2011 WL 6838130 (Md.App.) (Appellate Brief)
Maryland Court of Special Appeals.

In the Matter of Merilee ROSENBERG, for the Appointment of a Guardian of the Property.

No. 02744.
September Term, 2010.
August 15, 2011.

Appeal from the Circuit Court for Montgomery County
Michael J. Algeo, Judge

Brief of Appellant

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***1** STATEMENT OF THE CASE

The Circuit Court for Montgomery County, Maryland established a guardianship of the property for the Appellant with her consent on November 11, 2008. (E. 25). No guardianship of the person was sought or established. (E. 20, 25). On January 4, 2011, the Circuit Court held a hearing to determine whether the guardianship should be terminated. (E. 12). The main issue was whether the Appellant had recovered from her disability sufficiently to manage her property. At the conclusion of the hearing, the Honorable Michael J. Algeo denied the Appellant's request to terminate the guardianship of the property. (E. 14). This appeal is from that Judgment Order.

QUESTIONS PRESENTED

1. Whether the circuit court erred by adopting a “best Interests” standard rather than requiring “clear and convincing” evidence to continue an adult guardianship of the property.

2. Whether the Circuit Court erred by failing to consider a less restrictive alternative to guardianship.

3. Whether the record contains clear and convincing evidence or a preponderance of the evidence upon which to base the continuation of an adult guardianship of the property.

***2** STATEMENT OF FACTS

The Appellant, Merilee Rosenberg, [hereinafter “the ward”] was born in 1942. (E. 32). Early in her career she obtained a Ph.D. and taught French and German on the college level. (E. 148-149). In mid-career she earned a law degree at the Catholic University Law School and became an attorney for the U.S. Government practicing federal agency contract law. (E. 109). Toward the end of that career she developed Parkinson's disease. (E. 149). In 2008 she underwent deep brain stimulation surgery at Suburban Hospital in Bethesda, Maryland. (E. 149). After the surgery, she was unable to manage her **financial** affairs. (E. 150). Suburban Hospital initiated guardianship proceedings in the Circuit Court for Montgomery County, Maryland on August 14, 2008. (E. 16-20). The court appointed counsel for the ward, and after various discussions, the ward, through counsel, consented to a guardianship over her property without an evidentiary hearing. (E. 25). As time passed, the ward transitioned from hospital, to nursing home rehabilitation center, to group home, to her own apartment, where she has lived alone since July, 2010, with the support of a care manager and a health care aide, the latter assisting her approximately fifteen hours per week. (E. 155). The guardian of the ward's property is Robert McCarthy, Esq. [hereinafter “the guardian”], with whom the ward has had an uneasy relationship. (E.76-77). At the ward's prompting, in 2010, the guardian asked the circuit court to review the case to determine whether the guardianship of the property should be terminated. (E. 26). At a hearing held July 27, 2010, the guardian recommended that the Honorable Mary Beth McCormick appoint ***3** Patricia Nay, M.D. to perform an evaluation of the ward. (E. 113-114). The ward objected on the ground that her neurologist, who was also a psychiatrist, had already done an evaluation. (E. 113-114). Judge McCormick stated that it was difficult for treating physicians to be completely objective. (E. 113). Whereupon, Judge McCormick appointed Dr. Nay to evaluate whether the ward had recovered sufficiently to manage her property. (E. 28-29). Judge McCormick further ordered that Dr. Nay evaluation be admitted as substantive evidence without Dr. Nay's presence, but that any party could subpoena Dr. Nay if they wished. (E. 29). Dr. Nay's report was filed with the court in September, 2010. (E. 30). The matter was heard on the merits on January 4, 2011, before the Honorable Michael J. Algeo. The ward testified at the hearing, and also called as witnesses, her neurologist, Thomas Hyde, M.D., Ph.D., who testified that the ward did not have dementia, and that she was capable of managing her property (E. 124, 128-130, 133-134, 136), and a close friend, Cheryl Floyd, J.D., Ph.D., a U.S. Department of Justice attorney, who testified that she was willing to take on the

responsibility of attorney-in-fact, if, as before, medical problems rendered the ward incapable of writing checks or paying bills (E. 163-165). The guardian called no witnesses. He based his opposition to the termination of the guardianship on Dr. Nay's report, which concluded that the ward did have dementia. (E. 38). Judge Algeo determined that the guardianship of the property should not be terminated, relying mainly upon the written evaluation of Dr. Nay. (E. 168-172).

***4 ARGUMENT**

1. THE CIRCUIT COURT ERRED BY ADOPTING A "BEST INTERESTS" STANDARD RATHER THAN REQUIRING "CLEAR AND CONVINCING" EVIDENCE TO CONTINUE AN ADULT GUARDIANSHIP OF THE PROPERTY.

The ward respectfully suggests that the instant case poses the fundamental question of how society's interest in protecting impaired persons should be balanced with its interest in affording freedom to those persons. Effectively and justly balancing these interests requires well-defined ground rules for adjudication. The law must state who bears the burden of proof for establishing and continuing the restraint that a guardianship constitutes on a person's freedom. The law must provide whether the standard of proof is "clear and convincing evidence," a "preponderance of the evidence," a test as to the "best interests" of an impaired person, or some other standard. The ward respectfully suggests that entities seeking to establish or continue guardianships should bear the burden to prove the necessity of the guardianship by clear and convincing evidence.

The record in this case shows that as the ward recovered from deep brain stimulation surgery, she transitioned from hospital, to nursing home rehabilitation center, to group home, to her own apartment. (E. 150-151). This progress could not have taken place without great discipline, fortitude, and compliance with physicians' instructions. After returning to independent living, the ward intelligently exercised her right to seek the removal of her court appointed attorney in order to proceed with new counsel who was willing to press ahead with the termination of the guardianship. (E. 41-44). The ward participated in generating the evidence which counsel brought before the court. ***5** Throughout her ordeal of incapacity, the ward maintained a spirit of independence. Society and its judicial system ought to encourage and advance this spirit of independence.

In denying the ward's request to terminate the property guardianship, the Honorable Michael J. Algeo began his ruling by stating that "Ms. Rosenberg is an impressive person and has come a long way from the surgery. And for that, there is reason to celebrate and I'm delighted that she has improved to that extent." (E. 168). But contrary to the ward's suggestion, Judge Algeo stated that he was not controlled by the standard of clear and convincing evidence (E. 168), as advocated by the ward's counsel. (E. 176). Judge Algeo said he was controlled by Section 13-221 of the Estate and Trust Article of the Annotated Code of Maryland. That statute, set out here, is silent as to the standard of proof and as to who bears the burden of persuasion:
Termination by petition

(a) The minor or disabled person, his personal representative, the guardian, or any other interested person may petition the court to terminate the guardianship proceedings.

(b) A guardianship proceeding shall terminate upon:

(1) The cessation of the minority or disability;

(2) The death or presumptive death of the minor or disabled person;

(3) Transfer of all the assets of the estate to a foreign fiduciary; or

(4) Other good cause for termination as may be shown to the satisfaction of the court.

MD. CODE-ANN., Estates and Trusts § 13-221.

***6** Judge Algeo ruled that the "standard" was "simply whether the basis that brought us here by way of consent, whether there has been a cessation of the disability, and that's the operative language." (E. 168). But then Judge Algeo stated that he would apply a standard that is not present in the Maryland guardianship statute, to wit: the family law standard of the *best interest* of the ward (E. 182). [Italics supplied by Appellant.]

Estates and Trusts § 13-705(b). (guardianship of the person) is explicit that
[a] guardian of the person shall be appointed if the court determines from *clear and convincing evidence* that a person lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person, including provisions for health care, food, clothing, or shelter, because of any mental disability, disease, habitual drunkenness, or addiction to drugs, and that no less restrictive form of intervention is available which is consistent with the person's welfare and safety. [Italics supplied by Appellant.]

In contrast, Estates and Trusts § 13-201(c), (guardianship of the property) states

[a] guardian shall be appointed if the court determines that: (1). The person is unable to manage his property and affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, or disappearance; and (2). The person has or may be entitled to property or benefits which require proper management.

The ward has found only one reported adult guardianship case in Maryland concerning the burden of proof and standard of proof. *In In Re: Lee,* 132 Md. App. 696, 754 A. 2d 426 (2000), a case which involved a petition to establish a guardianship of the person and the property, Judge Krauser stated "we therefore conclude that a hearing on competency cannot be waived and must always be held for the Petitioner to establish by 'clear and convincing evidence' that the alleged disabled person is in need of a guardian." ***7** 132 Md. App. 696 at 714, 754, A.2d 426 at 436. The ward has not found any Maryland statute or Maryland case which deals with the burden of proof or standard of proof in termination of person and/or property guardianship cases. Therefore, the ward has reviewed appellate cases from other jurisdictions.

Authorities On Continuing Guardianships From Other Jurisdictions

In *Estate of Fallos,* 898 N.E.2d 793 (Ill. App. 2008), the Illinois court considered a petition to terminate a plenary guardianship by an individual who had been severely physically impaired for two decades before a guardianship was imposed. The event which led to the guardianship proceedings was the ward's fall from his wheelchair, leaving him unable to move or call for help. When he was found three days later, he was transported to a hospital, where he was treated for a fractured hip, dehydration, and delusions. In July, 2007, the ward filed a petition to terminate the guardianship, which the trial court denied after an evidentiary hearing. The trial court noted the ward's profound physical limitations, his reliance on others to assist him in all his basic needs, his underestimation of his limitations, his overestimation of his ability to live independently, and an issue as to whether he had behaved inappropriately with caretakers. The appellate court reversed the trial court, and remanded with directions. The appellate court stated that plenary guardianship is not appropriate where a respondent is capable of intelligently directing others to perform tasks for him. (It should be noted that Illinois provides for limited guardianship in appropriate cases.) The appellate court ***8** referred to a 2004 amendment to the Illinois Code that provided that a ward's inability to make or communicate decisions regarding the care of his person must be proven by clear and convincing evidence. After stating that typically, the moving party in a petition to terminate guardianship has the burden of proof, the Illinois court observed that the case before it made it "almost unfair" to place that burden on the ward because the guardianship was put in place during the ward's lowest state of cognitive functioning, a status from which he had regained "a great deal of mental capacity." The appellate court held that the trial court erred by failing to make a specific finding that the ward, as a result of his disability, clearly and convincingly, lacked sufficient understanding to direct others concerning his care, and was totally without capacity in that regard. Id. at 802.

In *In Re Bolander*, 624 N.E.2d 322 (Ohio App. 1993), the trial court established a guardianship of the property after an evidentiary hearing. The evidence showed that the blind female ward had a fondness for younger men, and had given away a large sum of money, suggesting that she was vulnerable to **financial exploitation**. (The opinion does not state the ward's age.) After the initial evidentiary hearing, the ward brought proceedings to terminate the guardianship, but the reviewing court denied the motion. In conjunction with that motion, a court appointed psychiatrist found that the ward had no impairments of intellectual functioning of sufficient severity to warrant a diagnosis of dementia, and that she possessed sufficient mental capacity to handle her day-to-day affairs. The psychiatrist cautioned, however, that the ward's estate needed to be protected from outsiders. In Ohio, once a person is found incompetent, there is a ***9** rebuttable presumption that he or she remains incompetent. Noting "that a guardian should only be appointed under the most dire circumstances[,]" *Id.* at 325, the appellate court reversed the denial of the ward's motion to dismiss the guardianship, stating that the psychiatrist's report rebutted the presumption of incompetence, "regardless of how any of us might approve or disapprove of how and on whom [the ward] spends her money. As long as she is determined to be competent, she may spend her money as she pleases." *Id.* at 326.

The *Estate of Lemley*, 653 S.W.2d 141(Ark. App. 1983) involved a woman who was adjudged incompetent after her last parent died in 1941. Over a period of twenty years, the ward had various guardians of her person and property, but moved to terminate the guardianship in 1981. The record showed that when asked how much money she had, the ward said she did not know because her last guardian would never say when the ward asked. The psychiatrist's report in the case indicated that the ward was "never quite average in intelligence," of limited education, unversed in her **financial** affairs, but without psychosis, and in good contact with reality. The psychiatrist recommended against a guardianship of the person, but in favor of a guardianship of the property. As in Ohio, the Arkansas rule is that once incompetency is established, it is presumed to continue until a change has been established by proof. *Id.* at 143. But the appellate court reversed the trial court's refusal to terminate the guardianship because the record failed to show "the requisite mental incapacity or unsoundness of mind" required under the Arkansas statute. The matter was remanded with instructions to consider whether the ***10** ward's **financial** inexperience might result in someone taking advantage of her, and whether that factor might warrant some degree of court supervision other than a full guardianship.

In *Hedin v. Gonzales*, 528 N.W.2d 567 (Iowa, 1995), the Supreme Court of Iowa articulated reasons supporting a clear and convincing evidence standard at all stages of a guardianship case. The court also held that the burden of proof remained with the party seeking to establish or to continue the guardianship. As with the cases cited above, the *Hedin* appeal arose from a lower court's denial of a petition to terminate guardianship. The Iowa court noted that the legal area of incompetence and the related field of guardianship involve the state's authority to take actions that limit an individual's right to make decisions about his or her person and property based on mental disability. The court observed that guardianship results in the forfeiture of substantial rights such as entering contracts, borrowing money, making purchases, making gifts, controlling one's residence and personal property, and other things of that nature. The imposition of a guardianship also burdens individuals with the stigma of being incapacitated or incompetent or both. Losing individual liberties and being stigmatized are matters of constitutional significance. Thus, the Iowa Supreme Court opined that the rights at stake were so important that the same procedural due process rights must be afforded to wards at all stages of guardianship proceedings - original petitions, petitions for modification, and petitions for termination. *Id.* at 580.

***11** As with the Maryland property guardianship statute, the Iowa statute provided no guidance concerning the standard of proof and who should bear the burden of persuasion in termination proceedings. Finding that the legal area of civil commitment was analogous to the legal area of guardianship, the Supreme Court of Iowa ruled that the same standard - clear and convincing evidence - should apply in guardianship cases, following the case of *In Re Boyer*, 636 P.2d 1085, 1091-1092 (Utah 1981). Boyer rejected the reasonable doubt standard as too restrictive, and the preponderance of evidence standard as allowing too much doubt. The *Boyer* court viewed the standard of clear and convincing evidence as a middle ground.

As to which party should bear the burden of persuasion in termination of guardianship proceedings, the Supreme Court of Iowa found favor with the rule stated in the case of *In Re Sanders*, 773 P.2d 1241 (N.M. App. 1989). Since in termination cases, it is likely to be the case that the need for a guardianship has already been proven, there is a presumption that the ward's condition

proven at the initial proceeding, continues to exist. The New Mexico court reasoned that the ward - the party against whom there is a presumption - has the burden of going forward to rebut or meet that presumption, but that the burden of persuasion continues to rest with the party who initiated the guardianship. *Id.* at 1244-45. The Supreme Court of Iowa declared that this analysis was particularly ***12** appropriate where the guardianship was voluntarily imposed without a contested hearing to determine the extent of the ward's incompetency. *Hedin,* 528 N.W.2d at 581. [1]

Maryland Authorities

If one follows the Iowa court's analogy between guardianship proceedings and civil commitment proceedings, one may be aided by reviewing the law concerning civil commitment proceedings in Maryland. Like Maryland's Guardianship Statute, its Civil Commitment statute, MD. CODE-ANN., Health General Article §10-632(e)(2), requires clear and convincing evidence at the outset. Also like the Guardianship statute, the Civil Commitment statute does not state who has the burden of proof and what quantum of evidence must be brought at hearing to determine whether an individual should be released from involuntary commitment. See Section 10-805(f) of the Health General Article and Maryland Rule 15-601. It would appear that the leading judicial decision construing Maryland law in this field is in the case of *Dorsey v. Solomon,* 604 F.2d 271 (4th Cir. 1979). In that case, inmates who had been involuntarily committed on the basis of having been acquitted by reason of insanity, petitioned the federal court to release them from commitment. The *Dorsey* Court held that the State of Maryland bore the burden of showing that the inmates were still dangerous. Under the Maryland Code at that time, a criminal defendant who was acquitted by reason of insanity was subject to ***13** involuntary civil commitment without a hearing. Since the Supreme Court had decided in *Baxstrom v. Herold,* 383 U.S. 107, 86 S.Ct. 760 (1966) that such a practice was unconstitutional, the Fourth Circuit held in Dorsey that it was "fundamentally unfair to require the Dorsey inmates whom the State had never proven committable, to bear the burden of proving their suitability for release." *Id.* at 274. While it is true that in the instant case, there was a right to an initial hearing, no such hearing was ever held because the ward consented to the imposition of the guardianship of her property. The need for a guardianship was conceded, but never proven by clear and convincing evidence as required in *In Re: Lee,* 132 Md. App. 696, 754 A. 2d 426 (2000). As did the Iowa Court, the Fourth Circuit saw involuntary commitment as an obvious deprivation of liberty. The ward submits that the imposition of the restraints on the free use of her property and the damage to her reputation are similar deprivations of liberty. Following *Dorsey,* the ward submits that the burden of proof should be with the entity who seeks to perpetuate the deprivation of that liberty.

In a final short section of its opinion, the *Dorsey* court noted the then recent decision in *Addington v. Texas,* 441 U.S. 418, 99 S.Ct. 1804 (1979), which disapproved of the use of the preponderance of the evidence standard in civil commitment proceedings. The Supreme Court held that the due process clause of the U.S. Constitution required proof by at least clear and convincing evidence. Chief Justice Burger cited Justice Harlan's concurring opinion *In Re Winship,* 397 U.S. 358, 370, 90 S.Ct. 1068 (1970): "a standard of proof represents an attempt to instruct the fact finder ***14** concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

The Court of Appeals of Maryland also cited Justice Harlan's words when it decided *Coleman v. Anne Arundel County Police Department,* 369 Md. 108, 797 A.2d 770 (2002). The court was asked to consider what standard of proof should apply in a case in which a county police officer was subject to termination by a departmental administrative hearing board on the ground that he had committed theft. In footnote 16 of that opinion, the Court of Appeals cited with approval the Maryland Pattern Jury Instructions' definitions of the three standards of proof recognized in Maryland, stating that the "preponderance" and "clear and convincing" standards are used in civil and administrative matters. These two standards are set out in the footnote below. [2]

***15** In *Coleman,* the Appellant argued that in a civil administrative disciplinary proceeding, he was entitled to have his accuser prove its case by clear and convincing evidence because he stood accused of dishonest conduct, and the adjudication's consequences impacted liberty and property interests - his employment, pension, and reputation. Without a statute which provided a clear and convincing evidence standard in police disciplinary cases, the Court of Appeals considered the types of cases in which the clear and convincing standard was already in use in Maryland, and whether the issues in the *Coleman*

case warranted similar treatment. The court noted that clear and convincing evidence was required in Maryland to prove cases involving fraud, libel and slander, punitive damages, civil commitment, termination of parental rights, deportation, and the withdrawal of life sustaining medical treatment. *Id.* at 786. The court did not list guardianship, but the legislature clearly requires a clear and convincing standard to establish a guardianship in Section 13-705(b) of the Estates and Trusts Article.

For the sake of its analysis, the *Coleman* court proceeded as if liberty and property interests were at stake in *Coleman*, but the court decided that the procedural safeguards available to the accused police officer were sufficient to adequately protect him without requiring that his culpability be proved by clear and convincing evidence. It found that Law Enforcement Officers' Bill of Rights [LEOBOR] hearing safeguards, followed by review by the police chief, and an opportunity for judicial review - "multi-layered protections" - limited the risk of an arbitrary or erroneous deprivation of liberty and property. The Court also opined that implementation of a "clear and convincing" ***16** standard would not significantly reduce the risks of faulty adjudication further since initial LEOBOR hearings are conducted by laymen not well attuned to distinctions in the quantum of evidence required to prove cases. The Court added that employing a higher standard of proof would be contrary to the public policies of effecting the expeditious removal of corrupt police officers and of maintaining internal discipline.

In the *Addington* involuntary civil commitment Supreme Court case, which is closer in kind to the instant case, Chief Justice Burger gave expression to other public policy considerations. He stated that the standard of proof serves to allocate the risk of error between litigants and to indicate the relative importance attached to the ultimate decision. *Id.* at 1808. He added that in cases involving individual rights, whether criminal or civil, the standard of proof reflects the value society places on individual liberty. *Id.* At 1809 [citation omitted.] The Chief Justice continued that, in civil commitment hearings, "the individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state. *Id.* at 1810. This last principle certainly applies to guardianship cases such as the case at bar.

Circumstances Justifying A Clear and Convincing Standard In The Instant Case

The particular circumstances in the case at bar provide strong justification for using the clear and convincing standard of proof with the burden of production allocated to the ward and the burden of persuasion allocated to the guardian as articulated in Hedin ***17** v. Gonzales. A recovering ward's quest to be emancipated can be unfairly frustrated by ambiguity in the rules or by rules which are biased in favor of the status quo. The recovering ward should have a meaningful opportunity to remove the restraints she consented to, by means of well defined standards which do not unduly obstruct the goal of independence.

The advantages of a professional guardian against his ward are not merely theoretical. The guardian in the instant case serves in that capacity in about 100 cases. (E. 171). In the review hearing in this case on January 4, 2011, the guardian assumed multiple roles. As a fiduciary to the ward, the guardian was privy to his ward's personal affairs. At the hearing, he served as an opposing counsel who had at his disposal all of the ward's confidential information. This dynamic does not square with the usual ethical rules applicable to contested litigation. The guardian's method of cross-examination was to posit facts from his knowledge of the ward and from the opinions he had formed about her. This strategy also enabled the guardian, in effect, to give testimony without being placed under oath. The guardian assumed additional roles: He was the agent and advisor to the court. (E. 181-182). The multiple roles of the guardian under present Maryland practice create conflicts of interest which detract from the fairness, perhaps even the integrity, of judicial administration, and which pose significant obstacles to a ward's attempt to extricate herself from a guardianship. Such obstacles warrant the imposition of heightened due process safeguards such as the requirement of clear and convincing evidence.

***18** Another example of how the scales are weighed against a ward's legal and property interests comes from the substantial fees which guardians may claim. In the instant case, for the first two years of his service, the guardian received fees and commissions totaling $53,407. (E. 103). Upon an elaborate petition filed by the guardian (E. 65-102), the Circuit Court granted additional commissions of $3,696.57 on December 21, 2010. (E.105). As of the summer of 2010, the ward's assets were between $250,000 and $300,000. (E. 34). Plainly, the fees paid to administer the ward's property demonstrate the profound impact of a guardianship on a ward's life, liberty, and property. The amount of the guardian's fees raises an obvious question as to which

legal status poses a greater risk of asset dissipation: control of the ward's assets by the guardian or control of the ward's assets by herself.

In the June 4, 2011 review hearing in the instant case, the guardian did not call a single witness. Instead, he relied solely on argument, and a court ordered doctor's report that the guardian was not even required to move in evidence. (E. 29). It was the guardian who nominated the evaluating doctor at a July 2010 hearing before another member of the bench, a nomination that the court accepted over the objection of the ward. (E. 110-114). While there might be a tendency to clothe such an expert appointee's report in words like “independent” and “objective,” it is wrong to do so where the government appoints the expert in a proceeding involving the government's continuing intrusion into a citizen's private affairs. Yet, the medical evaluation ordered by the court seems to have been received by the court with a presumption of accuracy (E. 113, 183-185), while the ***19** testimony of the ward's medical expert was accorded no such deference. (E. 113, 183-185). In this case, the Court “put significant emphasis” (E. 185) on the written report of the physician nominated by the guardian rather than on the ward's neurologist, who testified in person and was subject to cross examination.

Dr. Nay's Written Report

The court appointed physician, Patricia Nay, M.D., saw the ward but once for approximately one hour, five months prior to date of the hearing. In contrast, the ward's neurologist, Thomas Hyde, M.D., Ph.D., had been treating the ward over a period often years, examining her every other month. (E. 121-123). The ward was most recently examined by her neurologist one week before the hearing. (E. 127). The trial court disagreed with the ward's suggestion that it was irregular in a case such as this for the physician nominated by the guardian to have failed to consult with the ward's neurologist or the ward's primary care physician. (E. 170). The ward respectfully suggests that this lack of consultation is incomprehensible given the major difference in opinion expressed by the respective professionals. Dr. Nay consulted with the guardian who nominated her, and with the care manager who the guardian hired, but not with any of the ward's physicians. (E. 32). Dr. Nay's conclusion, after one meeting with the ward, was that the ward had dementia secondary to Parkinson's disease. (E. 38).

***20 Dr. Hyde's testimony**

If one reads the record carefully, one sees a more sophisticated analysis by the ward's neurologist, but his words were not accorded “significant emphasis.” The ward's neurologist testified that 80 percent of Parkinson's patients retain very good cognitive abilities, and that the ward falls into the 80 percent group (E. 141). Only the ward's neurologist was in a position to say that he had performed numerous mini-mental examinations on the ward. (E. 136). In test after test, the ward has never scored in the dementia range. (E. 136). (Argument 3 (pp. 25-35) below contains additional detail of Dr. Nay's and Dr. Hyde's opinions in the context of the Appellant's discussion of whether the evidence meets a clear and convincing standard or a preponderance of the evidence standard.)

Evaluation of the Contrary Medical Opinions

The ward acknowledges that sorting out contrary opinions is one of the functions of a judge. However, where ground rules as to burden of proof and quantum of proof are lacking, the court's most expedient course may be to simply accept the conclusions of the court-appointed guardian and his nominated evaluator simply because the court has greater familiarity with them than with wards and their witnesses. By virtue of their frequent contact with the court, the voices of professional guardians and court-appointed evaluators may drown out voices less well known to the court. An adjustment to the quantum of proof and burden of proof can rectify this imbalance.

***21** In summary, wards are at a disadvantage in contests with professional guardians. Guardians have a special status as advisors to the Court. Guardians are privy to their wards' personal information, and are free to make use of it in adversarial proceedings. The written reports of court-appointed evaluators carry prestige, while a ward's own physician's live testimony

is not considered to be objective. (E. 113). The ward's own assets fund the activities of the guardian although the guardian's continued participation is predicated on his good standing with the court, not the ward. Thus is the system weighted against wards under Maryland guardianship law as presently practiced. The ward respectfully suggests that the way to address the risk of erroneous adjudication under these circumstances is to require the person or entity objecting to the termination of the guardianship to bear the burden of persuasion by clear and convincing evidence that the ward still requires the guardianship. Public policy should thus favor lessening the difficulty of recovering wards who seek to regain control of their lives.

2. THE CIRCUIT COURT ERRED BY FAILING TO CONSIDER A LESS RESTRICTIVE ALTERNATIVE TO GUARDIANSHIP.

Estates and Trusts § 13-705(b) (guardianship of the person) is explicit that when considering whether to impose a guardianship of the person the court shall determine by clear and convincing evidence, "that no less restrictive form of intervention is available which is consistent with the person's welfare and safety."

The record in this case suggests that a less restrictive remedy than guardianship is available and practical. The articulate and intelligent testimony of the ward makes this ***22** point clear. After stating her professional background, the ward testified that she had begun to prepare to resume the handling of her **finances**. She felt fortunate to have a case manager, Felice Grunberger, who she intended to retain. (E. 151). When asked questions about current events and her personal reading, the ward demonstrated many of the favorable traits, including being oriented and intellectually intact, that both Dr. Nay and Dr. Hyde found despite their overall difference of opinion. (E. 35, 152-153).

The initial cross examination of the ward by her guardian focused on whether the ward provided the guardian with receipts. The ward testified that she retained her receipts, but had not transmitted them to the guardian. (E. 154). The guardian and his ward sparred over whether the ward was compliant with a budget, whether the ward wished to return to the practice of law, and whether the ward had cooperated with the guardian concerning bills. (E. 154-160). The ward's testimony, however, did not play as large a part in the trial court's decision-making as Dr. Nay's report. Nevertheless, the ward came to court, was appropriate, respectful, and not shown to have been inaccurate, unclear, or confused, as to any part of her testimony. (E. 148-162).

The ward called a friend and colleague as a witness to demonstrate that her planning for emancipation was serious and well-taken. The witness was Cheryl Floyd, a Ph.D. in philosophy, and a J.D. employed at the U.S. Department of Justice. (E. 163-165). The ward and Ms. Floyd had attended law school together, both had backgrounds in academia, and continued to be friends twenty five years after they initially met. Ms. Floyd testified as to her friendship with the ward and her willingness to take on the ***23** responsibility of attorney-in-fact if medical problems rendered the ward incapable of writing checks or paying bills (E. 163-165). Under cross examination of the guardian, Ms. Floyd stated that she was not willing to serve as a guardian (E. 166), which was consistent with the ward's stated goal of not continuing to be subject to a guardianship.

Aware of the ward's strong personality, Dr. Hyde stated that after ten years of treating her, he was of the opinion that many of her character traits and her manner of conducting her affairs predated her deep brain stimulation surgery. (E. 134). It is obvious, however, that prior to her brain surgery, no court would have considered imposing a guardianship on the ward for impulsivity, eccentricity, poor judgment, tardiness in paying bills, and the like. Here, the ward's force of character and exuberance may have been the very traits which enabled her to progress from brain surgery to a nursing home to her own apartment with a care manager and a fifteen hour per week aide.

While the ward conceded that she was not in a position to handle her **finances** after deep brain stimulation surgery in 2008, more than two years had elapsed since that time. (E. 25, 109, 150). Even at the beginning of this case, neither the original petitioner, Suburban Hospital, nor the court, nor any of the parties who participated in the matter pursued a request to impose a guardianship of the person. (E. 16-20). Thus, there is a stark anomaly in this case: Under the law, the ward is free to determine where she lives; which hobbies she pursues; which social relationships she cultivates; which doctors she sees. But she is not

permitted to write a check. In all other things, the ward is a self- ***24** directed adult citizen. What is under consideration in this case is whether the ward can reassume the freedom to deal with her property after her recovery from brain surgery.

The actual text of Section 13-705(b) would seem to provide a less restrictive infringement on the ward's freedom than guardianship in cases such as this one, in which all the witnesses acknowledged varying degrees of improvement in the ward's condition, but the trial court failed to make any finding as to whether there was a less restrictive form of intervention available, apparently completely disregarding the testimony of Cheryl Floyd. The court did not equate the ward's recovery with a corresponding lessening of its own involvement. It disregarded the formidable intellect of the ward. The ward respectfully suggests that no one giving her testimony a fair reading could come to the conclusion that she has dementia. Unfortunately, however, it is also true that no one will find any expression from the trial judge or the guardian that the imposition of a guardianship is an extraordinary intrusion into the freedom of the individual, an intrusion which should be exercised only with extreme caution and only with very strong evidence. In a case in which the ward submits that the record lacks clear and convincing evidence, or even a preponderance of the evidence, it was the trial court's duty to terminate the guardianship of the property in favor of a less restrictive intervention into the ward's affairs.

The availability of a highly qualified friend to serve as attorney-in-fact for the emancipated ward was a less restrictive means of addressing the fact that the ward has Parkinson's disease. The ward respectfully suggests that if the matter had been tried on ***25** November 8, 2008 on the evidence which was presented on January 4, 2011, a guardianship would never have been ordered. And whatever the character or personality of the highly educated, strong-willed ward, it is hard to contemplate any court considering the imposition of a guardianship prior to the time that the ward underwent deep brain stimulation surgery. January 4, 2011 was the court's opportunity to fashion a less restrictive alternative to guardianship by permitting the ward to resume the management of her **finances**, provided that Ms. Floyd assumed the role of attorney-in-fact. As there are no cases in Maryland construing Section 13-705(b)‘s text as to “no less restrictive form of intervention,” the ward respectfully suggests that the use of an attorney-in-fact as a less restrictive intervention than the perpetuation of a guardianship, is a reasonable, practical, and appropriate measure under the facts of this case.

3. THE RECORD LACKS CLEAR AND CONVINCING EVIDENCE OR A PREPONDERANCE OF THE EVIDENCE UPON WHICH TO BASE THE CONTINUATION OF THE ADULT GUARDIANSHIP OF THE PROPERTY.

The ward respectfully suggests that the instant case would have resulted in a different outcome had the guardian been required to demonstrate by clear and convincing evidence that the guardianship should be continued. The court considered evidence from two medical doctors who came to dramatically different conclusions about the present capacity of the ward. The court also heard testimony from the ward and her friend. As stated above, the guardian called no witnesses, but relied solely on the written report of Patricia Nay, M.D., the physician he recommended to a previous judge in the case. ***26** (E. 10). By order dated July 27, 2010, the Honorable Mary Beth McCormick charged Patricia Nay, M.D. “to determine if Merilee Rosenberg has recovered from the disability requiring imposition of the guardianship of the property to an extent that it is appropriate that the guardianship be terminated.” (E. 28). The diagnosis of dementia was the capstone of Dr. Nay's report, but it is not well-supported, and it is contradicted by Thomas Hyde, M.D., Ph.D. (E. 119-146), suggesting that the evidence is in equipoise, with the implication that a determination of this appeal concerning which party bears the burden of persuasion is key to the outcome of the controversy.

Details of Dr. Nay's Written Medical Report

Dr. Nay met with the ward on August 2, 2010 (E. 32). Dr. Nay's report, dated September 29, 2010, (E. 36) indicated erroneously that the ward was hospitalized in early 2009 with a diagnosis of dementia secondary to Parkinson's disease. (E. 33). Dr. Nay's very statement as to the case's genesis suggests that she failed to review the ward's medical records. No where in Dr. Nay's report did she allude to having done so “...even though a thorough review of a patient's medical history is important to an accurate

diagnosis of dementia." *In Re: Lee,* 132 Md. App. 696 at 714, 718, A.2d 426 at 439, citing *Principles of Geriatric Medicine and Gerontology* 1096; *Merck Manual of Diagnosis and Therapy* 1394. It should go without saying that medical history is especially important in guardianship cases. Contrary to Dr. Nay's report, the record in this case shows that the original petition for guardianship of the property was filed on ***27** August 14, 2008, after the ward's deep brain stimulation surgery at Suburban Hospital. (E. 16). Dr. Hyde testified that "they would not have done the surgery if [the ward] had significant dementia; that's an exclusionary criteria." (E. 122). The ward testified that she consented to the guardianship because of the difficulties she experienced in the wake of that surgery. (E. 109, 150).

Dr. Nay wrote in detail concerning the ward's gross and fine motor skills which are obviously impaired by Parkinson's disease, and on the ward's personality. While the physical effect of Parkinson's disease causes the ward to drop pills, spill food, have difficulty dressing, and fail to maintain a clean and neat apartment (E. 33-34), the essential charge to Dr. Nay was to report on whether "the disability requiring imposition of the *guardianship of the property"* had improved to an extent that the guardianship could be terminated (E. 28). (Italics supplied by Appellant.) As to the matter of managing property, Dr. Nay evoked answers from the ward concerning the ward's income and assets which the guardian reported were approximately correct, but which Dr. Nay pointed out were inaccurate by $1,000 per month. (E. 34). Dr. Nay stated that the ward wished to purchase a condominium for $250,000 - $350,000 in Northwest Washington, and to invest her remaining funds in high yield investments (E. 34), but Dr. Nay wrote that the ward could not describe "her monthly expenses for a condo, utilities, phone, cable, insurance, and food." (E. 34). At the time of the interview, the ward did not have a condo fee, and her utility and similar expenses were being paid by her guardian. Dr. Nay cast doubt on the ward's opinion that she would have high longevity given her ***28** family history, the doctor stating that the ward had "life-limiting diseases...." (E. 34). The ward concedes that Dr. Nay's report properly considered whether the ward understood the need for private duty caregivers, the source for paying such expenses, a back-up plan if she could not afford independent living, and whether it is feasible for her to work part-time as a lawyer. (E. 35).

Dr. Nay's "mental status exam" contained favorable and unfavorable results. On the favorable side, Dr. Nay found that the ward was neatly dressed and well groomed; alert; oriented to person, place and situation; cooperative; confident; of good humor in mood; fluent in speech; possessed of above-average vocabulary and general knowledge; capable of abstract interpretation of proverbs; non-suicidal; non-homicidal; and possessed of a generally intact long term memory (E. 35-36).

On the unfavorable side, Dr. Nay found that the ward's short term memory was impaired; she had a "somewhat blunted affect"; responded to questions in an "egocentric way"; and had poor insight and judgment as to her medical conditions, functional capabilities, executive functions, and behaviors. Dr. Nay opined that the ward's executive functioning was impaired, and that the impairment was exacerbated by her "narcissism...grandiosity, sense of self-importance, sense of entitlement, inability to acknowledge imperfections ... lack of empathy... and inability to allow others to assist her." (E. 35, 36). Dr. Nay concluded that by reason of dementia secondary to Parkinson's disease, the ward "requires a guardian of the property and a guardian of the person." (E. 36).

***29** The guardian did not call Dr. Nay as a witness, and did not move her report in evidence. While the ward admits that she could have summoned Dr. Nay to testify as an adverse witness at Dr. Nay's rate of $400.00 per hour (E. 40), the ward chose instead to call her neurologist, Thomas Hyde, M.D., Ph.D., on her behalf. The salient point is that by not appearing as a witness, Dr. Nay was not subject to cross examination. Most importantly, Dr. Nay's opinion concerning dementia was contradicted under oath by Dr. Hyde, who was subject to cross examination by the guardian.

Details of Dr. Hyde's Medical Testimony

Dr. Hyde, a Maryland licensed neurologist with a secondary expertise in psychiatry, and a widely published researcher (E. 46-64), testified squarely that the ward did not have an impairment which rendered her incapable of managing her property. (E. 124, 128-130, 133-134). When asked whether the ward had dementia when he referred her for deep brain stimulation surgery, Dr. Hyde testified, "[s]he had cognitive problems but they were primarily due to the massive doses of medication she was on at that time to treat her Parkinson's disease. (E. 122). "The expectation was that with the surgery, that her medications could be and

were reduced and that would improve her cognitive functioning." (E. 122). He further testified that she took a "downhill course" after surgery, but over a period of time, has "had a marked recovery in function." (E. 122-123). Dr. Hyde testified that he had had in depth and repeated discussions with the ward concerning her **finances** and her living situation (E. 123), and stated "with a reasonable ***30** degree of medical certainty, I think that she is competent to manage her own affairs at this time." (E. 124).

The guardian commenced his cross examination of Dr. Hyde with a statement: "The ward is a very strong-willed woman." (E. 125). Dr. Hyde answered, "[t]he ward is a unique character with her own set of strengths, weaknesses and eccentricities all of which I think I've enjoyed over the past 10 years." (E. 125). The guardian suggested that the ward's limited relationships were a result of her being "someone [not] to be trifled with lightly...." (E. 126), to which Dr. Hyde responded, "[t]he ward is a formidable individual, personality wise and intellectually." (E. 126). When the guardian asked Dr. Hyde whether the ward is "free of all cognitive limitations at this time," Dr. Hyde testified, "[s]he has some cognitive limitations but I don't believe that they rise to the level of incompetency...I don't think she has dementia." (E. 128). The guardian then asked whether "[the ward] has demonstrated that she has poor judgments (sic) on occasion, to which Dr. Hyde answered, "[y]es." (E. 129). The guardian then inquired whether "[the ward] has poor judgment to the extent it could materially affect her life...." (E. 129). Dr. Hyde responded that while "[the ward] exhibits poor judgment at times [and] does things in a way that I would not do them....she understands what the elements are to be competent. She is fully oriented. She does not operate under any compulsion or obsessional belief system or delusional belief system or hallucinations or psychosis that would drive her to behave in a deleterious fashion. She understands her **finances**, what her bills are, her medications, how to manage her life. Whether she does that properly is ***31** a different issue." (E. 129-130). The guardian then suggested that whether the ward manages her life properly is the basic concern of the court in view of cognitive limitations. (E. 130). Dr. Hyde responded, "[the ward] does have cognitive limitations.... I do not think that they rise to the level of incompetency." (E. 130).

The guardian further inquired of Dr. Hyde, in series, as to whether Dr. Hyde thought the ward, freed of guardianship, would fire her care manager if the care manager "told her something she didn't want to do...." (E. 131), whether the ward's poor judgment and cognitive limitations could lead to "fatal consequences to her" (E. 132), and whether the guardianship should be lifted when there was "the potential" that "[the ward's] going to wind up dead?" (E. 132). Dr. Hyde answered, "...[w]e have to deal with what is. And what is, is this is a woman who knows her **finances**, she knows her obligations, she knows her medical condition, she knows her treatment protocol, she knows who she needs to see and when she needs to see them. In that sense, she's ahead of a lot of people who are judged competent to manage their own affairs in this country." (E. 133). At the end of the cross examination by the guardian, Dr. Hyde testified "...[o]n a mini-mental state examination, [on] numerous occasions, she does not score in the dementia range." (E. 136).

On redirect, counsel for the ward asked Dr. Hyde to provide further detail as to the nature of the ward's cognitive limitations. Dr. Hyde testified, "I think that with complex information processing and problem solving, there are some issues there. But I believe that she understands the basics in order to manage her daily life and her personal ***32** **finances**." (E. 138). When the ward's counsel asked for an example of the complex thinking of which the ward was incapable, Dr. Hyde testified, "I think that if you asked her to weigh asset distribution[,] and complex mutual funds versus a real estate investment trust, she would have difficulty processing the pros and cons of that degree of **financial** allocations [sic] without some detailed discussions and assistance from a professional." (E. 139).

Judge Algeo's Decision

When delivering its opinion, the trial court began by signaling its agreement with Dr. Hyde that whether the ward has bad judgment or some cognitive problems is not the standard, but that these things are factors to consider (E. 183), a position with which the ward does not disagree. However, the ward vehemently disagrees that guardianship law permitted the court to decide this case using a "best interests" (E. 182) standard.

The trial court noted Dr. Hyde's opinion that the ward did not have dementia, but that "the court appointed doctor's opinion was quite the contrary." (E. 183). Apparently alluding to the questions of the guardian concerning dire consequences (E. 132),

the trial court said, “I share the concern of Mr. McCarthy about what might happen in the future.” (E. 182-183). The trial court quoted several of Dr. Nay's conclusions with apparent acceptance of her overall opinion. (E. 36, 184-185). As Judge Algeo stated, “[a]nd the court puts significant emphasis on that report.” (E. 185). The trial court noted that when one considered Dr. Nay's report, the matter of poor judgment, cognitive limitations, exceeding the guardian's budget, not complying with the guardian's request for receipts, ***33** the court cannot feel “comfort and reliance that [the ward] is in a position to be able to manage her affairs and to manage her property.” (E. 185).

It did not trouble the trial court that its appointed physician, Patricia Nay, M.D., saw the ward but once for approximately one hour on August 4, 2010, five months prior to the date of the hearing. [3] In contrast, Dr. Hyde testified as to in depth and repeated discussions with the ward concerning her **finances** and her living situation (E. 123), moving him to conclude “with a reasonable degree of medical certainty, I think that she is competent to manage her own affairs at this time [January 4, 2011].” (E. 124, 134). Dr. Nay's contrary conclusion is not accompanied by her statement that the finding is made within a reasonable degree of medical certainty. (E. 36).

While the trial court expressed concern about what might happen in the future (E. 182-183), the true issue before the court was whether the ward had the present capacity to handle her own **finances**. But the guardian's cross examination and advocacy switched the debate from whether the ward had the capacity to manage her property, to whether the ward's physical challenges and “strong willed” (E. 125) personality might lead to her injury or death. (E. 132, 168-171). While it is not unusual for an advocate to employ hyperbole, the essential factual question in this case was whether the ward had recovered from her disability sufficiently to understand the extent of her income and assets, and whether the ward could resume the management of her property.

***34** It escaped the trial court's comment that both Dr. Nay and Dr. Hyde opined that the ward had notable strengths. Dr. Nay observed that the ward was alert; oriented to person, place and situation; cooperative; confident; of good humor in mood; fluent in speech; and possessed of above-average vocabulary and general knowledge (E. 35-36). Dr. Hyde put it as follows: “[t]he ward is a formidable individual, personality wise and intellectually.” (E. 126). “She understands her **finances**, what her bills are, her medications, how to manage her life. Whether she does that properly is a different issue.” (E. 130). What Dr. Hyde finds to be very clear is that “...[o]n a mini-mental state examination, [on] numerous occasions, she does not score in the dementia range.” (E. 136).

The ward, with her strengths and weaknesses, articulated the following insight into herself at the review hearing of January 4, 2011, “I've made some foolish decisions in my life - ... but then, who hasn‘t? ... And I've paid dearly for them because they had economic repercussions.” (E. 156-157). This case poses the issue of whether such a person should be deprived of the freedom to manage her own **finances**. On the level of functional capabilities, Dr. Hyde was candid that “[s]he has some cognitive limitations but I don't believe that they rise to the level of incompetency.... (E. 128-130). The ward would add that Section 13-201(c) of the Estates and Trusts Article, requires a court to determine whether a “person is unable to manage his property and affairs effectively because of physical or mental disability, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign ***35** power, or disappearance.” The statute does not require the court to determine whether a person can manage his property and affairs as proficiently as a doctor or a judge.

In summary, the ward respectfully suggests that the conflicting opinions concerning dementia expressed at the review hearing do not add up to clear and convincing evidence, nor even to a preponderance of the evidence. The ward submits that “clear and convincing” evidence must be adduced to continue a guardianship, for if the protections of the guardianship statute are meant to prevent the loss of fundamental freedoms at the outset of guardianship proceedings, those protections are no less relevant at a later date when the issue before the court becomes whether to continue the guardianship. This is especially true in this case, where there was no proof by clear and convincing evidence at the outset because the ward consented to the guardianship over her property. (E. 25, 109, 150).

CONCLUSION

The Appellant respectfully requests that the Judgment Order of the Circuit Court for Montgomery County, Maryland be vacated or reversed, and that the case be remanded to the Circuit Court For Montgomery County, Maryland for further proceedings consistent with the decision of the Court of Special Appeals.

Appendix not available.

Footnotes

1 The Appellant acknowledges that many states have declined to adopt a standard requiring parties opposing the termination of a guardianship to bear the burden of proof by clear and convincing evidence. *One such case is Guardianship of Charles H. Lander*, 697 A.2d. 1298 (Me. 1997).

2 The standard of proof by a preponderance of the evidence is defined in the Maryland Pattern Jury Instructions as follows:

To prove by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence means such evidence which, when considered and compared with the evidence opposed to it, has more convincing force and produces in your minds a belief that it is more likely true than not true.

If you believe that the evidence is evenly balanced on an issue, then your finding on that issue must be against the party who has the burden of proving it.

MPJI 1:7 (3d ed. 2000).

Proof by clear and convincing evidence is defined in the Maryland Pattern Jury Instructions as follows:

To be clear and convincing, evidence should be “clear” in the sense that it is certain, plain to the understanding, and unambiguous and “convincing” in the sense that it is so reasonable and persuasive as to cause you to believe it.

MPJI 1:8 (3d ed. 2000).

3 Dr. Nay's Physician's Certificate states that her interview with the ward lasted 70 minutes. (E. 37). Dr. Nay's bill states that her interview with the ward lasted 100 minutes. (E. 40). Dr. Nay billed the ward's estate a total of $2,400.00, for six hours, including time for the doctor's interviews with others and for the doctor's report writing. (E. 40).

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