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Asperger's Disorder, High-Functioning Autism, and Guardianship in Ohio

Michael E. Bloom

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ASPERGER'S DISORDER, HIGH-FUNCTIONING AUTISM, AND GUARDIANSHIP IN OHIO

*Michael E. Bloom**

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I. INTRODUCTION

Not everything that steps out of line, and thus ‘abnormal,’ must necessarily be ‘inferior.’ – Hans Asperger (1938)¹

A. *The Growing Population of Adults with Asperger’s Disorder and High-Functioning Autism*

Early in the 1940s, two men, worlds apart and unaware of each other’s work, used the term “autism” to describe children that had remarkably similar characteristics,² namely core impairments in socialization, communication, and imagination.³ In the United States in 1943, Leo Kanner published an account of “early infantile autism,” describing children with impaired social interaction, impaired communication, and stereotyped behaviors and interests.⁴ Kanner’s children seemed to relate better to objects than people.⁵ In Austria in 1944, Hans Asperger used the term “autistic psychopathy” to describe children with impaired social interaction, behavioral oddities, and poor coordination.⁶ Asperger’s children, who displayed no delay in language development,⁷ could never seem to understand the rules of social

1. TONY ATTWOOD, *THE COMPLETE GUIDE TO ASPERGER’S SYNDROME* 11 (2007).

2. PATRICIA HOWLIN, *AUTISM AND ASPERGER SYNDROME: PREPARING FOR ADULTHOOD* 5 (2d ed. 2004); Hani Raoul Khouzam et al., *Asperger’s Disorder: A Review of Its Diagnosis and Treatment*, 45 *COMPREHENSIVE PSYCHIATRY* 184, 184 (2004); ATTWOOD, *supra* note 1, at 35 (“Hans Asperger and Leo Kanner never exchanged correspondence regarding the children they were describing, although both used the term autism.”).

3. Kathleen E. Macintosh & Cheryl Dissanayake, Annotation, *The Similarities and Differences Between Autistic Disorder and Asperger’s Disorder: A Review of the Empirical Evidence*, 45 *J. CHILD PSYCHOL. & PSYCHIATRY* 421, 421 (2004); Stephen Anderson & Jane Morris, *Cognitive Behaviour Therapy for People with Asperger Syndrome*, 34 *BEHAV. & COGNITIVE PSYCHOTHERAPY* 293, 293 (2006).

4. Nicole J. Rinehart et al., *A Clinical and Neurobehavioural Review of High-Functioning Autism and Asperger’s Disorder*, 36 *AUSTL. & N.Z. J. PSYCHIATRY* 762, 762 (2002); Khouzam et al., *supra* note 2, at 184 (citing Hans Asperger, *Die “Autistischen Psychopathen” im Kindersalter [The Autistic Psychopathy of Childhood]*, *ARCHIV FUR PSYCHIATRIE UND NERVENKRANKHEITEN* [ARCH. PSYCHIATR. NERVENKRANKHEITEN] 117, 76-136 (1944)).

5. Rinehart et al., *supra* note 4, at 762.

6. Khouzam et al., *supra* note 2, at 184; *see* Rinehart et al., *supra* note 4, at 762 (interpreting it as “psychopathology” as opposed to “psychopathy”).

7. Khouzam et al., *supra* note 2, at 184.

behavior.⁸ While Kanner's work quickly became prominent in the English-speaking countries, laying the foundation for autism research and therapy literature for the next 40 years,⁹ Asperger's work remained relatively unknown in the English-speaking world until the 1980s.¹⁰

In 1980, Lorna Wing, a specialist in autism spectrum disorders who was aware of Asperger's work, found that it was Asperger's descriptions of autism, and not Kanner's, that best described a group of her patients.¹¹ In fact, a growing number of clinicians had been seeking a more accurate definition and classification for patients that presented with a subset of the characteristics described by Kanner's autism.¹² In 1981, Wing wrote an article that exposed Asperger's work to the English-speaking world and spawned a decade and a half of further research, literature, and debate focusing both on this unique subset of autistic children and on whether Asperger's disorder ought to be a distinct diagnosis or classified as a "less severe variant in a spectrum of autistic syndromes."¹³ Despite disagreement in the medical community over how to more accurately catalogue these persons,¹⁴ an argument that persists to this day,¹⁵ clinicians settled on "high-functioning autism" and "Asperger's disorder"¹⁶ as the two diagnoses for this subset of people.¹⁷

8. Rinehart et al., *supra* note 4, at 762-63.

9. HOWLIN, *supra* note 2, at 5; ATTWOOD, *supra* note 1, at 35.

10. HOWLIN, *supra* note 2, at 5.

11. ATTWOOD, *supra* note 1, at 35.

12. HOWLIN, *supra* note 2, at 6; Khouzam et al., *supra* note 2, at 184 (explaining that until Wing's article, the autistic spectrum disorders had not been systemically described or studied).

13. Kathleen Macintosh & Cheryl Dissanayake, *A Comparative Study of the Spontaneous Social Interactions of Children with High-Functioning Autism and Children with Asperger's Disorder*, 10 *AUTISM* 199, 199 (2006); ATTWOOD, *supra* note 1, at 35; Macintosh & Dissanayake, *supra* note 3, at 421; HOWLIN, *supra* note 2, at 5-6 ("Wing's main purpose for highlighting Asperger's work was to draw attention to the fact that typically autistic features could be found in individuals with well-developed language and cognitive skills as well as in those of low IQ."); Rinehart et al., *supra* note 4, at 762-63; Khouzam et al., *supra* note 2, at 184.

14. Barbara Kugler, *The Differentiation between Autism and Asperger Syndrome*, 2 *AUTISM* 11, 12 (1998); Macintosh & Dissanayake, *supra* note 3, at 432 (concluding that it is more accurate to classify both high-functioning autism and Asperger's disorder in an "autism spectrum disorder" category); Macintosh & Dissanayake, *supra* note 13, at 199-200, 216 (noting the "long-standing controversy over whether Asperger's disorder exists as a discrete diagnostic entity separate from autistic disorder, or rather . . . a less severe variant in a spectrum of autistic syndromes . . ." and ultimately concluding that "Asperger's disorder is not a unique syndrome but rather lies on a continuum with autism").

15. HOWLIN, *supra* note 2, at 6.

16. Asperger's disorder is also referred to as "Asperger's syndrome." Khouzam et al., *supra* note 2, at 184.

17. See ATTWOOD, *supra* note 1, at 44 (noting that the term high-functioning autism was first used in 1981, the same year that Lorna Wing used the term Asperger's syndrome); Macintosh & Dissanayake, *supra* note 3, at 421 ("There is remarkable similarity and overlap between autistic

Asperger's disorder is more prevalent than high-functioning autism.¹⁸ Today, the prevalence rate¹⁹ for Asperger's disorder is 1 in 280 children,²⁰ while that for high-functioning autism is 1 in 2000 children.²¹ Children are typically diagnosed with Asperger's disorder at age eleven and with autism at age five.²² The first official diagnostic criteria for Asperger's disorder were published in the early 1990s.²³ Since that time, the referral rates for diagnostic assessment of these children continue to increase,²⁴ and there has been an extraordinary increase in the number of children diagnosed with Asperger's disorder over the last decade.²⁵ Taken together, these figures alert us that the first officially recognized wave of adults with Asperger's disorder and high-functioning autism is presently entering society.

disorder and Asperger's disorder, with core impairments in [socialization], communication, and imagination being [recognized] as fundamental and universal in both conditions."); Rinehart et al., *supra* note 4, at 768 ("[T]he terms Asperger's disorder and high-functioning autism are frequently used interchangeably.").

18. Rinehart et al., *supra* note 4, at 764; Khouzam et al., *supra* note 2, at 185 ("Gillberg and Gillberg found Asperger's syndrome to be five times as common as autism.").

19. Prevalence rates indicate how many individuals have a condition at a specific point in time. ATTWOOD, *supra* note 1, at 46.

20. ATTWOOD, *supra* note 1, at 46.

21. Rinehart et al., *supra* note 4, at 764.

22. Patricia Howlin, *Outcome in Adult Life for More Able Individuals with Autism or Asperger Syndrome*, 4 AUTISM 63, 79 (2000); Rinehart et al., *supra* note 4, at 763; Khouzam et al., *supra* note 2, at 184.

23. Kathrin Hippler & Christian Klicpera, *A Retrospective Analysis of the Clinical Case Records of 'Autistic Psychopaths' Diagnosed by Hans Asperger and his Team at the University Children's Hospital, Vienna*, 358 PHIL. TRANSACTIONS ROYAL SOC'Y: BIOLOGICAL SCI. 291, 291-292 (2003); Sheila Jennings, *Autism in Children and Parents: Unique Considerations for Family Court Professionals*, 43 FAM. CT. REV. (SPECIAL ISSUE) 582, 584 (2005) ("Most adults with [autism spectrum disorders] are not formally diagnosed, primarily because the syndrome was virtually unknown until it was added to the *Diagnostic and Statistical Manual* (DSM-IV; the gold-standard reference that defines mental disorders in North America) in 1994."); ATTWOOD, *supra* note 1, at 36; Khouzam et al., *supra* note 2, at 184-85 (noting that unique Asperger's disorder diagnostic criteria were published by Gillberg in 1989, the World Health Organization International Classification of Diseases (ICD-10) in 1990, and the American Psychiatric Association *Diagnostic and Statistical Manual* (DSM-IV) in 1994).

24. ATTWOOD, *supra* note 1, at 38. "The increases in the incidence and prevalence rates of [Asperger's disorder] over the years are thought to reflect better awareness and recognition of symptoms rather than an actual increase in their occurrence, though controversies abound regarding other possible causes of the increases." J. Russell Ramsay et al., *"Better Strangers": Using the Relationship in Psychotherapy for Adult Patients with Asperger Syndrome*, 42 PSYCHOTHERAPY: THEORY, RES., PRAC., TRAINING 483, 486 (2005).

25. GAIL HAWKINS, *HOW TO FIND WORK THAT WORKS FOR PEOPLE WITH ASPERGER SYNDROME: THE ULTIMATE GUIDE FOR GETTING PEOPLE WITH ASPERGER SYNDROME INTO THE WORKPLACE (AND KEEPING THEM THERE!)* 60 (2004); ATTWOOD, *supra* note 1, at 292.

B. *Their Quest for Independence*

Recent follow-up studies have shown a poor prognosis in adulthood for those with Asperger's disorder and high-functioning autism.²⁶ Most have a low employment status, few friends, and are highly dependent on their family and others for support.²⁷ Their impairments and ultimate dependence result in spite of their having a normal intelligence²⁸ and sometimes attaining high academic achievements.²⁹ Meanwhile, their normal intelligence, insight, and education serve to constantly remind them of the end result of their disorders – that they are imprisoned by their impairments.³⁰ Nonetheless, individuals with Asperger's disorder and high-functioning autism continue to maintain the hope and desire that they will someday live independently.³¹

C. *Guardianship, a Backdrop*

The natural guardianship of parents – that is their parental rights and control over their child – ends when their children reach the age of 18 At that point, they no longer have the legal ability to make decisions and to sign consent forms for their child, and they may be excluded from participating in decisions their child makes. Many parents who have a child with a disability struggle to decide if they need to remain the decision-makers in their child's life.³²

26. HOWLIN, *supra* note 2, at 15.

27. HOWLIN, *supra* note 2, at 16; Ramsay et al., *supra* note 24, at 486.

28. Dermot M. Bowler et al., *Memory Illusions: False Recall and Recognition in Adults with Asperger's Syndrome*, 109 J. ABNORMAL PSYCHOL. 663, 663 (2000) (noting that people with Asperger's disorder have normal intelligence); Rinehart et al., *supra* note 4, at 763 (noting that people with high-functioning autism have normal intelligence).

29. See, Gena P. Barnhill, *Outcomes in Adults with Asperger Syndrome*, 22 FOCUS ON AUTISM & OTHER DEVELOPMENTAL DISABILITIES 116, 118 (2007); Jennifer Jolly-Ryan, *Disabilities to Exceptional Abilities: Law Students with Disabilities, Nontraditional Learners, and the Law Teacher as a Learner*, 6 NEV. L. J. 116, 140 (2005) (discussing strategies for teaching law students with Asperger's disorder).

30. See Barnhill, *supra* note 29, at 118, 120 (discussing difficulties in social integration).

31. See, e.g., Kara Hume, Indiana Resource Center for Autism, "*I Can Do It Myself!*" *Using Work Systems to Build Independence in Students with Autism Spectrum Disorders*, <http://www.iidc.indiana.edu/irca/education/myself.html> (last visited Oct. 9, 2007).

32. DAVID A. ZWYER, GUARDIANSHIP IN OHIO 4 (Ohio Developmental Disabilities Council Mar. 2003) [hereinafter ZWYER, GUARDIANSHIP]; see also Ohio Rev. Code Ann. § 2111.08 (West 2008). "There are exceptions, such as when a court extends the obligation as the result of divorce." DAVID A. ZWYER, ESTATE AND FUTURE PLANNING FOR OHIOANS WITH DISABILITIES AND THEIR FAMILIES 4 (Ohio Developmental Disabilities Council Sep. 2005) [hereinafter ZWYER, ESTATE]; see also *Castle v. Castle*, 473 N.E.2d 803, 803 (Ohio 1984) ("The common-law duty imposed on parents to support their minor children may be found by a court of domestic relations having

Parents of children with Asperger's disorder and high-functioning autism are no different. Similarly, a major concern on the part of these parents is how their children will fare when the parents are gone.³³ These concerns raise a number of questions, all revolving around how best to help their children cope with their unique circumstances while navigating adulthood. One such question is whether the parents of individuals with Asperger's disorder and high-functioning autism should obtain a guardianship over their adult children, and, if so, what form of guardianship is best-suited to these individuals' limitations. In order to better answer these questions, some discussion as to the justifications and purposes of guardianship is warranted.

The fundamental justification for guardianship is the protection of an incompetent person and his property.³⁴ Guardianship proceedings are "sanctioned by the theory of *parens patriae* or 'parentage of the state.'"³⁵

A person is not made the subject of a guardianship because he transgressed social standards in a manner that presents a danger to others, but because, through illness or other disability, he lacked the present ability to make decisions necessary to carry on life affairs. The court acts in a protective role, like a parent, to assure control and management of the subject's affairs while the subject is not competent to do so.³⁶

"[I]n the main, the filing of a guardianship petition is the result of something amiss, some problem that the petitioner believes can be solved best or only by the appointment of a guardian."³⁷ If the judge is convinced of the reality of the problem, "then, within the limitations of the law, the judge will want to solve, or at least ameliorate, the problem."³⁸ In doing so, the court's primary goal should be to promote

jurisdiction of the matter, to continue beyond the age of majority if the children are unable to support themselves because mental or physical disabilities which existed before attaining the age of majority.").

33. HOWLIN, *supra* note 2, at 19.

34. Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 738 (2002).

35. Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 TOL L. REV. 189, 190 (1994). "*Parens patriae* means, literally, 'parent of his or her country,' and refers to the role of the state as sovereign and guardian of persons under legal disability." Kelm v. Kelm, 749 N.E.2d 299, 301 n.1 (Ohio 2001).

36. Fell, *supra* note 35, at 190.

37. Frolik, *supra* note 34, at 741.

38. Frolik, *supra* note 34, at 741.

the best interests of the person over whom a guardianship is considered.³⁹

D. The Guardianship Spectrum – from Plenary to Limited (Prison to Liberation?)

Ohio defines a guardian as “any person, association, or corporation appointed by the probate court to have the care and management of the person, the estate, or both of an incompetent.”⁴⁰ Depending on the needs of the ward (the person on whose behalf the guardian will be acting),⁴¹ the probate court has the ability to grant different powers to the guardian and structure the guardianship in the following forms: guardianship of the person, guardianship of the estate, plenary guardianship, and limited guardianship.⁴²

“Guardianship of the person” grants the guardian the authority to make all day-to-day decisions of a more personal nature on behalf of the ward, to include such decisions as arrangements for food, clothing, residence, medical care, recreation and education, medical consents, consents to individual habitation plans, and consents to participate in Special Olympics.⁴³ “Guardianship of the estate” grants the guardian the authority to make all financial decisions for the ward.⁴⁴ “Plenary guardianship” refers to a guardianship of both the person and the estate, combined.⁴⁵ Lastly, a “limited guardianship” is one in which the probate court grants the guardian a more limited and specific set of powers.⁴⁶

Guardianship can be summarized as a “legal relationship which authorizes one individual to become a substitute decision-maker for

39. *In re Guardianship of Baker*, No. 2005 CA 113, 2006 WL 2875822, at *1 (Ohio Ct. App. Oct. 6, 2006) (“In matters relating to guardianships, the probate court must act in the best interests of the incompetent.”); *see also* ABA COMM. ON THE MENTALLY DISABLED, REPORT TO THE HOUSE OF DELEGATES MIDYEAR MEETING 1989, Recommendation IV-B: Use of Limited Guardianship and Other Less Restrictive Alternatives (1989) [hereinafter Recommendation IV-B] (“[J]udges should use their inherent or equity powers to limit the scope of and tailor the guardianship order to the particular needs of the ward.”); Frolik, *supra* note 34, at 735-36. The unfortunate reality, however, is that the interests of the court and others are sometimes put above those whom they deem incompetent. *See infra* notes 215-217 and accompanying text.

40. Ohio Rev. Code Ann. § 2111.01(A) (West 2008).

41. *Id.* § 2111.01(B).

42. *See id.* §§ 2111.02(A) and 2111.02(B)(1).

43. ZWYER, GUARDIANSHIP, *supra* note 32, at 6; *see also* § 2111.13 (West 2008).

44. ZWYER, GUARDIANSHIP, *supra* note 32, at 6; *see also* § 2111.14 (West 2008).

45. ZWYER, GUARDIANSHIP, *supra* note 32, at 6; *see also* § 2111.15 (West 2008).

46. *See* Ohio Rev. Code Ann. § 2111.02(B)(1) (West 2008).

another.”⁴⁷ It is not until stated in the disjunctive, from the viewpoint of the ward, that the darker side of guardianship is revealed: “[g]uardianship is a court-imposed process by which a person is relieved of the right to make personal life decisions and another is appointed to make those decisions on that person’s behalf.”⁴⁸ The degree of autonomy lost or retained by the ward correlates directly with the type of guardianship imposed,⁴⁹ a factor that should be considered by the probate court in deciding how to promote the best interests of a prospective ward.⁵⁰

Under plenary guardianship, “nearly all of an individual’s rights are taken away and given to a guardian to exercise on the individual’s behalf.”⁵¹ The ward can lose the right to own a house, manage money, decide where or with whom to live, drive a car, make medical decisions, vote, and marry.⁵² Indeed, “[a]n involuntary guardianship deprives the

47. See Barbara A. Venesy, *1990 Guardianship Law Safeguards Personal Rights Yet Protects Vulnerable Elderly*, 24 AKRON L. REV. 161, 163 (1990) (quoting ABA COMM. ON MENTALLY DISABLED, GUARDIANSHIP & CONSERVATORSHIP 1 (1979)).

48. Fell, *supra* note 35, at 190.

49. See *infra* notes 51-59 and accompanying text.

50. See Ohio Rev. Code Ann. § 2111.02(B)(1) (West 2008).

51. ZWYER, GUARDIANSHIP, *supra* note 32, at 8.

52. Venesy, *supra* note 47, at 164; see also Fell, *supra* note 35, at 190 (“Generally, the subject of a guardianship loses the right to control her finances, to manage her property, to contract, to marry, to choose where to live, to choose her associates, to make decisions concerning medical care and to decide whether to stay in the community or be placed in a care facility or an institution.”). It is sufficient for purposes of this Comment to note the fact that a ward loses extensive individual rights and that said losses can have an adverse impact on the ward. See, e.g., Fell, *supra* note 35; Slack v. Windom, No. L-85-145, 1985 WL 8221, at *6 (Ohio Ct. App. Nov. 4, 1985). As such, the actual extent of the rights lost in Ohio when a plenary guardianship is imposed is beyond the scope of this Comment. It would appear, however, that the actual extent of that loss is subject to interpretation. Compare Ohio Const. art. V, § 6 (1851) (“No idiot, or insane person, shall be entitled to the privileges of an elector.”), Cox v. Cox, 2 Ohio Dec. Reprint 20, 1858 WL 3793, at *2 (Ct. Common Pleas 1858) (“[T]he Probate Code of 1853 . . . conferred upon the Probate Court exclusive jurisdiction ‘to make inquests respecting lunatics, insane persons, idiots and deaf and dumb persons, subject by law to guardianship.’”), and Brimfield Twp. v. Portage County Comm’rs, 10 Ohio 283, 285-86 (Ohio 1840) with ZWYER, GUARDIANSHIP, *supra* note 32, at 9 (“Unless a court specifically rules that a person is incompetent for purposes of voting, an individual retains the right to vote - even if the individual has a plenary guardian.”), Summit Co. Prob. Rule 66.1 (“No adult person adjudicated incompetent shall lose the right to vote, except upon motion, notice, and record hearing before the Court.”), and Ohio Rev. Code Ann. § 3503.21(A)(4) (West 2008) (“The registration of a registered elector shall be canceled upon . . . [t]he adjudication of incompetency of the registered elector for the purpose of voting as provided in section 5122.301 of the Revised Code.”); compare Ohio Rev. Code Ann. § 5122.301 (West 2008) (“Any person admitted to a hospital or otherwise taken into custody, voluntarily or involuntarily, under [Chapter 5122] retains all civil rights not specifically denied in the Revised Code or removed by an adjudication of incompetence following a judicial proceeding other than a proceeding under sections 5122.11 to 5122.15 of the Revised Code. As used in this section, ‘civil rights’ includes, without limitation, the

ward of her rights to any and all but the most meaningless . . . decisions.”⁵³ The divestiture of rights that accompanies plenary guardianship results in such a “dramatic and substantial loss of personal autonomy, self-determination and civil liberty” that it has been likened to “the severity of sanctions imposed by the criminal justice system.”⁵⁴ Moreover, once a plenary guardian is appointed, terminating that guardianship can prove difficult.⁵⁵ Thus, while guardianship is intended to protect an individual, the appointment of a plenary guardian over an individual already imprisoned by her own impairments can be the equivalent of throwing away the cell door key, forever foreclosing any

rights to contract, hold a professional, occupational, or motor vehicle driver's or commercial driver's license, marry or obtain a divorce, annulment, or dissolution of marriage, make a will, vote, and sue and be sued.”), *Lippmann v. Johnson*, 429 N.E.2d 167, 169-70 (Ohio Ct. App. 1980) (noting the “essential difference between guardianship proceedings provided in R.C. Chapter 2111 and civil commitment proceedings provided for in R.C. Chapter 5122,” as “[a]n adjudication of incompetency is not a determination that an individual is mentally ill subject to hospitalization”), and *Steele v. Hamilton County Cmty. Mental Health Bd.*, 736 N.E.2d 10, 19-20 (Ohio 2000) (finding that a person no longer must be adjudicated incompetent before the state's *parens patriae* power can be invoked in a forced medication case, noting that “requiring an adjudication of general incompetence in these cases would result in the unnecessary removal of additional civil rights particularly when a specific finding of lack of capacity regarding treatment is sufficient. Furthermore, it allows the patient to avoid the added stigma that often attaches to a person who has been adjudicated incompetent”), with Ohio Rev. Code Ann. § 4510.23 (West 2008) (“When any person having a driver's or commercial driver's license is adjudicated incompetent for the purpose of holding the license, as provided in section 5122.301 of the Revised Code, the probate judge shall order the license of the person delivered to the court.”) and Ohio Rev. Code Ann. § 3503.21(A)(4) (West 2008); compare *ZWYER*, GUARDIANSHIP, *supra* note 32, at 9 (“[C]ourts may prevent or nullify the marriage of a ward, especially if the marriage takes place without the guardian's consent.”) with Ohio Rev. Code Ann. § 2111.45 (West 2008) (“The marriage of a ward shall terminate the guardianship as to the person, but not as to the estate, of the ward.”); see also *In Matter of Houseman v. Houseman*, No. 831, 1981 WL 6048, at *1-2 (Ohio Ct. App. Oct. 30, 1981) (“A declaration of incompetency and the subsequent appointment of a guardian can have severe impacts on the life of an individual A person adjudged incompetent may generally not spend money, [choose] where to live, make contracts, or marry without the guardian's consent.”); *Huntington Nat'l Bank v. Toland*, 594 N.E.2d 1103, 1105 (Ohio Ct. App. 1991) (“[C]ourts have consistently held that the appointment of a guardian operates as a conclusive presumption of contractual incapacity in any action to enforce contracts made by the ward during the period of legal guardianship, divesting the ward of any contractual capacity.”).

53. *Slack*, 1985 WL 8221, at *6.

54. *Fell*, *supra* note 35, at 190.

55. See *Fell*, *supra* note 35, at 207 (noting that the ward is often unaware of her rights or unable to obtain assistance and there is usually no one with a real interest in initiating termination proceedings). Due to the imposition of the guardianship in the first place, and the fact that the ward will not be managing her own affairs during the guardianship, the case for continued guardianship could rely upon the same evidence presented to have the guardian appointed initially. See *Venesy*, *supra* note 47, at 173; see also *In re Guardianship of Michael*, No. 07AP-264, 2007 WL 3293364, at *1 (Ohio Ct. App. Nov. 8, 2007) (“There is a presumption that once a person is found to be incompetent that he or she remains incompetent, but the presumption is rebuttable.”).

possibility that the individual could have had at a normal life, at independence. It therefore becomes absolutely crucial that all other alternatives be considered before imposing plenary guardianship.⁵⁶

Under limited guardianship, by contrast, the guardian is granted authority “only over the portion of a person’s life where he or she is both incompetent and has a need.”⁵⁷ All the rights that are not specifically granted to the limited guardian are preserved in the ward.⁵⁸ It has long been recognized that by “restricting the authority of the guardian to the minimum required for the situation, the [ward’s] self-reliance, autonomy, and independence will be promoted, perhaps contributing to the [ward’s] ability to reestablish his or her functional capacity.”⁵⁹ Thus, not only can limited guardianship be less intrusive on the ward’s autonomy than plenary guardianship, but it can also be therapeutic, even liberating.

E. Aim of this Comment

In 2001, the Second National Guardianship Conference recommended that (1) “[d]ialogue between the legal and medical professions on the determination of diminished capacity and all aspects of guardianship be encouraged,” (2) research be conducted to measure successful practices and examine how the guardianship process is enhancing the well-being of persons with diminished capacity, and (3) “[a]wareness of risks and benefits of guardianship and planning alternatives to guardianship be raised”⁶⁰ The medical community has recently begun to shift its focus from the childhood characteristics of

56. See *Slack*, 1985 WL 8221, at *5 (“Continued imposition of an involuntary guardianship should be treated as an extremely serious matter and all due caution should be exercised before the proposed ward is continued to be deprived of all of her rights.”).

57. ZWYER, *GUARDIANSHIP*, *supra* note 32, at 7.

58. Venesy, *supra* note 47, at 171; Ohio Rev. Code Ann. § 2111.02(B)(1) (West 2008) (“An incompetent or minor for whom a limited guardian has been appointed retains all of the incompetent’s or minor’s rights in all areas not affected by the court order appointing the limited guardian.”).

59. Paul 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, 161 (1994) (citing COMMISSION ON NAT’L PROBATE COURT STANDARDS, NATIONAL COLLEGE OF PROBATE JUDGES & NATIONAL CTR. FOR STATE COURTS, NATIONAL PROBATE COURTS STANDARDS (1993)). “In addition, specifically enumerating the duties and powers of the guardian provides a guide for the court and others in evaluating and monitoring the performance of the guardian, [and] road map for the guardian to use in determining what [he] can or cannot do in carrying out assigned responsibilities.” *Id.*

60. Symposium, *Wingspan – The Second National Guardianship Conference, Recommendations*, 31 STETSON L. REV. 595, 596-97, 600 (2002) [hereinafter *Wingspan*].

Asperger's disorder and high-functioning autism to the implications faced in adulthood.⁶¹ The legal community has a place in this discussion. In the spirit of an interdisciplinary dialogue between the legal and medical professions, this Comment (1) calls attention to the issues faced by individuals suffering from Asperger's disorder and high-functioning autism in adulthood, with particular emphasis on their desire to live independent lives and the need for flexibility in any support that is provided; (2) contrasts those issues with the use of guardianship, plenary and limited, as capacity planning tools for these adults; (3) finds that the unique circumstances presented by those diagnosed with Asperger's disorder and high-functioning autism are such as to warrant the avoidance of plenary guardianship; and (4) concludes that, assuming guardianship is in fact warranted, limited guardianship can, instead of imposing a life sentence, open the door to life itself.

II. ASPERGER'S DISORDER, HIGH-FUNCTIONING AUTISM, AND THE PREREQUISITES OF GUARDIANSHIP

A. *The Three Core Impairments*

Autism is generally associated with many different social functioning impairments, including: "the failure to understand or respond appropriately to others' feelings or emotions, the lack of ability to share emotions or experiences, and poor integration of social, emotional and communicative [behaviors] within an interpersonal context."⁶² Approximately twenty-five percent of individuals with autism are diagnosed with the high-functioning form.⁶³ "High-functioning" denotes that the individuals are of normal intelligence.⁶⁴

61. See Marieke Jennes-Coussens et al., *The Quality of Life of Young Men with Asperger Syndrome*, 10 *AUTISM* 403, 404 (2006); Pekka Tani et al., *Insomnia is a Frequent Finding in Adults with Asperger Syndrome*, 3 *BMC PSYCHIATRY* 12 (2003) (non-paginated online journal) ("Most studies on [Asperger's disorder] concentrate on childhood while there is a scarcity of reports about the clinical and neurobiological characteristics of individuals in adulthood."); HOWLIN, *supra* note 2, at 1; Ramsay et al., *supra* note 24, at 486.

62. HOWLIN, *supra* note 2, at 98.

63. Rinehart et al., *supra* note 4, at 763. More recent literature has found the rate of high-functioning autism to be 30.8 percent in children with autism. Tomonori Koyama et al., *Cognitive and Symptom Profiles in Asperger's Syndrome and High-Functioning Autism*, 61 *PSYCHIATRY & CLINICAL NEUROSCIENCES* 99, 99 (2007).

64. REBECCA A. MOYES, *INCORPORATING SOCIAL GOALS IN THE CLASSROOM: A GUIDE FOR TEACHERS AND PARENTS OF CHILDREN WITH HIGH-FUNCTIONING AUTISM AND ASPERGER SYNDROME* 17 (2001); Simon Baron-Cohen & Sally Wheelwright, *The Friendship Questionnaire:*

Individuals with Asperger's disorder also have normal intelligence.⁶⁵ The essential difference between high-functioning autism and Asperger's disorder is that the Asperger's child has no developmental delay in language whereas the high-functioning autistic child's language is slower to develop,⁶⁶ which explains why high-functioning autism is diagnosed at an earlier age than is Asperger's disorder.⁶⁷

The small degree of separation between the two diagnoses, accompanied by the high degree of variability within each official diagnostic category,⁶⁸ spurs a debate as to whether the two are separate disorders or merely different points among the autistic spectrum.⁶⁹ For over a decade, authors and researchers have used the terms Asperger's disorder and high-functioning autism interchangeably and conducted joint studies, combining the findings, on individuals from both classifications.⁷⁰ Moreover, studies have shown that the differences between Asperger's disorder and high-functioning autism tend to diminish towards adulthood.⁷¹ Due to the similar characteristics and outcomes in adults with each disorder, Asperger's disorder and high-functioning autism warrant joint treatment in this Comment as well.

Asperger's disorder and high-functioning autism are more specifically characterized by three core impairments in communication, social interaction, and imagination.⁷² "Impairments in communication

An Investigation of Adults with Asperger Syndrome or High-Functioning Autism, and Normal Sex Differences, 33 J. AUTISM & DEVELOPMENTAL DISORDERS 509, 510 (2003); Rinehart et al., *supra* note 4, at 763; Kugler, *supra* note 14, at 14; Ramsay et al., *supra* note 24, at 485.

65. Bowler et al., *supra* note 28, at 663; Ramsay et al., *supra* note 24, at 485; Koyama et al., *supra* note 63, at 99.

66. Simon Baron-Cohen et al., *The Adult Asperger Assessment (AAA): A Diagnostic Method*, 35 J. AUTISM & DEVELOPMENTAL DISORDERS 807, 807-808 (2005); Rinehart et al., *supra* note 4, at 763; HOWLIN, *supra* note 2, at 6. Language delay is characterized by not using single words by two years of age or phrase speech by three years of age. Baron-Cohen & Wheelwright, *supra* note 64, at 510.

67. Rinehart et al., *supra* note 4, at 763.

68. Ramsay et al., *supra* note 24, at 485.

69. Rinehart et al., *supra* note 4, at 764; Macintosh & Dissanayake, *supra* note 13, at 199-200, 216 (noting the "long-standing controversy over whether Asperger's disorder exists as a discrete diagnostic entity separate from autistic disorder, or rather . . . a less severe variant in a spectrum of autistic syndromes . . ." and ultimately concluding that "Asperger's disorder is not a unique syndrome but rather lies on a continuum with autism").

70. M. R. Woodbury-Smith et al., *Screening Adults for Asperger Syndrome Using the AQ: A Preliminary Study of its Diagnostic Validity in Clinical Practice*, 35 J. AUTISM & DEVELOPMENTAL DISORDERS 331, 331 (2005); Kugler, *supra* note 14, at 14; HOWLIN, *supra* note 2, at 18; Rinehart et al., *supra* note 4, at 768; MOYES, *supra* note 64, at 18; Ramsay et al., *supra* note 24, at 485.

71. I. Engstrom et al., *Psychosocial Functioning in a Group of Swedish Adults with Asperger Syndrome or High-Functioning Autism*, 7 AUTISM 99, 100 (2003); HOWLIN, *supra* note 2, at 12-16.

72. Anderson & Morris, *supra* note 3, at 293; Macintosh & Dissanayake, *supra* note 3, at 421.

limit the ability to understand what is happening or why, and can result in major problems in relating to other people or in effectively controlling the daily environment.”⁷³ Some studies have found that only one third of these adults can be regarded as having “good” communication skills.⁷⁴ Common communication impairments include poor comprehension, problems with spoken language (verbal inflection, overly formal language, abnormal intonation, literalness, etc.), and the inability to take part in reciprocal conversations.⁷⁵ Superficially, an individual’s spoken language can appear well-developed, but there may be profound underlying comprehension difficulties, especially in a social context.⁷⁶ The uneven profile of linguistic functioning can mislead an observer to under-appreciate the extent of the impairment and instead interpret the failure to respond appropriately as uncooperative or rude.⁷⁷ These individuals also have difficulty with abstract or hypothetical concepts.⁷⁸ They are often incapable of talking about feelings, emotions, and physical pain.⁷⁹ There have been reports of seriously ill individuals who were unable to indicate that they were in pain, which lead to undiagnosed tooth abscesses, infections, appendicitis, and broken bones.⁸⁰ Emotional disturbances can be even more difficult for them to convey.⁸¹

As to social interaction impairments, “[d]ifficulties with reciprocal social contacts may mean that even the simplest personal interactions are fraught with hazards.”⁸² Here, problems lie in understanding social rules

73. HOWLIN, *supra* note 2, at 1-2.

74. HOWLIN, *supra* note 2, at 67 (defining “good communication skills” as having good comprehension, using mature grammatical structures, and being capable of taking part in reciprocal conversations).

75. HOWLIN, *supra* note 2, at 67-68.

76. HOWLIN, *supra* note 2, at 68-69; *see also* Barnhill, *supra* note 29, at 123 (“Although individuals with [Asperger’s disorder] may function well intellectually, their appearances of normality can be deceptive and often break down under stress.”).

77. HOWLIN, *supra* note 2, at 69. “Unlike the linguistically impaired autistics of the type depicted in the movie ‘Rain Man,’ Asperger’s children talk like little professors. ‘They seem brilliant because they have this language, . . . [b]ut in reality, it’s fact-obsessed, fact-oriented. It’s rigid and insular. It’s not a social brilliance.” Lawrence Osborne, *The Little Professor Syndrome*, N.Y. TIMES, June 18, 2000 (Magazine), at 5. “[T]his had been precisely the predicament of Asperger’s children in the past ‘[T]hey have been misdiagnosed because they’re almost normal. They almost blend in, but not quite. That’s their tragedy.’ ‘They are,’ says one parent . . . , ‘perfect counterfeit bills.’” *Id.*

78. HOWLIN, *supra* note 2, at 77-78.

79. HOWLIN, *supra* note 2, at 78.

80. HOWLIN, *supra* note 2, at 78.

81. HOWLIN, *supra* note 2, at 78.

82. HOWLIN, *supra* note 2, at 2.

and why others behave the way they do.⁸³ Common social impairments include difficulties integrating into community settings, making friends, understanding who is not a friend, understanding and relating to others' emotions, and integrating different modes of communication in socially and contextually appropriate ways.⁸⁴ "Notions of political correctness, in particular, are often difficult for people with autism to grasp."⁸⁵

The imagination impairment is associated with the presence of repetitive and stereotyped behaviors, whereby repetitive behaviors take the place of imaginative activities.⁸⁶ Common stereotyped behaviors include collecting facts, strict adherence to routine and dislike of change, collecting objects, and stereotyped movements such as rocking.⁸⁷ "Problems in coping with change, and the need to adhere to fixed routines and patterns of [behavior] can also have a major impact on day-to-day life."⁸⁸

83. HOWLIN, *supra* note 2, at 98.

84. HOWLIN, *supra* note 2, at 98-112. The following account provides an example of integrating modes of communication in socially and contextually appropriate ways:

[When he was a young child, one boy's] mother had often been able to calm his tantrums or distress by encouraging him to play with her earrings, and certain teachers at school had also allowed this. By the time he was twenty, being allowed to touch earrings was still a very effective way of calming him down. However, when he began attending a local social education [center], problems quickly arose when he started to fondle the earrings, or sometimes the ears, of other students and staff members, both male and female.

HOWLIN, *supra* note 2, at 111.

85. HOWLIN, *supra* note 2, at 77. The following account provides an example of the social impairment in action:

Jason, a young man in his late teens, alienated all his sister's friends after one of them had a baby by someone she had met on holiday in Jamaica. Jason was fascinated by the child's skin [coloring] and repeatedly questioned its mother about whether or not she had [realized] that she would have 'a half-white baby' as well as lecturing her on the perils of single motherhood.

HOWLIN, *supra* note 2, at 77.

86. Emma Honey et al., *Repetitive Behaviour and Play in Typically Developing Children and Children with Autism Spectrum Disorders*, 37 J. AUTISM & DEVELOPMENTAL DISORDERS 1107, 1107-1112 (2007). However, "[t]here is some debate over whether 'impairments in imagination' should be diagnostic criteria for [Asperger's disorder], since cases of individuals with [Asperger's disorder] who are gifted at drawing, film-making, and poetry are well-documented." Baron-Cohen et al., *supra* note 66, at 810-811.

87. HOWLIN, *supra* note 2, at 137-44.

88. HOWLIN, *supra* note 2, at 2. An example of the imagination impairment in the context of a consuming fascination or special interest includes that of one Mr. McCollum, described by some as the "urban legend" of Asperger's," whose fascination with trains led to his first arrest at 15 years old after being caught behind the controls of an E train in New York City and 18 subsequent arrests related to his transit fascination. Dean E. Murphy, *Crimes of Passion, for Trains; Where the Courts See Guilt, Others Find an Affliction*, N.Y. TIMES, March 15, 2001 ("Those parents of [Asperger's]

B. *Adult Outcome*

“Despite advances in our knowledge about the causes of autism, and about more effective approaches to intervention, autism remains a lifelong, pervasive and sometimes devastating disorder that can affect almost every aspect of an individual’s functioning.”⁸⁹ The effects of autism can be even more pronounced in adult life as individuals are faced with greater social demands.⁹⁰ Though there is a high degree of variability in overall adult outcome,⁹¹ even high-functioning individuals in the autistic spectrum generally have a poor prognosis.⁹² The majority have no close friends, struggle with a low employment status, and

children whose obsession or interest is trains may very well think, ‘Yes, I could imagine my child in that place in 20 years, especially if they receive no help or understanding.’”

89. HOWLIN, *supra* note 2, at 1; *see also* Khouzam et al., *supra* note 2, at 188 (“There is as yet no cure for Asperger’s disorder.”). “Autism and [Asperger’s disorder] are widely recognized as having a genetic basis, most likely from multiple genes, although other factors such as environmental agents may contribute.” Jennings, *supra* note 23, at 584 (internal citation omitted). “[F]amilies with an autistic child may have multiple members with [an autism spectrum disorder], including other children and adults over several generations.” Jennings, *supra* note 23, at 584. Similarly, “high rates of social difficulty” have been noted in members of the immediate family of individuals with Asperger’s disorder. Jennings, *supra* note 23, at 584.

90. Ramsay et al., *supra* note 24, at 486. “[Asperger’s disorder] can also be hidden in adulthood when an individual’s intellectual ability is high and environmental support is good; however, over time and in unexpected situations, the façade of normality cannot be maintained.” Barnhill, *supra* note 29, at 116 (internal citations omitted). “For example, the individual may display the technical and intellectual skills needed to be successful when beginning a particular job; however, the social skills requirements may be overwhelming, causing him or her to say or do something that is socially inappropriate.” Barnhill, *supra* note 29, at 116.

91. Engstrom et al., *supra* note 71, at 100; HOWLIN, *supra* note 2, at 38; Ramsay et al., *supra* note 24, at 485-86; Khouzam et al., *supra* note 2, at 187. Kanner and Asperger had different opinions as to how well their child patients would function in adulthood: Kanner, after following up with patients he saw as children, noted that the vast majority “did not fare well in adulthood” while Asperger remarked that the outcome for his patients was “remarkably good.” Engstrom et al., *supra* note 71, at 100. Of the ninety-six individuals that Kanner followed up with, eleven had jobs, one was at college, and one was married with a child. Howlin et al., *Adult Outcome for Children with Autism*, 45 J. CHILD PSYCHOL. & PSYCHIATRY 212, 212 (2004); HOWLIN, *supra* note 2, at 64. Asperger, on the other hand, noted that in the more able individuals, their special skills or interests led to social integration. HOWLIN, *supra* note 2, at 64. Some of Asperger’s examples included a professor of astronomy, a mathematician, a chemist, and a high-ranking civil servant. HOWLIN, *supra* note 2, at 64-65. Nonetheless, both Kanner and Asperger also recognized that the pendulum could swing in the opposite direction: Kanner described some individuals who had high education and employment achievements in adult life while Asperger referred to some of his patients as having considerable intellectual retardation with “very sad” fates ahead of them. HOWLIN, *supra* note 2, at 5.

92. HOWLIN, *supra* note 2, at 15. However, most studies show that individuals with Asperger’s disorder and high-functioning autism have a better outcome than those with autism in general. Engstrom et al., *supra* note 71, at 101.

remain highly dependent on their families or others for support.⁹³ This is so despite the individuals having IQs well within the normal range and sometimes reaching high academic levels.⁹⁴ Moreover, due to the wide range of cognitive, linguistic, social, and behavioral functioning, predicting outcome in autistic individuals has proven difficult.⁹⁵ Intellectual functioning can be a significant factor in determining outcome; specifically, an IQ over seventy can indicate a more promising result.⁹⁶ However, the other fundamental impairments associated with autism, especially ritualistic and stereotyped behaviors, can counteract the benefits of that relatively high IQ.⁹⁷ As a result, few parents of individuals diagnosed with these disorders know what to expect as their children reach adulthood.⁹⁸

“[A]lthough high-functioning people with autism or [Asperger’s disorder] *may* succeed well as adults, such achievements rarely come easily.”⁹⁹ Many refer to Asperger’s disorder and high-functioning autism as a “mild form of autism,” in part because there are not great cognitive impairments in such individuals; nevertheless, the social difficulties of these individuals can be just as restrictive and damaging to their quality of life as a severe intellectual impairment.¹⁰⁰ Complicating matters, individuals with Asperger’s disorder and high-functioning autism are also at greater risk for emotional disturbances and psychiatric disorders, including depression, anxiety, obsessive-compulsive disorder, and bipolar disorder.¹⁰¹

93. Howlin et al., *supra* note 91, at 226; HOWLIN, *supra* note 2, at 16; Ramsay et al., *supra* note 24, at 486; Jennes-Coussens et al., *supra* note 61, at 404 (noting that the first round of adult outcome studies found that most individuals rely heavily on the support of their families and are highly dependent; employment is disappointing as jobs are of low status or end prematurely due to social difficulties; few marry; and only fifteen to twenty percent have friendships with shared enjoyment).

94. HOWLIN, *supra* note 2, at 16.

95. Howlin et al., *supra* note 91, at 212.

96. Howlin et al., *supra* note 91, at 226; Khouzam et al., *supra* note 2, at 187.

97. Howlin et al., *supra* note 91, at 226.

98. HOWLIN, *supra* note 2, at 19. Studies have suggested that the effects of Asperger’s disorder are greatest during adolescence and young adulthood, as those transitioning out of school are now expected to find work, develop a social network, contribute to the household, and otherwise participate in the community. Jennes-Coussens et al., *supra* note 61, at 404. During this period, these individuals “frequently suffer from mental health problems such as depression and anxiety.” Jennes-Coussens et al., *supra* note 61, at 404.

99. Barnhill, *supra* note 29, at 118 (quoting Howlin, *supra* note 22, at 79).

100. HOWLIN, *supra* note 2, at 17; *see also* Barnhill, *supra* note 29, at 117-18.

101. Khouzam et al., *supra* note 2, at 187; Ramsay et al., *supra* note 24, at 486; Barnhill, *supra* note 29, at 119-20. The stresses associated with independence can lead to even greater anxiety. Khouzam et al., *supra* note 2, at 189.

C. The Guardianship Prerequisites: Incompetence and Necessity

Ohio law provides that “[w]hen found necessary, the probate court on its own motion or on application by any interested party shall appoint . . . a guardian of the person, the estate, or both, of [an] . . . incompetent”¹⁰² Thus, there are two prerequisites to guardianship: (1) the prospective ward must be incompetent and (2) the guardianship must be necessary.¹⁰³

A person is deemed “incompetent” if she is so mentally impaired as a result of a mental or physical illness or disability that she is incapable of taking proper care of herself or her property.¹⁰⁴ However, that a person meets the statutory definition of incompetence does not in and of itself support the finding that a guardianship is necessary.¹⁰⁵ “A person may have sufficient deficits in life, but the support network – families, friends, service providers, etc. – may be so strong that a guardianship is not necessary.”¹⁰⁶ For instance, “if an individual is well served by durable powers of attorney and property-management devices such as a revocable trust and joint bank accounts, a judge might well conclude that, despite the individual’s [incompetence], no guardianship is necessary.”¹⁰⁷ At the probate court hearing on the matter of appointment, both the prospective ward’s incompetence and the necessity for a guardianship must be proven by clear and convincing evidence.¹⁰⁸

102. Ohio Rev. Code Ann. § 2111.02(A) (West 2008).

103. In *Matter of Guardianship of Standel v. Standel*, No. 17199, 1995 WL 655934, at *2 (Ohio Ct. App. Nov. 8, 1995) (“The statute requires a two-fold determination prior to the imposition of a guardianship: (1) the person over whom the guardianship is to be imposed is incompetent; and (2) the guardianship is ‘necessary.’”); ZWYER, GUARDIANSHIP, *supra* note 32 at 5; *see also* Ohio Rev. Code Ann. §§ 2111.02(A), 2111.031, and 2111.041 (West 2008).

104. Ohio Rev. Code Ann. § 2111.01(D) (West 2008).

105. *Sharp v. Sharp*, No. 96-CA-26, 1997 WL 52933, at *3 (Ohio Ct. App. Jan. 31, 1997) (“The necessity factor is . . . independent of the incompetency factor.”).

106. ZWYER, GUARDIANSHIP, *supra* note 32, at 5.

107. Frolik, *supra* note 34, at 736. The terms of any such alternatives must prove sufficient to protect the prospective ward from her limitations before the court will forego guardianship. *See In re Guardianship of Thomas*, 771 N.E.2d 882, 894-05 (Ohio Ct. App. 2002) (finding that terms of preexisting *inter vivos* trust were “insufficient to provide the type of protection of [the prospective ward’s] assets that the appointment of a guardian would provide” where the prospective ward was deemed incapable of taking proper care of her property due to her deteriorating mental state, vulnerability to undue influence and exploitation, and inability to make informed decisions regarding financial matters).

108. Ohio Rev. Code Ann. § 2111.02(C) (West 2008) (requiring hearing on the matter of appointment); *id.* § 2111.02(C)(3) (requiring incompetence be proven by clear and convincing evidence); *In re Guardianship of Stokes*, No. 70666, 1997 WL 37686, at *3 (Ohio Ct. App. January

In the guardianship proceeding, the probate court will appoint a probate court investigator to investigate the circumstances of the alleged incompetent, file a report with the court describing the physical and mental condition of the alleged incompetent, and make a recommendation regarding the necessity for a guardianship or a less restrictive alternative.¹⁰⁹ The court will consider the investigator's report prior to establishing a guardianship.¹¹⁰ The probate court may also appoint a physician to examine, investigate, or represent the alleged incompetent for the purpose of assisting the court in deciding whether a guardianship is necessary.¹¹¹ Additionally, all applications for the appointment of a guardian on the grounds of mental incompetence must be accompanied by either "a statement of a physician or clinical psychologist or a statement that the prospective ward has refused to submit to an examination."¹¹² Lastly, the probate court may admit the testimony of both experts and lay witnesses at the hearing to assist the court in determining whether to appoint a guardian.¹¹³ Ultimately,

30, 1997) ("The standard to determine whether guardianship is necessary is the presentation of clear and convincing evidence.").

109. Ohio Rev. Code Ann. § 2111.041(A) (West 2008).

110. *Id.* § 2111.041(B).

111. *Id.* § 2111.031.

112. Ohio Sup. R. 66(A) (2008).

113. Lawrence A. Frolik, *Science, Common Sense, and the Determination of Mental Capacity*, 5 PSYCHOL. PUB. POL'Y. & L. 41, 45 (1999); Ohio Rev. Code Ann. § 2111.02(C)(7)(c) (2008) (alleged incompetent's right to have expert evaluation introduced); *see Houseman*, 1981 WL 6048, at *2-4 (finding that probate court erred in refusing to allow lay witness testimony related to prospective ward's competency at guardianship hearing); *In re Guardianship of Binkley*, No. 2-06-09, 2007 WL 638282, at *3-5 (Ohio Ct. App. Mar. 5, 2007) (discussing admissibility of lay witness opinion testimony at hearing on matter of appointment of guardian).

Here the expert witness, usually physicians, psychiatrists, or psychologists, testify after having examined the alleged incapacitated person. Yet courts do not seem attuned to the question of whether the testifying expert is in fact qualified to venture an opinion about the mental condition of the alleged incapacitated person. Even if the expert is qualified to render an opinion, the question arises as to the adequacy of the time devoted to the examination. In the past, medical testimony was sometimes based on a brief examination of the individual Because guardianship was commonly thought of as protective of the person and, more importantly, the property of the alleged incapacitated person, medical experts seem to have envisioned their role as one of facilitating the installation of the guardian. Expert witness, petitioners, and courts were less sensitive to the loss of personal autonomy and liberty occasioned by a guardianship. Because guardianship was considered beneficial, examining doctors were willing to make sweeping statements about the individual's mental capacity on the basis of cursory or brief examinations. Certainly in some circumstances the alleged incapacitated person was so demented or mentally impaired that the physician did not need an extended examination to diagnose a severe loss of mental capacity.

A brief examination of the alleged incapacitated person should not be tolerated. The

however, the court must rely on its own amorphous sense of competency and necessity to determine whether to grant a guardianship.¹¹⁴ When making this determination, the primary goal of the court is to promote the best interests of the ward.¹¹⁵

D. The Story of Abel – A Hypothetical

In order to better analyze the issues faced by adults with Asperger's disorder and high-functioning autism in contrast to the various guardianship concepts, it is better to consider a specific set of facts rather than abstract diagnostic criteria and clinical data. Thus, the following hypothetical is presented and will be referred to throughout the remainder of this Comment to assist in this analysis.¹¹⁶

Abel is a young man with Asperger's disorder. When Abel was twenty-two years old, his parents passed away unexpectedly. Abel's older sister, who had lived in another state for the previous six years, was his only living relative. Abel's mother and father each devised half of their estates to Abel and his sister.

possibility of the appointment of a limited guardian requires a more careful examination and a more detailed description of the alleged incapacitated person's deficits as well as remaining capacities.

Frolik, *supra* note 113, at 55-56.

114. Frolik, *supra* note 113, at 45; see *In re Langenderfer*, No. F-03-031, 2004 WL 1765463, at *4 (Ohio Ct. App. Aug. 6, 2004) (quoting *In re Guardianship of Wilson*, 155 N.E.2d 654, 654 (Ohio Ct. App. 1926)) ("The court, before appointing a guardian for an alleged incompetent, should be fully and completely satisfied that the claimed infirmity or infirmities of the alleged incompetent are of such a nature and character as to prevent such person from fully and completely protecting herself and property interests . . ."); *Rhoads v. Rhoads*, 163 N.E. 724, 725 (Ohio Ct. App. 1927) (finding that whether a prospective ward is competent or incompetent is "a legal question to be determined by the court, and not by any of the witnesses").

115. *E.g.*, *Langenderfer*, 2004 WL 1765463 at *3 ("In matters relating to guardianship, the probate court is required to act in the best interests of the alleged incompetent."); *In re Guardianship of Slone*, No. 3-04-13, 2004 WL 2581081, at *2 (Ohio Ct. App. Nov. 15, 2004) ("Under Ohio law, guardianship proceedings are not adversarial in nature, as the probate court is required to act in the best interests of the alleged incompetent.").

116. This hypothetical is loosely based on the clinical data set forth throughout this comment and the facts of *T.H. v. Div. of Developmental Disabilities*, 916 A.2d 1025 (N.J. 2007) (considering whether a fifty-five year old man with Asperger's disorder was properly denied services under New Jersey's Developmentally Disabled Rights Act and noting that the man was cared for by his parents his entire lifetime, had obsessive preoccupations, was socially isolated, had no close personal connections except with his parents, ate the same meal for dinner every night of his life and became agitated if any aspect of the meal changed, was employed through employment arranged by his father at the family business (continued employment was a condition of the later sale of that business to outsiders), had no understanding of the value of money, never prepared a meal, never shopped for food, and never tended to his personal hygiene unless prodded repeatedly).

Abel had lived with and was cared for by his parents his entire life. They provided for his every need and sought no outside assistance. Abel had no close personal connections except for his parents at the time of their death. Abel ate the same meal for dinner every night and became agitated if any aspect of that meal changed. Abel had never prepared a meal, shopped for food, done laundry, or cleaned the house. Abel's parents had to repeatedly prod him to tend to his personal hygiene.

One year prior to her death, Abel's mother contacted the Ohio Bureau of Vocational Rehabilitation, which developed an Individualized Plan for Employment for Abel and helped Abel find a form of supported employment stocking shelves at a retail store.¹¹⁷ Abel's parents transported him back and forth to work. After he started working, Abel's mother took him to the local bank, at which Abel opened a checking account. On days that Abel received his paycheck, his mother would take him to the bank so that he could deposit it. Overall, Abel's employer was pleased with his performance, noting only the peculiar way in which he ritualistically clocked in and out of work at exactly the same second each day.

Throughout his life, Abel had difficulty either communicating how he felt physically or deciphering which symptoms were normal and which were abnormal. For instance, Abel's mother might notice that Abel was generally lethargic and that his face was flush. When she would ask Abel how he felt, he would say "Fine." Upon investigating further, however, Abel's mother would learn that he had a high-grade fever. At doctor's visits, Abel, his mother, and his doctor would sit together and discuss Abel's health. Typically, Abel's mother would describe to the doctor what she perceived as symptoms in Abel, and the doctor would diagnose and treat Abel. Abel had never felt comfortable in health care settings, and when presented with any health care

117. The Bureau of Vocational Rehabilitation (BVR) "help[s] people with disabilities prepare for careers consistent with their interests and abilities." Ohio Rehabilitation Services Commission, Information Page, <http://www.rsc.state.oh.us/bvr/vrsi/info> (last accessed Nov. 2, 2008). Eligibility is based on three factors: (1) the individual has a physical or mental impairment that constitutes or results in a substantial impediment to employment; (2) the individual will benefit from services in terms of an employment outcome; and (3) the individual requires vocational rehabilitation services to prepare for, secure, retain, or gain employment. *Id.* The BVR provides counseling and guidance to choose an employment goal based on the individual's strengths, concerns, and interests; personal and work adjustment training, including social skill training needed to function effectively on the job to help the individual reach his occupational objective; vocational training; and placement services to find an employment setting suitable to the individual's skills and capacities. *Id.* The employment services provided by the BVR are very much like those called for by individuals in the medical community researching the adult outcome of individuals with Asperger's disorder. *See Barnhill, supra* note 29, at 123-24.

decision, he would experience anxiety, hesitate to make decisions, and ultimately defer to either his mother or the provider.

Abel enjoyed sports and was particularly obsessed with the Pittsburgh Steelers. When the newspaper was delivered, Abel would devour every bit of information in the sports section. If he was in a talkative mood, he might later make conversation with his father. These conversations usually consisted of Abel reciting nearly all facts learned from that day's readings, rarely stopping to allow his father to get a word in edgewise. Abel had sometimes, but rarely, talked about what he planned to do when he married. More frequently, he talked about what kind of car he intended to buy once he obtained his driver's license. He even had a study guide from the Ohio Bureau of Motor Vehicles from which to study for his driving test, but, to date, Abel's study sessions have always quickly transitioned into videogame playing sessions.

After their parents' death, Abel's sister moved home and assumed the responsibility of caring for her brother. Within a few months, she became annoyed at Abel's quiriness and exhausted over the incredible amount of effort she perceived necessary to both care for him and to keep after him to care for himself. Finally, one instance put her over the edge. As she had not yet found a job after moving back home, and her parents' estates had not yet been probated, Abel's sister soon realized that she would not have enough of her own money to pay for the both of their needs much longer. Abel's sister explained this fact to Abel and explained further that he would have to pay for his own expenses for the next few months. This plan worked for a short while. For instance, when she would return from a trip to the store to purchase all the required items for Abel's dinner, his sister would have him write her a check for the amount of the groceries. She kept track of his check register to ensure that Abel retained sufficient funds. One day, upon inspecting Abel's check book, she noticed a check missing. After being interrogated by his sister, Abel informed her that he had bought a season ticket to the Pittsburgh Steelers upcoming season from a seller in the newspaper's classifieds section. Abel was ecstatic at the thought of his purchase. He had paid \$5,000 for the ticket, emptying his checking account. Pittsburgh was over 100 miles away. Abel had yet to drive a car. And yes, he bought only one ticket.

Abel's parents' estates were finally probated and sizable sums were distributed to the siblings. Abel's sister worried about what Abel might do with his money. She was also exhausted from caring for Abel. Finally, after deciding that she and Abel could not continue on their present course, Abel's sister hired an attorney to help her petition the

probate court for a guardianship over Abel. She knew that her parents had left Abel sufficient funds to place him in an assisted living home that could care for him and decided that she could continue managing his finances. Abel's sister sought a plenary guardianship to accomplish her objectives.

The probate court appointed a court investigator and physician to evaluate Abel. Both filed reports with the court containing essentially these same findings: Abel is of average intelligence, but as a result of his Asperger's disorder, he is maladaptive to change, suffers from obsessive preoccupations, is withdrawn and self-isolated, is incapable of reciprocal social interaction, and cannot understand money and finances. The court investigator concluded that a guardianship was necessary because Abel could not care for himself or his property. The physician stated that Abel's personal hygiene practices were "highly inadequate" in terms of frequency, and because of his inability to shop for and prepare food, that he was unable to care for himself. The physician also stated that due to Abel's impairments, particularly in social interaction and communication, and his inability to understand money and finances, he was vulnerable to exploitation. At the hearing, Abel's sister intends to convey the facts set forth above and to lend her opinion that her brother has no understanding of the value of money, cannot care for himself, and is not able to live on his own.

E. Applying the Guardianship Prerequisites

1. Incompetence: Mental or Physical Illness or Disability

A person may be deemed "incompetent" for guardianship purposes if he is so mentally impaired as a result of a mental or physical illness or disability that he is incapable of taking proper care of himself or his property.¹¹⁸ Pursuant to that definition, incompetency cannot be established without first proving that the prospective ward suffers from a "mental or physical illness or disability."¹¹⁹ Chapter 2111 of the Ohio Revised Code does not define these terms. Nevertheless, courts have found that Asperger's disorder and high-functioning autism are a

118. Ohio Rev. Code Ann. § 2111.01(D) (West 2008).

119. See § 2111.01(D); *In re Swank*, No. 98CA69, 1999 WL 436860, at *2 (Ohio Ct. App. June 16, 1999) (holding that incompetency cannot be established without evidence of a mental or physical illness or disability).

“disability” in the non-guardianship context.¹²⁰ Additionally, through the creation of the Ohio Center for Autism and Low Incidence, the Ohio Legislature would appear to agree that autism spectrum disorders are a disability.¹²¹ The fact that individuals with Asperger’s disorder and high-functioning autism have a normal intelligence¹²² does not have any impact on this analysis; even if a prospective ward is “very intelligent” or has an above average “reasoning capacity,” this does not necessarily mean that he is capable of taking proper care of himself or his property.¹²³ Thus, a court will likely find that a prospective ward with Asperger’s disorder or high-functioning autism has a “disability” for guardianship purposes.

2. Incompetence: Hygiene, Cooking, Shopping, Cleaning, and Health Care

According to his sister, the court investigator, and the physician, Abel is incapable of taking proper care of himself because (1) he doesn’t take care of his personal hygiene as frequently as he should and has never prepared a meal, shopped for food, done laundry, or cleaned the house; and (2) he has difficulty in accurately interpreting, determining, and conveying his health care needs and is deferent in making health care decisions. Do these facts support a finding of incompetence?

Courts have taken into account a prospective ward’s failure to care for personal hygiene and inability to prepare meals, shop for food, do laundry, and clean in finding that he is incapable of taking proper care of himself.¹²⁴ Likewise, courts have based findings of incompetence upon

120. *Grine v. Sylvania Sch. Bd. of Educ.*, No. L-06-1314, 2008 WL 853519, at *1 (Ohio Ct. App. Mar. 31, 2008) (noting that Asperger’s disorder qualifies as a “disability” under the Individuals with Disabilities Education Act); *Faulders ex rel. Faulders v. Henrico County Sch. Bd.*, 190 F. Supp. 2d 849, 850 (E.D. Va. 2002) (noting that high-functioning autism qualifies as a “disability” under the Individuals with Disabilities Education Act) (*vacated on other grounds by* *JH ex rel. JD v. Henrico County Sch. Bd.*, 326 F.3d 560 (4th Cir. 2003)).

121. *See* Ohio Rev. Code Ann. § 3323.30 (West 2008) (“The center’s principal focus shall be programs and services for persons with autism.”); *id.* § 3323.35 (noting that the center is to develop “a clearinghouse for information about autism spectrum disorders and low incidence disabilities”).

122. *See supra* notes 28, 64-65 and accompanying text.

123. *See* *Matter of Guardianship of Worth*, No. 1430, 1997 WL 335559, at *4 (Ohio Ct. App. June 20, 1997); *In re Dicillo*, No. 2006-G-2718, 2007 WL 1113964, at *3 (Ohio Ct. App. April 13, 2007).

124. *See In re Hodge*, No. 00CA2733, 2001 WL 884082, at *1 (Ohio Ct. App. Jul. 30, 2001); *Worth*, 1997 WL 335559, at *4; *In re Guardianship of Vanko*, No. 2005-CA-00331, 2006 WL 2257014, at *2 (Ohio Ct. App. Aug. 7, 2006); *In re Poliska*, No. C-050474, 2006 WL 1449533, at *1 (Ohio Ct. App. May 26, 2006); *Matter of Guardianship of Snider*, No. CA92-11-101, 1993 WL

a prospective ward's inability to make health care decisions.¹²⁵ Given these findings, a court could find Abel incapable of taking proper care of himself and therefore incompetent.

Cautionary note: In those cases described above, the prospective wards were typically elderly and suffering from progressive illness such that their ability to care for themselves was far more likely to further deteriorate.¹²⁶ It is often on account of this "downhill trend" that courts appoint plenary rather than limited guardianships, so as to avoid a rehearing when the authority granted to the guardian proves inadequate due to the further deterioration of the ward.¹²⁷ However, when considering a guardianship for a prospective ward with Asperger's disorder or high-functioning autism, courts must be careful not to mistake an uphill climb for a downhill trend. Individuals with Asperger's disorder and high-functioning autism might be incapable of *intuitively* learning skills such as shopping, laundry, and personal hygiene, but this does not mean that they are incapable of *learning* such skills.¹²⁸ Therefore, though such limitations might justify a legal finding of incompetence, as will be made clear later in this comment, courts must also consider less restrictive alternatives that will sufficiently protect the prospective ward with Asperger's disorder or high-functioning autism while he acquires those skills.

3. Incompetence: Money and Property Management

[T]he court, before appointing a guardian for an alleged incompetent, should be fully and completely satisfied that the claimed infirmity or infirmities of the alleged incompetent are of such a nature and

471477, at *2-3 (Ohio Ct. App. Nov. 15, 1993); *Davis v. Cuyahoga County Adult Protective Serv.*, No. 77116, 2000 WL 1513752, at *5-6 (Ohio Ct. App. Oct. 12, 2000).

125. See *Poliska*, 2006 WL 1449533 (finding a prospective ward incompetent due in part to her inability to make decisions regarding medical treatment).

126. See *Hodge*, 2001 WL 884082, at *1 (concerning an elderly woman diagnosed with a condition that would cause "gradual deterioration in her mental function leading to her inability to care for her house, keep herself clean or properly take her prescribed medication"); *Worth*, 1997 WL 335559, at *1, 4 (concerning a ninety-one year old man with early dementia and amnesic disorder); *Vanko*, 2006 WL 2257014, at *2 (concerning a prospective ward who suffered "from a condition characterized by a fairly slow but progressive decline in one's ability to perform cognitive operations"); *Poliska*, 2006 WL 1449533, at *1 (noting that the condition of a ward suffering from multiple sclerosis "would continue to deteriorate"); *Snider*, 1993 WL 471477, at *3 (noting that the condition of a ward diagnosed with organic brain syndrome and dementia would quickly deteriorate when not taking her medication).

127. See *Fell*, *supra* note 35, at 202-04, 207; *Frolik*, *supra* note 34, at 743.

128. See *Barnhill*, *supra* note 29, at 123.

character as to prevent such person from fully and completely protecting herself and [her] property interests from those about her who would be inclined to and would take advantage of such person in the way of securing her property or means without giving proper service or value therefor.¹²⁹

According to his sister, the court investigator, and the physician, Abel has proven that he is incapable of taking proper care of his property because (1) he cannot understand money and finances and due to his impairments is vulnerable to exploitation, and (2) when given the opportunity to manage his own finances, he proved his inability to understand the value of money and vulnerability to exploitation by purchasing an expensive Pittsburgh Steelers season ticket at the least opportune time. Should the court be fully and completely satisfied that Abel's claimed infirmities are of such a nature and character as to prevent him from fully and completely protecting his property interests?

Courts have found that the making of disadvantageous investments can evidence a "total disregard of the value of money and property" such as to satisfy the court that the prospective ward was incapable of taking proper care of his property.¹³⁰ However, the court must also consider the circumstances surrounding the inquiry.¹³¹ Perhaps Abel knew that the price he paid was high, knew that he and his sister were facing hard times ahead, and still decided to buy the tickets as a way of coping with his grief over the loss of his parents or as a way to further motivate himself to study for his driving test. Essentially, before imposing guardianship, the court should be certain that Abel is incompetent in that he cannot take proper care of his property, not that he is just eccentric, cursed with poor judgment, or a typical twenty-two year old who spends his money as he sees fit (no matter how improvident others may deem such spending).¹³² Depending upon how the court decides this latter

129. *In re* Guardianship of Rich, No. 99-A-0062, 2000 WL 1738367, at *2 (Ohio Ct. App. Nov. 17, 2000) (quoting *Wilson*, 155 N.E. at 654-55).

130. *In re* Emswiler, 11 Ohio Dec. 10, 1900 WL 1262, at * 4 (Ohio Prob. Ct. 1900); *see also* Matter of Guardianship of Stiver, No. CA89-12-017, 1990 WL 94245, at *2 (Ohio Ct. App. July 9, 1990) (probate court appointing guardian based in part on finding that alleged incompetent did not comprehend financial information); *Michael*, 2007 WL 3293364, at *3 (finding that alleged incompetent's failure to express any ability to manage funds or have an understanding as to the value of her funds supported finding that she could not take care of her property).

131. *See* Frolik, *supra* note 113, at 49.

132. *See* Frolik, *supra* note 113, at 49; *In re* McClintock, No. 03-HA-548, 2003 WL 22231619, at *4-5 (Ohio Ct. App. Sep. 24, 2003) (finding that genuine issue of material fact existed regarding whether alleged incompetent was incapable of taking proper care of his property where court investigator noted that alleged incompetent "indicated the ability to perform the functions needed to care for his checking account and to pay his bills" but alleged incompetent's son stated that alleged

inquiry, the court may or may not find that Abel is incapable of taking proper care of his property.

4. Necessity: Generally

If a court finds that a prospective ward is incompetent, it must next find that a guardianship is necessary,¹³³ i.e. that “because of one or more functional limitations resulting from the prospective ward’s incompetency[,] his . . . best interest is served by appointment of a guardian.”¹³⁴ In turn, when considering the best interest of the prospective ward, the court should consider whether that interest will be better served by limited guardianship or some less restrictive alternative to guardianship.¹³⁵

To the extent that the following discussion explores less restrictive alternatives to guardianship, it is intended to illustrate the application of the necessity principle of guardianship in relation to less restrictive alternatives and the idea of creating an environment in which adults with Asperger’s disorder and high-functioning autism might learn the very skills the lack of which renders them “incompetent.” This discussion is not intended to serve as an expansive list and explanation of all potentially applicable alternatives. Such a discussion is beyond the scope of this Comment. Further, while the alternatives discussed may or may not be of use when applied to Abel’s hypothetical, this does not necessarily mean that such alternatives will or will not benefit another individual with Asperger’s disorder or high-functioning autism.

5. Necessity: Hygiene, Cooking, Shopping, and Cleaning

In analyzing the necessity of a guardian with regard to a prospective ward’s poor personal hygiene and inability to shop, do laundry, clean, and prepare meals, the first point to note is that these deficiencies do not necessarily require a substitute decision-maker.

incompetent had purchased expensive vehicles for his friends, had withdrawn substantial sums of money from his bank account, and was unable to protect himself from undue influence).

133. See Ohio Rev. Code Ann. § 2111.02 (West 2008); *Standel*, 1995 WL 655934, at *2.

134. *Sharp*, 1997 WL 52933 at *3.

135. See Ohio Rev. Code Ann. § 2111.02(B)(1) (West 2008) (“If the probate court finds it to be in the best interest of an incompetent or minor, it may appoint . . . on its own motion or on application by an interested party, a limited guardian with specific limited powers.”); ZWYER, GUARDIANSHIP, *supra* note 32, at 5; Frolik, *supra* note 34, at 736; see also § 2111.02(C)(5) (West 2008) (“Evidence of a less restrictive alternative to guardianship may be introduced, and when introduced, shall be considered by the court.”); § 2111.02(C)(6) (“The court may deny a guardianship based upon a finding that a less restrictive alternative to guardianship exists.”).

Instead, they require a caretaker who can go shopping for the prospective ward, do his laundry, clean his house, and convince him to take a bath. The only decision to be made is who will stand in the position of the caretaker.

Returning to Abel's hypothetical, if Abel's sister has a change of heart and decides that she will continue to care for Abel in this regard, no guardianship is necessary. Alternatively, if Abel understands that he has deficiencies in these areas and decides to enroll himself in an assisted living home, again no guardianship is necessary – the decision has been made. However, if Abel's sister is unwilling to care for him, Abel is unwilling to enroll himself in an assisted living arrangement, and the court remains convinced that he is unable to perform these tasks if living by himself, a guardianship will be necessary in order to bestow upon another the authority to make the decision to enroll Abel in an assisted living arrangement so that someone can care for him;¹³⁶ Abel will have no say in the matter.¹³⁷

Yet the appointment of a guardian over Abel's person could impede his ability to carry out his dreams of one day marrying and obtaining his driver's license.¹³⁸ Further, if his sister forces him into an assisted living arrangement, Abel might never learn these skills and could remain dependent on others for the remainder of his life.¹³⁹ Thus, the court should consider less restrictive alternatives that will sufficiently protect Abel from his limitations and simultaneously create an environment in which Abel can learn to shop, do laundry, clean, and prepare meals.¹⁴⁰

Supported living programs, overseen by county boards of mental retardation and developmental disabilities, could be a suitable less restrictive alternative in the area of self-care. Under these programs, services are provided to an individual through public or private resources, including moneys from the individual, to advance the individual's quality of life by providing the support necessary to enable him to live in a residence of his choice.¹⁴¹ Supported living programs

136. See § 2111.13(C) (West 2008) (“A guardian of the person may authorize or approve the provision to the ward of medical, health, or other professional care, counsel, treatment, or services . . .”).

137. See *In re Alexander H.*, No. L-00-1003, 2000 WL 1161690, at *5 (Ohio Ct. App. Aug. 11, 2000) (“A guardian is required to act in the best interest of his ward, which may or may not be the same as the ward's wishes.”).

138. See *supra* note 52 and accompanying text.

139. See *infra* note 185 and accompanying text (noting that the lack of such skills contributes to dependence).

140. See *supra* notes 106-108 and accompanying text.

141. See Ohio Rev. Code Ann. § 5126.01(U) (West 2008).

not only provide housing, food, clothing, habilitation, staff support, and other related support services necessary to ensure the health, safety, and welfare of the individual living on his own, but also assist the individual in acquiring, retaining, and improving the skills and competence necessary to live successfully on his own without support.¹⁴² If a prospective ward with limitations similar to Abel's could enroll in such a program, he would be protected from his deficiencies, given the opportunity to learn such skills, and retain more autonomy than if a guardianship were imposed. Thus, if one of these programs is available,¹⁴³ Abel's best interests would not be served by guardianship but rather by this less restrictive alternative.

6. Necessity: Money and Property Management

Is a guardianship over Abel's estate necessary? Protecting Abel's property from his limitations is surely in his best interest.¹⁴⁴ Also in his best interest, however, is providing Abel the opportunity and environment in which to learn these skills such that he can regain control over his property.¹⁴⁵ As such, the court should consider less restrictive alternatives to guardianship.¹⁴⁶

A spendthrift trust may have been ideal in Abel's hypothetical as a less restrictive alternative. Before their deaths, Abel's parents could have created a spendthrift trust for Abel's benefit and left his share of

142. *Id.*

143. To be eligible for MR/DD services, an adult must have a "developmental disability," Ohio Rev. Code Ann. § 5126.041(B) (West 2008), which is specifically defined as a severe, chronic disability that is characterized by all of the following:

- (1) It is attributable to a mental or physical impairment or a combination of mental and physical impairments, other than a mental or physical impairment solely caused by mental illness as defined in division (A) of section 5122.01 of the Revised Code;
- (2) It is manifested before age twenty-two;
- (3) It is likely to continue indefinitely;
- (4) It results in one of the following: . . .
- (c) In the case of a person age six or older, a substantial functional limitation in at least three of the following areas of major life activity, as appropriate for the person's age: self-care, receptive and expressive language, learning, mobility, self-direction, capacity for independent living, and, if the person is at least age sixteen, capacity for economic self-sufficiency.
- (5) It causes the person to need a combination and sequence of special, interdisciplinary, or other type of care, treatment, or provision of services for an extended period of time that is individually planned and coordinated for the person.

Id. § 5126.01(E).

144. *See supra* note 34 and accompanying text.

145. *See infra* notes 185-191 and accompanying text.

146. *See supra* notes 103, 106-107 and accompanying text.

their estates to the trust.¹⁴⁷ With Abel's sister or another responsible person serving as trustee, the trust assets would have been protected from Abel's improvident spending,¹⁴⁸ rendering a guardianship unnecessary. Moreover, Abel would have retained discretion as to his own earnings, providing him the opportunity to learn and understand money and finances.¹⁴⁹ Unfortunately, no such trust exists; instead, a sizable sum has been distributed to Abel, to which Abel currently has full access.

Is a power of attorney sufficient in this scenario? "A power of attorney is a written instrument authorizing an agent, known as an 'attorney-in-fact,' to perform specific acts on the principal's behalf."¹⁵⁰ The principal of the power of attorney retains the authority to act on his own behalf.¹⁵¹ A durable power of attorney "has the added feature that it will continue to be valid even if the maker of the power becomes incompetent."¹⁵² A person can also create a durable power of attorney that becomes effective only upon the occurrence of some later event, such as incompetency.¹⁵³ In order to create a power of attorney, one must be mentally competent.¹⁵⁴ The test applied to determine whether a

147. "A spendthrift trust is one [that] imposes a valid restraint on the voluntary and involuntary transfer of the beneficiary's interest in the trust property." Tracy Bateman Farrell et al., *Spendthrift Trusts*, 91 OHIO JUR. 3d Trusts § 189 (2008).

148. "A spendthrift clause in an instrument is designed for the financial protection of the beneficiaries. Although spendthrift trusts characteristically provide that the beneficiary shall receive only the income of the trust property, such a trust may exist notwithstanding the trustee is given discretionary power to use a part or all of the principal of the trust property for the care, health, or comfort of the beneficiary." *Id.*

149. *Cf. Michael*, 2007 WL 3293364, at *2-3 (affirming trial court's denial of ward's motion to terminate guardianship due seemingly in part to fact that ward had not managed her own funds during the five years she had been under guardianship and thus could not "express any ability to manage funds or have any understanding as to the value of her funds").

150. *In re Estate of Kirkland*, 885 N.E.2d 271, 277 (Ohio Ct. App. 2008).

151. *See Smith v. Flaggs*, No. 74414, 1998 WL 774664, at *4 (Ohio Ct. App. Oct. 29, 1998) ("[I]t is completely inconsistent with the fundamental principles of agency law to assert that an otherwise competent principal loses the capacity to enter into his own transactions simply because he has executed a durable power of attorney."); *see also Kirkland*, 885 N.E.2d at 277 ("A power of attorney is a written instrument authorizing an agent, known as an 'attorney-in-fact,' to perform specific acts on the principal's behalf."); *Meek v. Cowman*, No. 07CA31, 2008 WL 683972, at *1 (Ohio Ct. App. Mar. 7, 2008) (discussing a situation in which a testator had given another a power of attorney "only as a convenience, and he continued personally managing his finances").

152. ZWYER, ESTATE, *supra* note 32, at 26; *see also ZWYER, GUARDIANSHIP, supra* note 32, at 11-12; Ohio Rev. Code Ann. § 1337.09(A) (West 2008); *In re Scott*, 675 N.E.2d 1350, 1352 (Ohio Ct. App. 1996) ("R.C. 1337.09, the durable power of attorney statute, modifies the common law to the extent that a power of attorney fashioned according to the statute remains effective, even if the principal later becomes disabled, incapacitated or is adjudged incompetent.").

153. *See Ohio Rev. Code Ann. § 1337.09(B)* (West 2008).

154. *E.g., Testa v. Roberts*, 542 N.E.2d 654, 658 (Ohio Ct. App. 1988).

person is competent to create a power of attorney is different than the test of incompetence under the guardianship statute; the primary inquiry is not whether the person is incapable of taking proper care of himself or his property but rather “the ability of the principal to understand the nature, scope and the extent of the business she is about to transact.”¹⁵⁵

Assume that, although he is unable to understand money and finances and is vulnerable to exploitation, Abel understands that he suffers from these limitations and is capable of making the decision to have someone else manage his money and finances for him. In that instance, Abel could potentially be said to have the ability to understand the nature, scope, and extent of the business he is about to transact (that he is granting another equal control over the management of his finances) and thus is competent to create a power of attorney.¹⁵⁶ Whether or not a guardianship would truly offer any additional protection over a power of attorney, through the court’s monitoring of the guardianship, is debatable.¹⁵⁷ Nevertheless, the court presiding over Abel’s guardianship proceeding need not reach that question, because the court’s primary concern is Abel’s vulnerability to exploitation, i.e. the court will want to protect Abel from his own improvident spending. Since Abel, as the principal of the power of attorney, would not lose the authority to act on his own behalf (but merely grant that authority to the attorney-in-fact),¹⁵⁸ the power of attorney would be insufficient as it would not protect Abel from himself. Thus, based upon the foregoing analysis, a guardianship would appear necessary to protect Abel from his inability to take proper care of his property.

7. Necessity: Health Care Decisions

In Abel’s hypothetical, evidence was to be presented that Abel has difficulty in accurately interpreting, determining, and conveying his health care needs and that he is deferent in making health care decisions.

155. *See id.*

156. In this situation, and in others, courts must be aware that they may have to work through the communication, social interaction, and imagination impairments of individuals with Asperger’s disorder and high-functioning autism in order to accurately determine their cognitive limitations and must be careful not to mistake the former for the latter.

157. *See* Linda S. Whitton, *Durable Powers as an Alternative to Guardianship: Lessons We Have Learned*, 37 STETSON L. REV. 7, 10 (noting that “this additional measure of protection for the incapacitated person may be more illusory than real, especially where guardian-reporting requirements are minimal or judicial resources for guardian monitoring are inadequate”); *see also* Ohio Rev. Code § 2111.49(A)(1) (requiring guardian to file a guardian’s report with the court every two years).

158. *See supra* note 151 and accompanying text.

As discussed above, a court could base a finding of incompetence upon these limitations and find further that Abel is in need of a substitute decision-maker – someone to make his health care decisions for him.¹⁵⁹ Yet this does not necessarily mean that his best interests would be served by the appointment of a guardian.¹⁶⁰ The question becomes whether there is a less restrictive alternative that will provide Abel the protection of a substitute decision-maker for health care decisions while not imposing so heavily on his autonomy. The inquiry is complicated by the fact that privacy laws prevent health care providers from sharing an adult's health care information with others, including parents, unless there exists some documented legal authorization to do so.¹⁶¹

Ohio's durable power of attorney for health care statute provides that

[a]n adult who is of sound mind voluntarily may create a valid durable power of attorney for health care by executing a durable power of attorney . . . that authorizes an attorney in fact . . . to make health care decisions for the principal at any time that the attending physician of the principal determines that the principal has lost the capacity to make informed health care decisions for the principal [T]he authorization may include the right to give informed consent, to refuse to give informed consent, or to withdraw informed consent to any health care that is being or could be provided to the principal.¹⁶²

Presumably, if Abel is “mentally competent” for the purposes of creating a power of attorney, he is also of sufficiently “sound mind” for the purposes of creating a durable power of attorney for health care.¹⁶³

159. See *supra* note 125 and accompanying text.

160. See *Sharp*, 1997 WL 52933 at *3 (noting that to find that a guardianship is necessary, the court must find that “because of one or more functional limitations resulting from [his incompetency,] his . . . best interest is served by the appointment of a *guardian*” (emphasis added)).

161. See, e.g., Summary of the HIPAA Privacy Rule, (U.S. Dept. of Health and Human Servs. May 2003), available at <http://www.hhs.gov/ocr/privacysummary.pdf>.

162. Ohio Rev. Code Ann. § 1337.12(A) (West 2008).

163. “Sound mind” is not defined by the power of attorney statute, and it appears as though the phrase has not been defined by any court specifically interpreting Ohio Rev. Code § 1337.12(A). It is worth noting that the phrase “sound mind” is also used in the Ohio Revised Code provisions setting forth requirements for the valid creation of a will. See Ohio Rev. Code Ann. § 2107.02 (West 2008) (“A person of the age of eighteen years, or over, sound mind and memory, and not under restraint may make a will.”). A “sound mind” for purposes of executing a will is determined by four criteria . . . ‘1. The testator must understand the nature of the business in which he is engaged; 2. He must comprehend generally the nature and extent of his property; 3. He must hold in his mind the names and identity of those who have a natural claim on his bounty; and 4. He must be able to appreciate his relationship to members of his family.’

Assuming that Abel understands that he suffers from an inability to make health care decisions and is capable of competently deciding to have someone else make his health care decisions for him, Abel could be said to have the ability to understand the nature, scope, and extent of the business he is about to transact (granting another the authority to make his health care decisions for him) and thus competent to create a durable power of attorney for health care.

An attorney-in-fact under a durable power of attorney for health care “has the same right as the principal to receive information about proposed health care, to review health care records, and to consent to the disclosure of health records.”¹⁶⁴ Furthermore, because the durable power of attorney for health care will not activate until “the attending physician of the principal determines that the principal has lost the capacity to make informed health care decisions,”¹⁶⁵ Abel and the doctor will be forced to some extent to work through their communication difficulties. Requiring Abel to take on some responsibility in this regard could actually assist him in learning to make such decisions.¹⁶⁶ Upon running into some insurmountable barrier, whether due to communication issues or Abel’s discomfort with the situation, the physician could then look to the attorney-in-fact for assistance in working through the issue. Thus, if Abel created a durable power of attorney for health care, permitting an attorney-in-fact to make his health care decisions for him, not only would he be sufficiently protected from his limitations such that a guardianship is unnecessary, but he would also be provided the opportunity and environment in which to learn the very skills the lack of which rendered him “incompetent.”

Crowe v. Wagner, No. 20151, 2004 WL 2429807, at *2-3 (Ohio Ct. App. Oct. 8, 2004) (citing Niemes v. Niemes, 119 N.E. 503 (Ohio 1917)). Yet these criteria do not easily lend themselves to the durable power of attorney for health care context. Nevertheless, authorities hold that

[t]he requirement that a testator must be of sound mind and memory at the time of the execution of a will does not mean that one who has been weakened by sickness is incapable of making a will, but only that he or she must, at the time of making the will, have sufficient memory and mental capacity to understand fully what he or she is doing.

1 Baldwin's Oh. Prac. Merrick-Rippner Prob. L. § 26:5 (2007) (citing Fulkerson v. Fulkerson, 12 Ohio Law Abs. 324 (Ohio App. 1932)). If Abel knew he suffered from an inability to make his own health care decisions and was capable of competently making the decision to have someone else make his health care decisions for him such that he could be said to have the ability to understand the nature, scope, and extent of the business he was about to transact, then clearly he would also have the “mental capacity to understand fully what he is doing.”

164. Ohio Rev. Code Ann. § 1337.13(A)(3) (West 2008).

165. *Id.* §1337.13(A)(1).

166. *See infra* note 177 and accompanying text.

III. LIMITED GUARDIANSHIP AND LESS RESTRICTIVE ALTERNATIVES TO PAVE THE PATH TO NORMALITY AND INDEPENDENCE

The clinical descriptions of Asperger's disorder and high-functioning autism previously discussed in this comment paint a bleak picture of the road that lies ahead. As it turns out, these individuals can lead quite normal and fulfilling lives.¹⁶⁷ In fact, Hans Asperger once stated that

able autistic individuals can rise to eminent positions and perform with such outstanding success that one may even conclude that *only* such people are capable of certain achievements. It is as if they had compensatory abilities to counterbalance their deficiencies. Their unswerving determination and penetrating intellectual powers[,] . . . their narrowness and singlemindedness[,] . . . can be immensely valuable and lead to outstanding achievements in their chosen areas.¹⁶⁸

Could it be that more of these individuals would have such promising results if the proper support is provided?

A. Flexible Support Structure Vital to Good Prognosis

Studies have shown that the outcome of individuals in the autistic spectrum can be significantly influenced by the support structures available from childhood through adulthood.¹⁶⁹ The support structures that can most influence prognosis in autistic adults are those that enable them to progress through college and into appropriate employment, find appropriate accommodation, cope with the demands of daily life, and integrate as fully as possible into the community.¹⁷⁰ As children, these

167. See HOWLIN, *supra* note 2, at 22-24, 334.

168. HOWLIN, *supra* note 2, at 24 (quoting Hans Asperger) (emphasis added). In fact, "[a]bout 15% of autistic individuals have savant characteristics, being highly gifted in at least one area." Jennings, *supra* note 23, at 583.

169. HOWLIN, *supra* note 2, at 1; Howlin et al., *supra* note 91, at 226 ("[T]he ability to function adequately in adulthood life may depend as much on the degree of support offered (by families, employment and social services) as on basic intelligence."). "[A]dult people with Asperger syndrome or high-functioning autism often have extensive need for help from their families and/or society. Very few are living in 'normal' psychosocial conditions. They most often live alone, seldom have partner relations and are often without employment of any kind." Engstrom et al., *supra* note 71, at 109.

170. HOWLIN, *supra* note 2, at 2; Barnhill, *supra* note 29, at 118, 120. As to social integration, research on childhood experiences in relation to health outcomes in adulthood, as reported by adults with [Asperger's disorder] and their parents, indicated that although persons with [Asperger's disorder] "looked normal" and "talked normal," they never seemed to "quite fit in[.]" . . . Furthermore, many of these individuals described themselves as feeling like "outsiders," often being excluded educationally and socially and knowing they were different without anyone understanding

support structures are typically provided by parents and family,¹⁷¹ but the support tends to wane as children graduate high school.¹⁷² It should be no surprise then that “[a]lmost all parents will worry about the degree of independence that can be attained, or the ability of their son or daughter to cope when they are no longer there to care for them.”¹⁷³

These parents’ fears are not unwarranted. Traditionally, few specialized support systems existed for adults with Asperger’s disorder and high-functioning autism.¹⁷⁴ Fortunately, a growing number of organizations throughout Ohio now offer autism-specific support.¹⁷⁵ Further, with the creation of the Ohio Center for Autism and Low Incidence, whose “mission is to build state- and system-wide capacity to improve [the outcomes of individuals with autism and low-incidence disabilities, including autism spectrum disorders,] through leadership, training and professional development, technical assistance, collaboration, and technology,”¹⁷⁶ such support systems should continue to become even more available.

It has been suggested that, in order to be fully supportive in helping people on the autism spectrum develop a positive identity (and independence), some leeway must necessarily be given and the individuals should be allowed to make their own decisions.¹⁷⁷ In other words, the support must not be *too* supportive. “[While] it is important to avoid excessive demands or to have unrealistic expectations of what individuals are able to achieve, undervaluing their potential ability may do even more damage. The balance between under- and [over-pressuring] can be a difficult one to attain,”¹⁷⁸ but it is a balance that the legal community has a duty to competently and zealously strive to achieve.¹⁷⁹

why. All of the participants who were interviewed expressed views that likened their situation to “living on the edge of society.”

Barnhill, *supra* note 29, at 117 (internal citations omitted).

171. Barnhill, *supra* note 29, at 117.

172. HOWLIN, *supra* note 2, at 20.

173. HOWLIN, *supra* note 2, at 19.

174. Barnhill, *supra* note 29, at 117.

175. *See generally*, OCALI Services and Supports Database, <http://familyservices.ocali.org> (last accessed Nov. 1, 2008).

176. OCALI Mission Statement, <http://www.ocali.org/about> (last accessed Nov. 1, 2008).

177. Barnhill, *supra* note 29, at 123.

178. HOWLIN, *supra* note 2, at 335.

179. *See* Wiley Dinsmore, *Limited Guardianships Should be the Norm*, 2 PROB. L. J. OHIO 1, 3 (1991) (arguing that a lawyer who fails to seek less restrictive alternatives for proposed wards acts in derogation to his duties to represent his client competently and zealously). For a detailed analysis of ethical considerations arising within the guardianship context, see A. Frank Johns, *Guardianship*

B. *Attaining Independence through the Provision of Flexible Support*

As previously mentioned, a major life goal of individuals with Asperger's disorder and high-functioning autism is to live independently.¹⁸⁰ Independence in this regard has been measured in at least one study by examining education, employment, income, living arrangements, and mobility.¹⁸¹ Other literature addresses independence more generally, noting the desire of those with autism spectrum disorders simply to minimize the level of adult guidance in their lives.¹⁸² Yet others believe independence should be measured by the amount of control individuals have over their own lives, and the quality of their lives, when adequate support is provided.¹⁸³ Conversely, we might ask how exactly these individuals are *dependent*. It is said that most of these individuals "depend heavily on the support of their families to find jobs

Adjudications Examined within the Context of the ABA Model Rules of Professional Conduct, 37 STETSON L. REV. 243 (2007).

180. See, e.g., Hume, *supra* note 31.

181. Jennes-Coussens et al., *supra* note 61, at 407. The following excerpt provides a snapshot of the "malemployment" faced by these individuals:

Individuals with [Asperger's disorder] have reported difficulty finding a vocational niche, securing work that is commensurate with their ability levels, maintaining jobs, and negotiating social relationships. Mark Romoser, an adult with [high-functioning autism] who graduated cum laude from Yale University, used the term *malemployment* to describe the employment situation for many individuals with [autism spectrum disorders]. Romoser defined *malemployment* as working at a job far below your skill level and at a task for which you are unsuited.

Barnhill, *supra* note 29, at 118 (internal citations omitted). Another effect of the social interaction impairment in the employment arena is that adults with Asperger's disorder and high-functioning autism do not understand "office politics," causing them to make repeated mistakes in their dealings with others at work while often being unaware of the role their social behavior may have played in their work problems. Ramsay et al., *supra* note 24, at 485. Ritualistic and stereotyped behaviors also play a part in employment difficulties:

In the case of one man (initial IQ 80), for example, ritualistic checking [behaviors] seriously compromised his ability to work independently, despite his having obtained various postgraduate qualifications. In another (initial IQ 114), the level of anxiety engendered by his need for predictability meant that he could only cope with highly supportive, specialist autism provision as an adult. The very fixed routines and preoccupations of another (initial IQ 107) also resulted in his needing specialist support in adulthood, both in work and accommodation.

Howlin et al., *supra* note 91, at 226. "Even amongst those in employment, jobs tended to be poorly paid and did not provide individuals with adequate financial support to live independently." Howlin et al., *supra* note 91, at 224. Another factor affecting mobility (and employment) is the motor skill deficit associated with Asperger's disorder, which can limit the types of jobs such individuals are capable of working and act as a deterrent to their learning valuable other skills, such as driving. See Jennes-Coussens et al., *supra* note 61, at 410-11; Barnhill, *supra* note 29, at 120.

182. Hume, *supra* note 31.

183. JACQUELYN ALTMAN MARQUETTE, *INDEPENDENCE BOUND: A MOTHER AND HER AUTISTIC SON'S JOURNEY TO ADULTHOOD*, at xix (2002).

and accommodations.”¹⁸⁴ Additionally, the lack of skills such as shopping, laundry, and personal hygiene, skills which most learn intuitively but which must be taught to individuals with Asperger’s disorder and high-functioning autism, can contribute to dependence.¹⁸⁵

However, “[i]t is important to [recognize] that living independently is not synonymous to living without support.”¹⁸⁶

Most adults without a disability live independent lives, but they will nevertheless generally rely on a complex network of peers, family, work colleagues and [neighbors] in order to survive. However, unless a similar support network can be built up for people with autism living in the community, independence can in fact mean isolation, loneliness and rejection.¹⁸⁷

Oftentimes, a gradual increase in independence (gradual reduction of support) can occur by teaching skills such as cooking, self-care, cleaning, and shopping.¹⁸⁸ While the ability to exercise choice is important to the growth of these individuals, it may be necessary that parents and caregivers first help them experience what options are available.¹⁸⁹ The range of support rendered should change as their needs or skills change.¹⁹⁰ Long-term independence may be based on an ever-evolving package of support that involves assistance with finances, shopping, domestic arrangements or travel, access to work and leisure opportunities, counseling, and emotional support.¹⁹¹ Financial support might always be an issue, however, and it is therefore essential that individuals and their families are aware of the range of benefits to which they are entitled.¹⁹²

C. *Plenary vs. Limited Guardianship*

Plenary guardianship refers to guardianship over both the person and the estate and grants the guardian the authority to make nearly all

184. Barnhill, *supra* note 29, at 117.

185. *See* Barnhill, *supra* note 29, at 123.

186. HOWLIN, *supra* note 2, at 342.

187. HOWLIN, *supra* note 2, at 342.

188. HOWLIN, *supra* note 2, at 343.

189. HOWLIN, *supra* note 2, at 336.

190. HOWLIN, *supra* note 2, at 344.

191. HOWLIN, *supra* note 2, at 343-344.

192. HOWLIN, *supra* note 2, at 347. The range of public benefits available to individuals with Asperger’s disorder and high-functioning autism is beyond the scope of this Comment.

decisions for the individual.¹⁹³ Some of these decisions include managing the assets of the ward, bringing suits in the ward's name, waiving the physician-patient privilege for the ward, paying the ward's debts, defending lawsuits against the ward, controlling and protecting the person of the ward, and authorizing or approving medical care of the ward.¹⁹⁴ From the judicial perspective, plenary guardianship is an attractive option: it resolves any doubt that the guardian will have sufficient authority to protect the ward and the ward's property; it is expeditious; and it offers cost savings for the parties, as the guardian does not need to return to the court to have more power conferred upon him to deal with unforeseen contingencies or for interpretations regarding the extent of his authority.¹⁹⁵ "Plenary guardianship is also preferred by third parties who deal with the guardian because they know that the guardian's authority is broad enough to support his or her actions."¹⁹⁶

Yet those attractions to plenary guardianship are concerned with the needs and comforts of everyone *but* the prospective ward.¹⁹⁷ Guardianship should not be a "compromise designed to alleviate the concerns of the various parties, nor should it be some utilitarian system with the goal of bringing the greatest good to the greatest number."¹⁹⁸ Instead, the primary goal of guardianship should be "the protection and advancement of the life and property of the incapacitated person."¹⁹⁹ In seeking to advance and promote the best interests of the ward, probate courts must also consider the extensive loss of personal liberty associated with plenary guardianship.²⁰⁰

"The concept of limited guardianship recognizes that mental competence is not an all-or-nothing proposition but is, rather, a barely differentiated continuum,"²⁰¹ granting the guardian authority "only over the portion of a person's life where he or she is both incompetent and

193. Marta J. Williger, *Types of Guardianships, Conservatorships and Uses of Powers of Attorney*, in GUARDIANSHIP L. at 1a.3 (Ohio State Bar Ass'n CLE Institute 2005); ZWYER, GUARDIANSHIP, *supra* note 32, at 6.

194. David M. Farmer, *Overview of the Guardianship Process: From Filing to Accounting*, in GUARDIANSHIP L., *supra* note 193, at 2a.12-2a.20.

195. Frolik, *supra* note 34, at 742-43.

196. Frolik, *supra* note 34, at 743.

197. Frolik, *supra* note 34, at 741.

198. Frolik, *supra* note 34, at 745.

199. Frolik, *supra* note 34 at 745.

200. See Fell, *supra* note 35, at 190; Hannaford & Hafemeister, *supra* note 59, at 150-51 ("[F]ull guardianship is an unnecessary and inappropriate restriction on their liberty and autonomy.").

201. Venesy, *supra* note 47, at 170.

has a need.”²⁰² The concept of limited guardianship accompanied the guardianship-reform movement of the 1980s, whose followers viewed guardianship not as a benevolent act by the state but as a massive intrusion upon the autonomy and independence of an individual.²⁰³ According to reformers, the guardianship system was “too dependent on plenary guardianship and failed to seek a ‘less restrictive alternative.’”²⁰⁴ In creating the concept of a “limited guardianship,” reformers sought to reduce the number of false positives (approved guardians where the ward was not in fact incompetent), to reduce the number of persons over whom guardians could be appointed by changing the definition of competence in guardianship statutes, and to maximize the incompetent’s autonomy and independence in situations where guardianship could not be avoided.²⁰⁵ This reform made its way to Ohio in 1990 when the Ohio Legislature adopted amendments to Chapter 2111 of the Ohio Revised Code.²⁰⁶

Ohio’s guardianship statute provides that “[i]f the probate court finds it to be in the best interest of an incompetent or minor, it may appoint[,] . . . on its own motion or on application by an interested party, a limited guardian with specific limited powers.”²⁰⁷ Thus, a probate court may *sua sponte* determine that a limited guardianship would better serve the prospective ward. The same laws, rules, and procedures that apply to plenary guardianships apply to limited guardianships, with the exception that the court’s order of appointment and letters of authority will specify the limited powers of the guardian.²⁰⁸ The specific enumeration of the duties and powers of the guardian is beneficial to the court and others as it provides a guide for “evaluating and monitoring

202. ZWYER, GUARDIANSHIP, *supra* note 32, at 7.

203. Frolik, *supra* note 34, at 739; Dinsmore, *supra* note 179, at 2.

204. Frolik, *supra* note 34, at 739; *see also* Fell, *supra* note 35, at 201-02 (suggesting that courts are constitutionally required, per the least restrictive alternative doctrine, to recognize and separate “those areas in which a ward is capable of independent decisionmaking and those in which the ward is in need of protection,” limiting the scope of its guardianship order to those specific functions necessitated by the incompetent’s limitations, and allowing the ward to “retain the maximum control of his life commensurate with his decisionmaking capabilities”). The least restrictive alternative doctrine “encourages the development of maximum self-reliance and independence of the incapacitated person throughout the term of the guardianship.” Fell, *supra* note 35, at 202.

205. Frolik, *supra* note 34, at 740.

206. Dinsmore, *supra* note 179, at 1. The Legislature, in granting probate courts the ability to use limited guardianships, also intended to allow courts the ability to avoid situations in which more authority was conferred on a guardian than was necessary to alleviate the problems caused by the ward’s incompetence. Dinsmore, *supra* note 179, at 3.

207. Ohio Rev. Code Ann. § 2111.02(B)(1) (West 2008).

208. *Id.* § 2111.02(B)(1).

the performance of the guardian, as well as a road map for the guardian to use in determining what the guardian can or cannot do in carrying out assigned responsibilities.²⁰⁹ Most importantly, under a limited guardianship, the ward retains all rights that are not specifically granted to the limited guardian,²¹⁰ thereby promoting the ward's self-reliance, autonomy, and independence.²¹¹

D. Hesitance of Courts to Utilize Limited Guardianship

The Ohio Legislature's 1990 amendments to the guardianship statute, while creating the availability of limited guardianships, did not mandate that probate courts use, or even consider, limited guardianships; instead, the guardianship statute provides that "[i]f the probate court finds it to be in the best interest of an incompetent or minor, it *may* appoint . . . a limited guardian"²¹² Most states used similar language during the guardianship-reform movement,²¹³ yet courts in Ohio and across the country have been slow to utilize limited guardianship.²¹⁴ Commentators have posited many reasons for this, including the perception of the increased demand of limited

209. Hannaford & Hafemeister, *supra* note 59, at 161.

210. Venesy, *supra* note 47, at 171.

211. Hannaford & Hafemeister, *supra* note 59, at 161; *see also* Fell, *supra* note 35, at 202 (finding that maintaining autonomy and the opportunity for choice and control are important to one's mental health).

212. Ohio Rev. Code Ann. § 2111.02(B)(1) (West 2008) (emphasis added). Other states were more responsive to the reform movement, mandating that their courts prefer limited guardianships. Sally Burch Hurme, *Current Trends in Guardianship Reform*, 7 MD. J. CONTEMP. LEGAL ISSUES 143, 164-67 (1995).

213. *See* Hurme, *supra* note 212, at 163-67.

214. Venesy, *supra* note 47, at 176 ("[S]tudies indicate that 'partial or limited guardianships are rarely established.'"); Hannaford & Hafemeister, *supra* note 59, at 150 ("[C]ommentators bemoan the failure of . . . the courts to make use of modified or 'limited' guardianships."); Frolik, *supra* note 34, at 741 ("Today, limited guardianship is almost always an option for someone in need of a guardian . . . [, yet] it is rarely invoked."); Fell, *supra* 35, at 202 (noting that despite wide recognition of limited guardianships, "the unfortunate[] reality is that implementation is lacking" and they are "rarely used"). One commentator has cited authority stating that "[i]n Ohio, . . . out of a total of approximately 25,000 guardianship appointments in 1995, only 458 awarded less than plenary or complete authority to the guardian." Marshall B. Kapp, *The "Voluntary" Status of Nursing Facility Admissions: Legal, Practical, and Public Policy Implications*, 24 NEW ENG. J. ON CRIM & CIV. CONFINEMENT 1, 26 n.111 (1998) (citing Letter from the Ohio Department of Aging to the Center for Social Gerontology, Inc., dated December 13, 1996). Unfortunately, it is difficult to determine whether limited guardianship has grown more popular in Ohio since 1995 as Ohio state court administrative offices do not currently compile data on adult guardianship on a state-wide level. ERICA F. WOOD, ABA COMM. ON LAW AND AGING FOR THE NAT'L CENTER ON ELDER ABUSE, STATE-LEVEL ADULT GUARDIANSHIP DATA: AN EXPLORATORY SURVEY 27 (2006).

guardianships on a court's time and money,²¹⁵ the familiarity and comfort of courts and practitioners with plenary guardianship concepts,²¹⁶ and the fact that it is "easier to view the ward as competent or incompetent" than it is to determine exactly how a prospective ward might be incompetent and tailor the power of the guardian to fit the particular needs of the ward.²¹⁷

E. Limited Guardianship to Achieve the Correct Balance of Support and Autonomy

The medical community has recognized that young adults with Asperger's disorder and high-functioning autism have an expanding (or at least fluctuating) capacity²¹⁸ and that their potential for autonomy can be diminished by the imposition of a support structure that provides too much support and no opportunity to make their own decisions.²¹⁹ The medical community has also recognized that the type of support rendered should change as the needs and skills of these individuals change²²⁰ and that long-term independence might need to be centered on an ever-evolving package of support.²²¹ Legal commentators have long advocated limited guardianships as *the* tool (or at least *the* choice of guardianship) to achieve normality, or as close thereto as possible, for the mentally disabled.²²² Limited guardianship is "adaptable for a ward with fluctuating capacity, as well as for a ward whose capacity is expanding but whose ability to care for himself or herself would otherwise be diminished by the imposition of plenary guardianship," and holds "the promise of crafting just the degree of protection and assistance needed."²²³ It should be fairly clear at this point that courts and practitioners should rely upon limited guardianship where necessary,

215. Venesy, *supra* note 47, at 176; Fell, *supra* note 35, at 202 ("The additional time and resources required to tailor a guardianship to the respondent's specific needs and provide ongoing supervision, when combined with the reality of over-crowded dockets, results in substantial judicial resistance to this concept.")

216. Fell, *supra* note 35, at 202.

217. Venesy, *supra* note 47, at 176; Fell, *supra* note 35, at 203. For recent suggestions on how best to minimize the increased demands brought on by limited guardianship, a discussion on how the difficulties inherent in administering limited guardianship have trumped the "'softer' values of personal autonomy, dignity, independence, and respect for individual freedom," and more on the benefits of limited guardianship, see Frolik, *supra* note 34, at 749-55.

218. See *supra* notes 188-191 and accompanying text.

219. See *supra* notes 177-178 and accompanying text.

220. See *supra* notes 188-191 and accompanying text.

221. See *supra* notes 188-191 and accompanying text.

222. See Frolik, *supra* note 34, at 746.

223. Frolik, *supra* note 34, at 747.

and less restrictive forms of support to the extent practicable, in order to provide the proper balance of evolving support, flexibility, and decision-making autonomy that is required to bring individuals with Asperger's disorder and high-functioning autism closer to normality and independence.²²⁴ The next question is how to implement this conclusion in practice.

1. Importance of Specific Findings of Incompetence

In order to utilize limited guardianship, courts must make specific findings of incompetence,²²⁵ determining exactly how a prospective ward is limited by his or her Asperger's disorder or high-functioning autism. Only then can the court begin to determine whether certain less restrictive alternatives will be sufficient to protect the prospective ward from a specific limitation and render a guardianship unnecessary in that regard.²²⁶ Further, it is only upon considering which limitations will and will not be sufficiently served by less restrictive alternatives that a court will be able to specifically identify the limitations that necessitate guardianship.²²⁷

2. Coordinating with the Ohio Center for Autism and Low Incidence for the Provision of Less Restrictive Alternatives

The guardianship statute provides that “[e]vidence of a less restrictive alternative to guardianship may be introduced [at the appointment hearing], and when introduced, shall be considered by the court.”²²⁸ Thus, the burden is currently placed on the petitioner (Abel's sister) or prospective ward (Abel) to suggest less restrictive alternatives that could render the guardianship unnecessary. Yet the petitioner may have no interest in attempting to arrange for a less restrictive alternative to handle the limitation at issue, and the prospective ward may not know where to begin making such arrangements or even that he has to. Without evidence of less restrictive alternatives, a probate court may be more likely to conceptually conglomerate a prospective ward's

224. “[O]nly after the ward's interests have been served as best they can should the inquiry shift to whether and how limited guardianship can meet the interest of other parties, such as the petitioner or the judge.” Frolik, *supra* note 34, at 744.

225. See *supra* note 217 and accompanying text.

226. See *supra* notes 133-166 and accompanying text.

227. See *supra* notes 133-166 and accompanying text.

228. Ohio Rev. Code Ann. § 2111.02(C)(5) (West 2008). “The court may deny a guardianship based upon a finding that a less restrictive alternative to guardianship exists.” *Id.* § 2111.02(C)(6).

limitations, rather than considering them piecemeal, which could ultimately encourage plenary guardianship.²²⁹ One way to avoid this pitfall in such instances is, by amendments to either the guardianship statute or local court rules, to specifically require the individuals appointed by the probate court to investigate the prospective ward's circumstances to further investigate and attempt to arrange less restrictive alternatives to the guardianship.²³⁰

No matter who attempts to arrange less restrictive alternatives – court appointed investigator, petitioner, parent, or prospective ward – one resource that could help simplify this task is the Ohio Center for Autism and Low Incidence (OCALI). OCALI exists to assist individuals with autism to achieve their full potential.²³¹ Among its many duties, OCALI is tasked with collaborating and consulting with state agencies that serve persons with autism and low incidence disabilities; creating and implementing programs for technical assistance and intervention services; creating a regional network for communication and dissemination of information among educators and professionals serving persons in order to address educational services, evaluation, assistive technology, family support, transition, employment and adult services, and medical care for such persons; and developing a statewide clearinghouse for information about autism spectrum disorders and low incidence disabilities.²³² OCALI provides public access to its services and supports database, a searchable online database that “includes public and private services, supports and programs available to individuals with disabilities and their families in Ohio,”²³³ in which OCALI hopes to “include all providers who serve individuals with disabilities in Ohio.”²³⁴ This database of providers, which is searchable

229. See *supra* note 217 and accompanying text.

230. Ohio Rev. Code Ann. § 2111.041(A)(3) (West 2008) (requiring the court to appoint a probate court investigator to investigate the circumstances of the alleged incompetent and subsequently file with the court a report that contains a recommendation regarding the necessity for a guardianship or a less restrictive alternative); § 2111.031 (permitting the court to appoint “other qualified persons to examine, investigate, or represent the alleged incompetent, to assist the court in deciding whether a guardianship is necessary”); see Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 238 (2007) (noting that routine use of limited orders could be enhanced by directions to court investigators to examine limited approaches to guardianship).

231. Ohio Center for Autism and Low Incidence, <http://www.ocali.org> (last visited Nov. 1, 2008).

232. Ohio Rev. Code Ann. § 3323.34 (West 2008).

233. OCALI Resources, <http://www.ocali.org/resources> (last visited Nov. 1, 2008).

234. OCALI Services and Supports Database, <http://familyservices.ocali.org> (last visited Nov. 1, 2008).

both by type of service and by geographic location,²³⁵ should prove useful in investigating and arranging for less restrictive alternatives of support to help relieve the necessity of guardianship for individuals with Asperger's disorder and high-functioning autism.

3. Crafting the Limited Guardianship Order

Finally, upon determining the sufficiency of less restrictive alternatives, the court will be left with the list of limitations for which guardianship remains necessary, if any.²³⁶ Having reached this point, the last step of crafting the limited guardianship order should not be difficult.

For Abel's hypothetical, assume that the following course of events took place: The probate court found Abel incompetent because he is incapable of taking proper care of himself due to his inability to care for his personal hygiene, prepare meals, shop for food, do laundry, clean the house, and make health care decisions. The court also found Abel incompetent because he is incapable of taking proper care of his property due to his inability to understand money and finances and his vulnerability to exploitation. Abel's sister remained unwilling to care for him, and Abel refused to enroll himself in an assisted living arrangement. Upon the recommendation of Abel's court appointed investigator, Abel executed a durable power of attorney for health care, naming his sister attorney-in-fact, and Abel's sister utilized OCALI to find and arrange for Abel an apartment in which to live and a local support provider that will not only assist Abel with his self-care needs but also teach him those skills that he lacks.

Presented with these facts at the appointment hearing, the probate court can find that a guardianship is unnecessary to protect Abel from his inability to care for his personal hygiene, prepare meals, shop for food, do laundry, clean the house, and make health care decisions. The remaining limitations then are Abel's inability to understand money and finances and his vulnerability to exploitation; more specifically, the immediate concern is the sizable sum left to Abel through his parents' estates. To protect Abel from this last remaining limitation, the probate court could draft a limited guardianship order, appointing a guardian over the specific assets distributed from Abel's parents' estates.²³⁷

235. *Id.* (note: click one of the three age-related tabs to access the database).

236. *See supra* notes 133-166 and accompanying text.

237. *See* Ohio Rev. Code Ann. § 2111.02(B)(1) (West 2008) ("If the probate court finds it to be in the best interest of an incompetent or minor, it may appoint . . . a limited guardian with

Further, the court could place a duration limitation on the limited guardianship, limiting it to perhaps two or three years initially.²³⁸

By taking this approach and using a combination of less restrictive alternatives and limited (both in scope and duration) guardianship, the probate court will have created the environment of balanced support and autonomy called for by the medical community as necessary for a good prognosis in individuals with Asperger's disorder and high-functioning autism. Further, by avoiding plenary guardianship, with its "absolute labeling and stripping of rights," the probate court will have avoided creating unnecessary barriers to Abel's entrance to society.²³⁹

F. Modifying Ohio's Conservatorship Statute to Provide a More Suitable and Less Restrictive Alternative to Limited Guardianship

Ohio's conservatorship statute provides that "[a] competent adult who is physically infirm may petition the probate court . . . to place, for a definite or indefinite period of time, his person, any or all of his real or personal property, or both under a conservatorship with the court."²⁴⁰ A product of the guardianship-reform movement, conservatorship was intended to replace guardianships for physical disability.²⁴¹ Indeed, conservatorship works very much like a guardianship; in fact, "[u]pon issuance of the order, all sections of the Revised Code governing a guardianship of the person, the estate, or both, . . . and all rules and procedures governing such a guardianship, . . . apply to the conservatorship, including . . . applicable bond and accounting requirements."²⁴² Moreover, the conservatee (ward) enjoys the liberty of being able to precisely shape the powers and authority of the conservator (person acting for the conservatee):

A [conservatee] either may grant specific powers to the conservator or court or may limit any powers granted by law to the conservator or court The petition shall state whether the person of the competent

specific limited powers [T]he order of appointment and letters of authority of a limited guardian shall state the reasons for, and specify the limited powers of, the guardian.").

238. *See id.* § 2111.02(B)(1) ("The court may appoint a limited guardian for a definite or indefinite period.").

239. Frolik, *supra* note 34, at 746-47.

240. Ohio Rev. Code Ann. § 2111.021 (West 2008).

241. *See supra* note 206 and accompanying text (guardianship reform movement made its way to Ohio in 1990); Angela G. Garlin, *Guardianship – Appointment of Guardian*, 2 Baldwin's Oh. Prac. Merrick-Rippner Prob. L. § 63:64 (2008) ("Conservatorships became available in Ohio on January 1, 1990. They replace the former guardianships for physical disability.").

242. Ohio Rev. Code Ann. § 2111.021 (West 2008).

adult will be placed under the conservatorship, shall state with particularity all real and personal property that will be placed under the conservatorship, shall state the powers granted and any limitation upon the powers of the conservator or court, and shall state the name of a proposed suitable conservator.²⁴³

Given the fact that the conservatee is competent, the conservatee retains the authority to request or authorize the conservator to make specific transactions that fall within the scope of the conservatorship,²⁴⁴ i.e. the conservatee does not lose the authority to act on his own behalf. However, “the letters of a conservatorship may preclude such agency operation by including the specific rights and obligations of both the conservator *and the [conservatee]*.”²⁴⁵ In other words, the conservatorship can be crafted to restrict the conservatee’s authority to act on his own behalf. Lastly, “[a] conservatorship shall terminate upon a judicial determination of incompetency, the death of the petitioner, the order of the probate court, or the execution of a written termination notice by the petitioner.”²⁴⁶

As currently formulated, however, the conservatorship statute is probably of little use to an individual with Asperger’s disorder or high-functioning autism. The conservatorship statute requires the conservatee to be “[a] competent adult who is physically infirm.”²⁴⁷ While “incompetent” is defined for purposes of Chapter 2111 of the Ohio Revised Code,²⁴⁸ “competent” is not.²⁴⁹ As such, it remains unclear whether a court interpreting the conservatorship statute would construe “competent” as the opposite of “incompetent” – the prospective conservatee must not be mentally impaired and must be capable of taking proper care of himself or his property,²⁵⁰ or if it would apply a definition more akin to that used for powers of attorney – the prospective conservatee must be able to understand the nature, scope, and the extent of the business he is about to transact.²⁵¹

More problematic is the physical infirmity requirement. The intent of the Ohio Legislature in drafting the conservatorship statute was “to

243. *See id.* § 2111.021.

244. *Miebach v. Mathias*, 697 N.E.2d 297, 300 (Ohio Com. Pl. 1998).

245. *Id.* at 77 (emphasis added).

246. *See* Ohio Rev. Code Ann. § 2111.021 (West 2008).

247. *Id.*

248. *See id.* § 2111.01(D).

249. *See id.* § 2111.01.

250. *See id.* § 2111.01(D).

251. *See Testa*, 542 N.E.2d at 659.

provide the physical means of making otherwise difficult transactions for a physically infirm.”²⁵² Even if the motor skill deficit sometimes associated with Asperger’s disorder and high-functioning autism could be considered a physical infirmity,²⁵³ it is not that physical infirmity, in the main, that makes these individuals’ transactions difficult; rather, impairments in communication, social interaction, and imagination cause the bulk of their difficulties.²⁵⁴ Thus, conservatorship is not likely an option for individuals with Asperger’s disorder and high-functioning autism.

This conclusion is unfortunate. If available, conservatorship could actually provide a closer balance of flexible support and autonomy for individuals with Asperger’s disorder and high-functioning autism as it (1) provides the ability to narrowly tailor, modify, and limit the authority of the conservator (as with powers of attorney and limited guardianship),²⁵⁵ (2) provides the protections of court oversight and the ability to limit the authority of the conservatee (features unavailable with powers of attorney),²⁵⁶ (3) avoids a judicial determination of “incompetence”²⁵⁷ (and all the stigma that accompanies it),²⁵⁸ and (4) allows the conservatee to easily terminate the conservatorship (unlike with a guardianship).²⁵⁹ As such, the Ohio Legislature should strongly consider amending the conservatorship statute so that conservatorship is an available option to individuals with Asperger’s disorder and high-functioning autism.²⁶⁰

252. Miebach, 697 N.E.2d at 300.

253. *See supra* note 181 (discussing motor skill deficit).

254. *See supra* notes 62-88 and accompanying text.

255. *See* Ohio Rev. Code Ann. § 2111.021 (West 2008).

256. *Id.*

257. *See id.* § 2111.021 (“Neither the establishment of a conservatorship nor the filing of a petition for conservatorship with the probate court shall be considered as evidence of mental impairment under section 2111.01 of the Revised Code.”).

258. *See supra* notes 51-56 and accompanying text.

259. *See* Ohio Rev. Code § 2111.021 (2008); *see also supra* note 55 and accompanying text (discussing potential difficulty terminating plenary guardianship).

260. Two simple changes to the Code would be sufficient. First, the following definition (or one similar) of “competent” could be inserted into Ohio Rev. Code Ann. § 2111.01:

(H) ‘Competent’ for purposes of Ohio Rev. Code § 2111.021 means any person who is able to understand the nature, scope and the extent of the business the person is about to transact by entering into the conservatorship, granting another person the authority to act on the person’s behalf, and potentially limiting the person’s own authority to act with regard to those same matters.

Inserting such a definition would ensure that an individual with Asperger’s disorder or high-functioning autism who is capable of understanding the nature and extent of the limitations he or she may have, and capable of understanding exactly how entering into the conservatorship will assist him or her with those limitations, is not deemed too incompetent to enter into the

IV. CONCLUSION

The medical community has found that a flexible and evolving support structure, one that enables the individual to find appropriate accommodation, cope with the demands of daily life (including assistance with finances, shopping, travel, counseling, and emotional support), progress through college and into appropriate employment, and integrate as fully as possible into the community will be most beneficial for individuals with Asperger's disorder and high-functioning autism as they navigate adulthood.²⁶¹ Clearly, the type of support prescribed is a type better provided by social institutions. Though Ohio has proven its commitment to increasing the availability of such support by creating the Ohio Center for Autism and Low Incidence,²⁶² situations are bound to arise in which the legal community will become involved and guardianship will be considered.

Historically, courts have avoided limited guardianship in favor of plenary guardianship.²⁶³ Reasons for this include the fact that courts often (1) predict a "downhill trend" that would necessitate a limited guardian's return to court to acquire more authority, (2) perceive limited guardianship as more time consuming and costly, (3) are more familiar with plenary guardianship concepts, and (4) find it difficult to determine precisely how a prospective ward is incompetent and to tailor the guardianship order to fit the needs of that ward.²⁶⁴ These courts must be careful not to mistake an uphill climb for a downhill trend.

It may be true that a limited guardian will return to court many times to have its authority modified, but it is precisely that type of flexible and evolving support package, one in which support is provided in the deficient area only, that is necessary for a good prognosis for

conservatorship merely because he or she suffers from those limitations. Second, either a definition of "physically infirm" that includes "Asperger's disorder and high-functioning autism," "autism spectrum disorders," or "pervasive developmental disorders" could be inserted into Ohio Rev. Code Ann. § 2111.01, or § 2111.021 could be amended to include such terms. The conservatorship statute would continue to provide for the termination of the conservatorship upon a "judicial determination of incompetency," *see id.* § 2111.021, but, in determining whether the conservatee is incapable of taking proper care of himself or his property, a court could consider the fact that the conservatee recognized his limitations and took steps to accommodate the same by establishing the conservatorship. In that case, the conservatee might be proven incompetent only if the conservatorship proves inadequate.

261. *See supra* note 170 and accompanying text.

262. *See supra* notes 231-235 and accompanying text.

263. *See supra* notes 212-217 and accompanying text.

264. *See supra* notes 126-127, 215-217 and accompanying text.

adults with Asperger's disorder and high-functioning autism.²⁶⁵ It may also be true that probate courts will bear more costs by requiring their investigators to find and attempt to arrange less restrictive alternatives to guardianship, yet due to the fact that persons petitioning the court for a guardianship may not have the prospective ward's best interest in mind, and the prospective ward may not be in a position to find and arrange such support himself, this would appear to be a necessary cost of conducting guardianship hearings. Over time, these costs could be reduced both through the creation of standard investigation procedures, which could include checklists of less restrictive alternatives, and through the increased coordination of probate courts, local support providers, and the Ohio Center for Autism and Low Incidence.²⁶⁶

Once involved, it is essential that the legal community recognize the benefit in allowing individuals with Asperger's disorder and high-functioning autism to have their own voice.²⁶⁷ In the guardianship context, this means that courts and practitioners, in attempting to promote the best interests of a prospective ward diagnosed with Asperger's disorder or high-functioning autism,²⁶⁸ should avoid plenary guardianship in favor of limited guardianship and other less restrictive alternatives, which can provide just as much protection yet intrude less upon the individual's autonomy.²⁶⁹ This approach will require courts and practitioners to better familiarize themselves with limited guardianship concepts, make more precise determinations of incompetence, and narrowly tailor limited guardianship orders to only the extent necessary to protect the ward in the areas where less restrictive alternatives prove insufficient, additional efforts that are clearly justified by the positive impact they can have on the life of a prospective ward with Asperger's disorder or high-functioning autism.

265. See *supra* notes 177-178, 188-191 and accompanying text.

266. See Teaster et al., *supra* note 230, at 238 ("Routine use of limited orders could be enhanced by check-off categories of authorities on the petition form, directions to the court investigator to examine limited approaches, and templates for specific kinds of standard or semi-standard limited orders.").

267. See *supra* notes 177-178 and accompanying text.

268. See *supra* note 115 and accompanying text.

269. See *supra* notes 47-59 and accompanying text.