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DYNAMIC GUARDIANSHIP

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Abstract

Guardianship—the mechanism by which the law appoints someone to make legal decisions on behalf of an incapacitated adult—has been the target of legal reform for decades; long criticized as too substantial a deprivation of rights, granted too cavalierly. But reform efforts have not addressed all of the problems with guardianship, in part because they have failed to reckon with biological realities of its most common cause—Alzheimer's disease, which causes gradual, progressive cognitive decline.

This Article proposes a novel guardianship structure for cases of cognitive decline, designed to ensure both that the guardian has legal powers when they need them, and only uses those powers when the person subject to guardianship cannot—a "dynamic" guardianship. Drawing on a distinction between legal powers and fiduciary duties in private law, I suggest that, in cases of cognitive decline, guardians be granted plenary legal powers at the outset, subject to an ongoing fiduciary duty to use those powers only when the person subject to guardianship cannot; leaving that person's legal powers unaffected.

In this way, guardianships would look more like their most popular private alternative—the durable power of attorney, which is also structured around concurrent legal powers constrained by fiduciary duties. This harmonization of the law of decision-making on behalf of incapacitated adults suggests that we might address concerns about third-party reliance and abuse in guardianship and durable powers of attorney in the same way.

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INTRODUCTION

The furor over Britney Spears's guardianship has faded, but the need for guardianship reform hasn't.[1] Although precise numbers are hard to come by, roughly 1.3 million American adults are currently subject to guardianship—a mechanism in which a court appoints someone to make legal decisions on behalf of an individual found to lack the cognitive or psychosocial ability to do so themselves.[2] Most of those in guardianships are older adults with dementia—progressive loss of cognitive function, most commonly caused by Alzheimer's disease.[3]

On the one hand, we'll always need something like guardianship to make legal decisions for those who can't, and by all accounts, most guardians are family or close friends, trying their best.[4] On the other hand, guardianship is the most substantial civil deprivation of legal status an adult can undergo—foreclosing their power to enter contracts, make healthcare decisions, choose where to live and who to associate with, and more.[5] Notwithstanding these

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[1] *See, e.g.*, Helena Moradi & Bojan Perovic, *Britney Spears and Systemic Reform: Embracing Vulnerability in Conservatorship Laws*, 76 S.C. L. REV. 355, 358 (2024) (drawing insights from Britney Spears's case for guardianship reform); Robyn M. Powell, *Disability Reproductive Justice*, 170 U. PA. L. REV. 1851, 1854 (2022) ("[M]ost people subject to conservatorships lack Britney Spears's platform and resources . . . .").

[2] *See, e.g.*, NATIONAL COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARDS ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 65 (2018) (finding 1.3 million Americans are living under guardianship); *see also* Jim Berchtold, *Guardianship Data Reform*, Justice in Aging (Mar. 24, 2024), https://justiceinaging.org/guardianship-data-reform/ ("[T]hose estimates are based on only a handful of states that track and report reasonably reliable data. The estimates are also over six years old.")

[3] *See, e.g.*, Kenneth Miller, *What Happens When A Guardianship Gets Contentious*, AARP (Oct. 4, 2018), https://www.aarp.org/caregiving/financial-legal/info-2018/court-ordered-guardianship-separates-family.html?intcmp=AE-HP-TTN-R1-POS2-REALPOSS-TODAY (suggesting that over 85% of those subject to guardianship are over the age of 65); *see also* Betsy J. Grey, *Aging in the 21st Century: Using Neuroscience to Assess Competency in Guardianships*, 2018 WIS. L. REV. 735, 737 & n. 6 (2018) ("Most of these individuals show signs of what is commonly known as dementia.").

[4] *See, e.g.*, U.S. HOUSE OF REPRESENTATIVES, SELECT COMMITTEE ON AGING, MODEL STANDARDS TO ENSURE QUALITY GUARDIANSHIP AND REPRESENTATIVE PAYEE SERVICES: A REPORT 3 (1989) ("There are persons who need guardianship and for whom the system is working well."); Morgan R. Thurston & Georgia J. Anetzberger, *Addressing Abuse By Guardians: The Roles of Adult Protective Services, Law Enforcement, and the Courts*, 72 SYRACUSE L. REV. 369, 398 (2022) (reporting the results of a small, interview-based study with New York judges finding that "while none of the judges downplayed the importance of abuse by guardians, none of them felt abuse by guardians was a pervasive or prevalent problem").

[5] *See, e.g.*, Nina A. Kohn & Catheryn Koss, *Lawyers for Legal Ghosts: The Legality and Ethics of Representing Persons Subject to Guardianship*, 91 WASH. L. REV. 581, 581 (2016) ("Stripped of legal personhood, the individual becomes a ward of the state and his or her

stakes, it doesn't seem that courts take imposing or monitoring guardianships particularly seriously in practice—on the best evidence we have, many guardianships are unnecessary or overbroad; oversight is lackluster, spotty, and ineffective.[6] As the American Bar Association put it, contemporary guardianship law is at once both "a gulag and a godsend."[7]

These concerns have made guardianship one of the most active areas of state-level law reform in recent decades.[8] And yet, problems remain.[9] Perhaps this should be unsurprising. The longstanding push towards prioritizing *limited guardianship*—in which courts grant guardians only those legal powers that need to be transferred based on the individual's *current* limitations—is hardly the answer in dementia cases, where a person's cognitive abilities inevitably *decline*; demanding continuous re-litigation.[10] The push to replace guardianship with *supported decision-making*—a framework under which the individual with cognitive limitations remains the ultimate decider, with a "supporter" appointed to help them—cannot be a complete solution in dementia cases either; where, eventually, someone else

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decisions are delegated to a guardian."); Vicki Gottlich, *The Role of the Attorney for the Defendant in Adult Guardianship Cases: An Advocate's Perspective*, 7 MD. J. CONTEMP. LEGAL ISSUES 191, 197 (1995) ("The typical ward has fewer rights than the typical convicted felon.").

[6] *See, e.g.*, Comment, *An Assessment of the Pennsylvania Estate Guardianship Incompetency Standard*, 124 U. PA. L. REV. 1048, 1050 (1976) ("The consequences of guardianship are far too dire to be unleashed lightly."); LAUREN B. LISI ET AL., CTR. FOR SOCIAL GERONTOLOGY, NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDINGS AND RECOMMENDATIONS 44 (1994) (finding that most guardianships hearing in a sample took less than 15 minutes); Ben Chen, *Elder Financial Abuse: Fiduciary Law and Economics*, 34 NOTRE DAME J. L. ETHICS & PUB. POL'Y 307, 315 (2020) ("Limited funding, heavy caseloads, and shortages in staffing are all constraints that prevent courts or state agencies from engaging in extensive monitoring.").

[7] ERICA WOOD, PAMELA TEASTER & JENICA CASSIDY, AM. BAR ASS'N, RESTORATION OF RIGHTS IN ADULT GUARDIANSHIP: RESEARCH AND RECOMMENDATIONS 6 (2017).

[8] *See, e.g.*, Elizabeth Moran, *2021 Guardianship Legislation: Highlights and Trends Effectuating Improved Processes and Outcomes in U.S. Guardianship Systems*, 43 BIFOCAL 102 (2022) (summarizing guardianship reform efforts in the preceding year); A. Frank Johns, *Ten Years After: Where is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication*, 7 ELDER L. J. 33, 79 n. 398 (1999) (summarizing changes in guardianship law in the 1990s).

[9] *See, e.g.*, NATIONAL COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARDS ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 65 (2018) (noting a "general consensus that the guardianship system is not in much better shape than it was in 1987, despite decades of reform efforts").

[10] *See infra* Part II.A; *see also* Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 746–48 (2002) (noting the broad push for greater use of limited guardianship but observing that "it seems a poor fit for someone in decline . . .).

will *have* to decide.[11] And, similarly, advance planning tools are great—for those who use them.[12]

This Article offers a novel proposal for guardianship reform that would both ensure that, whenever a person subject to guardianship *can* make a decision on their own, the law will recognize it; *and* that when they can't, the guardian will already have the legal power to step in, without having to go back to court—a "dynamic" guardianship, the effective scope of which expands and contracts with the individual's contemporaneous needs and cognitive functioning. To accomplish this, the proposal draws on the distinction between "legal powers" and "fiduciary duties" in fiduciary law—the legal domain that constructs and constrains "fiduciary" legal relationships, including guardianship, alongside relationships like trust, agency, corporations, and more.[13] A fiduciary's *legal powers* describe the *kinds* of decisions they are empowered to make in a way that the legal system will recognize; their fiduciary *duties* govern *how* they must exercise those powers.[14] Each distinct fiduciary relationship is comprised of a set of legal powers subject to distinctive duties, tailored to the particular normative purposes of the relationship.[15]

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[11] *See, e.g.*, Emily A. Largent & Andrew Peterson, *Supported Decision-Making in the United States and Abroad*, 23 J. HEALTH CARE L. & POL'Y 271, 272 (2021) (describing supported decision-making and noting that it cannot be a complete solution in cases of comprehensive cognitive decline).

[12] *See infra* Part II.C.

[13] *See, e.g.*, Paul B. Miller, *Justifying Fiduciary Duties*, 58 MCGILL L. J. 969, 971 (2013) (describing guardians as fiduciaries); Lawrence A. Frolik, *Is a Guardian the Alter Ego of the Ward?*, 37 STETSON L. REV. 53, 54 (2007) (same); *see also* James Toomey, *Fiduciary Standards*, 51 ACTEC L.J. (forthcoming 2026) (manuscript at 24) ("Fiduciaries are . . . individuals who make legally effective decisions (in some sense) 'on behalf of' another, guided by some standard.").

[14] *See infra* Part III.A; ROBERT H. SITKOFF & JESSEE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 607 (11th ed. 2022) (distinguishing between legal powers and duties in private law).

As described, this distinction tracks roughly, but not precisely, the language of Wesley Hohfeld, who took legal powers to be the ability to affect the legal positions of others, and legal duties to constraints on behavior enforced by claim rights held by another. *See, e.g.*, Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L. J. 710, 756 (1913) (listing powers of owners of chattel as the kinds of decisions they can make to affect the legal positions of others with respect to the property); *see also* Andrew Halpin, *The Concept of a Legal Power*, 16 OXFORD J. LEGAL STUDS. 129, 131 (1996) (explaining the distinction between powers and duties in Hohfeld's framework). For Hohfeld, however, the distinction is primarily circumscribed by the respective "correlatives" held by persons on the other side of these legal concepts—an issue we're setting aside here, because whether a guardian's duties correlate with claim rights held by the person subject to guardianship, the state, someone else, or no one, for our purposes the *content of the duty* can be the same. *See, e.g.*, Hohfeld, *supra* note 14, at 710 (charting correlatives of the ontology of private law).

[15] *See infra* Part III.A.

With this distinction in mind, I argue for three legal innovations that, taken together, would create such a dynamic guardianship. First, all guardianships in cases involving progressive cognitive decline would grant guardians a full suite of legal powers at the outset—they would be "plenary" rather than "limited."[16] But, second, guardians would be subject to a novel, general fiduciary duty to *only use their powers when the person subject to guardianship cannot*; that is, where the person in fact lacks the cognitive ability to do so themselves.[17] And, finally, unlike today's guardianships, the appointment of a guardian would have no independent effect on the legal capacity of the person subject to it—that person could still exercise any legal powers for which they have the required contemporaneous cognitive functioning under the general law of capacity.[18]

Taken together, these reforms would create a form of guardianship the effective scope of which expands and contracts automatically with the present needs of the person subject to it. To the extent that person *can in fact* make a particular decision, they'll *legally* be able to—and their guardian will be under a duty *not* to make it.[19] But as soon as the person subject to guardianship can no longer make a decision themselves, the guardian can step in without having to go back to court—they already had the required legal power, and are *now* under a duty to use it.[20] This structure, then, ensures guardians both *can*, and *only do*, intervene when they must.

Moreover, although novel in guardianship law, this structure has important analogues across fiduciary law. For one thing, trust and corporate law have undergone a strikingly similar evolution in their history—both domains originally sought to constrain fiduciary abuse by granting only a limited suite of legal powers, analogous to the push for limited guardianship.[21] But after it became clear that doing so handicapped fiduciaries from doing things they ought to be able to do, both areas of law moved to grant fiduciaries broad powers subject to a robust set of duties—just as I propose here.[22] At the same time, this novel model of guardianship makes it look a lot more like the other primary contemporary relationship involved in deciding for the incapacitated—the durable power of attorney, a private alternative to guardianship that similarly delegates plenary,

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[16] *See infra* Part III.B.1.

[17] *See infra* Part III.B.2.

[18] *See infra* Part III.B.3.

[19] *See infra* Part III.B.2.

[20] *See infra* Part III.B.2.

[21] *See infra* Part III.A; *see also generally* John H. Langbein, *Rise of the Management Trust*, 143 TRUSTS & ESTATES 52 (2004) (summarizing the history of trust law from policing misconduct with limited powers to imposing robust fiduciary duties); SHAWN BAYERN, AUTONOMOUS ORGANIZATIONS 51–52 (2021) (same in corporate law).

[22] *See infra* Part III.A.

concurrent powers guided and constrained by fiduciary duties.[23]

And while no reform proposal in this domain will be *immune* from abuse, I suggest that the problem would be *at least less bad* under this proposal than under the law we have. This model clarifies, for one thing, that so long as the individual subject to guardianship has the cognitive ability to monitor their guardian's behavior, they have legal capacity and standing to sue for breach of fiduciary duty.[24] Past that point, nothing here is incompatible with increasing court monitoring of guardians' behavior—and, at a minimum, the proposal offers more guidance to guardians on how they ought to exercise their powers.[25] Finally, the way in which this suggestion brings guardianship closer to the law of durable powers of attorney suggests that whatever solutions we ultimately settle on can govern both—harmonizing the law of deciding for the incapacitated.[26]

The analysis proceeds in four Parts. First, in Part I, I offer general background on the law of guardianship and the criticisms to which it has long been subject—too substantial a deprivation of rights, imposed too cavalierly.

Next, Part II discusses the well-intentioned, if not wholly effective, most prominent proposals for guardianship reform—limited guardianship, supported decision-making, and advance planning tools, none of which sufficiently take into account biological realities of Alzheimer's dementia.

Part III, then, outlines my proposal by explaining the distinction between powers and duties in fiduciary law, and discusses how the law might reconfigure guardianship around a grant of plenary powers, constrained by a duty to use those powers only when the person subject to guardianship cannot, without affecting their legal powers, to create a model of dynamic guardianship.

And, finally, in Part IV, I address challenges and possible objections to the proposal—sounding in the risk of abuse and concerns about third-party confusion; ineliminable concerns, to be sure, but no worse on this proposal than current law.

I. GUARDIANSHIP AND ITS DISCONTENTS

Guardianship has, in the last fifty years, become an active site of law reform—but something like adult guardianship has existed for as long as the

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[23] *See infra* Part III.C; *see also generally* Karen E. Boxx, *The Durable Power of Attorney's Place in the Family of Fiduciary Relationships*, 36 GA. L. REV. 1 (2001) (describing the structure and rise of durable powers of attorney).

[24] *See infra* Part III.B.3; *see also* Kohn & Koss, *supra* note 5, at 598 (arguing that the Due Process Clause of the U.S. Constitution guarantees the right of persons subject to guardianship to sue their guardians).

[25] *See infra* Part IV.A.

[26] *See infra* Part IV.B.

United States; grounded in the *parens patriae* powers of the English Courts of Chancery, and stretching back even to Roman law.[27] For most of that legal history, guardianship has had the same basic structure, which this Part outlines.[28]

First, because guardianship takes place against the background of the doctrine of legal capacity, to make sense of guardianship we must understand how the capacity doctrine works. Next, I discuss the procedures by and standards under which guardians are appointed, before turning to the effects of traditional guardianship on legal powers, and guardians' duties in exercising them. Finally, I discuss the major themes of criticism to which the traditional model of guardianship has been subject.

A. Capacity in Private Law

The law of adult guardianship operates against the backdrop of the doctrine of legal capacity—if we didn't have a law of capacity tied to cognitive functioning, guardianship law might look very different.[29] Under the doctrine of capacity, private law only recognizes the exercise of legal powers made by individuals who have "sufficient mental capacity" at the time the decision is made.[30] That is, the law does not recognize the purported exercise of legal powers—the power to contract, bring suit, transact with property, execute a will, enter a marriage, serve as principal in an agency relationship, and so on—by an individual who lacks the cognitive or psychosocial functioning required by the law at the time the decision is

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[27] *See, e.g.*, Lawrence M. Friedman, Joanna L. Grossman & Chris Guthrie, *Guardians: A Research Note*, 40 AM. J. LEGAL HIST. 146, 146 (1996) ("Guardianship goes back quite far in legal history; it has been a feature of American law since the colonial period."); Mary Joy Quinn & Howard S. Krooks, *The Relationship Between the Guardian and the Court*, 2012 UTAH L. REV. 1611, 1611 (2012) ("Some form of guardianship has existed in the western world since ancient times.").

The law, of course, also recognizes "guardians" of minor children—typically but not always the child's parents. This is a distinct legal mechanism, and I am referring to the adult guardianship system when I refer to "guardianship" throughout. *See, e.g.*, Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J. L. & FEMINISM 29, 37–38 (1998) (distinguishing between guardianship for incapacitated adults and minor children).

[28] *See, e.g.*, Bradley Geller, *The Long and Winding Road: Guardianship Reform in Michigan*, 1 ELDER L. J. 177, 178–79 (1993) (summarizing the history of guardianship and the role the basic structure continues to play).

[29] *See, e.g.*, Sean M. Scott, *Contractual Incapacity and the Americans with Disabilities Act*, 124 DICK. L. REV. 253, 255 (2020) (noting conceptual and historical connections between guardianship law and the doctrine of capacity).

[30] *See, e.g.*, James Toomey, *Narrative Capacity*, 100 N.C. L. Rev. 1073, 1073 (2022) ("The doctrine of capacity is a fundamental threshold to private law.").

made.[31]

The law's test for whether an individual has the required "capacity" to make an enforceable decision is essentially a *cognitive* one—that is, it is a question of the person's "physical ability to think and reason."[32] The particular threshold of cognitive functioning the law demands varies with respect to different decisions—but roughly and in general the question is whether the individual was capable of understanding the nature and consequences of the decision they were trying to make at the time they made it.[33] From this perspective, a person might have the legal capacity to make some decisions but not others; but with respect to any *particular* decision, every individual always either has the capacity to make it or doesn't.[34] And, of course, the law generally presumes that adults have capacity to exercise the full suite of legal powers of legal personhood, but if a particular decision is challenged and it can be shown to have been made without the required cognitive functioning, it can generally be set aside.[35]

Moreover, the capacity test is one of actual contemporaneous cognitive functioning—particular medical diagnoses are neither necessary nor sufficient to establish legal incapacity.[36] There are, indeed, many

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[31] *See, e.g.*, KINSEL V. LINDSEY, 526 S.W. 3d 411, 419 (Tex. 2017) ("Documents executed by one who lacks sufficient legal or mental capacity may be avoided."); BOND V. BRANNING MFG. CO., 52 S.E. 929, 929 (1906) ("To execute either a will or a deed, it is abundantly established that the party must have sufficient mental capacity . . . ."); *see also* Restatement (Third) of Agency § 3.04(1) ("An individual has capacity to act as principal in a relationship of agency . . . if, at the time the agent takes action, the individual would have capacity if acting in person.").

[32] NINA A. KOHN, ELDER LAW 17 (2d ed. 2020); *see also* 1 E. ALLAN FARNSWORTH, FARNSWORTH ON CONTRACTS § 4.6 (2d ed. 1998) (describing the traditional capacity test as a "'cognitive' one").

[33] *See, e.g.*, KOHN, *supra* note 32, at 28 (describing the standard of capacity in these terms); *see also, e.g.*, Restatement (Second) of Contracts § 15 ("A person incurs only voidable contractual duties [if] he is unable to understand in a reasonable manner the nature and consequences of the transaction . . . .").

[34] *See, e.g.*, KELLY PURSER, CAPACITY ASSESSMENT AND THE LAW: PROBLEMS AND SOLUTIONS 14 (2017) ("[L]egal professionals see capacity . . . as a dualistic construct in that the person either has capacity to make the decision, execute the document, or enter the transaction, or they do not.").

[35] *See, e.g.*, KOHN, *supra* note 32, at 153 ("It is generally presumed that all adults have the ability and right to make their own decisions."); *see also* LARSON V. LARSON, 192 N.E. 2d 594, 597 (Ill. App. Ct. 1963) ("A marriage contract will be invalidated by the want of consent of capable persons . . . .").

[36] *See, e.g.*, IN RE ESTATE OF SCHLUETER, 994 P.2d 937, 940 (Wyo. 2000) (joining "several other states" in holding that clinical diagnosis of "senile dementia" is not sufficient proof of lack of capacity); *see also* Jalayne J. Arias, *A Time to Step In: Legal Mechanisms for Protecting Those With Declining Capacity*, 39 AM. J. L. & MED. 134, 140 (2013) ("[U]nder a majority of capacity definitions, a diagnosis of dementia alone is not conclusive evidence that an individual lacks capacity.").

conditions—some temporary and voluntary, like intoxication, some lifelong, like developmental disabilities—that can cause deficits in cognition.[37] Under the doctrine of capacity, *any* cause that has made it impossible for an individual to understand the nature and consequences of a particular decision—from temporary intoxication to traumatic brain injury—can set aside a putative legal decision.[38]

In practice, however, far and away the most common reason for legal incapacity is *dementia*—an umbrella term in medicine for symptoms of progressive cognitive decline.[39] The most common cause of dementia is Alzheimer's disease—an age-linked pathology that causes gradual, progressive cognitive decline over time; much more common in older adults.[40] For this reason, in practice, the doctrine of capacity is most commonly invoked in cases involving older adults in various stages of Alzheimer's disease.[41]

B. Guardianship—Goals and Procedure

Against this backdrop, enter guardianship. Guardianship is a mechanism by which the law appoints an individual to make a wide range of legally recognized decisions on behalf of someone thought to be, in some sense prescribed by state law, *generally* incapacitated.[42] (Two notes on

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[37] *See, e.g.*, Donna M. Langenbahn, Teresa Ashman, Joshua Cantor & Charlotte Trott, *An Evidence-Based Review of Cognitive Rehabilitation in Medical Conditions Affecting Cognitive Function*, 94 ARCHIVES PHYS. MED. & REHAB. 271, 271 (surveying a number of conditions with impacts on cognitive functioning).

[38] *See, e.g.*, IN RE GENTRY'S ESTATE, 573 P.2d 322 (Or. Ct. App. 1978) (addressing a challenge to testamentary capacity alleged to be caused by schizophrenia); IN RE BURRIS, So. 3d 984 (Miss. Ct. App. 2018) (same allegedly caused by alcohol abuse).

[39] *See, e.g.*, Jennifer Moye, Andrew B. Cohen, Kelly Stolzmann, Elizabeth J. Auguste, Casey C. Catlin, Zachary S. Sager, Rachel E. Weiskittle, Cindy B. Woolverton, Heather L. Connors & Jennifer L. Sullivan, *Guardianship Before and Following Hospitalization*, HEC FORUM 1, 10 (2022) (finding the most common cause of incapacity in a hospital cohort was dementia); Robin J. Bandy, Paul R. Helft, Robert W. Bandy & Alexia M. Torke, *Medical Decision-Making During the Guardianship Process for Incapacitated, Hospitalized Adults: A Descriptive Cohort Study*, 25 J. GEN. INTERNAL MED. 1003, 1005 (2010) (same); Jennifer Moye, Stacey Wood, Barry Edelstein, Jorge C. Armesto, Emily H. Boser, Julie A. Harrison & Erica Wood, *Clinical Evidence in Guardianship of Older Adults is Inadequate: Findings from a Tri-State Study*, 47 GERONTOLOGIST 604, 607 (2007) (same).

[40] *See, e.g.*, Jody Corey-Bloom & Michael S. Rafii, *The Natural History of Alzheimer's Disease*, in DAVID AMES, JOHN O'BRIEN & ALISTAIR BURNS, EDS., DEMENTIA 453, 453 (5th ed., 2017) (summarizing the symptoms and course of Alzheimer's disease).

[41] *See, e.g.*, James Toomey, *Love, Liberalism, Substituted Judgment*, 99 IND. L. J. 1289, 1297 (2024) (noting that capacity challenges most commonly involve older adults).

[42] *See, e.g.*, Toomey, *Narrative Capacity*, *supra* note 30, at 1084 (defining guardianship).

terminology. Historically, "guardians" had powers over the individual's person and "conservators" over their property; some states continue this lexical bifurcation, others refer to all such persons with one word or the other—I'm going with "guardian" for convenience.[43] And, historically, persons subject to guardianship have been called "wards," though "person subject to guardianship" or the equivalent is becoming more common today.[44])

Because of the doctrine of capacity, we can see how a mechanism like guardianship might be helpful, or even necessary.[45] Suppose an individual presents in an emergency room without the cognitive functioning required to give informed consent to treatment.[46] Or an older adult's house must be sold to finance nursing home care, but they lack the cognitive ability to sell real estate.[47] *Someone* has to make these decisions. In particular legal domains, the law has provided specific mechanisms to do so—in healthcare, for instance, state law provides lists of default surrogates.[48] But as dementia progresses, an individual will become incapacitated with respect to more and more decisions—we might want to have a mechanism to *generally* make decisions for them, which is guardianship.[49]

Procedurally, an "interested person" (precisely who varies somewhat from state to state) can file a petition for guardianship in an appropriate court on behalf of a person they believe is generally incapacitated.[50] As with the

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[43] *See, e.g.*, KOHN, *supra* note 32, at 154 (discussing the differences in terminology among guardians and conservators).

[44] *See, e.g.*, Patrick Hecker, Note, *Legally Alone: The Redeemability of Guardianship and Recommendations Toward Equitable Access*, 18 NW. J. L. & SOC. POL'Y 74, 78 (2023) (summarizing this dispute); *see also* SITKOFF & DUKEMINIER, *supra* note 14, at 508 n. 63 (11th ed. 2022) (discussing the push to avoid the word "ward").

[45] *See, e.g.*, Carolyn L. Dessin, *Financial Abuse of the Elderly: Is the Solution a Problem?*, 34 MCGEORGE L. REV. 267, 283 (2003) ("The need for a mechanism like guardianship is apparent . . . .").

[46] *See, e.g.*, Judy A. Clausen, *Making the Case for a Model Health Advance Directive Statute*, 14 YALE J. HEALTH POL'Y, L. & ETHICS 1, 6–7 (2014) (discussing this problem)

[47] *See, e.g.*, Emily Smith, *Protecting Our Most Vulnerable Wyoming Residents with Guardianship or Conservatorship*, 46 WYO. LAW. 24, 24–25 (2023) (emphasizing the importance of having someone make property management decisions on behalf of incapacitated adults).

[48] *See, e.g.*, Alexander A. Boni-Saenz, *Personal Delegations*, 78 BROOK. L. REV. 1231, 1237 (2013) (discussing statutory surrogate decision-making schemes in healthcare).

[49] *See, e.g.*, Corey-Bloom & Rafii, *supra* note 40, at 453 (discussing the course of Alzheimer's disease).

[50] *See, e.g.*, 2 Family Estate Planning Guide § 30:36 (2024–25) ("The guardianship petition is brought by an interested person, usually a relative or close friend, who fears the individual will somehow harm him or herself."); *see also* 3 Advising the Elderly Client § 34:26 ("Immediate family members or similar interested persons, health care providers, and custodial agents, are sometimes entitled to notice and to participate in the proceeding . . . .").

doctrine of capacity, no specific diagnosis is necessary or sufficient, but dementia in older adults is far and away the most common basis for guardianship petitions.[51] What follows is an adversarial proceeding in which the court assesses the abilities of the person alleged to be incapacitated against the relevant legal standard—which varies state to state, but generally requires a finding that the individual is broadly incapacitated with respect to many kinds of legal decisions and unable to manage their own legal affairs.[52] Courts can hear a wide range of evidence in making this determination—indeed, in many states the ordinary rules of evidence do not apply—but in practice courts tend to focus on medical testimony of cognitive functioning.[53]

If convinced that the person is indeed generally incapacitated under the state law standard, it will appoint a "guardian" empowered to make legal decisions on behalf of the person subject to guardianship.[54] Guardians are most commonly family members or close friends—indeed, statutes in most states offer a mandatory or recommended lexical priority for guardians, starting with family members.[55] But in principle a guardian could be anyone. And in some cases, it must be a stranger—where the person does not have family or friends available and willing to undertake the role, for instance.[56] Some guardians are professionals—usually local attorneys who will serve in the role for multiple people—or even companies that specialize in guardianship.[57]

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[51] *See, e.g.*, *supra* note 39; *see also* Rebecca Dresser, *Precommitment: A Misguided Strategy for Securing Death With Dignity*, 81 TEX. L. REV. 1823, 1826 (2003) (observing that "[d]ementia is the most common condition producing decisional incapacity in older people").

[52] *See, e.g.*, Arias, *supra* note 36, at 147 (noting all state guardianship standards require a finding of general incapacity); *see also* KOHN, *supra* note 32, at 156 ("The guardianship process is, by design, an adversarial one.").

[53] *See, e.g.*, C. Katherin Mann, *Alzheimer's and Multi-infarct Dementia—Proceedings to Appoint Guardian Based on Incapacity*, 18 A. Jur. Proof of Facts 3d 185 ("An unchallenged medical opinion regarding the proposed ward's mental incapacity may be determinative of the legal issue."); Toomey, *Narrative Capacity*, *supra* note 30, at 1085 (noting that contemporary guardianship adjudications tend to turn on medical evidence).

[54] *See, e.g.*, Paul L. Clark, *"What Will We Do With Dad?" Guardianship Reform in Idaho and its Implications for the Elderly*, 36 IDAHO L. REV. 269, 271 (2000) ("If found to be incapacitated the individual is declared a ward, and the court then appoints a guardian.").

[55] *See, e.g.*, Chen, *supra* note 6, at 330 ("The available empirical evidence suggests that most guardians and agents are laypersons who are closely related to, or friends with, the incapable individual."); Thaddeus Mason Pope, *Unbefriended and Unrepresented: Better Medical Decision Making for Incapacitated Patients Without Healthcare Surrogates*, 33 GA. ST. U. L. REV. 923, 979 (2017) ("Most guardians are family or friends.").

[56] *See, e.g.*, Pope, *supra* note 56, at 979 (discussing this challenge).

[57] *See, e.g.*, 3 Advising the Elderly Client § 34:36 (discussing professional guardians and guardianship companies).

C. Guardianship and Legal Powers

Under traditional law, the appointment of a guardian has two important effects on the respective legal powers of the person subject to guardianship and the guardian. The first is that, after a guardian is appointed, the person subject to guardianship is, *by virtue of the guardianship*, no longer able to exercise their own legal powers (at least, virtually any of them) themselves.[58] The theory is that imposing a guardianship logically depends on finding that the person is generally incapacitated, rendering the question of their capacity functionally *res judicata*.[59] Whatever its theoretical basis, the critical point is that guardianship operates as a *conclusive* legal presumption that the person subject to guardianship is incapacitated—that person is *precluded* from exercising legal powers; *even those* for which they in fact would have had the cognitive functioning required by the general doctrine of capacity.[60] To be sure, guardianship can be terminated, if the person subject to it can show they

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[58] *See, e.g.*, Gottlich, *supra* note 5, at 197 ("When a court appoints a guardian, the ward loses all rights to determine anything about her life."); John Pollock & Megan Rusciano, *Right to Counsel in Restoration of Rights Cases*, 42 BIFOCAL 75, 75 (2021) (noting that guardianship "impact[s] whether a person marries and forms a family; whether they vote; where they live; what education, job, or training opportunities may have; and what services they receive").

And, well, maybe not *any*—there's some controversy as to the extent of whether persons subject to guardianship have (and could be constitutionally deprived of) certain rights like the power to retain an attorney to challenge the guardianship or the right to vote. *See, e.g.*, Kohn & Koss, *supra* note 5, at 584 (arguing that persons subject to guardianship could not constitutionally be deprived of the right to retain an attorney); Nina A. Kohn & Casey Smith, *Defending Voting Rights in Long-Term Care Institutions*, 103 B.U. L. REV. 1025, 1025 (2023) (arguing that persons subject to guardianship still have the right to vote). And some states provide that adjudication of guardianship does not affect the capacity to engage in certain transactions, often including marriage. *See, e.g.*, Cal. Prob. Code § 1900 ("The appointment of a conservator of the person or estate or both does not affect the capacity of the conservatee to marry or to enter into a registered domestic partnership."); BOYD V. EDWARDS, 446 N.E. 2d 1151, 1158 (Ohio Ct. App. 1982) ("[A]n adjudication of incompetency prior to marriage is not necessarily conclusive proof of the person's incapacity to enter a valid marriage.").

[59] *See, e.g.*, Kohn & Koss, *supra* note 5, at 584 ("A person subject to guardianship has, by definition, been judicially determined to lack legal capacity and his or her decisions have been delegated to a third party."); Dessin, *supra* note 45, at 283 ("[A] person who is incompetent in the eyes of the law cannot enter into legally binding transactions.").

[60] *See, e.g.*, Nina A. Kohn, *Fiduciary Principles in Surrogate Decision-Making*, in EVAN J. CRIDDLE, PAUL B. MILLER & ROBERT H. SITKOFF, EDS., THE OXFORD HANDBOOK OF FIDUCIARY LAW 249, 252 (2019) (noting that "an individual for whom a guardian is appointed is stripped of the right to make all or some decisions for himself or herself"); *see also* Restatement (Second) of Contracts § 13 ("A person has no capacity to incur contractual duties if his property is under guardianship by reason of an adjudication of mental illness or defect.").

have regained general capacity—but not without a court proceeding.[61]

Instead, after a guardian is appointed, the *guardian* can exercise a general suite of legal powers on behalf of the person subject to guardianship—including powers to enter contracts in their name, sue and be sued for them, transact with their property, and so on.[62] And *only* the guardian can exercise these powers, the guardianship having deprived the person subject to it of their own power to do so.[63] From this perspective, the guardian effectively steps into the legal shoes of the person subject to guardianship.[64]

To be sure, there are some legal powers that guardianship does not transfer to the guardian—but rather than illustrating the limits of the transfer of powers traditional guardianship entails, they demonstrate its scope. The powers not transferred to the guardian are those historically considered too "personal" to an individual, including the power to compose a will and get married or divorced.[65] But, importantly, it's not as though the person subject to guardianship retains these—the guardianship forecloses the person's capacity to exercise those powers too.[66] And because the powers aren't transferred, and the person subject to guardianship cannot exercise them themselves, generally *no one* can exercise these non-delegable powers for the duration of the guardianship.[67]

D. Duties of Guardianship

Guardianship, from this perspective, operates as a substantial deprivation of the legal status of persons subject to guardianship—denied as they are of access to the basic suite of powers of legal personhood. For that reason, the

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[61] *See, e.g.*, Pollock & Rusciano, *supra* note 58, at 76 ("Petitions for restoration are complicated and require navigating specific court rules and gathering supportive medical evidence.").

[62] *See, e.g.*, Fla. Stat. § 744.102(9)(b) (authorizing plenary guardians the power "to exercise all delegable legal rights and powers of the ward"); Kohn, *Fiduciary Principles*, *supra* note 60, at 252 (noting that guardians may be empowered to "make highly personal decisions, such as where to live, with whom to associate, and what medical treatment to receive").

[63] *See supra* notes 58–60 & accompanying text.

[64] *See, e.g.*, Pollock & Rusciano, *supra* note 58, at 75 (suggesting that guardianship "removes a person's ability to be the author of their own life and make the decisions that compose who they are by playing those decisions in the hands of another").

[65] *See, e.g.*, Boni-Saenz, *Personal Delegations*, *supra* note 48, at 1233 (distinguishing between the broad suite of powers guardians are granted to exercises on behalf of those subject to guardianship, and the limited suite of powers considered non-delegable).

[66] *See supra* note 60.

[67] *See, e.g.*, James Toomey, *Executor Discretion*, 110 IOWA L. REV. 1322–23 (2025) (observing that persons subject to guardianship both lack the capacity to change their will themselves and their guardians don't have that power); Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 615 (2009) (same).

law has always constrained guardians' exercise of legal powers with duties.[68] Indeed, guardians have long been considered "fiduciaries" of persons subject to guardianship, subject to a range of "fiduciary duties."[69]

On the one hand, it is uncontroversial that guardians are "fiduciaries" and owe certain duties in the ways in which they exercise their powers.[70] On the other, it has not always been clear what that means—and what, practically speaking, the fiduciary duties of guardians amount to.[71] Indeed, guardians themselves have raised concerns about a lack of clarity about what they are supposed to do and how they are supposed to do it.[72] Today, it is fairly well accepted that guardians have a fiduciary duty to, in the first instance, exercise the person's legal powers as that person would have, if capacitated—the so-called "substituted judgment" standard.[73] If, however, following this standard would harm the person subject to guardianship or others (or there is no evidence of what they would do), guardians can generally comply with their duties by making their own judgment of the person's best interests.[74]

Similarly, it is relatively uncontroversial that guardians are subject to general fiduciary duties to avoid conflicts of interest and exercise reasonable prudence in managing assets—though it is not settled how these duties interact with the duty to do as the person would have wanted.[75] The law on the content of guardians' fiduciary duties is, indeed, comparatively thin in

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[68] *See, e.g.*, Frolik, *Alter Ego*, *supra* note 13, at 54 ("Just what is the relation of a guardian to the ward? Certainly, it is a fiduciary relationship . . . .").

[69] *See, e.g.*, Kohn, *Fiduciary Principles*, *supra* note 60, at 251 ("Upon appointment and acceptance, a guardian or conservator immediately enters into a fiduciary relationship with the individual subject to guardianship or conservatorship.").

[70] *See, e.g.*, Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L. J. 879, 908 (1988) (describing "guardian-ward" as a "paradigm of [fiduciary] relationship[]").

[71] *See, e.g.*, Karen E. Boxx & Terry W. Hammond, *A Call for Standards: An Overview of The Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207, 1209 (2012) ("[I]t is rare for state statutes to specify standards regarding what a guardian does once appointed.").

[72] *See, e.g.*, Susan Greene, *Through the Guardianship Looking Glass: A Personal Perspective on Conflicting Commitments*, 28 ELDER L.J. 1, 10–11 (2020) (noting, from personal experience, the lack of clarity surrounding guardians' duties).

[73] *See, e.g.*, Boxx & Hammond, *supra* note 71, at 1218 (observing that the Uniform Guardianship Act generally requires a guardian to decide "what the ward would have decided if asked when competent").

[74] *See id.* (noting the back-up "best interests" standard)

[75] *See, e.g.*, Chen, *supra* note 6, at 317 (arguing that too-strictly applying general fiduciary conflict rules to guardians conflicts with the goal of doing what the person subject to guardianship would have wanted); Kohn, *Fiduciary Principles*, *supra* note 60, at 256–57 (noting that a "notable characteristic of the duty of loyalty in the context of surrogate decision-making is that it is not necessarily inconsistent with substantial self-dealing" because "surrogates are to act according to the principal's wishes or directions, and the principal may wish to benefit the surrogate").

part because, unlike many other fiduciary relationships, it is not altogether clear that individuals subject to guardianship have capacity to sue their guardians for fiduciary breach—in any event it does not happen often.[76]

Rather, guardians' duties have historically been policed primarily by courts in an active, supervisory role (at least, this is how guardianship is *supposed to* work). In all states, guardianships are subject to some form of ongoing court supervision, although the level of court involvement varies dramatically from state to state (and, by all accounts, between the law on the books and in practice).[77] In many states, the court's role after imposing the guardianship is limited (even by law on the books) to receiving annual reports or accounts (a role that, minimal as it is, is apparently wildly underenforced).[78] In other states, courts (and the executive branch) may play a more active role in checking in on the guardian's behavior, requiring bonding, demanding the guardian undertake specified trainings, and a range of other monitoring techniques.[79]

E. Criticisms of Traditional Guardianship

Although something like guardianship has always existed, it has become increasingly controversial in the past half-century or so, concomitant with growing concern for the rights of individuals with cognitive impairments.[80]

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[76] *See, e.g.*, Rutter Group Prac. Guide Fed. Civ. Pro. Before Trial 7-B (observing that "[s]tate law generally provides that minors and incompetents cannot sue in their own names, or defend an action brough against them").

[77] *See, e.g.*, Scott J. Shackleford & Lawrence M. Friedman, *Legally Incompetent: A Research Note*, 49 AM. J. LEGAL HIST. 321, 326 (2007) ("The court (in theory) has direct supervision of the work of guardians."); Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 173 (2010) (surveying monitoring procedures of guardianships); Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STETSON L. REV. 143, 160–183 (2007) (surveying state techniques for monitoring guardianships during their duration).

[78] *See, e.g.*, Quinn & Krooks, *supra* note 27, at 1653 (summarizing guardians' reporting and accounting requirements under state law).

[79] *See, e.g.*, Selena E. Molina, *Monitoring Adult Guardianships and Conservatorships: The National Call and Delaware's Response*, 62 JUDGES' J. 9, 12 (2023) (summarizing the annual reports guardians are required to file in Delaware); U.S. Gov't Accountability Office, GAO-04-655, Guardianships: Collaboration Needed to Protect Incapacitated Elderly People 2 (2004) (noting that states require filing of reports at least annually by guardians).

[80] *See, e.g.*, Rebekah Diller, *Legal Capacity For All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L. J. 495, 796 (2016) ("For the last several decades, guardianship has been the subject of continual calls for reform . . . ."); Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 108–10 (2012) (noting that the contemporary push for guardianship reform began in the 1980s).

These criticisms have broadly sounded on three interrelated concerns—that guardianship represents too substantial an imposition on the legal status of those with cognitive impairments; that it is imposed too cavalierly and in many cases unnecessarily; and that it is inadequately monitored for abuse. Taken together, these critiques lead to the concern that, in practice, guardianship abuse is widespread, devastating, and poorly policed.

1. Too Substantial a Deprivation of Rights

As discussed, guardianship represents a substantial deprivation of legal rights—perhaps *the* most substantial a person can undergo short of death; or at least conviction of a serious crime.[81] Indeed, while the punishments of criminal law might deprive liberty (and even life), they do not (typically, and under contemporary law) deprive defendants of the ability to own property or enter into contracts.[82] And, of course, depriving defendants of rights is entirely the punitive *point* of criminal law, whereas guardianship is not meant to be punitive at all—it is intended to be an equitable mechanism of civil law fundamentally to *help* people who cannot take care of themselves, not punish them.[83] And yet, just as in criminal law, guardianship is non-consensual—the result of an adjudicated adversarial proceeding, whatever the individual subject to guardianship has to say about it.[84]

To many commentators, this non-consensual deprivation of rights is

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[81] *See supra* note 5; *see also* Linda S. Whitton, *Durable Powers as a Hedge Against Guardianship: Should the Attorney-at-Law Accept Appointment as Attorney-in-Fact?*, 2 ELDER L. J. 39, 39 (1994) ("[G]uardianship is an extraordinary measure involving significant loss of an individual's liberty interests."); Barak D. Richman, Breanna Barrett, Riya Mohan & Devdutta Sangvai, *A Financial Case for a Medical-Legal Partnership: Reducing Lengths of Stay for Inpatient Care*, 51 J.L. MED. & ETHICS 771, 775 (2023) ("[G]uardianship is an extreme measure that deprives patients of their legal autonomy.").

[82] *See, e.g.*, Subcomm. on Health & Long-Term Care of the House Select Comm. on Aging, 100th Cong., Abuses in Guardianship of the Elderly and Infirm: A National Disgrace (Comm. Print 1987) (prepared statement of Chairman Claude Pepper) ("The typical ward has fewer rights than the typical convicted felon. . . .").

[83] *See, e.g.*, Clifton B. Kruse, Jr., *The Self-Interested Fiduciary: Implications in Guardianship and Conservatorship Law*, 24 COLO. LAW. 2181, 2182 (1995) ("The intent of the protective statutes is not punitive, but to further such person's personal happiness by making personal and financial protection and well-being possible for them.").

[84] *See, e.g.*, Herbert M. Kritzer, Helen Marks Dicks & Betsy J. Abramson, *Adult Guardianships in Wisconsin: How is the System Working?*, 76 MARQ. L. REV. 549, 550–51 (1993) (describing the procedures by which guardianships are imposed); *see also* E.S. Cohen, Protective Services and Public Guardianship: A Dissenting View, Address at the 31st Annual Meeting of the Gerontological Society, Dallas, Tex., Nov. 20, 1978) ("Recognize guardianship for what it really is: the most intrusive, non-interest serving, impersonal legal decide known and available to us and as such, one which minimizes personal autonomy and respect for the individual . . . .").

simply unjustifiable in the extent to which it strips a category of persons of basic legal rights and powers.[85] Indeed, this position has apparently carried the day in international law with the adoption of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), Article 12 of which purports to require member states to "recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life."[86] Many commentators argue that this language requires domestic abolition of traditional guardianship, or substantial reform to recognize the ongoing legal capacity of persons subject to guardianship.[87]

To be sure, the United States has signed but not ratified the CRPD, and it is not clear what advocates think recognition of "legal capacity on an equal basis with others" means for persons with advanced dementia (or, say, in a coma)—but the point remains that guardianship represents one of, if not the, most wide-ranging deprivations of legal rights and status in the contemporary legal system.[88] And, indeed, whether or not we could really do without something like guardianship entirely, the extent to which it represents an extraordinary restriction of the legal autonomy of an individual suggests that courts must at a minimum be exceedingly careful about imposing it—a fact that shades into the following criticisms.[89]

2. Imposed Too Cavalierly

A second major criticism of the contemporary guardianship system has

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[85] *See, e.g.*, Diller, *supra* note 80, at 503 ("[E]ven at their best, guardianship still deprives the person of basic human rights."); Anne K. Pecora, *Representing Defendants in Guardianship Proceedings: The Attorney's Dilemma of Conflicting Responsibilities*, 1 ELDER L. J. 139, 139 (1993) ("Guardianship results in a devastating deprivation of personal rights and civil liberties which reduces the adult to the legal status of a child.").

[86] U.N. Convention on the Rights of Persons with Disabilities (2006) Art. 12 sec. 2;

[87] *See, e.g.* Diller, *supra* note 80, at 496 (arguing that the CRPD "offers no less than a promise to end adult guardianship as we know it"); Salzman, *supra* note 77, at 161 ("[A] move to a supported decision-making paradigm is consistent with the ADA, as well as with the recently adopted U.N. Convention on the Rights of People with Disabilities ('CRPD').")

[88] *See, e.g.*, IN RE MARK C.H., 906 N.Y.S. 2d 419, 433–34 (N.Y. Sur. Ct. 2010) (looking to the CRPD in holding that courts must monitor and periodically review guardianships); Arlene S. Kanter & Yotam Tolub, *The Fight for Personhood, Legal Capacity, and Equal Recognition Under Law for People with Disabilities in Israel and Beyond*, 39 CARDOZO L. REV. 557, 559 (2017) (noting "disagreement regarding whether or not Article 12 specifically requires the abolition of guardianship laws").

[89] *See, e.g.*, Kohn, *Fiduciary Principles*, *supra* note 60, at 252 (describing the "high bar" of evidence courts are supposed to look for in guardianship cases given the stakes); Eleanor M. Crosby & Rose Nathan, *Adult Guardianships in Georgia: Are the Rights of Proposed Wards Being Protected? Can We Tell?*, 16 QUINNIPIAC PROB. L. J. 249, 266 (2003) ("[T]hese statutes not only assure that guardianship is the intervention of last resort, but also require evidence to support fulfillment of the standard.").

to do with how it is implemented in practice. The claim is that, regardless of what the law says, guardianships are imposed far too easily, especially when the individual involved is an older adult, and even more especially when they have a diagnosis of dementia.[90] There is, indeed, evidence that courts can be highly cursory in imposing guardianships on these facts—one study found that most guardianship hearings take no more than fifteen minutes,[91] and another that courts impose guardianships on roughly 90% of petitions.[92]

There is, moreover, some evidence that ageism and stereotypes about individuals who have been diagnosed with dementia play a role in courts' cursory analysis of guardianship cases.[93] At the same time, another factor seems to be lack of judicial resources available to conduct an in-depth assessment of each individual; overwhelmed courts, evidently, often find it easier simply to impose a guardianship than conduct a thorough assessment of the person's capacity, as nominally required under state law.[94]

3. Subject to Inadequate Monitoring

Relatedly, many commentators criticize inadequate monitoring and supervision during the course of guardianships.[95] To a large extent, this too is a critique of guardianship law in practice rather than on the books—as we've seen, guardianship statutes do require some ongoing supervision, though they vary widely in scope.[96] In practice, however, it is generally

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[90] *See, e.g.*, Jane E. Rein, *Preserving Dignity and Self-Determination of the Elderly in the Face of Competing Interests and Grim Alternatives: A Proposal for Statutory Refocus and Reform*, 60 GEO. WASH. L. REV. 1818, 1864 (1992) (describing many guardianships as unnecessary and overbroad); Dustin Rynders, *Supporting Adults with Disabilities to Avoid Unnecessary Guardianship*, 55 HOUS. LAW. 26, 27 (2017) ("Guardianship itself is not the problem; unnecessary and overbroad guardianships are the problem.").

[91] *See, e.g.*, LAUREN B. LISI ET AL., CTR. FOR SOCIAL GERONTOLOGY, NATIONAL STUDY OF GUARDIANSHIP SYSTEMS: FINDINGS AND RECOMMENDATIONS 44 (1994).

[92] *See, e.g.*, GUARDIANSHIP WORK GROUP, ADULT GUARDIANSHIPS IN OREGON: A SURVEY OF COURT PRACTICES 4 (1999).

[93] *See, e.g.*, Morgan K. Whitlatch & Rebekah Diller, *Supported Decision-Making: Potential and Challenges for Older Persons*, 72 SYRACUSE L. REV. 165, 177 (2022) ("[A]ll these factors are filtered through the lens of ageism, which can result in a societal presumption that older persons are less capable than they actually are."); Janet L. Dolgin, *The Face of Ageism, The Reach of Ageism: Law, Medicine, and Society*, 60 TULSA L. REV. 311, 327 (2025) (describing guardianship law in practice as the result of ageism).

[94] *See, e.g.*, SALLY B. HURME, STEPS TO ENHANCE GUARDIANSHIP MONITORING (1991) (noting the limited personnel and resources courts have to review guardianship petitions).

[95] *See, e.g.*, Rebekah Diller & Leslie Salzman, *Stripped of Funds, Stripped of Rights: A Critique of Guardianship as a Remedy for Elder Financial Harm*, 24 U. PA. J.L & SOC. CHANGE 149, 159 (2021) (critiquing courts for failing to comply with state law requiring guardianship monitoring).

[96] *See supra* notes 77–79 & accompanying text; Norman Fell, *Guardianship and the*

acknowledged that most schemes of ongoing court supervision of guardians have little bite—once again attributed to lack of judicial and executive resources, sometimes itself thought to result from societal ageism that makes guardianship abuse look like less of a priority.[97]

4. Guardianship Abuse

Finally, the fact that guardianships involve a substantial deprivation of legal status, imposed by courts not engaged in particularly searching inquiry of the person's actual needs, and with limited monitoring, has led to the perception that guardianship abuse is widespread.[98] Such abuse and neglect can take many forms—from guardians enriching themselves out of the person's estate, to hard-to-police physical abuse and neglect, to simply ignoring the person's wishes and needs.[99] Of course (in part because of the lack of monitoring) numbers are hard to come by.[100] But anecdotes abound,[101]

Elderly: Oversight Not Overlooked, 25 U. TOL. L. REV. 189, 189 (1994) ("[C]ourt implementation of effective guardianship monitoring practices has been lacking.").

[97] *See, e.g.*, Sally Balch Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 867, 922 (2002) ("Financing for guardianship monitoring . . . must compete with other court needs, as well as other county and state needs, and often is not high on the priority list."); *see also* Diller & Salzman, *supra* note 95, at 59 ("Court systems lack the financial resources, and in some cases possibly the general commitment, to monitor property guardians. . . .").

[98] *See, e.g.*, U.S. Gov't Accountability Office, GAO-10-1046, Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors 8 (2010) (describing apparently increasing guardianship abuse).

[99] *See, e.g.*, Diller & Salzman, *supra* note 95, at 158–59 (noting a "steady drumbeat of press reports from around the country continues to expose incidents of guardian malfeasance."); Cohen, *supra* note 84 (noting that guardianship "has a high potential for doing harm and raises at best a questionable benefit/burden ratio").

[100] *See, e.g.*, Joy Solomon, Deirdre Lok & Malya Kurzweil Levin, *Changing of the Guardians: A Criticism and Analysis of the New York Guardianship Statute's Impact on Elder Abuse Victims*, 10 NAELA J. 149, 167 (2014) (noting that "a lack of guardianship data makes it difficult to determine how widespread this type of abuse is nationwide").

[101] *See, e.g.*, U.S. Dep't of Justice, Elder Abuse Initiative, *Abuse Stories* (last visited Dec. 16, 2025), https://www.justice.gov/elderjustice/abuse-stories (summarizing stories of abuse and neglect of elders, including by their guardians); Marian Kornicki, *Guardianship Destroyed My Family*, Mad in America (Jan. 10, 2022), https://www.madinamerica.com/2022/01/guardianship-destroyed-family-draft/ (summarizing negative personal experiences with guardianship).

and media reports[102] and case law[103] are replete with abject cruelty. At the same time, many who have been involved with the guardianship system report relatively benign experiences of courts and guardians trying to do a hard thing with limited resources.[104]

Whatever the actual extent of abuse, no one denies that it happens, its consequences can be devastating for the lives of people subject to guardianship and those that love them—and that it is facilitated by the scope of the deprivation of rights that guardianship entails, the offhand way in which courts apparently impose guardianships, and the lack of ongoing monitoring.[105]

II. REFORM PROPOSALS

As we've seen, guardianship has long been controversial and criticized. These criticisms have not fallen on deaf ears—guardianship has been an active area of state statutory reform for several decades now.[106] Unfortunately, although widespread, these reforms do not appear to have been hugely successful—guardianship remains criticized in many of the same ways as before.[107] This perhaps should perhaps be unsurprising. The primary

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[102] *See, e.g.*, Diller, *supra* note 80, at 500 (noting the "most recent round of reforms that began nearly thirty years ago in the wake of media accounts of widespread exploitation and abuse in guardianship"); *see also* NAT'L CENTER ON ELDER ABUSE, GUARDIANSHIP: REMEDY VS. ENABLER OF ELDER ABUSE 5 (2021) (discussing the indictment of the principals of a guardianship company for financial abuse); *Guardian for Elderly Arrested on Abuse, Neglect Charges*, ASSOCIATED PRESS (Feb. 11, 2020), https://apnews.com/general-news-23cbccff265b712f27650e2f96d6d83b (discussing how a professional guardian had ignored doctor's advice and caused the death of a person subject to guardianship by obtaining an order to cap his feeding tube); *A Rare Conviction and Tearful Capitol Testimony are Intensifying Pressure to Reform Colorado's Guardianship System*, THE COLORADO SUN (May 2, 2022), https://coloradosun.com/2022/05/02/guardianship-theft-elder-abuse/. (reporting a conviction of a guardian for financial abuse).

[103] *See, e.g.*, KNOX V. DEAN, 205 Cal. App. 4th 417 (2012) (involving allegations of financial abuse by a guardian); ROBINSON V. CALHOUN, No. A14294, 2017 WL 127572, at *1 (Cal. Ct. App. Jan. 13, 2017) (same).

[104] *See, e.g.*, Thurston & Anetzberger, *supra* note 4, at 398 (reporting that N.Y. judges have not found guardianship abuse to be a pervasive problem).

[105] *See, e.g.*, David Godfrey, *The Commission on Law & Aging Begins Its 44th Year of Advocating for Human Rights*, 44 BIFOCAL 1, 1 (2022) (noting that while "[d]ue process and human rights abuses in guardianship is not a new issue, but it is receiving renewed attention" and "the abuses . . . described in 1987 are still far too common today"); Solomon, Lok & Levin, *supra* note 100, at 167 ("[T]here is [an] obvious danger of out and out abuse, neglect, or fraud perpetuated against an incapacitated person by his or her guardian.").

[106] *See, e.g.*, Judith McCue, *The States are Acting to Reform Their Guardianship Statutes*, 131 TRUSTS & ESTATES 32 (1992) (summarizing state guardianship reform after the first wave of guardianship reform in the 1980s).

[107] *See, e.g.*, Diller & Salzman, *supra* note 95, at 151 ("The guardianship system is in

reform proposals, while well-intentioned, fail to reckon with realities encountered by guardianship in practice.

First, a push towards prioritizing "limited guardianships" has proven unsuccessful because it is not a long-term solution in dementia cases. Second, advocacy for a "supported decision-making" model is great as far as it goes—but has never purported to ensure that people's legal needs are met in all stages of dementia. Third, private mechanisms that let people avoid guardianship—particularly the durable power of attorney—have been very popular, but are not a solution for those who don't plan. This Part discusses each reform in turn.

A. Limited Guardianships

The most successful reform movement in guardianship law has been the development and prioritization of so-called *limited guardianships*. Developed in the first wave of guardianship reform in the 1980s and now authorized in every state, a limited guardianship grants the guardian only a limited suite of legal powers, meant to be tailored to the actual needs and deficits of the person subject to the guardianship.[108] In other words, while traditional ("plenary") guardianship finds an individual globally incapacitated and appoints a guardian to handle *all* of their legal needs, limited guardianship is intended to adjudicate the specific domains within which the individual is incapacitated and appoint a guardian to handle only those domains.[109]

In most jurisdictions today, statutes explicitly require courts to grant limited guardianships where doing so can meet the needs of the incapacitated person.[110] That is, most state statutes make plenary, traditional guardianship a last resort, only appropriate where an individual's needs could not be met with a limited guardianship that strips them of fewer legal powers.[111] At any

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perpetual crisis."); Alison Hirschel & Lori Smetanka, *The Use and Misuse of Guardianship by Hospitals and Nursing Homes*, 72 SYRACUSE L. REV. 255, 256 (2022) ("[M]uch has been written about the failings of the guardianship system in states across the country").

[108] *See, e.g.*, Nina Kohn & David English, *Protective Orders and Limited Guardianships: Legal Tools for Sidelining Plenary Guardianship*, 72 SYRACUSE L. REV. 225 (2022) ("[A]ll states now recognize the ability of courts to impose limited guardianships); Frolik, *Limited Guardianship*, *supra* note 10, at 739–40 (summarizing the law of limited guardianship, noting it was developed in the 1980s, and that "[t]oday, limited guardianship is almost always an option for someone in need of a guardian").

[109] *See, e.g.*, Quinn & Krooks, *supra* note 27, at 1621–24 (summarizing the distinction between limited and plenary guardianship across states).

[110] *See, e.g.*, Nina A. Kohn, *Legislating Supported Decision-Making*, 58 HARV. J. LEG. 313, 323 (2021) ("In most [states], courts lack the authority to impose a full guardianship if a limited one is sufficient to meet an individual's identified needs.").

[111] *See, e.g.*, Uniform Guardianship, Conservatorship, and Other Protective

guardianship hearing, then, courts are expected to hear evidence about the scope of the individual's functional impairments and grant the guardian only those powers needed to address them.[112] To many commentators, limited guardianships remain the answer to the problems of guardianship law—courts just need to be convinced (or forced) to take seriously their obligation to tailor them.[113]

From one perspective, the development of limited guardianship *has* been hugely successful—every state has reformed their statutory law to create limited guardianships, and most require they be granted where they can.[114] From another (more substantive) perspective, this movement has had very little effect—the evidence suggests that courts almost never impose limited guardianships, despite being legally required to.[115] Plenary guardianships remain by far the most common form of guardianship in the United States—notwithstanding now forty years of pushing courts away from them.[116]

There are many reasons for courts' reluctance to seriously consider limited guardianships—including the perceived convenience of imposing plenary guardianships in light of limited judicial resources.[117] Some of those challenges could, no doubt, be solved—with more funding or judicial

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Arrangements Act §§ 301, 401 (requiring courts to impose limited guardianship if doing so will meet the needs of the individual); *see also* Alaska Stat. Ann. § 13.26.266 (same); Fla. Stat. Ann. § 744.3215 (same); Idaho Code Ann. § 15-5-303 (same).

[112] *See, e.g.*, Wash. Rev. Cod. Ann. § 11.88.010(2) (requiring courts to consider "all evidence" in crafting guardianships limited to the needs of the person).

[113] *See, e.g.*, Eleanor Crosby Lanier, *Understanding the Gap Between Law and Practice: Barriers and Alternatives to Tailoring Adult Guardianship Orders*, 36–37 BUFF. PUB. INT. L. J. 155, 156–58 (2019) ("To many observers, the imposition of plenary guardianship contradicts the unambiguous statutory language in most states . . . ."); Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 DEPAUL L. REV. 453, 481 (1997) (describing limited guardianships as "woefully underutilized"); Lisa Kay Rosenthal, *Revisiting the Visitor: Main's New Uniform Probate Code & the Evolving Role of the Court-Appointed Visitor in Adult Guardianship Reform*, 74 ME. L. REV. 141, 184 (2022) (noting that the push towards limited guardianship remains an important thread in contemporary guardianship reform efforts).

[114] *See supra* notes 108–110 & accompanying text.

[115] *See, e.g.*, Phillip B. Tor & Bruce D. Sales, *A Social Science Perspective on the Law of Guardianship: Directions for Improving the Process and Practice*, 18 LAW & PSYCH. REV. 1, 20 (1994) ("Even where a limited guardianship would fulfill the needs of the proposed ward, few limited guardianship arrangements are ordered."); Frolik, *Limited Guardianship*, *supra* note 10, at 741 (describing limited guardianship as "rarely invoked").

[116] *See, e.g.*, Kohn, *Supported Decision-Making*, *supra* note 110, at 325 ("[A]ll indications are that plenary guardianships are substantially more common than limited ones in the United States . . . ."); Arias, *supra* note 36, at 156 (2013) ("Limited guardianships have not been effectively adopted as viable alternatives in the current system.").

[117] *See, e.g.*, Whitton, *Ageism*, *supra* note 113, at 481 (citing cost constraints as a reason courts are hesitant to impose limited guardianships).

training.[118] But the difficulty is more fundamental—limited guardianship is a uniquely ineffective solution to address the needs of people with *dementia*; and dementia is the most common reason for guardianship.[119] As helpful as limited guardianships are in cases involving more or less static lifelong cognitive deficits (the kinds of conditions, it's worth noting, for which limited guardianship was initially developed and promoted—and in which courts apparently *do* impose them),[120] to the extent they do not address the challenges of dementia patients, they are unlikely to solve the problems of guardianship generally.[121]

Dementia—especially its most common cause, Alzheimer's disease—is a *progressive* illness; it *will* get worse.[122] This is a biological fact,[123] and it means that a limited guardianship scheme genuinely tailored to people's functional impairments would have to be revisited—relitigated—continuously, adapting the powers of the guardian to the gradually declining cognitive abilities of the individual.[124] Moreover, the course of Alzheimer's

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[118] *See, e.g.*, Quinn & Krooks, *supra* note 27, at 1627–28 (describing the process of adjudicating limited guardianships as more expensive and time consuming)

[119] *See supra* note 39.

[120] *See, e.g.*, Frolik, *Limited Guardianship*, *supra* note 10, at 745 (noting that "advocates for the mentally ill and mentally retarded were some of the most aggressive advocates of limited guardianship"); Maureen A. Sanders & Katheryn Wissel, *Limited Guardianship for the Mentally Retarded*, 8 N.M. L. REV. 231 (1978) (advocating for limited guardianship for those with lifelong cognitive limitations).

[121] *See supra* note 39.

[122] *See, e.g.*, PURSER, *supra* note 34, at 7 (noting that the term "dementia" refers to "a large group of chronic degenerative neurological disorders that result in a progressive decline of cognition"); Elissa L. Ash, *What is Dementia?*, in CHARLES FOSTER, JONATHAN HERRING & ISRAEL DORON, THE LAW AND ETHICS OF DEMENTIA 4, 7 (2014) ("Dementia due to neurodegenerative causes is usually slowly progressive, in that the clinical and functional symptoms progress over a period of years.").

[123] In the literature, courts' reluctance to impose limited guardianships in dementia cases is sometimes ascribed to "ageism" or "stereotypes" about dementia patients. *See, e.g.*, Whitton, *Ageism*, *supra* note 113, at 481 ("The silent assumptions and stereotypes that support overuse of plenary guardianship practices illustrate why covert ageism is so difficult to identify and assess."). To be sure, of course, to the extent that older adults *without* dementia are stereotyped as senile and degenerating, *that* is a pernicious stereotype that cannot support imposition of plenary over limited guardianships. *See, e.g.*, Frolik, *Limited Guardianships*, *supra* note 10, at 748 ("Many older persons suffer from limited or selective mental incapacity. Their incapacity, if not permanent, is at least temporarily stable or, alternatively, is in very slow decline."). But it is a biological fact that older adults with dementia will undergo (hard to predict, variable in timeline) cognitive decline. *See supra* note 122.

[124] *See, e.g.*, Frolik, *Limited Guardianship*, *supra* note 10, at 748 ("Rather than a solution, [limited guardianship] seems only to assure that the parties must return to the court to grant the guardian additional power as the ability of the ward to handle his or her life continues its inevitable decline."); Fell, *supra* note 96, at 202 (ascribing courts' reluctance to impose limited guardianships in dementia cases to the need to frequently revisit their

disease is markedly heterogenous—worsening quickly, over the course of months, in some people, and slowly, over the course of years, in others; indeed, some people with Alzheimer's pathology never exhibit cognitive symptoms before their death.[125] It would not be, in other words, plausible to devise some kind of statutory timeline automatically transferring powers to the guardian at specified intervals.[126]

In the dementia context, then, a scheme prioritizing limited guardianships has no alternative but to conduct individualized, litigated tailoring of the guardian's powers to the actual cognitive abilities of a particular person on an ongoing basis.[127] In contrast, plenary guardianships do not have to be revisited in the same way, and they ensure that the guardian has legal powers when they are needed to address the person's evolving needs. In this context, it arguably makes *sense* for courts to impose plenary guardianships—and the evidence is overwhelming that they do.[128] In other words, even if courts had sufficient funding and time to engage in regular, comprehensive litigation around the scope of individuals' cognitive abilities and needs, the problem is really more fundamental—it is unclear that we'd *want them to*; that hardly seems better for the person subject to guardianship and their family.[129]

B. Supported Decision-Making

More radically, at least as a rhetorical matter, the last decade has seen a push not just to promote more limited guardianships, but abolish guardianship altogether, and replace it with a system known as "supported decision-making."[130] The pitch runs something like this. Individuals with

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scope).

[125] *See, e.g.*, Corey-Bloom & Rafii, *supra* note 40, at 453 (noting the "diverse spectrum of symptoms" Alzheimer's patients present with at different times); Karen Ritchie & Sylvaine Artero, *Mild Cognitive Impairment (MCI): A Historical Perspective*, in DAVID AMES, JOHN O'BRIEN & ALISTAIR BURNS, EDS., DEMENTIA 419, 421 (5th ed. 2017) (describing the diverse symptoms of "Mild Cognitive Impairment," often pre-clinical Alzheimer's).

[126] *See id.*

[127] *See, e.g.*, Arias, *supra* note 36, at 156 ("Plenary guardianships reduce the likelihood of the petitioner or ward returning to court."); Casey Marsh, *New York Mental Hygiene Law Article 81 Proceedings: A Proposal to Better Protect the Best Interests of an Alleged Incapacitated Person*, 38 TOURO L. REV. 1515, 1543 (2023) ("By appointing plenary powers, both judges and litigants save time.").

[128] *See supra* notes 115–16.

[129] *See, e.g.*, Frolik, *Limited Guardianship*, *supra* note 10, at 748 ("[S]een in that light, limited guardianship seems almost a cruel joke to play on the families and guardians of the incapacitated elderly.").

[130] *See, e.g.*, Largent & Peterson, *supra* note 11, at 272 ("Supported decision making offers just such an alternative paradigm and is rapidly gaining favor.").

cognitive impairments are persons with rights, autonomy, and morally significant preferences like the rest of us.[131] From this perspective, traditional guardianship, even limited guardianship, is an indefensible denial to persons of their core legal rights and recognition.[132] At the same time, individuals with cognitive impairments may need more help to form and express preferences than the rest of us, and the state fails in its responsibility towards them if it does not provide some mechanism for facilitating their decision-making.[133]

So the proposal of supported decision-making is, roughly, that in lieu of appointing a guardian with legal powers to make decisions *for* a person with cognitive impairments, courts are to appoint "supporters" whose role is to help the person make decisions for themselves.[134] Unlike traditional guardianship, the person with cognitive impairment never loses their legal capacity to make decisions, and the supporter never gains genuine legal powers.[135] The supporter's role, rather, is to help the individual make and

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[131] *See, e.g.*, Kristen Booth Glen, *Supported Decision-making and the Human Right of Legal Capacity*, 3 INCLUSION 2, 2–16 (2015) (arguing in favor of supported decision making on human rights grounds); *see also* Nandini Devi, *Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities*, 41 J.L. MED. & ETHICS 792, 799 (2013) ("Society must recognize that people with intellectual disabilities have their own desires, wills, and needs that are capable of making choices accordingly."); Rebekah Diller, *Decision-Making Supports and Cognitive Decline*, 35 HEALTH MATRIX 151, 159 (2025) ("Impaired cognition also does not preclude individuals dementia from being able to express values and preferences.").

[132] *See, e.g.*, Largent & Peterson, *supra* note 11, at 271 ("[T]he use of . . . surrogate decision-making regimes for persons with marginal capacity has increasingly been criticized for stripping people—in whole or in part—of their right of self determination."); Kristin Booth Glen, *Piloting Personhood: Reflections from the First Year of a Supported Decision-making Project*, 39 CARDOZO L. REV. 495, 499 (2017) ("If legal capacity is instrumental to personhood, then guardianship, which removes legal capacity in the name of 'protection,' is its antithesis.").

[133] *See, e.g.*, Glen, *Piloting Personhood*, *supra* note 132, at 499 (noting that "certain vulnerable populations may need assistance or accommodation in order to exercise their human rights"); Diller, *Supports*, *supra* note 131, at 157–58 (acknowledging that people with dementia have certain impairments relevant to making and expressing decisions).

[134] *See, e.g.*, Megan S. Wright, *Dementia, Autonomy, and Supported Healthcare Decision Making*, 79 MD. L. REV. 257, 262 (2020) (explaining the supported decision-making model).

[135] *See, e.g.*, Salzman, *supra* note 77, at 161 ("In contrast to guardianship, a supported decision-making model generally allows the disabled individual to retain the legal right to make decisions, and provides assistance to the disabled person to make or communicate those decisions."); Diller, *Supports*, *supra* note 131, at 153 ("Instead of having their decision-making power taken away and assigned to another individual or agency, individuals engaged in SDM receive the support they need to make and communicate their own decisions.").

communicate preferences.[136]

While a relatively new innovation, supported decision-making has been a highly popular one.[137] Several states have adopted it as a recognized legal mechanism (in parallel with, rather than to the exclusion of, traditional guardianship), and others have aspired to integrate elements of the supported decision-making model into their guardianship schemes.[138] The push, moreover, towards supported decision-making is continuing around the country, with more states adopting aspects of the model in different ways.[139]

On the account offered here, advocacy for supported decision-making is, generally, a good thing. To the extent that it is proposed as part of a cultural shift towards taking the interests and needs of individuals with cognitive impairments seriously—more power to it.[140] To the extent that it purports to require those deciding on behalf of the incapacitated to consult with them as much as possible and to take into account their wishes—I don't think anyone disagrees.[141] And to the extent that supported decision-making statutes offer individuals in the early stages of dementia a less intrusive alternative to guardianship, that is great.[142]

The problem with supported decision-making is that it is not (and does not purport to be) a *complete* solution to the challenge that dementia poses to

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[136] *See, e.g.*, Wright, *Dementia*, *supra* note 134, at 262 ("The supporter's role is to help the principal gather relevant information, think through the decision, and convey the decision to other people.").

[137] *See, e.g.*, Kohn, *Supported Decision-Making*, *supra* note 110, at 313 ("Fueled by this promise, by mounting concerns about guardianship, and by rhetoric surrounding the Convention on the Rights of Persons with Disabilities, states are rapidly adopting statutes that purport to enable and promote supported decision-making and advance the rights of persons with disabilities.").

[138] *See, e.g.*, Diller, *Supports*, *supra* note 131, at 172 (summarizing the adoption of supported decision-making in jurisdictions around the country)

[139] *See, e.g.*, Nina A. Kohn, Jeremy A. Blumenthal & Amy T. Campbell, *Supported Decision-Making: A Viable Alternative to Guardianship?*, 117 PENN ST. L. REV. 1111, 1113 (2013) ("[Advocates'] impassioned call to replace surrogate decision-making (sometimes referred to as 'substitute decision-making') with supported decision-making is rapidly gaining political momentum.").

[140] *See, e.g.*, Elizabeth Moran, *World Congress on Adult Capacity: Enhancing Autonomy, Support & Protection*, 43 BIFOCAL 123, 124 (2022) (describing supported decisionmaking as part of a "complete culture change"); Cathy E. Costanzo, Kristin Booth Glen & Anna M. Krieger, *Supported Decision-Making: Lessons from Pilot Projects*, 72 SYRACUSE L. REV. 99, 162 (2022) (describing supported decisionmaking as a "social and cultural 'paradigm shift'").

[141] *See supra* notes 108–110 & accompanying text.

[142] *See, e.g.*, Kohn, *Supported Decision-Making*, *supra* note 110, at 315 (advocating an approach that "would facilitate supported decision-making by prohibiting courts from stripping individuals of the right to make decisions if they can make decisions with support . . . .").

the legal system.[143] After all, supported decision-making depends on the premise—a factual claim—that people with cognitive impairments in fact have preferences and values that can be uncovered with a little extra work.[144] This is clearly true for people in the early stages of Alzheimer's, as for many with lifelong cognitive impairments.[145] But it is clearly false with respect to those in the late stages—at which point many Alzheimer's patients become catatonic.[146] Insisting that the individual in fact has preferences about these matters if only we dig far enough is rather mythological (and, we might worry, an invitation for unconstrained discretion in a "supporter" dubiously glossed up as the decision of the person with dementia).[147]

From this perspective, to the extent that the push towards supported decision-making reminds us to respect the autonomy of individuals with cognitive limitations, it is a good thing—guardianship law on the books doesn't disagree.[148] But it could hardly solve all of the problems of guardianship in dementia cases—where someone else's deciding will eventually be unavoidable.[149]

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[143] *See, e.g.*, Largent & Peterson, *supra* note 11, at 273 ("[T]here remain cases in which surrogate decision-making is necessary due to the extent of a person's cognitive and functional decline."); Wright, *Dementia*, *supra* note 134, at 263 ("[S]upported decisionmaking would increase the likelihood that persons with dementia could remain autonomous for longer in the progression of their disease . . . .").

[144] *See supra* note 131.

[145] *See, e.g.*, James Toomey, *"As Long as I'm Me": From Personhood to Personal Identity in Dementia and Decision-making*, 4 CAN. J. BIOETHICS 57, 57 (2021) ("[S]omeone who has just received an Alzheimer's diagnosis is roughly indistinguishable from a healthy adult in the extent to which they are able to make decisions such as those concerning property."); *see also* Agnieszka Jaworska, *Respecting the Margins of Agency: Alzheimer's Patients and the Capacity to Value*, 28 PHIL. & PUB. AFFS. 105, 109 (1999) ("I believe that many [dementia] patients may still be capable of autonomy to a significant degree and that they may still have authority concerning their well-being."). Like limited guardianships, supported decision-making was developed and has been most prominently advocated for by the disability rights community with respect to people with lifelong cognitive limitations—a context in which the model often *does* make sense on an ongoing basis. *See, e.g.*, Karrie A. Shogren, Evan E. Dean, Brad Linnenkamp, Sheida K. Raley, Jonathan Martinis & Peter Blanck, *Supported Decision-Making*, in ISHITA KHEMKA & LINDA HICKSON, DECISION MAKING BY INDIVIDUALS WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES (2021) (describing the development of supported decision-making models in disabilities rights communities and advocacy groups).

[146] *See, e.g.*, David Conn, John Snowdon, Nitin Purandare, *Residential care for people with dementia*, in DAVID AMES, JOHN O'BRIEN & ALISTAIR BURNS, EDS., DEMENTIA 312, 312 (5th ed. 2017) (describing catatonia as a symptom of late-stage Alzheimer's disease).

[147] *See, e.g.*, Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L. J. 1, 68 (1990) (observing the dangers of fictionally insisting another's decision was in fact made by the person).

[148] *See supra* note 110.

[149] *See, e.g.*, Kohn, *Supported Decision-Making*, *supra* note 110, at 326 ("Guardianship

C. Private Alternatives to Guardianship

The third set of legal innovations don't touch guardianship itself, but are designed to let people, through private advance planning, sidestep it entirely.[150] While the law has developed other private mechanisms that can help plan for incapacity in particular legal domains—notably revocable trusts for property management[151] and advance directives for healthcare decision-making[152]— the most popular of these tools is the *durable power of attorney*, which is the most analogous guardianship in the extent to which it is general in scope.[153]

If you don't want a court to appoint a guardian for you, you might want to select someone yourself. Common law has always let people delegate legal powers through the fiduciary relationship of agency—we call the person delegating the powers the "principal," and the delegee the "agent."[154] At common law, agency relationships terminated automatically at the incapacity of the principal and could not therefore be used to plan for incapacity.[155] But to empower people to use agency law to avoid guardianship, states in the middle of the last century began to pass so-called "durable power of attorney" statutes, which allow principals to enter into agency relationships that endure beyond their incapacity.[156] Thus, under these statutes, individuals can delegate their full suite of legal powers (or some subset of them) to an agent of their choosing—and that agent will retain those powers throughout the individual's incapacity; obviating the need for guardianship.[157]

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is commonly described in terms of how it is *actually practiced*, whereas supported decision-making is described in terms of how it *should be* practiced.").

[150] *See, e.g.*, Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L. J. 643, 656 (2014) (describing incapacity planning as a project of avoiding guardianship and outlining the alternative instruments).

[151] *See, e.g.*, David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*, 24 ELDER L. J. 1, 3 (2016) (describing the use of revocable trusts to plan for property management after incapacity).

[152] *See, e.g.*, JEFFREY A. SCHOENBLUM, MULTISTATE GUIDE TO ESTATE PLANNING, tbl. 10 (2021) (surveying the state laws governing the enforceability of advance healthcare instructions to plan for incapacity).

[153] *See, e.g.*, Boxx, *supra* note 23, at 12 (describing durable powers of attorney as "a staple of estate plans").

[154] *See, e.g.*, Restatement (Third) of Agency § 1.01 (defining agency and describing how it is created).

[155] *See, e.g.*, Toomey, *Executor Discretion*, *supra* note 67, at 1359 ("At common law . . . agency relationships terminate[d] at the death or incapacity of the principal.").

[156] *See, e.g.*, Boxx, *supra* note 23, at 1 ("The durable power of attorney is . . . merely an agency relationship, established by a written document, that continues during the principal's incapacity.").

[157] *See, e.g.*, Angela M. Vallario, *The Uniform Power of Attorney Act: Not a One-Size-*

Durable power of attorney relationships are created by written document (that must comply with specified formalities under state law) and they are generally governed by the common law of agency—like any agency relationship, the agent has a fiduciary duty to follow their principal's instructions.[158] This makes the content of durable power of attorney relationships far more flexible than guardianships—a principal can grant the agent immediately effective legal powers, or provide that powers will be transferred only upon their incapacity; and can authorize or prohibit certain kinds of transactions.[159] And they are subject to far less court involvement and oversight—created by purely private act; if all goes well, the court never need be involved at all.[160]

Durable powers of attorney have proven hugely popular—every state has passed statutes authorizing them, and they have become the centerpiece of elder law attorneys' incapacity planning toolkit.[161] From this perspective, in contemporary practice, guardianship is very much thought of as a fallback—avoidable for those who plan, the default for those who don't.[162] From my perspective here, this too is all a good thing. Durable powers of attorney are not perfect or immune from abuse—but they basically work and are surely better than guardianship.[163] They are private, flexible, and largely let people decide for themselves how they want to be treated after their incapacity.[164]

Fits-All Solution, 43 U. BALT. L. REV. 85, 86 (2014) (describing durable powers of attorney as "a simple way to avoid guardianship by allowing an agent to manage a principal's assets when necessity or incapacity requires it").

[158] *See, e.g.*, Rob Atkinson, *Obedience as the Foundation of Fiduciary Duty*, J. CORP. L. 43, 47–48 (2008) (describing agents' duty of obedience and characterizing it as a fiduciary duty).

[159] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 14, at 513 ("A durable power of attorney can be drafted to be effective immediately upon signing (a *standing* power) or only upon the principal's incapacity (a *springing* power)."); John C. Craft, *Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard*, 44 U. BALT. L. REV. 407, 407 (2015) (explaining this distinction).

[160] *See, e.g.*, Boxx, *supra* note 23, at 46 ("To include a thorough monitoring process would essentially gut the usefulness of the power of attorney . . . .").

[161] *See, e.g.*, *id.* at 12 ("By 1984, all states and the District of Columbia had enacted durable power of attorney provisions, and the document has now become a staple ingredient of estate plans.").

[162] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 14, at 507 ("Much as intestacy is the default estate plan for a person who does not make a will or dispose of her property by will substitutes, in most states *conservatorship* is the default plan for managing the property of an incapacitated person who does not provide otherwise.").

[163] *See, e.g.*, Boxx, *supra* note 23, at 56 (noting initial worries about abuse by durable powers of attorney and the ways in which states have worked to prevent it, largely successfully by all accounts); E. Thomas Shilling, *Report on ACTEC Elder Law Committee Questionnaire on Possible Abuse of Financial Durable Power of Attorney*, 21 ACTEC NOTES 247, 258 (1995) (finding that abuse under durable powers of attorney is rare).

[164] *See, e.g.*, Boxx, *supra* note 23, at 62 (noting the flexibility and "usefulness" of durable

Moreover, they are a way of recognizing and valuing the personhood of those without legal capacity—an agent under a durable power of attorney acts, as an uncontroversial theoretical matter, *for* the incapacitated person; with guardianship it is less clear (at least historically) whether the guardian acts for the incapacitated person or on behalf of the court in a paternalistic mode.[165]

The problem, of course, is that (much like supported decision-making), durable powers of attorney (or any mechanism of advance planning to avoid guardianship) can hardly *solve* the problems of the guardianship system.[166] These mechanisms only work if people *use them*—and not everyone will.[167] To some extent, not everyone can—durable powers of attorney are cheap as far as legal documents go, and can be executed privately, but access to counsel makes a tremendous practical difference as to whether someone will prepare a durable power of attorney instrument (not to mention a well-considered one).[168]

The law must provide some default for people who haven't taken advantage of the tools it makes available—that's guardianship; and we ought to make it as good as it can be for the people who end up in it. That is the project to which we now turn.

III. DYNAMIC FIDUCIARY DUTIES

The fundamental problems with guardianship, as we've seen, are that it is too substantial a deprivation of rights, imposed too cavalierly, monitored too loosely. A solution for dementia cases must reckon with the medical realities of Alzheimer's disease—particularly its progressive and heterogeneous character. From this perspective, we want a solution that is *dynamic*—that ensures that guardians have the legal powers they need when

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powers of attorney).

[165] *See, e.g.*, Frolik, *Alter Ego*, *supra* note 13, at 58 (noting "the guardian's dual obligations to the court and the ward").

[166] *See, e.g.*, Norman L. Cantor, *Making Advance Directives Meaningful*, 4 PSYCHOL. PUB. POL'Y & L. 629 (1998) ("[C]ommentators acknowledged a deep psychological reluctance of people to confront their own mortality by engaging in death planning.").

[167] *See, e.g.*, Kathy L. Cerminara, *Tracking the Storm: The Far-Reaching Power of the Forces Propelling the Schiavo Cases*, 35 STETSON L. REV. 147, 173 n. 124 (2005) (noting the "unrealistic expectation that many patients would have executed advance directives"); SIFKOFF & DUKEMINIER, *supra* note 14, at 66 ("[S]tudies show that only about half of all adults have a will—typically older, wealthier, and more educated persons.").

[168] *See, e.g.*, Arian Plaisance, Jessie Stilson, Aurore Benadiba & Daren K. Heyland, *How Engaged in Legal Planning for Incapacity and Death are Canadians? A Mixed-Methods Survey*, 18 HEALTHCARE POLICY 47, 53 (2023) ("One of the major themes emerging from the analysis [of why participants did not engage in incapacity planning] was lack of financial resources the expectation of high lawyer fees.").

the person subject to guardianship can no longer make a particular decision, but also that they aren't used before then. In this respect, both limited guardianship and supported decision-making cannot be the full solution.

This Part outlines a novel law reform proposal that meets these desiderata. Drawing on a distinction in private law between legal powers and fiduciary duties, this Part suggests that guardians might be understood to possess plenary legal *powers* with respect to the person subject to the guardianship, but that the exercise of those powers be constrained by a novel fiduciary *duty* to exercise them only when the person subject to guardianship cannot. In this way, the guardian would always have whatever legal powers they need to act for the person subject to guardianship, while their duties would be tethered to the person's changing cognitive function.

This Part first explains the distinction between legal powers and legal duties pervasive in private law. Next, it proposes how the package of powers and duties characteristic of guardianship could be reconceptualized to ensure guardians both have the powers they need when they need them and don't use them until that point. Finally, I observe how re-conceptualizing guardianship in this way would make it look more like a court-appointed durable power of attorney—in some ways completing an "agency revolution" in the way the law thinks about guardianship.

A. Rights and Duties in Fiduciary Law

Guardians, all agree, are *fiduciaries* of those subject to the guardianship.[169] And, like other fiduciaries—trustees, agents, corporate directors, healthcare proxies, and more—guardians exercise legal powers on behalf of another, subject to some standard; here, roughly, they exercise a plenary suite of legal powers over the person subject to guardianship, constrained to do so as that person would have done, subject to some particular guardrails and supervised by the court.[170] But the fiduciary character of guardianship as a private law relationship opens up paths of reform that have not yet been explored.

Across fiduciary relationships, the law distinguishes between the *legal powers* that a fiduciary is entitled to exercise on behalf of a beneficiary, and the fiduciary *duties* that guide their exercise of those powers.[171] *Legal powers* describe the *kinds* of legal decisions the fiduciary can make that will be recognized by law, while fiduciary duties describe *how* they are to exercise

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[169] *See supra* note 69.

[170] *See supra* Part I.B–C.

[171] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 14, at 607 (distinguishing between trustees' powers and their duties).

those powers.[172] So a trustee (a kind of fiduciary who holds and manages property on behalf of their "beneficiaries," the "equitable owners" of the property), for example, might be granted "all of the powers over trust property that a legally competent, unmarried individual has with respect to individually owned property,"[173] "subject to . . . fiduciary duties" to exercise those powers in the best interests of the beneficiaries.[174] This trustee has the legal *power* to sell property in the trust to their kid for a discount; but breaches their fiduciary *duties* in so doing.[175]

This distinction appears throughout fiduciary relationships. Imagine that you've authorized me, as your agent, to sell your car. If I purport to sell your house, I've acted beyond my legal powers—I did not have the legal power to sell your house.[176] In contrast, if I sell the car to my LLC I had the legal *power* to sell the car; I breached my fiduciary *duty* in the *way* I exercised that power.[177] Corporate directors have the power to sell all of the corporation's assets—and doing so may well comply with their duties, if it is a reasonable business judgment to get into the crypto game.[178] Or it may be a breach—if it's a discount sale to a director's lover.[179] And indeed, this distinction between legal powers and duties is pervasive *throughout* private law—I have the legal power to eject you from my dinner party, but I might be under a contractual duty not to.[180]

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[172] *See, e.g.*, Joshua Getzler, *An interdisciplinary view of fiduciary law "as if": Accountability and counterfactual trust*, 91 B.U. L. REV. 973, 986 (2011) ("The beneficiary thus polices the fiduciary through constant measurement of the *manner* in which power is exercised—not just the *limits* or outer scope of that power, as in classical corporate ultra vires.").

[173] Restatement (Third) of Trusts § 85 (noting this as the default scope of a trustee's legal powers over trust property, subject to modification by statute or the terms of the trust).

[174] Restatement (Third) of Trusts § 70.

[175] *See, e.g.*, HARTMAN V. HARTLE, 122 A. 615 (N.J. Ch. 1923) (holding that an executor expressly empowered under the terms of the will to sell the testator's real estate breached his fiduciary duties by selling it to his wife).

[176] *See, e.g.*, IN RE ESTATE OF KURRELMEYER, 895 A.2d 207 (Vt. 2006) (scrutinizing a durable power of attorney to find that it granted the attorney-in-fact the legal power to create a trust).

[177] *See, e.g.*, *id.* (holding that although the attorney-in-fact had the legal power to create a trust, in fact breached fiduciary duties in so doing).

[178] *See, e.g.*, Business Transactions Solutions § 32:74 ("The powers of the corporation shall be exercised, its business conducted and its property controlled by the board of directors, except as may otherwise be provided by statute or by the Certificate of Incorporation.").

[179] *See, e.g.*, Law of Corp. Offs. & Dirs. § 3:1 ("Corporate officers and directors owe a duty of undivided and unqualified loyalty to the corporation which they serve.").

[180] *See, e.g.*, WOOD V. LEADBITTER (1845) 13 M&W 838 (holding that property owners always have the power to revoke licenses and transform licensees into trespassers, though they may be subject to liability in breach of contract for doing so).

Obviously, because fiduciaries are supposed to act neither beyond their powers nor in breach their fiduciary duties, the distinction between these categories can be subtle—indeed, it is invisible when all goes well. Nevertheless, the difference between powers and duties has a number of practical implications—most prominently in terms of the *legal effects* and *remedies* that attend the purported exercise of a legal power one does not have and a breach of duty, respectively.[181] The purported exercise of a legal power that one does not have (an act "ultra vires") is (by default, paradigmatically) *void*—a legal nullity, like trying to sell something you don't own or entering a contract that would bind someone else (both of which are things that no one has the legal power to do).[182] In contrast, the exercise of a power one has inconsistent with a fiduciary duty gives rise to an action for breach of fiduciary duty.[183]

This formal distinction has important practical differences. Void transactions paradigmatically have *no legal effect*, absent statutory or common law intervention designed to protect specified good faith purchasers, settle title, and protect reliance interests.[184] Breach of fiduciary duty triggers personal equitable liability on the fiduciary enforceable by and to the beneficiary—which opens up a range of remedies, including equitable rescission of the transaction, disgorgement of any profits, personal financial liability on the fiduciary to the tune of compensatory, and possibly even

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[181] For a thorough discussion of this distinction in the related context of claims that a bankruptcy trustee's behavior was beyond their powers and breached a fiduciary duty, *see, e.g.*, IN RE CRISTENSEN, 598 B.R. 658, 665 (Banrkr. D. Utah 2019).

[182] *See, e.g.*, Defense Against a Prima Facie Case § 12:3 ("Acts, contracts, and other transactions by a corporation that are beyond its express or implied powers or are prohibited by law or by its certificate of incorporation have generally been held to be ultra vires."); 21A N.C. Index 4th Municipal Corps. § 199 ("If a contract is 'ultra vires,' it is wholly void . . . .").

[183] *See, e.g.*, Ray J. Koenig III, *Proactive Measures and Key Concerns for the Trust and Probate Attorney*, ASTAPORE 1, 2 (2010) ("A trustee may be sued for breach of fiduciary duty for, *inter alia*, failing to invest trust assets prudently, not looking out for the best interests of all the beneficiaries, taking money from the trust, or failing to account to trust beneficiaries."); *see also, e.g.*, IN RE SIGNATURE APPAREL GROUP, LLC, 577 V.R. 54, 109 (Bankr. S.D.N.Y. 2017) (noting that courts traditional enjoy "broad latitude to exercise [their] equitable powers to craft a remedy").

[184] *See, e.g.*, 1 Williston on Contracts § 1:20 (4th ed.) ("Void promises are not legally binding, have no legal effect, and, therefore, are not contracts."); Tyler B. Lindley, *Delegated Contract Formation*, 59 GA. L. REV. 901, 906 (2025) ("Traditionally, void contracts are of no effect, a legally nullity; they cannot be ratified and they cannot be enforced."); *see also* Black's Law Dictionary 1568 (7th ed., 1990) (defining "void" as "of no legal effect; null"); PENNSYLVANIA R.R. V. ST. LOUIS R.R., 118 U.S. 317 (1886) ("The contract itself is void, and nothing which has been done under it, nor the action of the court, can infuse any vitality into it.").

punitive damages, and more.[185] (Part of what's going on here, it's worth noting, has to do with the historical separation of law and equity—an act *ultra vires* has no *legal* effect; breaches of fiduciary duty are legally effective transactions, for which one must turn to equity for a remedy.)[186]

As counterintuitive as it may sound, then, from a beneficiary's perspective, if your fiduciary is going to act inappropriately, there are reasons to prefer they breach a fiduciary duty than purport to exercise a legal power they don't have.[187] The latter ordinarily entitles you to no remedies at all (because nothing, legally, happened),[188] while the former opens up a *broad, flexible* suite of equitable remedies, tailored to any harm you suffered, any benefit the fiduciary obtained for themselves, and crafted by the court to account for deterrence.[189] Similarly, from the fiduciary's perspective, the

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[185] *See, e.g.*, Meredith J. Duncan, *Legal Malpractice by Any Other Name: Why A Breach of Fiduciary Duty Claim Does Not Smell as Sweet*, 34 WAKE FOREST L. REV. 1137, 1148, 1156 (1999) (noting that "fiduciary law originated in equity" and today provides "quite ample" remedies, including "actual damages suffered, if any, [and] any profit realized by the fiduciary through acts inconsistent with the fiduciary's obligation of fidelity"); ICD PUBLICATIONS, INC. V. GITTLIZ, 24 N.E. 3d 898, 915 (Ill. App. 2014) ("Punitive damages are available as a matter of law for a breach of fiduciary duty." (quotations and alterations omitted)); *see also* Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRIES L. 355, 364 (2009) ("As part of the trustee's accountability to the beneficiary, the trustee may owe personal duties of restitution and compensation to maintain due administration of the trust.").

[186] *See, e.g.*, Getzler, *"As If," supra* note 172, at 985 ("English law classically spoke of disabilities and limits to power, and by the time of Lord Mansfield had already invented a plethora of tests for the proper exercise of powers that preserved the validity of such actions at law, but that rendered transactions subject to avoidance in equity at the suit of the beneficiary.").

[187] *See, e.g.*, *id.* at 978 (noting that the purpose of fiduciary remedies is to make it "as if" the fiduciary had performed properly).

[188] If a transaction *does* go through notwithstanding a lack of legal power, however, the beneficiary *might* have a remedy. *See, e.g.*, WISCONSIN REAL ESTATE INVESTMENT TRUST V. WEINSTEIN, 712 F. 2d 1095 (7th Cir. 1983) (allowing recovery by a beneficiary against a trustee who paid money out of the trust ultra vires); Restatement (Third) of Trusts § 106 (noting that trustees are personally liable to beneficiaries *both* for acting beyond their powers and breaching fiduciary duties); *but see* IN RE WEISS, 111 F.3d 1159 (4th Cir. 1997) (rejecting claim that trustee acted beyond their powers, because they *had* the relevant powers, as would typically be the case under contemporary trust law).

[189] *See, e.g.*, TULLY V. MCLEAN, 948 N.E. 2d 714, 738 (Ill. App. 2011) (noting that "[i]t lies within the equitable discretion of the trial court to determine the appropriate remedy for breach of a fiduciary duty"); WEINBERGER V. UOP, INC., 457 A.2d 701, 714 (Del. 1983) (noting that in breach of fiduciary duty cases "the Chancellor's powers are complete to fashion any form of equitable and monetary relief as may be appropriate, including rescissory damages"); EAVES V. PENN, 587 F.2d 453, 463 (10th Cir. 1978) (noting that trust law "provides for broad and flexible equitable remedies in cases involving breaches of fiduciary duty"); *see also* Joshua Getzler, *Legislative incursions into modern trusts doctrine in England: The Trustee Act 2000 and the Contracts (Rights of Third Parties) Act 1999*, 2

law's deterrence by way of fiduciary duties is (again, maybe counterintuitively) *stronger* than its disincentive to acts *ultra vires*—the law doesn't take acting beyond your legal powers to be a wrong at all (it's just a nullity—though people acting beyond their legal powers often commit another legal wrong, like fraud, usually of a third party, in so doing); breach of fiduciary duty is often conceptualized as a *tort* (and, where it isn't, a distinctive non-tortious legal wrong).[190]

If, for instance, having only been authorized to sell your car, I purport to sell your house, nothing from your perspective happens legally—you still own the house, and always have.[191] To be sure, the people to whom I purported to sell the house may well have tortious or restitutionary causes of action against me—but *you* don't.[192] Similarly, they *might* end up with the house, in the end, under the jurisdiction's recording act or adverse possession rules—but only if they are good faith purchasers or you have been paying absolutely no attention.[193] In contrast, if I transfer your car, having been

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GLOBAL JURIST TOPICS 1, 3 (2002) (noting "a movement in recent English case-law to redescribe fiduciary doctrine as a branch of tort").

[190] *See, e.g.*, Daniel B. Kelly, *On Disgorgement and Punitive Damages in Trust Law*, 107 IOWA L. REV. 2079, 2111–2122 (2022) (defending capacious remedies for breach of fiduciary duty on deterrence grounds); J. Travis Laster & Michelle D. Morris, *Breaches of Fiduciary Duty and the Delaware Uniform Contribution Act*, 11 DEL. L. REV. 71, 71 (2010) ("We conclude that a breach of a fiduciary duty is in fact a tort, although a unique species historically called an 'equitable tort.'"); 37 Am. Jur. 2d Fraud & Deceit § 36 ("Breach of fiduciary duty is a tort that arises from the violation of a relationship of trust and confidence." (and collecting cases)); *see also* Joshua Getzler, *Am I my beneficiary's keeper? Fusion and loss-based fiduciary remedies*, in SIMON DEGELING & JAMES EDELMAN, IN EQUITY IN COMMERCIAL LAW (2005) (manuscript at 36) ("[I]t is not clear that repression of egregious cases of fiduciary breach by exemplary damages, rather than achieving constant deterrent pressure through stringent causal rules in each and every case, would yield a superior method of enforcing fiduciary duties.").

[191] *See, e.g.*, Joshua Getzler, *Duty of Care*, in PETER BIRKS & ARIANNA PRETTO-SAKMANN, EDS., BREACH OF TRUST 41, 53 (2002) ("[T]he exceeding of dispositive powers was a 'fraud on the powers,' and was 'corrupt and void' for ultra vires, as a matter of strict liability, however careful or beneficent the donee of the power had been in its exercise."); Henry E. Smith, *On the Economy of Concepts in Property*, 160 U. PA. L. REV. 2097, 2121 (2012) (describing the principle that one cannot give what one doesn't own as the "baseline" notwithstanding policy-driven modification to protect reliance interests and good faith purchasers).

[192] *See, e.g.*, Restatement (Third) of Torts § 9 ("One who fraudulently makes a material misrepresentation of fact, opinion, intention, or law, for the purpose of inducing another to act or refrain from acting, is subject to liability for economic loss caused by the other's justifiable reliance on the misrepresentation."); Restatement (Third) of Restitution and Unjust Enrichment § 5(1) ("A transfer induced by invalidating mistake is subject to rescission and restation. The transferee is liable in restitution as necessary to avoid unjust enrichment."); *see also* LEONARD V. VROOMAN, 383 F.2d 556, 560 (9th Cir. 1967) (holding that a bankruptcy trustee owes damages to third parties harmed by their *ultra vires* acts).

[193] *See, e.g.*, John H. Scheid, *Down Labyrinthine Ways: A Recording Acts Guide for*

authorized to do so, to myself for free, *you* have a cause of action against me; I have *wronged* you—the court will surely set aside the transfer if it can, and, regardless, it will hold me liable to you to disgorge my profits, for any damages I've caused you, and punitive damages may well be on the table.[194]

With this distinction between legal powers and fiduciary duties in mind, we can think of different fiduciary relationships as distinctively constituted by different bundles of legal powers and duties. For instance, trusts and agency relationships respectively involve different allocations of legal powers. Under contemporary law, trustees have, by default, the full suite of property management powers that owners do.[195] In contrast, agents have only those powers specifically granted by a principal.[196] And trustees' duty of loyalty requires them to exercise their powers in the sole interests of their beneficiaries;[197] while agents have the additional duty to act as the principal would have wanted.[198]

The law designs distinct fiduciary relationships as particular bundles of powers and duties for normative reasons. Indeed, the law can and has *changed* the way it thinks about the powers and duties of particular relationships to better accomplish their normative purposes.[199] The history of both trust and corporate law is particularly instructive here, as both are analogous to guardianship in facing similar challenges of balancing power against risks of abuse. Just as guardians exercise legal powers over the person and property of the individual subject to the guardianship, trustees exercise power over property beneficially owned by the beneficiary, and corporate

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First Year Law Students, 80 U. DET. MERCY L. REV. 91, 91–82 (2002) (summarizing the design of recording acts to protect good faith purchasers of real property); *see also* Robyn L. Meadows, *A Potential Pitfall for the Unsuspecting Purchaser of Repossessed Collateral: The Overlooked Interaction Between Sections 9-504(4) and 2-312(2) of the Uniform Commercial Code*, 44 AM. U. L. REV. 167, 182–83 (1994) ("A possessor who has only void title to a good has absolutely no power to transfer any rights to the good, even to a good faith purchaser.").

[194] *See supra* note 185.

[195] Restatement (Third) of Trusts § 85.

[196] *See, e.g.*, Restatement (Third) of Agency § 3.01 ("Actual authority . . . is created by a principal's manifestation to an agent that, as reasonably understood by the agent, expresses the principal's assent that the agent take action on the principal's behalf.").

[197] *See, e.g.*, Restatement (Third) of Trusts § 78 ("[T]he trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee's fiduciary duties and personal interests.").

[198] *See, e.g.*, Paul B. Miller & Andrew S. Gold, *Fiduciary Governance*, 2 WM. & MARY L. REV. 513, 559 (2015) (describing agents' fiduciary duty of obedience).

[199] *See generally, e.g.*, MATTHEW CONAGLEN, FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES (2010) (sketching historical changes in the way that the law conceptualizes different fiduciary relationships to better accomplish their goals); Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039 (2011) (same).

directors exercise powers over a business owned by shareholders.[200] In each of these contexts, the law has worried about the abusive exercise of legal powers—that guardians might act contrary to the interests of the person subject to the guardianship, or that trustees or directors might help themselves to other people's property.[201]

In the early days of the trust, "trust law protected beneficiaries by giving the trustee only limited powers."[202] Indeed, by default, trust law granted trustees *no* powers—trustees "had only those powers that the trust instrument expressly granted, which were typically few . . . ."[203] The idea, of course, was that by granting trustees limited powers, beneficiaries were at less risk of abuse.[204] And so too in corporate law—corporations were originally only understood to have the specifically defined legal powers granted in a charter specified by the government.[205] Compare to the impulse behind limited guardianship—worried about abuse, proponents want to strictly limit the legal powers available to guardians; hoping that, by limiting guardians' powers, they can do less damage to those subject to guardianships.[206]

The problem with relying on limited powers to prevent abuse is that it also prevents trustees and directors from doing things that are *good* for beneficiaries; that we might want them to be able to do.[207] For example, it is true that one way to ensure that trustees don't harm beneficiaries by selling their property for too little is not to give trustees the legal power to sell the

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[200] *See, e.g.*, Restatement (Third) of Trusts § 85 (outlining the powers of a trustee over the beneficiary's property).

[201] *See, e.g.*, Langbein, *supra* note 21, at 53 ("Because the trustee nominally owns the trust property, the trust relationship, by necessity, puts the beneficiaries of a trust at the peril of trustee misbehavior.").

[202] SITKOFF & DUKEMINIER, *supra* note 14, at 600.

[203] Langbein, *supra* note 21, at 53 (2004); *see also* Getzler, *Duty of Care*, *supra* note 191, at 43 ("The use was largely a passive form of custody; discretionary powers of disposition only develop in the early sixteenth century.").

[204] *See, e.g.*, Getzler, *Duty of Care*, *supra* note 191, at 44 (noting that for several centuries, the trust "remained a custodial device segregating the entrusted assets from creditors of the legal owners" in which "active duties were not fundamental to the basic function of the trust").

[205] *See, e.g.*, BAYERN, *supra* note 21, at 51–52 ("[T]he doctrine of *ultra vires* ('beyond its powers') could invalidate corporate actions that overstepped a corporation's original charter.").

[206] *See supra* Part II.A.

[207] *See, e.g.*, BAYERN, *supra* note 21, at 54; Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning* , in LIONEL SMITH, ED., THE WORLDS OF THE TRUST (2013) ("The problem with this disempowerment strategy is that in protecting the beneficiary from mis- or malfeasance by the trustee, the law also disabled the trustee from undertaking transactions useful for the beneficiary."); Getzler, *Duty of Care*, *supra* note 191, at 70 ("With these restrictive investment norms in place, trust capital tended to underperform compared to the security market throughout the nineteenth and most of the twentieth centuries.").

property at all.[208] But, as we know today, it is generally thought to be in the best interests of beneficiaries for trustees to diversify, which requires their being able to sell it.[209] Likewise in corporate law—we might *want* the same corporation that built a bridge to be able to open a store nearby.[210]

For these reasons, the powers and duties of the fiduciary relationships of trustees and corporations have undergone a dramatic shift. Today, trustees are (by default) granted wide-ranging, ownership-equivalent powers over the property held in trust—ensuring that they have the power to transact; diversifying and investing to promote returns to beneficiaries.[211] And corporations have similar default powers to conduct "any lawful business."[212] But, of course, concerns about abuse by fiduciaries have not gone away. To police those worries while empowering trustees and corporations to transact in ways thought to best promote the interests of beneficiaries, a robust web of fiduciary duties governing trustees' exercise of their powers has grown up.[213] That is, while recognizing that there are good reasons in both trust and corporate law to grant fiduciaries a broad suite of *powers*, the law has transitioned to policing abuse by solidifying robust *duties* on their exercise.[214]

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[208] *See, e.g.*, Langbein, *supra* note 21, at 54 (noting that in the early days of trusts, trustees rarely had the power to transact with respect to the property).

[209] *See, e.g.*, Max M. Schanzenbach & Robert H. Sitkoff, *The Prudent Investor Rule and Market Risk: An Empirical Analysis*, 14 J. EMP. LEGAL STUD. 129 (2017) (discussing the consensus that trustees ought to be able to diversify trust corpora); *see also* Langbein, *supra* note 21, at 54 ("[W]hen the portfolio of financial assets displaced family land as the characteristic form of family wealth held in trust, disempowerment because quite counterproductive."); *see also* Getzler, *Legislative incursions*, *supra* note 189, at 5 ("The classical equity canons governing trust investment came to look increasingly archaic as the nineteenth-century capital markets became more stable and sophisticated.").

[210] *See, e.g.*, BAYERN, *supra* note 21, at 51 (observing that under traditional law "a bridge-building corporation could not open a general retail store at the foot of the bridge"); *see also* Fletcher Cyclopedia of the Law of Corporations Chap. 40 (2025) (surveying this history in corporate law).

[211] *See, e.g.*, Restatement (Third) of Trusts § 85 (recognizing that, by default, trustees have "all of the powers over trust property that a legally competent, unmarried individual has with respect to individually owned property").

[212] BAYERN, *supra* note 21, at 52.

[213] *See, e.g.*, Langbein, *supra* note 21, at 55 ("To prevent abuse, trustees were subject to duties, protective in nature, which were elaborated into a new body of law that we now recognize as trust fiduciary law."); David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011 (2011) (tracing the history of fiduciary duties in trust and trust-like relationships).

[214] *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 14, at 600 ("In modern practice, in which trusts are commonly used to facilitate professional management of property on behalf of be beneficiaries, the trustee is given broad *powers* of administration, but the exercise of those powers is subject to the trustee's *fiduciary duties*."); Sitkoff, *Trust Law*, *supra* note 207, at ("As trusts have come increasingly to be funded with liquid financial assets that require alert management in the face of swiftly changing financial markets, modern trust law

Tied up with this shift, as already alluded to, is the observation that it might just be *better* to police fiduciary misconduct with duties rather than limitations on powers—duties might offer more robust remedies to beneficiaries and are stronger deterrents on fiduciaries.[215] As has been frequently observed, limitations on powers are an "*ex ante*" strategy for policing misconduct, while duties remedy misconduct "*ex post*."[216] But from the perspective of a fiduciary acting in bad faith, the *ex ante* strategy is hardly a deterrent at all (especially so long as they can find a third party willing to play along),[217] while *ex post* remedies ensuring that they cannot profit from their breach and might even be *punished* deter misconduct from happening in the first place if anything will.[218] And for fiduciaries acting in *good* faith, *ex ante* limitations on their power are simply handicaps on behaving in ways that in fact promote the interests of their beneficiary, while duties on the exercise of those powers can serve as a guide.[219]

In light of the evolution in these other areas of fiduciary law, then, you might read the proposal that follows as suggesting a comparable shift in guardianship law. As in the early days of trust and corporate law, concerns

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has come to give the trustee broad *powers* to undertake any type of transaction, subject to the trustee's fiduciary *duties*.").

[215] *See supra* note 185; *see also* Joshua G. Getzler, *Equitable Compensation and the Regulation of Fiduciary Relationships*, in PETER BIRKS & FRANCIS ROSE, EDS., RESTITUTION AND EQUITY VOLUME 1: RESULTING TRUSTS AND EQUITABLE COMPENSATION (2000) (manuscript at 19) (noting that "the better approach" might be "to enquire into which circumstances relationships involving the assumption of responsibility for another's affairs should attract an overlay of fiduciary obligations, and hence regulatory duties of equitable account and compensation in excess of common-law remedies").

[216] *See, e.g.*, Getzler, *"As If"*, *supra* note 172, at 985 ("It has been said that fiduciary law has been caught between the strategies of disempowering the fiduciary by setting limits to capacity, and of applying *ex post* requirements that the fiduciary should use his or her wide powers to seek the best interests . . . .").

[217] The idea, of course, is that fiduciary's acting in bad faith won't be able to "transact" with third parties in ways that they lack the legal power to do—but it is really no deterrent to them trying, and if they *can* find a third party willing to "transact" with them (perhaps also acting in bad faith) the law may have little to do by way of remedy. *See supra* note 191.

[218] *See supra* note 185; Sitkoff, *Economic Structure*, *supra* note 199, at 1048 ("In the event of the fiduciary's breach of duty, the principal is entitled to an election among remedies that include compensatory damages to offset any losses or to makeup any gains . . . or to disgorgement by the fiduciary of any profit accru67 [by] the breach."); D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1493 (2002) ("Disgorgement is measured by the amount of the fiduciary's gain rather than by the amount of the beneficiary's loss, implying that the primary goal of providing the remedy is deterrence."); Getzler, *Equitable Compensation*, *supra* note 215, (manuscript at 21) ("What is common to all these areas is the paramountcy of deterrence in the imposition of duty.").

[219] *See supra* note 207; *see also* Getzler, *Duty of Care*, *supra* note 191, at 63 ("The rule that trustees may not take any appreciable risks with trust monies was based on a classical Chancery policy of prophylaxis . . . .").

about guardianship abuse have historically led to a push to limit the legal *powers* of guardians.[220] But, just like disempowered trustees and corporations, limited guardianships have not solved the problem—in dementia cases, to ensure that guardians have the legal powers they need to assist the person subject to guardianship as their abilities change, courts would have to constantly reassess the scope of the guardianship.[221] And so they don't, granting guardians the full suite of legal powers they might one day need at the outset—*without* the deterrent and conduct-guiding functions of a clear set of fiduciary duties.[222]

The suggestion of this Article is that, in fact, granting guardians a full suite of legal powers at the outset might make sense—after all, in dementia cases, the guardian *will*, indeed, need more and more powers. But the exercise of great legal powers must be constrained by meaningful legal duties. And, as in trust and corporate law, it is to the *duties* of guardians as fiduciaries that reform efforts might turn.[223]

B. A Dynamic Model of Guardianship

This Article's proposal is comprised of three interconnected legal innovations. First, all guardianships (in cases involving degenerative cognitive conditions) would grant guardians plenary powers at the outset. Second, guardians would be subject to a new general fiduciary duty to *only use their powers when the person subject to guardianship cannot*. And, finally, the grant of guardianship would, on this model, have no independent effect on the legal capacity of the person subject to guardianship, who would retain all legal powers they can exercise under the general doctrine of capacity. This Section walks through each proposed change in turn.

1. Plenary Powers

The first legal change of the proposal is that all guardianships in cases involving progressive cognitive disorders would be plenary from the outset.

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[220] *See supra* Part II.A.

[221] *See supra* Part II.A.

[222] *See supra* Part I.D.

[223] For what it's worth, there has been growing interest generally in relying on more robust fiduciary duties to address challenges in elder law. *See, e.g.*, Alexander A. Boni-Saenz, *Sexual Advance Directives*, 68 ALA. L. REV. 1, 42–46 (2016) (arguing that fiduciary duties can help ensure older adults retain sexual capacity while preventing abuse); *see also* Kohn, *Fiduciary Principles*, *supra* note 60, at 249 (discussing the importance of fiduciary duties in preventing abuse by guardians and agents under durable powers of attorney); Chen, *supra* note 6, at 15 (arguing for a conception of the fiduciary duty of loyalty in guardianship compatible with pursuing what the person subject to guardianship would have wanted).

(To be sure, limited guardianship should continue to be prioritized in cases involving more static conditions—this proposal hardly calls for the *abolition* of limited guardianship).[224] That is, upon petition, when a court is convinced that an individual is presently incapacitated under state law, to any extent sufficient to impose a limited guardianship, *and* has a condition that will cause their incapacity to progress, the court would grant its chosen guardian the full suite of legal powers traditionally reserved for plenary guardianships. This aspect of the proposal should not be hard for courts to do—it is apparently what they've been doing anyway.[225]

2. Exercised Only as When the Person Cannot Themselves

Of course, the exercise of guardianship powers would be, on this proposal, governed by all the fiduciary duties it currently is—including the directive to use powers as the person subject to guardianship would have and avoid conflicts of interests.[226] But in addition—the second critical legal reform—guardians would be subject to a new, general fiduciary duty to *only exercise legal powers on behalf of the individual when they cannot do so themselves*. Guardians who use their powers when the person subject to guardianship could have done so would be liable for breach of fiduciary duty—just as they currently are for deciding in some way other than what the person under their care would have wanted, or mismanaging their assets; and just as trustees are liable for selling trust property to related parties.[227]

On this account, then, a guardian's exercise of legal powers is only consistent with their duties where the person subject to guardianship cannot do so themselves because they lack the cognitive capacity to make the decision in an enforceable way. From this perspective, one notable distinction between this proposal and traditional guardianship law is that it relies on *guardians* rather than *courts* to make first cut assessments of the person's legal capacity.[228] To proponents of limited guardianships, who presumably want to see more capacity litigation in courts, this may seem a limitation of the proposal.[229]

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[224] *See supra* note 120 & accompanying text.

[225] *See supra* 115–116 & accompanying text.

[226] *See supra* Part I.D; *see also* Boxx & Hammond, *supra* note 71, at 1215 (noting that the Uniform Guardianship Act "requires that a guardian use substituted judgment").

[227] *See supra* Part I.D; *see also* Dessin, *supra* note 45, at 283 ("If a guardian misappropriates a ward's assets, each state allows the ward to sue the guardian for breach of fiduciary duty.").

[228] *See, e.g.*, Frolik, *Limited Guardianship*, *supra* note 10, at 735 (noting that "[g]uardianship comes within the special province of judges").

[229] *See, e.g.*, *id.* at 743 ("Inconclusive, halfway measures or orders that need clarification or amendment can mean additional hearings at a cost of the judge's time and at added

In contrast, I think delegating to guardians first-cut assessments of the person's ability to make a particular decision is a virtue rather than a vice. For one thing, the relevant legal standard does not seem altogether difficult for laypeople to apply, perhaps with a modicum of training—the question is (roughly) whether the person subject to guardianship has the ability to understand the nature and consequences of the decision under consideration.[230] This is hardly "lives in being plus 21 years;" and indeed the capacity test is *meant* to be a deferentially applied low bar.[231] And after all, it's not altogether clear that *courts* applying the legal standard in this context aren't doing much more than following their own intuitions about what it means to understand the nature and consequences of a particular decision.[232]

Indeed, all else equal, we might think guardians are generally *better* situated than courts to make assessments of whether a particular person is capable of making a particular decision. Most guardians are family or close friends of the person subject to the guardianship—they have known this person for, quite possibly, their whole life, interact with them regularly, and may be *best* positioned of anyone to tell whether the person is currently acting as themselves, or something has gone very wrong.[233] In contrast, courts apparently tend to defer to testimony from medical professionals in capacity cases—but it is unclear whether medical professionals who do not know an individual really have access to the kind of information that people think matters in this context.[234] And there is, indeed, a great deal of evidence that

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expense to the estate of the ward."); Neha Patel, Note, *The Homeless Mentally Ill and Guardianship: An Assessment of Current Issues in Guardianship and Possible Application to Homeless Mentally Ill Persons*, 11 GEO. J. POVERTY L. & POL'Y 495, 505 (2004) ("[L]imited guardianships require extra time and money in order to adequately determine the breadth of the guardian's responsibilities.").

[230] *See supra* note 32; *see also* Toomey, *Narrative Capacity*, *supra* note 30, at 1085–86 (noting that the capacity doctrine "is not hard to apply in extreme cases—where an individual is either plainly healthy or cognitively far gone").

[231] *See, e.g.*, Yochai Benkler, *Siren Songs and Amish Children: Autonomy, Information, and Law*, 76 N.Y.U. L. REV. 23, 36 (2001) ("[D]etermination of legal competence is based on the presence of minimal capacity for self-direction."); IN RE WRIGHT'S ESTATE, 60 P.2d 434 (Cal. 1936) ("Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act.").

[232] *See, e.g.*, Toomey, *Narrative Capacity*, *supra* note 30, at 1085 (noting the extent to which the outcomes of capacity cases appear to turn on judicial intuitions); Bradley E.S. Fogel, *The Completely Insane Law of Partial Insanity: The Impact of Monomania on Testamentary Capacity*, 42 REAL PROP. PROB. & TR. J. 67, 111 (2007) (discussing "arbitrary results that are based more on fact-finder bias than on well-defined rules of law" in capacity cases).

[233] *See, e.g.*, Toomey, *Substituted Judgment*, *supra* note 41, at 1333 (noting the extent to which loved ones can know what a person with dementia would ordinarily want to do).

[234] *See, e.g.*, Toomey, *Narrative Capacity*, *supra* note 30, at 1096 ("[T]oday, courts

in the absence of better evidence courts tend to impose, through the capacity doctrine, majoritarian preferences on people who do not share them.[235]

And finally, under this proposal, it is worth emphasizing that the guardian's judgment *is* a first cut—if the use of power is challenged, courts will litigate the necessity of the guardian's intervention.[236] From this perspective, the proposal's delegation to a fiduciary to apply a legal standard in the first instance, subject to court review, hardly appears idiosyncratic—this is something fiduciary law does all time. Fiduciaries in fact make first cut judgments of *capacity* all the time—where an instrument triggers certain powers of a trustee or agent under a power of attorney with reference the incapacity of the principal or beneficiary the fiduciary must make their own determination of whether the trigger is met.[237] But more broadly *all* fiduciary law has this structure—the law delegates to trustees the privilege of making first cut determinations of what is in the beneficiaries best interests (the legal standard), reviewed by courts under a deferential standard of review; ditto for agents.[238]

In short, perhaps the most essential legal reform here is to subject all guardian decision-making to an overwhelming duty to use their powers only when the person subject to guardianship cannot—making a *guardian's* exercise of a legal power that the person subject to it *in fact can exercise* a breach of fiduciary duty.

3. Legal Powers of the Person Subject to Guardianship

The final legal change proposed here is that guardianship, however

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rarely resolve capacity challenges with reference to facts *other than* medical testimony.").

[235] *See, e.g.*, Annick Persinger, *Still Pioneers: Special Social and Economic Hardships for Elderly Gays and Lesbians*, 21 HASTINGS WOMEN'S L.J. 137, 148–55 (2010) (summarizing a long history of courts gay testators leaving property to same-sex partners to have lacked testamentary capacity); IN RE STRITTMATER'S ESTATE, 53 A.2d 205 (N.J. 1947) (setting aside on "insane delusion" grounds testator's bequest to the National Woman's Party on the theory that she had been suffering from a "morbid aversion to men" and "feminism to a neurotic extreme").

[236] And depending on how much we end up trusting the comparative judgments of guardians and courts on this question, the court could have a more or less active *sua sponte* supervisory role, and the guardian's judgment entitled to a stronger or weaker presumption of validity.

[237] To be sure, in so doing, the trustee or agent is technically making a first cut interpretation of the *language of the instrument*. But the instrument might well incorporate the legal standard. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 14, at 513 (noting that it is fairly common for a durable power of attorney to be triggered by the principal's incapacity, and that the instrument can set the terms of incapacity to be assessed by the attorney-in-fact).

[238] *See, e.g.*, LIONEL SMITH, THE LAW OF LOYALTY 88 (2023) ("These are effectively jurisdictional principles: unless the administrator has done something unlawful, the decision is theirs, not the court's.").

plenary, *would not* strip the person subject to guardianship of legal capacity—indeed, the guardianship itself would have no effect on the legal capacity of the person subject to it. Like anyone else, that individual would retain all legal powers they, as a contemporaneous factual matter, have the legal capacity to exercise, and not have the ability to exercise those that they don't, just as before the guardianship was imposed.[239]

This kind of guardianship, then, creates *concurrent* legal powers in the guardian, rather than *transferring* powers from the person subject to it.[240] During the guardianship, both the guardian and the person subject to it formally have concurrent legal powers to transact in the name of the person subject to the guardianship. This notion of concurrent legal powers is not at all legally unprecedented. Indeed, it happens in every agency relationship—when I authorize you to go to the auction and buy cattle on my behalf, I do not *lose* the legal power to buy my own cattle; we both have it.[241]

Moreover, while this proposal contemplates concurrent legal *powers*, only one person can *properly* exercise those powers consistent with their *duties* at a given time. This is because while the person subject to guardianship is capable of exercising a power themselves, the guardian is under a duty not to.[242] The guardian can only exercise these powers consistent with their duties when the person subject to the guardianship *can't* do it themselves.[243] In other words, while the person has the legal capacity to make a particular decision, the guardian is under a duty not to; when the guardian can exercise the power, by hypothesis the person *cannot*—the powers are concurrent but the *duties are not*; only one person can properly exercise the legal power consistent with their duties at a given time.

The benefit of the concurrent powers, of course, is that, when we *do* need someone to decide on behalf of the person, because they cannot do so themselves, there is no need for the guardian to go back to court—they already have the relevant powers, they had just been under a duty to forego using them until now. This is what makes the proposed model of guardianship *dynamic*—the permissible scope of the guardian's *duties* track the actual cognitive limitations of the person subject to guardianship in real time; those

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[239] *See supra* Part I.A.

[240] *See supra* Part III.B.1; *see also* Diller, *supra* note 80, at 496 (2016) ("Under Article 12 [of the CRPD], governments may not deprive individuals of their 'legal capacity,' or right to make decisions and have those decisions recognized, on the grounds of disability or impaired decision-making skills.").

[241] *See, e.g.*, ADOLF REINACH, THE APRIORI FOUNDATIONS OF THE CIVIL LAW 86 (tr. John F. Crosby, 1983) (noting that the act granting agency powers "is of course not a transferring—the one who performs this act does not forfeit his power in the least—but rather [it is] a creative granting").

[242] *See supra* Part III.B.2.

[243] *See supra* Part III.B.2.

duties are constituted by whether the individual subject to guardianship has the cognitive ability to make a particular decision at a particular time. The guardians' powers are not tethered to the person's contemporaneous cognitive functioning—but having a full suite of powers from the outset ensures that guardians have the legal powers they need when exercising them *is* consistent with their duties; they always had them.

And because imposing the guardianship, on this scheme, itself has no effect on the legal capacity of the person subject to guardianship, they retain capacity and standing to sue their guardian for breach of fiduciary duty. This arguably would not itself be a legal change; rather, a clarification—Nina Kohn and Catheryn Koss have argued that people subject to guardianship have always had capacity and standing to sue their guardian for abuse.[244] Indeed, many states specifically provide that individuals subject to guardianship maintain capacity to retain an attorney and appear in court for the specific purpose of challenging the guardianship or the guardian's conduct.[245] Surely, regardless of one's views of the merits of the rest of this proposal, clearly ensuring that the law recognizes the capacity and standing of people subject to guardianship to sue their guardians for fiduciary breach is worthwhile.[246]

On the proposal offered here, then, there may well be a long period of time during which the individual subject to guardianship is broadly capacitated and capable of policing the guardian's behavior—a period of concurrent powers during which the guardian is under a duty to only exercise those powers that the person cannot themselves. Oversight by the person themselves during this time might help deter and remediate abuse.[247] Those

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[244] *See, e.g.*, Kohn & Koss, *supra* note 5, at 581 (arguing that that law necessarily permits people subject to guardianship to retain attorneys for the purpose of challenging the guardianship).

[245] *See, e.g.*, Wis. Stat. Ann. § 54.25(2)(b)(2) ("Notwithstanding any finding of incompetence for the ward, the ward may retain and contract for the payment of reasonable fees to an attorney . . . in connection with proceedings involving review of the terms and conditions of the guardianship, including the question of incompetence."); IN RE GUARDIANSHIP OF CARPENTER, 66 N.E. 3d 272, 275 (Ohio 2016) ("The very language of the statute implies that a ward may have an independent attorney to challenge the guardianship."); Neb. Rev. Stat. Ann. § 30-2620(b) (providing that someone subject to guardianship "may retain an attorney for the sole purpose of challenging the guardianship, the terms of the guardianship, or the actions of the guardians on behalf of the ward").

[246] *See, e.g.*, 3 Advising the Elderly Client § 34:47 ("Empirically, the issue of restoration tends to arise when a person other than the guardian, including the ward, challenges the guardianship in a collateral proceeding.").

[247] *See, e.g.*, James P. Seguin & Buckley King, *Overcoming New and Old Challenges in the Estate Planning Process*, ASTAPORE (July 2011) (describing the way in which beneficiaries can enforce trustees' fiduciary duties by private lawsuit); Boxx, *supra* note 23, at 44 ("[T]he trustee is required to account to the beneficiaries who in turn can object to the trustee's performance of his duties by bringing a suit in equity.").

worried about frivolous and harassing suits by people subject to guardianship (I'm not sure anyone is) might do well to notice that providing that guardianship itself has no effect on the legal capacity of the person is a largely self-limiting project—at a certain point the person will not be able to notice breach by the guardian and do anything about it.[248]

More serious a concern, of course, is the potential for abuse or breach of duty by the guardian *after* the person subject to guardianship is no longer able to monitor their behavior.[249] But—to be discussed more below—of course clarifying that persons subject to guardianship have legal capacity to sue their guardians for breach is not to say that is the *only* way the law ought to enforce guardians' duties—and the court, regardless, surely ought to play *some sort* of ongoing supervisory role along the lines discussed above, involving such techniques as accountings and periodic check-ins.[250] The point is simply that, at a minimum, ensuring that plenary guardianships do not have independent effect on the legal capacity of persons subject to guardianship, among other things, clarifies that they are able to monitor their guardians for abuse—at least another path to deterring it.

C. Dynamic Guardianship and Durable Powers of Attorney

In short, the proposal offered here—to reconceptualize guardianship in cases of cognitive decline as a legal relationship that grants plenary, concurrent powers to a guardian, subject to the duty to use those powers only when the person subject to guardianship cannot do so themselves. At first glance, this proposed legal relationship may look rather idiosyncratic—indeed, I am aware of no other *characterized* by a duty to use powers only when someone else cannot. From one perspective this is as it should be—every fiduciary relationship is characterized by its own bundle of powers and duties tailored to the normative situation in which it arises; that is what *makes* it a distinct legal relationship.[251] But from another perspective, the proposed relationship doesn't look so idiosyncratic after all—indeed, it looks a great deal like how durable powers of attorney work.[252]

Durable powers of attorney can be written to grant the agent legal powers immediately, or only upon the principal's incapacity.[253] Take the former case.

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[248] *See supra* Part I.A.

[249] *See infra* Part IV.A.

[250] *See infra* Part IV.A.

[251] *See supra* Part III.A.

[252] *See generally, e.g.*, Boxx, *supra* note 23, at 1 (surveying the law governing durable powers of attorney).

[253] *See, e.g.*, John C. Craft, *Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard*, 44 U. BALT. L. REV. 407, 407 (2015) (that durable powers of attorney can be drafted in either of these ways).

In that instance, upon execution, both principal and agent have concurrent legal powers—both have the legal power to make decisions on behalf of the principal.[254] And what has been created is a common law agency relationship, entailing the fiduciary duty to follow the principal's instructions.[255] So suppose that the instrument instructs the agent to only exercise the legal powers they've been granted when the principal cannot do so themselves. The agent would in this case have a duty to do so; a *fiduciary* duty to do so, enforceable by lawsuit.[256] This mechanism—established privately and consensually—mirrors in substance the proposal for guardianship sketched above. The agent would, from the execution of the agreement onward, have plenary legal powers, held concurrently with the principal; and the principal could enforce during that time any overreaching use of the powers as a breach of fiduciary duty.

The fact that the proposal I've sketched above with respect to guardianship can be (and maybe already is being) replicated in the law of durable powers of attorney has a number of benefits for the proposal. First, of course, it suggests its practical plausibility. If people are not currently drafting durable powers of attorney along these lines, they easily could—they would be enforceable, and courts would have to address questions of whether the agent breached their duty by acting when the principal could have themselves.[257] Forty years of experience with durable powers of attorney in widespread use has shown that—while abuse, of course, happens—these tools basically work and courts are at least apparently effective at policing their outer boundaries.[258]

Second, this insight helps harmonize the law governing decision-making for the incapacitated. Durable powers of attorney were (and are) explicitly developed to provide a private, cheap, consensual alternative to

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[254] *See supra* note 241. For what it is worth, this approach to drafting durable powers of attorney—to grant concurrent legal powers, effective immediately—appears to be standard best practice in the field of planning for incapacity. *See, e.g.*, SITKOFF & DUKEMINIER, *supra* note 14, at 513 ("A survey of estate planners conducted in connection with the drafting of the [Uniform Power of Attorney Act] found that a majority preferred standing powers."); UPC § 5B-109(a) (providing that, as a default rule, durable powers of attorney grant immediate, concurrent legal powers).

[255] *See, e.g.*, Boxx, *supra* note 23, at 20 ("An agent . . . has a duty to obey the instructions of the principal.").

[256] *See supra* note 158.

[257] *See, e.g.*, Boxx, *supra* note 23, at 50 ("Where the principal is competent, the attorney-in-fact can, except in extreme circumstances, follow the principal's direction, since the principal's desires are the defining fiduciary purpose in agencies.").

[258] *See, e.g.*, *id.* at 14; 12 (summarizing state level controversies and concerns about durable power of attorney abuse but observing that "[b]y 1984, all states and the District of Columbia had enacted durable power of attorney provision, and the document has now become a staple ingredient of estate plans").

guardianship.[259] We might expect that the default mechanism of guardianship should, from that perspective, emulate best practices that could be built into durable powers of attorney; and, similarly, that any well-motivated reforms we make to guardianship law should be replicable consensually and outside of the court system by durable power of attorney.[260] And that is exactly what we see on this proposal—a reform to guardianship that makes it look more like durable powers of attorney, and a way in which durable powers of attorney could be drafted to replicate that structure.

Finally, and more theoretically, the convergence here between agency and guardianship suggests that the proposal sketched above might complete what could be thought of as an "agency revolution" in guardianship law—a broad legal reconceptualization of guardianship from a sort of court-appointed trustee to a court-appointed durable power of attorney.[261] Traditional guardianship law was paternalistic—it asked guardians, more like trustees, to make their own judgment about the person's best interests in consultation with the court, not do what the person would have wanted.[262] In the past fifty years or so, the law has reconceptualized guardianship as more like agency—asking guardians to, in the first instance, do what the person subject to guardianship would have done.[263] By proposing that guardianship law borrow from agency notions of concurrent legal powers and the "principal's" standing to enforce duties related to their exercise, the proposal offered here continues this trend.[264]

And this might all be, normatively, as it should be. Serving as someone's agent is a way of treating them *as a person*—part of what it means to be a person is to be entitled to make your own decisions, and to treat another person *as* a person is to respect those decisions.[265] Agency is, from this

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[259] *See, e.g.*, Boni-Saenz, *Personal Delegations*, *supra* note 48, at 1237 (describing the durable power of attorney as the primary alternative to guardianship); Feder & Sitkoff, *supra* note 151, at 27–28 (describing durable powers of attorney as the most familiar alternative to the default plan for incapacity of guardianship).

[260] *Cf., e.g.*, SITKOFF & DUKEMINIER, *supra* note 14, at 81 (suggesting that best practices in wills practice ought to influence intestacy as a default scheme for those without a will).

[261] *See, e.g.*, Frolik, *Alter Ego*, *supra* note 13, at 83 (noting that "courts are now conflating the role of a guardian with that of an agent acting under a durable power of attorney").

[262] *See id.* at 85 ("The ultimate result was . . . a redefining of the proper role of a guardian—from being a representative of the court to being more akin to a judicially appointed agent of the ward.").

[263] *See id.* at 65 ("[T]he guardian is essentially the agent of the ward and perhaps even more closely bound to the preferences of the ward than an agent is to the principal.").

[264] *See supra* Part III.B.3.

[265] *See, e.g.*, Toomey, *Fiduciary Standards*, *supra* note 13, at 35 ("[T]o treat someone *as a person* is to follow the decisions they make for themselves"); Rebecca Morgan & Barbara Harty-Golder, *Constitutional Development of Judicial Criteria in Right-to-Die*

perspective, a relationship that you can't have with any entity other than a person.[266] Contrast all this with the paternalistic frame of traditional guardianship law—acting in someone's best interests as you understand them is precisely not treating them as a person, and it *is* a relationship you could have with an animal or perhaps even an inanimate object.[267] To the extent the law wants to treat individuals subject to guardianship as persons, then, conceptualizing guardianship as a sort of agency relationship (even if a fictional one, because, by hypothesis, the individual no longer has an *actual* preference for the agent to follow) is the way to do that.[268]

IV. IMPLICATIONS AND CHALLENGES

Drawing on the distinction between powers and duties in fiduciary law, the proposal offered here aspires to *better* balance meeting the needs of older adults with dementia with respect for their autonomy. But of course, like any proposal of law reform, it faces challenges of its own. This Part highlights two. First, any discussion of guardianship reform would be incomplete without considering the possibility of abuse—but the proposed structure is, in notable ways, at least less vulnerable to abuse than contemporary law. Second, by granting guardians concurrent powers and making guardianships look more like durable powers of attorney, the proposal raises questions about third-party reliance. This is a genuine challenge—but not one unique to the proposal, which the law has had to address in the durable power of attorney context.

A. Abuse

Abuse is, of course, a central concern in any effort at guardianship reform—it is, indeed, likely to be its impetus.[269] By granting guardians a plenary suite of legal powers from the beginning of the relationship, this

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Cases: From Brain Dead to Persistent Vegetative State, 23 WAKE FOREST L. REV. 721, 742 ("[Substituted judgment] is limited entirely by the individuality of the patient . . . ."); CARL WELLMAN, REAL RIGHTS 114 (1994) (noting that, in agency relationships, "the agent is representing the agency of the principal").

[266] *See, e.g.*, WELLMAN, *supra* note 265, at 117 (arguing that agency presumes the autonomy of the principal).

[267] *See, e.g.*, Toomey, *Fiduciary Standards*, *supra* note 13, at 38 (noting that the "best interests" standards can be "relatively straightforwardly adapted to accommodate beneficiaries who are not persons at all").

[268] *See, e.g.*, Toomey, *Substituted Judgment*, *supra* note 41, at 1292 (suggesting that there are good reasons for the law to adopt, as a legal fiction, the presumption that incapacitated individuals could return to their full personhood).

[269] *See supra* Part I.E.4.

proposal may seem, if anything, to exacerbate the risk of abuse—especially from the perspective of a longstanding push for more limited guardianships.[270] Of course, it is difficult in the abstract to assess the likelihood of abuse in different legal structures. But for at least three reasons, I'd suggest that the proposal is, a minimum, less likely to facilitate abuse than the law we currently have.

First, it is an essential part of the proposal—and a genuine distinction with contemporary practice—that the person subject to guardianship retains whatever general legal capacity they would have had anyway through the course of the guardianship, including the capacity to retain an attorney and standing to bring suit against the guardian for fiduciary breach.[271] This fact ensures that, notwithstanding the plenary grant of legal powers, the proposed structure looks very different from "plenary guardianship" as currently practiced—and, indeed, differs in a way that dissolves the means by which that structure is currently particularly vulnerable to abuse.

The problem with contemporary plenary guardianship, from the perspective of abuse, is not, indeed, that it grants the guardian plenary legal powers—people can do this through agency law whenever they'd like.[272] The problem is that plenary guardianship historically has *stripped* the person subject to guardianship of their legal powers.[273] Under traditional law, if the person subject to guardianship wants to, and (factually) *can*, exercise particular legal powers, they can't—they *must* exercise their powers through the guardian, which is what gives the guardian plenary powers *over* the person subject to guardianship. That simply does not happen on the proposal offered here. Because the person subject to guardianship retains all their legal powers, if they *can* use them, it remains their prerogative to do so—and, indeed, the guardian remains under a duty not to exercise the powers they have been granted so long as that is the case.[274]

Moreover, so long as the person subject to guardianship retains some cognitive functions, their ability to enforce the guardian's fiduciary duties by private lawsuit—and even their ability to *credibly threaten* to do so—offers an important, private way to enforce guardianship duties. On this proposal, if a guardian uses their powers in breach of their duty, when the person subject to guardianship could have themselves, they can bring suit.[275] And what's elegant about this is that the person subject to guardianship's physical ability

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[270] *See supra* Part II.A.

[271] *See supra* Part III.B.3.

[272] *See, e.g.*, Restatement (Third) of Agency § 2.02 (noting that agents have whatever scope of power principals give them).

[273] *See supra* Part I.C.

[274] *See supra* Part III.B.2.

[275] *See supra* Part III.B.3.

to enforce the guardian's duties roughly track the substance of the guardian's duties—that is, if the person subject to guardianship is physically capable of noticing the breach and bringing suit over it, the guardian's use of power was, likely, indeed a breach; and vice versa. And while, of course, no one wants guardians and persons subject to guardianship to be constantly suing one another, ensuring that they can credibly threaten to do so can go a long way to deterring abuse—at least, so presumes fiduciary law.[276]

Of course, ensuring at least nominal *legal* capacity to persons subject to guardianship does not preclude all potential for guardianship abuse—especially after the person has lost the *factual* ability to monitor the guardian's behavior. Which leads to the second point—nothing in this proposal suggests that guardians' duties *only* be enforced by private lawsuit by the person subject to guardianship—all of the ways in which courts currently monitor guardian behavior, from annual accountings, to guardian trainings, check-in hearings, and what have you, remain relevant.[277] And, indeed, nothing in the proposal precludes *increasing* court involvement in guardianship monitoring—oft-heard pleas to increase funding for courts to better police guardianship are entirely compatible with the account offered here.[278]

Moreover, the way in which this model makes guardianships look more like durable powers of attorney might suggest additional, novel ways in which states can police guardianship abuse. After all, durable powers of attorney are structurally amenable to abuse in many of the same ways guardianships are—an agent acting under a durable power of attorney may well have plenary legal powers, and might be serving a principal who lacks the physical capacity to monitor their behavior, all without the active court monitoring of traditional guardianship.[279] States have responded to concerns

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[276] *See, e.g.*, Byron F. Egan, *Fiduciary Duties of Corporate Directors and Officers in Texas*, 43 TEX. J. BUS. L. 45, 123 (2009) (noting the role that threats of suit play in encouraging compliance with directors' fiduciary duties); *see also* Geoffrey A. Mann, *Agency Costs and the Oversight of Charitable Organizations*, 1999 WIS. L. REV. 227, 253 (1999) (proposing entities that monitor and use the threat to sue to encourage compliance with fiduciary duties in the charitable trust context).

[277] *See supra* note 77–79 & accompanying text; *see also* Uniform Trust Code § 405 (noting that the expansion of standing to settlors to enforce the terms of charitable trusts "does not negate the right of the state attorney general or persons with special interests to enforce either the trust or their interests").

[278] *See, e.g.*, NAT'L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARDS ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 22 (2018) ("Courts lack adequate resources, technical infrastructure, and training to monitor guardianships effectively and to hold guardians accountable . . . ."); Thurston & Anetzberger, *supra* note 4, at 405 ("Another common call for preventing abuse by guardians is sufficiently funding the courts so that they could perform the necessary oversight functions.").

[279] *See, e.g.*, Boxx, *supra* note 23, at 38–39 (nothing that the "purpose of the duties" in

of abuse in this context—from (controversially) leaning on criminal law[280] to (the Uniform Act's response) granting broad standing to anyone interested in the welfare of the incapacitated adult to bring suit to enforce the agent's duties; we might export these ideas to guardianship.[281]

Finally, we should not underestimate the *expressive* benefits of the proposed reform. After all, many have observed that one of the biggest challenges of guardianship—perhaps a source of abuse—is lack of legal guidance about what guardians ought to be doing, how they should think about their role, and what their duties actually are.[282] One of the benefits of the proposed model, from this perspective, is its emphasis on the guardian's role as one circumscribed by *necessity* on behalf of the incapacitated individual. Guardians would be impressed with the notion that they have been granted great powers, but only to be used when the person subject to guardianship *cannot do so themselves*. This is not an epistemically difficult standard for a layperson to grasp.[283] And it is one that can play an important expressive role in ensuring that guardians understand the gravity of their position.

To be sure, of course, the possibility of abuse is ineliminable in the law of deciding for the incapacitated. But by ensuring that guardianship does not strip persons subject to guardianship of legal powers, remaining compatible with external monitoring by courts and third parties, and impressing on guardians the other-regarding nature of their role, abuse seems at least less likely under this proposal than traditional law.

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durable powers of attorney "is to superimpose virtue in place of the supervision of the role of the attorney-in-fact, in order to provide care for vulnerable persons").

[280] *See, e.g.*, Nina A. Kohn, *Elder (In)justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 1 (2012) ("Another common approach is to make abuse of a durable power of attorney, which is a common form of elder financial exploitation, a separate crime.").

[281] *See, e.g.*, Unif. Power of Att'y Act § 116 (Nat'l Conf. of Comm'rs on Unif. State L. 2006) (granting standing to enforce durable powers of attorney to any person with "sufficient interest").;

[282] *See, e.g.*, Kelsey L. Laabs, *The "Who" of Guardianship: A Comparative Analysis of Orders of Priority for Appointment of a Guardian for an Adult*, 19 NAELA J. 19, 20 (2023) (noting "demand for increased guidance to better support guardians in their roles"); Thurston & Anetzberger, *supra* note 4, at 416 ("Together with better training for the guardian and post-appointment monitoring, including a format for guardianship complaint handling and oversight, much abuse by guardians would be averted."); *see also* Daniel Leinung, *Reforming New York State's Guardianship System: It's Time for a Change (Again)*, 2 ALB. GOV'T L. REV. 677, 688 (2009) (arguing that many guardianship reform efforts "lack guidance about what monitoring is supposed to be looking for.").

[283] It is, after all, the organizing principle of popular super-hero Spiderman. *See, e.g.*, STAN LEE, AMAZING FANTASY #15 (1962).

B. Third Party Reliance

On the dynamic guardianship model sketched here, there will be a period of time during which a person and their guardian concurrently hold presently exercisable legal powers.[284] Moreover, whether the guardian's exercise of a particular power is appropriate (or may be subject to rescission and other fiduciary remedies) turns on an assessment of the transaction's necessity—which itself turns on nuanced judgments about the person subject to guardianship's cognitive state.[285] Third parties are not likely to have access to that information.

In dealing with guardians under this proposal, then, third parties might worry about getting caught in duplicative transactions—in which, say, a guardian insists to the bank that the person has lost capacity and the accounts must for some reason be drained, when the person shows up the next day and demands their money back.[286] And we might worry more broadly that, with this worry in mind, financial institutions and other third parties would simply refuse to let *either* the guardian or person subject to guardianship make transactions without the other present—inhibiting the value of guardianship as an efficient way to make decisions that need to be made on behalf of incapacitated individuals.[287]

This is a legitimate difficulty. But the critical point is that the dynamic guardianship model sketched above would hardly be the only place the law faces this problem—durable powers of attorney, indeed *all* agency relationships, raise similar concerns in third parties about liability for duplicative transactions.[288] So the good news is that this problem is not at all unique to guardianship, and presumably the dynamic guardianship model can rely on whatever works with respect to durable powers of attorney and other agency relationships.

The bad news is that the law has apparently some way to go in ensuring

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[284] *See supra* Part III.B.3.

[285] *See supra* Part III.B.2.

[286] And, indeed, financial institutions may be financially liable for duplicative transactions in cases where they inappropriately followed the instructions of a guardian. *See, e.g.*, IN RE GUARDIANSHIP OF THOMAS, 2008 Ohio 2409 (Ohio Ct. App. 2008) (holding financial institutional liable for accepting withdrawal from a guardianship account only supposed to be accessible by court order).

[287] *See, e.g.*, Daniel A. Wentworth, *Durable Powers of Attorney: Considering the Financial Institution's Perspective*, 17 PROB. & PROP. 37, 38 (2003) (discussing the problem of financial institutions refusing to accept transactions for fear of duplicative transactions and liability in the durable power of attorney context); Judy B. Shepura, *While You Were Aging*, 80 ALA. LAW. 338, 341 (2019) (noting that many financial institutions "have implemented and were already following their own internal safety measures" to avoid facilitating guardianship or durable power of attorney abuse before statutory intervention).

[288] *See supra* note 241.

third parties acknowledge legitimate exercises of powers under durable powers of attorney. Indeed, "banks and other financial institutions are notoriously resistant to directions from an agent under a power of attorney."[289] From this perspective, the law must settle some set of rules to ensure that *both* guardians and agents under durable power of attorneys (and other agents!) can transact efficiently and reliably with third parties, while minimizing and monitoring abuse.[290] The challenge, of course, is that these goals are in conflict—the more the law insists that financial institutions must immediately accept guardians' transactions, the more guardians can use them abusively; the more we put the risk of guardianship abuse on financial institutions, the less likely they will be to accept transactions by guardians, at least not without burdensome bureaucracy.[291]

But these are solvable problems—indeed, they are rather banal challenges of allocating and mitigating quantifiable risk. If we want to mandate financial institutions to accept guardians' transactions, for example, while ensuring that persons subject to guardianship can recover, we could require guardians to insure themselves and relieve financial institutions of liability—indeed, many states already require guardians to post bonds.[292] Or we could require financial institutions to accept guardians' exercise of legal powers that reasonably appear legitimate and bear the costs of the exercise of the power not being legitimate; perhaps financial institutions ought to be insured against abuse here. And so on.[293]

Indeed, states have acted to strike this balance in different ways in the

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[289] SITKOFF & DUKEMINIER, *supra* note 14, at 513; *see also* Linda S. Whitton, *The Uniform Power of Attorney Act: Striking a Balance Between Autonomy and Protection*, 1 PHOENIX L. REV. 343, 345–56 (2008) (noting the hesitation of financial institutions in recognizing the efficacy of durable powers of attorney).

[290] *See, e.g.*, Jeffrey A. Baskies, *Florida Needs Legislative Change Regarding Durable Powers of Attorney*, 69 FLA. B.J. 59, 59 (1995) ("As many financial institutions only recognize their own forms, there is a need for a new statute which would provide a uniform durable power of attorney form—one which would be universally acceptable.").

[291] *See, e.g.*, Boxx, *supra* note 23, at 12 ("The power of attorney's greatest advantage, its ease of use and informalities, is also its greatest flaw since it becomes easy to abuse in the hands of a dishonest person.").

[292] *See, e.g.*, N.Y. Elder Law Practice § 18.44 ("The court may require a guardian or a temporary guardian to file a bond, prior to exercising their duties."); 3 Tex.. Prac. Guide Probate § 19.33 ("When a guardian posts a bond as required by the Texas Estates Code, the surety on the guardian's bond has insured the faithful performance of its principal's duties in the capacity in which the principal was appointed."); *see also* Christopher J. Kaeser, *Administration of Estates*, 25 PAC. L. J. 379, 379 (1994) ("Existing law requires that before letters can be issued, a guardian, conservator, or personal representative must file a bond with the clerk of the court.").

[293] *See, e.g.*, Lawrence A. Frolik, *Keep Powers of Attorney in Check*, 4 TRIAL 42, 44–45 (2009) (discussing options to address this problem while ensuring that those harmed by abuse can recover for it).

durable power of attorney context. Some state statutes, for instance, require third parties accept reasonable and valid powers of attorney and relieve third parties who do so from liability for reasonable reliance on them.[294] The Uniform Durable Power of Attorney Act, further, allows for a court order compelling compliance with a valid durable power of attorney, paid for by the institution that refused to accept it.[295] And, by all accounts, the situation is improving—financial institutions and other third parties have become more willing to accept durable powers of attorney.[296] The point, then, is that with durable powers of attorney clearly here to stay, whatever balance states end up striking between efficiency and abuse in the context of third party reliance can apply just as well to dynamic guardianship.[297]

CONCLUSION

Guardianship reform is once again in the spotlight, as people frustrated by its potential for abuse are looking for new ways of thinking about its structure. The proposals thus far have failed to address the biological realities of dementia, guardianship's most common cause—limited guardianships would need to be constantly re-litigated; supported decision-making makes no sense in Alzheimer's late stages; and advance planning only works for those who engage in it.

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[294] *See, e.g.*, Wentworth, *supra* note 287, at 41 ("Some state statutes require that a third party accept a reasonable and valid power of attorney."); *see also* Tex. Est. Code Ann. § 751.201 ("Unless one or more grounds for refusal . . . exist, a person who is presented with and asked to accept a durable power of attorney by an agent with authority to act under the power of attorney shall accept the power of attorney . . . .").

[295] Unif. Power of Attorney Act §§ 119; 120; *see also* Julia Patterson Forrester, *Rethinking Powers of Attorney in Real Estate Transactions*, 71 SMU L. REV. 369, 370–71 (2018) (noting that one of the motivations for the new Uniform Power of Attorney Act was "the problem of parties refusing to accept powers of attorney"). Whether this is the right settlement in this context is, of course, contested. *See, e.g.*, Michael W. Davis & Richard F. Lindstrom, *Carrots, Sticks and Landmines: The Uniform Power of Attorney Act*, 41 MD. B.J. 38, 40 (2008) (noting that the "question of third party liability under the UPOAA is the largest stumbling block to acceptance of the UPOAA").

[296] *See, e.g.*, Russell E. Haddleton, *The Durable Power of Attorney: An Evolving Tool*, 14 Prob. & Prop. 59, 60 (2000) ("[T]he committee believes that problem is diminishing" with respect to securities brokers, but "remains . . . with some other financial institutions"); Unif. Power of Attorney Act § 119 cmt (arguing that its legal changes "promote[] acceptance of powers of attorney, which is essential to their effectiveness as an alternative to guardianship").

[297] *See, e.g.*, 32 EST. PLAN. 45, 45 (2005) ("The ever popular durable power of attorney is in vogue today as a mechanism to deal with the issue of property owners who become incompetent."); Carolyn L. Dessin, *Acting as Agent Under A Financial Durable Power of Attorney: An Unscripted Role*, 75 NEB. L. REV. 574, 575 (1996) ("Since its creation, the durable power of attorney has become a extremely popular planning device.").

This Article has taken a new direction—relying on a ubiquitous but often under-appreciated distinction between legal powers and duties in private law, to craft a new, dynamic understanding of guardianship as a fiduciary relationship. On this proposal, all guardianships in cases of cognitive decline grant the guardian plenary legal powers at the outset; to be used only when the person subject to guardianship cannot do so themselves. And unlike today's guardianship law, these guardianships would have no effect on the legal capacity of the person subject to guardianship.

Taken together, these reforms create a form of guardianship the duties of which track in real time the actual needs of the person subject to guardianship. The guardian will always have the legal powers they need without having to go back to court—indeed, they always had them. But until the guardian *needs* to use these powers, they are under a duty not to. Reconceptualizing guardianship as more like a court-appointed durable power of attorney, this structure could go a long way to deterring abuse and impressing on guardians the importance of their role; the extent to which it is created and constrained to help the person subject to it.