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The Impact of Estate of Howell: Guardianship, Heir Misbehavior, and the Modern Family Within Illinois, 50 J. Marshall L. Rev. 615 (2017)

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THE IMPACT OF *ESTATE OF HOWELL*:
GUARDIANSHIP, HEIR MISBEHAVIOR,
AND THE MODERN FAMILY WITHIN
ILLINOIS

MICHAEL HABIC*

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I. INTRODUCTION

The Illinois Appellate Court in *Estate of Howell* correctly reversed the trial court's holding that would have forced a disabled adult to create an estate plan against his own wishes and best interests.¹ Had the trial court's holding stood, the disabled adult's estate plan would need to follow the rules of intestacy, causing a majority of his multi-million dollar estate to be distributed upon his death to a neglectful father as well as ten half-siblings he never met.² Instead, the court on appeal reversed the lower court in favor of the disabled adult, whose name is Donald Howell (hereinafter "Donald"), because the trial court imposed a limit on Donald and his guardians that was not intended in the probate act.³ The appellate court allowed Donald's guardian to make an estate plan on his behalf using a sensible standard—the hierarchical substituted judgment and best interests rule—a standard instituted only in Illinois and the District of Columbia.⁴ The Illinois standard permits guardians to create a desirable and feasible estate plan for those like Donald in a manner greater than any other state standard in America.⁵

Disabled Americans, many of which require assistance in making crucial decisions,⁶ make up nearly twenty percent of the

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1. *Estate of Howell v. Howell*, 36 N.E.3d 293, 305 (Ill. App. Ct. 2015).

2. *Id.* at 296 (stating that "if [the disabled adult] were to die survived by his parents and half-siblings, the parents and siblings would inherit [the disabled adult's] intestate property in equal shares.").

3. *Id.* at 305 (holding that the coguardians' statutory interpretation was reasoned and that the trial court "imposed limitations on the guardians' actions which were not intended by legislature.").

4. 755 ILCS 5/11a-18(a)-(a-5) (2015) (stating that a guardian may "exercise any or all powers over the estate and business affairs of the disabled adult that the disabled adult could exercise if present and not under disability" and that "[t]he court may approve the making on behalf of the disabled adult of such agreements as the court determines to be for the disabled adult's best interests."). The court in *Estate of Howell* interpreted 5/11a-18 to require an estate planning approach that "follow[s] the disabled adult's subjective wishes, to the extent those wishes can be ascertained, but the overriding principal is to act in the disabled adult's objective 'best interests.'" *Estate of Howell*, 36 N.E.3d at 300.

5. See *infra* Part III.

6. For example, courts agree that the mentally impaired are entitled to the

country's population.⁷ To ensure satisfactory decision-making for a disabled adult, guardians are appointed to improve a disabled adult's limited lifestyle and help with routine tasks such as getting the disabled adult dressed or helping the disabled adult use the bathroom.⁸ Under statute, an Illinois court may appoint a guardian for a variety of a disabled adult's needs,⁹ including representation in legal matters,¹⁰ management of finances and business,¹¹ and establishing custody of and caring for the disabled adult.¹² In light of the Illinois Appellate Court's ruling in *Estate of Howell*, the protections of disabled adults are enhanced and ensures equitable and fair outcomes with proper guardianship actions.¹³ The individual opportunity for the disabled adult's wishes to be manifested comes from the guardian's assistance and representation, which is the catalyst for such an opportunity. However, even though the case of *Estate of Howell* may have an

same rights of a competent person in making crucial decisions regarding abortion and life-sustaining treatment, even if the mentally disabled are unable to make the decision for themselves. See Norman Cantor, *The Relation Between Autonomy-Based Rights and Profoundly Mentally Disabled Persons*, 13 ANN. HEALTH 37, 37 (2004) (referring to an individual's constitutional right to make crucial medical decisions).

7. *Prevalence of Disability for Selected Age Groups: 2005 and 2010*, in AMERICANS WITH DISABILITIES: 2010 HOUSEHOLD ECONOMIC STUDIES No. 1, 4 (Dep't of Commerce 2010).

8. A census regarding Americans with disabilities states that 9.4 million disabled adults (3.9 percent of the U.S. population) are challenged in performing activities necessary to living, such as getting out of bed and practicing good hygiene, while 15.5 million people (6.4 percent of the U.S. population) struggle and need assistance with activities instrumental to daily living, including managing their money and taking prescription medication. DEP'T. OF COMMERCE, AMERICANS WITH DISABILITIES: 2010 HOUSEHOLD ECONOMICS STUDIES 70-131 (2012).

9. As the role of the court in supervising a disabled adult is reduced, the fiduciary duty placed upon the guardian increases. See Karen Boxx and Terry Hammond, Symposium: *Third National Guardianship Summit: Standards Of Excellence: A Call for Standards: An Overview of the Current Status and Need for Guardian Standards of Conduct and Codes of Ethics*, 2012 UTAH L. REV. 1207, 1215-17 (2012) (reasoning that more guardians are appointed without close court supervision due to a decrease in the court's resources to finance supervision).

10. See 755 ILCS 5/1-2.08 (2015) (stating that a "[g]uardian includes a representative of a minor and a representative of a person under legal disability."); see also *Rucker v. Rucker*, 23 N.E.3d 442, 451 (Ill. App. Ct. 2014) (describing the relationship of a guardian to a disabled adult is akin to a trustee and beneficiary, where a guardian must manage a disabled adult's estate "with the same degree of vigilance, diligence and prudence as a reasonable person would use in managing his own property.").

11. 755 ILCS 5/11a-18 (2015).

12. 755 ILCS 5/11a-17 (2015).

13. *Estate of Howell v. Howell*, 36 N.E.3d 293, 305 (Ill. App. Ct. 2015) (holding that the coguardians' statutory interpretations were reasoned and that the trial court "imposed limitations on the guardians' actions which were not intended by legislature.").

impact on rights and privileges of the nearly 1.3 million disabled individuals and their guardians that reside in Illinois,¹⁴ many states unfortunately do not have a statute that provides similar protection for a disabled adult's estate.¹⁵

This Comment shall discuss and evaluate the guardianship decision-making standard implemented in *Estate of Howell* as it relates to guardianships of disabled persons, and why Illinois has the best scheme for safeguarding the assets of a disabled adult when a guardian creates an estate plan on his or her behalf.¹⁶ The discussion is based on the holding in *Estate of Howell* that a guardian may act on behalf of the disabled adult's interests and therefore the disabled adult's last will and testament need not conform to the rules of intestacy, because of the hierarchical substituted judgment and best interests rule (sometimes hereinafter "the hierarchical standard").¹⁷ The Comment will also discuss the rules of intestacy and why other jurisdictions should change their laws to model Illinois's laws, which reflect today's modern family views on disinheriting undeserving family members of the decedent.

The background in Part II discusses *Estate of Howell* and applicable Illinois law regarding guardianships, intestacy, neglectful parents, and the hierarchical standard. Next, the analysis in Part III contrasts Illinois probate law with probate law of other states to demonstrate the impact of different decision-making models used in America. The analysis also compares Illinois and other jurisdictions' rules of intestacy to highlight Illinois policies that, ensures a decedent's inheritance descends only to deserving family members. Finally, the proposal in Part IV advocates for other American jurisdictions to adopt not only the hierarchical standard, but also the protections in the Illinois probate code that ensures descendible assets shall not pass to a blood-related family member whom has provided neither care nor affection for his or her child.

14. See LEE ERICKSON & S. VON SCHRADER, 2008 DISABILITY STATUS REPORT: ILLINOIS, CORNELL UNIVERSITY REHABILITATION RESEARCH AND TRAINING CENTER ON DISABILITY DEMOGRAPHICS AND STATISTICS 7 (2010) (listing the percentage of each state population that has disabilities). This number includes all types of disabilities at all ages within Illinois. *Id.* Illinois citizens with cognitive disabilities similar to Donald, who are placed within the age group of 21-64 and number in the 600,000s, totals 3.3% of the Illinois population. *Id.* at 7.

15. See *infra* Part III.A.1.

16. *Estate of Howell*, 36 N.E.3d at 305-06. This case is a case of first impression in Illinois where the coguardians were unable to rely on pre-existing case law. *Id.* at 306.

17. *Id.* at 298, 303.

II. CREATING AN ESTATE PLAN FOR DISABLED ADULTS UNDER GUARDIANSHIP IN LIGHT OF *ESTATE OF HOWELL* AND MISBEHAVING HEIRS

A. *Guardianship of a Disabled Adult and Guardian Decision-Making*

The responsibilities of a guardian in Illinois has developed over time to best serve the needs of a disabled person because the law places a duty on guardians to use good judgment when making his or her decisions based on their own best interests, but only if the disabled adult's testamentary wishes cannot be ascertained.¹⁸ The background first discusses guardianship and the hierarchical standard, followed by a discussion regarding the rules of intestacy and actions affecting heirs' rights to receive a distribution through intestacy.

1. *Past and Present: Guardianship Over a Disabled Person's Estate in Illinois*

When the court determines that a person has a disability that, renders one unable to manage their estate or own well-being,¹⁹ the court appoints a guardian to step in and manage that person's affairs.²⁰ This approach to guardianship traces its beginnings to ancient Rome,²¹ and was later adopted during the times of medieval Britain, where the crown took the responsibility upon itself to represent incompetent persons under the tenet of *parens patriae*.²² States have adopted and codified this ideal using various general approaches.²³ The guardian's responsibilities and guidelines to

18. See *infra* Part II.A.3.

19. See 755 ILCS 5/11a-3(a)(2015)(stating that a petition for adjudication of disability requires "by clear and convincing evidence that a person is a person with a disability."); see also 755 ILCS 5/11a-2 (2016)(defining the attributes of one with a disability).

20. 5/11a-3(a)(2015). A guardianship is used only to "promote the well-being of the disabled person, to protect him from neglect, exploitation, or abuse" and shall be ordered to represent the disabled adult "only to the extent necessitated by the individual's actual mental, physical and adaptive limitations." *Id.*

21. See Peter Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40. MO. L. REV. 215, 218 (1975) (discussing how an incompetent person's protection of property was recognized during the ancient time of Cicero).

22. *Id.* (stating "in the 14th century, guardianship was formally recognized in England as a duty of the sovereign and exercised through the Lord Chancellor."). The theory of *parens patriae* stems from the 14th century English belief that the king is the father of the country, therefore the king has a duty to furnish protection for the mentally disabled, where upon a disabled person's death, assets in his or her name would transfer to his heirs. *Id.*

23. See WASH. REV. CODE § 11.88.005 (2015)(stating broadly that a disabled

make decisions on behalf of the disabled adult within Illinois stem from common law, early case law, and the Illinois probate act.²⁴

Illinois's probate law evolved over the last century to allow disabled adults to execute estate plans when under guardianship. Reflecting the *parens patriae* approach, Illinois courts initially allowed a guardian, only upon their petition, to make expenses solely for the disabled person's need for immediate support.²⁵ As decades passed, courts recognized the need not only to maintain support for the disabled person, but also to conserve and maintain those funds spent from his or her estate for the disabled person's future enjoyment and use.²⁶ The guardian's ability to make expenditures not directed toward the disabled person's support soon included the authority to make non-charitable gifts to lower the size of the taxable estate.²⁷

More recent cases, which implore a more liberal reading of the Illinois probate code, have stated that guardians may act with implied authority from the code to perform acts not specifically mentioned.²⁸ While the standards have loosened throughout Illinois's history, the court can enact its supervisory powers and provide equitable treatment when needed, such as when a guardian breaches his or her fiduciary duty by wasting the disabled person's estate.²⁹ Ultimately, it was not until 1996 that the Illinois Probate

adult's liberty is restricted to the extent that a guardian must provide for his or her care); *cf.* CAL. PROB. CODE § 2401(2015)(discussing specifically the duties and obligations of a guardian to manage an estate of the disabled adult); 5/11a-18 (noting the authority of a guardian to execute the disabled adult's estate and the duty to do so within the disabled adult's ascertainable wishes).

24. See *infra* Part III.A.

25. See *In re* Conservatorship of Hall, 19 Ill. App. 295, 298-99 (Ill. App. Ct. 1886) (allowing support for the disabled person's daughter); *Lewis v. Hill*, 56 N.E.2d 619, 621 (Ill. 1944) (discussing the need to consider the disabled person's interest in allowing the guardian to sell her home in order to use the proceeds to support the disabled person).

26. *Proehl v. Leadley*, 230 N.E.2d 516, 519 (Ill. App. Ct. 1967).

27. See *In re* Estate of Berger, 520 N.E.2d 690, 705 (Ill. App. Ct. 1987) (citing Annotation, *Power of court or guardian to make noncharitable gifts or allowances out of the funds of incompetent ward*, 224 A.L.R.3d 863 (1969)).

28. See *Karbin v. Karbin*, 977 N.E.2d 154, 160 (Ill. 2012) (finding that reading both 5/11a-17 and 5/11a-18 together confers broad decision making authority to the guardian of the estate and person); see also *In re* Burgess, 725 N.E.2d 1266, 1270-71 (Ill. 2000) (holding that a guardian has implied authority under 5/11a-17 to continue a dissolution of marriage action for the ward as it keeps with the disabled person's wishes); *In re* Estate of K.E.J., 887 N.E.2d 704, 721 (Ill. App. Ct. 2008) (holding that under 5/11a-17 a guardian may petition for the disabled adult to undergo an involuntary sterilization if there is clear and convincing evidence it is within that disabled person's best interests).

29. See *In re* Estate of O'Hare, 34 N.E.2d 1126, 1131-32 (Ill. App. Ct. 2015) (finding that the guardian's disregard in managing and controlling the disabled person's estate resulted in affirming a proper remedy under 5/11a-18). Not only did the guardian maintain sloppy record keeping of estate expenditures, the guardian also used large sums of the estate for the benefit of the whole family

Act incorporated past case law in amending §11a-18(a-5) so that guardians have statutory authority to create an estate plan on behalf of a disabled adult.³⁰ Since then, courts have given the statute a broad reading which therefore allows, a guardian to act in ways not limited to the stated language within §11a-18(a-5).³¹

In order for an Illinois court to appoint a plenary guardian, a court must find that one that is unable to manage his or her estate due to some physical incapability or mental disability.³² The court will consider and grant a guardian's petition for guardianship if he or she is "capable of providing an active and suitable program of guardianship for the person with a disability."³³ In considering appointment and limitations of a guardian, the court is concerned with promoting the disabled adult's well-being and protecting the disabled adult from abuse, exploitation, or neglect.³⁴ A court may consider appointment of either a family or professional guardian.³⁵

Once a court has appointed a qualified guardian based on the petition for guardianship,³⁶ the guardian shall have a duty to manage disabled adult's person, estate, or both.³⁷ Section 5/11a-18 of the Illinois probate act expressly allows a probate court to authorize "the guardian to exercise any or all powers over the estate" that the disabled adult "could exercise if present and not under disability."³⁸ The court, for example, may approve the

rather than solely for the disabled person; expenditures included the purchase of a home, vehicles, and other effects for the family. *Id.* at 1129.

30. MARGOT GORDON, *ESTATE PLANNING IN ILLINOIS GUARDIANSHIPS 2015 EDITION* ch. 1 (2015).

31. *See Zagorski v. Kaleta*, 404 Ill. App. 3d 75, 86-87 (2010) (stating that a guardian may amend a disabled adult's revocable trust, not only for limiting tax consequences, but for any reason whatsoever as long as it keeps with the disabled adult's wishes).

32. *See 755 ILCS 5/11a-2* (2015)(defining further a "person with a disability" as one who exposes their family to distress from drug use and waste of the estate or one with fetal alcohol syndrome); D. REBECCA MITCHELL, *SPECIAL-NEEDS TRUSTS* § 3.60 (2015).

33. *See 755 ILCS 11a-5* (2015) (requiring that the guardian be at least 18 years old, an American citizen, free of unsound mind and disability, and possessing no felony conviction unless the best interests of the disabled adult outweigh the conviction and the conviction does not involve harm to an elder or minor).

34. *755 ILCS 5/11a-3(b)* (2016).

35. For a discussion on how family and professional guardians tend to make decisions based on a disabled adult's preferences or best interests, *see infra* Part III.A.2.

36. *See Howse v. Johnson*, 708 N.E.2d 466, 472 (Ill. App. Ct. 1999) (stating that, in selecting a guardian, the court shall "give due consideration to the preference of the disabled person," but "of paramount concern . . . is the best interest and well-being of the disabled person, regardless of that person's choice.").

37. *755 ILCS 5/11a-17* (2015); *755 ILCS 5/11a-18* (2015).

38. *755 ILCS 5/11a-18(a-5)*(2015); *see also Zagorski v. Kaleta*, 404 Ill. App. 3d 75, 86-87 (2010)(ruling that a plenary guardian may amend a revocable trust where the court found that the current trust does not align with the disabled

appointed guardian estate as sole beneficiary of the disabled adult's estate,³⁹ as long as the decision is "keeping with the disabled adult's wishes so far as they can be ascertained."⁴⁰

2. *The Hierarchical Substituted Judgment and Best Judgment Hybrid Standard*

Illinois's hierarchical substituted judgment and best judgment hybrid standard requires that a disabled adult's purported wish on a matter be followed where that wish is what the disabled adult would have decided if he or she were competent; if the disabled adult's wish is unascertainable, then the least restrictive best interests of the disabled adult shall be implemented.⁴¹ The test is based on the common law rationale that, in a world preserved by a guardian's substituted judgments where the disabled adult regains mental cognizance, the judgment would conform to the disabled adult's intentions so he or she would therefore be pleased with the substituted decision.⁴² This rule shows that a guardian's powers, whether from statutory or implied authority, must consider the wishes of the disabled person before acting.⁴³ This is juxtaposed to states that have explicitly limited the actions a guardian may perform even if that action is be one of the disabled adult's wishes.⁴⁴

adult's wishes).

39. As the case background in *infra* Part II.C shows, this testamentary plan is the one that Donald's mother seeks to implement. The court, in statutorily interpreting 755 ILCS 5/11a-18(a) and 5/11a-18(a-5) contemporaneously, allowed the conclusion that "the guardian is in the position to initially assess who should be a beneficiary of the proposed estate plan." *Estate of Howell v. Howell*, 36 N.E.3d 293, 302 (Ill. App. Ct. 2015).

40. 755 ILCS 5/11a-18(a-5)(2015).

41. 755 ILCS 5/11a-17(e)(2015); *see also* *Estate of Greenspan*, 137 Ill. 2d 1, 17-18 (1990) (determining that removal of artificial life support is in best intentions of the disabled adult where family member testimony reveals his dislike for life-support systems and nursing homes); *In re C.E.*, 161 Ill. 2d 200, 220-23 (1994) (deciding that administration of psychotropic medication or electroconvulsive therapy of the mentally ill is governed by the substituted judgment rule).

42. *See* Alexander Boni-Saenz, *Personal Delegations*, 78 BROOKLYN L. REV. 1231, 1255 n. 108 (2013) (noting that the common law origin derives from dealing with lunatics and idiots, the former class being those with mental capabilities but lost it and the latter class being those that never had mental capabilities).

43. *See Zagorski*, 404 Ill. App. 3d at 85-86 (applying rules of statutory interpretation to conclude that a guardian's amendment of trusts is not limited only to tax purposes); *see also* 11a-18(a-5) (stating that "in ascertaining and carrying out the disabled adult's wishes the court may consider, but is not limited to, minimization of state or Federal income," and "[t]he disabled adult's wishes as best they can be ascertained shall be carried out, whether or not tax savings are involved.").

44. *See* Boni-Saenz, *supra* note 42, at 1244 (noting the potential authority of a guardian to manipulate a disabled adult's assets, therefore making a will for a disabled adult is barred). The rationale for this rule is that allowing guardians

Historically, the hierarchical standard has been applied within Illinois mainly to address medically incapacitated individuals who are unable to declare their own intentions.⁴⁵ Illinois case law has applied the standard where the guardian must make decisions regarding the disabled adult's use of life-sustaining treatment or medicine while in an institution.⁴⁶ In these medical related instances, there is case law to help guide guardians to act properly when an individual loses capacity.⁴⁷ What is unique to *Estate of Howell* is the application of the hierarchical standard in an estate planning scenario where the preferences of the disabled adult were not ascertainable.⁴⁸

There is an ongoing discussion on how to ascertain disabled adults' wishes and interests. One Illinois court ruled where one's desires had been expressed that any prior considerations occurring before the lawsuit can trump other considerations given during the proceedings.⁴⁹ This raises the question as to how courts go about obtaining such information for what the best interests of a disabled adult may be and whether those interests should conflict with prior preferences. Further application of the hierarchical standard will be expounded upon after a discussion of the rights and status of a disabled adult.⁵⁰

to prepare wills as well as make financial making judgments to be delegated to the guardians may allow in manipulation of the estate. *Id.*

45. See 405 ILCS 5/2-107.1 (2016)(requiring, upon petition to authorize an electroconvulsive therapy or psychotropic medication, the guardian show numerous standards are met including clear and convincing proof that benefits of the therapy or medication outweigh potential harms to the disabled person); see also Rebecca O'Neill, *Surrogate Health Care Decisions for Adults in Illinois – Answers to the Legal Questions That Health Providers Face on a Daily Basis*, 29 LOY. U. CHI. L.J. 411, 431-32 (1998)(providing precedent that an appointed guardian, on behalf of an incapacitated disabled adult, can authorize the use of psychotropic drugs, blood transfusions, and abortions).

46. See *In re C.E.*, 161 Ill. 2d at 217 (arguing successfully that a guardian's judgment should override the interest the state has in determining medication for one presiding at a mental institution); *Estate of Longeway*, 133 Ill. 2d 33, 50-51 (1989) (establishing that the guardian's mother, the disabled adult receiving life-sustaining treatments, could apply her best judgment absent the disabled adult's intent).

47. See *Estate of Longeway*, 133 Ill. 2d at 49-51 (stating a surrogate decision maker determine prior expressed explicit intent regarding medical treatment).

48. See 755 ILCS 5/11a-17(e) (2015)(stating that decisions are to be made "in accordance with the preferences of the disabled adult.") (emphasis added).

49. See *In re Estate of K.E.J.*, 887 N.E.2d 704, 721 (Ill. App. Ct. 2008)(considering that the disabled adult's head injury at the age of 8 that caused her disability would preclude any preferences she may have as a 29 year old in receiving a tubal ligation).

50. See *infra* Part III.A.

3. Legal Status of a Disabled Adult

The Illinois statute defines a disabled adult as one who is eighteen or older and unable to manage one's own estate or person due to physical incapacity or mental deterioration.⁵¹ Upon filing for guardianship, the respondent's adjudication of legal disability is a question of fact,⁵² where the trial court must consider and answer the threshold question of whether the respondent is "capable of managing his person or estate."⁵³ The petition for adjudication to declare a disability must also include a physician's opinion on the mental or physical condition of the respondent and a recommendation for guardianship.⁵⁴

However, a person may be mentally or physically disabled—as opposed to a person has been adjudicated legally disabled—and so may possess the testamentary capacity needed to demonstrate sound mind and memory.⁵⁵ Along with being 18 or older and with the presence and attestation of two witnesses, a potentially disabled adult with sound mind and memory may execute a will.⁵⁶ When evaluating the validity of a will, evidence including a doctor's report or lay witnesses' testimony may be used to build or rebuke a claim

51. See 755 ILCS 5/11a-2 (2015) (noting that a disabled person may include one with a mental illness, developmental disability, or one who suffers from effects relating to drinking, drugging, or gambling).

52. See 755 ILCS 5/11a-3(a) (2015) (stating "the court may adjudge a person to be a disabled person, but only if it has been demonstrated by clear and convincing evidence that the person is a disabled"); *accord*, 5/11a-2 (defining the characteristics of a person with a disability); see also *Estate of Galvin v. Galvin*, 112 Ill. App. 3d 677, 681-812 (1983) (stating that determination of incompetency is "a uniquely factual question to be decided by the trial judge.").

53. *In re Estate of McPeak*, 53 Ill. App. 3d 133, 135 (1977).

54. See 755 ILCS 5/11a-9 (2015) (outlining the necessary contents of a physician's report that accompanies a petition to appoint a guardian and adjudicate a disability). The physician's report should include: an explanation of the respondent's disability and how it affects his or her functionality and decision-making abilities, an evaluation on the respondent's physical and mental state, an opinion whether guardianship is needed, a recommendation on how the respondent should be treated and rehabbed, and certification of any physician's credentials that contributed to the report. 755 ILCS 5/11a-9(a) (2015).

55. 6 ILL. JURISPRUDENCE PROBATE, ESTATES AND TRUSTS § 4:03 (Matthew Bender & Co. 2015). Under the Illinois Probate Act, one possesses testamentary capacity if he or she: "comprehends and remembers the natural objects of his or her bounty; knows and remembers the extent and character of his or her property; knows the manner in which he or she wishes to dispose of the property; and makes a disposition in accordance with that plan." *Id.*

56. See 755 ILCS 5/4-1 (2015) (stating "[e]very person who has attained the age of [eighteen] years and is of sound mind and memory has power to bequeath by will the real and personal estate which he has at the time of his death."); 755 ILCS 5/4-3 (2015) (requiring a will to be in writing, to be signed by the hand or under direction of the testator, and to be attested to by two witnesses in presence of the testator).

of unsound mind and memory,⁵⁷ but the most persuasive evidence is gained from the disabled adult's preferences.⁵⁸ The problem in ascertaining one's testamentary intent may be exacerbated if one's mental capacity is questionable during the process of drafting a will, although the law only requires sound mind and memory at the moment of will execution.⁵⁹ In disposing property through a will, the testamentary standard requires one with a disability to have mental capacity at the time of execution to understand his or her natural bounty and the extent of his or her property, but it is not necessary for the disabled to actually recall detailed information.⁶⁰

A disabled adult may be encouraged to have a guardian appointed on his or her behalf to create and ultimately effectuate a will or estate plan.⁶¹ The court has authority to grant the guardian powers over the disabled adult's estate in light of "the permanence of the disabled adult's disabling condition and the natural objects of the disabled adult's bounty."⁶² Yet it remains the same that the "disabled adult's wishes as best they can be ascertained shall be carried out."⁶³ The hierarchical standard allows a guardian's choice to fill the gap where testamentary capacity is non-existent, therefore a guardian can legally act for the disabled adult to add a

57. See *Estate of Austwick*, 275 Ill. App. 3d 665, 669 (1995) (suggesting that a doctor need not decide the decisional capacity of the patient); see also *Estate of Basich*, 79 Ill. App. 3d 997, 1001 (1979) (stating that such evidence is "competent and may be considered if it tends to show the testator's mental condition at the time he made the will.").

58. See *Zagorski v. Kaleta*, 404 Ill. App. 3d 75, 97 (2010) (providing that, even though there is a guardian, the disabled adult's preferences should be given substantial weight where the disabled adult possess decision-making capacity).

59. See 755 ILCS 5/4-1 (2015) (providing, "[e]very person who has attained the age of 18 years *and is of sound mind and memory* has power to bequeath by will the real and personal estate which he has at the time of his death.") (emphasis added); see also *Anlicker v. Brethorst*, 329 Ill. 11, 17 (1928) (explaining that "the time of the execution of the will is the time to judge the testator's mental capacity.").

60. See *Challiner v. Smith*, 396 Ill. 106, 124 (1947) (dying and deaf testatrix with broken leg and breast cancer with whose inability to recall the extent of her property is not controlling in determination the validity of the testatrix's will); see also *Estate of Osborn*, 234 Ill. App. 3d 651, 658 (1991) (ruling summary judgment on the issue of testamentary capacity where evidence suggested testatrix's weakened state but not her mental incapacity).

61. See 755 ILCS 5/11a-18(c) (2015) (stating "the guardian of the estate shall have the care, management and investment of the estate . . ."), see also Margot Gordon, *Determination of Disabled Adult's Testamentary Capacity*, § 4.1 in *ESTATE PLANNING IN ILLINOIS GUARDIANSHIPS* (2015) (discussing need for guardian to hire legal counsel where tax and special-needs issues are apparent).

62. 5/11a-18(a-5).

63. *Id.*

codicil to a will,⁶⁴ amendment a trust,⁶⁵ and add features that may deviate from an intestate distribution of his property.⁶⁶

B. Rules of Intestacy and Consequences of a Neglectful Heir

The antiquated yet effectively enforceable common law doctrine of intestacy has grown from its stringent medieval roots and now allows disinheritance of an heir in Illinois based on their numerous harmful actions to the decedent.⁶⁷ The rules of intestacy stem from the prevailing idea that, due to a family's blood relationship, an intestate decedent's heirs are entitled to receive personal and real property absent a written will or where a written will is present but improperly executed.⁶⁸ Today's modern statutory law has changed significantly since the common law's archaic demands of primogeniture and limited testamentary freedom;⁶⁹ modern law instead discards such relics and allows individuals to custom tailor their asset transfers in a way they see fit by utilizing a will.⁷⁰ Such a transformation has occurred because American citizens desire their accumulation of wealth to stay with who they choose: either within the family or to others that the testator chooses.⁷¹ However, one idea not generally adopted by today's law across the United States is the effect of heir misbehavior on an intestate interest.⁷² The only instance that is uniform among the states is generally cited in a slayer statute, which bars an heir from

64. A codicil is an amendment to the will and is made effective by proper signing and attestation of the will. See 755 ILCS 5/4-3 (2015).

65. 5/11a-18(a-5)(11)(summarizing the guardian's authority to allow "modification] by means of codicil or trust amendment the terms of the disabled adult's will or any revocable trust created by the disabled adult.").

66. See *Estate of Howell v. Howell*, 36 N.E.3d 293, 297-98 (Ill. App. Ct. 2015)(applying rules of statutory construction allowed the Illinois Appellate Court to reverse the trial court's holding that the estate plan must conform to Illinois rules of intestacy).

67. For purposes of this Comment, a neglectful heir is one who is punishable via disinheritance under the rules of intestacy.

68. See Paula Monopoli, "Deadbeat Dads": *Should Support and Inheritance Be Linked?*, 49 U. MIAMI L. REV. 257, 259 (1994) (noting that the relationship of the family unit does not change a blood relative's right to inheritance).

69. See Joshua Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 149, 151 (2008) (defining primogeniture as "the right of the firstborn son to succeed to his father's land", and describing the use of *enfeoff* as where a landowner would allow friends to use his real property and that it would be transferred to his friends upon the owner's death).

70. *Id.* at 154-57 (discussing how British and Spanish colonies, which eventually became a part of the America, abolished use of primogeniture; most states had abolished it by 1800).

71. See *id.* at 156-60 (providing American's encouragement for work and savings in order to maximize wealth as well as the view that one may do with their assets as they see satisfactory).

72. See *infra* Part II.B.2., Part III.B.

gaining his or her share of the decedent's inheritance if that heir kills or otherwise advances the death of the decedent.⁷³

The Illinois rules of intestacy are governed solely under the Illinois Probate Act.⁷⁴ The Probate Act expressly notes that there is no distinction between brothers and sisters of full-blood or half-blood relations;⁷⁵ this notion acts as a reminder of the strong emphasis that the common law places on blood relations even to this day.⁷⁶ Where a will fails to properly devise all property or there is no will at all, the distribution of a decedent's assets are determined by the applicable rule of intestacy.⁷⁷ The rules of intestacy will not always be followed if an heir has acted in certain ways that society frowns upon during the decedent's lifetime. For example, statutes in Illinois bar inheritance to heir, if they abandoned a minor,⁷⁸ if the child was born out of wedlock,⁷⁹ if the child was neglected,⁸⁰ and if the heir commits neglect, abuse, or financial exploitation against the disabled adult or the estate.⁸¹

To expound on the abandonment statute, for example, its policy reflects society's view that a parent has an obligation to care for their children, but unfortunately this obligation has begun to be neglected within the parlance of our times.⁸² The truth is, "[i]n the vast majority of jurisdictions the intestate rules treat an abandoning parent as an equal heir with the non-abandoning parent. Equity requires a different result."⁸³ While there is a statutory distinction between neglect of a disabled adult and

73. See Monopoli, *supra* note 68, at 273 (1994) (noting the one major example of law, referred to as slayer statutes, acts to disinherit an heir who murders the decedent). Every state, excluding three, have statutory language regarding disinheritance through slaying the decedent, while those remaining three have case law which ban the inheritance. Anne Marie Rhodes, *The Thirtieth Annual Law Review Symposium of Estate Planning: Changing Laws for Changing Times: Symposium Article: Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U.L. REV. 975, 979 n. 20-21 (2007).

74. 755 ILCS 5/2-1 (1999).

75. *Id.*

76. *Id.*; see also *Meyers v. Fraser*, No. 43,083, 1944 LEXIS 985, *5-*6 (Ill. App. Ct. Oct. 23, 1944) (interpreting the controlling statute, which disallows distinguishing based on a blood relation, to indicate a separate group of descendants). A majority of states treat full-blood and half-blood siblings the same in regards to intestate distributions. *E.g.* GA. CODE ANN. § 53-2-1 (2015); IND. CODE § 29-1-2-1, § 29-1-2-5 (2015).

77. See 755 ILCS 5/4-14 (2015)(stating, "[t]he real and personal estate of a testator that is not bequeathed by his will descends and shall be distributed as intestate estate.").

78. 755 ILCS 5/2-4 (2015).

79. 755 ILCS 5/2-2 (2015).

80. 755 ILCS 5/2-6.5 (2015).

81. 755 ILCS 5/2-6.2 (2015).

82. See Monopoli, *supra* note 68, at 259 n. 2 (according to an organization, parents are more likely to pay off their car loan delinquencies than support owed to mothers (citing Press Release, Children's Defense Fund (June 17, 1994))).

83. Anne-Marie Rhodes, *Abandoning Parents Under Intestacy: Where Are We, Where We Need to Go*, 27 IND. L. REV. 517, 518 (2008).

abandonment of a disabled minor,⁸⁴ the underlying principle is the same: today's legal system places a higher pedigree on a relationship based on blood rather than what should be deemed equitable within the modern family unit.⁸⁵

The Illinois standards differ regarding the neglect of a minor and the neglect of a disabled adult.⁸⁶ The statute dealing with neglect of a disabled person does not make mention of acts done to the person during his or her childhood, but instead states that the court shall consider facts and circumstances as it seems appropriate to reduce the benefit received.⁸⁷ This leaves the question open of whether the benefit may be reduced entirely based on the facts and circumstances.

C. *The Estate of Howell v. Howell*

The case of *Estate of Howell* centers on Donald, a cognitively disabled male.⁸⁸ Donald was born out of wedlock to LaTanya and Donald Bernard Howell (hereinafter Donald Bernard).⁸⁹ As an infant and while in utero, Donald succumbed to lead poisoning that resulted in severe cognitive disabilities.⁹⁰ The condition was

84. See 755 ILCS 5/11-13 (2015) (listing duties of a guardian to a minor); see also e.g., 755 ILCS 5/11a-17, 5/11a-18 (2015) (listing duties of a personal and estate guardian).

85. See Rhodes, *supra* note 83, at 547 (declaring, “[t]he root of the legal problem is intestacy’s historic link to feudal life and to property rights based on inflexible bloodlines.”).

86. Compare 755 ILCS 5/2-6.2 (2015)(discussing consequences of abuse, neglect, or financial exploitation to one who is an elder or disabled) with 755 ILCS 5/2-6.5 (2015) (discussing consequences of a parent neglecting a child while making no distinction between a disabled child and a non-disabled child).

87. See 755 ILCS 5/2-6.2 (2015)(stating, “[t]he court may, in its discretion, consider, such facts and circumstances as it deems appropriate to allow the person found civilly liable for financial exploitation to receive a reduction in interest or benefit” instead of no interest or benefit).

88. Donald was born on November 15, 1991, with microcephaly caused by lead poisoning. *Estate of Howell v. Howell*, 36 N.E.3d 293, 295 (Ill. App. Ct. 2015). Children’s early exposure to lead poisoning commonly occurred from eating or breathing in lead-based paint and may result in “severe cerebral edema and permanent cerebral damage.” COURTROOM MEDICINE SERIES: HEAD AND BRAIN § 141.05(2)(a)(ii) (2015). Microcephaly is a type of cerebral damage identifiable by an “abnormally small head” that “correlates strongly with mental retardation and cannot be treated.” Nancy K. Rhoden, *Treatment Dilemmas For Imperiled Newborns: Why Quality of Life Counts*, 58 S. CAL. L. REV. 1238, 1291 (1985).

89. *Estate of Howell*, 36 N.E.3d at 294-95, 304.

90. *Howell v. Chi. Hous. Auth.*, No. 1-09-3617, 2011 Ill. App. LEXIS 204, at *1-*2 (Ill. Ct. App. Mar. 25, 2011). The testifying doctor proclaimed that due to Donald being exposed to lead paint in the womb and as a young infant, his condition shortly thereafter was “characterized by significant language and intellectual and social retardation to a point where he is never going to be employable and will require long-term 24-hour custodial care.” *Id.* at *7-*8.

ultimately identified as microcephaly.⁹¹ The jury verdict granted \$16.5 million in 2011 for Donald's personal injury lawsuit.⁹² Unfortunately, Donald's condition is permanent and requires daily medication, numerous types of therapy, a child proof living environment, and extra assistance from his mother, LaTanya Turks, and caregiver, Tyheshia Wilkins.⁹³ Upon receiving the judgment, coguardians LaTanya and Northern Trust Bank petitioned the court to create two instruments, a revocable trust and pour-over will,⁹⁴ for Donald in 2012.⁹⁵ Under this plan, Donald would be the sole beneficiary during his life, and only upon his death would LaTanya become beneficiary of the corpus with Tyhesia as the successor in interest.⁹⁶ In petitioning the court for permission to commence this estate plan, LaTanya argues that she is able to utilize Donald's best interests to create the estate plan in place of Donald's preferred judgment, because he cannot clearly show how he would like the estate to be crafted.⁹⁷

The opposing guardian ad litem argued that the proposed estate plan would be void and that since Donald himself cannot declare any subjective intent regarding distribution of his estate, the court must order the coguardians to create an estate plan following the rules of intestacy.⁹⁸ If the guardian ad litem's recommendation were implemented, then LaTanya, Donald Bernard, and Donald's ten half-brothers and half-sisters, all of which are Donald Bernard's children with multiple women, would receive an equal pro rata share of the assets pursuant to Illinois's intestacy statute.⁹⁹ LaTanya appealed the case to reverse the trial

91. *Estate of Howell*, 36 N.E.3d at 295.

92. *Chi. Hous. Auth.*, 2011 LEXIS 204, at *1, *20.

93. *See* 755 ILCS 5/4a-5(1)(2015)(noting that a caregiver cannot be a family member of the individual gaining assistance, but is one who assists in taking care of one on a voluntary or compensatory basis); *see Estate of Howell*, 36 N.E.3d at 295-96. There is conflicting testimony regarding Tyheshia's blood relationship to the family. *Id.* at 296.

94. Revocable trusts, while they do not have tax advantages, maintain many advantages of a trust and allow the settlor to keep control over the trust during the settlor's life because he or she reserves the power to amend and revoke the instrument. ILL. TRUST. ADMIN. § 1.3. (2015). The existence of a pour-over will, which is commonly coupled with a revocable trust, allows the trust "to receive all of the assets of a probate estate." *Id.* at § 7.95; § 11.8.

95. *Estate of Howell*, 36 N.E.3d at 295.

96. *Id.* In order to realize this distributive plan the coguardians intended to utilize a revocable trust and pour-over will. *Id.* The plan also allows Donald's aunt Laurie to take if LaTanya and Tyhesia predeceased Donald. *Id.*

97. *Id.* at 301. When the guardian ad litem interviewed Donald, he did not answer questions about his care and instead spoke nonsense words. This led to the guardian at litem's conclusion that he was unable to direct preparation of an estate plan. *Id.* at 295.

98. *Estate of Howell*, 36 N.E.3d at 296-97.

99. Donald has little to no relationship with his dad and none with his ten half siblings. *Id.* However, Illinois intestacy law does not make a distinction "between the kindred of the whole and the half blood," therefore both parents

court's order that the trust and will must follow the rules of intestacy on the basis that an estate plan can still be made based off the best interests of Donald.¹⁰⁰

The Illinois Appellate Court scrutinized the Illinois Probate Act and reversed the trial court, holding that estate plans shall incorporate the disabled adult's objective best interests because the disabled adult's personal judgment cannot be ascertained.¹⁰¹ The implication from this ruling in this matter allowed LaTanya to become the estate's beneficiary because the estate plan and beneficiary designation represents Donald's best interests.¹⁰² This ruling ensures that a disabled adult's estate plan is not forced to follow the rules of intestacy.¹⁰³

III. THE ILLINOIS PROBATE ACT AND OTHER JURISDICTIONS' PROBATE ACTS: WHY ILLINOIS HAS SET THE STANDARD FOR OTHERS TO FOLLOW

When it comes to Illinois' hierarchical standard and the litany of laws that disinherit misbehaving heirs, no other jurisdiction grants more protection for disabled adults under guardianship who wish to create an equitable estate plan. Not only do these laws appeal to today's modern family,¹⁰⁴ but the laws also have done away with a focus on blood-relations and forced distribution to those that may not be so deserving. Part A of this analysis discusses the different guardian decision-making standard across the United States, along with how the decision-making tendencies of appointed guardians comport with the jurisdiction's decision-making standard.¹⁰⁵ Because of the difference in standards among jurisdictions, the outcome in *Estate of Howell* would likely not be as equitable in jurisdictions whose decision-making standards differ from Illinois's standard.¹⁰⁶ Part B of the analysis compares different jurisdiction's probate laws to show that, unlike those other

and siblings shall receive an equal parts share in the estate. 755 ILCS 5/2-1 (2015).

100. *Estate of Howell*, 36 N.E.3d at 297.

101. *Id.* at 300.

102. *Id.* at 299-300. The court interpreted 5/11a-18 to allow the "disabled adult's wishes as best they can be ascertained shall be carried" but the language does not state that only the disabled adult's wishes should be carried out. *Id.*

103. *Id.* at 296.

104. The term "modern family" as used throughout this Comment is a family that exists under Illinois's probate laws, where the law's policy concerns for providing fair and equitable treatment for a deserving family trumps the notion of receiving inheritance for sake of having a blood ties with a decedent who may have been mistreated by the heir during life.

105. *See infra* Part III.A.

106. *See infra* Part III.A.1.

jurisdictions, Illinois actually permits punishment of misbehaving heirs using statutes that bars inheritance.¹⁰⁷

A. Guardianship Decision-Making Standards: Substituted Judgment, Best Interest, Hybrid, and No Standard at All

Since the court allows appointed guardians to use discretion in supporting a disabled adult and managing their estate,¹⁰⁸ a multitude of factors induced by legislature influence the process the guardian takes in reaching major decision.¹⁰⁹ Further, studies show that a jurisdiction's statutory language and the guardian's relationship to the disabled adult can often influence whether the guardian favors a best interests standard or substituted judgment standard.¹¹⁰ Following is an analysis of numerous factors that affect how guardians make their decisions, including the different decision-making models jurisdictions use and how the guardian's relationship with the disabled adult changes the decision-making dynamic.

1. Impact of Different Decision-Making Models

Eighteen United States jurisdictions have statutes relating to substituted judgment language, six employ a best interests approach, and twenty-eight have neither substituted judgment nor best interest decision-making guidelines for guardians.¹¹¹ A majority of the jurisdictions with substituted judgment language

107. *See infra* Part III.B.

108. *But see* Estate of Longeway, 133 Ill. 2d 33, 52 (1989) (discussing the state's common law *parens patriae* power, which allows courts to intervene on a guardian's decision to administer end-of-life treatment to a disabled adult).

109. *See* Ralph Brashier, *Conservatorships, Capacity, and Crystal Balls*, 87 TEMP. L. REV. 1, 8-9 (2014) (discussing how current guardianship reform seeks to limit excess state intervention by enhancing the decision-making discretion a guardian is afforded).

110. General findings of the study, which involved participation of sixty guardians, indicated that the best interest approach allowed more consideration to what the family members would want. However, when deciding an issue regarding finances or property, a guardian was more inclined to use a substituted judgment approach paired with evidence of current conversations with the disabled adult. The jurisdiction's statutory language does influence the standard employed. A family guardian is more likely to consider the views of other family members and rely on past conversations, while a professional guardian uses a more pragmatic approach and use of current disabled adult conversations. For further discussion, *see* Linda Whitton and Lawrence Frolik, *Symposium: Third National Guardianship Summit: Standards of Excellence: Surrogate Decision-Making Standards for Guardians: Theory and Reality*, 2012 UTAH L. REV. 1491, 1519-21 (2012).

111. *Id.* at 1495. These jurisdictions include all 50 states, the District of Columbia, and the U.S. Virgin Islands.

also incorporate a best interest's approach.¹¹² Only two jurisdictions, Illinois and the District of Columbia, utilize a hierarchical decision-making approach, where the best interests of the disabled adult guide a guardian's decision-making process only if the guardian is unable to apply the substituted judgment standard.¹¹³

a. No Decision-Making Guidelines Approach

Twenty-eight jurisdictions do not use a substituted judgment or best interests standard to define guardian duties when making a decision.¹¹⁴ Instead, some jurisdictions leave discretion to the guardian to make decisions as if they were the disabled person's parent,¹¹⁵ others use an ordinary care and diligence standard,¹¹⁶ and some use non-specific wording to define a guardian's powers.¹¹⁷ A majority of these jurisdictions incorporate language from the 1969 Uniform Probate Code that give "[a] guardian of an incapacitated person... the same powers, rights and duties respecting his disabled adult that a parent has respecting his emancipated minor child."¹¹⁸

This standard would have created a troubling and unpredictable result in *Estate of Howell* had LaTanya and Donald Bernard been coguardians, because each guardian would need to act on the best interests of Donald's parents. Acting solely on behalf of LaTanya would allow the court to reach the same holding as the appellate court,¹¹⁹ but Donald Bernard would likely request that he

112. *Id.*

113. *Id.* at 1501 (utilizing such an approach gives "preference for substituted judgment when possible", otherwise the guardian acts on behalf of the disabled adult's best interest).

114. *Id.* at 1945; *but see* Michael Casasanto, *A Model Code of Ethics for Guardians*, 11 WHITTIER L. REV. 543, 547 (1989) (arguing that a standard that delineates a guardian's duties to that of a parent reflects a best interests approach).

115. *See* ALA. CODE § 26-2A-78 (2016) (stating that "[a] guardian of a minor disabled adult has the powers and responsibilities of a parent regarding the disabled adult's health, support, education, or maintenance.").

116. *See* CAL. PROB. CODE § 2401 (2016) (stating a guardian "has the management and control of the estate and, in managing and controlling the estate, shall use ordinary care and diligence.").

117. *See* OKLA. STAT. TIT. 30 § 1-121 (2015) (defining a guardian's duties, *inter alia*, to "keep safely the property of his disabled adult.").

118. UNIF. PROB. CODE § 5-312 (1969) (summarizing the duties and powers of a guardian to require responsibility over the disabled adult's estate and person).

119. LaTanya's court petition to create an estate plan for Donald that deviates from the rules of intestacy was upheld and an evidentiary hearing was held to decide if it is within Donald's best interests for LaTanya to be the sole beneficiary of his estate. *Estate of Howell v. Howell*, 36 N.E.3d 293, 295 (Ill. App. Ct. 2015). It likely is presumed that a guardian acting as LaTanya would come to the same testamentary plan.

receives the whole estate.¹²⁰ Even where the standard gives criteria to consider,¹²¹ it does not accommodate the situation where the two parents have substantially conflicting interests and viewpoints regarding the disabled adult's needs.

b. Substituted Judgment Approach

The eighteen jurisdictions that use the substituted judgment approach use one of two methods: a majority of the jurisdictions use the substituted judgment standard combined with a best interests approach,¹²² while the minority utilizes only a substituted judgment standard.¹²³ The majority of jurisdictions that use both substituted judgment and best interests standards use a dual mandate or plain language approach,¹²⁴ a hierarchical approach,¹²⁵ or a no priority approach.¹²⁶ These statutes are problematic because they do not

120. While Donald Bernard argues that the testamentary plan be dispersed via intestacy, see *Estate of Howell*, 36 N.E.3d at 279 (stating “because it was impossible to determine Donald’s wishes, any distributive portion of the estate should follow the intestacy statute.”). If one were arguing on behalf of his best interests he would ask for the entire estate. *Id.*

121. See e.g., ALA. CODE § 26-2A-78 (stating a guardian become “personally acquainted with the disabled adult,” but that a guardian may delegate certain responsibilities to the disabled adult); UNIF. PROB. CODE § 5-312 (qualifying the powers of a guardian as approving medical treatment, reporting the disabled adult’s condition, and compelling support for the disabled adult from third parties).

122. See Whitton and Frolik, *supra* note 111, at 1495 n.23 (listing all eighteen jurisdictions whose guardianship statutes involve language indicating use of the substituted judgment standard).

123. See *id.* at 1495 n.24 (listing fourteen of the eighteen jurisdictions that include substituted judgment language “in combination with a best interest component.”).

124. The dual mandate standard, created in the 1997 Uniform Guardianship and Protective Proceedings Act “requires a guardian to ‘consider the expressed desires and personal values of the disabled adult’ and ‘at all times . . . act in the disabled adult’s best interest.’” Five jurisdictions adopted language similar to this standard. See Lawrence Frolik and Linda Whitton, *Symposium: The Uniform Probate Code: Remaking American Succession Law: The UPC Substituted Judgment/Best Interest Standard for Guardian Decisions: A Proposal for Reform*, 245 U. MICH. J.L. 739, 744 (2011) (listing the four jurisdictions and single territory that use the dual mandate approach).

125. Six jurisdictions use a hierarchy distinction in their guardian statutory scheme. Four of the jurisdictions of substituted judgment but also “require a guardian to ‘consider the expressed desires and personal values of the disabled adult’ and to ‘otherwise act in the disabled adult’s best interest,’” which only merely suggests the guardian considers the disabled adult’s best interests alongside the guardian’s own judgment. Two of the jurisdictions, Illinois and the District of Columbia, explicitly require the best interest standard to be used only if the substituted judgment standard cannot be effectively employed. See *id.* at 744-45 (listing the six jurisdictions that use a hierarchy scheme). For further discussion of the Illinois and the District of Columbia hierarchical approach, see *infra* Part III.A.1.d.

126. Three jurisdictions use both best interest and substituted judgment

delegate preferential use to either best interests or substituted judgment standards and therefore the two standards conflict where a statutory prioritization scheme is not in place.¹²⁷ In applying this standard generally to *Estate of Howell*, LaTanya would be arguing the implementation of the best interests standard while the guardian ad litem would advocate for the substituted judgment standard. Though the substituted judgment standard would likely fail because Donald's desires and preferences cannot be ascertained,¹²⁸ the standard invites the clash between two competing standards due to statutory vagueness in applying both.

The minority of states that use only the substituted judgment standard generally require that the guardian obtain information from the disabled adult, including their views, preferences, and values, before making decisions on their behalf.¹²⁹ In cases such as *Estate of Howell* where the disabled adult's desires cannot be understood, the substituted judgment standard would fail and perhaps cause significant harm to the disabled adult's future health and affairs.¹³⁰

standards but "do not indicate what relative weight guardians are to give substituted judgment and best interest when making decisions." See Frolik and Whitton, *supra* note 125, at 746-47 (listing the three jurisdictions that use both standards with no priority of implementation).

127. Whitton and Frolik, *supra* note 104, at 111; *but see* Frolik and Whitton, *supra* note 125, at 746-47 (stating also that the legislative intent behind conflicting statutes implies that a guardian consider best interests if the substituted judgment of the disabled adult cannot be discerned).

128. *Estate of Howell v. Howell*, 36 N.E.3d 293, 297 (Ill. App. Ct. 2015) (stating the portion of Donald's estate to be distributed should be done so under the rules of intestacy). A conflicting statute's vagueness may not provide for whether best interests trump a lack of substituted judgment or if the rules of intestacy should be followed instead. See Whitton and Frolik, *supra* note 111, at 1500-01 (stating that some jurisdictions do not require a guardian to act in the best interests of the disabled adult "at all times.").

129. *Id.* at 1502-03 (listing the four jurisdictions that use only a substituted judgment standard); *e.g.*, MICH. COMP. LAWS § 700.5314 (2016) (requiring the guardian to consult with the disabled adult "[w]henever meaningful communication is possible," but does not provide for an alternate approach if the communication is not possible); N.Y. MENTAL HYG. LAW § 81.20 (2016) (stating that the guardian shall give the disabled adult "the greatest amount of independence and self-determination" regarding personal decisions and property management).

130. Such a situation would arise if the statute had a strict adherence to the substituted judgment standard, where the guardian may only consider past preferences of the disabled adult, but past preferences have never been manifested. See Frolik and Whitton, *supra* note 125, at 753 (stating "the guardian must have actual knowledge of what the incapacitated person would have done in the present circumstances.").

c. Best Interests Approach

Six jurisdictions use a sole best interests approach with no substituted judgment language intact.¹³¹ Some states directly require the best interests of the disabled adult to be obeyed,¹³² while at least one other state uses substantially similar language.¹³³ This approach requires the guardian to act as a reasonable person would, even if that means considering outside professional advice.¹³⁴

The two issues with this approach are that there is little guidance on what a best interest actually is,¹³⁵ and one guardian's reasonable approach on determining best interests may be wholly inconsistent from another guardian's perspective.¹³⁶ For example, a professional guardian would consult other professionals to create a best interests decision, while a family guardian may instead only consider opinions of other family and friends.¹³⁷ The biggest concern with this approach is that, even if a disabled adult's wishes or preferences are known, the guardian could completely disregard those desires.¹³⁸ In *Estate of Howell*, Donald's best interests were objectively obtained because his judgment could not be ascertained.¹³⁹ If Donald's guardian were not his mother then different best interests would likely be advanced, which places great importance on the appointment of a proper guardian.¹⁴⁰

131. See Whitton and Frolik, *supra* note 111, at 1497 n. 35 (listing the six jurisdictions that contain language pertaining to a guardian's use of the best interests standard while omitting substituted judgment standard language).

132. See *e.g.*, MO. REV. STAT. § 475.120(2) (2016) (requiring “[a] guardian . . . of an incapacitated person shall act in the best interest of the disabled adult.”); OHIO REV. CODE ANN. § 2111.14(A)(2) (2016) (requiring an estate guardian “[t]o manage the estate for the best interest of the disabled adult.”).

133. See NEV. REV. STAT. § 159.079 (2015).

134. See Frolik and Whitton, *supra* note 125 at, 756-57 (preferring a guardian considers options based on his beliefs and other's opinions instead of being concerned with what the disabled adult wants or would prefer).

135. See Whitton and Frolik, *supra* note 111, at 1498 (stating “[t]he lack of statutory guidance on the meaning of ‘best interest’ may explain, in part, why there is so little case law on the meaning of the standard.”).

136. A guardian is left to consider what shall be within a disabled adult's best interests. See *id.* at 1497 (arguing that “none of these statutes provides guidance as to . . . what the guardian should consider when determining whether a decision will serve the incapacitated person's best interest.”).

137. See Frolik and Whitton, *supra* note 125, at 757 (adding that strict adherence to the best interests approach is necessary only if the disabled adult is fully incapacitated and the guardian is a professional). For more information on how different guardians reach decisions, see *infra* Part III.A.2.

138. See Frolik and Whitton, *supra* note 125, at 756 (stating “[t]he guardian is not concerned with what the incapacitated person would do.”).

139. *Estate of Howell v. Howell*, 36 N.E.3d 293, 301 (Ill. App. Ct. 2015) (concluding that “[a]lthough Donald's cognitive deficits have thus far prevented him from expressing his wishes for his estate, the estate guardian is generally empowered to act in Donald's best interests, which may mean deviating from intestacy.”).

140. See Peter Guthrie, Annotation, *Priority and Preference in Appointment*

d. Hierarchical Decision-Making Approach

The hierarchical standard, enacted only in Illinois and the District of Columbia, explicitly requires the best interest standard to be used only if the disabled adult's substituted judgment cannot be ascertained.¹⁴¹ One general criticism of this approach is that a guardian may intentionally provide a weak yet convincing argument of the inability to ascertain a disabled adult's wishes in order to proceed to the best interests standard, resulting in a standard critics call a "best judgment standard".¹⁴² However, because a supportive family member appointed as guardian would more likely be aware of the problems that the disabled adult encounters, a family guardian should be given preference over a professional guardian to counteract the potential for a guardian's bad faith argument.¹⁴³

The Illinois statute allows the guardian to consider a substituted judgment decision based on "the disabled adult's personal, philosophical, religious and moral beliefs, and ethical values."¹⁴⁴ However, if the disabled adult's wishes are unascertainable then the best interest approach should be used after considering the risks and consequences that the disabled adult would deem important.¹⁴⁵ The statute permits LaTanya to argue that the best interests of both her and Donald are aligned and therefore she should be the beneficiary of his estate.¹⁴⁶ The

of Conservator or Guardian for an Incompetent, 65 A.L.R. FED. 991 (1978) (appointing courts should exercise discretion in contemplating the disabled adult's best interests when selecting a guardian).

141. *See e.g.*, 755 ILCS 5/11a-18 (2015) (stating, upon petition of the guardian, that he may "exercise any or all powers over the estate and business affairs of the disabled adult that the disabled adult could exercise if present and not under disability" and that "[t]he court may approve the making on behalf of the disabled adult of such agreements as the court determines to be for the disabled adult's best interests."); D.C. CODE § 21-2047(a)(6) (2015) (requiring a guardian to "[m]ake decisions on behalf of the disabled adult by conforming as closely as possible to a standard of substituted judgment," or if the disabled adult's wishes are unascertainable, then the guardian shall "make the decision on the basis of the disabled adult's best interests.").

142. *Id.* at 1514; *see also* Daniel Sulmasy & Lois Snyder, *Substituted Interests and Best Judgments*, 304 J. AM. MED. ASSN. 1946, 1946-47 (2010) (indicating a best judgment approach occurs where one's preferences are unknown).

143. *See infra* Part III.A.2. This argument does not consider the situation where neither family nor professional guardian can discern a disabled adult's best interests where the disabled adult has been disabled since birth and has never impliedly or expressly indicated his or her desires.

144. 755 ILCS 5/11a-17(e) (2015); *see also* 755 ILCS 5/11a-18(a-5) (2015) (stating, "[t]he probate court, upon petition of a guardian... may authorize the guardian to exercise any or all powers over the estate and business affairs of the disabled adult that the disabled adult could exercise if present and not under disability.").

145. 755 ILCS 5/11a-17(e) (2015).

146. *Estate of Howell v. Howell*, 36 N.E.3d 293, 299-300 (Ill. App. Ct. 2015);

language used for considering substituted judgment requires the guardian to conform to the disabled adult's wishes, and LaTanya's estate plan for Donald was "consistent with Donald's wishes so far as they can be ascertained."¹⁴⁷ The Illinois's standard does not clearly discern whether consideration of the disabled adult's complete desires are fully required,¹⁴⁸ but the statute does make certain that the court should consider the views of family and friends.¹⁴⁹ Due to LaTanya and Tyheshia's relationship with Donald, it would seem equitable that LaTanya can designate herself as beneficiary of the estate with Tyheshia as a successor beneficiary.¹⁵⁰

The District of Columbia's guardian decision-making statute is more concise, stating that a guardian shall make decisions for the disabled adult "by conforming as closely as possible to a standard of substituted judgment or, if the disabled adult's wishes are unknown and remain unknown after reasonable efforts to discern them, make the decision on the basis of the disabled adult's best interests..."¹⁵¹ This standard implicates the hierarchical approach and may even exculpates the guardian from liability.¹⁵² Unlike the Illinois statute, however, the District of Columbia statute vaguely indicates what best interests should be considered as opposed to Illinois's exhaustive list.¹⁵³ While every state has various tests for deciding how to disperse property or maintain a disabled adult's health,¹⁵⁴

see also 755 ILCS 5/11-18(a)-(a-5) (2015). It should be noted that LaTanya has been appointed guardianship over her son's person and his estate, while Northern Trust Bank is appointed only as a guardian over his estate. *Estate of Howell*, 36 N.E.3d at 295.

147. *Id.* at 296.

148. *See* 755 ILCS 5/11a-18(a-5) (2015)(stating that the "probate court, upon petition of a guardian . . . may authorize the guardian to exercise any and all powers . . . that the disabled adult could exercise if present and not under disability", and that the guardian may apply funds of the disabled adult if the court approves the application of funds "as being in keeping with the disabled adult's wishes so far as they can be ascertained.").

149. *Id.* at 5/11a-18(a-5)(1), (6), (8) (2015) (stating that in ascertaining the disabled adult's wishes the court can consider friends or relatives of the disabled adult who would likely acquire part of the disabled adult's estate).

150. 755 ILCS 5/11a-18(a-5)(6) (2015) (permitting application of funds to "creat[e] for the benefit of the disabled adult *or others*, revocable or irrevocable trusts of his or her property that may extend beyond his or her disability or life.") (emphasis added).

151. D.C. CODE § 21-2047(a)(6) (2015).

152. *Compare* D.C. CODE § 21-2017 (2015) (declaring that a guardian "is not personally liable to third persons by reason of that responsibility for acts of the disabled adult."), *with* 755 ILCS 5/11a-18(e) (2015) (exculpating guardian liability only when it arises from an agency relationship).

153. D.C. CODE § 21-2047(a)(1)-(3) (2015). In interpreting the statute in full, the best interests and substituted judgment are likely tied to the guardian's understanding of the disabled adult's "capabilities, limitations, needs, opportunities, and physical and mental health," as well as the guardian's knowledge of the disabled adult's property and need for protection. *Id.*

154. Sulmasy & Snyder, *supra* note 143, at 1504.

the guardian is more likely to make a decision based on his or her familial or non-familial relationship with the disabled adult.

2. Family Guardians and Professional Guardians

When a guardian must make a decision on behalf of a disabled adult but the true preferences and desires of a disabled adult are unknown, there is a chance that the guardian will choose the wrong decision.¹⁵⁵ Because it is hard to decipher the idiosyncratic and sometimes private preferences of an individual,¹⁵⁶ it is estimated that only 65% of decisions made on behalf of a disabled adult accurately depict what the disabled adult would likely desire.¹⁵⁷ A guardian's decision-making process depends largely upon the professional or familial relationship the guardian has with the disabled adult upon appointment.¹⁵⁸

Data collected by the National Guardian Summit discloses the weight of factors that influence family and professional guardians' decisions in determining property and financial decisions on behalf of a disabled adult.¹⁵⁹ The data shows that a professional guardian is more likely to use a substituted judgment approach by considering what the guardian believes the disabled adult would want, while a family guardian is most likely to consider the disabled adult's best interests.¹⁶⁰ A family guardian is more concerned than the professional guardian when making a decision that could result in harmony among existing family members, while a professional guardian is more likely to consider the opinions of investors or accountants.¹⁶¹ The family guardian is more inclined to make a decision based on the objective view of the whole family while a professional guardian is likely to make a decision based on the disabled adult's subjective views.¹⁶² These statistics reveal that a family guardian would want to keep investments within the family

155. Boni-Saenz, *supra* note 42, at 1259-60.

156. *Id.*

157. See Nina A. Kohn and Jeremy A. Blumenthal, *Designating Health Care Decisionmakers for Patients Without Advance Directives: A Psychological Critique*, 42 GA. L. REV. 979, 994 (2008) (noting that this survey considered over 20,000 separate cases of disabled adults who were patients receiving health care).

158. 6 ILL. JURISPRUDENCE PROBATE, ESTATES AND TRUSTS § 42:01 (Matthew Bender & Co. 2015); see also Estate of Barr, 492 N.E.2d 1241, 1246 (Ill. App. Ct. 1986) (stating that the disabled person's sister, his limited guardian, had no self-serving motives but was concerned with his financial welfare).

159. Sulmasy and Snyder, *supra* note 143, at 1524.

160. *Id.*

161. *Id.*

162. *Id.* at 1534. In considering a decision, a guardian will likely rely on "current conversations, the guardian's knowledge of the incapacitated person's values and preferences, and what others told the guardian about the incapacitated person's values and preferences." *Id.*

while a professional guardian would consider a more pragmatic utilization of an estate.¹⁶³

The standards used to govern the effectiveness of a guardian are more stringent for a professional guardian than a family guardian.¹⁶⁴ For instance, courts hold that professional guardians are held to a higher standard due to their profit motives in lieu of a bloodline connection, while courts are more reluctant to have burdensome standards placed on family guardians due to their “good Samaritan” status.¹⁶⁵ Family guardians make the argument that if they were held to the same standard as a professional guardian then their decisions and recommendations made on behalf of the disabled adult might receive more support from the court.¹⁶⁶ The discretion a court uses in adopting a recommendation by a guardian is based on the decision-making approach to be used as proscribed by statute and the relationship of a guardian to the disabled adult.¹⁶⁷

B. Consequences of Neglect and Abandonment Under the Rules of Intestacy

Scholars suggest that the primary role of intestacy is to distribute the assets of one who dies intestate in a manner that the decedent would have opted for had a will been effectuated.¹⁶⁸ On the other hand, a family-oriented inheritance system that falls short of considering the deceased’s intent, prior relationship with the heirs, or the amount of support paid or affection given, is a flawed system that requires statutory reform.¹⁶⁹ For example, in a majority of states a parent that abandons his or her child shall still receive an inheritance from the abandoned child’s estate.¹⁷⁰ And even though all states may disinherit an heir that slays the decedent, only a small handful of states punish an heir for misconduct such as abuse or financial exploitation of a disabled person.¹⁷¹ A state’s hesitation

163. See Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N. C. L. REV. 199, 205-6 (2001)(arguing that the family paradigm’s true function in utilizing inheritance law is to preserve the family unit, not necessarily to support an individual).

164. Boxx and Hammond, *supra* note 9, at 1235.

165. *Id.*

166. *Id.* at 1236.

167. See *supra* Part III.A.

168. See Rhodes, *supra* note 83, at 518 n. 12 (citing Allison Dunham, *The Method, Process and Frequency of Wealth Transmission at Death*, 30 U. CHI. L. REV. 241 (1963)).

169. See Foster, *supra* note 163, at 204, 222 (stating that proposed reforms fall short of meeting the needs that social welfare demands due to a family-oriented inheritance system).

170. For a list of states that do exclude abandoning parents from inheritance, see Rhodes, *supra* note 73, at 983.

171. See *id.* at 976 (discussing the slayer statute); *id.* at 986 n. 48 (listing states that bar inheritance for conviction for abuse).

to enact statutes that limit inheritance for misconduct or abandonment reflects the legislature's intent not to disrupt the family model of inheritance; however, this creates a diminished allocable share among non-abandoning and deserving heirs because misbehaving heirs are apportioned part of the same estate.¹⁷²

1. *Abandonment of a Child*

There are only eleven jurisdictions, Illinois included, which has enacted a statute that disinherits a parent from receiving an abandoned child's estate.¹⁷³ Based on the abandoning parent statute within Illinois specifically,¹⁷⁴ a parent that normally would be entitled to their deceased child's inheritance may not receive anything where the parent either did not support the child or had abandoned the child for more than a year immediately before the child's death.¹⁷⁵

When the case of *Estate of Howell* was heard, Donald was no longer a minor thus the abandonment statute could not apply,¹⁷⁶ however the fact that Donald Bernard abandoned Donald during his first eighteen years of his life merits a discussion of the abandonment and neglect statutes. The facts surrounding Donald Bernard's abandonment shows that he was in jail for thirteen of the first fifteen years of Donald's life, was not significantly involved in Donald's minor life after his release, and contributed a small total amount of \$400 for support during Donald's childhood.¹⁷⁷

Illinois and South Carolina are the only two states where a judge may consider the circumstances of the abandonment, including abandonment or failure to support the disabled adult, to determine how much of the inheritance is owed to the parent.¹⁷⁸ The policy backing his law is to allow a minor's wishes and interests to influence the judge's decision on what the abandoning parent may receive.¹⁷⁹ For example, if Donald had passed before attaining the age of majority, the court would consider how much influence would Donald Bernard's single contribution of support or a brief visit with

172. *Id.* at 977.

173. *Id.* at 983.

174. See 755 ILCS 5/2-6.5 (2015) (stating that "[a] parent who . . . has willfully deserted the minor or dependent child shall not receive any property, benefit, or other interest by reason of death," though the court can make considerations in deciding how much to deduct from the parent's a disabled adult). For a list of all other state statutes regarding abandonment or neglect of a child, see Rhodes, *supra* note 73, at 982-85.

175. 755 ILCS 5/2-6.5 (2015).

176. See 755 ILCS 5/2-6.5 (2015) (regarding the guardian and only the deceased minor or dependent child); *but see* 755 ILCS 5/2-6.2 (2015) (permitting heir liability where neglect and financial exploitation of an elderly or disabled person is found by a preponderance of the evidence).

177. *Estate of Howell v. Howell*, 36 N.E.3d 293, 296 (Ill. App. Ct. 2015).

178. Rhodes, *supra* note 73, at 985 n.45-46.

179. *Id.* at 985.

his son have in the judgment granting full, partial, or no inheritance? Enactment of abandonment statutes can act as a powerful tool to encourage supporting one's children and to maintain a strong parent and child bond, while punishing those who do not conform to society's idea of a modern supportive family.¹⁸⁰

2. *Abuse and Neglect of a Child or Disabled Person*

Similar to Illinois's child abandonment statute, a judge has discretion in allowing a partial or full inheritance based on whether the heir is convicted of abuse, financial exploitation, or neglect.¹⁸¹ There are several states that have statutes that may apply to children, disabled adults, or both.¹⁸² The Illinois statute, however, only applies to elder people or people with a disability.¹⁸³ Each statute also has different requirements to be met—for example, Maryland's statute only applies if there is financial exploitation, and Oregon's statute does not bar inheritance where a conviction occurred five years or more before the death of the decedent.¹⁸⁴ The astounding fact is that only six jurisdictions have this type of statute enacted;¹⁸⁵ the majority of these particular jurisdictions may disagree with the premise that “[t]he abusive behavior of those targeting a vulnerable population merits a disinheritance.”¹⁸⁶ It is time that each jurisdiction review their probate code to prevent against such misbehavior.

180. See Rhodes, *supra* note 83, at 537 (quoting, “[a] statute specifically excluding a willfully abandoning parent from participating in a deceased child's estate is undoubtedly a powerful and direct remedy to unfair distribution and it should be included in all jurisdictions' intestate provisions.”); Monopoli, *supra* note 68, at 264-65 (stating that abandonment statutes helps to establish paternity and to punish a parent for failure to acknowledge or support their child).

181. 755 ILCS 5/2-6.2 (2015).

182. Rhodes, *supra* note 73, at 986 n.48-49.

183. See 755 ILCS 5/2-6.2(b)(2015)(stating that those “[p]ersons convicted of financial exploitation, abuse, or neglect of an elderly person or a person with a disability or persons person with a disability or persons who have been found by a preponderance of the evidence to be civilly liable for financial exploitation” are barred from inheritance).

184. Susan N. Gray, *Symposium: The Uniform Probate Code: Remaking American Succession Law: Article: The Probate Definition of Family: A Proposal For Guided Discretion in Intestacy*, 45 U. MICH. J.L. REFORM 787, 809-10 (2012).

185. Rhodes, *supra* note 73, at 986 n.48-49.

186. See Anne-Marie Rhodes, *Blood and Behavior*, 36 ACTEC L.J. 143, 173-75 (2010) (summarizing the California legislature's intent in enacting a statute which disinherits those who abuse elders).

IV. ADVOCATING FOR NATIONWIDE RECOGNITION OF THE HYBRID STANDARD AND EXCEPTIONS TO THE RULES OF INTESTACY THAT BAR MISBEHAVING HEIRS

Not only does this proposal aim to tweak existing Illinois law, this proposal mainly is to promote the aforementioned Illinois laws as the most equitable set of laws in the United States that provide for those in a situation similar to Donald and his family. Other jurisdictions ought to consider the hierarchical standard and the multiple statutes that disinherit misbehaving heirs in contemplating their own probate laws in light of today's less stringent standards that was once historically placed on heirs based solely on blood-relations.

Further, within Illinois and other states, there exists limited case law and statutory guidance regarding how a guardian must act when representing a disabled adult.¹⁸⁷ In reaching a decision, courts must review conflicts of interest and a guardian's authority to make a decision,¹⁸⁸ which can take time and disturb a long contemplated and thought out decision that the guardian believes would be necessary and fair. A guardian, especially a family guardian, is given more statutory preference in their decisions due to their supportive relationship with the disabled adult and knowledge of the disabled adult's tendencies and needs. Therefore, this proposal also recommends that a family guardian always be nominated instead of a professional guardian.

A. Guardians and Hierarchical Standard Proposal

Other states should take heed to Illinois's hierarchical approach because it promotes the policy that deserving heirs should receive over misbehaving heirs based on today's need for a strong modern family. Today, the Illinois legislature is proactive in staying current with ensuring policies expressed in case law is reflected in the probate code. Illinois has revised their law to allow disabled adults without testamentary capacity to create a will or codicil.¹⁸⁹ Creating a trust under the Illinois statute also ensures that guardians in certain circumstances have unequivocal power in

187. Whitton and Frolik, *supra* note 111, at 1534.

188. Boni-Saenz, *supra* note 42, at 1274. It is not always clear when the judges need to evaluate a decision in order to approval it. *Id.* For example, they may evaluate tax effects and gifting from an estate but judges may be incompetent to evaluate a more personal decision when the judge is neither aware of underlying facts nor can clearly ascertain the disabled adult's desires. *Id.*

189. 755 ILCS 2/11a-18(d-5) (2016). The statute allows for wards to make a will if they are under guardianship, or otherwise the ward can make a will upon showing a physician's report stating that the ward has testamentary capacity. This legislation was passed soon after *Estate of Howell* was heard.

decision-making where the court need not assess the decision.¹⁹⁰ Illinois can also consider changing the newest statute and allow more express decision-making powers to guardians for enacting trusts or other estate planning instruments.

Illinois can consider adding more guidelines to the statute. For example, if the guardian can prove no one else is in a better position to have been appointed then he or she may create certain trusts or wills excluding family members, where those excluded family members may petition the court only after the disabled adult's death to be a beneficiary of the granting instrument. Implementing these minor changes in laws will grant wider latitude in creating estate plans for disabled people, as well as remove procedural hurdles for the guardian and increase efficiency within the court system.

B. Preference of Family Guardians Over Professional Guardians

The Illinois Probate Act was fashioned so if the disabled adult's wishes could not be ascertained then the guardian would need to make the best decision.¹⁹¹ This makes the court's appointment of the proper guardian very important because the court gives discretion to the guardian's decision-making procedure, including a guardian's decision to nominate his or herself as beneficiary of the ward's estate. Thus, in appointing a guardian, the court should envision whether a particular guardian beneficiary will engage in a good faith fiduciary relationship with the disabled adult;¹⁹² this ensures that the disabled adult is taken care of and in return society views the guardian's beneficiary interest as equitable. In a situation similar to *Estate of Howell*, the court should only be considering a family guardian.¹⁹³

190. In authorizing a guardian action, current law requires a petition that "outline[s] the action or application of funds for which [the guardian] seeks approval," the results sought, and any tax savings to be accrued. The court may also direct the guardian to give notice to all interested persons. *Id.* at 5/11a-18(a-5).

191. *Estate of Howell v. Howell*, 36 N.E.3d 293, 300 (Ill. App. Ct. 2015).

192. Other considerations when appointing guardians include the "closeness of relationship with the disabled adult (*e.g.*, family or friend), familiarity with the disabled adult's wishes, proximity, professional experience and skills (*e.g.*, nurse or social worker), reliability, availability, age, and health". Sara Spitler, *Guardianship and Receivers*, in CHANCERY AND SPECIAL REMEDIES § 10.10 (Ill. Inst. for Cont. Legal Educ. 2013).

193. *But see* David Baker and Sarah Severson, *Litigation in Illinois Guardianships*, in ESTATE, TRUST, AND GUARDIANSHIP LITIGATION § 16S.27 (describing a case where the court "refused to assume that a parent would be preferred over a non-parent indicating that the statutory and case law preferences for parents in minor guardianships would carry less weight in a dispute regarding an adult guardianship) (citing *In re Estate of Johnson*, 284 Ill.App.3d 1080, 1091 (1996)).

In making financial decisions on behalf of the disabled adult, the family guardian typically considers other family member's views, consensus among family members, and what the guardian would do in the disabled adult's circumstances.¹⁹⁴ However, a professional guardian relies on written directions and current conversations gathered about the disabled adult.¹⁹⁵ A family member who might have taken care of the disabled adult since birth will have a better understanding of the disabled adult's needs or desires than a professional could ever gather during an appointment. That concept can be seen in *Estate of Howell*, where personal care and time spent with the cognitively disabled adult cannot be replicated into document format for a professional to thoroughly understand. For this reason, a family guardian should always be appointed, when possible, as guardian for a disabled adult who has been permanently disabled since birth.

Furthermore, a family guardian should be held to a lower threshold for creating a financial decision for the disabled adult if it is shown no one else could act on the disabled adult's behalf as well as the guardian and the general public would see the decision as favorable in improving the disabled adult's lifestyle needs. These proposals facilitate the best of the hierarchical standard and incentivize family guardians to take upmost care of the disabled adult. The standard measuring potential neglect or abuse of the financial decision should be a high burden on the party opposing the decision. However, if the guardian did commit neglect or abuse, then the punishment should be reducing or completely barring the guardian's inheritance in order to deter self-dealing behavior of family guardians.

C. Rules of Intestacy and Abandoning Parent Proposal

As mentioned in the analysis and background, Illinois has many statutes that disinherit non-deserving heirs. One statute that should be revised is the one that provides for disinheritance based on financial exploitation, abuse, or neglect of the disabled or the elderly.¹⁹⁶ Illinois should amend this statute to provide also for children.¹⁹⁷ Currently, there is only one jurisdiction that has enacted statutes that provides for disinheritance for abuse of an elder, disabled person, or child.¹⁹⁸ While Illinois has a rule which

194. See Boxx and Hammond, *supra* note 9, at 1533.

195. *Id.*

196. 755 ILCS 5/2-6.2 (2015).

197. See Rhodes, *supra* note 73, at 986 n. 48-50 (noting the varying types of abuse and neglect statutes that the handful of states have adopted).

198. See MD. CODE ANN, EST. & TRUSTS § 3-111 (West 2007) (barring a parent's inheritance from a child if, *et al.*, the parent sexually abused or raped the child); MD. CODE ANN, EST. & TRUSTS § 8-801(e) (West 2017) (disqualifying a potential heir from inheritance if they, with fraud or deceit, obtain a disabled

bars an heir from inheriting completely or partially for financial exploitation, abuse, or neglect of a disabled adult,¹⁹⁹ and another that bars a parent's inheritance when he or she has neglected or failed to support a child before the child's death,²⁰⁰ neither of these can adequately protect one who is in the position of Donald. For full protection of the estate, disabled adults need laws that protect the estate from one who has defrauded or sexually abused the ward.²⁰¹

A proper solution would involve a synthesis of the Illinois statutes pertaining to a parent neglecting a child and an heir abusing a disabled adult, as well as implementing punishment for the abandonment of a child or a disabled adult. If such a statute is properly created, it would deter disinherited heirs from bringing lengthy will contests where they must prove by a preponderance of the evidence that they were wrongfully barred.²⁰² This is for two reasons: first, not many will contests are brought in the first place, and second, the disinherited heir's character will have already created a negative impression with the court and the heir may feel that a chance of success does not exist.²⁰³ Such a statute should set certain standards regarding whether an abandonment of a disabled adult has occurred. The standard should adopt conditions referring to the last time an heir paid support and continued to support the heir,²⁰⁴ whether the court may deem that abandonment has indeed occurred,²⁰⁵ and an agreement on a statutory definition of parent.²⁰⁶

The statutory definition of a parent should encourage the public policy that blood parents may not always be entitled to an inheritance. For example, a two-pronged definition of parent may state, "the act of becoming a parent (birth or adoption) coupled with the acts of being a parent (care and nurturing of the child)."²⁰⁷

adult or elder person's property and do not restore the property to its rightful owner before the owner passes).

199. 755 ILCS 5/2-6.2 (2015).

200. 755 ILCS 5/2-6.5 (2015).

201. *See* Tate, *supra* note 69, at 142 (considering one's power to disinherit raises questions of undue influence, mental capacity, fraud, or duress, therefore a check on testamentary freedom is merited).

202. *Id.* at 144.

203. *See id.* (stating that disinherited heirs would likely perceive the will as being fair and would not want to further embarrass oneself by advocating for change in the will.)

204. *See e.g.*, N.C. GEN. STAT. § 31A-2 (2014) (stating a parent has a right in a child's inheritance "where the abandoning parent resumed its care and maintenance at least one year prior to the death of the child and continued the same until its death."); N.Y. EST. POWERS & TRUST LAW § 4-1.4 (Consol. 2015) (barring a parent from inheritance "unless the parental relationship and duties are subsequently resumed and continue until the death of the child.").

205. *See* OHIO REV. CODE ANN. § 2105.10(D)(2) (LexisNexis 2015) (requiring an estate's administrator to file for approval of adjudication of an abandoning parent with the court before the parent is barred from inheritance).

206. Rhodes, *supra* note 83, at 517.

207. *Id.* This weight of this definition is divided between a direct familial link and the policy view that a parent should act as a supportive and nurturing

Applying this definition to Donald Bernard, there is no question that he is the actual father of Donald, but a court would have to decide whether his relationship and support with Donald aligns with the second half of the proposed statutory definition. The statute should also provide that facts and circumstances from the disabled person's child and adult life are admissible so that the court is in the best position to hear any argument for or against the adjudication of an abandoning parent.

The aim of the proposed statute is to upset the American view of the family paradigm—the idea that closest related blood relatives are always entitled to inheritance.²⁰⁸ This proposal promotes the modern family, where opportunity and equality in estate planning among preferred family members is promoted.²⁰⁹ The statute should disallow a laughing heir from gaining a share of an estate, or one who has never created a positive and supportive relationship with the decedent.²¹⁰ But, such a disruption of the historically accepted yet outdated family paradigm seems to deter many state legislatures to move forward and protect the vulnerable individuals.²¹¹ Therefore, in creation of an inheritance barring statute, a legislature must be aware of how a law would change familial behavior and should thus create one that policy would deem appropriate and that does not entirely infringe on familial ties. Legislature can promote a shift in policy that focuses on an individual's right to distribute to close family members as he or she sees fit while the court protects the estate from those who deserved to be barred.²¹²

V. CONCLUSION

The ruling in *Estate of Howell* and the statutory adoption of the hierarchical substituted judgment and best interest hybrid

parent. *Id.*

208. Proponents for the rules of intestacy argue that the distribution scheme “take[s] into account the pattern of distribution that survivors would consider fair” and so comports with provisions that “an average property owner would be most apt to favor,” though scholars admit “where the social interest at stake is of “overriding” importance” there is conflict with intestate decedents. Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of its Context*, 73 *FORDHAM L. REV.* 1031, 1034-35 (2004).

209. Foster, *supra* note 163, at 240.

210. *See id.* (defining a laughing heir as one who laughs, as opposed to grieves, upon the decedent's passing because of realizing a windfall merely due to blood ties).

211. *See* Rhodes, *supra* note 73, at 977 (referring to statutory bars to inheritance, “[l]egislatures have not moved boldly in this area, perhaps reflecting a general reluctance to wade too far into family matters, allowing a zone of privacy for the day to day details of family affairs.”).

212. *See* Tate, *supra* note 69, at 159 (arguing that an individual's right to acquire and possess property also encompasses the right to devise the property how he or she fits even if the decedent intended to disinherit another).

standard affirm that Illinois has created legislation that permits equitable treatment of disabled adults whose testamentary capacity can never be manifested. While traditional laws that promote intestacy or the decision-making ability of a guardian weigh down some states, Illinois has proven with *Estate of Howell* that it is the most progressive of any jurisdiction in dealing with issues regarding guardianship and estate planning. To further an individual's rights, be it the rights of a minor, disabled adult, or guardian, a jurisdiction should adopt statutes that give an opportunity for equal treatment among those deserving of a loved one's estate.

