FAMILY MATTERS: EXAMINING SIBLING RIGHTS UNDER GUARDIANSHIP LAW

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ABSTRACT

This Note challenges the prevailing assumption that siblings do not have fundamental legal rights of association, and illustrates, through a case in the author's own family, the barriers this presumption erects in the guardianship context. Guardianship law is state law, and therefore differs from state to state. Some states do not explicitly recognize siblings as parties that have standing in guardianship and visitation disputes. This legal construct devalues sibling relationships, which are often amongst the most meaningful and long-lasting relationships enjoyed by an individual. In the absence of state protections, siblings may turn to the Constitution to assert a liberty interest in their sibling relationship, but often find no relief.

In addition to comparing state statutory schemes and examining the state-based guardianship system, this Note revisits Supreme Court family law precedents to show that they present a more complicated approach to constitutional siblinghood than conventionally assumed and point toward a fundamental liberty interest that reaches siblings. Recognizing this view, some courts have begun to embrace a broader approach to guardianship disputes and sibling standing issues. Ultimately, this Note argues that protections for sibling rights in

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adult guardianship and visitation cases should be strengthened at the federal and state level.

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I. INTRODUCTION

In November 2012, my aunt, Julie, filed a motion for review of her sister's guardianship in the Cuyahoga County Probate Court in the State of Ohio, citing "changed circumstances in the health and welfare" of her sister, Terese.[1] Terese, my father's youngest sister, has severe developmental disabilities, including limited abilities to make significant life-decisions, speak, read, and write.[2] At the request of my grandparents, the court appointed their youngest son and tenth child, James, as Terese's guardian in 2011.[3] In January 2013, Julie's motion was amended to join four additional siblings, including my father.[4]

1. *In re* Guardianship of Sweeney, No. 103285, 2016 WL 3091957, at *2 (Ohio Ct. App. June 2, 2016).
2. *See* Appellant's Brief at 3, *Sweeney*, No. 103285 (Ohio Ct. App. Nov. 20, 2015).
3. *See Sweeney*, 2016 WL 3091957, at *1.
4. *See id.* at *2.

The legal case quickly divided my extended family over whether the guardianship should be subject to review regarding Terese's health and living arrangements in a group home. Between December 2011 and June 2016, Terese suffered from chronic scabies that morphed into staph infections, being increasingly medicated with psychotropic drugs, blackened and sore teeth, and overgrown toenails limiting her ability to walk.[5] As these conditions continued, her guardian took steps to limit the five petitioning siblings' visits with Terese.[6]

After five years, and hundreds of hours of legal work at great expense, litigation in the Ohio court system culminated in the transfer of Terese's guardianship to Julie.[7] The ability of Terese's siblings to advocate for her and obtain legal relief for themselves hinged on establishing legal standing to bring and prove their case on the merits.[8] In keeping with judicial precedent in Ohio, the trial level probate court held that Terese's siblings did not have legal standing to intervene in her guardianship.[9]

In 2016, however, the Ohio Court of Appeals granted Julie the right to file an appeal challenging the probate court's denial of her motion to intervene, and, in an unprecedented decision, ruled that Julie had shown an interest worthy of standing when she attempted to obtain, and was foreclosed from obtaining, Terese's medical records.[10] This interest, which was deemed adverse to Terese's current guardian's interest, was considered to be sufficient under Ohio's law governing standing.[11] In a four-three vote, the Supreme Court of Ohio declined to review the case, and the Court of Appeal's decision recognizing a form of sibling rights stood.[12] Years after initially seeking relief from the court, Julie was granted the right to access and present evidence to demonstrate her

5. *See* Appellant's Brief, *supra* note 2, at 4–5; *Sweeney*, 2016 WL 3091957, at *1–2.

6. *See Sweeney*, 2016 WL 3091957, at *1–2.

7. *See id.* at *1–2, 5 (noting first motion was filed in November 2012 and final decision was issued in June 2016); *see also* Magistrate's Decision at 18, Guardianship of Sweeney, No. 2011 GRD 150554 B (Ohio Cuyahoga Cnty. Prob. Ct. Oct. 21, 2016) (appointing Julie as guardian on Oct. 12, 2017).

8. *See Sweeney*, 2016 WL 3091957, at *3.

9. *See, e.g.*, *id.* at *1, 3–4 (discussing standing issue on appeal).

10. *Id.* ("Julie was prejudiced from her ability to pursue [her interest in the proceeding] because of the trial court's denial of her motion to intervene.").

11. *Id.*

12. *See generally In re* Guardianship of Sweeney, 54 N.E.3d 1268 (Ohio 2016) (denying opposing party's motion to stay the appeal court's judgment); *In re* Guardianship of Sweeney, 63 N.E.3d 156 (Ohio 2016) (denying appeal).

concerns about her sister's medical well-being and her brother's imposed restrictions on visitation.

When my family's case began, I was confused that my father and his sisters did not have a right to assert their concerns about Terese and have access to evidence to prove the legitimacy of their concerns. Yet, to this day, courts and states remain split on whether individuals possess an inherent, fundamental liberty interest in continued contact and association with their siblings, as well as potentially related interests such as ensuring the health and well-being of a particularly vulnerable sibling.[13] This legal construct devalues sibling relationships, which are often amongst the most meaningful and long-lasting relationships enjoyed by an individual.[14] As a result, when sibling interests clash with a guardian's interests, outcomes for siblings can differ significantly from state to state, and from court to court, due to varied interpretations of statutory and constitutional law.[15]

This Note will address the rights of siblings in adult guardianship cases. Specifically, it will discuss sibling rights, guardian rights, and the intersection of the two. This Note proceeds in six parts. Following this overview, Part II introduces guardianship arrangements. Part III examines sibling rights under the Constitution and the lack of a recognized fundamental right to association for siblings. Part IV moves to a description of sibling rights under state law and includes discussion on the issues of standing and sibling visitation rights in guardianship matters. Part V explores the state guardianship system more broadly, and highlights areas where legislatures at the state and federal level could strengthen safeguards for individuals subject to guardianships and their siblings. Finally, Part VI summarizes the conclusions of this Note. Ultimately, this Note discloses a need for the law to develop a consistent means of recognizing and protecting fundamental sibling interests in guardianship disputes across the states.

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13. *See infra* Part III.

14. *See* William Wesley Patton, *The Status of Siblings' Rights: A View into the New Millennium*, 51 DEPAUL L. REV. 1, 2 (2001); Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 900 (2012) ("A sibling relationship can last for decades longer than the relationship between a parent and child, which typically ends with the parent's death when the child still has many years left, or the relationship between spouses, who usually do not meet until adulthood.").

15. *See infra* Part IV and Section V.C.

II. OVERVIEW OF ADULT GUARDIANSHIPS

A guardian is a court-appointed adult who has the legal authority to make decisions about a person's personal interests, property interests, or both kinds of interests, once that person has been deemed incapacitated.[16] Courts deem individuals legally incapacitated by evaluating whether the individual lacks sufficient capacity to manage their affairs and well-being.[17] Courts may determine individuals are incapacitated for a variety of reasons, such as mental illness, an intellectual or developmental disability, dementia, age, or a head or medical injury inhibiting the person's ability to care for themselves.[18] Once the court creates a guardianship, the incapacitated person becomes the guardian's ward.[19] That said, the individual granted the title "guardian" acts as an agent of the court carrying out guardianship responsibilities.[20] The court itself is the ward's guardian and is often called the "superior guardian" to the ward.[21]

All states have their own judicial and administrative processes for establishing guardianships.[22] For example, in New Jersey, the guardianship process begins when a parent, relative, public official, or other interested party files a petition for guardianship, which includes the proposed ward's name, address, date of birth, nature of the incapacity, and further details about the ward as required by the court.[23]

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16. *See, e.g.*, N.J. STAT. ANN. § 3B:13–2 (West 2023) (defining "guardian"); *Guardianship*, N.J. DEP'T. OF HUM. SERVS. DIV. OF DEV. DISABILITIES [hereinafter NJ DHS Guardianship], https://www.state.nj.us/humanservices/ddd/individuals/guardianship (last visited Nov. 7, 2023); *see also* OHIO REV. CODE ANN. § 2111.01 (West 2016) (defining "guardian").

17. *See* N.J. STAT. ANN. § 3B:1–2 (West 2023) (defining "incapacitated individual"); § 3B:12–24.1 (outlining a court's role in determining whether an individual needs a guardian); *see also* OHIO REV. CODE ANN. § 1337.22 (West 2023) (defining "incapacity").

18. *See, e.g.*, NAT'L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF–DETERMINATION 35 (2018) [hereinafter BEYOND GUARDIANSHIP], https://www.ncd.gov/assets/uploads/docs/ncd-guardianship-report-accessible.pdf.

19. *See, e.g.*, N.J. STAT. ANN. § 3B:1–2.

20. David Hardy, *Who is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*, 4 NAELA J. 1, 5 (2008).

21. *Id.*; *see also* SUP. CT. OF OHIO, FUNDAMENTALS OF ADULT GUARDIANSHIP 20 (2017), https://www.ohiochannel.org/Assets/Files/UserContent/40/155679.pdf.

22. *See, e.g.*, Herbert M. Kritzer, Helen M. Dicks & Betsy J. Abramson, *Adult Guardianships in Wisconsin: How Is the System Working?*, 76 MARQ. L. REV. 549, 549 (1993).

23. *See Adult Guardianship*, N.J. CTS., https://www.njcourts.gov/courts/civil/guardianship (last visited Mar. 12, 2023) [hereinafter

Once the petition is filed, the court reviews it and gives notice of the time and place of a hearing on the matter.[24] The court will appoint a lawyer for the alleged incapacitated person ("AIP") to confirm that the person is in fact "incapacitated," and to advocate for the individual's interests.[25] Prior to the hearing, a physician or psychologist must examine and provide a written statement on the proposed ward's mental condition.[26]

While a guardianship may be necessary for someone who is unable to make critical decisions to protect their physical, mental, or fiscal well-being, the life of a person subject to a guardianship is fundamentally impacted because the guardianship removes an individual's basic right of self-determination.[27] For example, a guardian may be authorized to involuntarily commit the ward to an institution if the guardian feels the decision is necessary for the ward's well-being.[28] A guardian can make medical treatment decisions for a ward, even if those decisions appear to conflict with the ward's wishes, and may control the ward's finances and property.[29]

Although there are some similarities to a parent-child relationship, in the eyes of the law, a guardianship does not recreate the parent-child relationship. While the United States Supreme Court has acknowledged that parents have fundamental rights to rear their children, those same fundamental rights do not carry over into guardianships.[30] For instance, guardianships remain subject to court review, and guardians cannot

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NJ Guardianship] (providing overview of New Jersey's guardianship process and linking to forms to complete during the petitioning process).

24. *Id.*; *see also* N.J. STAT. ANN. § 3B:12–24.1.

25. *See* N.J. CTS., GUIDELINES FOR COURT-APPOINTED ATTORNEYS IN GUARDIANSHIP MATTERS 8–9 (2021), https://www.njcourts.gov/sites/default/files/forms/12756_gdnshp_crt-app_atty.pdf; NJ Guardianship, *supra* note 23.

26. *See* NJ Guardianship, *supra* note 23.

27. NJ DHS Guardianship, *supra* note 16. Debates regarding whether courts should reform guardianship models to avoid stripping individuals of their fundamental rights if a person may not need a full or permanent guardianship arrangement is beyond the purview of this Note, which focuses on situations where adult wards are patently unable to care for themselves.

28. *See* George J. Alexander, *Premature Probate: A Different Perspective on Guardianship for the Elderly*, 31 STAN. L. REV. 1003, 1003–04 (1979).

29. *Id.* at 1004–06.

30. *See, e.g.*, *In re* Jamison, 4 N.E.3d 889, 901 (Mass. 2014) (noting a guardianship is neither the equivalent of, nor coextensive with, parenthood).

choose their successor guardian if their ward outlives them, as parents may.[31]

Nonetheless, while a guardian's legal powers do not precisely mirror parents' fundamental rights to rear their children, guardians, like parents, have control over a ward's most basic needs and resources, such as medical care, housing, and finances, and courts have consistently supported guardians' rights to make decisions on behalf of their wards unless there is a clear abuse of power and the relationship is no longer in the ward's "best interest."[32] As some guardian powers may closely track parental rights traditionally valued by the Supreme Court and other federal and state courts, it is not surprising that when guardian interests clash with other party interests, guardian decisions are typically viewed by courts as superseding and superior to the interests of third parties, including the interests of a ward's siblings.[33]

III. SIBLING RIGHTS UNDER THE CONSTITUTION

A. *Revisiting the Scope of Family Rights Pre- and Post-*Troxel v. Granville

Nearly one hundred years ago, the Supreme Court acknowledged a "private realm of family life which the state cannot enter."[34] Since its mid-1920s decision in *Pierce v. Society of Sisters*, the Court has repeatedly affirmed that the Constitution protects the sanctity of family because the institution of the family is "deeply rooted in this Nation's history and tradition."[35] But the precise scope of familial rights protected under the Constitution is less clear.

The Supreme Court has continually averred that parents have a fundamental right under the Fourteenth Amendment's Due Process

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31. *See* NJ Guardianship, *supra* note 23. Parents can nominate a guardian or create a will to determine who will care for their child in the event of their death. *See, e.g.*, N.J. STAT. ANN. § 3B:12–30 (West 2023) (allowing appointment of guardian by a parent).

32. *See supra* notes 27–29; *see, e.g.*, Parham v. J.R., 442 U.S. 584, 604 (1979) (finding that parents *or guardians* who admitted their children to state mental hospitals did not violate the children's rights under the Due Process Clause of the Fourteenth Amendment) ("[W]e conclude that our precedents permit the parents to retain a substantial, if not the dominant, role in the decision, absent a finding of neglect or abuse. . . .").

33. *See infra* Part IV.

34. Prince v. Massachusetts, 321 U.S. 158, 165–66 (1944) (citing Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925)).

35. Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977); Meyer v. Nebraska, 262 U.S. 390, 399–400 (1923) (affirming fundamental family rights that a state cannot infringe on).

Clause to oversee the care, custody, and control of their children.[36] Indeed, the Court has stated that this right "is perhaps the oldest of the fundamental liberty interests recognized by this Court."[37] The extent of this right, however, is not entirely straightforward, and at times, has been inconsistently applied. For example, the Court found in one case that the absence of a biological connection between foster parents and children meant that the relationship between the foster parents and their children enjoyed no fundamental constitutional protection.[38] Yet, in two other instances, the Court found that biological parentage by itself was insufficient to give rise to a fundamental parent-child relationship.[39]

The Court's plurality decision in *Troxel v. Granville* further complicated the legal contours of parental and familial rights, as the Court struck down Washington state's grandparent visitation statute that allowed grandparents to petition for child visitation rights over parental objections—even if visitation was in the child's best interest.[40] The Court concluded that granting visitation under the statute in its current form unconstitutionally interfered with a parent's fundamental liberty interest in rearing his or her child.[41] As discussed later in Part IV, the Court's holding in *Troxel* has implications for siblings in guardianship disputes when a parent is involved.

In its plurality opinion, the Court could not agree on the reasoning behind its conclusion, but focused on the statute's unconstitutionally broad drafting, zeroing in on its: (1) failure to give parents' visitation decisions "any presumption of validity or any weight whatsoever" and (2) authorization to courts to overrule parents' interests if a judge found that

36. Troxel v. Granville, 530 U.S. 57, 65–66 (2000). The Court found in *Wisconsin v. Yoder* that parents' rights to raise their children are "now established beyond debate as an enduring American tradition." 406 U.S. 205, 232 (1972).

37. *Troxel*, 530 U.S. at 65 ("[T]he interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.").

38. *See* Smith v. Org. of Foster Parents, 431 U.S. 816, 843–47 (1977).

39. Lehr v. Robertson, 463 U.S. 248, 261–62 (1983) (finding the due process clause does not require notice of an adoption proceeding to be given to a biological father who had no custodial relationships with the child); Michael H. v. Gerald D., 491 U.S. 110, 130–32 (1989) (finding a child did not have a due process right to maintain a filial relationship with her biological father because the man that raised her had cared for her financially, emotionally, and psychologically, as a father-figure traditionally would).

40. *Troxel*, 530 U.S. at 60, 67 (plurality opinion) (discussing the state statute at issue providing that "[a]ny person" could seek visitation "at any time" (alteration in original)).

41. *Id.* at 72–74.

visitation with a third party was in the child's best interest.[42] The plurality did not articulate *why* the extent of potential visitation by grandparents violated the parents' liberty interests, and it expressly declined to "define . . . the precise scope of the parental due process right in the visitation context."[43]

Notably, the dissenting opinions in *Troxel* differed greatly from the plurality. In his dissent, Justice Kennedy signaled that third-party association rights might be strong enough to survive an absolute parental veto.[44] Similarly, Justice Stevens in his dissent suggested that children's interests in visitation with close third parties should be balanced with parental interests when evaluating the child's best interest.[45] He recognized the legal fiction in assuming that parents always presumptively act in their children's best interest.[46]

With that in mind, what does *Troxel* tell us about the bounds of parental and familial rights protected under our Constitution? First, parental rights presumptively override the rights of other relatives seeking visitation, and second, may even override these rights regardless of whether granting visitation is in the child's best interest.[47] That latter conclusion is less clear, as the Court did not spell out the showing required to find that a child's best interests outweigh a parent's fundamental rights in a visitation context.[48] The Court made it known, however, that judges may not base their decision on the opposing presumption that unless proven otherwise, visitation is in the best interest of children, even over a parent's objections.[49]

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42. *Id.* at 67, 73–75. The Court issued six opinions in total. Four justices joined the plurality opinion, two wrote concurrences, and three dissented in separate opinions. *Id.* at 60, 75, 80, 91, 93.

43. *Id.* at 73; Patton, *supra* note 14, at 30–31.

44. *Troxel*, 530 U.S. at 97–99 (Kennedy, J., dissenting) ("[R]elationships can be so enduring that 'in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm . . .' [such that] contemporary practice should give us some pause before rejecting the best interests of the child standard in all third-party visitation cases . . . ." (quoting *In re* Smith, 969 P.2d 21, 30 (Wash. 1998))).

45. *Id.* at 85–86 (Stevens, J., dissenting) ("[W]e have never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm.").

46. *See id.* ("There is . . . [an] individual, whose interests are implicated in every case to which the statute applies—the child.").

47. *See id.* at 72–74 (plurality opinion).

48. *Id.* at 73.

49. *Id.* at 69–70.

This result is consistent with other decisions by the Court that have found that parental rights generally prevail over children's constitutional rights in cases involving child care issues.[50] For instance, in *Parham v. J.R.*, the Court found that a child's liberty and due process rights are not violated when parents—or guardians—have their children voluntarily committed to a mental institution if the commitment procedures entail an independent medical review.[51]

That said, *Troxel* did not define the full ambit of a parent's right to rear their children. Although the plurality opinion acknowledged that a narrower state visitation statute providing sufficient weight to the parents' determination might pass constitutional muster, the plurality did not clarify whether a finding of "harm or potential harm to the child" is "a condition precedent to granting visitation."[52]

More broadly, the Court's cases discussing fundamental parent and child rights have raised important questions regarding the definition of families, and the depth of "family rights" protected by our Constitution. Because the Court's reasoning in this constitutional area has not been solidified, there remains room for the Court to find other, broader fundamental protections in the familial sphere—namely, that siblings with substantial relationships do indeed have a fundamental interest in each other's lives, and that the law should protect their fundamental right to associate.

B. Reviewing Whether Siblings Possess a Fundamental Right to Association

The concept that siblings have, or should have, fundamental rights of association to one another is not new. Legal scholars have long noted the potential constitutional bases for sibling rights, and have discussed how the law has not kept pace with research studies documenting the importance of sibling association throughout a person's life.[53] Siblinghood is often a primary, lifelong relationship, and siblings "can know and

50. Patton, *supra* note 14, at 10; William Wesley Patton & Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 U. MIA. L. REV. 745, 751 (1994).

51. Parham v. J.R., 442 U.S. 584, 601–02, 610, 620–21 (1979); *see also* Santosky v. Kramer, 455 U.S. 745 (1982); Reno v. Flores, 507 U.S. 292, 304 (1993) ("So long as certain minimum requirements of child care are met, the interests of the child may be subordinated to the interests of other[s].").

52. *Troxel*, 530 U.S. at 73; Patton, *supra* note 14, at 30–31.

53. Hasday, *supra* note 14, at 899 ("The sibling relationship offers a striking illustration of a crucial, yet legally neglected, family tie."); *see* Angela Ferraris, *Sibling Visitation as a Fundamental Right in* Herbst v. Swan, 39 NEW ENG. L. REV. 715, 717–19 (2005).

support each other from their earliest years through their final ones."[54] Siblings who have developed significant bonds naturally stand in special relation to one another and have interests in one another's lives greater than other members of the general public. Not only did the dissents in *Troxel* provide support for other family members' rights of association beyond the parent-child context, but other Court cases touching on family law support such a right.

The Court acknowledged in the 1984 case, *Roberts v. United States Jaycees*, that relationships between family members that are vital to the "creation and sustenance of a family" receive protection under our Constitution because family members, "by their [very] nature, involve deep attachments and commitments" that define a person's identity and are central to the concept of liberty.[55] The Court then highlighted examples of such relationships or events in the familial sphere—marriage, childbirth, the raising and education of children, and cohabitation with one's relatives—and cited to cases protecting these relationships from unwarranted state interference.[56] The Court has repeatedly stated that the Constitution protects the inherent and fundamental association, privacy, and due process rights held by family members.[57]

Although the Supreme Court has not specifically determined whether siblings have a constitutional right to association, both scholars and courts have found that the Court's jurisprudence confirms that they do, or at least, should have this right. The Second Circuit found that a half-sister, who was also a foster mother to her younger siblings, had a constitutionally protected interest in her siblings under the Fourteenth Amendment.[58] A federal district court, citing the Supreme Court's *Roberts* decision, found that siblings do, in fact, have a right to associate

54. Hasday, *supra* note 14, at 899 n.7 ("Bessie is my little sister, only she's not so little. She is 101 years old, and I am 103 . . . . Neither one of us ever married and we've lived together most all of our lives, and probably know each other better than any two human beings on this Earth.").

55. 468 U.S. 609, 619–20 (1984).

56. *See id.* (discussing how freedom of association is an intrinsic element of personal liberty).

57. *See, e.g.*, Cleveland Bd. of Ed. v. LaFleur, 414 U.S. 632, 639–40 (1974) (discussing due process rights); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (discussing due process rights); Smith v. Org. of Foster Fams. for Equal. & Reform, 413 U.S. 816, 842 (1977) (discussing privacy rights); *Roberts*, 468 U.S. at 617–18 (discussing association rights).

58. Rivera v. Marcus, 696 F.2d 1016, 1026 (2d Cir. 1982) (stating that the siblings "possesse[d] an important liberty interest in maintaining, free from arbitrary state interference, the family environment that they have known since birth").

with each other and preserve their relationships.[59] Other federal district courts and legal scholars have also concluded that the Supreme Court's jurisprudence supports a finding that sibling associational rights are protected under the First, Ninth, and Fourteenth Amendments.[60]

Similarly, scholars have demonstrated how the Court's reasoning in prior cases encompasses sibling relationships. For instance, in their article on sibling associational rights, two legal scholars illustrate a hypothetical scenario where identical twins, who are raised as members of the same family unit since birth, and share an "even closer genetic connection than an unwed father or mother with their child," have no legally recognized relationship despite being linked by a bond "endemic to the American definition of family."[61] Based on one line of cases, these twins should have the benefit of a fundamental family association because of their close biological connection.[62] Based on other cases, like *Michael H. v. Gerald D.*, the twins should possess an inherent, fundamental liberty interest in continued contact and association because the twins have grown up together, and are part of the same family unit.[63]

In essence, familial rights of association do not need to be a "zero-sum game."[64] Granting siblings a fundamental right to associate, or acknowledging that siblings may have a special interest in one another because of familial ties, need not infringe on fundamental parental interests or other protected family rights. Based on consideration of the facts, and an evaluation of different family member's associational rights, as suggested by Justice Stevens' *Troxel* dissent, courts are capable of

59. Aristotle P. v. Johnson, 721 F. Supp. 1002, 1005 (N.D. Ill. 1989) (stating that "children['s] relationships with their siblings are the sort of 'intimate human relationships' that are afforded" protection from unwarranted state interference (quoting *Roberts*, 468 U.S. at 618)).

60. Connor B. *ex rel* Vigurs v. Patrick, 771 F. Supp. 2d 142, 163 (D. Mass. 2011) (citing to the Court's decision in Stanley v. Illinois, 405 U.S. 645, 651 (1972), and finding that broad rights of familial association are protected by the First and Ninth Amendment); *see also* Barbara Jones, *Do Siblings Possess Constitutional Rights*, 78 CORNELL L. REV. 1187, 1200–04 (1993) (collecting federal court cases that have found rights to association for siblings under the Fourteenth and First Amendments, and other federal statutes such as Section 1983).

61. Patton & Latz, *supra* note 50, at 776–79.

62. *See, e.g.*, *Stanley*, 405 U.S. at 651.

63. *See* Michael H. v. Gerald D., 491 U.S. 110, 130–32 (1989).

64. Patton, *supra* note 14, at 24.

analyzing and resolving potential conflicts between fundamental rights, or conflicts with other legal interests.[65]

Securing a fundamental liberty interest in sibling association plays an important role in key legal determinations relating to guardianships where sibling issues are involved. As discussed further below, siblings in some states cannot bring actions in guardianship proceedings, and cannot challenge a guardian's restrictions on visitation, because courts will find that they do not have legal standing—a barrier introduced by the lack of an acknowledged constitutional right to association.[66] A similar issue arose in *Troxel*, where the child's grandparents, attempting to pursue a right to visitation, struggled to have their challenge heard on its merits in lower courts because of lack of standing.[67] In the absence of clear constitutional or uniform statutory protections, determinations relating to siblings' rights in the context of guardianships are left largely to state governments and state courts for resolution. This legal gap has had the effect of creating inconsistent legal barriers for family members experiencing similar circumstances, and in some states, has prevented families from maintaining strong sibling relationships and protecting vulnerable adult wards.[68]

IV. SIBLING RIGHTS UNDER STATE LAW

Since the Supreme Court has not acknowledged a constitutionally protected right of association for siblings, decision-making on whether siblings have legal standing or visitation rights in guardianship cases has been left largely to state legislatures and courts.[69] Thus far, there has been "no federal policy promoting adult guardianship reform," although, as discussed later, calls for such federal reform have recently begun to mount.[70] As explored in the next subsections, at the state level, several major considerations impact sibling associational rights.

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65. *Id.* at 38 n.200; *see* Troxel v. Granville, 530 U.S. 57, 82–91 (2000) (Stevens, J., dissenting); Jones, *supra* note 60, at 1188 ("When the sibling's rights and the parent's rights collide, the constitutional arguments should cancel each other out.").

66. *See infra* Part IV; *Troxel*, 530 U.S. at 62 (plurality opinion); *In re* Guardianship of Richardson, 900 N.E.2d 174, 174 (Ohio 2008) (denying standing to family member).

67. *Troxel*, 530 U.S. at 62.

68. *See infra* Part IV.

69. *See* Patton, *supra* note 14, at 24, 38; Jones, *supra* note 60, at 1188–90.

70. *See* Elizabeth Moran, *2021 Guardianship Legislation: Highlights and Trends Effectuating Improved Processes and Outcomes in U.S. Guardianship Systems*, ABA (Mar. 14, 2022), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-43/bifocal-forty-three-four/2021-guardianship-trends/.

A. Siblings' Standing Before the Court

The legal doctrine of standing can be a significant barrier for siblings and relatives seeking to participate in guardianship and visitation rights cases.[71] Standing is "[a] party's right to make a legal claim or seek enforcement of a duty or right."[72] To show standing, plaintiffs typically must demonstrate that: (1) they will suffer actual injury because of the challenged action; (2) there is causation between the contested act and the injury; and (3) the injury can be redressed by access to the court.[73]

Although the application of the doctrine has divided judges and scholars alike,[74] the doctrine's importance to case outcomes is undisputed, because a determination on standing is often a threshold matter that parties must satisfy for a court to hear a case on its merits or on appeal.[75] Satisfying the elements of standing can be difficult in a guardianship suit depending on the laws of the state in which the suit is filed.[76]

To illustrate this point, compare the different approaches taken in the states of Ohio and New Jersey. The state of Ohio has stricter standing requirements for family members in guardianship proceedings than some other states, including New Jersey. At the trial level, a petitioner must either have standing created by a statute, or file a motion to

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71. *See, e.g.*, *In re* Guardianship of Sweeney, No. 103285, 2016 WL 3091957, at *3–4 (Ohio Ct. App. June 2, 2016).

72. *Standing*, BLACK'S LAW DICTIONARY (11th ed. 2019).

73. *See, e.g.*, Allen v. Wright, 468 U.S. 737, 751 (1984).

74. While some scholars argue that standing is essential to, and logically applied throughout, our constitutional and judicial system, others contend that the doctrine is inconsistent in its application and can create an avenue for courts to escape difficult decision-making. *Compare* Lea Brilmayer, *The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement*, 93 HARV. L. REV. 297, 297 (1979), *with* Mark V. Tushnet, *The "Case or Controversy" Controversy*, 93 HARV. L. REV. 1698, 1715 n.72 (1980) ("Doesn't the fact that the Court issues so many inconsistent decisions tend to indicate that the entire concept of standing is awfully prone to manipulation and incoherence?").

75. *See, e.g.*, *In re* Guardianship of Richardson, 900 N.E.2d 174, 174 (Ohio 2008); *see also* Steven L. Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371, 1371 (1988) ("Nevertheless, the courts treat standing as a 'bedrock requirement' delimiting the scope of the judicial process.").

76. *See* Patton & Latz, *supra* note 50, at 787–88; *see, e.g.*, Weber v. Weber, 524 A.2d 498, 498–99 (Pa. Super. Ct. 1987) (finding that an adult sibling did not have standing to bring an action for partial custody of a minor daughter over the objections of parents absent a showing of (1) statutory bases, (2) parental unfitness, or (3) exceptional circumstances, such as a divorce action, or dependency and delinquent hearing).

intervene under Ohio Civil Rule 24.[77] To intervene under Civil Rule 24, petitioners must show they are an "interested party" by demonstrating: (1) a statute confers an unconditional right to intervene; or (2) they have an interest relating to the property or transaction that is the subject of the action, and their ability to protect that interest is impaired or impeded without adequate representation in the matter.[78] Still, Civil Rule 24 grants only limited standing as necessary for petitioners to protect their interests, reflecting the Ohio courts' view that guardianship matters relate principally to the court, the ward, and the guardian, rather than the interests or standing of a third party.[79]

Further, if petitioners fail to intervene under Civil Rule 24, and there is no statutory basis for standing, they are essentially barred from appealing a probate court's decision denying standing.[80] In the case In re *Guardianship of Richardson*, the Supreme Court of Ohio held that a daughter did not have legal standing to bring an action challenging her sister's guardianship of their mother because the daughter had never intervened or sought party status during her mother's guardianship hearing.[81] Thus, the failure to make a formal motion to intervene or obtain standing can be a fatal trap for the unwary litigant.

Moreover, an Ohio court noted, "[b]ecause guardianship proceedings are not [traditionally] adversarial, but are in rem proceedings involving only the probate court and the ward, the requirements for standing to appeal [guardianship decisions] are more elaborate."[82] Filing a motion to intervene under Civil Rule 24 does not automatically guarantee standing to appeal.[83] The Ohio Supreme Court has articulated that "to have standing in an appeal from a guardianship order, parties must either

77. *See, e.g.*, *In re* Guardianship of Thich Minh Chieu, No. CA2018–05–112, 2018 WL 6445218, at *2 (Ohio Ct. App. Dec. 10, 2018); *see also In re* Guardianship of Santrucek, 896 N.E.2d 683, 686–87 (Ohio 2008).

78. *In re* Guardianship of Sweeney, No. 103285, 2016 WL 3091957, at *3–5 (Ohio Ct. App. June 2, 2016).

79. *See Santrucek*, 896 N.E.2d at 686–87.

80. *See id.*

81. *See* In re *Guardianship of Richardson*, 900 N.E.2d 174, 174 (Ohio 2008). One of the dissenting justices noted that the outcome of the case meant that the daughter, who believed that her mother did not require a guardian, was barred from challenging her mother's guardian in any meaningful way because she had not previously filed an application to become her mother's guardian. *See id.* (Pfeifer, J., dissenting).

82. *Santrucek*, 896 N.E.2d at 685. In rem proceedings are lawsuits directed toward a piece of real or personal property, and not a person. *Judgment In Rem*, BLACK'S LAW DICTIONARY (11th ed. 2019). *See infra* Section V.B. for further discussion on guardianship hearings being classified as ministerial in nature in some states.

83. *Sweeney*, 2016 WL 3091957, at *4.

have an interest adverse to the ward's or have otherwise been aggrieved in some manner by the order," as in, the party's motion to intervene was denied, and the petitioner's interests are adverse to one of the other parties in the proceeding.[84] The bar for meeting these requirements is high, particularly if a family member brings a complaint alleging concerns about a ward's well-being—which seemingly would not be adverse to the ward's interest.[85]

By contrast, New Jersey broadly construes the doctrine of standing in guardianship cases. New Jersey courts describe the threshold for standing in guardianship contexts "to be fairly low."[86] Standing will generally be granted if a plaintiff shows a sufficient personal stake and degree of adverseness with respect to the subject matter of the litigation, thereby ensuring that a court is "not asked to render an advisory opinion."[87] As a result, New Jersey courts have routinely found that relatives have standing in guardianship proceedings, and these findings are also reflected in court guidance on the motions that can be filed by interested third parties in such hearings.[88]

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84. *See Santrucek*, 896 N.E.2d at 685 (citing *In re* Guardianship of Love, 249 N.E.2d 794, 796 (Ohio 1969)).

85. *See* Julia B. Meister, et al., *Nonresident Next of Kin and Standing in Guardianships: The* Santrucek *Decision*, 19 OHIO PROB. L.J. 116, 116 (2009) (noting the Ohio Supreme Court in *Santrucek* was concerned that allowing intervention in guardianship cases "would open the floodgates to intervention").

86. N.J. Div. of Child Prot. & Permanency v. G.T., No. A–4983–14T3, 2016 WL 3461757, at *16 (N.J. Super. Ct. App. Div. June 27, 2016) (quoting Triffin v. Somerset Valley Bank, 343 N.J. Super. 73, 81 (App. Div. 2001)).

87. *Id.* (quoting Jersey Shore Med. Ctr.-Fitkin Hosp. v. Est. of Baum, 417 A.2d 1003, 1006 (N.J. 1980)). Those defined as "mere [legal] strangers" to an incapacitated person, such as a friend or long-time acquaintance, who fail to establish some other kind of equitable interest in a proceeding, cannot file actions against a guardian in New Jersey. *See, e.g.*, *In re* Oswald, 28 A.2d 299, 300 (N.J. Ch. 1942) (finding that "[n]otwithstanding petitioner's allegations of friendship for the person whom she is seeking to have legally declared incompetent, she is nevertheless a stranger to [the alleged incapacitated person] in the eyes of the law" and therefore, could not bring the action). As with most states, if a "stranger" according to New Jersey law has concerns about neglect or abuse under a guardianship, he or she may report the alleged abuse to the corresponding state agency, that will then investigate the report. *See, e.g.*, *Reporting Abuse*, DISABILITY RTS. N.J. (Mar. 12, 2023), https://disabilityrightsnj.org/wp-content/uploads/Reporting-Abuse-rev.-2023.pdf.

88. *See, e.g.*, *In re* Tierney, 421 A.2d 610, 622 (N.J. Super. Ct. Law Div. 1980) (finding that plaintiff must be the incapacitated party's spouse, domestic partner, next of kin, relative, or a person with a legal or equitable interest in the subject of the action to meet standing requirement); N.J. STAT. ANN. § 4:86–7(c) (West 2023) ("An incapacitated person, or an interested person on his or her behalf, may seek review of a guardian's conduct and/or review of a guardianship by filing a motion setting forth the basis for the relief requested."); *How to File a Motion in a Guardianship Case*, N. J. CTS. (Feb. 2017), https://www.njcourts.gov/sites/default/files/forms/12032_motion_guardianship.pdf.

Proponents of strict application of standing requirements argue that this approach promotes judicial economy and ensures that the correct parties are before the court.[89] They assert that a failure to enforce meaningful standing requirements could expose courts and guardians to frivolous and costly litigation, and might further disincentivize relatives from taking on guardianship responsibilities.[90] That said, in states that allow for more expansive standing in guardianship proceedings, courts have successfully navigated these judicial and policy concerns even while permitting family members to have their cases heard on their merits. New Jersey provides an example of this approach.

Outside the guardianship context, statutes often recognize that siblings and other family members have special interests in one another's lives. Ohio has enacted several statutes that recognize siblings' interests in each other's lives.[91] Ohio's wrongful death statute allows siblings to participate in a wrongful death action following the loss of a sister or brother, and brothers and sisters are considered interested parties under the state's guardian estates provisions.[92] Also, certain federal laws recognize the vested interest siblings have in one another's lives.[93]

In my family's case, the Ohio probate court required Terese's siblings to specify a statutory framework that granted family members "higher standing" than other persons communicating with the court in order to bring a motion to review issues related to Terese's health and visitation

89. *See* Kenneth E. Scott, *Standing in the Supreme Court – A Functional Analysis*, 86 HARV. L. REV. 645, 670 (1973).

90. *Tierney*, 421 A.2d at 615 ("The public policy which gave birth to the standing requirements as to incompetency actions is clearly to protect individuals from unwanted interference in their affairs; to shield an individual from the necessity of defending himself or herself from frivolous or insidious incompetency charges.").

91. *See, e.g.*, OHIO REV. CODE ANN. § 2151.414 (West 2023) (instructing courts to consider the interaction and interrelationship of a child with the child's siblings in granting permanent custody); OHIO REV. CODE ANN. § 3107.161 (West 2023) (instructing the same, but for contested adoptions).

92. *See In re* Figley, No. 12 CO 15, 2013 WL 500775, at *3 (Ohio Ct. App. Feb. 8, 2013) (discussing siblings participating in wrongful death suit); *In re* Guardianship of Snyder, Nos. 09CA21, 09CA22, 2010 WL 3291835, at *1, *5 (Ohio Ct. App. Aug. 18, 2010) (allowing siblings to challenge their brother's final accounting of their parents' estate, even though brother was the appointed guardian of his parents).

93. The Fostering Connections to Success and Increasing Adoptions Act of 2008 decreed that states must make reasonable efforts to keep siblings together in foster care, guardianship, or adoption situations, unless the placement is contrary to any sibling's safety or well-being. Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110–351 § 206, 122 Stat. 3949, 3962 (2008). If siblings are separated, states must make efforts to facilitate regular visitation. *Id.*

rights between Terese and her siblings.[94] The probate court's denial of standing to Julie and her four other siblings meant they could not: obtain access to relevant medical records or other kinds of witnesses or documents central to the issues before the court; speak with, depose, or compel the testimony of any witnesses, including calling any medical, psychological, or public health professionals to provide evidence in support of their claims that their sister's medical care had been neglected; make objections during the hearing; present rebuttal evidence; and, perhaps most importantly, take an appeal from any decision made by the probate court.[95]

As stated previously, to take an appeal from a denial of standing in an Ohio guardianship matter without a statutory basis for standing, petitioners must have: (1) moved to intervene to assert standing under Ohio Civil Rule 24; and either (2) demonstrated that their interest is adverse to the ward's or guardian's interest; or (3) demonstrated they have otherwise been aggrieved in some manner by the probate court's order.[96] Julie filed a motion with the probate court to intervene under Civil Rule 24 for visitation and further relief, and that motion was denied.[97] In Julie's brief submitted to the Ohio Court of Appeals, she argued for standing by describing, among other things, her injury and special interest in the case arising out of her relationship with her sister, explaining that she was aggrieved that she was "forced to watch her sister suffer, all the while knowing that Terese is a vulnerable person who, as a major part of her disability, cannot speak and thus is unable to describe the pain that she is experiencing."[98]

Although the Court of Appeals granted standing to Julie, her standing was limited to her appeal of the denial of her motion to intervene, specifically regarding her inability to obtain Terese's medical records.[99] Interestingly, the court noted that Julie's status as Terese's sibling "[did] not in and of itself confer party status upon Julie," but her close family relationship with Terese did appear to factor into the court's

94. Magistrate's Decision at 2, Guardianship of Terese Sweeney, No. 2011 GDN 150554 B (Ohio Cuyahoga Cnty. Prob. Ct. Sept. 22, 2014); *see also* Appellant's Brief, *supra* note 2, at 10.

95. Appellant's Brief, *supra* note 2, at 15, 36.

96. *See supra* notes 82–85 and accompanying text.

97. *In re* Guardianship of Sweeney, No. 103285, 2016 WL 3091957, at *2 (Ohio Ct. App. June 2, 2016).

98. Appellant's Brief, *supra* note 2, at 15.

99. *Sweeney*, 2016 WL 3091957, at *4–5.

decision to grant standing to Julie.[100] The court distinguished unfavorable case precedent based on the fact that Julie was a sibling seeking to intervene, rather than a government entity attempting to do so.[101] Julie ultimately spent years litigating the issue of standing in the case before being permitted to address the health and well-being of her sister.[102]

While blanket denial of standing to siblings in guardianship cases serves to shield guardians from frivolous scrutiny, denials often fail to consider the best interest of the adult ward involved, or the rights of the ward's siblings to continued association. For the estimated 1.3 million adults with disabilities subject to guardianship, and their families,[103] the unwillingness of courts to evaluate sibling concerns and protect sibling bonds through rights of association can be devastating. Many family members do not have the support of other siblings, resources, attorneys, and the ability to persist through years of litigation to obtain basic relief, such as access to medical care and protection of family relationships with loved ones. Preventing people with immediate familial bonds from intervening to ensure the proper care and protection of other family members strictly on the basis that these family members have no cognizable legal interest undermines the very essence of families.

B. Sibling Visitation Rights

Because the Supreme Court has not held that siblings have a fundamental right to associate, states are not obligated to recognize a constitutional protection for sibling visitation rights when siblings are separated. Siblings can be separated in several contexts, including guardianship cases, parental denial of visitation to stepchildren, adoption cases, foster cases, and custody battles.[104] In the context of

100. *See id.*

101. *See id.*; *In re* Guardianship of Spangler, 933 N.E.2d 1067, 1069 (Ohio 2010).

102. *See supra* note 7. The court's decision in this case may have signaled a broader shift in Ohio towards allowing greater intervention from family members in guardianship cases when a ward's care and protection are at issue. Six months prior, the Ohio Court of Appeals held that the maternal great-aunt of two minor children had a right to intervene in a permanent custody proceeding against a state governmental agency after finding that the aunt had an interest in the care and custody of the children because she had been involved in their day-to-day care for nearly ten months. *In re* R.W. & T.W., 30 N.E.3d 254, 258–59 (Ohio Ct. App. 2015). Also discussed further below, Ohio has adopted recent amendments to its guardianship requirements regarding visitation, indicating the state is promoting greater family involvement in wards' lives. *See infra* notes 129–34 and accompanying text.

103. BEYOND GUARDIANSHIP, *supra* note 18, at 16–17.

104. Jones, *supra* note 60, at 1187.

guardianship disputes, guardian-imposed limitations on visitation will frequently cause family members to file complaints or actions against a guardian in court.[105] Although rulings or policies that authorize guardians to limit a ward's visitors have begun to shift in recent years as allegations regarding the abuse of individuals subject to guardianship have received more media attention, states have traditionally given guardians unfettered authority to limit a ward's visitors.[106]

As there are currently no federal laws granting visitation rights to siblings in guardianship settings, visitation issues are largely left to the purview of states.[107] Many states have adopted specific visitation statutes, but because protection of these rights has been left to state legislatures and courts, the extent of these rights is a patchwork across the country.[108] For instance, grandparents in South Carolina who have never met their grandchildren can petition for visitation using a state statute, but those same grandparents would be unable to do so in Arkansas.[109]

Under specific, defined circumstances, all fifty states have, or at some time have had, statutes allowing third parties to sue for visitation with children.[110] Siblings, if they are explicitly named in a visitation statute, are generally listed after other close relatives, such as grandparents or step-parents.[111] Many of these visitation statutes expressly name children as wards, without providing clarification on how the statute might apply in the context of an adult ward.[112]

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105. *See infra* notes 117–22 and accompanying text.

106. Dari Pogach, *Guardianship and the Right to Visitation: An Overview of Recent State Legislation*, ABA COMM'N ON L. & AGING (Dec. 1, 2018), https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-40/issue-2-november-december-2018/guardianship-visitation. The issue of visitation is closely linked to the well-being of wards since restriction on visitation rights of family members and close relations can dramatically increase the likelihood that neglect, fraud, and abuse of the ward will go unnoticed and unaddressed. *See id.*

107. *See id.*; Emily DiMatteo et al., *Rethinking Guardianship to Protect Disabled People's Reproductive Rights*, CTR. FOR AM. PROGRESS (Aug. 11, 2022), https://www.americanprogress.org/article/rethinking-guardianship-to-protect-disabled-peoples-reproductive-rights/ ("There is no federal legislation on guardianship.").

108. Sarah J.M. Cox, *Grandparent and Third-Party Visitation Rights: A Fifty State Survey*, 40 CHILD. LEGAL RTS. J. 76, 77 (2021) (describing how factually similar cases have different outcomes depending on the state the action is filed in).

109. *Id.*

110. *Id.* at 76; Troxel v. Granville, 530 U.S. 57, 99 (2000) (Kennedy, J., dissenting) ("[A]ll 50 States have enacted a third-party visitation statute of some sort.").

111. *See, e.g.*, N.J. STAT. ANN. § 9:2–7.1 (West 2023).

112. *Id.*

Recall that in *Troxel*, the petitioners were grandparents who were seeking visitation with their grandchildren against the parents' wishes under Washington state's third-party visitation statute.[113] Although *Troxel*'s holding serves as a warning to states against adopting overly broad statutes, the case did not provide states with strong guidance on the appropriate legal theory to be followed in drafting or amending state visitation statutes.[114]

Since the *Troxel* decision, some states have amended their visitation statutes to align more closely with *Troxel*, while others have merely applied *Troxel*'s holding to the interpretation of their existing statutes.[115] For instance, post-*Troxel*, the state of Washington passed legislation amending—and narrowing—its nonparent visitation statute to allow third parties to petition for visitation with a child if: (1) the petitioner has an "ongoing and substantial relationship" with the child; (2) the third party is related to the child; and (3) the child will "likely . . . suffer harm or a substantial risk of harm if visitation is denied."[116]

In the absence of statutes that expressly protect visitation rights, as explained above, the issue of standing becomes of paramount concern when a guardian opposes or restricts access between the ward and his or her siblings.[117] For example, in a 1985 case centering on standing, a New Jersey trial court found that four adult children had standing to seek visitation with their two minor siblings, despite their father and stepmother's arguments to the contrary.[118] The court remarked that the right of siblings to share experiences and a relationship was "without question, a natural, inalienable right which is bestowed upon one merely by virtue of birth into the same family."[119] The court further concluded

113. *Troxel*, 530 U.S. at 60–61.

114. *See* Cox, *supra* note 108, at 78–79.

115. *Id.*

116. WASH. REV. CODE ANN. § 26.11.020 (West 2023).

117. *See, e.g.*, *In re* Katrina E., 223 A.D.2d 363, 363–64 (N.Y. App. Div. 1996) ("Family Court correctly ruled that petitioners, the aunt and uncle of children . . . have no standing to sue for visitation. Absent standing, the question of whether such visitation would be in the best interests of the children cannot be considered.") (citations omitted); Ellen Marrus, *"Where Have You Been, Fran?": The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 TENN. L. REV. 977, 977–78 (1999) ("[W]hen parents decide to separate siblings . . . I argue that siblings should have *standing* to sue . . . .") (emphasis added); *see also* Paige Ingram Castaneda, *O Brother (or Sister), Where Art Thou: Sibling Standing in Texas*, 55 BAYLOR L. REV. 749 (2003).

118. L. v. G., 497 A.2d 215, 218, 222–23 (N.J. Super. Ct. Ch. Div. 1985) ("[S]iblings possess the natural, inherent and inalienable right to visit with each other.").

119. *Id.* at 218.

that granting siblings access to the courts did not impermissibly impinge on parental rights.[120]

New Jersey's legislature then codified sibling visitation rights in its 1987 amendments to the state's grandparent visitation statute, N.J. Stat. Ann. § 9:2-7.1, when it added siblings as interested parties in visitation actions.[121] In applying this statute, New Jersey courts have recognized that visits with relatives are an important part of a child's upbringing and that siblings do indeed have standing to seek visitation.[122] Additionally, New Jersey allows "interested parties," which include close relatives of a ward, like siblings, to file a motion with the court to review a guardianship or raise concerns about a guardian's conduct, such as actions taken to deny visitation.[123]

In response to increased reporting and publicity about widespread abuse in the guardianship system, many states are amending and passing statutes that address visitation in greater detail, although such legislation differs dramatically depending on the state.[124] For example, "[i]n South Dakota, Rhode Island, and Tennessee, [a] guardian must seek a court order to restrict visitation."[125] Other states allow courts to sanction or even remove a guardian for restricting the ward's ability to visit or communicate with others.[126] Nebraska provides relatives with procedural protections such as the right to a hearing, and allows family members who are denied visitation to petition the court.[127] In addition, some states have adopted statutes that prescribe that even in situations where a ward is unable to communicate visitation preferences, a court must presume that visitation is in the ward's best interest, unless there is contrary evidence presented.[128]

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120. *See id.* at 220–22 (noting that parental objections to sibling visitation is merely one factor to be considered in determining the best interest of the children).

121. N.J. STAT. ANN. § 9:2–7.1 (West 2023); *see* Moriarty v. Bradt, 827 A.2d 203, 211 (N.J. 2003).

122. *In re* D.C., 4 A.3d 1004, 1011–13, 1022 (N.J. 2010) (recognizing sibling's right to petition for visitation with her twin siblings under § 9:2–7.1).

123. NJ Guardianship, *supra* note 23; *How to File a Motion in a Guardianship Case*, N.J. CTS. (Feb. 2017), https://www.njcourts.gov/sites/default/files/forms/12032_motion_guardianship.pdf.

124. Pogach, *supra* note 106.

125. *Id.*

126. *Id.* (discussing courts that force guardians to pay court costs or attorney's fees as sanctions).

127. *Id.*

128. *Id.*; *see, e.g.*, R.I. GEN. LAWS § 33-15-18.1(a) (2017) (authorizing consent to be presumed based on the prior relationship history with the person).

Prior to 2022, Ohio had strict requirements for granting visitation rights to third parties,[129] but in January 2022, the Ohio Supreme Court adopted several amendments to its guardianship rules that bear on ward visitation rights.[130] These amendments require Ohio probate courts to establish a process for documenting instances when a court-appointed guardian denies a visitation request with the guardian's ward and require all guardians to submit a list of the names of any persons or entities whom the guardian has "excluded or seeks to exclude from visiting or communicating with the ward."[131] Any updates to that list must also be reported to the court.[132]

The amendments also include additional changes that encourage family and friends to maintain contact with a person under guardianship, in part to tackle issues around abuse, fraud, and exploitation of wards.[133] Although the amendments make it more difficult for guardians to isolate wards from family members, they do not alter Ohio's statutory mandates regarding third-party visitation actions, nor do they grant family members standing to appeal a guardian's decision to restrict or prohibit visitation.[134]

Because progress by the states has been piecemeal, ideally, enactment of laws allowing relatives of wards to raise serious concerns and protecting visitation and standing would begin at the federal level, either through constitutional protections or legislation. Whether implemented at the federal or state level, creating clear statutory or court-imposed regulations in this area should deter guardians from placing unreasonable restrictions on visitation.

Also, at a minimum, courts should not invalidate visitation statutes passed by state legislatures simply because they invite questions regarding a parent or guardian's authority. Many courts have demonstrated that there are ways to interpret sibling visitation statutes

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129. Cox, *supra* note 108, at 91 ("Ohio's statutory law only allows grandparent visitation in situations when there is an active custody case, when the mother of the child was unmarried at the time of the child's birth, or when one of the parents is deceased.").

130. *Amendments to the Rules of Superintendence for the Courts of Ohio*, SUP. CT. OF OHIO, https://www.supremecourt.ohio.gov/ruleamendments/documents/Guardians%20-%20Judicial%20Conference%20proposal%20(As%20Adopted).pdf (last visited Jan. 19, 2024).

131. *Id.* (Rule 66.09(F)(2)(i)).

132. *See id.*

133. Csaba Sukosd, *Guardianship Rules Changes Address Disputed Visitations and Abuse*, CT. NEWS OHIO (Feb. 14, 2022), https://www.courtnewsohio.gov/happening/2022/guardianshipRules_21422.asp.

134. *See id.*

narrowly in a manner that will not override a parent or guardian's ability to act in the best interest of their child or ward.[135] *Troxel* adds a strong safeguard for parental authority by instructing courts to presume a parent's wishes are in the child's best interest.[136]

Furthermore, familial and, in particular, sibling relationships in guardianships would benefit from the willingness of legislatures and courts to use the wealth of scholarship that has developed regarding the psychological bonds and benefits of siblinghood, sibling association, and sibling visitation interests. At the heart of many of these scholarly sources is data-driven information that indicates that taking steps to maintain these rights will operate in a ward's best interest absent evidence to the contrary.[137] The traditional paradigm should be reversed—rather than placing the burden on siblings to file suit and seek standing to maintain their relationship with a family member, guardians should be required to provide sufficient justification for limiting or severing an important relationship, particularly if that relationship involves a relative of the ward.[138] After all, the evidence is overwhelming that maintaining positive family relationships is generally in a child or ward's best interest.[139]

V. GUARDIANSHIP ADMINISTRATION AND COURTS AS SUPERIOR GUARDIANS

Once a guardianship is established, the state plays a dual role as (1) the "superior guardian" to the ward and (2) the impartial judicial fact finder during any guardianship proceedings.[140] For example, if a guardian dies, or the guardianship must be transferred to some other person for another reason, the state may act as a superior guardian to ensure that the needs of the wards continue to be met while undertaking

135. *See, e.g.*, *In re* D.C., 4 A.3d 1004, 1011–13, 1022 (N.J. 2010).

136. *See* Troxel v. Granville, 530 U.S. 57, 68, 73 (2000).

137. *See, e.g.*, Hasday, *supra* note 14, at 899–903; Jones, *supra* note 60, at 1187–89; Patton, *supra* note 14, at *1–2.

138. *Legislative Fact Sheet*, ABA COMM'N ON L. & AGING 6–7, (May 2018), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2018-05-24-visitation-legislative-factsheet.pdf.

139. *See supra* note 137.

140. OHIO REV. CODE ANN. § 2111.50 (West 2023) ("[T]he probate court is the superior guardian of wards who are subject to its jurisdiction . . . ."); *In re* Myers, 85 N.E.3d 217, 223 (Ohio Ct. App. 2017) ("Because the probate court is the superior guardian, 'the appointed guardian is simply an officer of the court subject to the court's control, direction, and supervision . . . .'").

fact-finding steps to appoint a new guardian who will serve the ward's best interests.[141] Fulfilling both roles, which are not always simple to separate, can be demanding for state courts.

The following sections explore some of the challenges facing courts in administering guardianships and discuss how legislative and policy reforms could address current gaps in the state-based guardianship system. In addition to federal and state reform, removing cumbersome barriers to family participation in critical guardianship matters can operate as a check on the guardianship apparatus. In effect, a more balanced family-based approach would allow family members to alert overburdened courts to guardianship concerns without undermining the system's ability to act as a necessary limit on family involvement.

A. Oversight of Guardians

Courts have not been designed, nor have judges and their staff been extensively trained, to run the administration of state guardianships.[142] Once a guardianship is created, oversight is often lacking because many states have not established a robust system to monitor guardian decisions.[143]

Alarmingly, a 2010 U.S. Government Accountability Office study found that in sixty percent of selected closed cases, courts failed to oversee their appointed guardians, which allowed vulnerable adults to be subject to both financial and physical abuse.[144] The 2010 study does not appear to be an anomaly, as more recent studies have similarly found

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141. *See, e.g.*, § 2111.02; NJ DHS Guardianship, *supra* note 16 ("Once a guardian or co-guardians have been appointed . . . only the court can modify or change the guardianship order.").

142. *See* U.S. GOV'T ACCOUNTABILITY OFF., GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS (Sept. 2010), https://www.gao.gov/assets/gao-10-1046-highlights.pdf (finding that in thirty percent of sampled cases, courts failed to provide adequate screening of potential guardians, and appointed individuals with criminal convictions or significant financial problems to manage high-dollar estates, and in fifty-five percent of sampled cases, courts and federal agencies did not communicate, or did not communicate effectively with each other about abusive guardians, thereby contributing to the continuation of the abuse).

143. *See* NAOMI KARP & ERICA WOOD, GUARDING THE GUARDIANS: PROMISING PRACTICES FOR COURT MONITORING 2 (Dec. 2007), https://legacy.utcourts.gov/committees/visitor/Promising%20Practices.pdf ("Despite a dramatic strengthening of guardianship statutory standards in recent years, judicial monitoring practices in many areas appear lax."); Hardy, *supra* note 20, at *4 ("A significant number of jurisdictions do not have an established system to monitor the guardianship, and most do little to provide any systematic oversight of the guardian's actions.").

144. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 142.

widespread financial and physical abuse, and fraud, in the state-based guardianship system.[145] The paucity of effective oversight can often be attributed to limited judicial resources and insufficient funding to support oversight mechanisms.[146] In 2018, courts were tasked with supervising guardianships for more than 1.3 million disabled people nationally, and an estimated $50 billion in assets linked to these guardianships.[147] Many court systems in individual states are expected to manage tens of thousands of guardianships.[148] Since the number of living adults over the age of sixty-five will nearly double by 2050, the number of adult guardianships in need of judicial administration will likely increase significantly in the coming years.[149]

While states require guardians to file reports to document the welfare of wards, most state court systems do not have the administrative capacity to review reports filed, follow up on substantive issues contained in these reports, or pursue guardians that fail to file reports on time or at all.[150] Courts themselves acknowledge these deficits, and judges have expressed concerns over their ability to monitor compliance by guardians and review guardianship reports in a timely manner due to limited court staffing.[151] These deficiencies in court control over guardianships are

145. *See, e.g.*, David Holmberg, *The Scourge of Elder Abuse: Don't Be Afraid to Speak Up*, FORBES (Oct. 18, 2019), https://www.forbes.com/sites/davidholmberg/2019/10/18/the-scourge-of-elder-abuse-dont-be-afraid-to-speak-up/?sh=5adb98d4637e ("In 2016, the General Accountability Office . . . examined the state-based guardianship system and found hundreds of cases of physical and financial abuse, and negligence throughout the country."); *ABA Adopts Commission Sponsored Resolution in Support of a Guardianship Court Improvement Program*, ABA (Oct. 1, 2020) [hereinafter ABA GCIP], https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-42/vol-42--issue-1--september-october-2020-/aba-adopts-commission-sponsored-resolution-in-support-of-a-guard/ ("[E]very year[,] media accounts reveal both large scale systemic abuses and individual cases of abuse and neglect.").

146. ABA GCIP, *supra* note 145.

147. BEYOND GUARDIANSHIP, *supra* note 18, at 16–17, 65.

148. Kristin Thorne, *Eyewitness News Investigation Finds Alarming Issues in Tri–State's Adult Guardianship Systems*, ABC7 (Jan. 18, 2023), https://abc7ny.com/investigation-adult-guardianship-law/12712558/ ("As of December 2022, New York had 49,877 court-appointed guardianships and New Jersey had 36,515.").

149. *Id.*

150. *See id.* (describing how court representatives stated that courts are "significantly burdened" by the volume of guardianship cases and the oversight required by each); S. SPEC. COMM. ON AGING, ENSURING TRUST: STRENGTHENING STATE EFFORTS TO OVERHAUL THE GUARDIANSHIP PROCESS AND PROTECT OLDER AMERICANS, S. REP. NO. 115-392, at 16 (2018) [hereinafter SCA Report] (stating that a Texas court official reported in 2018 that forty-three percent of guardianship cases reviewed by a compliance project were out of compliance with reporting requirements).

151. Thorne, *supra* note 148.

gravely troubling given that those who suffer are often society's most vulnerable members, and courts' wherewithal to adequately protect wards goes to the heart of their core responsibility to serve as superior guardians to their wards.

In response to widespread criticism of abuse in the guardianship system, in addition to the modifications described above in Part IV, state legislatures and courts have begun to establish further safeguards.[152] For example, in 2022, Ohio amended its guardianship appointment rules to include a requirement that guardians receive training on the detection and reporting of abuse, neglect, and exploitation allegations to authorities.[153] The State of Nevada created a hotline enabling individuals to submit complaints against a guardian, and Nevada state courts now fund and operate a guardianship compliance office to strengthen their monitoring capabilities.[154]

Since courts are the superior guardians for wards, strong follow-up on reporting requirements should be put in place and enforced; comprehensive case management systems should be instituted to track guardianships; and proper training to identify the red flags for potential abuse or neglect should be prioritized.[155] Courts should also appoint officials or volunteers to conduct periodic well-being checks and issue clear guidelines and educational materials to responsible officials on how to ensure that wards receive proper protection and care.[156]

Additionally, state legislatures and courts need better data on the number of individuals subject to guardianships and the asset amounts controlled by guardians.[157] Since each state manages its system differently through its own distinct guardianship practices, procedures, and requirements, there is a lack of standardized reporting across the

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152. *See* ABA COMM'N ON L. & AGING, GUARDIANSHIP REFORM: 2021 ADULT GUARDIANSHIP LEGISLATION SUMMARY 1 (2021) [hereinafter ABA Legislation Summary], https://www.americanbar.org/content/dam/aba/administrative/law_aging/2021-guardianship-leg-summry.pdf ("In the last 10 years, states have enacted nearly 400 adult guardianship bills ranging from a complete revamp of code provisions to minor changes in procedure.").

153. *See Amendments to the Rules of Superintendence for the Courts of Ohio*, *supra* note 130; OHIO SUP. R. 66.06(A).

154. Thorne, *supra* note 148.

155. *Monitoring Guardianships*, CTR. FOR ELDERS & CTS., https://www.eldersandcourts.org/guardianship_conservatorship/resources-for-courts/monitoring-guardianships (last visited Mar. 12, 2023); *see* SCA Report, *supra* note 150, at 17.

156. *See* SCA Report, *supra* note 150, at 6–8.

157. *Id.*; ABA GCIP, *supra* note 145.

states.[158] Moreover, guardianship-related court records are often sealed, making it more difficult for interested parties to gain access to information that enable courts and interested parties to hold guardians accountable.[159] While it is certainly true that guardians should be permitted to make reasonable decisions on behalf of their wards, and competent guardians should not be over-burdened, the reports of rampant guardianship abuse and the accompanying life-altering consequences underline the need for judicial systems that can root out failing or failed guardianships.

Without a doubt, federal and state governments can assist state courts in strengthening guardianship oversight by expanding funding for guardianship services. In 2020, the American Bar Association reported that state courts "bear total fiscal responsibility for guardianship," and as a result, "often lack the necessary resources to protect the individual rights and safety of the individuals who come before them in guardianship cases."[160] Legislative representatives can further support courts by identifying and establishing appropriate funding levels for the measures needed to safeguard adults subject to guardianship.[161]

At the federal level, elected representatives have introduced bills proposing state-based guardianship reforms.[162] Members of Congress, officials at federal agencies, and academic scholars have all suggested that the federal government fund a Guardianship Court Improvement Program ("GCIP") to strengthen monitoring and compliance by courts, improve data collection efforts, and standardize certain procedures and protections for wards nationally.[163] And, scholars and experts have

158. *See* DiMatteo, *supra* note 107.

159. Will Van Sant, *Special Investigation: Sealed Guardianship Cases*, NEWSDAY (Sept. 29, 2016), https://projects.newsday.com/long-island/sealed-guardianships-cases/.

160. ABA GCIP, *supra* note 145.

161. ABA Legislation Summary, *supra* note 152, at 17.

162. In October 2021, legislators introduced the Guardianship Accountability Act, which would provide accountability and oversight of guardianships and provide funding and training to identify abuse. *See* S. 2881, 117th Cong. (2021); H.R. 5600, 117th Cong. (2021) (requiring that "the Department of Health and Human Services (HHS) . . . create a National Resource Center on Guardianship for the publication of resources and data relating to court-determined adult guardianships", and "HHS to award at least 5% of certain grant funds for state programs related to overseeing the administration of court-appointed guardian arrangements").

163. *See* Dari Pogach & Christopher Wu, *The Case for a Guardianship Court Improvement Program: Federal Funding to State Courts Could Improve Guardianship Systems and the Lives of Millions of Older Adults and People with Disabilities*, 72 SYRACUSE L. REV. 495, 500–01, 530–34 (2022).

identified laws that Congress can amend to incentivize state-based reforms.[164]

In sum, the avenues of reform identified—amending relevant statutes and court rules, strengthening monitoring and compliance systems, and increasing funding for state guardianship systems—have the potential to create a more humane and just system for millions of vulnerable adults.

B. Substantive and Procedural Discretion in Guardianship Law

Where federal or state statutes do not regulate the administration of state guardianship systems, it is incumbent upon the courts to fill any gaps. In these instances, judges are called upon to exercise their own discretion in a variety of guardianship decision-making situations: appointment, review of complaints against a guardian, discipline or termination of a guardian, visitation disputes, and more. The scope of this judicial discretion encompasses both substantive and procedural matters.

Much of a court's substantive discretion is derived from a "best interest" standard that many state courts, including New Jersey and Ohio, employ in both routine and complex guardianship decisions.[165] This standard requires courts to consider the "best interest" of the incapacitated individual in reaching its determination in a case.[166] What "best interest" means, however, differs widely from state to state. For example, some states have adopted statutes that outline specific factors a judge must weigh in determining a child or adult ward's best interest, and these statutes diverge in specificity depending on the context of the dispute.[167] Other state statutes instruct courts to analyze the best

164. *Id.* at 527–28. For example, Congress could amend the Older Americans Act of 1965, which provides funding for aging Americans, to condition the continued disbursement of federal funds on the adoption of prescribed state-based reforms. *Id.* at 527. Congress could also condition Medicaid and Supplemental Security Income funds upon state assurances that state guardianship proceedings are providing adequate due process protections for wards. *Id.* at 527–28. Members of Congress have introduced bills awarding Department of Health and Human Services funds to state programs overseeing the administration of guardianships. *See supra* note 162.

165. *See infra* notes 166–70. Some states also use a "substituted judgment" standard, either in tandem with or as an alternative to the "best interest" standard, which requires courts and guardians to make decisions that the incapacitated person would make if he or she had capacity. BEYOND GUARDIANSHIP, *supra* note 18, at 36.

166. *See, e.g.*, *In re* M.R., 638 A.2d 1274, 1280–81 (N.J. 1994).

167. *See, e.g.*, N.J. STAT. ANN. § 3B:12–57(f) (West 2023) (explaining the general responsibility of guardians to "exercise authority over matters relating to the rights and best interest of the ward's personal needs" and listing ten specific responsibilities); *In re*

interest of a ward without offering any substantial guidance on the meaning of that term.[168] Ultimately, where less definition is provided by the statute, courts are more or less granted almost unlimited discretion in determinations affecting a ward's life.

Although vague statutes that leave the "best interest" determination to courts' full discretion may allow courts to fashion decisions more tailored to an individual's particular needs or circumstances, they also grant enormous power to courts over the fundamental rights of particularly vulnerable individuals, with few restraints. These broad powers remain largely unchecked within the trial court system because in many states, even if a person obtains standing to take an appeal, the standard of review for a trial court's factual determinations for guardianship matters is abuse of discretion, as opposed to de novo review.[169] That is, to find an abuse of discretion, an appellate court would have to hold that the trial court acted unreasonably, arbitrarily, or unconscionably.[170] Because this is a high bar to clear, it is far less likely that a trial court's rulings will be overturned.[171]

Even when statutes include factors for evaluating a ward's "best interest," the breadth and nature of these factors still frequently vest

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Goldemberg, No. BER–P–460–05, 2006 WL 337083, at *8–9 (N.J. Super. Ct. Feb. 7, 2006) (citing provisions from § 3B:12–57(f) in best interest analysis and finding plaintiffs demonstrated they could meet the court's requirements set forth for guardianship, such as visiting the ward, providing care, comfort, and maintenance for the ward, taking care of the ward's clothing and personal effects, and managing the ward's finances); *see also* N.J. STAT. ANN. § 9:2–4(c) (West 2023) (including the list of fourteen factors that New Jersey courts consider in determining a child's best interest in custody disputes).

168. *See, e.g.*, OHIO REV. CODE ANN. § 2111.01 (West 2023) (failing to define "best interest"); § 2111.50(C) (failing to define "best interest" but listing powers of the probate court); OHIO SUP. R. 66.01, https://www.supremecourt.ohio.gov/docs/LegalResources/Rules/superintendence/Superintendence.pdf (last visited Feb. 22, 2024) (defining "best interest" as "the course of action that maximizes what is best for a ward, including consideration of the least intrusive, most normalizing, and least restrictive course of action possible given the needs of the ward"). Ohio courts also appear to use the responsibilities of a guardian, outlined in Rule 66.09, to guide their best interest analysis, such as looking at whether the guardian will make choices or decisions for the ward that meet the needs of the ward while imposing the least limitations on the ward's rights. *See* Magistrate's Decision, *supra* note 7, at 10–12 (citing Rule 66.09).

169. *See, e.g.*, *In re* Estate of Bednarczuk, 609 N.E.2d 1310, 1313 (Ohio Ct. App. 1992); *In re* Guardianship of Parker, 275 S.W.3d 623, 628 (Tex. App. 2008).

170. *See, e.g.*, *Bednarczuk*, 609 N.E.2d at 1313.

171. *See In re* Metzenbaum, No. 72052, 1997 WL 428612, at *2 (Ohio Ct. App. July 31, 1997) ("[T]he probate court has broad discretion in appointing guardians and, in the absence of an abuse of that discretion, the decision of the probate court will not be set aside.").

courts with broad discretion.[172] For instance, a statute may outline several circumstances that are relevant to a child or adult ward's life, but will not provide any explanation of the analysis to be applied to the facts determined by a court, or specify how the factors should be prioritized.[173] Scholars have noted that the "best interest" standard has largely been applied in inconsistent ways, with one scholar stating, "the best interest" standard is so vague that it can be, and sometimes has been, used to subvert children's interests entirely and instead to serve the interests of contending adults."[174]

Essentially, without further guidance from legislatures on the judicial analysis to use in weighing "best interest" factors in guardianship proceedings, the judgment of "best interest" becomes a subjective matter for individual judges to apply their personal views on preferred guardianship practices and models.[175] The ambiguity of the "best interest" standard, and the difficulty in satisfying the appellate abuse of discretion standard, further combined with judicial deference to guardian decisions and substantial legal standing issues arising within certain states, hinder efforts of siblings to effectively intervene in guardianships.

Turning to the procedural aspects of guardianships, state judges have vast authority in the application of procedures to guardianship matters as well. Researchers have criticized the "lax processes" followed by some state courts in guardianship matters, noting that guardianship matters are viewed as low-priority, time-consuming family matters despite the fundamental liberty issues at stake in guardianship arrangements.[176] In some jurisdictions, guardianship hearings are

172. *See* Janet L. Dolgin, *Why Has the Best Interest Standard Survived?: The Historic and Social Context*, 16 CHILD. LEGAL RTS. J. 2, 8 (1996).

173. *See id.* at 3 ("Even statutory versions of the best-interest standard that attempt to delineate relevant values and give some content to those values remain normative rather than objective.").

174. *Id.* at 6, 8 ("The principle can be, and has been, used to prefer mothers; to prefer fathers; to prefer joint custody; and to prefer 'psychological,' over biological, parents; or biological over psychological parents.").

175. *See id.* at 3 ("Thus, best-interest determinations remain dependent on the values and choices of particular judges . . . ."). Some states have a system of appointing a guardian ad litem for guardianship proceedings, where an attorney advises the court concerning the best interest of the incapacitated person, but ultimately, the final determination rests with the judge. *See In re* Guardianship of Macak, 871 A.2d 767, 772, 772 n.3 (N.J. Super. Ct. App. Div. 2005).

176. *See* Pogach & Wu, *supra* note 163, at 520 (discussing guardianship cases receiving low priority in the court hierarchy and receiving less administrative attention and resources as a result); Neil B. Posner, *The End of Parens Patriae in New York:*

disposed of in a few seconds or minutes, and are viewed as ministerial in nature notwithstanding that many such matters involve the fundamental rights of wards and may have materially adverse impacts upon the wards.[177] Procedural rules intended to protect the rights of the parties may be relaxed or entirely absent, unlike those employed in cases involving other subject matter, or may be left up to the judge to be applied in an ad hoc basis.[178]

Additionally, judges in some states have broad discretion to decide whether to review a guardianship and who will be permitted to intervene in guardianship matters. In these states, judges have substantial flexibility in choosing whether to investigate a complaint regarding a guardian's treatment of his or her ward. For instance, once a court in Ohio receives a complaint about a guardian, a judge is required to review the complaint, but then has several options for handling it, including taking no further action.[179] The judge may refer the complaint to a prosecuting attorney or other state agency for further investigation, schedule a hearing before the court, or dismiss the complaint on its face and choose to take no action at all.[180] Similarly, in New Jersey, although guardianship issues filed with the court "shall be promptly reviewed," the

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Guardianship Under the New Mental Hygiene Law Article Eighty-One, 79 MARQ. L. REV. 603, 606 (1996).

177. *See* BEYOND GUARDIANSHIP, *supra* note 18, at 86 (quoting Elaine Jarvik & Lois M. Collins, *Gray Area: Who Should Make Choices for the Elderly?*, DESERET NEWS (Nov. 24, 2008), https://www.deseret.com/2008/11/24/20287476/who-should-make-choices-for-the-elderly) ("'Once the paperwork is in order, "hearings" average seconds, not minutes.' It is worth noting that in many jurisdictions magistrate judges hear guardianship cases, which tends to support the notion that these cases are seen as ministerial when in fact they impact fundamental rights."); *Supported Decision Making & the Problems of Guardianship*, ACLU, https://www.aclu.org/issues/disability-rights/integration-and-autonomy-people-disabilities/supported-decision-making (last visited Jan. 18, 2024) ("Judges typically approve guardianship petitions without asking many questions.").

178. *See, e.g.*, *In re* Guardianship of A.E.R., 111 N.E.3d 674, 684 (Ohio Ct. App. 2018) (concluding that because guardianship proceedings are non-adversarial in nature, hearsay rules were not applicable to guardianship proceedings); *see also* BEYOND GUARDIANSHIP, *supra* note 18, at 144–45 (stating a "retired judge agreed: [M]uch of the procedural protections that are provided in the [guardianship] statute are ignored" and also noting that some professionals feel "[j]udges may be less likely to care about the due process issues and less likely . . . to value the individuals in front of them because of a priority on expediency and judicial economy").

179. Loc.R. 66.03(B)(4) of the Court of Common Pleas of Cuyahoga County, Probate Court.

180. *See, e.g.*, *id.* ("Plans of action may include any of the following: (a) The matter *may* be set for Review Hearing . . . (b) The Judge or Magistrate *may* conduct an investigation into the complaint . . . (c) The Judge or Magistrate *may* determine that, on its face, the complaint does not warrant further action.") (emphases added); Loc.R. 17(B)(4)(c) of the Court of Common Pleas of Warren County, Probate Court.

judge in some situations has discretion to determine whether any further action is taken by the court in response.[181]

As calls for reform of state guardianship systems continue to grow, state legislatures may improve their systems and the lives of those subject to guardianships by clearly enunciating judicial requirements for reviewing, evaluating, and correcting guardianship performance. Checks and balances could be put in place so that legitimate concerns about neglect or abuse will not be left entirely to judicial discretion, recognizing the administrative burdens that already threaten to overwhelm many state court systems. In agreeing to treat guardianships on equal footing with other legal matters, legislators and courts may also implement the systems and methods to detect, flag, and correct instances of abuse and neglect as early and effectively as possible.

C. Appointing Guardians Under Different State Statutory Schemes

The process of appointing individuals as guardians provides another illustration of how differences in state statutes significantly affect the individuals who will receive care from the appointed guardian. Courts appoint individuals as guardians in two scenarios: (1) a court appoints a guardian for the first time after an individual is deemed unfit to care for him or herself; or (2) the court appoints a successor guardian in the event that a previous guardian is no longer able to care for the ward, or is removed as guardian for other causes, such as a failure to perform the necessary duties imposed on a guardian.[182]

Like other areas of guardianship law, state statutes governing guardianship appointment are not standardized.[183] For instance, some states, like New Jersey, provide preferential appointment of family members as guardians over court-appointed professional guardians, while others, like Ohio, do not.[184] Also, the latitude accorded to judges in making these appointments varies from state to state.[185]

In New Jersey, the procedure for appointment of a guardian is determined by section 3B:12-25 of the New Jersey Statutes Annotated

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181. *See* N.J. Ct. R. 4:86–1(c)(3) ("Case monitoring issues referred to the attention of the [court] *shall* be promptly reviewed and such further action taken *as deemed appropriate* in the *discretion* of the court.") (emphases added).

182. *See, e.g.*, N.J. DEP'T OF HUM. SERVS. BUREAU OF GUARDIANSHIP SERVS., FREQUENTLY ASKED QUESTIONS 4–5 (2011) (describing court appointing a successor guardian after appointed guardian passes away).

183. Annemarie M. Kelly et al., *A Fifty-State Review of Guardianship Laws: Specific Concerns for Special Needs Planning*, J. FIN. SERV. PRO., 60–61 (Jan. 2021).

184. *See infra* notes 186–95.

185. *See infra* notes 186–95.

and New Jersey Court Rule 4:86-6(c).[186] New Jersey's law expressly provides preference for appointing next of kin as guardians.[187] Rule 4:86-6(c) provides that if a guardianship is to be created, "the court shall appoint . . . any of the following: 1) the incapacitated person's spouse . . . 2) the incapacitated person's next of kin . . . ."[188] In 2009, a trial court affirmed the appointment of a ward's daughter as her guardian in preference to the ward's second husband.[189] In its reasoning, the court pointed to section 3B:12-25 and its statutory preference language favoring the appointment of family members as guardians.[190] The court noted that the statute does not provide a preference to spouses over daughters, but "merely provides a list of potential persons which must be given 'first consideration' before the appointment of [a] Public Guardian is made."[191] Furthermore, a New Jersey court may override the next-of-kin preference if such an appointment would be "affirmatively contrary to the best interests of the [incapacitated person]."[192]

Conversely, Ohio law does not include a statutory preference scheme for the appointment of guardians.[193] As observed by an Ohio appellate court, "[a]lthough courts generally select the next of kin, those with familial ties, or someone acceptable to [the ward] on the theory that they will be the ones most concerned with the ward's welfare, they are not required to do so . . . [a] probate court may appoint a stranger as guardian

186. N.J. STAT. ANN. § 3B:12–25 (West 2023); N.J. Ct. R. 4:86–6(c).

187. § 3B:12–25; N.J. Ct. R. 4:86–6(c); *In re* Quiero, 864 A.2d 437, 445 (N.J. Super. Ct. App. Div. 2005) (recognizing "a kinship-hierarchy preference" for appointment of non-testamentary guardians).

188. N.J. Ct. R. 4:86–6(c).

189. *See In re* Floretta Sutton–Logan, No. 105261, 2009 WL 2707357, at *5 (N.J. Super. Ct. App. Div. Aug. 31, 2009).

190. *Id.*

191. *Id.*; *Guardianships*, PROB. LITIG. RES. CTR., https://newjerseyprobatelitigation.com/guardianships/ (last visited Mar. 19, 2024). *But see In re* S.H., No. A–0885–12T4, 2014 WL 4675005, at *2 (N.J. Super. Ct. App. Div. Sept. 22, 2014) (discussing that where two equally fit relatives are interested in guardianship, the statutory scheme prevented the court from weighing who would better serve the interests of the ward and instead required the court to appoint a nephew over a sister-in-law, because the nephew was considered closer kin, even though the sister-in-law was socially closer to the ward).

192. *In re* Roll, 283 A.2d 764, 765–66 (N.J. Super. Ct. App. Div. 1971).

193. In Ohio, the appointment of a guardian is determined by "a probate court on its own motion or on application by any interested party shall appoint . . . a guardian of the person, the estate, or both, of a minor or incompetent . . . ." OHIO REV. CODE ANN. § 2111.02 (West 2013); *In re* Myers, 85 N.E.3d 217, 222–23 (Ohio Ct. App. 2017).

if it is in the best interest of the ward."[194] This statutory policy leaves more discretion to Ohio judges in appointing guardians than New Jersey judges, who must at least consider the statutory preference scheme for kin passed by the legislature. Ohio's guardianship statute, however, does provide an express preference for any guardian applicants nominated by the ward's parents.[195]

Most state statutes provide instructions that if a court determines that appointment of any of the guardian applicants would not be in the "best interest" of the incapacitated person, the court can instead appoint a registered professional guardian—a stranger to the ward.[196] A professional guardian is a court-appointed "surrogate decision-maker," charged with the obligation and right to make all of the ward's decision, both financial and healthcare related.[197]

In some reported cases, courts have appointed strangers as guardians to wards, even when relatives are available and willing to assume guardianship responsibilities.[198] Understandably, courts must be able to appoint non-relative third parties as guardians when incapacitated individuals do not have any remaining relatives to provide care. Nonetheless, appointments of non-relative third-party guardians should be made judiciously, given that studies and advocates have shown that ward placements with family and relatives provide superior care to placements with professional guardians, who often lack the time and resources to provide individualized care for their wards.[199] Forced to

194. *Myers*, 85 N.E.3d at 223.

195. *See* OHIO REV. CODE ANN. § 2111.02(D)(2) (West 2023) (citing § 2111.121); *see, e.g.*, *In re* C.F.C., No. A–3168–11T3, 2013 WL 1908039, at *9 (N.J. Super. Ct. App. Div. May 9, 2013) (relying primarily on mother's will to appoint daughter as guardian of son, rather than her second daughter). The court reversed on other procedural defects in this case. *Id.*

196. *See, e.g.*, *In re* Terzano, No. 90–L–14–050, 1990 WL 199103, at *2 (Ohio Ct. App. 1990).

197. *See* N.J. STAT. ANN. § 52:27G–32 (West 2023); N.J. STAT. ANN. § 3B:12–24 (West 2023).

198. Thorne, *supra* note 148 (describing a New York court that appointed a stranger as guardian to a woman despite protests from the woman's daughter).

199. In a 2018 Congressional hearing before the Special Committee on Aging, a state guardianship supervisor from Pennsylvania remarked: "[C]ourts need to be very careful about overriding people who actually know the individual and moving too quickly to that professional guardian . . . [because] people who know the individual, know their preferences, know their values, know what makes them happy, [and] know what makes them tic, are going to be better guardians." The supervisor also counseled that courts should not merely appoint a third party simply because family members disagree on who to appoint as guardian. *Abuse of Power: Exploitation of Older Americans by Guardians and Others They Trust: Hearing Before the Special Committee on Aging*, 115th Cong. 12 (2018) (statement of Nina A. Kohn, Associate Dean for Research and Online Education, David M.

operate with insufficient funding and staffing, public or state-sponsored professional guardianship offices are not always able to provide minimal, let alone intensive, care for their wards.[200] Professional guardians may be assigned dozens—or sometimes, even hundreds—of wards to care for, and may therefore tend to push their wards into institutions.[201]

Some states have set a limit on the number of wards per professional guardian.[202] In New Jersey, no guardian is allowed to manage the affairs of more than five individuals at a time.[203] This restriction was put into effect in the aftermath of a scandal involving an attorney who stole a total of $1.7 million dollars from dozens of incapacitated individuals.[204]

In my family's case, on the day that Julie's brother resigned as guardian, a local attorney with more than eighty wards, and a stranger to Terese, applied to be appointed as Terese's guardian.[205] This attorney later testified that he did not know the total number of wards he was responsible for, stated he had been a person's guardian for eighteen years, but had only visited her six times, and explained that he familiarizes himself with his wards through phone calls or letters, thereby raising immediate questions about his ability to communicate in any meaningful way with Terese, who is unable to communicate through

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Levy Prof. of Law, Syracuse University College of Law); *see also* BEYOND GUARDIANSHIP, *supra* note 18, at 23 (finding that there have been several high-profile cases of abuse by professional guardians and that in most states, these professionals operate with minimal oversight except by the court itself).

200. *See* BEYOND GUARDIANSHIP, *supra* note 18, at 98 (determining funding streams for public guardianship systems are underfunded).

201. *See Supported Decision Making & the Problems of Guardianship*, ACLU, https://www.aclu.org/issues/disability-rights/integration-and-autonomy-people-disabilities/supported-decision-making (last visited Jan. 18, 2024); *see* ABA GCIP, *supra* note 145 ("Approximately one to three million people in the [United States] have a court appointed guardian. This number will increase as the population of individuals ages 65 and over grows.").

202. Shannon Mullen, *Broken System*, ASBURY PARK PRESS N.J. (June 27, 2015), https://www.app.com/story/news/investigations/watchdog/investigations/2015/06/10/guardianship-crimes-barbara-lieberman-sentencing/71007758/.

203. *Id.*

204. *Id.*

205. Post Hearing Brief at 59, 63, *In re* Guardianship of Sweeney, No. 2011 GRD 150554B (Ohio Cuyahoga Cnty. Prob. Ct. July 26, 2017) ("[The local attorney] is currently responsible for 85 wards in three counties across Ohio."). The true number of wards the attorney was responsible for is unclear. A local report alleged the attorney was responsible for over 200 adults in the state. Motion to Give Preference to Family Member for Guardianship Over Attorney with Questionable Record at 4, *In re* Guardianship of Sweeney, No. 2011 GRD 150554B (Ohio Cuyahoga Cnty. Prob. Ct. June 20, 2017) [hereinafter Preference Motion].

these means because of her disability.[206] Still, in Ohio, where there is no statutory preference scheme for the appointment of guardians, the court had virtually unfettered discretion to find that a stranger applicant with a multitude of wards was preferable to guardian applicant Julie, a close sibling of Terese's, an attorney by profession, a parent of two grown children, and an individual with no wards.[207] In Terese's case, the court was comfortable in holding that both Julie and the local attorney were qualified and competent, met all the criteria for serving as a guardian in the state of Ohio, and had presented plans of care that were "thoughtful and appropriate."[208] Had the court found that the appointment of this stranger as Terese's guardian was in her best interest, Julie would have been compelled to appeal the decision with a heavy burden of meeting the abuse of discretion standard set by Ohio.[209] Fortunately, the court ultimately concluded in October 2017 that Terese's best interest would be met by having her sister Julie appointed as guardian, rather than the local attorney.[210]

VI. CONCLUSION

Siblings continue to be without fundamental legal rights of association, and the absence of these fundamental rights erects barriers to legal standing in sibling guardianship and visitation rights proceedings. To truly address the best interest of those subject to guardianship, and to respect the basic ideal of family, courts should acknowledge that siblings have a fundamental right of association, and on that basis, should interpret the legal doctrine of standing more broadly to allow cases involving sibling rights to be heard on their merits. In cases involving sibling visitation rights, courts should presume that visitation is in a ward's best interest absent evidence to the contrary and should routinely grant sibling visitation rights in guardianship cases. States, as well as the federal government, should continue to shift from

206. Post Hearing Brief, *supra* note 205, at 59. Allegedly, this local attorney appeared to exhibit other instances of being unaware of the affairs of his wards. A local reporter claimed that the attorney had filed a routine guardian report with the court where he stated he had not observed any changes in his ward's physical or mental condition, unaware that his ward had died at least three months earlier. Preference Motion, *supra* note 205, at 4.

207. *See In re* Metzenbaum, No. 72052, 1997 WL 428612, at *2 (Ohio Ct. App. 1997) (noting the probate court's broad discretion in appointing guardians).

208. *See* Magistrate's Decision, *supra* note 7, at 9.

209. *See, e.g.*, *In re* Guardianship of Schneider, 806 N.E.2d 610, 613–14 (Ohio Ct. App. 2004).

210. Magistrate's Decision, *supra* note 7, at 18.

paradigms that have in the past bestowed incontestable rights upon guardians, instead of wards and their families. Given the interests at stake, a more balanced family-based approach is in order.

Legislative action, both at the federal and state levels, would be beneficial in clarifying the fundamental rights of siblings, and ensuring the proper application of these rights in contexts relating to sibling standing and sibling-related guardianship conflict. Without further guidance from the federal and state governments, these areas of the law are largely left to judges—who are under-resourced, and often informally trained—to apply their own set of values on what constitutes the "best interest" of a ward in matters that are deeply personal to families. At a minimum, state statutes should: (1) interpret the doctrine of standing to allow siblings, and next-of-kin in general, to raise concerns about guardianships under certain circumstances; (2) direct that a ward's family receive guardianship appointment preference over a stranger unless a court determines that such an appointment is not in the ward's "best interest"; and (3) mandate that judges and their staff investigate reports of neglect, abuse, or inappropriate conduct by a guardian, and create appropriate guidelines for conducting such investigations.

In the spring of 2018, for the first time in six years, I gave my aunt Terese a hug. She looked healthy and happy, surrounded by family, and living in the home of her family. Her scabies had been successfully treated so that her skin was clear and intact. She remains beloved by her family and has become a member of her Maryland community—making friends, caring for her cats and garden, and regularly walking or riding her tricycle in the neighborhood. Although it took many years of litigation, I am relieved and grateful that the Ohio courts heard and adjudicated our family's case on its merits.