supra note 4.
  \item \textsuperscript{199} UEKERT, supra note 40, at 8.
  \item \textsuperscript{201} AM. BAR ASS’N, COMM’N ON L. & AGING, supra note 4, at 3.
  \item \textsuperscript{202} Id.
\end{itemize}
fee to a visitor or have entirely volunteer-based programs. As such, states are beginning to recognize the need for robust court visitor training programs that recruit, train, and monitor visitors in adult guardianship proceedings to protect vulnerable adults in a way that is cost-effective for overburdened and underfunded court systems.

2. Visitor Programs: Ohio, Oregon, Nebraska, and Utah

Ohio

Like Maine, Ohio does not have a centralized probate court system, leaving each county to independently determine its procedures for adult guardianships. For example, the Cuyahoga County Probate Court has one program for individuals tasked with helping the judge determine the appropriateness of the guardianship and another program for individuals tasked with ongoing monitoring. The court employs court investigators to “interview with the prospective ward in order to assist the Court in determining the advisability of guardianship” and guardian partners to “spend fifteen to thirty minutes with each ward, and provide an objective report on a form provided by the Probate Court to help determine if wards are safe and their needs are being met.” The Guardian Partners Program was established in 2020 and has since “recruited and trained 25 guardian partners to visit the adults in the program at their place of residence, speak to their guardians and report any issues that may affect the persons health and welfare.”

The Delaware County Probate Court has an established Court Visitor Program, which is managed by the Court Visitor Program Manager or the Probate Court Investigator. In 2019, the program had six trained volunteers that conducted 167 court visits. The program “utilizes volunteers and student interns from local colleges to visit with wards and guardians involved with the Court.” In addition to evaluating the suitability of guardianship, visitors are involved in ongoing monitoring of existing guardianships to “see whether they are receiving appropriate care” and “to assist the guardian and/or ward with linkage to community resources.”

203. See discussion infra Section III.B.2.
209. Id.
210. Id.
211. Id.
As far as training and support in Delaware County, “[i]nitial training covers the Guardianship process, the Wards’ rights, communicating with Wards, what to look for on visits, and the identification of community resources.”212 Additionally, “[f]ollow-up training” and “quarterly meetings” are provided by the court, and visitors are encouraged to contact staff with any questions throughout their appointments.213

Ohio’s program demonstrates that an effective visitor program can be implemented in a state without a centralized probate court system.214

Oregon

When a respondent in Oregon is served with notice that a guardianship petition has been filed, the notice specifically outlines the role of the visitor and provides the respondent with expectations about the visitor’s role in the proceedings.215 The relevant section provides:

The judge will appoint someone to investigate whether you need a guardian to make decisions for you. This person is called a “visitor.” The visitor works for the judge and does not work for the person who filed the petition asking the judge to appoint a guardian for you, for you or for any other party. The visitor will come and talk to you about the guardianship process, about whether you think that you need a guardian and about who you would want to be your guardian if the judge decides that you need a guardian. The visitor will talk to other people who have information about whether you need a guardian. The visitor will make a report to the judge about whether what the petition says is true, whether the visitor thinks that you need a guardian, whether the person proposed as your guardian is able and willing to be your guardian, who would be the best guardian for you and what decisions the guardian should make for you. If there is a hearing about whether to appoint a guardian for you, the visitor will be in court to testify. You can tell the visitor if you don’t want someone else making decisions for you when the visitor comes to talk with you about this matter.216

To fulfill these responsibilities, the Oregon statute provides that the visitor must satisfy two qualifications:

(a) Have the training and expertise adequate to allow the person to conduct the interviews and make the recommendations required under ORS 125.150 and 125.155, to communicate with, assess and interact with respondents and protected persons, and to perform the other duties required of a visitor; and

213. Id.
216. Id.
(b) Demonstrate sufficient knowledge of the law so as to be able to inform a respondent or protected person of the nature and effect of a protective proceeding, to inform a respondent or protected person of the rights of the respondent or protected person in the protective proceeding, to answer the questions of a respondent or protected person and to inform fiduciaries concerning their powers and duties.”

Oregon courts do not have a uniform process by which they train visitors, though such a program has been proposed to the Chief Justice by the Task Force on Protective Proceedings. Instead, each county operates independently. One Oregon elder law attorney noted, “[i]n the larger counties the court visitors are psychologists or social workers. In counties where money is short, the visitor may be a local volunteer with time on his hands, or a judge’s secretary.”

By statute, each county’s probate judge “shall by court order establish . . . qualifications for persons serving as visitors for the court . . . [and] [s]tandards and procedures to be used by visitors in the performance of their duties.” For example, in Deschutes County, in an administrative order establishing court visitor qualifications, the circuit court ordered that visitors must have a bachelor’s degree in behavioral science, social science, or a closely related field, an associate’s degree in the same plus two years of human services experience, or three years of human services experience. In addition to these educational and/or experiential requirements, the order requires visitors to have “[t]raining and/or experience in evaluating the functional capacity and needs of a protected person” and/or “[e]xperience providing assistance to individuals or groups with issues such as abuse and neglect, substance abuse, health, disabilities, inadequate housing, cultural competencies, etc.”

The Presiding Judge of Marion County, home to Oregon’s state capital of Salem, has ordered that all court visitors in Marion County must watch a series of three training videos developed by the Oregon Judicial Department, read the Handbook

220. Id.
223. Id.
for Court Visitors, and sign a training certification indicating that the visitor has watched the videos, read the handbook, and passed a background check.

While Oregon’s visitor programs are not uniform across all counties, there is momentum for continuing to refine and expand existing resources and improve the guardianship system.

A particularly helpful element of Oregon’s statutory scheme is that the Legislature recognized the importance of two particular responsibilities of the visitor: (i) the ability to effectively interview the respondent and provide a useful report, and (ii) the ability to understand and communicate necessary elements of guardianship law to the respondent. As Maine considers reforming the statutory language of 18-C M.R.S. § 5-306 to expand upon the visitor’s role, standards of conduct, and responsibilities, it ought to consider that knowledge of social and interview skills and knowledge of the law are equally important.

Nebraska

Nebraska law requires a visitor to be “trained in law, nursing, social work, mental health, gerontology, or developmental disabilities.” Furthermore, the court is required to “maintain a current list of persons trained in or having demonstrated expertise in the areas of mental health, intellectual disability, drug abuse, alcoholism, gerontology, nursing, and social work, for the purpose of appointing a suitable visitor.”

Nebraska offers a unique Volunteer Court Visitor Program when the county court determines that an individual requires a public guardian. The Office of the Public Guardian (OPG) serves as the coordinator of Nebraska’s Volunteer Court Visitor Program for cases that are referred to it—cases for which a public guardian has been appointed to serve as an individual’s guardian or conservator. The program is advertised on the State of Nebraska Judicial Branch website, which states: “[i]n a court proceeding that has the potential to remove a person’s civil rights, the Court Visitor is an important link in helping courts obtain independent information to make good and humane decisions for folks who have very few allies, advocates, or sanctuaries left in their lives.” As such, background training provided by the OPG is mandatory, and includes five hours of online training and six hours of classroom orientation so that the visitor is “prepared to gather information useful for the

227. OR. REV. STAT. § 125.165 (2020).
228. NEB. REV. STAT. § 30-2624 (2013).
229. Id.
231. See id.
232. Id.
court." Furthermore, individuals interested in serving as a volunteer court visitor must complete an application, interview, and criminal history background check. If an aspiring visitor is also an attorney, they can receive eleven Continuing Legal Education (CLE) credits for completing the training. As a recruitment and educational tool, the OPG offers an internship to university students which involves the student completing the training required to become a court visitor.

Utah

Utah has a very comprehensive court-appointed visitor program, after which many other states have modeled similar programs. Utah’s version of the UPC provides that the “visitor is, with respect to guardianship proceedings, a person who is trained in law, nursing, or social work and is an officer, employee, or special appointee of the court with no personal interest in the proceedings.”

In 2009, the Utah Ad Hoc Committee on Probate Law and Procedures issued a report recommending the development of a “cadre of volunteer court visitors for assignment by the court” and the implementation of a pilot program called the Volunteer Court Visitor Program. The program was funded by a three-year grant from the State Justice Institute. Notably, “the authority of the court to assign a visitor has been part of the Utah Code since 1975,” but the authority “has been used only sporadically due to lack of qualified people willing to serve.”

There are three primary purposes that the Utah Volunteer Court Visitor Program served: “preparing the file for the hearing, investigating whether to excuse the respondent from the hearing, and monitoring the guardianship after the appointment is made.” The pilot program was a success and eventually led to the formation of the Guardianship Reporting and Monitoring Program (GRAMP) in 2018. GRAMP oversees the Court Visitor Program (CVP) and is staffed by two full-time employees. Its primary objective is to “help[] the courts manage risks, prevent abuse, and increase public confidence in the guardianship process.”

The program has strict onboarding requirements. A prospective court visitor must commit to serving as a court visitor (CV) for at least eight to ten hours per

233. Id.
234. Id.
235. Id.
237. UTAH CODE ANN. § 75-5-308 (West 2020).
239. Id.
240. Id.
241. Id.
243. Id.
244. Id.
month for a period of at least one year.\(^{246}\) Furthermore, the individual must complete an application, be interviewed by the GRAMP Program Coordinator, undergo a background check, sign a visitor agreement acknowledging a code of ethics, and complete an orientation training.\(^{247}\) The training program involves a thorough overview of CVP procedure, the CV handbook, court procedures, and navigation through an assignment.\(^{248}\)

The focus of visitors in Utah is on serving as a neutral party and providing an objective, investigative report to the court.\(^{249}\) As such, CVs “do not give an opinion or recommendation [unless specifically requested in writing by the judge]; rather, they report solely on observable facts and collected information.”\(^{250}\) Additionally, CVs also serve an important role in the ongoing monitoring of existing guardianships to help the courts determine if the respondent remains in need of an active guardianship, has regained capacity, or might benefit from a different structure of protection such as an SDM model.\(^{251}\) The program acknowledges that “[f]ew courts have the resources to oversee guardians to the fullest extent needed; using trained volunteers extends the monitoring capacity of the court.”\(^{252}\)

### C. Proposal for a Maine Court Visitor Program

As the first state to adopt much of the UPC and the state ranking first in the nation for the highest proportion of residents over the age of sixty-five,\(^{253}\) Maine is uniquely situated to be a leader in guardianship reform. The policies and procedures of Maine’s probate courts must evolve to reflect the legislative intent of the UGCOPAA that our Legislature boldly adopted in 2019.\(^{254}\) If visitors are tasked with evaluating the appropriateness of a guardianship, there ought to be adequate protections to ensure that they know how to do their jobs and that there are safeguards for the public if they do not perform their jobs appropriately.

When approaching the question of how to implement uniform visitor requirements, training, and oversight, advocates in Maine do not have to start anew. There are many similarities between the role of the visitor in adult guardianship proceedings and the role of Guardians ad Litem (GAL) and Court Appointed Special Advocate (CASA) GALs in child protection proceedings.\(^{255}\) The statutes, court

\(^{246}\) Id.

\(^{247}\) Id.

\(^{248}\) Id.

\(^{249}\) Id. (“The role of a Court Visitor is to be a neutral, objective special appointee of the court - one who gathers facts and information from an array of individuals and institutions, and provides this essential information to the judge.”).


\(^{251}\) Id.


\(^{254}\) See discussion infra Introduction.

\(^{255}\) See discussion infra Section III.C.1.
rules, studies, critiques, and reforms of the GAL model in Maine can serve as a case study and guide for implementing a Maine Court Visitor Program.

1. Guardian ad Litem and Court Appointed Special Advocate Program Models

GALs serve many roles in district and probate courts. A GAL may be appointed by the court to represent the best interests of a child in a family, parental rights and responsibilities, child protection, or guardianship matter. The policy reasons for the GAL program are to ensure that Maine’s children are afforded the best opportunity to thrive and that parental rights are not terminated unless doing so is truly in the best interest of the child. Similarly, a robust visitor program would ensure that Maine’s adults are afforded due process before their fundamental rights are assigned to another individual’s stewardship.

The role of a court visitor in adult guardianship matters and the role of a GAL in child protection matters have many parallels:

Guardians ad litem and court visitors both have a unique role as they act as the eyes of the court during the guardianship proceeding, conducting interviews and compiling reports to present to the court. They are meant to speak to the ability of the respondent to make decisions for themselves, and to make recommendations to the court regarding the outcome of the hearing.

Both GALs and visitors are able to do what a judge cannot: “visit a living room, or confer privately with a therapist, or meet teachers and neighbors and family members outside the courtroom and without the rudiments and tensions of cross-examination.”

Beyond serving similar roles from the perspective of the court, both GALs and visitors are also fulfilling an investigatory role in situations that demand a high level of sensitivity to family dynamics and an ability to safely and effectively manage situations potentially involving mental illness and physical and/or emotional abuse. As such, the public is entitled to know the credentials, training, and ethical duties of the GAL or visitor and how the person’s role may influence the judge or outcome in court.

Despite these similarities, the requirements, screening, training, reporting, and grievance process involved with GALs and visitors diverge significantly. To become a GAL in Maine, a person must be a licensed Maine attorney or a qualified

257. Id.
260. Prescott, supra note 258, at 69.
261. Id. at 71.
licensed mental health professional.\textsuperscript{263} The person must complete an application, pass a criminal history background check and child protection background check by the Maine Department of Health and Human Services, provide a certificate of good standing and disciplinary history letter, successfully complete the rostered GAL core training, and be appointed by the Maine Guardian ad Litem Review Board.\textsuperscript{264}

The GAL core training, provided at no cost to the applicant, involves at least eighteen hours of training over four days.\textsuperscript{265} Topics covered include an overview of the probate, domestic relations, and health and welfare codes, domestic abuse, substance abuse, mental health, legal issues and processes, the duties and obligations of the GAL as an agent of the court, and interviewing techniques.\textsuperscript{266} For GALs serving in child protection cases, an additional twenty-three hours of training is required.\textsuperscript{267} Additionally, all GALs must complete at least six hours of continuing professional education credits annually in order to maintain rostered GAL status, which must include one hour of training on ethics and professionalism.\textsuperscript{268}

The GAL serves as an agent of the court and is considered a “quasi-judicial officer” that is “entitled to quasi-judicial immunity for acts performed within the scope of the duties of the guardian ad litem.”\textsuperscript{269} Additionally, there is a Guardian ad Litem Review Board with a formal complaint system to receive and adjudicate complaints against a rostered GAL for misconduct.

A comprehensive Maine Court Visitor Program could mirror aspects of the GAL program in Maine—specifically, the credentials required for appointment,\textsuperscript{270} a core training requirement,\textsuperscript{271} a continuing education requirement for longstanding visitors to stay abreast of developments in guardianship law and related issues,\textsuperscript{272} standards of conduct regarding mandated reporting, confidentiality, and ex parte communications,\textsuperscript{273} and the establishment of a procedure by which visitors are formally monitored.\textsuperscript{274}

The next two sections will explore what a Maine Court Visitor Program could adopt and adapt from the GAL model in order to (i) establish credentials required for appointment as a visitor and (ii) establish uniform visitor guidelines, training, and methods of oversight.

\textbf{a. Credentials Required for Appointment}

As the above state case studies show, there is tremendous variance among states as to what qualifications a person must have in order to serve in the role of a visitor.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{264} Id.
\item \textsuperscript{265} Id.
\item \textsuperscript{266} Id.
\item \textsuperscript{267} Id.
\item \textsuperscript{268} Id.
\item \textsuperscript{269} 4 M.R.S. § 1554 (2021).
\item \textsuperscript{270} M.R.G.A.L. 2(b)(2)(A).
\item \textsuperscript{271} M.R.G.A.L. 2(b)(2)(B).
\item \textsuperscript{272} M.R.G.A.L. 10.
\item \textsuperscript{273} M.R.G.A.L. 5(f)-(h).
\item \textsuperscript{274} M.R.G.A.L. 7(a).
\end{itemize}
\end{footnotesize}
For example, some programs have specific educational requirements independent of a visitor training program, others require completion of a training program in order to qualify, and still others leave the interpretation of the adequacy of previous training or experience up to judicial discretion.\textsuperscript{275}

One potential criticism of applying the GAL program model to the visitor context is the lack of attorneys and/or qualified professionals available to meet the demand. A practical challenge that probate courts are already facing is a dearth of individuals who are available to serve as visitors; this is especially true in more rural counties. Opponents of the effort to mandate the appointment of an attorney in adult guardianship proceedings in Maine cite the lack of available attorneys to serve in such a capacity as one of the primary arguments against the proposal.\textsuperscript{276} Some counties may experience the same challenge with finding suitable community members to serve as visitors, especially with the proposed addition of qualification and training requirements.

To address this in the GAL context, another program in Maine is the CASA program, which trains lay volunteers to serve as child advocates or GALs in child protection cases.\textsuperscript{277} To become a CASA volunteer, an individual is only required to be twenty-one years old and hold a high school diploma or GED.\textsuperscript{278} Once a prospective volunteer completes the application form, they will need to pass a criminal and DHHS background check, pass a references screening, and provide a copy of their driver’s license and automobile insurance.\textsuperscript{279} If everything checks out, the prospective volunteer may then be invited for an interview to determine if they are a good fit for a thirty-hour training program.\textsuperscript{280} After completing the training, CASA will conduct a second interview to ensure the person’s readiness to serve effectively as a CASA GAL.\textsuperscript{281} At that point, the CASA volunteer will be sworn in as an officer of the court and granted the legal authority to conduct research and submit reports to the court.\textsuperscript{282}

\textsuperscript{275} See discussion infra Section III.B.2.
\textsuperscript{276} An Act to Establish a Presumption of Entitlement to Counsel for a Person Who is the Subject of an Adult Guardianship, Conservatorship or Other Protective Arrangement Proceeding, 130th Legis. (2021) (testimony of Nadeen Daniels, Register of Probate of Cumberland County Probate Court) (“[W]e have a very small number of attorneys available to accept court-appointed cases. I do not know where we would find attorneys to handle the sheer volume of these cases in Cumberland County.”); An Act To Establish a Presumption of Entitlement to Counsel for a Person Who Is the Subject of an Adult Guardianship, Conservatorship or Other Protective Arrangement Proceeding, 130th Legis. (2021) (testimony of Kathleen G. Ayers, Register of Probate for Kennebec County and President of the Maine Association of Registers of Probate) (“[T]here is already a shortage of attorneys willing or available now in contested Guardianship matters.”).
\textsuperscript{277} The CASA program “is established within the Administrative Office of the Courts of the Judicial Department . . . to provide volunteer lay persons to serve as court appointed special advocates or guardians ad litem under Title 22, section 4005, subsection 1, in child abuse and neglect cases.” 4 M.R.S. § 1501 (2021).
\textsuperscript{279} Id.
\textsuperscript{280} Id.
\textsuperscript{281} Id.
\textsuperscript{282} Id.
The CASA training program has been successful at recruiting individuals from a variety of personal and professional backgrounds and, in turn, those individuals have helped to improve the quality of services to district courts and families. “Research suggests that children who have a CASA guardian ad litem have a better chance of finding permanent homes than children without a CASA assigned, and they and their families receive more needed services than children who do not have a CASA guardian ad litem.”

The Maine Court Visitor Program should model its qualifications requirements after those of the CASA program, rather than after the more elevated requirements of the GAL program. Attorneys are not necessarily well-versed in the nuances of providing social services to vulnerable populations and, in turn, qualified licensed mental health professionals are not necessarily well-versed in the nuances of guardianship law. Requiring the visitor to have one of these two educational backgrounds would not only greatly reduce the number of qualified potential visitors, but it would do so without much benefit because training in the specifics of adult guardianships, the evaluation of capacity, the interview process, and other important elements of the visitor role would still be necessary.

As such, the Maine Court Visitor Program could function similarly to the CASA model and provide a much-needed service to probate courts and families involved in guardianship proceedings. Probate courts in Maine need visitors that are committed to their responsibilities, are dependable, and understand the nuances of the MUPC rules governing their appointments. Utah’s robust court visitor program is successful, in part, because of “collaborative community partnerships in volunteer training and recruitment.” There are three communities in Maine in particular that present great opportunity and untapped potential for visitor recruitment through the CASA model: The Maine Association of Retirees, the Maine Senior College Network, and the University of Maine School of Law.

The Maine Association of Retirees was founded in 1981 as an organization “representing the unique interests of thousands of individuals who spent their working lives as State, Education, Judicial, Legislative and Participating Local District employees in Maine.” The organization has 13,500 members across the state and connects its members with volunteer opportunities, particularly in the areas of advocacy and policy.

The Maine Senior College Network, a program of the University of Southern Maine, is a network of seventeen Senior Colleges throughout the State of Maine with 6,500 members. The colleges offer “exciting, intellectually stimulating non-credit courses (taught by volunteers)” and provide “exciting learning opportunities for adults over the age of 50.”

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283. Id.
286. Id.
288. Id.
Finally, the University of Maine School of Law has nearly three hundred enrolled students each year who are eager to gain legal experience and build their professional reputations. Maine CASA has successfully partnered with the law school to recruit, screen, train, and oversee current students to “serve as officers of the court to act in pursuit of the best interests of children involved in Title 22 child protection cases.”

The school also sponsors a rostered GAL training through a course offered each spring. A Court Visitor Training Program could function similarly—law students could receive academic credit for participating in the training course, and the probate courts in the surrounding counties of Cumberland, York, Androscoggin, and Sagadahoc could gain trained, dedicated visitors to serve in adult guardianship matters. When the Utah Ad Hoc Committee on Probate Law and Procedure submitted its report to the Utah Legislature calling for the implementation of a Court Visitor Program, the Committee noted that “[t]he [Court Visitor Program] model is very similar to the Court Appointed Special Advocate (CASA) program in the juvenile court, which has been so successful at helping children whose parents are accused of abuse . . . . The results can be invaluable to the court.”

b. Uniform Visitor Guidelines, Handbook, Training, and Oversight

Implementing a Court Visitor Training Program that could be utilized by Maine’s sixteen probate courts would protect older adults and train a cadre of dedicated visitors that can continue the effort to improve the program in the future. Additionally, developing a Visitor Handbook as well as a series of Online Training Modules could be a low-cost and effective way to recruit and train individuals to lend their time and services to Maine probate courts, while also enhancing the quality of visitors tasked with evaluating the capacity of vulnerable adults.

In 2011, the ABA’s Commission on Law and Aging adapted a series of handbooks to be modified and used by state courts in efforts to improve the monitoring of existing guardianships. One of the handbooks, the Trainer’s Handbook, includes a model two-day training course for court visitors. The Trainer’s Handbook could be adapted to the needs of Maine probate courts in training visitors to serve at the onset of a guardianship petition and during the ongoing monitoring of existing guardianships. Such a handbook would not only serve a practical training function, but it would also help the sixteen probate courts in Maine articulate visitor guidelines that are uniform across counties. In some counties, visitors may currently be serving more of a neutral, investigatory role, and in others

they may be utilized for their subjective opinion on a given matter. If a Visitor Handbook was developed with the input of probate judges and registers of probate, Maine could begin to develop uniform guidelines and expectations of visitors in adult guardianship matters, better reflecting the legislative intent of the UGCOPAA. Online Training Modules could be asynchronous, allowing participants to view the modules around their work schedules and other obligations, while being able to refer to the Visitor Handbook to supplement the online presentations.

Having tangible tools with which to train visitors will better enable probate courts to recruit new visitors from communities such as The Maine Association of Retirees, the Maine Senior College Network, and the University of Maine School of Law. In turn, tapping into community resources with individuals that are eager to become involved in meaningful, intellectually stimulating community service could significantly increase the quality of available visitors within the probate court system.

Maine courts should hire a Visitor Coordinator whose job is to recruit, train, and monitor visitors. The trained visitors could be used not only to evaluate the capacity of an individual when a petition has been filed, but also to help the courts with the ongoing monitoring of guardianships. Economies of scale would make it cost-efficient for a single statewide training program to be delivered—in-person or virtually—to all visitors across the state.

2. Costs and Other Practical Matters

One initial challenge is to secure the funding necessary to hire a Visitor Coordinator and launch a uniform training program. In 2018, Maine’s probate courts collectively administered 3,066 adult guardianship and conservatorship proceedings. The lowest caseload was in Piscataquis County with twenty-nine cases, and the highest caseload was in York County with 486 cases. The number of available visitors in each county is not published, but the training program should not be limited to new visitors—it should also require current visitors to participate in order to gain new knowledge and understand best practices in the field of guardianship law. With the participation of the sixteen probate courts, one Visitor Coordinator could oversee the training process for all counties—primarily through the use of technology and asynchronous training modules. Therefore, the primary funding needed would be used to hire a full-time employee to oversee the program. Additionally, some funding would be needed for training materials, recruitment, and marketing. Some of these costs could be offset by collaborations with colleges, universities, and continuing education programs that would offer the visitor training program for academic credit.

When Utah first developed its Court Visitor Program, it did so with financial support from the State Justice Institute (SJI), a national non-profit organization that provides project grants, curriculum adaptation, and training grants that could be

294. An Act to Establish a Presumption of Entitlement to Counsel for a Person Who is the Subject of an Adult Guardianship, Conservatorship or Other Protective Arrangement Proceeding, 130th Legis. (2021) (testimony of Margaret Reinsch, Senior Analyst at the Office of Policy and Legal Analysis at the Maine State Legislature).

295. Id.
utilized to support a Maine Court Visitor Program. In 2018, after a successful pilot program, Utah’s Legislature included $183,700 in their budget for two full-time employees in the Guardianship Reporting and Monitoring Program, which oversees the Court Visitor Program. Maine could launch a three-year pilot program funded through outside sources such as the SJI while efforts are underway to amend the Probate Code. By that time, the probate court system in Maine may be under the umbrella of the Maine State District Court and, thus, permanently funding and centrally administering the Maine Court Visitor Program would be feasible next steps.

Efforts are underway, as they have been for decades, to overhaul the probate court system in Maine. In 1967, Maine voters amended the Constitution to encourage the Legislature to "establish a different Probate Court system with full-time judges." Over the decades, there have been various reports, commissions, and committees recommending that the Legislature transfer the jurisdiction of Maine probate courts to the Superior Court. There are many policy reasons for doing so, but the most practical reason is administrative—the state court system has “a central administration to support and oversee the work of all clerks and judges, as well as uniform procedures and forms, training programs, an alternative dispute resolution program, data collection, and other features.”

Development of a Maine Court Visitor Program need not wait for the passage of the most recently proposed amendment to overhaul the probate court system and restructure the courts, but, once such an amendment does pass, the Visitor Program will benefit from a centralized administrative structure.

3. Next Stop: The Legislature

The first step to enhancing and enforcing the experience and training requirements for visitors is to persuade the Legislature to amend the MUPC to reflect
the needed reforms. To do that appropriately and effectively, advocacy groups need to encourage a lively public debate about what qualifications, standards of conduct, and oversight should be required for visitors. The Joint Standing Committee on Judiciary should resolve to ask PATLAC to examine the concept of more robust visitor guidelines, consult with interested parties, and make recommendations concerning the proposed legislation to amend the MUPC to reflect the suggested qualifications, standards of conduct, and monitoring requirements. Organizations such as the Maine State Bar Association Elder Law Section, Maine Legal Services for the Elderly, NAMI Maine, DRM, ACLU of Maine, and the Maine Registers of Probate Association should be invited to discuss the challenges and opportunities of such legislation and negotiate language that would provide safeguards but not overly burden the system and cause delays in proceedings.

Currently, the MUPC contains only one sentence about the required background of a court-appointed visitor: “[t]he visitor must be an individual having training or experience in the type of abilities, limitations and needs alleged in the petition.” If some of the most vulnerable citizens of Maine are to be secure in knowing that their most basic civil rights will not be removed unless absolutely necessary, it is imperative that the MUPC reflect the training and experience necessary to effectively perform the visitor duties.

Specifically, 18-C M.R.S. § 5-304 should be amended to reflect additional requirements and standards for visitors. The statute should mandate that visitors complete a state-required training program that includes topics such as interviewing techniques, the spectrum of capacity, the stages of Alzheimer’s disease, implicit bias, the legal aspects of guardianship, SDM, navigation of the probate court and online filing systems, and more. It should also require a criminal history and background check, references screening, and an interview. Additionally, it should provide for a complaint process for individuals in guardianship proceedings to address concerns with a review board that holds visitors to the standards set forth in the training program.

An unspoken obstacle that interest groups will face when advocating for the implementation of increased safeguards for adult guardianships is the perception that there is no problem with the current system. The effects of granting a full guardianship when a limited guardianship or SDM model may have sufficed is not a problem that is easily quantifiable. Quietly removing someone’s civil rights—perhaps, even, without their objection—is easily dismissed as a non-priority. Because individuals subject to a guardianship petition are usually adults with intellectual or physical disabilities and/or elderly individuals, the dismissal of the problem of guardianship oversight is a symptom of a paternalistic culture that marginalizes people with disabilities and the elderly. The legal system should be designed to protect the most vulnerable members of our society by maximizing autonomy and self-determination rather than arbitrarily deciding that someone with an intellectual disability or who is of a certain age is inherently incapable of managing his or her own affairs. The lack of substantive and procedural safeguards in the guardianship context is a problem that should not be neglected, for “[h]ow we

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as a society treat the elderly not only reveals much about our collective values, but also has important implications for our individual futures.”

CONCLUSION

Court-appointed visitors provide one of the greatest safeguards of the rights of individuals confronting a potential guardianship—if the petitioner’s motives are improper, the visitor stands as the primary barrier against abuse and exploitation of the elderly or disabled person. Recent evolutions in guardianship law have focused on two avenues of reform: (i) a push for limited guardianships and alternatives to guardianship, such as SDM models; and (ii) an increase in safeguards once a guardianship has been granted, such as more comprehensive and frequent reporting requirements. However, for such reforms to be effective, those serving as the eyes and ears of the court must be fluent in the rationale of these policies and have the tools with which to evaluate and recommend alternatives to guardianship.

As Maine continues to reimagine its probate court system and implement the MUPC, legal scholars and policymakers ought to carefully re-examine the pivotal role that visitors play in evaluating the nuances of a proposed guardianship as well as in evaluating the need, or lack thereof, for an existing guardianship. Ultimately, increasing the quantity and quality of court-appointed visitors will uphold the policy aims of the MUPC by protecting and preserving the civil rights, liberty, and autonomy of people with disabilities and the elderly.