PERFECT AMBIGUITY: THE ROLE OF THE ATTORNEY IN MARYLAND GUARDIANSHIPS

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INTRODUCTION

> An ambiguity, then, is not satisfying in itself, nor is it, considered as a device on its own, a thing to be attempted; it must in each case arise from, and be justified by, the peculiar requirements of the situation. On the other hand, it is a thing which the more interesting and valuable situations are more likely to justify.
> -- William Empson[1]

Generally, counsel for an alleged disabled individual could act in one of two different capacities: as a zealous advocate or as a guardian *ad litem*. A zealous advocate would be bound to advocate the client's decisions, or, in the absence of instructions, presumably should resist vigorously the guardianship petition. An attor-

* Sole practitioner in Annapolis, Maryland, with a practice that includes estates and trusts, business and tax planning, and related litigation. Mr. Franke was trial counsel *after* remand in *Law v. John Hanson Savings & Loan* as the "zealous advocate" for those challenging the appointed guardian, a case which--before remand--involved "a series of proceedings, that dragged on over a three-year period before four judges of the circuit court, and produced a record (excluding depositions and transcripts of hearing) exceeding 1,630 pages." Law v. John Hanson Sav. & Loan, 400 A.2d 1154, 1155 (Md. Ct. Spec. App. 1979). After remand, the case involved some further legal wrangling until, upon the ward's death, it mutated into a will contest. Mr. Franke has participated in a number of more conventional guardianship proceedings as well.

[1] WILLIAM EMPSON, SEVEN TYPES OF AMBIGUITY 235 (2d ed. 1947).

ney acting as a guardian *ad litem*, on the other hand, would evaluate, then act, in the client's best interest--which could include agreeing that a guardianship is necessary to protect the client.

Ambiguity surrounds the role of the attorney for an alleged disabled person in a guardianship proceeding in Maryland. Must the attorney act as a "zealous advocate" in all cases, thereby doing all that he or she can do to resist the guardianship petition regardless of foreseeable damage to the client?[2] Or must the attorney act as a guardian *ad litem*, guided by the "best interest" of the alleged disabled person, although such an approach may result in increasing the likelihood that someone other than the client will become authorized to make fundamental decisions regarding the client's life?[3]

Maryland law does not spell out the role of the attorney representing the alleged disabled person in a guardianship proceeding. This ambiguity provides flexibility and permits the role of the attorney to fit the situation. If appropriate, an attorney for the alleged disabled person may act as zealous advocate, or, he or

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[2] Sometimes, the "zealous advocate" approach is zealously advocated by self-styled reformers. *See* Lori A. Stiegal et al., *Three Issues Still Remaining in Guardianship Reform*, 27 CLEARINGHOUSE REV. 577, 581-82 (1993) ("Reform-minded advocates for older people and people with cognitive disabilities consider their role to be the same for their guardianship clients as for all of their other clients--that of zealous advocate. Others . . . have argued that the attorney should act as a guardian *ad litem*.").

[3] The Uniform Guardianship and Protective Proceedings Act follows the *ad litem* model:

> After the filing of a petition, the Court shall set a date for hearing on the issue of incapacity . . . unless the allegedly incapacitated person is represented by counsel, [the Court shall] appoint an attorney to represent the person in the proceeding. The person so appointed may be granted the powers and duties of a guardian ad litem.

UNIF. GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT § 5-303(b), 8 U.L.A. 463 (1987). The guardianship procedure under the Uniform Act generally is focused on the "best interests" of the alleged disabled person, and it does not follow the pattern of the traditional adversarial tribunal. As stated in the Act, "Any person may apply for permission to participate in the proceeding, and the Court may grant the request, with or without hearing, upon determining that the best interest of the alleged incapacitated person will be served thereby." *Id.* § 5-303(d).

she may act as a guardian *ad litem*, acting in the client's best interest. The ambiguity is good and valuable. It ought to be preserved.[4]

I. BACKGROUND

The role of the attorney representing an alleged disabled person is the subject of a recent national debate. At its root, the debate is over the character of a guardianship proceeding.

Generally, those who argue that the attorney for an alleged disabled person *must* act as a zealous advocate in *all* cases base this conclusion on a view that a guardianship proceeding is comparable to a criminal proceeding:

> The alleged incapacity of the defendant [sic] and the complexity and importance of the proceeding make the risk of an erroneous deprivation of the liberty of the uncounseled defendant in a guardianship proceeding insupportably high. To reduce that risk, the defendant must be represented by an attorney who meets with him and investigates the law and the facts so that the attorney can present a legal and factual case, object to

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[4] Nationally, those jurisdictions examining whether the attorney ought to act as advocate or guardian *ad litem* are split as to the proper role of such attorney:

> Is the attorney a traditional attorney/advocate/agent, or is the attorney a guardian *ad litem* who acts in the best interests of the client? Some courts have held that the attorney has no authority to waive any right of the client and that the attorney should do everything reasonably necessary to oppose the petition seeking guardianship. Others have held that the attorney should do anything that is in the best interest of the client, regardless of the client's wishes. Still others have held that the attorney first must determine whether the client understands the nature of the proceeding. If the client does understand, then the attorney is bound by the client's wishes. If the client does not understand, then the attorney is authorized to waive procedural or statutory rights only if the waiver is in the client's best interest as evidenced on the record.

Anne K. Pecora, *Representing Defendants in Guardianship Proceedings: The Attorney's Dilemma of Conflicting Responsibilities*, 1 ELDER L.J. 139, 174-75 (1993).

> inadmissible evidence, cross-examine witnesses and otherwise act as adversarial counsel in opposition to the parties seeking the guardianship.[5]

Those who argue that someone ought to act as a guardian *ad litem* for the alleged disabled person and be required to look out for his or her "best interest," on the other hand, point out that a guardianship is not a quasi-criminal proceeding:

> Although liberties are at stake in both guardianship proceedings and criminal proceedings, there is a fundamental difference between the two. In a criminal proceeding, the interests of society in punishing the crime and/or in having criminals off the street are pitted against the interests of a criminal defendant in retaining his or her liberty.
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> No such adversarial posture is inherent in a guardianship proceeding. A person who has been determined to be incapacitated remains in society and another member of society is appointed to make certain decisions on his or her behalf. There are not strong competing societal and personal interests. The primary purpose of the proceeding is the protection of the incompetent person. Further, the rights taken from a ward by a guardianship order should be only those rights and responsibilities that the ward is actually unable to exercise by reason of disability, a loss that has occurred outside of and without regard to the legal system.[6]

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[5] Anne K. Pecora, *The Constitutional Right to Court-Appointed Adversary Counsel for Defendants in Guardianship Proceedings*, 43 ARK. L. REV. 345, 372 (1990).

[6] Carol A. Mooney, *Guardianship Reform: A Federal Mandate*, PROB. & PROP., Mar.-Apr. 1990, at 48, 50.

The debate of the proper role of counsel is part of a broader discussion of guardianship procedures that was sparked by a series of articles published by the Associated Press (AP) in 1987. As a result of the AP series, the House Select Committee on Aging held hearings and various bills were introduced in the Fall of 1988 (then reintroduced, from time to time, thereafter) to impose federal standards on the state guardianship procedures. These bills would require that counsel be appointed by the court for the alleged disabled person *and* that counsel act as an advocate, not as a guardian *ad litem*, for the alleged disabled. These bills drew objection from the estate planning bar and died in Committee.[7]

In addition to the Congressional activity, the American Bar Association (ABA) convened a national symposium of experts at the Wingspread Conference Facilities in Racine, Wisconsin, which resulted in the Wingspread Report.[8] The Wingspread Report likewise called for counsel's role to be defined as zealous advocate, albeit over the objections of a minority of the conferees. The recommendation that counsel act as a zealous advocate prompted the ABA's Section on Real Property, Probate and Trust (also presumably experts) to withhold its general endorsement of the recommendations unless the provisions mandating a zealous advocate were withdrawn. As a compromise, the ABA policy as

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[7] *See* Charles A. Collier & Judith W. McCue, *Regents Oppose Imposition of Federal Standards for Guardianships and Conservatorships*, 17 ACTEC NOTES 16 (1991) [hereinafter Collier & McCue, *Regents Oppose*]; Judith McCue, *The States are Acting to Reform their Guardianship Statutes*, TR. & EST., July 1992, at 32, 32 [hereinafter McCue, *The States are Acting*] ("For reasons about which the author chooses not to speculate in this article, the efforts to enact federal guardianship legislation in the guardianship area have not been successful.").

[8] ABA COMM'N ON THE MENTALLY DISABLED & COMM'N ON LEGAL PROBLEMS OF THE ELDERLY, GUARDIANSHIP: AN AGENDA FOR REFORM iii-iv (1989). The Wingspread Report contains the recommendations of the National Guardianship Symposium and it was published as part of the ABA Commission on the Mentally Disabled and the Commission on Legal Problems of the Elderly. *Id.* at iii. The symposium assembled on July 21-23, 1988, and consisted of 38 "guardianship experts." *Id.* at iv. The participants "included probate judges, attorneys, guardianship service providers, doctors, aging network representatives, mental health experts, government officials, law professors, a bioethicist, a state court administrator, a judicial educator, an anthropologist and the American Bar Association staff." *Id.*

presented to and adopted by the ABA House of Delegates in February 1989 did not contain a requirement that counsel act as a zealous advocate.[9]

In Maryland, the Office on Aging convened a Guardianship Task Force in 1993 which drafted proposed revisions to the Maryland guardianship statute.[10] As with the original recommendations of the Wingspread Report, the Task Force proposed defining the role of counsel as zealous advocate:

> [Proposed] § 13-705.1 - APPOINTMENT OF ATTORNEY
> (A) APPOINTMENT BY THE COURT. - Upon the filing of a complaint for Appointment of Guardianship or Motion to Terminate or Modify the Guardianship Order, the court shall appoint an attorney to represent the defendant or disabled person, unless the person already has counsel. The fee of an appointed attorney shall be determined by the court and shall be paid out of the fiduciary estate. If the fiduciary estate is insufficient, the fee shall be paid by the state, in accordance with its guardianship fee schedule.
> (B) ROLE OF THE ATTORNEY. - (1) The attorney for the defendant shall act as a zealous advocate for the defendant, and not as a guardian *ad litem.* The attorney shall not substitute the attorney's own judgment for that of the defendant on the subject of what may be in the defendant's best interests, or any other matter.

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[9] *Id.* at 12 (Recommendation II-C cmt.).

[10] The recommendations call for sweeping changes to Subtitles 1 (General Provisions) and 7 (Guardianship of the Person) of Title 13 of the Estates and Trust Article of the Annotated Code of Maryland. Under present law, the guardianship proceeding is initiated by the filing of a "Petition" and the alleged disabled is referred to in the statute and in the Maryland Rules as "the person alleged to be disabled" or the "disabled person," depending on the context. *See* MD. R. 1110, R71, R73. The proposed revision changes "petition" to "complaint" and the "person alleged to be disabled" to "defendant." MD. CODE ANN., EST. & TRUSTS § 13-705 (Proposed Draft 1994). This change is more than mere word-play. It telegraphs the revisors' intention of making the guardianship proceeding an adversarial affair--a quasi-criminal proceeding whereby if the "defendant loses" (has a guardian appointed on his or her behalf) it is akin to incarceration.

The Task Force introduced its proposed code revision at a public forum on November 16, 1994. At the public forum and thereafter, strong public reaction was expressed regarding fundamental policy issues, including whether counsel for an alleged disabled person ought to be required to act as a zealous advocate in all cases. The proposed legislation was not introduced in the 1995 General Assembly.

II. The Ambiguity of Current Maryland Law

The role of the attorney for an alleged disabled person in Maryland is not definitively set forth in statute, court rule, ethical mandate, or case law. Moreover, a fair reading of the various authority produces no definitive solution to whether the attorney should act as zealous advocate or guardian *ad litem*.

Part of the ambiguity flows from the peculiar nature of a guardianship proceeding: "A guardianship is not an ordinary type of lawsuit in which the court's role is merely that of fact-finder and adjudicator."[11]

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[11] Law v. John Hanson Sav. & Loan, 400 A.2d 1154, 1158 (Md. Ct. Spec. App. 1979). Unlike many matters historically "in equity," the legislature, not the courts, possessed the inherent jurisdiction over the persons or property of disabled individuals. *Id.* The court, by legislative fiat and not inherent right, protects disabled persons. *See* Hamilton v. Traber, 27 A. 229 (Md. 1893). In *Hamilton*, the Court of Appeals for Maryland stated:

> Lunacy or mental unsoundness did not give the English court of chancery jurisdiction over the person or state of a lunatic until after an inquisition of a jury, adjudging the person to be a *non compos mentis* had been first regularly found. The authority directing the inquisition to be taken did not pertain to that court, but was derived by delegation from the Crown. It was a portion of the king's executive power, as *parens patriae*, and did not belong to the court of chancery by virtue of its inherent and general judicial functions.

Id. at 230. The legislature succeeded to the executive power as *parens patriae*:

> In this Country after the Revolution, the caring and custody of persons of unsound mind, and the possession and control of their estates, which in England belonged to the King as a part of his prerogative, were deemed to be vested in the people; and the people are represented by the Legislature.

In re Easton, 133 A.2d 441, 445 (Md. 1957).

Indeed, the court is the guardian:

> Lest sight be lost of the fact, we remind all concerned, that a court of equity assumes jurisdiction in guardianship matters to protect those who, because of illness or other disability, are unable to care for themselves. In reality, the court is the guardian; an individual who is given the title is merely an agent or arm of that tribunal in carrying out its sacred responsibility.[12]

Given the non-adversarial nature of the hearing and the unusual role of the court in the proceeding, it is hardly surprising that counsel for an alleged disabled person should have a broader role than that as advocate.

Part of the ambiguity flows from the seemingly contradictory ethical duties established by the Maryland Rules of Professional Conduct.[13] Rule 1.14 (Client Under a Disability) directs that "[w]hen a client's ability to make adequately considered decisions in connection with a representation is impaired, . . . the lawyer shall, as reasonably possible, maintain a normal client-lawyer relationship with the client."[14] Generally, of course, the

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[12] Kicherer v. Kicherer, 400 A.2d 1097, 1100 (Md. 1979).

[13] The Maryland Rules of Professional Conduct are derived from the Model Rules of Professional Conduct promulgated by the American Bar Association:

> [The model rules] were not written primarily for the estate planning and fiduciary administration practice and, understandably, many of them make less than great sense in those contexts. Even those rules that are general enough to be applicable in those settings often do not reflect the needs of clients for family planning representation. Worse, many rules that are appropriate in a litigation setting are inappropriate in a counselling practice.
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> Attorneys should be encouraged to negotiate, mediate, and otherwise fashion results that avoid litigation.

Jeffrey N. Pennell, *Professional Responsibility: Reforms are Needed to Accommodate Estate Planning and Family Counseling*, 25 INST. ON EST. PLAN. ¶ 1800, ¶ 1811, at 18-50 to 18-51 (1991).

[14] MARYLAND RULES OF PROFESSIONAL CONDUCT Rule 1.14(a) (1995).

lawyer "shall abide by a client's decisions concerning the objectives of representation."[15] The general rule, however, is modified when a lawyer represents a disabled client in that "[a] lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."[16] Indeed, the representation itself may give the lawyer implied authority (and, perhaps a duty) to act in the best interests of the client:

> The lawyer for a client who appears to be disabled may have implied authority to make disclosures and take actions that the lawyer reasonably believes are in accordance with the client's wishes that were clearly stated during his or her competency. If the client's wishes were not clearly expressed during competency, the lawyer may make disclosures and take such actions as the lawyer reasonably believes are in the client's best interest. It is not improper for the lawyer to take actions on behalf of an apparently disabled client. . . .[17]

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[15] *Id.* at 1.2(a).
[16] *Id.* at 1.14(b).
[17] American College of Trust and Estate Counsel, *ACTEC Commentaries on the Model Rules of Professional Conduct*, 28 REAL PROP. PROB. & TR. J. 865, 964-65 (1994).

Various ethics opinions have supported that a lawyer is bound to act in the best interest of a client if the client appears incompetent.[18]

Maryland statute and regulation perpetuate the ambiguity. Maryland law directs that the court-appointed attorney for the alleged disabled person "represent him [sic] in the proceeding" unless such person has counsel of his or her "own choice."[19] The statute is silent as to the nature of the representation. Maryland Rule R76 states that "[t]he court in its discretion may appoint an attorney who shall investigate the facts of the case and shall report, in writing, his findings to the court."[20] The duty to report

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[18] *See, e.g.*, Neb. State Bar Ass'n Advisory Comm., Op. 91-4 (1991), *excerpted in* 8 ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 26 (1992).

> A lawyer represents a recently divorced elderly man who owns the apartment building in which he resides but is unable to make the monthly payments on the building. The bank that holds the deed of trust scheduled the property to be sold at auction. On the eve of sale, the lawyer filed a Chapter 13 bankruptcy for the client. The Chapter 13 plan provides that the client would attempt to sell the property by private sale. A buyer has offered approximately $30,000 in excess of the encumbrances, but the client refuses to accept.
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> The lawyer believes the client is incompetent. The client denies that he has filed a Chapter 13 bankruptcy and refuses to cooperate with the proceedings. For this reason the bankruptcy will soon be dismissed . . . . The lawyer is concerned that if he takes no action the client's property eventually will be sold at auction and the client will not receive any of the proceeds of the sale. The lawyer has suggested filing a report with Adult Protective Services and asks whether filing such a report would violate the ethics rules.

Id. at 26-27. The disclosure was permitted "to the extent necessary to protect the best interests of the client." *Id.* at 27.

[19] MD. CODE ANN., EST. & TRUSTS § 13-705(d) (1991).

[20] MD. R. R76.

findings to the court--a task that may involve the disclosure of information received from the alleged disabled person--would suggest that the attorney should serve as a guardian *ad litem*. [21]

III. What Should be the Attorney's Role?

The ambiguity surrounding the role of counsel in Maryland guardianships reflects that the question of whether the attorney for the alleged disabled should be a zealous advocate or a guardian *ad litem* depends on the circumstances.

In many (perhaps most) situations, a family will struggle emotionally with the decision to seek a guardianship for a loved one. The decision may be forced on the family after months, perhaps years, of exhausting care-giving. The family members rendering the care often are those seeking the guardianship. Why introduce an adversarial model to this fragile situation? What purpose is served by the parry and attack that characterizes adversarial litigation? Why add the emotional and economic cost to a guardianship proceeding?[22]

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[21] Interestingly, Proposed Rule 10-106(a) mandates a court-appointed attorney to represent the alleged disabled person but fails to describe that attorney's role. 22:24 Md. Reg. P-20 (Nov. 24, 1995) (proposed Nov. 6, 1995). The note accompanying the Proposed Rule states that the lawyer's role "is governed by Rule 1.14 of the Rules of Professional Conduct and is a matter of substantive law." *Id.* at P-21 (Proposed Md. R. 10-106 reporter's note). As discussed above, Rule 1.14 is a "best interest of client" approach. *See supra* notes 14-18 and accompanying text.

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> The fear expressed by many lawyers, especially probate lawyers who tend to view themselves as family lawyers, is that telling a lawyer that he or she must act as a "zealous advocate" will turn most, if not all, guardianship proceedings into adversarial proceedings and will add not only to the economic cost of such proceedings but also immeasurably to the human and psychological costs of the proceedings. A guardianship proceeding is often painfully embarrassing to both the petitioner and the respondent. Making the proceeding adversarial will increase the pain without necessarily improving the outcome.

Mooney, *supra* note 6, at 51.

Some situations may require a zealous advocate. A "dysfunctional" family member or other person in a confidential relationship may be seeking improper advantage over a vulnerable elder. The AP articles catalogued abuses perpetrated on disabled individuals under a guardian's control. While the message of the AP story may be that court supervision of guardians after appointment is inadequate,[23] these incidents remind us that there will be situations where the alleged disabled needs protection from the petitioner *ab initio*. As it now stands, Maryland law permits the attorney for the alleged disabled to be a zealous advocate if the situation warrants that approach.

Identifying that disabled persons need their rights protected, of course, does not lead irrevocably to the conclusion that a zealous advocate for the alleged disabled is the only way of protecting those rights. Under a pure adversarial model, the attorney for a guardian owes the guardian, not the ward, his or her undivided loyalty. If a guardian informs the guardian's attorney that the guardian had misappropriated funds, the attorney has no duty to the ward under pure adversarial rules. The attorney can only encourage the guardian to make amends, but the attorney may not reveal the misappropriation.[24] The Maryland Rules, however, apparently alter this result: "If the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interest, the lawyer may have an obligation to prevent or rectify the guardian's misconduct."[25]

Under present law, the ambiguity in the law permits the court to assign (or, perhaps, counsel to determine) whether the court-

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> While generally speaking, the articles [in the AP series] indicated that the system of local guardianship laws was working, the articles sought to identify apparent abuses, lack of consistent enforcement, and particularly, lack of adequate court review and supervision of guardians or conservators after a guardianship or conservatorship had been established.

McCue, *The States Are Acting, supra* note 7, at 32.

24 *See* Pennell, *supra* note 13, ¶ 1803.6 n.33 (discussing ABA Comm. on Ethics and Professional Responsibility, Informal Op. C-778 (1964)).

25 Maryland Rules of Professional Conduct Rule 1.14 cmt. (1995).

appointed attorney should be a zealous advocate or guardian *ad litem*, depending on the exigency of the case. There is no evidence that the present system does not work. Why change a system that appears to work for one that could create emotional and financial hardship?

IV. Due Process Considerations

The Court of Appeals of Maryland has found that the Maryland statute meets the United States and Maryland State constitutional due process requirements.[26] Generally, due process requires notice and a hearing, an appropriate standard of proof, and the right to counsel.[27]

Maryland Rule R74 provides that the alleged disabled receive process, including any show cause order. Although Rule 2-124(b) states that service on a disabled person is to be served on his or her "parent, guardian, or other person having care or custody" of him or her,[28] Rule R74 states that if the "alleged disabled person . . . resides with the petitioner, process shall be served upon such other persons as the court may direct."[29] Section 13-705(e) states that the alleged disabled is entitled to be present at the hearing, and waiver of the right to be present shall not be presumed from his or her nonappearance at the hearing.[30] If desired, the alleged disabled may present evidence and cross-examine witnesses. Maryland Rule R77(b) gives the alleged disabled person the right to a jury determination.

Section 13-705(b) of the Maryland Estates and Trusts Article states that a guardian of the person shall be appointed "if the court determines from clear and convincing evidence" that the person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his or her person. Section 13-705(d) of the Estates and Trusts Article directs that counsel be appointed for the alleged disabled in all cases where

[26] *See In re* Easton, 133 A.2d 441 (Md. 1957).
[27] *See* Pecora, *supra* note 5, at 348-51.
[28] Md. R. 2-124(b).
[29] Md. R. R74(a).
[30] Md. Code Ann., Est. & Trusts § 13-705(e) (Supp. 1995).

he or she is not already represented. If the alleged disabled is indigent, the state pays a reasonable attorney's fee. As noted, the role of appointed counsel is not defined.[31]

CONCLUSION

The right to, and role of, court-appointed counsel in guardianship proceedings is often seen as "analogous to" that of proceedings involving involuntary commitment to mental institutions.[32] Ironically, the successful "reform" by the "civil liberties movement" in deinstitutionalizing persons from state mental hospitals appears to have added immeasurably to the suffering of one portion of the elderly population--those who are mentally ill:

> A second trend linked to the increasing concern over misuse of guardianship is the movement to deinstitutionalize persons from state mental hospitals who are chronically mentally ill. . . .
> To the serious detriment of the deinstitutionalization movement, this shrinkage in hospital care occurred in the absence, rather than the proliferation, of alternative living settings and service systems that could provide adequate assistance, support, and care. Nevertheless the movement was pushed forward by a number of forces: . . . [including] by the civil liberties movement which pushed for "the least restrictive alternative." . . .
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> While it is not clear how many of the deinstitutionalized are elderly or where they are in the community, it is clear that they have serious problems. Many are living

[31] *See* MD. R. R76 ("The court in its discretion may appoint an attorney who shall investigate the facts of the case and shall report, in writing, his findings to the court."). Because the Rule refers to a discretionary appointment of counsel, whether this Rule defines counsel's role under § 13-705(d)--which is a mandatory appointment--is problematic and open to interpretation.
[32] *See* Pecora, *supra* note 5, at 351.

> in the streets. Many others were simply "transinstitutionalized" into nursing homes -- institutions neither intended nor equipped to serve the mentally ill.[33]

The guardianship proceeding is currently "not an ordinary type of lawsuit"[34] but rather a non-adversarial proceeding designed to protect those who may not be able to protect themselves. It ought not be converted into an ordinary lawsuit, taking as its model a criminal proceeding.

If the ambiguity of current law is unsatisfactory, the statute need not be changed to mandate an adversarial proceeding in all guardianships. Litigation is financially and emotionally costly. A "reform" should be structured that will provide a cost-effective manner and "user friendly" procedure for the typical guardianships--the guardian *ad litem* approach--while permitting a zealous advocate to be appointed in the atypical circumstance.[35] The conversion of the current proceeding into an adversarial one would be a mistake.

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[33] HOUSE SELECT COMM. ON AGING, MODEL STANDARDS TO ENSURE QUALITY GUARDIANSHIP AND REPRESENTATIVE PAYEESHIP SERVICES, H.R. REP. NO. 729, 101st Cong., 1st Sess. 6 (1989).
[34] Law v. John Hanson Sav. & Loan, 400 A.2d 1154, 1158 (Md. Ct. Spec. App. 1979).
[35] One approach would be to mandate the counsel for the alleged disabled serve as guardian *ad litem* in all cases, with a zealous advocate appointed in those cases either (1) where the alleged disabled tells the guardian *ad litem* he or she wishes to contest the petition, or (2) when the court, based on the report from the guardian *ad litem*, deems a zealous advocate in the alleged disabled's best interest.