

**DON'T YOU KNOW THAT YOUR LAW IS TOXIC?
BRITNEY SPEARS AND ABUSIVE
GUARDIANSHIP: A REVISIONARY APPROACH
TO THE UNIFORM PROBATE CODE,
CALIFORNIA PROBATE CODE, AND TEXAS
ESTATES CODE TO ENSURE EQUITABLE
OUTCOMES**

*by Lisa Zammiello**

I.	INTRODUCTION	588
II.	A BRIEF HISTORY ON CONSERVATORSHIP	592
	A. <i>Guardianship and Conservatorship</i>	594
	B. <i>“High-Functioning” Wards</i>	595
III.	THE UNIFORM PROBATE CODE	596
	A. <i>Incapacitated Persons Under the UPC</i>	597
	B. <i>Guardianship</i>	597
	1. <i>Who May Become a Guardian?</i>	598
	a. <i>Priorities of Who May Become a Guardian</i>	598
	b. <i>Proposed Vetting Under the UPC</i>	600
	2. <i>Duties of the Guardian</i>	602
	3. <i>Powers of The Guardian</i>	602
	4. <i>Monitoring the Guardianship</i>	604
	a. <i>Termination or Modification of Guardianship</i>	605
	C. <i>Conservatorship</i>	606
	1. <i>Who May Be a Conservator?</i>	607
	2. <i>Protected Person’s Interest in Inalienable Rights</i>	608
	a. <i>Best Interest of the Ward</i>	608
	3. <i>Challenging Guardianship Under the UPC</i>	609
IV.	BRITNEY SPEARS IN CALIFORNIA.....	610
	A. <i>California</i>	611
	1. <i>Appointment: Standard of Proof</i>	611
	2. <i>Assessment of Proposed Limited or General</i> <i>Conservatee</i>	612
	B. <i>Who May Become a Conservator?</i>	612
	1. <i>Duties of Conservator</i>	613

* J.D. Candidate, Texas Tech University School of Law, 2022; B.S., Texas State University, 2017. I would like to thank Gabrielle Griffith and Macie Alcoser for their teachings, feedback, and editorial contributions. I would also like to give a special thanks to my parents, David and Cindy, and my brother Joey, for the love and support over my lifetime.

	2. <i>Review of Conservatorship</i>	614
	3. <i>Termination of Conservatorship</i>	615
V.	TEXAS.....	616
	A. <i>Creation of Guardianship—Standards of Proof</i>	616
	B. <i>Appointment of a Guardian</i>	617
	1. <i>Eligibility and Qualifications</i>	618
	2. <i>Certification of Guardian</i>	618
	C. <i>Termination and Review of Guardianship</i>	620
	D. <i>Less Restrictive Alternatives to Guardianship</i>	620
	1. <i>Supports and Services</i>	620
VI.	POTENTIAL FOR ABUSE	621
VII.	STORIES OF ABUSE	621
VIII.	PROPOSALS	623
	A. <i>Proactive Approach: Guidance on “Incapacitated”</i>	623
	1. <i>Uniform Registration and Certification</i>	625
	B. <i>Reactive Approach: Mandatory Review Process</i>	628
	1. <i>Funding to Create Review Board</i>	628
XI.	CONCLUSION	630

I. INTRODUCTION

September 2001.¹ Awards season kicks off with the MTV Music Video Awards.² Britney Spears is performing at the award ceremony, creating an iconic moment in pop culture history.³ This night is remembered for Britney delivering dance moves while wrapped in a python.⁴ Almost twenty years later, Britney is still making headlines—but for other reasons.⁵ The world had a front row seat to Britney Spears’s life taking a less than glamorous turn towards conservatorship.⁶ The emotional stress of fame led to her infamous 2007 public breakdown, and conservatorship followed shortly after in 2008.⁷ Britney’s father, Jamie Spears, and lawyer Andrew Wallet, obtained conservatorship over Britney’s person and property.⁸ Britney’s conservators

1. See Megan Riedlinger, *MTV Video Music Awards: Most Buzz-worthy Moments of VMAs Past*, MSN ENT. (Aug. 30, 2020), <https://www.msn.com/en-us/music/awards/mtv-video-music-awards-most-buzz-worthy-moments-of-vmas-past/ss-BB18mnnT#image=5> [perma.cc/CV47-QMSR].

2. *Id.*

3. Leon Sánchez, *Britney Spears – I’m a Slave 4 U Live / 2001 MTV VMAs*, YOUTUBE (Feb. 20, 2021), <https://www.youtube.com/watch?v=q01yoGp9Dik> [perma.cc/K53F-DRUM].

4. *Id.*

5. See Riedlinger, *supra* note 1.

6. *Id.*

7. Elyse Johnson, *Truth About Britney Spears Mental Health in 2020*, GOSSIP COP (Aug. 10, 2020, 5:00 PM), <https://www.gossipcop.com/truth-about-britney-spears-mental-health-in-2020/2552140#:~:text=Britney%20Spears%20has%20been%20very%20open%20about%20her,herself%20into%20a%20mental%20health%20facility%20after%20> [perma.cc/Q9SC-L9XN].

8. Korin Miller, *The Full Timeline of Britney Spears’ Conservatorship Spans More Than a Decade*, WOMEN’S HEALTH MAG. (Feb. 11, 2021), <https://www.womenshealthmag.com/life/a33336398/britney-spears-conservatorship-timeline/> [perma.cc/5FA6-ENYQ].

exercise total control over her life, such as who she can see and how she can spend her money.⁹

Conservatorship, known in some states as guardianship, is a “fiduciary relationship between a guardian and a ward or other incapacitated person, whereby the guardian assumes the power to make decisions about the ward’s person or property.”¹⁰ Further, “a guardianship is almost always an involuntary procedure imposed by the state on the ward.”¹¹ The very nature of the relationship between conservator and conservatee lends itself to the risk of abuse of the conservatee by the conservator, because the ward loses all autonomy and decision-making power.¹²

Conservatorship is typically reserved for individuals with conditions rendering them incapable of caring for themselves or their property.¹³ Such conditions may include, but are not limited to, dementia or mental infirmity due to age.¹⁴ Once conservatorship is implemented, it proves difficult to undo.¹⁵ A person is deemed legally incapacitated if the probate court finds by a preponderance of the evidence either that, “(1) the proposed ward is totally without capacity to care for himself [or herself] and manage his [or her] property, or (2) the proposed ward lacks the capacity to do some, but not all, of the tasks necessary to care for himself [or herself] and manage his [or her] property.”¹⁶ The court exercises discretion to dictate the scope of conservatorship based on the necessity of assistance required to aid the ward in daily living (limited conservatorship, or full-authority conservatorship).¹⁷ A ward retains all civil rights and powers not specifically granted to the guardian.¹⁸

Britney Spears’s journey into conservatorship appeared warranted in the court of public opinion; the press captured Britney’s struggle with mental health and the world watched.¹⁹ Initially, the public enjoyed the entertainment.²⁰ But, as the story progressed, it became clear that Britney seriously struggled with mental health and drug abuse issues.²¹ Conservatorship seemed fitting because it was clear she was “out of control,”

9. *Britney Spears’ Sister Jamie Lynn Seeks Control of Singer’s Finances*, BBC ENT. & ARTS (Aug. 27, 2020), <https://www.bbc.com/news/entertainment-arts-53930167> [hereinafter *Jamie Lynn Seeks Control*] [perma.cc/N2KJ-SRP6].

10. *Guardianship*, BLACK’S LAW DICTIONARY (11th ed. 2019).

11. *Id.*

12. See Jennifer Moye, *Guardianship and Conservatorship*, IN *EVALUATING COMPETENCIES FORENSIC ASSESSMENTS & INSTRUMENTS* 309, 309 (Springer ed. 2005), https://doi.org/10.1007/0-306-47922-2_8 [perma.cc/LND8-4LAP].

13. *Id.*

14. *Id.*

15. See *Jamie Lynn Seeks Control*, *supra* note 9.

16. *Daves v. Daniels*, 319 S.W.3d 938, 941 (Tex. App.—Austin 2010, pet. denied).

17. *Id.*

18. *Id.*

19. See *Miller*, *supra* note 8.

20. *Id.*

21. *Id.*

evidenced by her custody battle and physical altercation with paparazzi.²² More recently, headlines about the singer are about Britney fans' growing concern for the singer's legal trouble in attempting to remove the conservatorship.²³

The #FreeBritney movement is based in the theory that Britney is "trapped" in her conservatorship, and that her father is exploiting his daughter by keeping her under his care.²⁴ The fan-led movement was birthed in 2019 on Twitter, and quickly started trending.²⁵ Followers of the movement express concern that Britney's autonomy is compromised of the greed of her father, and that she is being "held captive" by the legal arrangement.²⁶ Fans speculate that Britney no longer requires the conservatorship, and refer to her ability to work throughout the duration of the conservatorship as proof that she is not incapacitated.²⁷ Britney has released four albums since 2008, and scored a four year residency in Las Vegas at the MGM Grand.²⁸ Britney has since expressed her desire to end the conservatorship, and fans are convinced that Jamie is keeping her under his care for self-serving reasons.²⁹ Because Jamie is in charge of her care, he earns over \$100,000 per year as compensation.³⁰ Additionally, Britney's net worth of \$60 million is out of her reach; therefore, Britney lacks access to her fortune due to her legal status as a conservatee, and her conservator is the only one who has access to Britney's hard-earned money.³¹

Members of the #FreeBritney movement believe Jamie will wield his power over Britney in order to keep her under conservatorship, and that he has already exercised his power in an abusive manner:

The unnamed source said, 'What is happening is disturbing, to say the least. Basically, Britney was in rehearsals for *Domination*. It came to [her father]

22. *Id.*

23. *Id.*

24. Alyssa Newcomb, *Here's Why Britney Spears Fans are Fueling a #FreeBritney Movement on Social Media*, TODAY POP CULTURE (July 13, 2020, 3:45 PM), <https://www.today.com/popculture/free-britney-2020-what-know-about-movement-spears-conservatorship-t186642> [perma.cc/SM3L-DUXQ].

25. Gil Kaufman, *#FreeBritney: Why the Movement Started and How Its Leading Voices Are Keeping It Going*, BILLBOARD (Sept. 10, 2020), <https://www.billboard.com/articles/news/9445049/free-britney-spears-movement-started> [perma.cc/UY9S-EF4P].

26. *Id.*

27. Isobel Lewis, *Britney Spears May Be Under Conservatorship For the Rest of Her Life, Former Estate Manager Claims*, THE INDEPENDENT (Oct. 6, 2020, 9:56 AM), <https://www.independent.co.uk/arts-entertainment/music/news/britney-spears-conservatorship-andrew-wallet-jamie-free-b830686.html> [perma.cc/VL9T-GHJR].

28. Karen Mizoguchi, *She's Back! Britney Spears Announces a New Residency in Vegas 9 Months After Piece of Me Show*, PEOPLE (Oct. 18, 2018, 10:24 PM), <https://people.com/music/britney-spears-announces-new-vegas-residency/> [perma.cc/DM8W-EJDK].

29. See Newcomb, *supra* note 24.

30. Joseph Allen, *Britney Spears Filed Documents to Remove Her Dad as Sole Conservator of Her Estate*, DISTRACTIFY (Mar. 3, 2021, 5:10 PM), <https://www.distractify.com/p/britney-spears-dad-net-worth> [perma.cc/27UY-A2Z9].

31. *Id.*

Jamie's attention that Britney was not taking her medication as prescribed. She was missing a lot of doses and just full-on not taking them.' The source then claimed that her father 'pulled the show' after Britney refused to take her medications, and that the singer had been in a mental health facility since 'mid-January' of 2019.³²

During the September 2, 2020, court hearing on the conservatorship, Britney requested her conservatorship case be opened to the public after her father moved to seal the documents.³³ Jamie asserts that it is in Britney's best interest to keep the documents private as they contain personal information.³⁴ #FreeBritney movement members believe he has something to hide.³⁵ As of the time of this comment, Britney requested that her father be removed from the role as conservator on November 4, 2020.³⁶ On November 10, 2020, the court denied the request for removal, and the court noted, "that's the subject of another discussion down the road."³⁷ According to Britney's lawyer, Britney is afraid of her father and does not want to professionally perform while he is still her conservator.³⁸

The issues raised by the #FreeBritney movement beg the question, why is such a high-functioning conservatee, who has expressed opposition to the conservatorship, still under the conservatorship?³⁹ If the rumors of Jamie's abuse are true, what protections are in place for Britney and others who find themselves in the same predicament?⁴⁰ If Britney wants out of the conservatorship, why is it virtually impossible to get out of the conservatorship once it has been established?⁴¹

Britney's story has drawn attention to the issues surrounding conservatorship, but she is not the only person who has suffered from such a

32. Kaufman, *supra* note 25.

33. *Id.*

34. Andrew Dalton, *Britney Spears Shows Love for #FreeBritney in Court Filing*, ASSOCIATED PRESS (Sept. 3, 2020), <https://apnews.com/article/entertainment-ap-top-news-ca-state-wire-85debe4cef319a3d713c660efd9a5b39> [perma.cc/C4ZK-4L68].

35. *Id.*

36. Abby Gardner, *The Britney Spears Conservatorship Situation, Fully Explained*, YAHOO!LIFE (Feb. 12, 2021), <https://www.yahoo.com/lifestyle/britney-spears-conservatorship-situation-fully-1355215>

43.html?guccounter=1&guce_referrer=aHR0cHM6Ly9zZWZyY2gueWFob28uY29tLw&guce_referrer_sig=QAAANtpxauazu-HvL_-OZ7Ex_sLM-KHy6osPRmP4Z2uegPiys51KTehuA-JYiytYrgfq4S-YyFH OOKmviqwJEFoJLD9dE_WkBJEsaw5GgjTVVShSIXcmL_yvGjxt9C3SqIUERtW_rr2pkYObcihI81w ZshzWU-xTG0YA_38dVaYSrg [perma.cc/D5E4-3VYT].

37. *Id.*

38. *Id.*

39. Maria Puente, *Why Does Britney Spears Still Have a Conservator? Legal Expert Says Her Case File Suggests Answers*, USA TODAY (Oct. 25, 2019, 9:53 AM), <https://www.usatoday.com/story/entertainment/celebrities/2019/10/24/britney-spears-why-does-she-still-need-conservator/2288009001/> [perma.cc/K8T4-UJL5].

40. *Id.*

41. *Id.*

relationship.⁴² While legal documentation of such abuse is scarce, anecdotes of conservatorship abuse occur all across the United States.⁴³

This Comment examines what laws, if any, are in place to protect wards from abuse.⁴⁴ Next, this Comment examines the Uniform Probate Code and varying state laws for procedural safeguards and opportunities to challenge conservatorship, while sharing the stories of people who have suffered under conservatorship.⁴⁵ Lastly, this Comment proposes improvements to existing laws and argues the need for supportive services to ensure equitable enforcement of protective laws.⁴⁶

II. A BRIEF HISTORY ON CONSERVATORSHIP

Conservatorships in America are rooted in the history of English law.⁴⁷ Conservatorships and guardianships began with a well-intentioned concern for the elderly's ability to care for and protect themselves; this idea extends to the mentally incapacitated.⁴⁸ Legal incapacity was created by the legislatures as the standard by which a court recognizes a state's ability to intrude on a person's rights.⁴⁹ The threshold of legal incapacity has changed dynamically as our understanding of the human mind has evolved.⁵⁰ Recent history spurred this evolution; the cultural revolution of the 1960s sparked discussion surrounding human rights.⁵¹ Furthermore, psychology developed greatly in the 1960s as a well-accepted science that aided understanding of the human mind.⁵² States responded to the need for legal protections by enacting statutes in the wake of the disability rights movement.⁵³ Guidance on guardianship law such as the 1969 revision of Uniform Probate Code reflect

42. *Id.*

43. See *Guardianship Education and Prevention*, AAAPG, <https://aaapg.net> (last visited Oct. 20, 2020) [perma.cc/XW6R-UGQ7].

44. See discussion *infra* Part III.

45. See discussion *infra* Parts IV, V.

46. See discussion *infra* Part VII.

47. See Gregory Atkinson, *Towards a Due Process Perspective in Conservatorship Proceedings for the Aged*, 18 J. FAM. L. 819, 820 (1979).

48. See *Guardianship Education and Prevention*, *supra* note 43.

49. See Kristin Booth Glen, *Changing Paradigms: Mental Capacity, Legal Capacity, Guardianship, and Beyond*, 44 COLUM. HUM. RTS. L. REV. 93, 95 (2012).

50. *Id.*

51. See Roland Burke, 'How Time Flies': Celebrating the Universal Declaration of Human Rights in the 1960s, 38 THE INT'L HIST. REV. 394 (2016).

52. Kendra Cherry, *The Origins of Psychology from Philosophical Beginnings to the Modern Day*, VERYWELLMIND (June 25, 2020), <https://www.verywellmind.com/a-brief-history-of-psychology-through-the-years-2795245> [perma.cc/BYB3-LK5V].

53. Gerard Quinn, NUI Galway, *Personhood & Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD*, Paper Presented at Harvard Law School HPOD Conference (Feb. 20, 2010), reprinted in CTR. FOR DISABILITY L. & POL'Y, app. 6, at 73 (Aug. 2011), [https://www.nuigalway.ie/media/centrefordisabilitylawandpolicy/files/archive/Submission-on-Legal-Capacity-to-the-Oireachtas-Committee-on-Justice,-Defence-&Equality-\(August,-2011\).pdf](https://www.nuigalway.ie/media/centrefordisabilitylawandpolicy/files/archive/Submission-on-Legal-Capacity-to-the-Oireachtas-Committee-on-Justice,-Defence-&Equality-(August,-2011).pdf) [perma.cc/5X27-QFNH].

the new ideas the movement brought about.⁵⁴ In 1987, the Associated Press published a detailed six-part series of articles following a year-long investigation on guardianships.⁵⁵ The exposition spurred outcries for change, and thus began the new wave of guardianship reform.⁵⁶ Modern laws on guardianship that followed the Associated Press stories include the “clear and convincing evidence” standard of proof, and the requirement that the incapacitated person must be notified of the guardianship proceeding and be present if they so choose.⁵⁷

Currently, courts must find a potential ward incapacitated to such a degree that warrants state intervention because the incapacitated person is no longer able to make medical, financial, or personal decisions.⁵⁸ A court may initiate conservatorship proceedings or may be petitioned by a person interested in the proposed ward’s wellbeing.⁵⁹ Britney’s father did not petition the court for conservatorship; rather, he was appointed by the court as a conservator after Britney was involuntarily committed under the California Welfare laws.⁶⁰ Once a court determines that a person is unable to understand and make decisions about their own person or property, the court will evaluate what type of legal protection is needed, and how much protection is necessary.⁶¹ The court should address potential conservatorships on a case-by-case basis, because each person’s set of circumstances is unique.⁶² Conservatorships may be limited or unlimited.⁶³ The court will grant authority to a guardian only to the extent necessary to meet the ward’s needs.⁶⁴ For example, the court may determine that a potential ward possesses the requisite capacity to make decisions about money management, but not healthcare decisions.⁶⁵ The guardian will have the authority to only make decisions about healthcare.⁶⁶ In comparison, if the court determines the ward does not retain the requisite capacity to make *any* decisions, then the guardian will obtain absolute decision-making power.⁶⁷ Britney’s father currently has unlimited guardianship authority.⁶⁸

54. UNIF. PROB. CODE § 1-101 (amended 2019) (1969).

55. Emily Gurnon, *Guardianship Laws: Improving, But Problems Persist*, NEXT AVENUE (May 24, 2016), <https://www.nextavenue.org/guardianship-laws-improving-problems-persist/> [perma.cc/R9F8-TF4C].

56. *Id.*

57. *Id.*

58. *Id.*

59. *In re Conservatorship & Est. of Spears*, No. B214749, 2011 WL 311102, at *1 (Cal. Ct. App. Feb. 2, 2011).

60. *See* discussion *infra* Part IV.

61. *See* discussion *infra* Part IV.

62. Meta S. David, *Legal Guardianship of Individuals Incapacitated by Mental Illness: Where Do We Draw the Line?*, 45 SUFFOLK U. L. REV. 465, 483 (2012).

63. *Id.* at 473–74.

64. *Id.* at 474.

65. *See id.*

66. *See id.*

67. *See id.*

68. Puente, *supra* note 39.

Conservatorships are designed to protect the ward from undue influence, exploitation of property, or both, as well as to provide the incapacitated with necessary daily care.⁶⁹ Britney's case is unique because of her fame and fortune, so the court must consider how Britney's position as a pop star will affect the protections needed in order to provide an efficient conservatorship.⁷⁰ Further, the court is compelled to consider the fact that Britney is worth \$60 million as of this writing.⁷¹ The value of her person and estate may cause a conservator to be ill-intentioned and driven by greed, which requires vigilant legal protections for Britney.⁷²

A. Guardianship and Conservatorship

In some jurisdictions, guardianship refers to a guardian's legal duty to care for the health and welfare of the incompetent person while simultaneously safe keeping and managing the ward's property.⁷³ Other jurisdictions create two separate roles: one role looks after the ward's health and welfare (usually called a guardianship), and the other role looks after the ward's property (often called a conservatorship).⁷⁴ The Uniform Probate Code and California Probate Code treat "conservatorship" and "guardianship" as different concepts.⁷⁵ The Texas Estates Code uses the term "guardianship" to encompass both the person and person's property.⁷⁶ This comment will refer both to conservatorship and guardianship.⁷⁷

Understanding the unintended consequences of conservatorship continues to enlighten the legal profession as time progresses.⁷⁸ Such consequences include revocation of an individual's constitutional rights.⁷⁹ Legal commentators note that the legal relationship between conservator and conservatee is not adequate in meeting the needs of the elderly or incapacitated.⁸⁰ Commentators argue that a lack of judicial oversight of the conservatorships results in substantial loss of liberty and property for many of the persons that these arrangements are intended to protect.⁸¹

69. *Id.*

70. *Id.*

71. Allen, *supra* note 30.

72. *Id.*

73. TEX. EST. CODE ANN. § 1001.001.

74. UNIF. PROB. CODE §§ 5-301, 5-401 (amended 2019) (1969).

75. *Id.*; CAL. PROB. CODE § 1400 (West, Westlaw through Ch.10 of 2021 Reg. Sess.).

76. TEX. EST. CODE ANN. § 1001.001.

77. See discussion *infra* Part III.

78. See Paula L. Hannaford & Thomas L. Hafemeister, *The National Probate Court Standards: The Role of the Courts in Guardianship and Conservatorship Proceedings*, 2 ELDER L.J. 147, 148 (1994).

79. *Id.* at 157.

80. *Id.* at 148-49.

81. *Id.*

Due process concerns arise when a person is deemed legally incompetent by a judge.⁸² When an individual is declared legally incompetent, they lose the legal right to marry, contract, and vote.⁸³ Because legally protected rights are at stake, substantial due process requires careful considerations throughout conservatorship proceedings.⁸⁴ Further, procedural due process concerns will arise if the incompetent person desires to hire their legal representation; but cannot contract with a lawyer for representation.⁸⁵

The ramifications of conservatorship revert an adult to the legal status of a child.⁸⁶ The evolution of conservatorship has led legal experts, lawyers, and judges to reexamine the process, and some states have responded through legislative protections.⁸⁷ While the progress in conservatorship protection is positive, conservatorship law still has room for improvement in the area of high-functioning wards, such as Britney Spears.⁸⁸

B. “High-Functioning” Wards

This Comment refers to a “high-functioning” ward as an individual who can care for themselves, generate income, and has the acuity to understand the nature of the conservatorship despite living with functional limitations.⁸⁹ Britney Spears is a high-functioning ward, evidenced by her ability to execute complicated performances to make a living throughout her conservatorship.⁹⁰ Britney can understand her conservatorship’s nature and has expressed her desire to terminate her father as her conservator.⁹¹ Furthermore, Britney’s social media presence is a window into her daily life; onlookers witness her vibrancy.⁹² Allowing fans insight into Britney’s life is what sparked the #FreeBritney movement because Britney’s social media posts are convincing her fans that she is, in fact, competent.”⁹³

82. *Id.*

83. *See Doe v. Rowe*, 156 F. Supp. 2d 35, 46 (D. Me. 2001).

84. Hannaford & Hafemeister, *supra* note 78, at 148–49.

85. Chandra Bozelko, *Britney Spear’s Conservatorship Can Be Both Legal and Quite Bad for Her. Many Are*. NBC NEWS (Nov. 14, 2020, 9:11 AM), <https://www.nbcnews.com/think/opinion/britney-spears-conservatorship-can-be-both-totally-legal-quite-bad-ncna1247750> [https://perma.cc/6RCH-YMWF].

86. *Id.*

87. Hannaford & Hafemeister, *supra* note 78, at 12.

88. *See Bozelko supra* note 85.

89. *Gallo v. Colvin*, No. 13-CV-06528 MAT, 2014 WL 3901129 (W.D.N.Y. UG. 11, 2014).

90. *See Bozelko, supra* note 85.

91. *Id.*

92. Gil Kaufman, *#FreeBritney: Why the Movement Started and How Its Leading Voices Are Keeping It Going*, BILLBOARD (Sep. 10, 2020), <https://www.billboard.com/articles/news/9445049/free-britney-spears-movement-started> [https://perma.cc/64D9-WD5F].

93. *Id.*

High-functioning status may be considered on a case-by-case basis and is subjective to each ward's position.⁹⁴ If there is another feasible and less-restrictive means to provide for the ward's needs, the court should consider reviewing the situation and making reasonable modifications.⁹⁵ In comparison, persons who cannot care for themselves and completely depend on their guardian for survival are not considered high-functioning.⁹⁶

This Comment is concerned with persons who toe the line of competence and incompetence.⁹⁷ The court must consider medical diagnosis and analysis from medical professionals to determine a person's level of functioning compared to an "average" person in similar circumstances.⁹⁸ A review process is necessary because courts are often busy and slow; an out-of-court review process will allow easier access and faster response times to request for review of the conservatorship.⁹⁹

III. THE UNIFORM PROBATE CODE

The Uniform Probate Code (UPC) was enacted in 1969 to create a model standard of laws to address issues of wills, trust, and estates.¹⁰⁰ The UPC was intended to standardize the probate process in all fifty states; however, it has only been fully adopted by some of the states.¹⁰¹ The section of the code that discusses guardianship was integrated by the Uniform Guardianship and Protective Proceedings Act of 1997/1998 and is now incorporated as Article V of the UPC.¹⁰²

The 1997 revisions were created in response to the guardianship "revolution" of the 1980s.¹⁰³ The nation's legal scholars began understanding how guardianships, although rooted in assisting incapacitated persons, potentially pose risks to incapacitated persons' autonomy.¹⁰⁴ Individual state legislatures began implementing laws reflecting the need to facilitate the

94. Karen Andreasian, *Revisiting S.C.P.a 17-a: Guardianship for People with Intellectual and Developmental Disabilities*, 18 CUNY L. REV. 287 (2015).

95. *Id.*

96. See discussion *infra* Part VII.

97. See discussion *infra* Part VII.

98. Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735 (2002).

99. Kenneth Rosenau & Evan Greenstein, *Guardianship and Conservatorship: Frequently Asked Questions*, LAWHELP.ORG, <https://www.lawhelp.org/dc/resource/guardianship-and-conservatorship-frequently-a> (last visited Jan. 19, 2021) [<https://perma.cc/AUF9-E3MD>].

100. *Uniform Probate Code Lawyers*, LEGAL MATCH, <https://www.legalmatch.com/law-library/article/uniform-probate-code-lawyers.html#:~:text=There%20are%20currently%2018%20states%20that%20have%20adopted,North%20Dakota%2C%20South%20Carolina%2C%20South%20Dakota%2C%20and%20Utah> (last visited Oct. 20, 2020) [<https://perma.cc/8L2X-A2WN>].

101. *Id.*

102. UNIF. PROB. CODE § 5-101 (amended 2019) (1969).

103. UNIF. PROB. CODE Art. V, refs & annos.

104. *Id.*

autonomy of incapacitated persons.¹⁰⁵ A two-year study by the A.B.A. Senior Lawyers Division Task Force on Guardianship Reform generated a report that created the foundation for the 1997 revisions in light of a new understanding of guardianship consequences.¹⁰⁶ The revisions emphasized limited guardianship and support for autonomy.¹⁰⁷

With this in mind, the 1997 revision made substantial changes to guardianship law.¹⁰⁸ The improvements were made to view guardianship as a last result, and to foster a working relationship between the guardian and the ward in the decision-making process.¹⁰⁹ So far, eighteen states have fully adopted the UPC: Alaska, Arizona, Colorado, Florida, Hawaii, Idaho, Maine, Minnesota, Montana, Nebraska, New Mexico, North Dakota, South Carolina, South Dakota, and Utah.¹¹⁰

A. Incapacitated Persons Under the UPC

The Uniform Probate Code distinguishes between guardianship (protection of the person) and conservatorship (protection of the person's property).¹¹¹ By dividing the two concepts, the court has flexibility in establishing what level and type of care is needed for the proposed ward.¹¹² This Comment analyzes guardianship and conservatorship separately.¹¹³

B. Guardianship

Uniform Probate Code section 5-102(4) defines an incapacitated person as “an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, *even with appropriate technological assistance*.” (emphasis added).¹¹⁴ The revised definition is designed to take into consideration the development of assistive technology that may “enable the individual to receive and evaluate information or to make or communicate decisions” to potentially find that the person is not an incapacitated person.¹¹⁵ By allowing technological assistance to play a role in determining a person's capacity to care for themselves, the UPC creates an avenue for persons who

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. UNIF. PROB. CODE Art. V, refs & annos.

110. *See Uniform Probate Code Lawyers, supra* note 100.

111. UNIF. PROB. CODE §§ 5-301, 5-401 (amended 2019) (1969).

112. *Id.*

113. *See discussion infra* Sections III.B, III.C.

114. UNIF. PROB. CODE § 5-102(4).

115. *See Uniform Probate Code Lawyers, supra* note 100, at 15.

are limited in their capacity, not to the degree of warranting a restriction of rights.¹¹⁶ This option protects a person from unnecessary guardianship.¹¹⁷ As technology progresses rapidly, the application of that technology to everyday life may encourage a broader application of this provision to find more persons able to care for themselves.¹¹⁸

1. Who May Become a Guardian?

Under UPC section 5-301, when an incapacitated person is under guardianship by court appointment, the guardian may be a parent, spouse, or a person appointed by the court.¹¹⁹ The guardianship will continue until terminated, regardless of the location of the guardian or ward.¹²⁰ A person interested in the individual's wellbeing may petition the court to assess the individual's needs.¹²¹ The court may determine the potential ward's incapacity and appoint a guardian upon review of the individual's needs and may install an unlimited or limited guardianship.¹²² The burden of proof in establishing guardianship is clear and convincing evidence.¹²³

a. Priorities of Who May Become a Guardian

Once the court finds a person incapacitated to the degree warranting a guardianship, the court must decide who may be a guardian to serve the ward's best interest.¹²⁴ UPC section 5-310 classifies potential guardians in an order of priority as follows:

- (1) A guardian, other than a temporary or emergency guardian, currently acting for the respondent in this state or elsewhere;
- (2) A person nominated as guardian by the respondent, including the respondent's most recent nomination made in a durable power of attorney, if at the time of the nomination the respondent has sufficient capacity to express a preference;
- (3) An agent appointed by the respondent or any individual nominated by will or other signed writing of a deceased spouse;
- (4) The spouse of the respondent or an individual nominated by will or other signed writing of a deceased spouse;
- (5) An adult child of the respondent;

116. See UNIF. PROB. CODE. § 5-102 cmt.

117. See *Uniform Probate Code Lawyers*, *supra* note 100, at 15.

118. See *id.*

119. UNIF. PROB. CODE. § 5-301.

120. *Id.* § 5-301.

121. *Id.* § 5-304(a).

122. *Id.* § 5-301.

123. *Id.* §§ 5-311, 5-401.

124. *Id.* § 5-306 (a professional evaluation of the potential ward, at or before the hearing, may be ordered at the request of the potential ward to determine incapacity).

- (6) A parent of the respondent, or an individual nominated by will or other signed writing of a deceased parent; and
- (7) An adult with whom the respondent has resided for more than six months before the filing of the petition.¹²⁵

This prioritized list offers guidance to the court when making this determination, but it is not binding.¹²⁶ The court has the discretion to appoint a guardian of equal priority or out of order if such a person is best qualified to become the ward's guardian.¹²⁷ This type of appointment is typically implicated when there is already an existing guardian.¹²⁸ Most cases that fall under the already existing guardian category involve transfers of guardianship between states.¹²⁹ Granting priority to a current guardian assures a smooth transition between jurisdictions and will deter forum shopping.¹³⁰ The UPC considers the proposed ward's preference in sections (2) and (3).¹³¹ The official comment states, "[t]he agent is granted a preference on the theory that the agent is the person the respondent would most likely prefer to act."¹³² The language used in subsection (6) intentionally added the phrase "with whom the respondent has resided for more than six months" to replace the previous versions' "domestic partner or companion" which limited the application of this section to a domestic partner, a spousal relationship, or both.¹³³ The current version was revised to encompass other types of relationships that offered the similar nature of a "close enduring relationship," which may be in the ward's best interest.¹³⁴ Moreover, the new version broadened this subsection's application to include close relationships outside of the romantic type.¹³⁵ Subsection (7) allows for a domestic partner, companion, or an individual who has a close, personal relationship with the respondent to serve as guardian; such priority is granted by applying a reasonableness standard so that priority is given to someone with a close, enduring relationship with the ward.¹³⁶

The list of priorities allows the court to have a uniform approach to appointing guardians and reflects the consideration of who may serve as guardian in line with the best interest of the ward.¹³⁷

125. UNIF. PROB. CODE § 5-310.

126. *Id.* § 5-310(b).

127. *Id.* § 5-310.

128. *Id.*

129. *Id.*

130. *Id.*

131. UNIF. PROB. CODE § 5-310(a)(2)-(3).

132. *Id.* § 5-310 cmt.

133. *Id.* § 5-310(a)(6).

134. *Id.* § 5-304 cmt.

135. *Id.* § 5-304.

136. UNIF. PROB. CODE § 5-304(7).

137. *See* discussion *supra* Section III.B.1.a.

b. Proposed Vetting Under the UPC

The reader may consider that most protections in place for wards are reactionary.¹³⁸ The legislature should consider implementing proactive measures of protection to reduce the potential for harm to the ward, while also reducing the volume of cases before the probate court.¹³⁹

While the court must decide based on the ward's best interest, the UPC does not create a vetting process for a proposed guardian.¹⁴⁰ Generally, the proposed guardian will be a person in close familial relation to the ward, which creates the illusion that the proposed guardian is the best person for the role.¹⁴¹ In most instances, a family member or spouse will have the best intent for the proposed ward and will be the reasonable choice to care for the conservatee.¹⁴²

Two issues may arise when a kindred gains legal status over the ward.¹⁴³ First, the guardian may not fully understand what they are getting into.¹⁴⁴ Once the court grants guardianship, the guardian is bound by a fiduciary relationship to care for the ward.¹⁴⁵ A fiduciary duty is defined as "a duty of utmost good faith, trust, confidence, and candor owed by a fiduciary to the beneficiary; a duty to act with the highest degree of honesty and loyalty toward another person and in the best interest of the other person."¹⁴⁶ The duty enumerated in UPC Section 5-314 states, "a guardian shall make decisions regarding the wards support, care, education, health and welfare."¹⁴⁷ Second, life changes rapidly, and circumstances may arise when the guardian is no longer able to serve in the ward's best interest.¹⁴⁸

The complex nature of guardianship is best understood when a potential guardian is properly educated in matters of fiduciary duty and legal liability.¹⁴⁹ Some states, such as Texas, provide certification programs for potential guardians to help the guardian understand the undertaking of becoming a guardian for an incapacitated person.¹⁵⁰ Certification serves as a

138. See discussion *supra* Section III.B.4.a.

139. See discussion *infra* Section VII.A.1.

140. UNIF. PROB. CODE § 5-310.

141. *Id.*

142. See *In re Guardianship of Alabraba*, 341 S.W.3d 577 (Tex. App.—Amarillo May 13, 2011).

143. See *id.*

144. See *id.*

145. Johnathan J. Bates. Colleen Elbe, Lynn Kamin, Hon. Stephani A. Walsh, R. Kevin Spencer, GUARDIANSHIP LAW IN TEXAS, Chapter 42, (Advanced Fam. L. 43-VIII, 2018).

146. *Duty*, BLACK'S LAW DICTIONARY (11th ed. 2019).

147. UNIF. PROB. CODE § 5-314 (amended 2019) (1969).

148. *Id.* § 5-310 cmt.

149. *Guardianship Certification Requirements*, TEXAS JURISPRUDENCE PLEADING AND PRACTICE FORMS § 131:34 (2d. ed.).

150. *Id.*

proactive measure in mitigating the risk of abuse or neglect of wards by guardians.¹⁵¹

Furthermore, some states require that guardians register in a data system in order to monitor ongoing guardianships.¹⁵² The data collected by the registration system may provide lasting benefits as the need for guardianship in America is predicted to increase as the elderly population increases.¹⁵³ Data collected through the registration system will expand knowledge and understanding of guardianship issues which may be used to improve upon the institution.¹⁵⁴ Guardianship registration records will lay the foundation of a new wave in understanding how guardianship affects an individual's freedoms as well as utilizing collected data to educate future guardians more effectively.¹⁵⁵

Legal processes are foreign and often intimidating to most people.¹⁵⁶ A guardian is bound by a fiduciary relationship, which creates a potential legal liability on behalf of the guardian.¹⁵⁷ The court should address the potential legal implications with a proposed guardian and ensure that said person is fully informed on the legal issues that may arise throughout the guardianship by requiring the guardian's certification.¹⁵⁸ A breach of duty may result in sanctions, suspension, or removal of the guardian.¹⁵⁹ The court will decide.¹⁶⁰ Certification will follow an educational course to prepare a proposed guardian.¹⁶¹ The certified guardian is then presented with a document that states their status as a certified guardian.¹⁶² Certification ensures that a proposed guardian is informed and equipped with the tools needed to care for their incapacitated loved one, including a community of other people in a similar situation by which the guardian may tap into when faced with difficult situations throughout the guardianship.¹⁶³ The guardian's certification process should establish a legal presumption that the breach of the fiduciary duty is made knowingly because the guardians acted adversely to the duty owed to the ward.¹⁶⁴ Failing to act in the ward's best interest, such as

151. *Id.*

152. Thomas M. Featherston, Jr., Lisa H. Jamieson, Judge Steve M. King, Sarah Patel Pacheco, REGISTRATION OF GUARDIANS § 17:60 (Texas Practice Guide Probate, 2021).

153. *See* discussion *supra* Section VII.A.1.

154. *See* discussion *supra* Section VII.A.1.

155. *See* discussion *supra* Section VII.A.1.

156. Margaret Hagan, *The Legal System Needs to be Redesigned, By Normal People for Normal People*, OPEN L. LAB (Nov. 18, 2015), <https://www.openlawlab.com/2015/11/18/the-legal-system-needs-to-be-redesigned-by-normal-people-for-normal-people/> [<https://perma.cc/W8XD-RNLC>].

157. UNIF. PROB. CODE § 5-314 (amended 2019) (1969).

158. *See* discussion *infra* Section VIII.A.1.

159. Mary F. Radford, § 5:31. *Sanction, Suspension, or Removal of Conservator; Appointment of Temporary Substitute Conservator*, GA. GUARDIANSHIP & CONSERVATORSHIP (2020).

160. *Id.*

161. *See* discussion *supra* Section VIII.A.1.

162. *See* discussion *supra* Section VIII.A.1.

163. *See* discussion *infra* Section VIII.A.1.

164. *See* discussion *infra* Section VIII.A.1.

mishandling of money for self-dealing, is a breach of fiduciary duty.¹⁶⁵ The guardian is made aware of the duty via educational course and certification, so any conflict with that duty is an informed decision.¹⁶⁶

2. Duties of the Guardian

Section 5-314 of the UPC details guardian's role and how the guardian should care for the ward.¹⁶⁷ The guardian, "at all times, shall act in the best interest and exercise reasonable care, diligence, and prudence."¹⁶⁸ Standards set forth for guardians were made to align with the ideals of autonomy and to "encourage the development of maximum self-reliance and independence of the incapacitated person and to make appointive and other orders only to the extent necessitated by the incapacitated persons mental and adaptive limitations."¹⁶⁹ A ward's values and expressed desires are given weight in the decision-making process, but only "to the extent known to the guardian."¹⁷⁰ Limiting language does not alleviate the guardian from making an effort to learn the ward's personal values and to inquire what the ward desires before the guardian makes decisions.¹⁷¹ By establishing an expectation that a ward, while incapacitated, retains the ability to influence the guardian in decision making, the ward's best interest is better served.¹⁷² Also, a ward will maintain a sense of dignity because their voice should be considered throughout the decision making process that directly affects their life.¹⁷³

3. Powers of The Guardian

Powers expressly granted to the guardian under UPC section 5-315 include:

- (a) Except as otherwise limited by the court a guardian may:
 - (1) apply for and receive money payable to the ward or the ward's guardian or custodian for the support of the ward under the terms of any statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship;

165. *Breach of Fiduciary Duties*, HOFFMAN, <https://www.hoffmanpa.com/practices/probate-guardianship-trusts-estates/guardianship-contests/breach-of-fiduciary-duties/> (last visited Jan. 26, 2021) [<https://perma.cc/D3CX-5YMG>].

166. See discussion *infra* Section VIII.A.1.

167. UNIF. PROB. CODE § 5-314 (amended 2019) (1969).

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. See *id.*

- (2) if otherwise consistent with the terms of any order by a court of competent jurisdiction relating to custody of the ward, take custody of the ward and establish the ward's place of custodial dwelling, but may only establish or move the ward's place of dwelling outside this state upon express authorization of the court;
 - (3) if a conservator for the estate of the ward has not been appointed with existing authority, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the ward or to pay money for the benefit of the ward;
 - (4) consent to medical or other care, treatment, or service for the ward;
 - (5) consent to the marriage [or divorce] of the ward; and
 - (6) if reasonable under all of the circumstances, delegate to the ward certain responsibilities for decisions affecting the ward's well-being
- (b) The court may specifically authorize the guardian to consent to the adoption of the ward.¹⁷⁴

A guardian is granted a significant amount of power over the ward's life.¹⁷⁵ While the court must make decisions based on the best interests of the ward, a guardian has the potential to wield such power of the ward as to harm the ward.¹⁷⁶ Some states have limited the power by statute as to "prohibit a guardian from consenting to certain procedures . . . especially procedures which implicate the incapacitated persons constitutional rights."¹⁷⁷ Further, "[t]here may be similar requirements requiring a guardian's consent to electroconvulsive therapy (ECT) or other shock treatment, experimental treatment, sterilization, forced medication with psychotropic drugs, or abortion."¹⁷⁸ The court may limit the powers of the guardian as they see fit.¹⁷⁹ Granting excessive powers to a guardian is risky, and may allow a guardian to take advantage of the position bestowed upon them by the court.¹⁸⁰ Monitoring mechanisms are in place to allow the court continued review of guardianship and to readjust such guardianship as the relationship progresses over time.¹⁸¹

174. *Id.* § 5-315.

175. See Gregory Atkinson, *Towards a Due Process Perspective in Conservatorship Proceedings for the Aged*, 18 J. FAM. L. 819, 829 (1979).

176. *See id.*

177. UNIF. PROB. CODE § 5-315 cmt.

178. *Id.*

179. *See id.* § 5-315.

180. Hannaford & Hafemeister, *supra* note 78, at 12.

181. UNIF. PROB. CODE § 5-315.

4. Monitoring the Guardianship

Once guardianship is implemented, the UPC creates a monitoring system for guardianships in section 5-317.¹⁸² Within a thirty (30) day period after the guardian is appointed, the guardian must submit a report to the court containing information about the ward's condition and the ward's account(s) for money and assets which the guardian has possession or control by way of the guardianship.¹⁸³ The report must be in writing and the guardian must report to the court on an annual basis (or at any time the court orders a report).¹⁸⁴ The contents of the report must contain:

- (1) the current mental, physical, and social condition of the ward;
- (2) the living arrangements for all address of the ward during the reporting period;
- (3) the medical, educational, vocational, and other services provided to the ward and the guardian's opinion as to the adequacy of the ward's care;
- (4) a summary of the guardian's visit with the ward and the activities on the ward's behalf and the extent to which the ward has participated in the decision-making;
- (5) if the ward is institutionalized, whether the guardian considers the current plan for care, treatment, or rehabilitation to be in the ward's best interest;
- (6) plans for future care; and
- (7) a recommendation as to the need for continued guardianship and any recommended changes in the scope of guardianship.¹⁸⁵

The court should establish a way to monitor guardianships by means deemed necessary by the court, including the filing and review of reports.¹⁸⁶ Monitoring systems must contain mechanisms for assuring reports made on an annual basis are filed and reviewed in a timely manner.¹⁸⁷ Official comment for section 5-317 highlights that "[an] independent monitoring system is crucial for a court to adequately safeguard against abuses in the guardianship cases."¹⁸⁸ A court may appoint a person to review said report, and to make investigatory efforts if necessary.¹⁸⁹ The visitor appointed to investigate the guardianship by the court has a duty to investigate whether less restrictive alternatives to conservatorship exist and report to the court if

182. *Id.* § 5-317.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* § 5-317 cmt.

187. UNIF. PROB. CODE § 5-317 cmt.

188. *Id.*

189. *See id.*

such alternatives are a more feasible option for the ward.¹⁹⁰ The UPC's independent monitoring requirement is a retroactive protection that is needed to address harm that may go unseen by the court but for the reporting and ongoing monitoring of the guardianship.¹⁹¹

a. Termination or Modification of Guardianship

Under section 5-318 of the UPC, the guardianship is terminated upon the death of the ward.¹⁹² The guardianship may also be terminated if the ward, guardian, or another person who is interested in the ward's welfare, petitions the court to terminate the guardianship—if it is determined that the ward no longer needs the assistance or protection of a guardian.¹⁹³ The probate judge is bound to make decisions that are in the best interest of the ward; therefore, the court may modify, rather than terminate, the guardianship if it is determined that the ward is still unable to care for themselves.¹⁹⁴ The court may alter the type of appointment or powers granted to the guardian if, after review, the court finds the extent of protection or assistance previously needed are no longer needed.¹⁹⁵ Moreover, the court will consider the ward's preferences and personal values when determining the terms of the guardianship.¹⁹⁶

UPC section 5-314 list the duties of the guardian.¹⁹⁷ The guardian has a duty to report to the court if the ward's condition changes so significantly that the guardian believes that the ward is "capable of exercising rights previously removed."¹⁹⁸ If the guardian immediately reports changes in the ward's condition, the risk that the ward will be trapped in a guardianship longer than necessary is reduced because the ward will not have to wait to have their rights restored.¹⁹⁹ Enumerating the duty to immediately report any changes in the ward's condition gives the guardian proper notice of the duty, which leaves no room for excuses as to why the guardian did not immediately report any changed circumstances.²⁰⁰ This bright line rule of liability for failure to immediately report furthers efforts to adequately protect the ward from unnecessary guardianship.²⁰¹ The guardian will be liable for

190. *See id.*

191. *See* discussion *infra* Section VIII.B.

192. UNIF. PROB. CODE § 5-318(a).

193. *Id.* § 5-318.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.* § 5-314.

198. UNIF. PROB. CODE § 5-314(5).

199. *Id.* § 5-314 cmt.

200. *Id.* § 5-318 cmt.

201. *See* discussion *supra* Section VIII.A.1.

perpetuating guardianship for self-serving reasons,²⁰² for example, payment from the ward's estate to the guardian for services.²⁰³

If the court is petitioned for review and termination of the guardianship, the party petitioning the court must make a prima facie showing in order to terminate the guardianship.²⁰⁴ The official comment of section 5-318 explains that the standard to establishing guardianship should be higher than the standard to terminate or modify guardianship.²⁰⁵ The standard set forth is aligned with the intention to protect the ward from unnecessary guardianship.²⁰⁶ Once the party has proven their case to the court, the burden shifts to the opposing party to prove by clear and convincing evidence that continuation of the guardianship is in the best interest of the ward.²⁰⁷

C. Conservatorship

Conservatorship under the UPC refers to the legal relationship between the incapacitated person's property and the person appointed by the court to oversee the conservatee's estate and affairs.²⁰⁸ The court may simultaneously create a guardianship and conservatorship in the same person (like Jamie Spears oversees Britney Spears' person and property), or appoint different people for each role.²⁰⁹ The court may also implement conservatorship over the proposed ward's property in conjunction with guardianship over the person depending on what the court determines is in the best interest of the proposed ward.²¹⁰ The court may also grant a limited or unlimited conservatorship as is available for guardianship.²¹¹ Conservatorships under the UPC contain revisions which emphasize limiting assistance of an incapacitated person to allow such persons autonomy.²¹²

If the court determines that a person is unable to manage property and business affairs themselves, the court will appoint a conservator under UPC section 5-401.²¹³ UPC section 5-401(2)(A) establishes that a court will determine:

[b]y clear and convincing evidence, the individual is unable to manage property and business affairs because of an impairment in the ability to

202. See discussion *supra* Section VIII.A.1.

203. See discussion *supra* Section VIII.A.1.

204. UNIF. PROB. CODE § 5-318 cmt. (amended 2019) (1969).

205. See *id.*

206. See *id.*

207. See *id.*

208. *Id.* § 5-401.

209. UNIF. PROB. CODE §§ 5-401, 5-315.

210. See *id.* §§ 5-401, 5-315.

211. *Id.* § 5-401.

212. *Id.*

213. *Id.*

receive and evaluate information or make decisions, even with the use of appropriate technological assistance . . .

And;

by a preponderance of the evidence, the individual's property that will be wasted or dissipated unless management is provided, or money is needed for the support, care, education, health, and welfare of the individual or of individuals who are entitled to the individual's support and that protection is necessary or desirable to obtain or provide money.²¹⁴

UPC section 5-401(2) requires that the proposed ward is impaired as to warrant a status of "incapacitated" similar to the test for the appointment of a guardian under UPC section 5-102(4).²¹⁵ Further, the drafting committee took into consideration potential technological assistance for the proposed conservatee and determined that the importance of the proposed conservatee's rights required any technological assistance available to be a consideration regardless of the cost.²¹⁶ Such a provision was created in mind with assisting an incapacitated person by the least restrictive means.²¹⁷

1. Who May Be a Conservator?

UPC section 5-413 lists persons who may be conservator of a conservatee's property in an order of priority—the list is nearly identical to UPC section 5-310.²¹⁸ Similar to who may become a guardian, the court determines whether a particular person as a conservator is in the best interest of the conservatee.²¹⁹ The court may use its discretion to appoint a person out of order of the priority list.²²⁰ The proposed conservatee may nominate an individual to serve as the conservator, and if the nominee has sufficient capacity to express a preference, that person will be granted priority over the conservatee's relatives.²²¹ A conservatee with capacity to choose their conservator is granted this choice based on the theory that the appointed person is the person who conservatee would most likely prefer to act.²²² UPC section 5-413 provides that a relative or spouse has priority in consideration of becoming a conservator.²²³ Having a close personal relationship with the conservatee may be an asset to the conservatee, but may also create risk due to the close nature of the relationship.²²⁴ A guardian of close kinship to the

214. *Id.* § 5-401(2)(A).

215. UNIF. PROB. CODE § 5-401(2).

216. *Id.* § 5-401 cmt.

217. *Id.*

218. *Id.* § 5-413.

219. *Id.*

220. *Id.* § 5-413 cmt.

221. UNIF. PROB. CODE § 5-413 cmt.

222. *Id.*

223. *Id.*

224. *In re Guardianship of Vesa*, 892 S.W.2d 491, 579 (Ark. 1995).

ward may attempt to act in the best interest of the ward, but may have clouded judgement because of the relationship.²²⁵ Courts should use the standard of reasonableness in applying a close relative or spouse as a conservator so that priority is given to someone with whom the conservatee has a close, enduring relationship with.²²⁶

This section of the UPC is similar to determining who has priority for proposed guardianship.²²⁷ The same suggestions made in Section III above, proposed vetting, are also relevant and should be applied to conservatorships under the UPC.²²⁸

2. Protected Person's Interest in Inalienable Rights

UPC section 5-422 grants protections of the conservatee's property rights while under conservatorship.²²⁹ Official comment of section 5-422 discusses the relationship between conservator and conservatee in regard to the conservatee's property, which is similar to a trustee relationship.²³⁰ UPC section 5-422 grants protection of the conservatee's rights to the property and is intended to afford protections to the estate as well.²³¹ The intent behind this subsection should be expanded upon.²³² The theory of a fiduciary relationship as a trustee should extend to all sections of the UPC in respect to guardians and conservatorships.²³³ Official comments are not binding law; the UPC may improve upon itself by establishing the duty of the conservator as one of a trustee.²³⁴

a. Best Interest of the Ward

Throughout the UPC, the court is bound to act "in the best interest of the ward."²³⁵ However, the UPC does not create bright-line rules for determining what is in the best interest of the ward.²³⁶ Creating a bright line rule may be difficult as each person's situation is unique and will require a

225. See UNIF. PROB. CODE § 5-413.

226. *Id.*

227. *Id.* § 5-413(c).

228. See discussion *supra* Section III.B.1.b.

229. UNIF. PROB. CODE § 5-422.

230. *Id.* § 5-422 cmt.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Persuasive Authority*, CORNELL L. (May 2020), https://www.law.cornell.edu/wex/persuasive_authority (last visited Jan. 28, 2021) [<https://perma.cc/CT7U-4T85>].

235. See, e.g., UNIF. PROB. CODE § 5-107 cmt. ("[t]he standard . . . is always the best interest of the ward.").

236. See discussion *supra* part III.

case-by-case analysis of what is in the best interest of the ward.²³⁷ While no set of rules will fit perfectly to each situation, more explicit guidance from the UPC may prove to benefit the guardianship and conservatorship proceedings.²³⁸ The UPC currently offers understanding of the ward's best interest by considering the proposed ward's preference of who may be a guardian (if sufficient capacity is found).²³⁹ Also, the UPC expanded upon appointing a guardian that has a "close enduring relationship" to include persons with whom the ward has resided with for six months prior to the ward's incapacity (as opposed to the previous version of the code which limited the "close enduring relationship" to a spouse or domestic partner).²⁴⁰ The UPC affords protection of the ward through mandatory accounting and reporting to the court to ensure the relationship is still in the best interest of the ward.²⁴¹

What is best for the ward should be expanded to include guardians who are properly vetted, trained, and certified.²⁴² Incorporating the expectation of a fiduciary duty in context of guardianship and enumerating what causes of action may be brought for a breach of that fiduciary duty would further serve the best interest of the ward.²⁴³

Section 5-314 lists the duties of the guardian, but the repercussions for violating the duties are not listed.²⁴⁴ Guardians should be put on notice of what a breach of fiduciary duty entails and what will happen if the duty is breached; such notice may serve as a proactive protection of the ward.²⁴⁵

The UPC should add a section "causes of action" under the code for breach of fiduciary duty and other claims for specific harms which may arise from the guardian-ward relationship. Adding this measure will ease access to the courts by way of an established case and controversy arising from the court appointed guardianship.

3. Challenging Guardianship Under the UPC

The UPC allows a petition by a "ward, guardian or another person interested in the wards welfare" to review or terminate guardianship.²⁴⁶ If the UPC explicitly outlines the fiduciary duties and causes of action for breach of the duties, then an action challenging the guardianship or seeking to

237. Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735 (2002).

238. *Id.*

239. UNIF. PROB. CODE § 5-310.

240. *Id.* § 5-310 cmt.

241. *Id.* § 5-317.

242. See discussion *infra* Section V.B.2.

243. See discussion *infra* Section V.B.2.

244. UNIF. PROB. CODE § 5-314.

245. See discussion *infra* Section V.B.2.

246. UNIF. PROB. CODE § 5-318.

terminate the guardianship will be strengthened by establishing a prima facie case for termination via breach of fiduciary duty and enumerated cause of action under this code.²⁴⁷ As official comment of UPC section 5-414 states, “it is essential that the protected person have the right to petition for the appropriate relief.”²⁴⁸ This will put guardians on notice of their liability under the code while granting the ward proper means to bring a challenge of the guardianship through an established cause of action.²⁴⁹

IV. BRITNEY SPEARS IN CALIFORNIA

Britney Spears is under conservatorship in the state of California.²⁵⁰ Spears’s story began as her mental health issues unfolded in public.²⁵¹ Britney was in the middle of a divorce and child custody battle, was battling drug abuse, and was estranged from her parents.²⁵² On January 31, 2008, Britney was admitted to UCLA Medical Center under California Welfare & Institutions Code section 5150 “Dangerous or gravely disabled person; taking into custody procedures,” and was placed on a psychiatric hold.²⁵³ California law grants the state power to take a person into custody in emergency situations where a person, as a result of a mental health disorder, is a danger to themselves or others.²⁵⁴ Concerning behavior by Britney, such as locking herself in a bathroom with one of her children, warranted the state to intervene by exercising its authority under California Welfare & Institutions Code section 5150.²⁵⁵ The probate court instituted temporary conservatorship over the person and estate of Britney.²⁵⁶ Britney’s father, Jamie Spears, was appointed temporary conservator of Britney’s person; Jamie and Andrew Wallet were appointed temporary conservators of the estate; and Samuel Ingham was Britney’s court-appointed attorney.²⁵⁷

On February 4, 2008, the probate court held a hearing and extended both letters of conservatorship to February 14, 2008.²⁵⁸ Upon hearing, the probate court determined Britney did not possess the capacity to retain counsel.²⁵⁹

247. See discussion *infra* Section V.B.2.

248. UNIF. PROB. CODE § 5-414 cmt.

249. See discussion *infra* Section V.B.2.

250. Joanne Kavanaugh, *PROTECTED Britney Spears’ Conservatorship: What is it and How Does it Work?* THE SUN (July 6, 2020), <https://www.thesun.co.uk/tvandshowbiz/12046668/britney-spears-conservatorship/> [https://perma.cc/KPQ4-XHQAJ].

251. *Id.*

252. Lutfi v. Spears, No. B246253, 2015 WL 1088127 (Cal. Ct. App. Mar. 11, 2015).

253. CAL. WELF. & INST. CODE § 5150 (West 2021).

254. *Id.*

255. See *In re Conservatorship & Est. of Spears*, No. B214749, 2011 WL 311102, at *1 (Cal. Ct. App. Feb. 2, 2011).

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

Through various other court proceedings, such as the temporary restraining order against her manager Sam, it was brought to light that Britney was being taken advantage of; Britney's mother accused Sam of crushing up pills and drugging Britney.²⁶⁰ Britney was at risk of harming herself and unable to protect herself against harm from others like Sam.²⁶¹ It was clear at the time that Britney needed help, and conservatorship of Britney's person and property functioned as the best choice for Britney at this time in her life as she began the journey towards recovery.²⁶²

A. California

California conservatorship laws differ from the UPC in that "guardianship" is reserved only for proceedings regarding minors,²⁶³ while "conservatorship" is used in protective proceedings of a person and a person's estate.²⁶⁴ Section 1800.3(b) of the California Probate Code states, "[n]o conservatorship of the person of the estate shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the *least restrictive* alternative needed for the protection of the conservatee."²⁶⁵ The language used by the California Probate Code aligns with the UPC's intent to respect the conservatee's autonomy.²⁶⁶

1. Appointment: Standard of Proof

California Probate Code section 1801(a) states that a conservator may be appointed for "a person who is unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter."²⁶⁷ Further, subsection (b) continues to grant power over said person's estate when "a person who is substantially unable to manage his or own financial resources or resist fraud or undue influence."²⁶⁸ The code grants the power of conservatorship over the person and estate in subsection (c).²⁶⁹

In 2008, the circumstances of Britney's life, such as her public meltdown, met the requirements set forth in the California Probate Code as she was unable to care for herself, her kids, or her finances.²⁷⁰ Britney's

260. *Id.*

261. *Id.*

262. *Id.*

263. *See* CAL. PROB. CODE § 1419.5 (West 2021).

264. *Id.* § 1800.3.

265. *Id.* § 1800.3(b).

266. *Id.* § 1800.3.

267. *Id.* § 1801(a).

268. *Id.* § 1801(b).

269. CAL. PROB. CODE § 1801(c).

270. *See* CBS, *Timeline: Britney's Public Meltdown* CBS NEWS (Feb. 20, 2007), <https://www.cbsnews.com/news/timeline-britneys-meltdown/> [<https://perma.cc/4K8Q-YRTE>].

manager allegedly exploited Britney according to a book written by Britney's mother, Lynn.²⁷¹ Moreover, people remember Britney's reckless behavior such as driving while holding her infant son in the driver's seat and publicly shaving her head.²⁷²

2. Assessment of Proposed Limited or General Conservatee

California Probate Code section 1827.5 provides that once the necessity of conservatorship is determined by the court, the court shall order an assessment at a regional center pursuant to Division 4.5 of the Welfare and Institute Code.²⁷³ The regional center must deliver a copy of its findings to the proposed conservatee and their attorney if the proposed limited conservatee has one for the purpose of this court proceeding.²⁷⁴ The regional center will report on "the specific areas, nature, and degree of disability of the proposed conservatee."²⁷⁵ The court may find, based upon the report, that the proposed conservatee will best benefit from either a limited or unlimited conservatorship.²⁷⁶ While the report lays a foundational understanding of the level of care the proposed conservatee needs, the report is not binding upon the court.²⁷⁷

B. Who May Become a Conservator?

California Probate Code section 1810 allows the proposed conservatee to nominate a person to be their conservator, if the proposed conservatee has sufficient capacity to express an "intelligent preference."²⁷⁸ Similar to the UPC, the court is bound to appoint a nominee that is in the best interest of the proposed conservatee.²⁷⁹ Further, if the proposed conservatee cannot form an intelligent preference, section 1811(a) allows, "the spouse, domestic partner, or an adult child, parent, brother or sister of the proposed conservatee may nominate a conservator in the petition."²⁸⁰ Allowing a close family member to decide who will best serve in the role of conservator when the conservatee is unable to make an intelligent decision preserves the proposed conservatee's preference because a close family member is knowledgeable on the proposed conservatee's personality, preferences, likes, and dislikes.

271. See *In re Conservatorship & Est. of Spears*, No. B214749, 2011 WL 311102, at *1 (Cal. Ct. App. Feb. 2, 2011).

272. See CBS, *supra* note 270.

273. CAL. PROB. CODE § 1827.5 (2008).

274. *Id.*

275. *Id.* § 1827.5(c)(1).

276. *Id.* § 1827.5.

277. *Id.*

278. *Id.* § 1810.

279. See *id.*

280. *Id.* § 1811(a).

While the court may honor the proposed conservatee's preference, the court will make the decision based on what is in the best interest of the proposed conservatee.²⁸¹ Section 1812 grants the court discretion to appoint a conservator in order of preference listed in the statute, or to select a conservator out of the order of preference based on the courts finding of what is in the best interest of the proposed conservatee.²⁸²

1. Duties of Conservator

California Probate Code section 1835 lists the duties, limitations, and responsibilities of the conservator.²⁸³ Explicitly listing the duties of the conservator in the code binds the conservator to a standard of care expected of the conservator.²⁸⁴ The legal standard listed in the code allows the court to hold the conservator legally responsible for any breach of duty the conservator owes to the conservatee.²⁸⁵ The conservator has proper notice of the expectations of care as the fiduciary duties are explicit pursuant to the code.²⁸⁶ Section 1835 states:

- (a) Every superior court shall provide all private conservators with written information concerning conservator's rights, duties, limitation, and responsibilities under this division.
- (b) The information to be provided shall include, but not be limited to, the following:
 - (1) the rights, duties, limitations, and responsibilities of a conservator
 - (2) the rights of the conservatee
 - (3) how to assess the needs of the conservatee
 - (4) how to use community-based services to meet the needs of the conservatee
 - (5) how to ensure that the conservatee is provided with the least restrictive possible environment
 - (6) the court procedures and processes relevant to conservatorships
 - (7) the procedures for inventory and appraisal, and the filing of accounts[.]²⁸⁷

California law is progressive because the law puts responsibility on the court to ensure that the court is diligent while selecting a conservator, but also ensures that the conservator is equipped with knowledge of the responsibility

281. CAL. PROB. CODE § 1810 cmt.

282. *Id.* § 1812.

283. *Id.* § 1835.

284. *Id.*

285. *Id.*

286. *Id.*

287. CAL. PROB. CODE § 1835.

and legal duty bound upon them.²⁸⁸ The section continues by stating that: “(c) An information package shall be developed by the Judicial Council, after consultation with the following organizations or individuals.”²⁸⁹

Again, the court has the responsibility to properly educate and inform new conservators.²⁹⁰ The ward’s best interest is substantively considered because the court has a duty to consult with various organizations by collecting information for the package to be given to the conservator.²⁹¹ The Judicial Council consults with:

- (1) The California State Association of Public Administrators, Public Guardians, and Public Conservators, or other comparable organizations
- (2) The State Bar
- (3) Individuals or organizations, approved by the Judicial Council, who represent court investigators, specialist with experience in performing assessments and *coordinating community-based services*, and legal services programs for the elderly.²⁹²

California takes a more holistic approach when considering conservatorships as the role of a conservator is researched and condensed through various entities.²⁹³ A community-based approach allows the conservator-conservatee relationship to develop in a progressive manner because they will not be isolated and will be held to standards set forth by the community.²⁹⁴

2. Review of Conservatorship

California Probate Code section 1850 mandates the court to review the conservatorship.²⁹⁵ Section 1850 refers to section 1851(a) of the code by ordering a court investigation pursuant to section 1851(a).²⁹⁶ Six months after the appointment of the conservator, a court investigator must report to the court about the appropriateness of the conservatorship.²⁹⁷ Further, the court investigator must determine if the conservator is still operating in the best interest of the conservatee.²⁹⁸ Following this, the court must review the

288. *See id.* § 1835(c).

289. *Id.*

290. *Id.*

291. *Id.*

292. *Id.* (emphasis added)

293. *See id.* § 1835.

294. *See id.*

295. *Id.* § 1850.

296. *Id.* § 1851(a).

297. *Id.*

298. *Id.*

conservatee's placement, quality of care (physical and mental), and finances.²⁹⁹ The court then has discretion to take action based on the findings of the investigation, such as to further review the conservatorship or to order an accounting from the conservator.³⁰⁰

Frequency of review depends on the court.³⁰¹ The court must review the conservatorship one year after the appointment of the conservator and, based off that report, may order review annually or biannually.³⁰² The subsequent review period is determined in lieu of what is in the conservatee's best interest.³⁰³

Review of the conservatorship is also available at the request of any "interested person."³⁰⁴ Interested persons are, "generally proper parties and may be permitted to intervene in guardianship or conservatorship proceedings."³⁰⁵ An example of an interested person is next of kin, and these individuals will be a proper party to the guardianship proceedings as a consequence of their interest in the guardianship.³⁰⁶ An interested person may request review or accounting of the assets of the estate in accordance with California Probate Code section 2620.³⁰⁷

3. Termination of Conservatorship

Conservatorship is terminated upon death of the conservatee or by order of the court.³⁰⁸ A court order subject to California Probate Code section 2476 grants the conservator powers in accordance with the terms of the conservatorship which are necessary to perform the conservator's duty.³⁰⁹ Section 1860 does not apply to limited conservatorships.³¹⁰

Termination of a limited conservatorship is subject to California Probate Code section 1860.5.³¹¹ Section 1860.5 enumerates instances where termination is proper.³¹² Ultimately, the limited conservatorship is terminated upon death of conservator or conservatee, or if the court finds that the conservatorship is no longer necessary for the limited conservatee.³¹³ An interested person, the limited conservator, or conservatee may petition the

299. *Id.* § 1850(a)(1).

300. *Id.* § 1850(a)(1)(A)–(B).

301. *Id.* § 1850.

302. *Id.*

303. *Id.* § 1850(b).

304. *Id.*

305. 57 C.J.S. Mental Health § 142.

306. *Id.*

307. CAL. PROB. CODE § 2620.

308. *Id.* § 1860.

309. *Id.* § 2467.

310. *Id.* § 1860(c).

311. *Id.* § 1860.5.

312. *Id.*

313. CAL. PROB. CODE § 1860.5.

court stating facts showing that the limited conservatorship is no longer necessary.³¹⁴

V. TEXAS

Texas Estates Code section 1001.001 grants the state either full or limited authority over an incapacitated person.³¹⁵ Texas determines the level of authority granted to the guardian in proportion to the level of assistance the court finds is necessary to protect the well-being of the ward.³¹⁶ Texas' laws on guardianship are designed to promote maximum self-reliance and independence of the ward.³¹⁷ If an incapacitated person has the ability to make personal decisions in some areas of their life, then they retain the right to do so.³¹⁸ The purpose of guardianship, provided in section 1001.001, is congruous with the progressive movement towards preservation of individual freedoms of incapacitated persons.³¹⁹

A. Creation of Guardianship—Standards of Proof

Before guardianship is implemented, Texas Estates Code section 1101.101 requires the court to find, by clear and convincing evidence, the proposed ward is incapacitated; the guardianship is in the best interest of the proposed ward; and all alternatives to guardianship were considered.³²⁰ The current version of the statute, implemented in 2015, mandated the consideration of other less-restrictive alternatives to guardianship before finding—by clear and convincing evidence—that guardianship is necessary.³²¹ This additional requirement reflects the Texas Legislature's intent to preserve incapacitated persons' rights in decision-making.³²²

Section 1101.101 also requires the court to find—by a preponderance of the evidence—that the proposed guardian is eligible to become a guardian.³²³ The preponderance of the evidence standard applies to subsection D which states:

The proposed ward: (i) is totally without capacity as provided by this title to care for himself or herself and to manage his or her property; or (ii) lack

314. *Id.*

315. TEX. EST. CODE ANN. § 1001.001(a).

316. *Id.* § 1001.001.

317. *Id.* § 1001.001(b).

318. *Id.* § 1001.001.

319. *Id.*

320. TEX. EST. CODE ANN. § 1101.101(a)(1)(A)–(E).

321. Amanda Kreshover, *2015 Legislative Update: Texas Guardianship Law*, HOUS. L., Sept./Oct. 2015, at 16.

322. *Id.*

323. TEX. EST. CODE ANN. § 1101.101(a)(2).

the capacity to do some, but not all, of the tasks necessary to care for himself or herself or to manage his or her property.³²⁴

The clear and convincing evidence standard is slightly higher than preponderance of the evidence—the court must find that the person's incapacitation has a substantially greater than 50% likelihood of being true.³²⁵ In comparison, preponderance of the evidence must show the guardian is at least 51% eligible to serve as a guardian.³²⁶ The court must find more proof to implement guardianship but not so much as to who may be a guardian.³²⁷ Determining who is eligible to be a guardian is just as, if not more, consequential when implementing the guardianship.³²⁸ Wards in Texas may benefit from a more rigorous process when considering who is eligible to become a guardian.³²⁹

B. Appointment of a Guardian

Texas allows any person to commence a proceeding by filing an application in the proper court.³³⁰ Guardianship may be sought over the person, property, or both.³³¹ Texas Estates Code section 1001.001 establishes that the applicant must consider alternatives to guardianship before the applicant becomes guardian.³³² Consideration of guardianship alternatives is not a dispositive factor but it evidences the intent that guardianship is the last resort for incapacitated persons.³³³

The court may exercise its authority to initiate guardianship proceedings if it “has probable cause to believe that a person domiciled or found in the court in which the court is located is an incapacitated person, and the person does not have a guardian in the state.”³³⁴ Probable cause may be determined by a letter to the court submitted by an interested person or a letter certified by a physician who believes the person is incapacitated.³³⁵ The court will appoint a guardian ad litem or an investigator.³³⁶ The role of a guardian ad

324. *Id.* § 1101.101(D).

325. Ken LaMance, *What Is the Clear and Convincing Evidence Standard?*, LEGAL MATCH <https://www.legalmatch.com/law-library/article/clear-and-convincing-evidence-standard.html> (last visited Jan. 26, 2021) [<https://perma.cc/B3E9-RMJV>].

326. *Id.*

327. TEX. EST. CODE ANN. § 1101.101(a)(1)–(2).

328. *Ten Things to Think About: Choosing a Guardian*, FINDLAW (Nov. 18, 2018), <https://www.findlaw.com/family/guardianship/ten-things-to-think-about-choosing-a-guardian.html> [<https://perma.cc/WJ2M-R66H>].

329. *See* discussion *infra* Section VIII.A.1.

330. TEX. EST. CODE ANN. § 1101.001(a).

331. *Id.* § 1101.001(a)(3).

332. *Id.* § 1101.001.

333. *Id.*

334. *Id.* § 1102.001(a).

335. *Id.*

336. TEX. EST. CODE ANN. § 1102.001(b).

litem or court investigator is to assist in determining if guardianship is necessary for the potentially incapacitated person.³³⁷

1. Eligibility and Qualifications

Once the court determines guardianship is necessary, the court must select an appropriate person to serve as guardian.³³⁸ A guardian may be a friend or family member of the ward, or a professional guardian.³³⁹ The Texas Estates Code is similar to the UPC and California Probate Code, in that Texas will appoint a guardian in accordance to the circumstances and in consideration of the best interest of the ward.³⁴⁰ Texas Estates Code section 1101.102 provides a list in the order of preference of who may serve as guardian if the court finds that two or more persons are equally qualified to be appointed guardian of the incapacitated person.³⁴¹ Texas gives preference to spouses and next of kin.³⁴² If two or more persons are in equal degree of kinship, the court will exercise its discretion to choose who will serve as guardian in the best interest of the incapacitated person.³⁴³ The preference given to spouses and next of kin increases the likelihood that the guardian will be a non-professional guardian.³⁴⁴

2. Certification of Guardian

Texas differs from the UPC and California Probate Code because it requires registration and certification of professional guardians.³⁴⁵ Texas Estates Code section 1104.251 mandates that professional guardians obtain certification under Subchapter C, Chapter 155, of the Government Code.³⁴⁶ Professional guardians must also meet certain requirements such as a high school education, a bachelor's degree in a relevant field, and two plus years of experience in a field relevant to guardians.³⁴⁷ Certification for professional guardians is a component of their education and training similar to holding a license to practice law.³⁴⁸ Texas does not require certification of

337. *Id.* § 1102.001(b)(1).

338. *Id.* § 1104.001.

339. *Id.*

340. *Id.*

341. *Id.* § 1104.102.

342. TEX. EST. CODE ANN. § 1104.102..

343. *Id.*

344. *Id.*

345. *Id.* § 1104.251.

346. *Id.*

347. *Guardianship Certification*, TEX. CTS., (Mar. 11, 2021) <https://www.txcourts.gov/jbcc/guardianship-certification/initial-certification/> [<https://perma.cc/9E2F-EPAM>].

348. *Id.*

non-professional guardians (friends, family) but offers optional provisional certification.³⁴⁹

However, certification should be mandatory for non-professional guardians as well.³⁵⁰ Certification entails the study of guardianship law and the passing of an examination, with a limited number of chances.³⁵¹ Providing an educational component to guardianship will serve the best interest of the ward because an educated guardian will obtain the tools necessary to carry out their role in the most effective manner.³⁵² Non-professional guardians are most likely to be family or friends—people with little to no experience with guardianship.³⁵³ Although no official statistics exists, it is believed that about eighty percent of guardians are relatives of the incapacitated person.³⁵⁴ The responsibilities of guardianship are great and potentially cumbersome, therefore lay persons need certification before entering into the fiduciary role.³⁵⁵

Texas also mandates that each guardian, professional or not, must register with the state before undertaking the role of guardian.³⁵⁶ Guardianship registration requires the potential guardian to complete an hour-long online training course.³⁵⁷ As of the time of writing this comment, the Texas Guardianship Training includes: (1) “Understanding Why Guardianship May be Necessary;” (2) “Overview of Alternatives to Guardianship;” (3) “Types of Guardianships;” (4) “Process to Establish Guardianship;” (5) “Duties of the Guardian;” (6) “Reporting Requirements of the Guardian;” and (7) “Modifying, Terminating, or Closing a Guardianship.”³⁵⁸ Information provided to potential guardians through training and certification proves fundamental to understanding the role of guardianship and should be required for family and friends of the incapacitated person in order to facilitate a functional relationship between the guardian and ward.³⁵⁹

349. TEX. EST. CODE ANN. § 1104.253.

350. See discussion *infra* Section VIII.A.1.

351. See *Guardian Certification*, *supra* note 347.

352. See discussion *infra* Section VIII.A.1.

353. See discussion *infra* Part VI.

354. Gurmon, *supra* note 55, at 9.

355. See discussion *infra* Section VII.A.1.

356. *Register a Guardianship*, TEX. CTS. (Jan. 15, 2021), <https://www.txcourts.gov/jbcc/register-a-guardianship/> [https://perma.cc/58YH-7S6P].

357. *Texas Guardianship Training*, TEX. JUD. BRANCH, <https://guardianship-txcourts.talentlms.com/catalog/info/id:144> (last visited Feb. 2, 2021) [https://perma.cc/Y63S-CM77].

358. *Id.*

359. See *id.*

C. Termination and Review of Guardianship

Guardianships must be reviewed on an annual basis.³⁶⁰ Review encompasses the well-being of the ward, and the court shall reasonably determine whether a guardian is performing all the duties of the guardian in a diligent manner.³⁶¹ Upon review, the court may determine that the ward has retained sufficient capacity as to warrant termination or modification of the guardianship.³⁶²

D. Less Restrictive Alternatives to Guardianship

Texas guardianship laws include a progressive alternative to guardianship-supported decision making.³⁶³ Texas Estates Code section 1357.003 states the purpose of supported decision making is to recognize a least restrictive alternative to guardianships.³⁶⁴ Adults that are high-functioning are good candidates for supported decision making because the tool is designed for adults with disabilities who need help making daily decisions but who are not considered incapacitated so as to require a guardianship.³⁶⁵ Texas is one of nine states to implement the less restrictive alternative to assist persons who retain decision-making capability but are still in need of some guidance in making life decisions.³⁶⁶ Supported decision making allows high-functioning persons to retain autonomy while simultaneously carrying out the protection function that guardianship aims to preserve.³⁶⁷

1. Supports and Services

Texas guardianship law requires the court to consider supports and services available to a potential ward that may assist in daily living.³⁶⁸ Sufficient supports and services aid a potentially incapacitated person in decision making.³⁶⁹ Accounting for such assistance may allow a high functioning person to retain the requisite capacity to avoid guardianship.³⁷⁰

360. TEX. EST. CODE ANN. § 1201.002(a).

361. *Id.*

362. *Id.* § 1201.052.

363. *Id.* § 1357.001.

364. *Id.* § 1357.003.

365. *Id.* § 1357.003.

366. Zachary Allen & Dari Pogach, *More States Pass Supported Decision-Making Agreement Laws*, AMERICAN BAR ASS'N (Oct. 1, 2019) https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-41/volume-41-issue-1/where-states-stand-on-supported-decision-making/ [<https://perma.cc/V49T-LHRU>].

367. TEX. EST. CODE ANN. § 1357.003.

368. *Id.* § 1101.101(a)(1)(E).

369. *Id.*

370. *Id.*

Consideration of supports and services is another mechanism in place to prevent a high functioning person from losing autonomy through guardianship.³⁷¹ In *Guardianship of N.P.*, the court defined supports and services as “including formal and informal resources and assistance that enable a person to make those particular decisions [regarding residence, voting, operation of motor vehicle, or marriage].”³⁷² The court must take a comprehensive approach when considering the assistance needed to support the potentially incapacitated person and what support is available on a case-by-case basis because each set of facts will be unique to each person.³⁷³

VI. POTENTIAL FOR ABUSE

The conservatorship of Britney Spears and the #FreeBritney movement turned a Twitter trend into a serious conversation about the complexities of conservatorship law.³⁷⁴ Britney’s case draws attention to abuse of wards because of her fame.³⁷⁵ Britney’s fame sets forth a unique set of circumstances for the court to consider when making decisions surrounding her conservatorship.³⁷⁶ The legal community’s concern of abusive guardianships is not new; however, because of the #FreeBritney movement, it is a rising issue for the general public.³⁷⁷

VII. STORIES OF ABUSE

Across the United States, millions of people find their lives have unexpectedly turned towards guardianship.³⁷⁸ Further, those guardianships are stripping people of freedoms and subjecting them to the will of the court.³⁷⁹

Emily Gurnon, warns:

[m]ost of us don’t think we would ever end up in a nursing home against our will. We can’t image having our hard-earned savings drained by someone assigned to take care of us. We would never believe that we might someday be kept away from the people we love the most. But those are the

371. *Id.*

372. *Guardianship of N.P.*, No. 02-19-00233-CV, 2020 WL 7252322, *4 (Tex. App.—Fort Worth Dec. 10, 2020).

373. *Id.*

374. Newcomb, *supra* note 24, at 4.

375. *Id.*

376. *Id.*

377. Gregory Atkinson, *Towards a Due Process Perspective in Conservatorship Proceedings for the Aged*, 18 FAM. L. 819 (1979).

378. See generally *Guardianship Education and Prevention*, AAAPG, <https://aaapg.net> (last visited Oct. 20, 2020) [<https://perma.cc/7GH6-D36Y>] (a platform where persons share their stories of abusive guardianship to spread awareness of abusive guardianships).

379. *Id.*

kinds of nightmares suffered everyday by some of the estimated 1 million to 2 million people who have been placed under guardianship or conservatorship in the United States.³⁸⁰

Take, for example, Marie Long, a woman living in Phoenix who managed to save \$1.3 million over her lifetime.³⁸¹ Following a stroke, Marie Long was placed under guardianship.³⁸² A mere four years later, she lost almost every penny because of the mishandling of her funds by an unscrupulous guardianship agency.³⁸³

Similar to Marie Long is the case of Daniel Gross, who was hospitalized while visiting his daughter in Connecticut.³⁸⁴ During his hospitalization, discourse broke out between his children regarding their father's care and control over his money.³⁸⁵ Daniel Gross was then placed under conservatorship without being told of the hearing and found himself locked in a nursing home against his will.³⁸⁶ While being held at the nursing home, Gross shared a room with a violent roommate.³⁸⁷ He was later freed by a reviewing judge who described Daniel Gross' case as a terrible miscarriage of justice.³⁸⁸

The U.S. Government Accountability Office (GAO) conducted a study on guardianship cases of financial exploitation, neglect, and abuse of seniors in 2010.³⁸⁹ The report found that there had been hundreds of allegations of abuse by guardians made across forty-five states and in the District of Columbia between 1990 and 2010.³⁹⁰ The report enumerated common themes throughout the cases:

In 6 of 20 cases, the courts failed to adequately screen potential guardians, appointing individuals with criminal convictions or significant financial problems to manage high-dollar estates. In 12 of 20 cases, the courts failed to oversee guardians once they were appointed, allowing the abuse of vulnerable seniors and their assets to continue. Lastly, in 11 of 20 cases, courts and federal agencies did not communicate effectively or at all with each other about abusive guardians, allowing the guardian to continue the abuse of victims and/or others.³⁹¹

380. Gurnon, *supra* note 55, at 9.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.*

385. *Id.*

386. Gurnon, *supra* note 55, at 9.

387. *Id.*

388. *Id.*

389. *Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, GAO.GOV (Sept. 2010), <https://www.gao.gov/assets/gao-10-1046.pdf> [<https://perma.cc/F8U2-BY3D>].

390. *Id.*

391. *Id.*

The report goes on to illustrate each case of abuse of ward in detail.³⁹² Anecdotes of abusive guardians are vast and continue to grow.³⁹³ Britney's case is just one of many, but it stands out among them all due to her fame and the attention of the media.³⁹⁴ Now that abusive guardianship is a topic of discussion, legal scholars must capitalize on this opportunity and use the momentum gained by the #FreeBritney movement to push for change.³⁹⁵

VIII. PROPOSALS

Guardianship law is mature, complex, and constructed from years of experience.³⁹⁶ Proposing major change will not meet the goals of protecting wards from abuse, because current laws offer sufficient protections.³⁹⁷ Courts possess the tools to protect wards but lack resources to maximize protections.³⁹⁸ The best way to effect change is to promote equitable enforcement of the laws by directing resources to the court system.³⁹⁹

Because conservatorship law is state specific, as each state has the right to make laws surrounding property and estate planning, this comment will propose uniform suggestions similar to the UPC, and improvements upon existing laws.⁴⁰⁰ Modern conservatorship law is a product of decades worth of experience and improvement upon latent mistakes only to be understood through failure.⁴⁰¹ As the science of psychology and humanity improves, so does our understanding of how the legal system must act in response to new information.⁴⁰² The law must take proactive measures to mitigate potential harm, as well as reactive measures to redress any harm a legal tool may inflict upon a person.⁴⁰³

A. Proactive Approach: Guidance on "Incapacitated"

Almost all 50 states require that a person be found "incapacitated" before the state's authority to implement guardianship kicks in.⁴⁰⁴ However, states vary in the process determining a person's mental capacity.⁴⁰⁵ Further, determination of a person's mental capacity is up to the sole discretion of the

392. *Id.*

393. *Id.*

394. Newcomb, *supra* note 24, at 4.

395. *Id.*

396. Hannaford & Hafemeister, *supra* note 78, at 12.

397. *Id.* at 149.

398. *Id.*

399. *Id.*

400. *See* discussion *supra* Parts III, IV, V.

401. *See* discussion *supra* Section II.A.

402. *See* discussion *supra* Section II.A.

403. *See* discussion *supra* Section III.B.1.b.

404. *See* discussion *supra* Section III.A.

405. David, *supra* note 62, at 10.

judge.⁴⁰⁶ A potentially incapacitated person's autonomy is left in the hands of just one person with little to no statutory guidance on how to make such a determination.⁴⁰⁷

A judge will take into account many factors such as medical condition, diagnosis, and psychological evaluation in conjunction with living conditions of the person and the person's ability to manage their financial affairs.⁴⁰⁸ While specific factors will not be uniformly dispositive in determining incapacity, creating some guidance may improve the court's ability to ensure fair and equal outcomes.⁴⁰⁹ The court ultimately makes the decision by using its best judgement.⁴¹⁰ A judge shall exercise their discretion in guardianship cases because each set of circumstances is unique, and it is difficult to imagine that one set of rules may apply to each case.⁴¹¹

However, this approach allows for extreme and unpredictable outcomes.⁴¹² Each case is subject to the judge's current disposition; what appears reasonable to one may be unreasonable to another.⁴¹³ The ambiguous standard of "incapacity" without a uniform approach in determining incapacity proves harmful to those who find themselves facing guardianship because the standard provides few guidelines as to what conduct ought to result in an involuntary guardianship.⁴¹⁴ Current guardianship laws create a specific standard of incapacity, but fail to illustrate how incapacity is met, which in turn "encourage[s] value judgment rather than neutral fact-finding."⁴¹⁵ A uniform approach to incapacity may take some discretion away from the judge when considering the unique facts of each case.⁴¹⁶ As no one set of facts will be identical, it may be difficult to create uniform guidelines.⁴¹⁷ Nonetheless, the uniform approach may be created in broad scope, allowing the judge to exercise discretion within the guidelines when reaching a decision.

Some states, such as Connecticut, provide factors enumerated in legislation which the judge must consider when evaluating guardianship petitions.⁴¹⁸ Other states list factors for consideration that are not statutorily required.⁴¹⁹

406. *Id.*

407. *Id.*

408. *Id.*

409. Hannaford & Hafemeister, *supra* note 78, at 12.

410. David, *supra* note 62, at 10.

411. *Id.*

412. *Id.*

413. *Id.*

414. Hannaford & Hafemeister, *supra* note 78, at 12.

415. *Id.*

416. David, *supra* note 62, at 10.

417. *Id.*

418. *Id.*

419. *Id.*

Daniel Gross' case might have been avoided if a uniform approach to determining incapacity existed.⁴²⁰ Further, by enumerating a uniform approach to incapacity determination, reviewing attorneys and judges will use the base-line standards to support an argument against a finding of incapacity.⁴²¹

Let us return to Britney's case, and think about how her case may be resolved in light of guidance on incapacity.⁴²² Britney may strengthen her argument when trying to dissolve her conservatorship if a uniform approach to incapacity is enforced; because she is high-functioning, her circumstances may not fall within the uniform guidelines of incapacity.⁴²³ A uniform approach in determining incapacity will serve as a starting point in all guardianship cases, and will leave some discretion to the judge to factor in the unique set of facts of each case.⁴²⁴

1. Uniform Registration and Certification

Another proactive measure that should be uniformly adopted is a guardianship registration system. For example, Texas requires that all guardians register in a database, and mandates an hour-long training before a person is eligible to register in the database.⁴²⁵ The purpose of a national guardianship database is threefold. First, registration in the system and the training requirement ensures that all guardians are properly equipped with knowledge and resources before taking on the responsibility of guardian.⁴²⁶ Second, the registration system will serve a data collection function which will give insight into modern guardianships.⁴²⁷ The data collected may be used as evidence to support changes in the law, and may reveal patterns of behavior which elude to potential abuse of a ward.⁴²⁸ Third, the data base will enhance the court's ability to fulfill its monitoring requirement.⁴²⁹ Currently, most courts rely on an annual reporting requirement, which is the responsibility of the guardian.⁴³⁰ A registration system allows access to information which may be monitored by the court and interested persons, without depending on the guardian's annual reporting.

Allocation of monetary resources to implement a guardianship training program and registration database improves existing laws by educating

420. See discussion *supra* Part VII.

421. See discussion *infra* Part VII.A.1.

422. See discussion *infra* Part VII.A.

423. See discussion *infra* Part VII.A.

424. See discussion *infra* Part VII.A.

425. See discussion *supra* Section V.B.2.

426. See discussion *supra* Section V.B.2.

427. See discussion *supra* Part VIII.

428. See discussion *supra* Parts VI, VII.

429. See discussion *supra* Section III.B.4.

430. See discussion *supra* Section III.B.4.

potential guardians of their fiduciary duty.⁴³¹ The person chosen to serve as guardian is appointed because their service is in the best interest of the ward.⁴³² Typically, a family member or friend serving as a guardian is in the best interest of the ward because a family member or friend is someone the ward trusts.⁴³³ The best interest of the ward is improved by the family member or friend properly preparing for undertaking the role of guardian.⁴³⁴ The majority of guardianships last until the death of the ward, and a lifetime commitment to care for an incapacitated family member must not be entered into lightly.⁴³⁵ By coupling the registration/training and the certification process of the potential guardian, the potential guardian will gain a better understanding of the gravity of the situation. Enlightenment through education may mitigate potential harm to wards by ensuring that a guardian is furnished with sufficient knowledge to act in the best interest of the ward.⁴³⁶ If a guardian understands how a breach of their fiduciary duty will effect both the guardian and the ward, the guardian may be less likely to act in a harmful manner.⁴³⁷ In Britney's case, if Jamie Spears had the proper tools to improve his relationship with his daughter, maybe she would not feel the need to request his removal as her conservator.

Furthermore, registration of guardianships in a nationwide database will generate statistical insight on modern guardianships. The data collected will prove an invaluable resource for legal scholars to consider when making adjustments to the law.⁴³⁸ Statistical data may expose patterns of behavior as indicators of abuse or neglect of a ward, and potentially spark the next wave of legislative reform to guardianship law.⁴³⁹

Creating an easily accessible medium—an online database—will strengthen the court's monitoring requirement.⁴⁴⁰ Details of the guardianship will be viewable on the registration platform, so not only can the court check in, but interested persons such as family may monitor the guardianship themselves. A self-serving guardian will not be able to hide behind obscurity, and the court will not be dependent on the annual report to the court.⁴⁴¹ Enhancing the monitoring requirement will protect the ward from abusive guardianship because transparent monitoring will deter a self-serving guardian from taking advantage of their ward, or will detect improper

431. See discussion *supra* Section III.B.1.b.

432. See discussion *supra* Section III.B.1.

433. See discussion *supra* Section III.B.1.b.

434. See discussion *supra* Section III.B.1.b.

435. See discussion *supra* Section III.B.4.a.

436. See discussion *supra* Section V.B.2.

437. See discussion *supra* Section V.B.2.

438. See discussion *supra* Section II.B.

439. See discussion *supra* Section II.B.

440. See discussion *supra* Section III.B.4.

441. See discussion *supra* Section III.B.4.

behavior of the guardian at an earlier time.⁴⁴² Because Britney's case is highly publicized, information available to the public is limited.⁴⁴³ If Britney's case was part of the uniform registration system, members of her family or close friends would have access to the details of her conservatorship, which may perpetuate theories of abuse, or quell accusation of abuse.⁴⁴⁴

In reality, uniform registration may raise privacy and information concerns. Information shared on the registration system will only be available to those on a need-to-know basis, such as family members, close friends, and attorneys. Identification will be used through an assigned number or code name. Access to the system will be granted by obtaining a security code, and the code will be updated semi-regularly to ensure only a limited number of persons have access.

Further, a uniform approach to certification modeled after Texas's certification process may serve as another proactive measure to mitigating risk of abuse of wards.⁴⁴⁵ Uniform certification should specifically enumerate the expectations of the guardian, similar to California Probate Code section 1835.⁴⁴⁶ Texas law mandates that all professional guardians must become certified by passing a certifying exam, and that non-professional guardians may become provisionally certified if they so choose.⁴⁴⁷ A uniform approach in application of a certification requirement should take it a step further and mandate that *all* guardians become certified before becoming a guardian.⁴⁴⁸

Additionally, certification should establish a legally binding duty of the guardian, and a legal presumption. The guardian should be required to enter into an agreement with the court as part of the certification process. Obtaining certification means that the guardian is aware of their fiduciary duty, and by accepting said duty, they accept potential legal liability. A certified guard will be required to sign a legally binding document which enumerates the duty of the guardian. Britney may be successful in removing her father as conservator if he is certified, and in agreement with the court to act in the best interest of Britney, if the facts elude to Jamie's behavior as adverse to the binding agreement.⁴⁴⁹ Certification should establish a rebuttable presumption of a breach of fiduciary duty, and the burden may shift once the guardian has shown that the alleged breach was made in good faith and in the best interest of the ward. When Britney petitions the court for her father's removal, if she alleges abuse, Jamie then has to prove the abuse claims as false.⁴⁵⁰ By putting the burden on Jamie, Britney does not have to accumulate enough evidence

442. See discussion *supra* Section III.B.4.

443. See discussion *supra* Part IV.

444. See discussion *supra* Part IV.

445. See discussion *supra* Section V.B.2.

446. See discussion *supra* Section IV.B.1.

447. See discussion *supra* Section V.B.2.

448. See discussion *supra* Section V.B.2.

449. See discussion *supra* Part IV.

450. See discussion *supra* Part IV.

to prove abuse is occurring.⁴⁵¹ Dissolving a guardianship is extremely difficult—almost impossible—so placing the burden on the certified guardian relieves some of the strife the ward faces when raising the issue of an abusive guardian.⁴⁵² High-functioning wards may have a better chance at challenging their guardianship if their access to the court is less restricted by the terms of their guardianship.⁴⁵³

While the dual process of mandatory registration and certification appears tedious, it is necessary due to the nature of the relationship between guardian and ward; a ward loses most of their rights and becomes dependent on the guardian to navigate daily living with little to no chance of repossessing their autonomy again.⁴⁵⁴ Moreover, implementing preventative measures will serve as a screening system because a committed guardian will not be deterred by the cumbersome process.⁴⁵⁵

B. Reactive Approach: Mandatory Review Process

Once guardianship is established, mechanisms must be in place to ensure that guardianship is still serving its proper function.⁴⁵⁶ Current laws, such as reviewing and accounting requirements, carry out a protective function.⁴⁵⁷ Additions or changes to the current laws are not necessary, instead stricter enforcement and improved review will protect the ward from being trapped in an abusive guardianship.⁴⁵⁸

1. Funding to Create Review Board

As stated in Section VII, establishing a uniform approach to determining incapacity may provide consistent outcomes, as well as create a baseline for reviewing decisions made by judges.⁴⁵⁹ However, the court system is notorious for moving at a glacial speed, and reviewing a potentially abusive guardianship is time sensitive. Petitioning the court to review a guardianship case may take weeks or months, and often are reviewed by a single judge. Review by a single judge exercising their sole discretion still presents the issues discussed in Section VII.⁴⁶⁰

Funding should be directed to the courts to create a guardianship review board. Congress may enact a statute to authorize the states to establish a

451. See discussion *supra* Part IV.

452. See discussion Section II.A.

453. See discussion Section II.B.

454. Hannaford & Hafemeister, *supra* note 78, at 12.

455. *Id.*

456. See discussion *supra* Section III.B.4.

457. See discussion *supra* Section III.B.4.

458. See discussion *supra* Section III.B.4.

459. See discussion *supra* Part VII.

460. See discussion *supra* Section III.B.4; see discussion *supra* Part VII.

review board and allocate money for this purpose. The board should consist of lawyers, judges, professors, psychologists, and social workers who serve on a rotating basis. The “community-based approach” of California law is an example of a comprehensive approach that should be mirrored in a review board.⁴⁶¹ The goal is to create an unbiased entity, with diverse understanding, whose sole responsibility is to review guardianships.⁴⁶² Extensive review of guardianships by qualified members protects the ward from unreasonable outcomes because the power to decide the ward’s fate will not be vested in one person.⁴⁶³ Review by multiple persons who contribute a unique understanding of guardianship as a result of their professional background offers a comprehensive review of each case and will yield an outcome that is truly in the best interest of the ward.⁴⁶⁴ A majority of the panel must act in agreement on what is in the best interest of the ward, based on uniform standards. Each guardianship case deserves meticulous review because of the consequences which arise from abusive guardianships.⁴⁶⁵ Guardianship is a uniquely complex legal issue because it is one of the only times the state can involuntarily strip a person of their freedoms; a lot is at stake for a potential ward so any guardianship case must be handled with the utmost care and consideration.⁴⁶⁶

A high-functioning ward such as Britney might have a better chance of effective change to the conservatorship if discretion is exercised by more than one judge.⁴⁶⁷ The ambiguity inherent in the standard of incapacity may not act as a liability because a panel of experts will act together to determine what incapacity looks like in accordance with the particular circumstances of each case.⁴⁶⁸ Delegation of decision making power to a review board may raise concerns of taking authority away from the judge.⁴⁶⁹ It is a judge’s job to make tough decisions.⁴⁷⁰ While this is the way the legal system works, it is apparent a change needs to occur in the area of guardianship law based on the alarming amount of abusive guardianships.⁴⁷¹ The review board will supplement the judge’s knowledge of what is in the best interest of the ward, and the judge will still be involved in the outcome of the case.⁴⁷²

Further, a review board allows easier access to challenge the terms of guardianship.⁴⁷³ Currently, wards have restricted access to the court system

461. See discussion *supra* Section IV.A.1.

462. See discussion *supra* Section IV.A.1.

463. See discussion *supra* Part VII.

464. See discussion *supra* Part VII.

465. See discussion *supra* Part VII.

466. See discussion *supra* Part VI.

467. See discussion *supra* Parts IV, VI.

468. See discussion *supra* Part VI.

469. See discussion *supra* Part VI.

470. See discussion *supra* Part VI.

471. See discussion *supra* Part VII.

472. See discussion *supra* Part VI.

473. See discussion *supra* Sections II.A, B.

as a product of their conservatorship because the state may take away a ward's right to contract, which means a ward is unable to contract with an attorney to challenge their conservatorship.⁴⁷⁴ High-functioning wards such as Britney should not be restrained by the terms of their conservatorship in their ability to challenge said conservatorship.⁴⁷⁵

A review board also serves to benefit the court system by relieving the court of the burden of reviewing guardianship cases. Shifting the workload of reviewing guardianships will free up the docket and allow the court to hear cases fractionally faster than the current rate.

Requesting the reallocation of money to the probate court to create a review board may be overly ambitious because there are so many other issues that require monetary solutions. However, the unique nature of guardianship—the stripping of rights and freedoms—and the long history of abuse demands immediate attention.⁴⁷⁶ Guardianship issues raise human rights concerns which should be a priority of the government.⁴⁷⁷

XI. CONCLUSION

The #FreeBritney movement and Britney Spears' conservatorship case will remain in the headlines until Britney fans are confident that Britney is not trapped in an abusive conservatorship.⁴⁷⁸ Currently, the law offers protections for wards but lacks equitable enforcement mechanisms.⁴⁷⁹ Preventative measures like proper training of non-professional guardians like Jamie Spears and registration of guardians may enhance the courts ability to fulfill their purpose of protecting wards.⁴⁸⁰ Close monitoring of conservatorships and sufficient review will improve response time to allegations of abuse.⁴⁸¹ Further, creating accountability through certification may reduce difficulties of challenging abusive guardianships.⁴⁸² By obtaining certification, the guardian will have the burden of rebutting the presumption of breach of the fiduciary duty, which makes it slightly easier for wards to have their cases seriously considered for review.⁴⁸³ Additionally, guardianship law may be improved upon by directing funds to create a review board intended to consider guardianship cases in a comprehensive manner

474. See discussion *supra* Section II.A.

475. See discussion *supra* Section II.B; see discussion *supra* Part IV.

476. See discussion *supra* Section II.A.

477. See discussion *supra* Section II.A.

478. See discussion *supra* Part IV.

479. See discussion *supra* Part VIII.

480. See discussion *supra* Section VIII.A.1.

481. See discussion *supra* Section VIII.B.1.

482. See discussion *supra* Section VIII.A.1.

483. See discussion *supra* Section VIII.A.1.

and make determinations of what is in the best interest of the ward, rather than leave it up to the sole discretion of one judge.⁴⁸⁴

As of the time of this comment, Britney's latest petition to remove her father as conservator was denied.⁴⁸⁵ Britney's struggle is not in vain because her case brings issues surrounding guardianship to the forefront of discussion.⁴⁸⁶ Millions of Americans face similar challenges, and issues of guardianship are now gaining mainstream recognition because of the #FreeBritney movement.⁴⁸⁷

484. See discussion *supra* Section VIII.B.1.

485. See discussion *supra* Part IV.

486. See discussion *supra* Part IV.

487. See discussion *supra* Parts IV, VII.