From the Desk of the President

Over the years, I have always been proud of the role NCPJ has played in advancing education and awareness of probate matters. The many important issues we face as probate judges mandate outreach and coordination with other organizations that enhance and compliment the overall goals of the NCPJ.

I would like to take this opportunity to highlight just a few examples of our organization’s contribution on a national level: NCPJ has provided input, from a judicial perspective, to the National Conference of Commissioners for Uniform State Laws. NCPJ is also participating in a joint project with ACTEC and the National Judicial College to create online probate education modules available to judges throughout the country. Within NCPJ, we are organizing an effort.

I would invite anyone with an interest in probate to attend the upcoming conference in Santa Fe, New Mexico to meet your fellow probate judges and experience the quality of the probate related education programs.

For those NCPJ members, I would encourage you to contact me, or any of the executive committee members, to find out how you can get involved with the various NCPJ projects nationwide.

It is my distinct privilege to serve with so many knowledgeable and dedicated executive committee members. The time and effort the members put into the various programs and projects are a credit to the organization.

Apportioning the Mother Emanuel Hope Fund

By Laura Evans

June 15, 2015—a date no Charlestonian will ever forget. On that evening, an admitted white supremacist entered the Emanuel AME Church (“Mother Emanuel”) and killed nine innocent worshippers who had welcomed him to a Bible study with open arms. Three survivors remained, all of whom bore witness to the unbelievably heinous act. Mother Emanuel is the oldest African Methodist Episcopal Church in the south and co-founded by Denmark Vesey. Booker T. Washington and Martin Luther King, among others, have graced its pulpit.

Within days, with the city still reeling from loss, the Charleston County Bar went into action. I was lucky enough to chair the pro bono committee formed to provide assistance to the victims’ families and survivors. Their grace would humble all who volunteered.

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“Hate cannot drive out hate; only love can do that.”

– Martin Luther King

Of concern for the City of Charleston and longtime Mayor Joseph P. Riley, Jr. was distributing the millions of dollars donated to the City’s Hope Fund in honor of the victims and survivors. Donations poured in from across the nation, as well as from international donors. Mayor Riley asked me to spearhead development of an allocation formula and to oversee the distribution process. Thankfully, one of the nation’s top legal experts in mass settlements, Joseph F. (“Joe”) Rice, practices law in Charleston and quickly volunteered.

Mayor Riley’s sole charge to us was to be “fair” and “transparent.” While he had several priorities, he largely left it to us. After several brainstorming sessions with accounting, political, and tax experts (to ensure the distributions were tax free), and after obtaining input from renowned mass injury settlement fund expert Ken Feinberg, we set to work developing a formula. While we took lessons from the settlement fund formulas for the World Trade Center, Boston Marathon, Virginia Tech, and Columbine tragedies, none fit our situation perfectly. All but one of the victims died intestate and the social circumstances of each family varied dramatically. We also had three survivors—one adult who witnessed the shooting and whom the shooter “spared” so she could “tell the story,” and the wife and young child of Pastor and State Senator Clementa Pinckney who hid in an adjoining office, but heard everything.

For several weeks, we struggled with the right balance. Joe is a renowned trial attorney in the plaintiff’s bar—I am on the defense side. We agreed to treat it like a mediated settlement—when we reached a point of honestly saying we would recommend it to our respective “sides” were we in litigation, we would be done. As Joe repeated throughout the process, “never let the perfect get in the way of the very, very good.”

We finally settled upon a “classification” approach. If an individual met the requirements of a specific “classification,” he or she would be entitled to a formulaic distribution thereunder. If an individual met more than one “classification,” he or she could “stack” distributions. The formula was as follows:

- 10% of the fund was allocated to the “surviving minors” (<18 years of age and lost a parent). Because all were close in age, we elected not to weight ages.
- 5% of the fund was allocated to the college aged dependents (>18, enrolled in school, and lost a parent). Because these recipients were at varying stages of their college careers, we developed a sub-formula based upon the number of semesters each had remaining in a 4 year cycle.
- 25% of the fund was allocated to survivors (any person present at Mother Emanuel during the event), distributed pro rata per survivor. Some argued we should treat the survivor who witnessed the shooting differently than the survivors in the adjoining room, who only heard the event. We ultimately determined that we could not differentiate the psychological trauma of one seeing an event and one hearing an event. This was especially true because (to be continued page 3)
Presentation of the Treat Award for Excellence for Excellence

At the NCPJ 2016 Fall Conference in Charleston, South Carolina, Shale Stiller, adjunct faculty member at Maryland Carey Law, was awarded the 2016 Treat Award for Excellence. The award, named in honor of the NCPJ's founder and first president, the Hon. William W. Treat, is given annually to an individual who has made significant contributions to the field of probate law.

Stiller was nominated for the prestigious award by Sol & Caryln Hubert Professor of Law Paula Monopoli, the founding director of Maryland Carey Law's Women, Leadership and Equality Program. A trusts and estates, probate, and inheritance law scholar and teacher herself, Monopoli is also the author of American Probate: Protecting the Public, Improving the Process (Northeastern University Press 2003).

Emphasizing Stiller’s more than fifty years of service as an adjunct faculty member at Maryland Carey Law in her nomination letter, Monopoli described Stiller’s Federal Estate & Gift Tax course as “legendary among students for its rigor and the interest it sparks in those who have gone on to become estate planning lawyers.” Since he began teaching in 1963, Stiller has also instructed classes in Commercial Law, Constitutional Law, Federal Jurisdiction, and Taxation of Non-Profit Organizations.

Mother Emanuel (continued from page 2)

the two survivors who heard the event were in fear of their lives and one was a young child.

- 55% of the fund was allocated to the “decedent beneficiaries.” Because the majority of the decedents died intestate, this was defined as any person who would have benefitted from the decedent’s estate under the applicable probate intestacy statute. The total percentage was split pro rata per victim family, nine in all. The monies were then distributed within each family in accordance with the intestacy statute.

- 5% of the fund was allocated to “Special Needs Claimants.” Because our committee had developed close ties to the families and survivors, we suspected that special circumstances existed where victims supported extended family members and friends. This ranged from a victim assisting a nephew with school expenses to a victim assisting a neighbor with home improvement expenses. These funds were set aside and a “claim application” developed. A claimant had to provide proof of pre-death support and make a showing that it likely would have continued post-death. Each claim was capped at $2500.00. No individual who took under any other “classification” was eligible to apply as a “special needs claimant.”

Once the formula was developed and approved by the city, a meeting was arranged with the families, survivors, Mayor Riley, and other city personnel. In this meeting, the formula was explained and everyone was given a chance to offer feedback. Always gracious, the families and survivors approved of the formula and the initial distribution was initiated. We strongly believed that family and survivor “buy in” was vital.

A local partner, South State Bank, agreed to act as trustee and pro bono tax counsel drafted a trust agreement. Because Mayor Riley rightfully insisted that we act quickly, the initial distribution ($2.5m) was completed in October of 2015. For each distribution, we required that the recipient sign and acknowledge the allocation formula and the amount calculated thereunder. Once the check was received, the recipient was required to sign an acknowledgement of receipt and a release as to the City, our law firm, the Charleston County Bar, and South State Bank. Two subsequent distributions were made in 2016, and thereafter the fund closed.

There is always triumph after tragedy. I am proud to say that many of the Hope Fund recipients have started non-profits and/or foundations to honor their loved one’s legacies.

The way our city handled the tragedy is a testament to our citizens. As Martin Luther King said “Hate cannot drive out hate; only love can do that.” We proved him right.

#CharlestonStrong

NCPJ President, Frank Bruno, presenting the Treat Award for Excellence to Shale Stiller, adjunct faculty member at Maryland Carey Law

“There is always triumph after tragedy.”
Constitutional Considerations When Restricting Access to the Proposed Ward in Contested Guardianship Proceedings

By Hon. Brenda H. Thompson, Mark R. Caldwell, and Sarah V. Toraason

I. Introduction

While the collection of guardianship data from a national perspective remains imperfect, the number of guardianship proceedings appear to be on the rise in the United States. This trend will likely increase. According to the U.S. Census, in 2050, the population aged 65 and over is projected to be 83.7 million, almost double its estimated population of 43.1 million in 2012. In addition to the elderly population growing, this population is living longer while diseases and dementias are increasing—conditions that will only potentially breed more guardianship proceedings.

Brenda K. Uekert and Richard Van Duizend, in their article entitled Adult Guardianships: A "Best Guess" National Estimate and the Momentum for Reform, report:

By 2050, the number of people age 65 and older with Alzheimer’s disease may nearly triple, from 5 million to as many as 16 million, barring the development of medical breakthroughs to prevent, slow, or stop the disease.

To reduce expensive, contested battles where parties frequently attempt to use the proposed ward as a pawn, probate judges are often forced to supervise civil visitation, much like family court judges in child custody and visitation disputes. While many probate courts routinely instruct parties not to communicate about the proceeding with the proposed ward, these restrictive instructions alone are not always sufficient.

This article highlights the probable legal constraints on, and practical issues facing, a probate court in considering whether to restrict a third party's access to the proposed ward during the pendency of a contested guardianship proceeding. Serious constitutional issues arise in issuing such orders before a guardianship is established, particularly substantive and procedural due process concerns. The constitutional right to intimate association is implicated whenever such orders are issued, and practical considerations, such as monitoring and enforcement, must be considered.

The limited, but evolving, case law in this area provides the probate courts some guidance, and we should be careful to ensure, at a minimum, that: (1) adequate procedures are in place to afford both the third party and the proposed ward reasonable notice and the opportunity to be heard; and (2) any restrictions on visitation or access are proportional to the probable harm such contact may cause the proposed ward. The most conservative approach would be to require personal service on any non-party whose access is sought to be restricted.

II. Common Visitation Issues Encountered in Contested Guardianships

Even though conventional estate planning tools, such as trusts and powers of attorney, can prevent or limit the need for a guardianship, these tools increasingly serve as the root cause of a contested guardianship proceeding, usually because of the choice of fiduciary or because the fiduciary did not have robust legal representation after appointment. Such proceedings often involve disputes between siblings over who should serve as guardian for an ailing parent, and the proposed ward’s incompetency is often not truly in dispute. In

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NCPJ Spring Conference in Santa Fe, New Mexico

Last November many of you joined us and many of our members and guests in beautiful and historic Charleston, South Carolina. Attendees enjoyed the best of Southern hospitality, culture, and cuisine along with an informative, educational program at the charming Mills House Hotel. Now we are happy to ask that you please save the dates of May 17 through May 20 to join us for our Spring 2017 NCPJ Conference in exciting Santa Fe, in enchanting New Mexico. The site of our conference will be the grand and spacious Eldorado Hotel and Spa (www.eldoradohotel.com). This magnificent venue is the jewel luxury facility of beautiful Santa Fe, offering world-class amenities to its guests. We have secured very favorable group rates for our NCPJ members who register for this important probate conference to be held in our country’s fascinating southwest. Additionally, registrants who attend our conveniently scheduled educational sessions will earn a full 9 hours of CLE credit, thereby combining professional advancement concurrently with a most enjoyable and memorable cultural experience.

Judges Tamara Curry and Frank Bruno have developed an informative and entertaining program for our spring conference in beautiful Santa Fe. On Thursday, May 18, the agenda includes a full report by Grey McKenzie, Esquire who will expound on the final revision of the Uniform Probate Code, which was drafted by the National Conference of Commissioners on Uniform State Laws. Judge Michelle Morley, Michael Kirkland, and Linda Firestone will speak about how to handle new options for elders related to high conflict families. Local attorney, Laurie Wilcox, will discuss disclaimers, releases, and post-mortem credits.

On Friday, May 19, the agenda includes a presentation on a new integrated attack on elder financial abuse and fraud. We will be provided with a presentation from The Honorable Brenda Thompson from Dallas County, Texas, along with a demonstration on how to replicate the new concept in your jurisdiction by the principals of the Elder Financial Safety Center.

On Saturday, May 20, we will be provided with a special training session called “Mindfulness for Judges” offered by Dr. Lisa Blue, a psychologist, attorney, author, and nationally recognized jury selection consultant. A presentation on visitation issues in contested guardianships will also be provided. Don’t miss this very informative CLE.

ACCOMMODATIONS: NCPJ has negotiated a conference rate of $165.00 single/double plus tax. The rates are offered three days before and after the meeting dates, subject to availability. The cut-off date to make reservations is April 15, 2017, but you are strongly encouraged to make your reservations before then, as it is very likely the NCPJ room block will fill. You may call the Eldorado at (800) 955-4455 to make your reservation, or go to the NCPJ website (www.ncpj.org) and use the online reservation link shown there.

REGISTRATION: The conference registration fee is $400.00 for members if received by April 17 and $450.00 after April 17. The fee for retired judges is $300.00. The registration fee includes all conference materials, the welcome reception, and final reception/banquet. The fee for spouses/guests is $80.00, which includes the reception and banquet.

TRANSPORTATION: Although there is a small airport in Santa Fe, it probably is a better idea to fly into Albuquerque (ABQ), since that airport is much larger and served by a number of different airlines. It is a one-hour drive straight up the interstate from the Albuquerque Airport to Santa Fe.

ACTIVITIES: The Eldorado Hotel is located in the heart of Santa Fe, America’s second oldest city. As a guest you will be within walking distance of a treasure trove of treats for history buffs, art enthusiasts, and lovers of adventurous discovery of multi-cultural delights. Only a short and pleasurable walk from the hotel are myri-ad things to see and do: Downtown Santa Fe (1 block), Santa Fe Plaza (2 blocks), New Mexico History Museum (2 blocks), the Palace of the Governors (2 blocks) and many other equivalent attractions are located within a radius of a few thousand feet of the hotel. Daily historic cultural walking tours depart from the hotel every afternoon at 1:30 p.m. ■
Constitutional Considerations (continued from page 4)

these instances, the probate court must determine if any applicant is disqualified, and if neither is disqualified, which of the competing applicants is more suitable.

The competing applicants will often identify each other’s perceived deficiencies, including arguing that: the opponent is indebted to the proposed ward by reason of improperly receiving her property; the opponent wants to put the proposed ward in a nursing home; the opponent is using the guardianship process to simply take control over the proposed ward’s estate and use it how they see fit; and the applicant is truly the person the proposed ward “really wants” as his or her guardian.

One goal of these arguments is, of course, to curry the proposed ward’s favor during the pendency of the proceeding, in hopes of convincing the court that she has the proposed ward’s “blessing.” Some parties are so determined to maintain their perceived “favored” position that almost every interaction with the proposed ward invariably reverts to advancing their own agenda, instead of behaving in a manner consistent with the proposed ward’s best interest. In these cases, the Court must sometimes restrict, and in rare cases deny, such a party access to the proposed ward during the pendency of the case.

III. Relevant Legal Principles and Special Considerations in Limiting Access

A. The Doctrines of Parens Patriae and Best Interest

The purpose of a guardianship proceeding is to promote and protect the well-being of an incapacitated person. The state’s role is that of a protector who acts in parens patriae towards the incapacitated person. Parens patriae literally means “parent of the country,” and refers to the role of the state as guardian of persons under legal disabilities, such as juveniles or incapacitated persons. Under this doctrine, it is “the right and duty of the state to step in and act in what appears to be the best interests of the ward,” as stated by the court in the Matter of Guardianship of L.W., 167 Wis. 2d 53, 76, 482 N.W.2d 60, 68 (1992).

In In re Hoke, 2003-Ohio-4704, 2003 WL 22064121, the court held that a probate court generally has “broad power in all matters touching guardianship.” In Bower v. Bourne-Bower, 469 Mass. 690, 698, 15 N.E.3d 745, 752 (2014), the court held these “broad and flexible inherent powers [are] essential to the court’s duty to act in the best interests of persons under its jurisdiction.” In selecting a guardian, a court must exercise its powers in the best interests of the ward. No person has an absolute right to serve as a guardian because to be a guardian is a privilege, with a concomitant duty, conferred by the trial court in its discretion.

The Uniform Guardianship and Protective Proceedings Act (UGPPA) has significantly influenced the development of guardianship law from a policy perspective. The 1997 UGPPA included a mandate to consider the ward’s expressed desires and personal preferences in addition to the traditional best interest doctrine, as it requires that a “guardian at all times shall act in the ward’s best interest.”

These parens patriae and best interest concepts naturally apply to visitation and access issues. After all, a probate court has the inherent power to resolve visitation and access issues after the establishment of a guardianship. If a court properly obtains valid jurisdiction over the parties and proposed ward, it follows that it would have the power to resolve access and visitation issues that arise during the pendency of a contested guardianship.

B. Basic Jurisdictional Concepts

The process of attaching the court’s jurisdiction over third parties is nuanced, especially where they are “inactive litigants” entitled to some form of statutory notice. A court’s power to restrict someone’s access before a guardianship is even established is significantly limited by such person’s substantive and procedural due process rights, and his/her First Amendment right of association. From a procedural due process standpoint, it is doubtful that a probate court could simply issue an order re-
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stricting someone’s access to the proposed ward without actual notice to such person (even if the guardianship proceeding is in rem). It is also unclear as to how far a court could go in issuing such an order with respect to a non-resident person—especially if the guardianship proceeding falls under the “status” jurisdiction exception first mentioned in Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877):

To render a binding judgment, a court must have both subject-matter jurisdiction over the controversy and personal jurisdiction over the parties. Accordingly, to issue an order restricting someone’s access to the proposed ward during the pendency of a guardianship proceeding, the court must have: (1) the subject matter jurisdiction to issue such an order; and (2) personal jurisdiction over the person whose access is sought be restricted.

Given a probate court’s broad parens patriae and “best interest” powers, restricting or denying someone’s visitation with, or access to, the proposed ward during the pendency of a contested guardianship proceeding likely falls within the probate court’s subject matter jurisdiction. Although subject matter jurisdiction is rarely an issue in a guardianship proceeding, personal jurisdiction—apart from the ward and the active litigants—can be problematic relative to restricting a family member’s access to the proposed ward during the proceeding. For example, in our highly mobile society, proposed wards commonly have adult siblings and/or children who reside outside the forum state. The exercise of personal jurisdiction over a defendant must not violate due process.

1. General Due Process Principles Applicable to Guardianships

Guardianship proceedings are subject to the due process requirements of the Fourteenth Amendment of the U.S. Constitution. As outlined below, both substantive and procedural due process effectively limit a court’s power to restrict access to the proposed ward during the proceeding, especially if it impacts constitutionally protected rights of association.

The 14th Amendment to the U.S. Constitution prohibits a state from depriving a person of liberty or property without due process of law. Due process under the Fourteenth Amendment encompasses both: (1) procedural due process; and (2) substantive due process. Consequently, to the extent a probate court issues an order in a guardianship proceeding that deprives a person of liberty or property, it must afford such person due process of law. Thus, a court’s order restricting someone and/or the proposed ward from seeing one another during a guardianship proceeding could violate: (1) the person’s and/or the proposed ward’s substantive due process rights, to the extent it deprives them of his/her rights to intimate association under the due process clause of the Fourteenth Amendment (and possibly the person’s and/or the proposed ward’s First Amendment rights); and (2) the person’s and/or the proposed ward’s procedural due process rights, to the extent such order is issued without notice (or without adequate notice) and without an opportunity to be heard.

2. Substantive Due Process

Substantive due process is almost always at the forefront of pre-guardianship visitation or access issues. Substantive due process “focuses on whether the government has an adequate reason for taking away a person’s life, liberty, or property.” Pittman v. Cuyahoga County Dept. of Children & Family Services, 640 F.3d 716, 729 (6th Cir. 2011). “Substantive due process . . . serves the goal of preventing governmental power from being used for purposes of oppression, regardless of the fairness of the procedures used.” Id. Generally, “substantive due process claims may be loosely divided into two categories: (1) deprivations of a particular constitutional guarantee; and (2) actions that ‘shock the conscience.’” Id. The first type involves claims based on the deprivation of a fundamental liberty interest claim and in this sense, “substantive due process provides that, irrespective of the constitutional sufficiency of the processes afforded, [the] government may not deprive individuals of fundamental rights unless the action is necessary and animated by a compelling purpose.” Id.

The First Amendment protects the right of “intimate association” that “involves an individual’s right to enter into and maintain intimate or private relationships free of state intrusion.” Freebey v. Coons, 589 F. Supp. 2d 409, 421 (D. Del. 2008), aff’d, 355 Fed. Appx. 645 (3d Cir. 2009). A “protected” relationship is “distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusion from others in critical aspects of the relationship.” Id.

In Roberts v. United States Jaycees, 468 U.S. 609 (1984), the Supreme Court generally recognized two types of constitutionally protected rights of association. One type of freedom of association is related to privacy and is protected by the due process clause—for example the freedom of association on which we base family life and personal friendship—and the second type of freedom of association is a means to another more basic end such as free speech in the political marketplace, the right of voters to cast an informed vote, or to form coalitions with other voters. While the U.S. Supreme Court has “recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the Bill of Rights,” it has “not attempted to mark the precise boundaries of this type of constitutional protection.” Bd. of Directors of Rotary Intern. v. Rotary Club of Duarte, 481 U.S. 537, 545 (1987). Such relationships may take various forms, including: marriage; cohabitation with relatives; dating relationships; personal friendships; child rearing and education; and sibling relationships.

Laws or policies that restrain intimate associations are subject either to: (1) strict scrutiny, if they impose a “direct and substantial interference” with intimate association; or (2) rational basis review, if they constitute “lesser interferences.” DeSoto v. Bd. of Parks & Recreation, 64 F. Supp. 3d 1070, 1088–89 (M.D. Tenn. 2014) and Akers v. McGinnis, 352 F.3d 1030, 1040 (6th Cir. 2003). “The Con-

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stitution protects . . . [the] freedom of intimate association, a privacy interest derived from the Due Process Clause of the Fourteenth Amendment but also related to the First Amendment.” Pucci v. Michigan Supreme Court, 601 F. Supp. 2d 886, 903 (E.D. Mich. 2009).

To survive strict scrutiny, the state must show that the state action serves a compelling state interest which cannot be achieved through “means significantly less restrictive of one’s associational freedom.” Behm v. Luzerne County Children & Youth Policy Makers, 172 F. Supp. 2d 575, 585 (M.D. Pa. 2001). The “freedom of association” issues necessarily implicated by access and visitation orders are critical. Moreover, the heightened standard of review applicable to court orders imposing a “direct or substantial interference” with protected relationships through access restriction may be constitutionally invalid if not the least restrictive alternative.

3. Procedural Due Process

Procedural due process “refers to the procedures that the government must follow before it deprives a person of life, liberty, or property.” Erwin Chemerinsky, Constitutional Law: Principles and Policies, §7.1, pg. 523 (2nd ed. 2002). The procedural guarantees of the Fourteenth Amendment only apply whenever “the state seeks to remove or significantly alter” personal interests that fall within the meaning of either “liberty” or “property” as used in the due process clause. See Paul v. Davis, 424 U.S. 693 (1976). Because guardianship proceedings are authorized and conducted under state statutes, there is “state action” sufficient to trigger the due process clause.

Guardianship proceedings, by their nature, involve constitutionally protected liberty interests. In re Guardianship of Hahn, 276 S.W.3d 515, 517 (Tex. App. —San Antonio 2008, no pet.) According to the West Virginia Supreme Court in Shamblin v. Collier, 191 W. Va. 349, 352, 445 S.E.2d 736, 739 (1994): It is axiomatic that a declaration of incompetency and the resulting appointment of a committee, guardian, or conservator to oversee an individual’s affairs may affect constitutionally-guaranteed liberty interests. One of the historic liberties which is protected by the due process clauses . . . is the right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security. The appointment of a guardian results in a massive curtailment of liberty, and it may also engender adverse social consequences. The guardian becomes the custodian of the person, estate, and business affairs of the ward; the guardian dictates the ward’s residence; the ward’s freedom to travel is curtailed; and the ward’s legal relationship with other persons is limited.

When a state action, such as a guardianship, infringes on a constitutionally protected liberty or property interest, the state must institute procedures to protect that interest. In Mathews v. Eldridge, infra, the United States Supreme Court considers three factors to determine whether a particular procedure provides constitutionally adequate due process: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. “Due process is flexible and calls for such procedural protections as the particular situation demands.” Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Essentially, the fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner” before being deprived of a liberty or property interest. Id. At the very least, the court in Mathews requires that there be due process protections in every guardianship—including any court action that potentially infringes on constitutionally protected liberty interests.

C. Specific Procedural Due Process Concerns Regarding Guardianship Jurisdiction

In our highly mobile society, it is not uncommon for all family members of a proposed ward not to reside in one state. Moreover, restricting access to a proposed ward is not limited to physical access, as destructive conduct, like manipulation, can take many different forms, especially as more and more proposed wards rely on their cellular phones. Thus, a court must know how to obtain jurisdiction over non-residents. Understanding the constitutional limits on the judicial restriction of a non-resident’s access to a proposed ward requires an understanding of the type of jurisdiction imposed. Generally, there are four different types of jurisdiction: (1) personal jurisdiction (the power of a court to render a binding judgment against a defendant); (2) in rem jurisdiction (the power of a court to act with regard to property within its borders); (3) quasi in rem jurisdiction (the power of the court to enter a judgment for an amount of money up to the value of the property); and (4) status jurisdiction (the power of the court to decide the status of the litigants). In personam, in rem, and status jurisdiction are the most frequently encountered, and reflect significant differences in their approach to notice, both historical and contemporary.

1. A Brief Historical Overview of Key Jurisdiction Principles

The evolution of modern theories on state court jurisdiction can be traced back to the 1877 landmark U.S. Supreme Court case of Pennoyer v. Neff, supra. Eventually, courts and legislatures gradually loosened the rule requiring a defendant to be served with process within the state’s boundaries before a court could render a binding in personam judgment. When seeking to restrict or deny a non-resident’s access to a ward during a contested guardianship, the validity of a probate court’s jurisdiction over such non-resident
will be analyzed under International Shoe’s minimum contacts test—regardless of whether the guardianship proceeding is characterized as in rem or in personam. In International Shoe Co. v. Washington, 326 U.S. 310 (1945), the Court announced a new standard for determining personal jurisdiction over non-residents:

Due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend “traditional notions of fair play and substantial justice.”

The legal fictions created by the Court in Pennoyer continued to apply to in rem cases until 1977, when the U.S. Supreme Court decided the landmark in rem case of Shaffer v. Heitner, 433 U.S. 186 (1977). Prior to Shaffer, the rules relating to in personam and in rem jurisdiction had developed separately. As one scholar notes, Shaffer consolidated the illogically bifurcated system of in rem and in personam jurisdiction, which emphasized due process for some but ignored due process for others, into a single theory designed to provide due process for all. Many scholars have noted that while in rem proceedings may have been a useful jurisdictional device to obtain jurisdiction over a nonresident defendant during the days of Pennoyer, state long-arm statutes have essentially eliminated the need to resort to such in rem arguments.

2. The Importance of Notice

Due process of law, as applied to the states through the Fourteenth Amendment, requires that for a judgment to be binding, a court must first obtain jurisdiction over the parties to a suit. Service perfects the court’s personal jurisdiction over the party. In Omni Capital Intern., Ltd. v. Rudolf Wolff & Co., Ltd., 484 U.S. 97, 104 (1987), the Court held that, “A judgment entered without notice or service is constitutionally infirm.” In other words, without valid service of process, a trial court does not obtain personal jurisdiction over the defendant. A judgment entered by a trial court before it acquires jurisdiction of the parties, is void.

Consequently, proper service on the party whose access is sought to be restricted during the pendency of a contested guardianship becomes crucial. Historically, the classification of an action as in rem or in personam was considered important with regard to the citation required to establish jurisdiction. Today, however, the historical differences for the types of notice required in in personam and in rem proceedings are being whittled down by modern technology and corresponding fundamental notions of fairness.

3. In Personam and In Rem Notice Compared

Many states refer to guardianship proceedings as in rem proceedings. Other states seem to take a more nuanced view and note that jurisdiction over persons under guardianship involves both rights in rem and rights in personam and, at least, with respect to original proceedings for the appointment of a guardian are primarily in personam. While it may appear that these classifications govern what type of notice is constitutionally sufficient when seeking to restrict a person’s access to the proposed ward, the issue of adequate notice more appropriately depends on the reasonableness of the notice and the opportunity to be heard as opposed to rigid rules of the past.

In personam jurisdiction refers to a court’s power over a particular defendant’s person. When a court’s jurisdiction is based on its authority over the defendant’s person, the action and judgment are denominated “in personam” and can impose a personal obligation on the defendant in favor of the plaintiff. Perfecting personal jurisdiction over the proposed ward is fairly straightforward. Many states require personal service on the proposed ward before a guardianship may be established. The personal jurisdiction analysis, however, may become extremely nuanced as it relates to a third parties, especially non-residents.

When jurisdiction is based on the court’s power over property within its territory, the action is called “in rem” or “quasi in rem.” The effect of a judgment in an in rem or quasi in rem case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner. The court, in Bodine v. Webb, 992 S.W.2d 672, 676 (Tex. App.—Austin 1999, pet. Denied), stated that, “an in rem action is a proceeding or action instituted directly against a thing, an action taken directly against property, or an action that is brought to enforce a right in the thing itself.” Indeed, in the Guardianship of Wooley, 02-14-00315-CV, 2016 WL 3179643, at *8 (Tex. App.—Fort Worth June 2, 2016, pet. filed), the court argued that “a proceeding in rem is essentially a proceeding to determine rights in a specific thing or in specific property.” A judgment in rem affects the interests of all persons in designated property. Judgments in rem are typically binding “on the whole world.” They bind persons to the extent of their interest in the property whether or not they were parties to the proceedings.

Prior to the landmark 1950 U.S. Supreme Court case of Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 320 (1950), determining what type of notice would satisfy due process largely depended on whether the proceeding in question could be classified as one in rem or in personam. Traditionally, the rulings issued in in rem proceedings seemed to imply that notice by publication alone was sufficient “to all defendants, whether residents or non-residents, whose identities and addresses were unknown,” so writes Jerry L. Malone in Property—Meeting the Due Process Requirements of Notice to Mortgagors in Tax Sales, published in the University of Arkansas at Little Rock Law Review (1984). Even where the name and whereabouts of a non-resident defendant was known, notice by publication was sufficient. In fact, many of these concepts have significantly affected modern day probate jurisdiction over decedent’s estates.

After Pennoyer, however, the U.S. Supreme Court became more concerned with achieving substantial justice. Jerry L. Malone writes: “There occurred a gradual expansion and strengthening of notice requirements—a move toward notice reasonably calculated to give actual notice.” The Court began to take an interest in the probability of a party actually receiving the notice it was provided. Thus, in certain circumstances, Malone states published notice is insufficient since “process which is a mere gesture is not due pro-

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cess.” In fact, some scholars believe that the Court in Mullane was emphasizing that merely labeling a proceeding as in personam or in rem does not fully answer the question when a party can resort to constructive notice (e.g. published or posted notice).

Further, Malone writes, “an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . the notice must be of such nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance.”

4. Notice in Status Jurisdiction

The United States Supreme Court has long recognized a status basis for exercising jurisdiction in satisfaction of due process requirements. The status exception to personal jurisdiction could significantly impact a probate court’s jurisdiction over non-residents in a guardianship proceeding. The seminal case of Pennoyer v. Neff required a defendant’s actual presence or service in a state for jurisdiction to attach, but excepted from its strict rule “cases affecting the personal status of the plaintiff.”

In cases decided after Pennoyer, the Supreme Court established the minimum contacts test as the basis for jurisdiction for both in personam, and eventually in rem cases, but continued to exempt “status cases,” recognizing Pennoyer’s extension of jurisdiction to “cases involving the personal status of the plaintiff, such as divorce actions, [as such cases] could be adjudicated in the plaintiff’s home state even though the defendant could not be served within that state.” In Shaffer v. Heitner, supra, the Court specifically noted: “We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness.”

Traditionally, the most common adjudications of status occurred in divorce proceedings, where courts have exercised jurisdiction over non-residents without adhering to the minimum contact requirement. Status jurisdiction is still routinely utilized in custody cases, but not support cases, where personal liability can be at issue. In one recent case, the Vermont Supreme Court utilized the status exception to terminate a non-resident’s parental rights of two minor children who resided within Vermont. The Vermont Supreme Court based its decision, in part, on the United States Supreme Court’s long recognition of a status basis for exercising jurisdiction in satisfaction of due process requirements and cited Pennoyer v. Neff, which generally required a defendant’s actual presence or service in a state for jurisdiction to attach, but excepted from its strict rule “cases affecting the personal status of the plaintiff.” The Vermont Supreme Court cited it was joining other jurisdictions that have similarly held that asserting jurisdiction over termination proceedings based on status does not offend the due process clause.

No reported case could be located invoking status jurisdiction to a guardianship proceeding—much less to a guardianship proceeding involving restricting a non-resident’s access to a proposed ward. However, some courts seem to question whether status jurisdiction really applies to guardianship proceedings involving adults in the first instance. A difference may exist in proceedings dealing with a status once established and proceedings to establish such status, but that difference has yet to be widely recognized.

IV. Section 1983 Claim

A. General Concepts

Anytime a state actor, including a judge, infringes on someone’s constitutionally protected rights, section 1983 concerns arise. The Civil Rights Act, 42 U.S.C. §1983, authorizes a private right of action against a person acting under color of state law for violation of a constitutional right. The purpose of the statute is to protect people from unconstitutional actions under color of state law. The current version of the statute reads:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered a statute of the District of Columbia.

Thus, under 42 U.S.C. §1983, a plaintiff must allege: (1) A person; (2) acting under color of state law; (3) deprived the plaintiff of a right secured by the Constitution or federal law. Although a state and its agencies are not “persons” under §1983, state officials sued in the individual capacities, are “persons” subject to suit under the statute. Municipalities and other local governmental units may also be sued under §1983 where the injury is the result of an official policy.

According to the Court in Dennis v. Sparks, 449 U.S. 24, 27-28 (1980), to be held accountable for acting under “color of state law,” a person must be an employee or official performing a job within the government or be “a willful participant in a joint action with the State or its agents.” Thus, private persons, actively engaging with state officials in the challenged action are acting “under color of law” for purposes of 42 U.S.C. §1983. A court-appointed guardian and his or her attorney are not state actors for purposes of §1983. §1983 provides no substantive rights, but merely allows a plaintiff to sue individual governmental actors for damages for acts that allegedly violate some part of the Constitution or another federal statute. §1983 does not include liability for remedies sought under state law.

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B. Judicial Immunity

Although 42 U.S.C. § 1983 is silent as to common law defenses afforded to individuals sued for acts performed in the course of their official duties, the U.S. Supreme Court has held that all government officials are entitled to either absolute or qualified immunity for such acts. Judges are protected from liability for judicial acts performed within the scope of their jurisdiction, including probate judges entering orders in guardianship proceedings. Judicial immunity affords absolute immunity from liability to judges when performing normal judicial functions. As long as the judge has proper jurisdiction, the doctrine protects judges from all judicial decisions even those decisions made in error, bad faith, or with malice. Although the doctrine does not bar prospective injunctive relief against a judge, Congress amended §1983 to prohibit injunctive relief under the statute against a "judicial officer for an act or omission taken in such officer's judicial capacity" unless "a declaratory decree was violated or declaratory relief was unavailable."

The doctrine exists to protect the integrity of the judicial process, rather than the judges themselves, and to avoid any adverse impact on a judge's independent decision-making. Additionally, parties wronged by a judge have other remedies available to them, including reconsideration, appellate, and mandamus relief.

In Adams v. McIlhany, 764 F.2d 294, 297 (5th Cir. 1985), "Absolute judicial immunity extends to all judicial acts which are not performed in the clear absence of all jurisdiction." Thus, immunity is overcome only for actions that are: (1) non-judicial, i.e., not taken in the judge's official capacity; or (2) taken in the complete absence of all jurisdiction. Judicial acts encompass actions taken by judges in adjudicating, or otherwise exercising judicial authority over, proceedings pending in their courts.

The Fifth Circuit has established four factors to consider in determining whether an act is judicial: (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit to the judge in his official capacity. Id.

These factors are construed broadly in favor of immunity. Although the scope of immunity is broad, it does not extend to non-judicial acts such as administrative, legislative, or executive functions judges may perform. Thus, the following, although performed by a judge, have been considered non-judicial: (1) selecting jurors; (2) establishing and enforcing a code of conduct for attorneys; and (3) making personnel decisions, such as hiring and firing court employees.

In Mireles v. Waco, 502 U.S. 9, 11–12 (1991), Judicial immunity also requires that the judge must have acted in the "complete absence of all jurisdiction." Thus, because probate judges are without jurisdiction to try criminal case, if a probate judge convicted someone of a crime, the judge would not be entitled to judicial immunity. If the existence of subject matter is debatable, however, the doctrine still applies.

As to guardianships, probate judges have subject matter jurisdiction pursuant to their parens patriae power and are therefore protected by judicial immunity for decisions regarding visitation and pending proceedings in their court. A judge acts in an adjudicatory capacity in appointing a guardian or a temporary guardian and is therefore immune from suit under §1983. The Fifth Circuit has held that because the appointment of a guardian ad litem or a court investigator involves no deprivation of liberty, such action is not actionable under §1983. Although the appointment of a guardian or temporary guardian, who is empowered to exercise authority over the ward, thus affecting the ward's liberty interest, such determinations are within a probate judge's adjudicatory capacity and are immune from liability.

V. Conclusion

Restrictions on access to a proposed ward during the pendency of a contested guardianship proceeding are fraught with constitutional traps. These cases routinely involve basic constitutional protections, such as the right to intimate association, which probate courts are wise to recognize. Before imposing restrictions on access to a proposed ward, probate courts must carefully analyze and adhere to federal constitutional protections, which at a minimum require notice on all affected parties and a meaningful opportunity to be heard.

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Note: This article has been condensed and does not contain the footnotes included with the original submission. The full text of the article may be found at www.ncpj.org.