GUARDIANSHIP LAW:
DOCTRINE, THEORY, OBJECTIVE

by

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Abstract

Guardianship is a vital legal process designed to recognize and protect personal and property interests. The societal need for guardianship is growing, yet guardianship law is obscure and its theoretical foundation is uncertain. The first part of this thesis examines the historical foundation and doctrine of English law concerning persons with profound intellectual disabilities – then called “idiots.” Surprisingly, the theory or doctrine of parens patriae played only a limited role. After an examination of the royal prerogatives of the monarch, I conclude guardianship was an “active use” that survived the Statute of Uses. A use is a form of trust, but the phrase “theory of use” is utilized to reflect its unique form, distinguishing it from other kinds of trusts.

The second part of this thesis constructs a theoretical framework for guardianship law today. A theory of use recognizes that after the migration of English law to the United States, such a theory must be compatible with state constitutions and must be modified to take into account that change in the form of government. There are two central features of a use, separation of title and protection in a court of equity. Title is separated into a ward’s equitable right and a guardian’s legal title. The guardian is assigned a positive role as legal title holder, especially in relation to other interest holders. Utilizing legal title includes processes of assuming title, protecting the ward’s rights and interests, and acting in the ward’s best interests. A guardian’s wide discretion in a highly individualized context is subject to legal, financial and practical limits. The features of equity are well-suited to protect the ward’s equitable right.
Preface

This thesis is original, independent work by the author.
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1 Introduction

1.1 The Growing Need for Guardianship

Guardianship is a vital legal process designed to protect personal and property interests. It consists of court proceedings declaring an individual, called a ward, incapable of managing his or her own finances or health care, and appointing another person, called a guardian, to administer those interests. Guardianship has broad implications for a ward’s personal and financial well-being and society at large. Because of an aging population and greater incidence of disability, the need for guardianship is sharply increasing. However, guardianship law is obscure and its doctrine, theory and objective are uncertain. Courts, judges, guardians, family members, government agencies, caregivers, service providers, advocates, scholars, reformers, and others will benefit from clarity of the law in this environment of social change.

Social trends foretell a sharp increase in the need for guardianship in the future. In the coming decades in the United States, for example, those trends include an aging population and higher prevalence of developmental disability. Policy implications arise from greater numbers of people who potentially need guardianship. According to the Congressional Research Service (CRS), one of the most significant challenges individuals face is needed “protection against the increasing

1 The term “ward” refers to “[a] person, especially an infant, placed by authority of law under the care of a guardian.” BLACK’S LAW DICTIONARY 1755 (4th ed. rev. 1968). The use of the word can be pejorative but that is not the intent here. See, e.g., Sally Balch Hurme, Current Trends in Guardianship Reform, 7 MD. J. CONTEMP. LEGAL ISSUES 143 n.4 (1996).

2 The term “guardian” is used in this thesis to refer to adult guardianship, though historically it applied primarily to minor children. Alternative names for a guardian include “committee,” “conservator,” “curator,” or “tutor.” See BLACK’S LAW DICTIONARY, supra note 1 at 834.

risk of experiencing periods of poor health and/or disability.” An increasing population of older citizens will affect health care needs, resources, and spending. Aging in particular will affect health policy not only because the proportion of the population is greater, but because the number comprising the whole population is also growing. As a result, the CRS notes, social and economic demands will grow, causing “a substantial impact on the formal and informal health and social care systems and on the financing of medical services in general.” Guardianship law must accommodate these societal changes.

The increasing prevalence of developmental disabilities is another societal trend informing the law. A typology of disabilities is useful. Physical disabilities are distinguished from mental disabilities. Mental disabilities include psychiatric disability (or mental illness), and developmental disabilities. Developmental disabilities include intellectual disabilities (ID) (formerly known as mental retardation), epilepsy, cerebral palsy, and autism. Intellectual disabilities are described as mild, moderate, severe, or profound, but the tendency is to define disability in terms of adaptive skill areas rather than the level of intensity. The law concerning persons or wards with profound ID is the focus of this thesis.

Despite a lack of data, there is some agreement the prevalence of developmental disabilities is increasing. In the United States, though the rate is not precisely known, most sources agree

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4 Id. at 25.
5 Id. at 26.
6 Id. at 27.
7 Id. at 27.
9 Id. at 10-11.
persons with developmental disabilities represent 1.5%-2.5% of the total population, with other organizations reporting higher and lower rates.\textsuperscript{10} Based on this agreed-upon percentage of the population, there are about 4.6 to 7.7 million persons in the United States with developmental disabilities.\textsuperscript{11} Census data does not provide a complete picture of prevalence; it may not embrace all adults with developmental disabilities.\textsuperscript{12} Adults may not self-identify as disabled. Data on children is seen as more available and more dependable,\textsuperscript{13} and that data reveals about 16% of school age children have developmental delays.\textsuperscript{14} More data suggests the number of children with autism increased a staggering 300% since 2000.\textsuperscript{15}

Traumatic brain injury (TBI) is another significant health problem in the United States. TBI is caused by a penetrating head injury or a blow, jolt or bump to the head,\textsuperscript{16} frequently arising from injuries sustained in war. Severe TBI (those involving death and hospitalization) causes wide-ranging effects on cognitive and neurological function, especially the ability to engage in activities of daily living. Severe TBI also creates consequences for relationships with family and

\begin{enumerate}
\item \textit{Id.} at 3.
\item \textit{Id.} at 3.
\item \textit{Id.} at 2.
\item \textit{Id.} at 2.
\item \textit{Id.} at 2.
\end{enumerate}
friends, and accounts for 90% of all medical costs associated with TBI.\textsuperscript{17} Finally, combined rates for TBI-related emergency room visits, hospitalizations, and death increased dramatically over 2001 to 2010.\textsuperscript{18}

These data show aging, disability, and TBI are all significant health policy issues in the United States which are signaling an emergent need for guardianship. Indeed, Dussault recognized long ago that guardianship is especially crucial for persons with ID:

Guardianship has become a critically important area of law for the [intellectually disabled]. The guardianship process is the only judicially recognized means to determine the existence of legal incompetency or disability. Thus, while the guardianship process is important to many segments of our population, it has particular importance to the [intellectually disabled]. In many instances it is the only method available to [persons with intellectual disabilities] to define and protect their rights from the presumptions and prejudices of a population that is totally ignorant of the actual effects of the disability.\textsuperscript{19}

In summary, an aging population creates challenges to guardianship law.\textsuperscript{20} The same can be said about increases in prevalence of DD and TBI. When more people need guardianship, more people will need an intelligible understanding of guardianship law.

1.2 Obscurity of Guardianship Law

One challenge to a better understanding of guardianship law is its obscurity. Guardianship law is

obscure for several reasons. First, the law is not easy to find or describe. According to Hurme and Wood, this area of law is considered a “‘backwater’ topic.”\textsuperscript{21} Guardianship law is criticized as “substantively archaic.”\textsuperscript{22} It is ancient; it covers centuries; it is founded on “royal prerogatives,” writs from the “Petty Bag” office of the “Latin side” of the Court of Chancery (Chancery), inquests of office, grants by letters-patent, an “active use,” and court review by the “Keeper of the King’s Conscience.”

The “scare” quotes are intentional. Any bridge between law and society, however, requires an examination of the law. On the law side of the bridge, the royal prerogatives provide a foundation for a doctrine of “use,” a trust-like property disposition. This doctrine migrated across the span of the bridge for thousands of miles and hundreds of years. A theory of trust animates the doctrine, but a holistic theoretical framework supporting the bridge has not been carefully examined. Adapting and anchoring such a framework to today’s societal needs – on the society side of the bridge – has not been attempted. The bridge between law and society spans from there to here, and from then to now. This thesis takes something old from English law and adapts it anew for guardianship law today.

Another reason why guardianship law is obscure might is because many legal research materials are under unexpected topic headings, such as equity jurisprudence, idiocy or lunacy, infancy, guardian and ward, and insane persons. Older sources on these topics are physically scattered among different libraries. For researchers using online materials, those older materials are not always accessible without academic credentials or costly subscriptions. To complicate matters,

\textsuperscript{22} Frolik and Barnes, \textit{supra} note 20 at 698 n.50.
today guardianship law is roughly fragmented into three categories of guardianship for elders, minors, and persons with disability, and also within the categories of health law and mental health law. The basic information needed to determine the foundation and doctrine, and how it spanned time and place, is old and not easily found.

Finally, guardianship law does not receive academic attention proportionate to its importance in the legal community and society in general. Elder law, which is a part of guardianship law, provides an example. In elder law, there is no general article on guardianship law in the top twenty law review journals; the number of scholars is limited; and the subject in law schools is not taught or not well-developed. A considerable amount of scholarship takes place on the society side of the bridge. However, there is little or no effort to start from the law side and see how the law spans to and informs society today at a time when intelligibility is needed the most. Thus, the first objective of this thesis is to lay a foundation at the law side of the bridge and describe the historical doctrine which spanned from England to the United States, and from then to now.

1.3 The Uncertain Foundation of Guardianship Law

Perhaps because of its obscurity, guardianship law also suffers uncertainty about the foundation of guardianship law. In doctrinal terms, “royal prerogatives” – at least to Americans – seem amorphous and mysterious. Theoretical concepts such as “best interests” and equity seem indeterminate. The purpose of guardianship law seems uncertain. In 2001, Kapp noted guardianship law suffered from systemic indeterminacy. The “basic purpose” of the legal

structure was uncertain, and the “fundamental nature, goals, and methods” of guardianship were in a state of disagreement.\textsuperscript{24} Indeed, without an examination of doctrine or theory, the law side of the bridge seems to hang in a historical time and place with no apparent purpose.

Kapp’s comments were made in the context of an ongoing social reform movement of guardianship law, comprised of attorneys, judges, and elder law and disability rights scholars and advocates. In the United States, these law reforms began in the 1960s.\textsuperscript{25} The complete history of the reform movement is not recounted here. Relevant here is a more recent event. In 2011, the Third National Guardianship Summit (Third Summit) concluded with a burst of new scholarship and a series of new recommendations for reform.\textsuperscript{26}

If the scholarship of the Third Summit is indicative, law reformers apparently now agree regulation of guardians is the singular purpose of guardianship law. Proposed reforms shift from a focus from the ward’s life and well-being – and how the guardian acts to advance the ward’s interests and societal relations – to whether or not the guardian is a “bad” guardian according to ethical standards. No one disputes that guardians must be ethical, but why is the ward in the second seat? This new emphasis on guardian regulation thus raises issues of guardianship law’s doctrine, theory, and objective.


Despite the apparent consensus of the Third Summit participants, there is little or no doctrinal or theoretical support for a conclusion that guardianship regulation is the exclusive object of guardianship law. I do not mean to oversimplify philosophical positions, but the disciplines most concerned with guardianship law tend to focus exclusively on the society side of the bridge. Kohn and Spurgeon say elder law is concerned with client status and outcomes, “not by a distinct set of legal doctrines.” 27 In disability law studies, Kanter says “a shift has already begun to take place from traditional doctrinal analysis forbidding discrimination on the basis of disability to a more textured understanding of people with disabilities…” 28 This is not a criticism and it is an oversimplification of the approaches of these scholars. Indeed, law obtains meaning from social practices. 29 However, law also obtains meaning from doctrine and theory.

Building a doctrinal foundation and theoretical framework from the law side of the bridge affords opportunities to connect with the society side in new ways in order to inform and meet today’s societal needs. Society informs the law, but law also informs society. Accordingly, the second objective of this thesis is the construction of a theoretical framework focused on the ward’s rights and interests in the world and how the guardian protects them.

27 Kohn and Spurgeon, supra note 23 at 429–430.
2 Methodology

A methodology is defined by Rubin as an “independent, systematic set of arguments or criteria which claims to arrive at a true or accurate account of the subject matter under consideration.”\(^{30}\)

This thesis is informed by my experience and expertise as a lawyer in private practice of guardianship law for over fifteen years and as a professional guardian for over ten. Both these practices focused on persons and wards with profound ID and supplied insights of a general nature not typically accessible to others. Most lawyers and judges (including many of those involved in guardianship law) do not have experience as practicing guardians. Wards with profound ID comprise a very small percentage of all wards with ID. Guardians for such wards are likely to be family members; professional guardians are a more recent development.

This thesis is informed by both insider and outsider perspectives.\(^{31}\) The insider perspective is based on direct experience and observation, as well as familiarity with wards with profound ID. As Dussault claimed, “[t]he best rule of thumb is that personal observation and interaction are absolute necessities for accurately determining the functioning level of any individual who is labeled [intellectually disabled].”\(^{32}\) The same is true for assessing all facets of the ward’s life. I am also familiar with the rights and interests of persons with profound ID, the court and institutional systems and processes related to guardianship, and legislative and administrative processes. This thesis is motivated in part by challenging situations with the legal system as


\(^{32}\) Dussault, supra note 19 at 595.
lawyer and professional guardian which raised a question in my mind about the disconnect between guardian regulation in law reform and protecting the ward’s rights and interests in guardianship practice. An outsider perspective provides me with the additional benefit of what Litowitz calls “critical distance.”33 I do not identify as a person with disabilities. In addition, my insights and perceptions of reality are not informed by any personal stake. This work is not funded by, and I am not financially supported, by any special interest. Rather, this thesis is motivated by a desire to create a positive benefit to the lives of all wards with disabilities. A theory which organizes the law around a ward’s rights and interests is particularly significant for persons with disability who have struggled with a lack of dignity and respect at the hands of the law for centuries.

I draw on both perspectives in this thesis. Chapter 3 is all about “finding the law”34 on the law side of the bridge in historical35 England. Guardianship law for persons with profound ID was founded on royal prerogatives and consisted of a doctrine of “use,” a kind of trust.36 Protecting the monarch’s beneficial right in Chancery was the intrinsic objective. “Real world” practice experience helped immensely in the process of wading through ancient vernacular and concepts. The foundation of the law side of the bridge is laid, the doctrine is described, and a theory of trust is revealed. Then, in Chapter 4, a theoretical framework is developed for guardianship law

36 See generally Ernest J. Weinrib, Legal Formalism: On the Immanent Rationality of Law, 97 YALE L. J. 949 (1987). However, I do not strictly follow or formally adopt the entire formalist approach.
here and now.\textsuperscript{37} Since this thesis considers many aspects of guardianship law, the approach tends to be broad rather than deep.

\textsuperscript{37} Martha Minow, \textit{Archetypal Legal Scholarship: A Field Guide}, 63 J. LEGAL EDUC. 65 (2013).
3 Central Features of Guardianship Law

3.1 Introduction

In Chapter 1, the greater societal need for guardianship, as well as the obscurity and uncertainty of guardianship law, were noticed as reasons for building a foundation of guardianship on the law side of a metaphorical bridge between law and society. This Chapter lays that foundation.

What is guardianship law? A synopsis of contemporary guardianship law is provided in Section 3.2 to provide context for the historical discussion that follows. There are typically three stages of procedure today: petition for guardianship, appointment, and post-appointment administration.

The historical theory or doctrine of *pater patriae* (father of the country) or *parens patriae* (parent of the country) is considered the foundation of guardianship law today. I use the terms interchangeably because they are equivalent for purposes here. *Pater patriae* meant the English monarch protected his or her subjects, especially those who could not protect themselves, by the exercise of a royal prerogative of the same name. A ward’s protection is thus defined today in a context of state power rather than a ward’s beneficial interest. A different historical account of royal prerogatives follows in Sections 3.3 and 3.4.

Section 3.3 describes the English monarchy, royal prerogatives generally, and the migration and reception of English law in the United States. England was a monarchy, and an individual called a citizen today was called a “subject” then. Subjects owed their allegiance to the monarch. The monarch had personal powers called royal prerogatives. The English law recognized these royal prerogatives. The monarch used various processes in English law to effectuate them. The processes used were predominantly judicial and originated in Chancery. In short, the origin of
guardianship law for purposes here is found in the English law of royal prerogatives, which migrated around the world, including to the colonies and states of the United States.

In Section 3.4, the question of foundation is addressed, with reference to multiple royal prerogatives involved in guardianship of an idiot. Now considered pejorative, the word “idiot” is used because of its legal meaning at the time. “The Romans made use of the term for illiterate or foolish [or] commonly signifies, an unlearned or illiterate person....With the English jurists, however, idiot is a legal term, signifying a person who has been without understanding from his nativity, and whom the law therefore presumes never likely to attain any.” Generally, a person with profound ID today was legally called an “idiot” then.

The English law of guardianship as of 1776 involved an ensemble of royal prerogatives, not just *pater patriae*. This Section describes those prerogatives, the processes used to effectuate them, their legal consequence, and a brief comment comparing them with contemporary law. A more accurate portrayal of the theory of *parens patriae* is depicted.

Section 3.4 continues by describing the doctrine of a “use.” The history of the use, the separation of legal title and beneficial interest, and the protection of the beneficial interest in Chancery, was the doctrinal basis for guardianship law for persons with profound ID. The intrinsic objective of a “use” is the protection of a beneficial interest. Finally, in Section 3.5, the conclusions reached in this Chapter are briefly discussed.

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39 For convenience, in this thesis, I use the terms English law rather referring to Great Britain or the United Kingdom.
3.2 A Synopsis of Contemporary Guardianship Law

Before shedding light on the historical doctrine and theory of guardianship law, a glimpse of its contemporary counterpart is in order. The synopsis below describes a typical guardianship case, and its standards and processes, in a typical state court jurisdiction in the United States. This may be particularly useful for readers with no or little knowledge of guardianship or guardianship law.

Guardianship law, like any area of law, is situated within a wider framework or system of rules and principles. Historically, there were two types of courts in the English law tradition. First, the common law courts handled disputes between persons over property, contract, and torts. Equity, on the other hand, possessed exclusive jurisdiction over certain subjects. Fields of jurisdiction in equity today include family law, wills and succession, trusts, and guardianship. The name of the state court in the United States exercising equitable powers in these areas and the extent of those powers differs according to jurisdiction, but ultimately the exercise of equity in state courts corresponds to the equity exercised by Chancery.

In a typical guardianship case, there are three fundamental stages of proceedings, which also may vary in each jurisdiction. In the first stage, the court, typically at the behest of a private petitioner, appoints a guardian ad litem (GAL) or like official to make a factual inquiry and

42 Black’s Law Dictionary, supra note 1 at 634.
43 Friedman, supra note 41 at 398.
make a report to the court. Based on the report, the court makes a determination whether or not the ward is capable of managing his or her financial and health care affairs, i.e., is incapacitated.

In a second stage, which might be combined with the first, the court appoints a person as guardian after finding the person suitable for the office. After appointment, the guardian takes an oath of office. Taking office is evidenced by the issuance of guardianship letters, a document which is sealed by a court official. The guardian then takes legal possession of the property of the ward, together with legal custody of the ward. Legal custody confers discretion with respect to physical custody.

The third stage consists of implementation of the guardianship by the guardian and the court. Unlike most civil cases, which have two parties in dispute over conflicting rights and interests, a guardianship case typically concerns only the rights and interests of the ward. This third stage includes various processes that include filing documents with the court and providing for the court’s review of them. A guardian files an inventory of property, listing the property in the estate, and a care plan for the person, identifying the ward’s personal needs. In addition, a guardian is obligated to file a periodic financial accounting and status reports about the ward with the court. During this stage, the guardian implements the guardianship.

There are two types of guardianship: guardianship of the person and guardianship of the estate. A guardianship case might concern personal interests, or financial interests, or both. Guardianship can also be full or limited. A full guardianship gives the guardian management over all the property or personal interests of the ward. A limited guardianship tailors the guardianship, matching specific powers with specific needs so the ward retains discretion over some property and personal interests.
There are two principles which guide the guardian’s discretion. The first is the substituted judgment standard. Under this principle, the ward’s preferences relating to financial and personal interests are determinative to the extent those preferences can be ascertained by the guardian. The second is the “best interests” principle, which is applied when such preferences cannot be ascertained. The latter principle is not well-defined or elaborated. The principles may conflict, such as when a ward’s expressed preferences are not consistent. Nevertheless, guardians exercise discretion according to these principles.

A ward with profound ID is likely to have a full guardianship of both the person and estate because such a ward is typically unable to make abstract decisions or communicate or act upon them. Thus, the applicable principle for a guardian’s discretion is the ward’s “best interests.”

When referring to a ward with profound ID in this thesis, I am assuming a full guardianship of person and estate exists, and “best interests” is the applicable standard.

In summary, the three fundamental processes in contemporary guardianship law are petitioning for guardianship, appointing a guardian, and reviewing in equity. Though institutions, standards, and processes vary according to jurisdiction, these stages of procedure are very similar to the historical processes that are described next.

45 “Substituted judgment,” however, is a misnomer because the guardian does not substitute his or her judgment for that of a ward under this standard.


47 See id. (discussing best interest standard).

3.3 Royal Prerogatives Generally

3.3.1 Introduction

Royal prerogatives constitute the foundation of guardianship law for persons with profound ID. Generally, the royal prerogatives were rights of the monarch and their exercise was not matter of state. However, the distinction between the monarch’s personal capacity and a sovereign capacity varied by monarch and historical timeframe. In this Section, after a brief description of the structure of the English monarchy, a discussion ensues about royal prerogatives generally and how the English law of prerogatives migrated to the United States and was received in the colonies and states there.

3.3.2 The English Monarchy

A complete discussion of the English unwritten constitution, the monarchy, and the law of royal prerogatives is not possible here. However, a brief review of the English system of government sets the stage for reviewing the particular prerogatives exercised in guardianship cases. It is common knowledge the government of England was monarchical. The powers of the monarch were often described in terms of prerogatives.

In a monarchical system, the duties of sovereign and subject were mutual: the sovereign gave protection, and the subject gave allegiance.49 In that rather broad context, the monarch had a duty of protection, i.e., security and governance according to law, and the subject had a duty of allegiance. In a very general sense, a concept of parens patriae infused the entire monarchical

system. However, despite these idealistic concepts, a monarch determined the rights of his or her subjects. When talking about a subject’s rights, it was necessary to refer to a description of monarchical powers to define them. The same was true for guardianship law, where the personal prerogative of the monarch determined an idiot’s personal and property interests.

Sovereignty was primarily vested a monarch, legislative bodies, and judicial bodies. The power to make laws was vested in the monarch and the Lords and Commons, who together constituted Parliament. The administration and execution of those laws were vested in the monarch as executive. Chitty states the monarch had exclusive and extensive discretion as the executive.

At this level of generality, however, the royal prerogatives involved with guardianship of idiots did not involve making laws or enforcing them. The monarch was not acting in a law-making role with Parliament, and was not using executive powers to enforce or administer laws. Rather, their exercise was more akin to exercising private rights. As explained below, the prerogatives were utilized in order to make a disposition of the property and custody of an idiot.

3.3.3 The Royal Prerogatives Generally

The royal prerogatives generally were delineated by an ancient declaratory statute known as the Statute de prerogative Regis. The nature and extent of royal prerogatives relating to

50 Id.
51 Id. at 2.
52 Id. at 3.
54 A “declaratory statute” is “one enacted for the purpose of removing doubts or putting the end to conflicting decisions in regard to what the law is in relation to a particular matter. It may either be expressive of the common law, or may declare what shall be taken to be the true meaning and intention of a prior statute, though in the latter
guardianship of idiots was included in the codification.\textsuperscript{56} The statute expressly recognized a beneficial interest belonging to the monarch. The guardianship of idiots generated ordinary revenue, in the form of profits from the lands, and this revenue constituted a royal prerogative.\textsuperscript{57}

By 1760, however, likely from the assertion of a bolder Parliament, all of the monarch’s prerogative revenue was surrendered to the central treasury in exchange for regular income known as the Civil List.\textsuperscript{58} Though the monarch was no longer entitled to all of the profits from the lands personally, there is no reason to believe the exercise of any of the other royal prerogatives involved with guardianship (discussed further below) stopped occurring.

3.3.4 The Migration of Royal Prerogatives to the Colonies

The English common law travelled across different bridges to different English colonies and dominions throughout the world. The law of royal prerogatives, forming the foundation of guardianship law, thus travelled to such countries as Australia, New Zealand, Hong Kong, Canada, and the United States. The individual states of the United States are the jurisdictions considered in this thesis.

During the period prior to the American Revolution, the English law migrated into the original thirteen colonies of the United States. The migration followed from an explanation how possession of lands was transferred from indigenous people to settlers. Lands were taken by

\textsuperscript{55} See, e.g., 17 Edw. 2, c. 9 (1324?) (Eng.).

\textsuperscript{56} CHITTY, supra note 49 at 4.

\textsuperscript{57} Id. at 237.

\textsuperscript{58} VINCENZI, supra note 53 at 238.
conquest, treaty, or by possession when they were found to be uninhabited.\textsuperscript{59} With conquest or treaty, the law in the conquered or ceded territory generally continued in force,\textsuperscript{60} so the migration of English law in the United States appears based on the fictional theory the colonies were uninhabited. With uninhabited lands, the rights of an English subject were recognized, and the English law was in force, “as applicable and necessary to their [local] situation [and] laws for the protection of their persons and property.”\textsuperscript{61} Thus, “[w]herever an Englishman goes he carries with him as much of English law and liberty as the nature of his situation will allow.”\textsuperscript{62}

Generally, the form of government in the colonies duplicated the form of government in England.\textsuperscript{63} The monarch granted legislative powers – to a provincial governor, a proprietary government, or by a charter – which, when exercised, could not be repugnant to the laws of England.\textsuperscript{64} Further, royal prerogatives were exercised as colonial prerogatives.\textsuperscript{65} Typically, governors of colonies were given royal authority.\textsuperscript{66} A governor, for example, had custody of the Great Seal, and was Chancellor within his province, with the same powers as the Lord High Chancellor.\textsuperscript{67} Though the nature of that exercise differed by colony and depended on the particular form of government in the colony, it appears royal prerogatives first migrated to the

\begin{footnotes}
\item[59] CHITTY, supra note 49 at 29.
\item[60] Id. at 29–30.
\item[61] Id. at 30.
\item[62] Id. at 30.
\item[63] Id. at 31.
\item[64] Id. at 30–31.
\item[65] Id. at 32–34.
\item[66] Id. at 34.
\item[67] Id. at 36.
\end{footnotes}
colonies and existed as colonial law. Colonial law no doubt influenced legal development after the American Revolution either as a body of existing or customary law.

3.4 Guardianship as an “Use”

3.4.1 Introduction
A doctrine of “use” in guardianship law for persons with profound ID was based on effectuating a monarch’s royal prerogatives. In Subsection 3.4.2, each of the foundational prerogatives, the legal processes used, their legal consequence, and their similarity to contemporary guardianship processes are described.

Then, in Section 3.4.3, the focus turns to two of those prerogatives. The first is the prerogative of grant, which separated title into a legal title and a beneficial interest. The second is the prerogative of justice, which protected the beneficial interest in equity. In short, the separation of title, coupled with duties imposed on the legal title holder, and the protection of the beneficial interest in Chancery, constituted an “active use” which prevented the execution of the use under the Statute of Uses.

3.4.2 The Royal Prerogatives in Cases of “Idiocy”
The specific royal prerogatives exercised in guardianship for persons with profound ID are discussed next. The prerogative of entitlement originated from the monarch’s personal entitlement to the lands, goods, and person of an idiot. After obtaining title, the monarch granted a legal title to another, separating a beneficial interest in the profits of from the land. After the grant, Chancery recognized and protected the beneficial interest, which was the basis for its jurisdiction.
The processes used by the monarch to effectuate royal prerogatives both began and ended in Chancery. The prerogative of entitlement used a writ process to put title of into the name of the monarch. After entitlement was established, the monarch exercised the prerogative of grant by issuing letters-patent. After a grant, the matter returned to Chancery. The discussion below describes Chancery’s role and the prerogatives of entitlement and grant.

3.4.2.1 Prerogative of justice

The prerogative of justice consisted of creating courts and offices.68 “[A]ll judicial power is supposed to be derived from the Crown; and though the King himself possesses none, yet he appoints those by whom it is exercised, and constitutes [the] courts and [its] officers.”69

Common law courts, concerned with legal rights, were not directly involved in the exercise of these prerogatives. Chancery was the court vested with the powers to implement legal processes associated with effectuating the monarch’s prerogatives relating to guardianship for idiots. Chancery had two “sides.” The Latin side was concerned (among other things) with administering the monarch’s property rights. The English side protected the monarch’s beneficial interest.70

The personal right of the monarch to the property and person of idiots and the exercise of the royal prerogatives with respect to it were limited in part by the Magna Charta.71 For example, the monarch was confined to using legal process when seizing persons, lands, or goods from

68 CHITTY, supra note 49 at 75.
69 Id. at 6.
71 9 Hen. 3, Magna Charta (1225) (Eng.).
subjects.\textsuperscript{72} Thus, the monarch was required to rely on the Latin side\textsuperscript{73} of Chancery for the issuance of the requisite legal processes to effectuate his entitlement. After obtaining title of record, the prerogative of grant was utilized to transfer or convey a legal title. Grants by letters-patent, however, did not originate from either side of Chancery. A grant was a distinct prerogative exercised by the King in Council and the Lord Chancellor. Still, the Lord Chancellor referred the issue of a fit and suitable grantee to court officers who used judicial processes to decide the issue.\textsuperscript{74} Finally, after appointment, the case moved back to Chancery equity side of Chancery. Each of these three distinct stages of proceedings is discussed next. Notably, the processes used by the monarch with respect to his or her beneficial right were mostly judicial.

### 3.4.2.2 Prerogative of entitlement

The monarch first exercised a prerogative of entitlement. The monarch – as \textit{pater patriae} – possessed this right. Highmore states, “The principle of vesting in the crown the person and property of idiots, is well-founded in the general principle of the monarchical part of the British constitution.”\textsuperscript{75} However the seizure was theoretically justified, guardianship law was based on the literal entitlement of the monarch to possession and custody. In order to realize it, a legal process called inquest of office issued from the Petty Bag office of the Latin side of Chancery. The result was a jury verdict vesting full title in the monarch as a matter of court record.

\textsuperscript{72} CHITTY, \textit{supra} note 49 at 76–77.

\textsuperscript{73} The Latin side included the “petty bag office” which was concerned with administrative affairs of Chancery. BAKER, \textit{supra} note 70 at 115–116.

\textsuperscript{74} See Subsection 3.4.2.3.

\textsuperscript{75} ANTHONY HIGHMORE, \textit{A TREATISE ON THE LAW OF IDIOCY AND LUNACY} 18 (1807), \textit{available at} http://galenet.galegroup.com/.
The prerogative of entitlement was ancient. It may have been based on the feudal tenure system of land ownership in England in which all title was derived from the monarch. A complete description of feudal tenure is beyond the scope of this thesis. However, under the tenure system all estates of land originated from the monarch who could reassert the right to possession.

From the time of the Magna Charta (1215) through the time of Henry III (1216-1272), it appears the monarch did not exercise the prerogative of entitlement. Instead, guardianship of idiots was vested in the lords and others as title holders under the monarch. Idiots, according to Highmore, “were accounted only as infants within age[,] therefore the custody of them was perpetual so long as they lived.” Thus, a lord (a landholder immediately below the monarch) became the guardian of the idiot arising from the custody of a minor as an incident of feudal system. Because it was presumed natural fools could never attain reason, the lords, said Highmore, “took the care of [the] lands in fee.”

Things changed. “It was anciently held that the King took to his own use, and therefore might demise at a rent, all the possessions of a natural fool” during idiocy. The royal prerogative of entitlement to take “to his own use” was apparently asserted against the lords as early as the reign of Edward I (1272-1307). The prerogative was asserted to prevent waste of the idiot’s

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76 Highmore, supra note 75 at 16.
77 Id. at 16. See also Chitty, supra note 49 at 158.
78 Highmore, supra note 75 at 16.
79 Id. at 16.
80 Id. at 16.
81 Id. at 16–17 (emphases added).
82 Id. at 16.
estate, to prevent impoverishment and distress of the idiot and the idiot’s heirs\(^{83}\) and to prevent disinheritance of those heirs.\(^{84}\)

A higher sense of definition of the prerogative of entitlement emerged during the reign of Edward II (1307-1327), when the Statute *de prerogativa Regis*,\(^{85}\) was enacted. The statute provided (according to Shelford) that “[monarch] shall have the custody of the lands of natural fools, taking the profits of them without waste or destruction, and shall find them their necessaries, of whose fee soever the lands be holden. And after the death of such idiots, he shall render them to the right heirs: so that by such idiots, no such alienation shall be made, nor shall their heirs be disinheritcd.”\(^{86}\) Another part of the statute\(^{87}\) preserved the rights of the lords by providing, according to Highmore, that the monarch “has custody of the bodies and inheritances of ideots [sic] and fools in fee,” until idiots were of lawful age.\(^{88}\)

The statute thus confirmed the lords’ loss of the guardianship as much as it asserted the royal prerogative which anciently existed. The statute was declaratory because it created no new rights.\(^{89}\) Despite any uncertainty which might have existed regarding the source of the prerogative, the scope and extent of the prerogative was codified by the statute. By 1603, in

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\(^{83}\) CHITTY, *supra* note 49 at 158.

\(^{84}\) HIGHMORE, *supra* note 75 at 17.

\(^{85}\) 17 Edw. 2, c. 9, (1324?) (Eng.).


\(^{87}\) 17 Edw. 2, c. 10 (1324?) (Eng.).

\(^{88}\) HIGHMORE, *supra* note 75 at 17.

\(^{89}\) CHITTY, *supra* note 49 at 157.
Beverley’s Case,\textsuperscript{90} the prerogative was expressly recognized at common law,\textsuperscript{91} though some of the language in the case might be read to suggest the ward was the beneficiary.

Perhaps it is for that reason that treatise writers on idiocy and lunacy impute generous motives to the monarch in the exercise of this prerogative. According to Shelford, the name of \textit{parens patriae} was attributed to this entitlement. Some authorities called \textit{parens patriae} a prerogative; others called it \textit{regium munus}, or a duty owed by the monarch in return for allegiance.\textsuperscript{92} The treatise writers all seem to agree there was a duty of protection and care of those who could not take care of themselves, and that the duty was in the nature of a trust for the benefit of the idiot.

Collinson says \textit{parens patriae} was a “duty of protection” arising from the reciprocal duty of allegiance.\textsuperscript{93} Chitty also asserts the monarch had a “duty,” in return for allegiance given him, to “take care of such of his subjects, as are legally unable, on account of mental incapacity, [including idiocy,] to take proper care of themselves and their property.”\textsuperscript{94} Shelford says the monarch – as political “father” (i.e., \textit{pater patriae}) and guardian – had the protection of all his subjects, their lands and goods, and that he was “bound in a peculiar manner” to take care of those who could not care for themselves.\textsuperscript{95} He also says the prerogative “seems more properly a royal trust, committed to the Crown by act of Parliament, for the benefit of the subject.”\textsuperscript{96}

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\textsuperscript{90} (1603) 76 Eng. Rep. 1118 (K.B.) (Eng.).
\textsuperscript{91} \textit{Id.}
\textsuperscript{92} SHELFORD, supra note 86 at 6.
\textsuperscript{93} COLLINSON, supra note 38 at 87.
\textsuperscript{94} CHITTY, supra note 49 at 155 (citation omitted).
\textsuperscript{95} SHELFORD, \textit{supra} note 86 at 6.
\textsuperscript{96} \textit{Id.} at 6.
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All three writers strongly suggest the theoretical basis for the exercise of the prerogative of entitlement is the monarch’s duty of protection in a political rather than a personal capacity. Despite this generous gloss, the prerogative of entitlement involved a seizure for purposes of putting title in the monarch, and resulted in a beneficial interest for the monarch, not the ward. It is true that the ward possessed an interest in receiving necessaries, and the monarch was bound to pay them. However, to generally attribute the exercise of the prerogative to a parens patriae duty of protection to the ward for necessaries is to ignore that the seizure of the monarch was “to his own use.”

Moreover, the prerogative of entitlement existed for centuries without mention of pater patriae. The phrase pater patriae first appeared in dictum in a 1696 case concerning infancy. Custer, discussing parens patriae in a context of infants and minor children, amply demonstrates parens patriae to this day does not possess a sound footing as a theory or doctrine. There was apparently no use of the phrase at all until 1610, when James I referred to himself as parens patriae, and there is no case authority until the similar phrase pater patriae was used in dictum in the 1696 concerning infancy. After 1696, parens patriae is only mentioned as a basis for jurisdiction in cases of infancy. In a 1725 case concerning infancy, the court discussed the phrase, but

98 Id. at 200–202.
99 Id. at 202–205.
erroneously referred to Beverley’s Case in 1603 as comparing infancy with idiocy. In fact, Beverley’s Case compared lunacy and idiocy, and never used the phrase parens patriae. 100

Since the prerogative of entitlement was front and center in Beverley’s Case, the failure to mention the phrase hardly supports an assertion parens patriae was a controlling theory or doctrine in 1603. Subsequently, the mention of parens patriae up to 1776 were only in cases considering infancy, not idiocy. In summary, parens patriae as a theory in cases of idiocy sat on a very shaky foundation and was less than 100 years old at the time of the American Revolution.

Whatever the source of the prerogative, or the theory behind it, the legal processes to effectuate entitlement began in Chancery. In order to entitle the monarch, it was necessary to seize the idiot’s land, property and person and vest title in the monarch as a matter of court record. First, the Magna Charta had provided, “no free man shall be taken or imprisoned, or disseised or outlawed or exiled, or in any way destroyed . . . except by the lawful judgment of his peers or by the law of the land.” 101 Then, in the time of Henry III (1216-1272), the Magna Charta was reissued providing for the “fundamental principle” the monarch could not enter or seize possessions on “bare surmises” without a jury. 102 Like his subjects, the monarch could not assert possession of land without a deed or a legal entry into the land to claim possession, and the monarch could not have legal entry without an inquest of office. 103 When the monarch asserted

100 Id. at 203–205.
101 9 Hen. 3, Magna Charta (1225), c. 29 (emphasis added).
102 CHITTY, supra note 49 at 247.
103 Id. at 249.
entitlement, the issue was determined by a process called inquest of office. Thus, legal process known as an inquest of office, including a jury, was required in cases of idiocy.

Historically, inquest proceedings were resorted to on many occasions. The inquiry into entitlement was made by an office, i.e., a sheriff, coroner, escheator, either *virtue officii* (by virtue of the office), or by writ, or by appointment of commissioners. An officer was bound to inquire into a matter, such as idiocy, where title could be asserted and seized for the monarch.

There were two kinds of inquests of office. The first was issued before a seizure from the Court of Exchequer in the form of instructions to an officer in cases where an office (and court record) was not necessary to entitle the monarch. That kind of inquest is not considered further here. The relevant kind of inquest of office is the entitling inquest. Since a monarch could not obtain possession by seizure except as a matter of court record, an office was necessary to exercise his or her entitlement. Thus, process issued from Chancery directing an office to conduct the inquest of office.

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104 *Id.* at 250.
105 *Id.* at 246.
106 *Id.*
107 SHELFORD, *supra* note 86 at 47.
108 The Court of Exchequer was an English court with jurisdiction over revenue cases and involving claims of the Crown against those owing money to the Crown. BLACK’S LAW DICTIONARY, *supra* note 1 at 430.
110 *Id.* at 247.
111 *Id.* at 247.
The process used was a writ *de Ideota inquirendo*, which was also known as an inquest of office, 112 “an office,” “by office” or “office found.” A writ was issued from the Latin side of Chancery from the “Petty Bag” office, and the resulting verdict was returned there. The writ was directed to an officer to empanel a jury, make an inventory, and to inquire and examine the “idiot.” A jury decided whether or not the individual was an “idiot,” and if so, issued a verdict that the title belonged to the monarch “by office.” 113 Once the title was a matter of record, the person, goods, and lands of the idiot were seized.

The issue for the jury was the monarch’s prerogative of entitlement. 114 The question on the verdict was “whether [a person] be an idiot *a nativitate* [at birth or infancy] and therefore, together with his lands, appertains to the custody of the [Crown]?” 115

An idiot, or fool natural, “who from his nativity by a perpetual infirmity[,] is *non compos mentis* [not of sound mind].” 116 The other classes of persons considered *non compos mentis* were infants and lunatics. Those other classes were governed by different standards and processes and were characterized by different Chancery jurisdictions. 117 In cases of idiocy, a person “who cannot count or number twenty pence, nor tell who was his father or mother, nor how old he is, &c., so as it may appear that he hath no understanding of reason what shall be for his profit, or what for

112 A “writ” is a written precept, issued in the name of the sovereign authority, sealed by a court issuing it, and directed to and commanding a sheriff, officer, or some other person to do something. BLACK’S LAW DICTIONARY, *supra* note 1 at 1783.

113 A contemporary equivalent of holding title by office might be a municipal tax collector’s sale to the municipality.


115 CHITTY, *supra* note 49 at 248.

116 SHELFORD, *supra* note 86 at 1.

his loss . . .” was deemed a natural fool or idiot.\textsuperscript{118} Failing this rudimentary test meant a verdict for the monarch.

Writs were eventually superseded by a commission “in the nature of a writ.”\textsuperscript{119} Commissions were made by letters-patent under the Great Seal, directed from the Lord Chancellor to commissioners to inquire whether the person was an idiot; to take an inventory; and to make return into the Court of Chancery. The officers were directed to empanel a jury to hear the inquest.\textsuperscript{120} Like the writ, a commission of idiocy issued from the “Petty Bag” office of the Latin side of Chancery.\textsuperscript{121} The commission was executed by empaneling a jury, was conducted openly, and the inquisition was taken where the individual alleged to be an idiot resided, and both officers or commissioners and the jury inspected the individual. The individual had a right to be present, but notice was not required. Officers or commissioners could summon witnesses and were bound to receive the testimony of witnesses openly.\textsuperscript{122}

Once the verdict of the jury was found, it was filed with the court\textsuperscript{123} and title by office became a matter of record. Lands seized by the monarch by inquisition, however, could not be granted to another until the verdict was returned to Chancery, plus three months, in order to allow traverse\textsuperscript{124} of the inquisition.\textsuperscript{125} These limitations indicate a historically legislative role in

\begin{footnotes}
\item[118] SHELFORD, supra note 86 at 2.
\item[119] HIGHMORE, supra note 75 at 30.
\item[120] CHITTY, supra note 49 at 157.
\item[121] SHELFDOR, supra note 86 at 53.
\item[122] COLLINSON, supra note 38 at 129–138.
\item[123] Id. at 138–142.
\item[124] A “traverse” is a denial of an alleged fact. A traverse of office is thus an allegation that the inquest was defective and untrue. BLACK’S LAW DICTIONARY, supra note 1 at 1671–1672.
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procedural protection of the rights of a person alleged to be an idiot during the exercise of this prerogative.

The culmination of the inquest of office process was a title vested in the monarch “by office” as a matter of court record. By vesting record title in the monarch through legal process, the monarch complied with the Magna Charta and was thus entitled to lawfully enter, seize and possess the idiot’s person, goods, and lands.

The inquest of office process used then bears a strong resemblance to today’s petition for guardianship process. Today, a petition for guardianship is adjudicated by the court. A court officer is assigned the responsibility to investigate the facts alleged in the petition and report to the court. A proposed ward may request a jury trial in some jurisdictions. Statutes ensure procedural due process. Like the inquest of office process, the legal consequence of today’s petition process is a determination by a court or a jury that the ward is incapable of managing his or her own affairs such that a guardian should be appointed by the court.

3.4.2.3 Prerogative of grant

The exercise of the prerogative of entitlement resulted in title of record in the monarch, paving the way for the monarch to transfer or convey to others. The prerogative of grant, as I call it here, was accomplished by the issuance of letters-patent which were signed and sealed in the name of the monarch. In the letters-patent, the monarch granted the possession and custody of the person, goods, and property of a ward to a grantee (a recipient of a title) by letters-patent (a document similar to a deed), while retaining a beneficial interest protected in Chancery.

\[125\] CHITTY, supra note 49 at 253–255.
consequence was a separation of title into legal and equitable estates. This is discussed in more detail next.

The monarch possessed a general royal prerogative (with no relation to a theory of parens patriae) to create offices, grant lands seized under offices, and issue letters-patent which passed under the Great Seal and transferred title to a grantee as a matter of record. In cases of idiocy, the Crown as monarch, like any typical owner of lands and goods, possessed the power to alienate (transfer) title and choose the grantee. As Highmore claimed, “[T]he custody of ideots [sic] . . . was in the power of the King, who might delegate [or grant] the same to such person as he should think fit,” noting the power was personal and not annexed to the Great Seal.

The prerogative of issuing letters-patent was broader than cases of idiocy. The monarch held extensive powers to make all kinds of grants, and granted title and offices for various reasons and to accomplish various objectives. Issuing letters-patent was not based on pater patriae. It was based instead on a personal right to alienate property. As in most conveyances such as deeds, the particular letters-patent defined the scope and extent of the conveyance. Though a

126 An “estate” is an interest in land. BLACK’S LAW DICTIONARY, supra note 1 at 643. Estates are either legal or equitable. Id. at 644. An “equitable estate” is an interest which is cognizable and enforceable in a court of equity. Id. at 644. A “beneficial interest” includes a profit, advantage, or benefit arising from an equitable estate. Id. at 199. When referring to the character of an estate, a “beneficial interest” includes an interest taken “solely for his own use and benefit, and not as holder of title for the use and benefit of another.” Id. A “beneficial interest” is equivalent to an “equitable right.” See Id. at 634–635 (defining an equitable right as one enforceable in a court of equity).

127 CHITTY, supra note 49 at 387.

128 Id. at 389–391.

129 HIGHMORE, supra note 75 at 29.

130 CHITTY, supra note 49 at 384–389.
monarch could not hold an equitable title to his or her own use and benefit in cases of lunacy, he or she could do so in cases of idiocy.\textsuperscript{131}

This process of grant by letters-patent, though personal to the monarch, was related to the King in Council, probably because of the monarch’s prerogative of revenue. The monarch issued a document called a general warrant under his sign manual (his personal signature) which was countersigned by two secretaries of state. A general warrant was used to avoid the necessity of obtaining the monarch’s signature on a grant in each particular case.\textsuperscript{132} The general warrant likely consisted of a list or register of estates seized by office. A warrant from an authorized municipal officer to a tax collector with a list of properties seized for non-payment of taxes, and authorizing the tax collector to sell them at a tax collector’s sale, provides a contemporary analogy.

Under the general warrant, the Lord Chancellor was authorized to issue letters-patent in the name of the monarch and under the Great Seal. The warrant authorized the Lord Chancellor to issue and seal the letters-patent, and to exercise discretion in choosing a grantee, as Keeper of the Great Seal.\textsuperscript{133} As Keeper, the Lord Chancellor performed the perfunctory act of sealing the letters-patent and making a court record of the transfer. The letters were likely recorded in the Latin side of Chancery because, as described earlier, that is where the verdict establishing title by office was returned. The Lord Chancellor also possessed a discretionary authority to choose the grantee.

\textsuperscript{131} COLLINSON, \textit{supra} note 38 at 97–98.
\textsuperscript{132} COLLINSON, \textit{supra} note 38 at 103.
\textsuperscript{133} COLLINSON, \textit{supra} note 38 at 102–105.
The general warrant did not add to the jurisdiction of the English side of Chancery134 and the Lord Chancellor did not exercise equity powers when acting under the warrant. The exercise of discretion may have been as a member of the King in Council, or as the Lord Chancellor on the Latin side of Chancery which was held “before the King,”135 or, more likely, as the Lord Chancellor ex officio (by right of office).

The process began with a petition or application for issuance of letters patent, which was directed to the Lord Chancellor under the warrant and not to the English side.136 Regardless of the precise capacity of the Lord Chancellor, the petition was typically referred to a Master in Chancery. Masters in Chancery were officers of the court acting as assistants to the Lord Chancellor.137 As deputies to the Lord Chancellor, some Masters were responsible for keeping records, including grants passing under seal,138 and conducted court administration on the Latin side.139 Blood relatives and persons with a “vested or presumptive interest in property” were permitted to appear before the Master and nominate guardians, with their expenses reimbursed from the ward’s estate.140 After hearing, the Master in Chancery approved “the most fit and proper persons” as grantee.141 The Lord Chancellor was not bound by the Master’s Report. The Lord

134 SHELFORD, supra note 86 at 10; Chitty, supra note 49 at 158.
135 BAKER, supra note 70 at 116 (internal quotations omitted).
136 COLLINSON, supra note 38 at 193-194. But see HIGHMORE, supra note 75 at 29 (noting application is to Chancery).
137 BLACK’S LAW DICTIONARY, supra note 1 at 1127.
138 BAKER, supra note 70 at 115.
139 See BLACK’S LAW DICTIONARY, supra note 1 at 1127 (noting the Master of the Rolls was responsible for maintaining records on the common law side of Chancery).
140 COLLINSON, supra note 38 at 196–197.
141 Id. at 194.
Chancellor either approved it, returned it to the master to review again, or appointed another grantee.\(^{142}\)

An appeal of the determination of the Lord Chancellor was to the King in Council.\(^{143}\) As this was not an appeal from equity, the King in Council – like the Lord Chancellor – did not possess any jurisdiction to issue *in personam* decrees (orders relating to disputes between persons) or exercise *in rem* jurisdiction (orders related to title of property).\(^{144}\) Rather, it appears the jurisdiction under the warrant and on appeal was strictly limited to the determination of whether or not a grantee was the “most fit and proper” person for the grant in the particular case.

Once a fit and proper person was appointed, the letters-patent were sealed and made a matter of court record. A grant by letters-patent, signed by the Lord Chancellor, and sealed with the Great Seal, was effective to convey a grant.\(^{145}\) Although the express terms of the letters-patent were controlling in an individual case, the legal consequence of the grant was a separation of title into a legal title in an official capacity and a beneficial interest.

The grant by letters-patent, however, was not absolute and could be repealed. Chitty, referring to public officers in general, noted grantees of an office could lose the office because of misconduct, acceptance of another incompatible office, or completion of the purpose of the office.\(^{146}\) Misconduct included abuse, misuse, non-use, or wilful refusal to exercise the office.\(^{147}\)

\(^{142}\) *Id.* at 198.

\(^{143}\) CHITTY, *supra* note 49 at 158; COLLINSON, *supra* note 38 at 104, 199-200.

\(^{144}\) CHITTY, *supra* note 49 at 411.

\(^{145}\) COLLINSON, *supra* note 38 at 103.

\(^{146}\) CHITTY, *supra* note 49 at 85-88.
and was considered a forfeiture of office. The legal processes discussed below were available to review and repeal grants. The extent to which they were used in connection with grantees of letters-patent in cases of idiocy is uncertain.

First, a writ of *scire facias* (let us know) was available from the Petty Bag office of the Latin side of Chancery, because that is where letters-patent were recorded.\textsuperscript{148} *Scire facias* compelled a respondent to “show cause” why the grant should not be repealed.\textsuperscript{149}

Second, the Lord Chancellor also had an exclusive jurisdiction in the “law side” of Chancery in personal actions by or against his subordinates,\textsuperscript{150} likely because they were officers of the courts. For the same reason, a grantee could be held in contempt of court for violating court orders.\textsuperscript{151}

Finally, a writ of *quo warranto* (by what authority is the office exercised) could be brought in the common law courts – such as the King’s Bench – in the name of the monarch to review and repeal grants of office.\textsuperscript{152} All these judicial processes ensured the grantee was protecting the monarch’s beneficial interest.

The processes used for the prerogative of grant are remarkably similar to the appointment of a guardian today. As discussed earlier, the court refers the matter to an official (such as a guardian *ad litem*) who evaluates the suitability of a proposed guardian and provides a report to the court.

\textsuperscript{147} *Id.* at 85–86.
\textsuperscript{148} *Id.* at 330–331.
\textsuperscript{149} BLACK’S LAW DICTIONARY, *supra* note 1 at 1513.
\textsuperscript{150} BAKER, *supra* note 70 at 116.
\textsuperscript{151} “Contempt of court” includes a “failure or refusal of a party to obey a lawful order, injunction or decree of the court . . .” BLACK’S LAW DICTIONARY, *supra* note 1 at 390.
\textsuperscript{152} CHITTY, *supra* note 49 at 337.
The official receives input from family members and other parties interested in the ward and the ward’s estate. The court reviews the report and enters an order appointing a guardian. After taking an oath of office, letters of guardianship are issued, sealed, and made a matter of record with the court.\footnote{See supra Section 3.2.} Court processes for modifying guardianships and removing guardians are also available.

In summary, the royal prerogatives of entitlement and grant were effectuated through legal processes in Chancery and are similar to those legal processes used today. Surprisingly, parens patriae was not the dominant concept. It was confined to the prerogative of entitlement as its justification. It was also not the exclusive concept. It was mentioned earlier that a monarch “took to his own use.” The prerogative of grant separated legal title from the monarch’s beneficial interest, and protected that interest in Chancery. This was a doctrine of “use,” and is discussed next.

\textbf{3.4.3 A Doctrine of “Active Use”}

The “use” was a property disposition based on the effectuating the royal prerogative of grant. The prerogative of grant resulted in the separation of title into legal and equitable estates. This separation of title, together with the protection of the equitable aspect in Chancery, constituted what the law considered a “use.” Guardianship law in cases of idiocy was based on a doctrine of use. Before examining the use more closely, a very superficial history is provided.
The history of the use is a complex and nuanced mix of property law and equity jurisprudence.\(^{154}\) In the early conception, a grantor conveyed the possession of property by grant to a grantee who was obliged “in conscience” to observe a trust for the grantor, the beneficiary. The grantee was said to hold the property *ad commodum* or *ad opus* (to the benefit of) the beneficiary.\(^{155}\) This arrangement, originally a temporary one, became more permanent and was known as a “use,” the French word for *opus*.\(^{156}\) The term “use” has nothing to do with the verb “to use,” but is derived from the law French word *opus* from the Old French *oeps*, with the “p” becoming silent.\(^{157}\)

A grantee holding *ad opus* meant a separation of title, with the holder of equitable title considered as the effective owner.\(^{158}\) In the older terminology, the grantor was called the “feoffor,” the grantee the “feofee of uses,” and the beneficiary the “cestui que use.”\(^{159}\) Early equity jurisprudence recognized the practice of “feoffment to uses,” a grant of legal title for the benefit of the beneficiary.\(^{160}\) By the early 16th century, much of the Chancery’s business on its English side consisted of cases concerning uses, equitable principles, and recognition of equitable rights.\(^{161}\)

However, as a conveyance of property, the use evaded financial and tax burdens which were based on the right of possession. For example, a conveyance of A to B to the use of the A meant

\(^{154}\) 54 AM. JUR. Trusts § 9 (1936) [hereinafter Trusts].

\(^{155}\) BAKER, *supra* note 70 at 283.

\(^{156}\) *Id.* at 285.

\(^{157}\) BAKER, *supra* note 70 at 286 n.7.

\(^{158}\) See BAKER, *supra* note 70 at 283 (discussing separation of title).

\(^{159}\) BLACK’S LAW DICTIONARY, *supra* note 1 at 1710.


\(^{161}\) BAKER, *supra* note 70 at 285–287.
that A, the beneficial interest holder, no longer owed taxes. Eventually, the property in a large part of England was held in use. The Parliament intervened in 1536 with the Statute of Uses (Statute),\(^\text{162}\) and destroyed the grants by fictionally “executing the use.” Executing the use meant, continuing the example, legal title and possession was deemed to vest immediately in A, the grantor and beneficial interest holder.\(^\text{163}\) After the use was executed, A was once again the legal title holder and accordingly owed taxes and other financial responsibilities to the monarch.

The Statute restored the monarch’s prerogatives to revenue despite equity’s recognition of the interest of the beneficial interest holder. However, the Statute “did not abolish conscience or eradicate equitable interests[;] jurisdiction to enforce uses and trusts nevertheless continued in situations not covered by the terms of the statute.”\(^\text{164}\) There were exceptions. The most prominent exception from the Statute was known as the “use upon a use,” or passive or general trust, which eventually evolved into the law of trusts as it is known today.\(^\text{165}\) Personal property was also not within the ambit of the Statute, which was concerned only with real property.\(^\text{166}\) The relevant exception to the Statute for purposes here, however, is the “active use.”\(^\text{167}\) An active use survived the Statute, jurisdiction was retained in Chancery, and equitable title was effective as such in the monarch as beneficiary.

\(^{162}\) 27 Hen. 8, c. 10 (1536) (Eng.).
\(^{163}\) Trusts, supra note 154, § 9.
\(^{164}\) BAKER, supra note 70 at 328.
\(^{165}\) Id. at 328-329.
\(^{166}\) Id.
\(^{167}\) Id.
Active uses were those where a legal title remained necessary to execute the use, as in situations where duties remained to be performed, or the interests represented by the legal title required continuing management.\textsuperscript{168} “such as the collection and distribution of income, the payment of debts, the management of an estate, or the execution of a conveyance.”\textsuperscript{169} An example of a passive use was a grant to A to the use of B, which meant B held bare possession while A enjoyed the profits.\textsuperscript{170} An active use, however, was a grant from A to the use of B coupled with duties of management, such as collecting and turning over income.\textsuperscript{171} Similarly, charitable trusts, which favored a purpose (such as the relief of poverty) rather than an individual B, were active uses because they required ongoing execution of duties related to that purpose.\textsuperscript{172} An active use was called an “official use” when duties were imposed on a legal title holder.\textsuperscript{173} Thus, within the doctrine of uses, the concept of a grantee with official or fiduciary capacity emerged.

Active uses survived the Statute because the use included such ongoing duties. In the cases concerning idiocy, it would have made little sense for a grantee to have no duty to turn over profits to the monarch. Further, as discussed earlier, the Statute \textit{de prerogativa Regis} contemplated an ongoing duty to prevent waste, and to pay necessaries for the idiot and the idiot’s family out of profits.

\textsuperscript{168} Trusts, \textit{supra} note 154, § 13.
\textsuperscript{169} \textit{BAKER}, \textit{supra} note 70 at 328.
\textsuperscript{170} \textit{BLACK’S LAW DICTIONARY}, \textit{supra} note 1 at 1711.
\textsuperscript{171} \textit{BAKER}, \textit{supra} note 70 at 328.
\textsuperscript{172} \textit{Id.} at 328–329.
\textsuperscript{173} \textit{BLACK’S LAW DICTIONARY}, \textit{supra} note 1 at 1711.
Since active uses were outside the scope of the Statute, Chancery’s field of jurisdiction in idiocy continued. However, jurisdiction of Chancery was interrupted during the reign of Henry VIII (1509-1547), when the Court of Wards and Liveries was created. In 1540, the Master of the Court of Wards assumed the management of the property and person of idiots and natural fools until 1645, when the court was abolished,\textsuperscript{174} and jurisdiction reverted to Chancery,\textsuperscript{175} where it remained until the American Revolution.

In conclusion, guardianship in cases of idiocy constituted an active use.\textsuperscript{176} A guardian (then called a committee) was given actual possession and management, with ongoing duties to the monarch. Ongoing duties created an official or fiduciary capacity. The active use exception to the Statute applied. Without such an exception, the Statute would have executed the legal title of all the monarch’s grantees and vested full title in the monarch, rendering superfluous the monarch’s past grants and impairing the monarch’s prerogative to make grants by letters-patent in the future.

\textbf{3.4.4 Separating Legal Title and Beneficial Interest}

As repeated often here, the exercise of the royal prerogative in cases of idiocy separated title into legal and equitable estates, with a beneficial interest in the monarch. However, the Statute \textit{de prerogativa Regis} recognized a unique constellation of additional interests belonging to the

\textsuperscript{174} SHELFORD, supra note 86 at 6–7.

\textsuperscript{175} \textit{Id.} at 10.

\textsuperscript{176} The word “trust” was originally a synonym for the word “use,” but later came to refer to any equitable estate which survived the Statute. BAKER, supra note 70 at 329 n.43.
ward, the ward’s family, and the guardian. The Statute describes with specificity the various interests involved. A summary of the nature of these interests is provided next.

The ward and the ward’s heirs at law had an interest in title after the death of the idiot. During the ward’s lifetime, the monarch and grantees holding under him owed a duty to not commit waste. The ward and the ward’s family held an interest in obtaining necessaries.\textsuperscript{177} The monarch was entitled to a beneficial interest, but legal title did not include a right of alienation because the monarch was obligated to convey the title to the heirs when the idiot died.

Despite the separation into various interests, the beneficial interest of the monarch was superior to all others. When interests of the monarch and others were concurrent in time, the monarch’s title was always paramount. Chitty noted this was an “established principle, that where the King’s right and that of a subject meet at one and the same time, the King’s shall be preferred. \textit{Detur digniori} [(Let it be given to those more worthy)] is the rule in concurrence of title between the King and subject.”\textsuperscript{178} The incidental interests of the ward and the ward’s family were interests cognizable in equity, but did not preclude the monarch’s assertion of his or her superior beneficial interest.

The creation of a beneficial interest also created corollary duties owed to the beneficiary to protect it.\textsuperscript{179} Because the goal of guardianship law was the protection of the monarch’s interest, duties of the legal title holder were generated. The same is not true for other types of

\textsuperscript{177} “Necessaries” are defined as “[t]hings indispensable, or things proper and useful, for the sustenance of human life.” \textsc{Black’s Law Dictionary, supra} note 1 at 1181.

\textsuperscript{178} \textsc{Chitty, supra} note 49 at 381.

\textsuperscript{179} Wesley Newcomb Hohfeld, \textit{Fundamental Legal Conceptions as Applied in Judicial Reasoning}, \textsc{26 Yale L.J.} 710–770 (1917).
guardianship. A grant of a title or possession without any discretion or duties was called a dry, passive, bare, or naked use.\footnote{Trusts, supra note 154, § 14.} In cases of lunacy, the prerogative of grant created such a passive use or trust; however, in cases of idiocy, it was an active use which was created.\footnote{SHELFORD, supra note 86 at 8. See also COLLINSON, supra note 38 at 98 (noting the monarch receives a “beneficial interest with a trust, for he is entitled to receive the rents and profits of their estates for his own use and benefit . . .” (emphasis added)).}

The doctrine of active use – an exception to the Statute of Uses and based on royal prerogatives – applied to guardianship for idiots. Title was separated into legal and equitable estates, with ongoing duties owed by the grantee and legal title holder. The objective of guardianship was the protection of the monarch’s beneficial interest, which generated revenue. How that interest was protected in Chancery is discussed next.

3.4.5 Chancery’s Protection in Equity

The separation of title into legal and equitable aspects was one characteristic of a “use.” The other characteristic was the protection of the beneficial interest in Chancery. Chancery was involved in all the royal prerogatives. Record title was established in the monarch from the inquest of office process. The Lord Chancellor \textit{ex officio} issued letters-patent and chose suitable guardians through a petition process. Chancery also issued writs to review or repeal the grant of an official capacity. However, after the separation of title by grant, the post-appointment protection of the monarch’s beneficial interest moved to the English side of Chancery.

The treatise writers are in agreement on this point. Collinson said, “After appointment of committees, the Lord Chancellor acts in all matters relative to the \textit{non compos} by virtue of his
general authority as keeper of the king’s conscience, and not under the sign manual.”182 After a grant of custody has passed the Great Seal, he is functus officio (meaning, he has performed his office) as to his authority under the sign manual. This means the authority under the warrant was fully discharged, and “the Lord Chancellor then acts by virtue of his general power as keeper of the king’s conscience…”183

Shelford, referring only to lunacy, also stated that after appointment, the Lord Chancellor as Keeper of the Great Seal acted “by virtue of his general power as keeper of the King’s conscience; and the orders of the Court of Chancery in matters of lunacy are enforced by attachment, not as being warranted by the sign manual, but by the general power of the Court.”184 What was the conscience jurisdiction of Chancery?

Chancery’s jurisdiction was originally called a jurisdiction of conscience but according to Baker came to be called equity. The historical evolution from conscience to equity spanned centuries.185 While the history of Chancery cannot be fully considered here, one theme stands out. Unlike the common law courts, the Chancellor “was less concerned with rules than individual cases,” and rather “delv[ed] as deeply as conscience required into the particular circumstances before him…”186 Eventually, this fact-based inquiry became known as equity.187

A court of equity is necessary in the real world because “men’s actions are so diverse and infinite

182 COLLINSON, supra note 38 at 194.
183 Id. at 103–104.
184 SHELFORD, supra note 86 at 11.
185 BAKER, supra note 70 at 122–128.
186 BAKER, supra note 70 at 122.
187 Id. at 122.
that it is impossible to make a general law which may aptly meet with every particular act, and not fail in some circumstances.” The prerogative of grant separated title, creating a legal title and a beneficial interest. The purpose of equity jurisdiction was to use an equity approach to protect the beneficial interest as part of Chancery’s general equity jurisdiction.

3.5 Conclusion

In this Chapter, a doctrine of use – based on royal prerogatives – was discovered at the law end of the metaphorical bridge and two interesting conclusions emerged. First, guardianship law for persons with profound ID was based on a doctrine of use, with the objective of protecting the monarch’s beneficial interest. Second, an exclusive jurisdiction was provided in Chancery to protect that interest.

A doctrine of use for guardianship law goes against the contemporary grain. A theory or doctrine of parens patriae is the assumed historical foundation. However, guardianship law was based on the prerogatives of entitlement and grant, each of which utilized different processes and produced different legal consequences, and parens patriae was associated only with the prerogative of entitlement, and only in a limited way. A theory of parens patriae remains today a theory of state power. Parens patriae informs and emphasizes a social value of protection of the physical body as an expression of government power, is indeterminate and unbounded, and is

state-centered. There is little potential for developing any theoretical framework around *parens patriae* in terms of a ward’s rights and interests because the theory is framed in terms of state power.

In contrast, a doctrine of use was based on the prerogatives of grant and was animated by a theory of trust. Pomeroy – a leading treatise writer on equity – recognized that trust concepts were involved in guardianship, though he stated the analogy “should not be taken far” and did not constitute a basis for exclusive jurisdiction in equity.\(^1\) It is true that guardianship law for persons with profound ID was not like other forms of trust. The quality and extent of the legal title was different, the custody of the person was involved, and other interests recognized in the *Statute de prerogativa Regis*. A use for wards with profound ID was *sui generis* (unique to meet the circumstances).

But things have changed since Pomeroy’s pronouncements. A ward’s rights and interests are now entitled to equal protection.\(^2\) Ultimately, recognition of a separated title, a ward’s beneficial interest, and an objective of protecting it in a court of equity provides a much stronger foundation for developing a theoretical framework than one based on *parens patriae*.

The second conclusion – an exclusive equity jurisdiction existed – also cuts against the contemporary grain. Early treatise writers on equity recognized the exclusive jurisdiction.\(^3\) However, by the 1880s, American commentators such as Pomeroy diverged from that view and

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asserted guardianship was the subject of legislative power.\textsuperscript{194} American courts employed strong \textit{dictum} to assert \textit{parens patriae} power was a legislative or executive power.\textsuperscript{195} The role of a contemporary legislature exercising \textit{parens patriae} powers is not within the scope of this thesis.\textsuperscript{196} However, \textit{parens patriae} as a theory of state power positions a ward’s beneficial interest (if it is recognized at all) on the margins of majoritarian exertions of an unbounded and indeterminate state power.

In contrast, a court of equity was historically considered the competent tribunal for protecting a beneficial interest.\textsuperscript{197} A court of equity has unique features, standards, and processes aligned with the objective of protecting that interest. The objective of protection is also advanced by the contemporary recognition that rights of persons with disabilities are on equal footing with those of all other citizens.\textsuperscript{198}

In making both conclusions in this Chapter, some caveats are in order. The first caveat concerns the transferability or continuity of doctrine. The research in this thesis focuses on the English law up to circa 1776, the time of the American Revolution. This cut-off date is relevant because it is the date the body of English law formally migrated and was received in the United States in

\textsuperscript{194} 3 POMEROY, \textit{supra} note 191 at 333–337. See also \textit{1 id.} at 140 (characterizing the type of jurisdiction concerning fiduciaries as concurrent and remedial rather than original and exclusive).

\textsuperscript{195} Late Corp. of Church of Jesus Christ v. United States, 136 U.S. 1, 10 S. Ct. 792, 34 L. Ed. 478 (1890); Magill v. Brown, 16 F. Cas. 408 (1833).

\textsuperscript{196} See 29 AM. JUR. Insane and Other Incompetent Persons § 10 (1936) (characterizing the source of jurisdiction to determine insanity as statutory, with statutes conferring jurisdiction on courts); 25 AM. JUR. Guardian and Ward § 23 (1936) (characterizing the source of jurisdiction to appoint guardians as varied).

\textsuperscript{197} Walsh, \textit{supra} note 189.

many jurisdictions. The doctrine of use and the royal prerogatives are based on the state of law which existed at the circa 1776 cut-off date.

Another caveat is related to the research sources which were utilized. This Chapter relied primarily on three treatise writers concerning the law of idiocy and lunacy (Shelford, Highmore, and Collinson) and one treatise writer on royal prerogatives (Chitty). It would be nearly impossible to examine all primary sources of English law such as case law and legislation for time span considered. The sources were chosen and used because they were the sources most contemporaneous with the cut-off date.

A third caveat regarding the scope of this thesis: many important subjects were omitted. Only the law concerning a person or a ward with profound ID was considered. The law of persons with ID who are not yet adults, those who are seniors, and the law of persons with mental illness present different dynamics in practice and were excluded to make the thesis more manageable. It became apparent during the course of research that other types of guardianship – especially persons with mental illness and young persons – refer to significantly different foundations, doctrines, and theoretical frameworks. To the extent there is an overlap between adult guardianship of persons with ID and those categories, this thesis did not consider the overlap. I also touch on

199 See Van Ness v. Pacard, 27 U.S. 137, 7 L. Ed. 374 (1829) (determining that the English common law forms part of the common law of the states, insofar as it is suitable to the condition and business of the people, and consistent with the federal and state constitutions and laws).


many other topical areas that are discussed in passing and cannot be more fully explained in the context of a historical review of the doctrine. It is not possible to take into account fully every particular aspect of guardianship law, so these limitations on the scope of research were necessary.

In conclusion, because of the growing need of guardianship law, and its obscurity, Chapter 3 sheds light on the royal prerogatives and a doctrine of use that survived the Statute of Uses. An active use was animated by a theory of trust, i.e., a legal title, a beneficial interest, and an exclusive jurisdiction in equity, and establishes a starting point for constructing a theoretical framework for guardianship law today. That work is done in Chapter 4.
4 A Theory of Use for Guardianship Law Today

4.1 Introduction

As explained in Chapter 1, in response to the obscurity of guardianship law and its systemic indeterminacy, and the growing societal need for guardianship, building a doctrinal foundation and theoretical framework is essential.

In Chapter 3, the doctrinal foundation was established at the law end of metaphorical bridge. Guardianship law is based on exercising the royal prerogatives of entitlement and grant. The doctrine or theory of *parens patriae* was associated with the entitlement and the resulting seizure of the lands, goods and person of an idiot. That prerogative and *parens patriae* is not considered further here.

Rather, the focus of this Chapter is on the prerogative of grant, which separated legal title from the monarch’s beneficial interest, and protected that interest in Chancery. Doctrinally, this is considered an active use. Though the doctrine of active use is animated by a theory of trust, the active use in guardianship law was *sui generis*. For that reason, and to distinguish the active use in guardianship from other forms of trusts, I use the phrase “theory of use” in this Chapter to refer only to the active use in guardianship. I also refer to the beneficial interest in Chapter 3 as an equitable right in this Chapter because the terms are equivalent.\(^{202}\)

The objective of this Chapter is to construct a framework for the bridge from the law side which spans from there to here, from then to now, and from law towards society. This framework is a

\(^{202}\) See supra note 126.
theory of use. First, in Section 4.2, I briefly examine how guardianship law formally migrated to the United States across the span of the bridge and how a theory of use should be modified to reflect the change in form of government from a monarchy to state constitutions in the United States. The migration of English law was cut off by American Revolution, but was still adopted as a system of law to the extent it was suitable to local conditions.

Then, in Section 4.3, a theory of use is developed. It includes trust concepts of legal title, equitable right and the objective of protecting the ward’s right. It contemplates three processes for a guardian’s utilization of legal title: assuming legal title, asserting the ward’s rights and interests against other interest holders, and acting in the ward’s “best interests.” Finally, a theory of use recognizes that the features of a court of equity are designed to contribute to the objective.

Finally, Section 4.4 concludes the Chapter with comments and remarks about some of the implications of a theory of use for guardianship law today, including opportunities for connecting the framework with the society side of the bridge.

4.2 Crossing the Bridge: The Migration and Suitability of English Law

4.2.1 Introduction

In the United States, guardianship law is a state rather than a federal matter. In order to make a theory of use compatible with a state constitution, a theory of use should recognize (1) that the ward, and not the state, is the holder of the ward’s equitable right; (2) that the content of a ward’s equitable right is informed by a backdrop of civil and constitutional rights; and, (3) that state courts are established which exercising equity powers.
The English law as an entire body of law migrated throughout the world. In the United States, this migration and its “reception” took place either as part of the colonial law or later when individual states attained statehood. The date of 1776 was often chosen to determine the content of the body of law received. In order to be consistent with a state constitution, however, a theory of use contemplates that the ward is the holder of the equitable right in guardianship, not the monarch; the content of the equitable right is recognized; and, the judicial branch of government establishes courts which exercise equity powers corresponding to the powers of Chancery designed to protect that right.

4.2.2 The Migration of English Law

When English law migrated, so did guardianship law. In the United States, the English law’s formal migration occurred when the common law was adopted, either as a continuation of colonial migration, or after a state was formed under a state constitution.

English law migrated first as part of the imperial or colonial law in the original colonies before the Revolution. After the Revolution, the colonial law was continued in the colonies. In addition, the English law also migrated to states other than the original colonies. The date of 1776 was typically adopted as the cut-off date for further migration.

Guardianship law was based on the common law of royal prerogatives, uses and trusts. Thus, the English law of guardianship existing in 1776 migrated as part of the English common law. This formal reception of the English law is evident in the guardianship practice today. The royal prerogatives of entitlement, grant, and administration in Chancery (there and then) are very

\[203\text{ See Subsection 3.3.4.}\]
similar to the processes of petitioning for guardianship, appointing a guardian, and post-appointment review in a court of equity (here and now).

4.2.3 The Suitability of English Law

The transferability of the English law across the bridge was qualified by social and legal considerations. In particular, the reception of English law was made subject to the requirement the transferred law was suitable to the condition and business of the people, and (in relevant part) was consistent with state constitutions.\footnote{Van Ness, 27 U.S. 137; see also Flint River Steamboat Co. v. Foster, 5 Ga. 194 (1848) (establishing paramount levels of laws in the following hierarchy: (1) United States Constitution; (2) treaties; (3) United States statutes; (4) the state constitution; (5) state statutes; (5) provincial acts in force May 14, 1776 not repugnant to any of the above; (6) common law and statutes of England in force before the American Revolution and not repugnant to any of the above).}

State constitutions do two fundamental things: they establish a framework or institutions of government,\footnote{See ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 2 (2d ed. 1993) (stating the fundamental point that a state constitution provides for the structure and functions of government and creates limitations on otherwise plenary sovereign powers; by contrast, powers under the federal constitution must be within the ambit of a grant of enumerated powers).} and they recognize state constitutional rights.\footnote{William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489 (1976).} Is a theory of a use consistent with a state constitution today? The question cannot be fully answered here, in part because each state constitution has its own history and language. However, a theory of use should consider at least three aspects of guardianship law in the context of compatibility with state constitutions.

First, a theory of use must be modified to account for the reality after the American Revolution that only the ward can hold the equitable right once held by the monarch. A monarch does not
exist in a state constitution; states are not successors to the beneficial interest personally held by a monarch; and only the individual ward can holds his or her equitable right in property.

Second, a theory of use should contemplate that the ward’s equitable right incorporates the same constitutional and civil rights of self-ownership of person and property as every other citizen holds. In this sense, the ward’s equitable right is a proxy for a backdrop of constitutional and civil rights contained in the state and federal constitutions or protected in state law. Collectively, I refer to all those background rights as “the ward’s rights and interests.” A theory of use thus defines a ward’s equitable right in terms of the rights and interests others enjoy, not as the subject of a monarch or object of state power. The equitable right always belongs to the ward, and cannot be alienated.

Finally, a theory of use should recognize that equity powers exercised in a guardianship case in post-appointment correspond to the equity powers of Chancery. An equity court is designed to protect the ward’s equitable right. Those features are discussed further below in Subsection 4.3.6.

4.2.4 Conclusion

In summary, a theory of a use migrated and was received as part of the English law in the United States. A theory of use recognizes English law should be modified in order to be compatible with state constitutions. The ward’s equitable right should be recognized, the ward should be deemed to have the same civil and constitutional rights that all citizens have, and an equity court should


208 See, e.g., In re Sall, 110 P. 32, 110 P. 626, 59 Wash. 539 (1910) (holding superior court has the same powers of equity in guardianship matters as Court of Chancery possessed in 1776).
be available to protect those interests. How a theory of use is operationalized, and protects the ward’s equitable right, is discussed next.

4.3 The Framework: A Theory of Use

4.3.1 Introduction

This Section constructs a theory of use for contemporary guardianship law from the law side of the bridge and builds it out towards the society side. The framework first assumes a theory of use is compatible with state constitutions as discussed in Section 4.2. The central feature of a use, the separation of title, is discussed first. Title is separated into the ward’s equitable right and legal title. The guardian is assigned a positive role as legal title holder, especially in relation to other interest holders. Utilizing legal title includes processes of taking title, protecting the ward’s rights and interests, and acting in the ward’s best interests. A guardian’s wide discretion in a highly individualized context is subject to legal, financial, and practical limits on the feasibility of actions. The features of equity are well-suited to protect the ward’s equitable right.

4.3.2 The Separation of Title

The first central feature of a use is the separation of title into legal and equitable estates, with the generation of an intrinsic objective to protect a ward’s equitable right. A theory of a use defines the relationship between guardian and ward with regard to the ward’s rights interests and generates a guardian’s duty to protect them. A brief discussion of legal title, equitable right, and the objective of protection is next.
A “legal title” means a title cognizable or enforceable in a court of law with respect to ownership and possession, but without a beneficial interest or equitable title. As a holder of the legal title, a duty is generated to use the title to protect the ward’s rights and interests. It is this duty to use legal title that establishes the fiduciary relationship.

The ward, on the other hand, holds an equitable right to enforce the duty. An equitable right typically has two aspects: a right to call for the return of legal title, and recognition of the beneficial interest of the one who equity regards as the effective or “true owner” although legal title is held by another.

Finally, a theory of use generates the distinct, intrinsic objective of protecting the ward’s equitable right in a court of equity. A theory of a use supplies this objective by recognizing that the ward’s equitable right needs protection and enforcement by the court. This objective is forward-looking and person-centered. It focuses on an equitable right of the ward as property in a free and democratic society. The equitable right is in the ward. The court does not own it, the guardian does not own it, but both protect it.

4.3.3 The Ward’s Equitable Right

A theory of use protects the equitable right of the ward, but raises some interesting issues about rights in general, the content of an equitable right, and whether rights exist if they cannot be

209 BLACK’S LAW DICTIONARY, supra note 1 at 1042.
210 See, e.g., Seattle-First Nat’l Bank v. Brommers, 570 P.2d 1035, 89 Wash. 2d 190 (1977) (stating a court has a duty to protect a ward’s interests).
211 See BLACK’S LAW DICTIONARY, supra note 1 at 1656 (defining equitable title).
exercised by a ward.

Those issues cannot be fully resolved here, but a brief discussion helps clarify these issues: (1) Do wards lose rights after guardianship? (2) What rights does the equitable right incorporate? (3) Do wards with profound ID hold rights if they cannot exercise them? I cannot fully resolve these issues here but a brief discussion helps to clarify them.

First, do wards have rights after guardianship? According to a theory of use, the answer is yes. A ward does not “lose” all rights because of guardianship. Rather – and this is crucial for a theory of use – the ward retains an equitable right which incorporates all the self-ownership of person and property. Because this self-ownership expresses itself in a “best interests” determination (discussed later), a claim of “losing” rights under a theory of use is inapt.

Second, what rights does the equity incorporate? A theory of use contemplates that all citizens, including wards with profound ID, are holders of rights and interests and that the equitable right is a proxy or placeholder for the same constitutional and civil rights all other citizens possess.

A ward holds an infinite variety of rights and interests depending on the particular ward, including social and emotional interests; interests arising from citizenship; interests relating to health care, including physical and emotional well-being; and, property interests.213

These rights and interests of the ward might also conflict with other interest holders in contexts such as contracts for care, suing for injuries, and property ownership. The ward’s rights and

interests might also conflict with the interests of government, such as the provision of public benefits or health care. By recognizing a ward’s equitable right in equity, the ward’s civil rights and constitutional rights are also recognized and protected as with all other citizens.

Third, do wards with profound ID hold the rights just described when they are unable to personally exercise them? While I cannot resolve debates about theories of rights here, I use a basic trichotomy of being, knowledge and belief, and action to discuss those theories briefly. Wards with profound ID typically (though perhaps not always) are unable to know and believe, or act according to knowledge and belief. A ward with profound ID – depending on the particular individual – might still exercise his or her own rights and interests through limited indications of choice of likes and dislikes. Such a choice might be expressed by pushing away, facial expressions, looking away or some other emotional expression. Discerning these indications and expressions requires observation, familiarity, and encouragement of engagement.

A theory of rights of persons with profound ID might rest on the ward’s status as a living being. Theories of rights are generally divided into “will theories” and “interest theories.” However, a “will theory” of interests – which is one I define as action based on knowledge and belief – simply cannot account for the rights and interests of a ward with profound ID. Thus, rights of persons with profound ID appears to be based on some other theory of rights.

An “interest theory” of rights grounds the existence of a right in an interest which is sufficiently significant such that a duty is imposed on the holder by another to acknowledge and respect the

interest. A ward’s equitable right, which is comprised of all the self-owned aspects of life, is undoubtedly of the highest significance and is a basis for imposing fiduciary duties.

In conclusion, a theory of use envisions a ward as holding an equitable right which was not lost but rather is recognized; the equitable right is a proxy for all the rights of self-ownership in person and property all other citizens possess; and the equitable right depends on being rather than knowledge and action.

4.3.4 Legal Title and Other Interest Holders

A theory of use takes a balanced view of guardianship law by positioning the role of a guardian within a theory of use, and by assigning a positive value to the role of a guardian, while also acknowledging guardians must fulfill fiduciary duties and act ethically.

A theory of use considers a guardian as a valuable resource who can bring expertise to bear in identifying, exercising, and protecting the ward’s equitable right in relation to other interest holders such as health care providers, government agencies, or relatives. This is especially true for wards with profound ID, where capability is slight and vulnerability considerable, and where most of a ward’s rights and interests are implicated in the provision of government services. Such a ward is in constant interaction with caregivers and medical providers. Government standards, processes, and service delivery may create disadvantage or detriment to the ward’s rights and interests. Government determines ongoing eligibility for services (or not). Priority

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may be given to program funding rather than program goals. Caregivers and care facilities may also have interests which do not coincide with those of the ward.

According to a theory of use, a guardian holding legal title affords at least two significant benefits to the ward in relation to other interests holders. First, a guardian supplies an equalizing benefit of knowledge and action with relation to the ward’s rights and interests. Second, this knowledge is based on observation, familiarity, and expertise about the ward’s rights and interests in the real world.

A guardian, by supplying knowledge and action, provides legal force to the ward’s rights and interests which would otherwise be silent if no guardian existed. Other interest holders typically have full capability to advance their own interests. By supplementing the ward’s knowledge and action, a guardian provides legal force and empowers the ward’s rights and interests in real world contexts. Under this view, the guardian does not pose a threat, but provides a benefit. A theory of use is not about social coercion. Legal title is utilized to equalize and empower rights and interests of the ward which otherwise would have no legal force.

The second benefit afforded a ward is that the actions taken by the guardian are based on a comprehensive knowledge about the ward’s rights and interests and their interaction with other interest holders. This knowledge includes: background knowledge about the ward and the ward’s surrounding circumstances (including the ward’s known and stated preferences); observation of and familiarity with the ward’s rights and interests and how those rights and interests were respected (or not) in the past; and, professional or personal expertise in identifying, exercising, and protecting rights and interests.
This positive view of a guardian’s role is not universally held. One person’s advocate is another person’s troublemaker. Responses to a guardian’s assertion of a ward’s rights and interests can sometimes be met with misunderstanding, non-cooperation, defensiveness, and resentment by others. Regardless of the underlying reasons for this, other interest holders are typically not fiduciaries, and might have personal, financial, or institutional reasons for acting. The dynamic of interaction between guardians and other interest holders is an interesting one, but from a guardian’s perspective negative responses from other interest holders can limit the guardian’s ability to obtain knowledge and to act on that knowledge for the benefit of the ward.

4.3.5 Utilizing Legal Title

A theory of use envisions three processes in guardianship law: assuming legal title, asserting rights and interests against other holders, and acting in the best interests of the ward. These processes are considered below.

4.3.5.1 Assuming legal title

The first stage, assuming legal title, recognizes that a guardian takes and holds legal title in a fiduciary and not a personal capacity. When first appointed, a guardian takes possession of the property and the legal custody of the ward. An inventory of some kind is filed with the court documenting the real and personal property of the ward for purposes of establishing the guardianship of the estate. Depending on the jurisdiction, a personal care plan or some kind of an individualized assessment of the ward’s needs is also filed for the guardianship of the person. A guardian thus begins to identify the ward’s rights and interests manifested in the real world.
When a guardian takes and assumes legal title, this is evidence a guardian has a legal capacity to act on behalf of the ward.216

It is within this process that a distinction is drawn between a guardian’s fiduciary and personal capacities. The capacity of holding legal title is a fiduciary, not a personal, capacity of the guardian. When the guardian pays the ward’s bills, the guardian pays them from the ward’s funds, not from the guardian’s personal funds. When a guardian executes a document, or asserts title to an asset relating to the ward’s interests, it is in the fiduciary, and not the personal capacity, of the guardian. The fiduciary capacity reflects a guardian’s duty to use legal title to protect the ward’s equitable right. However, a guardian is not duty-bound to use personal resources or labor to subsidize the ward’s funds, though a guardian who is a volunteers or family member might do so.

4.3.5.2 Protecting the ward’s rights and interests

The second process contemplated by a theory of use is the assertion, defense, and protection (which collectively are referred to as protection) of the ward’s rights and interests vis-à-vis other interest holders. Once a guardian has legal title, a guardian utilizes the title to protect the ward’s rights and interests and not those of others. Thus it is often said the paramount duty of the guardian is to the ward.

Protecting the ward’s rights and interests is primarily characterized by information gathering, i.e., obtaining knowledge about the ward’s rights and interests and how they interact with other

216 “Capacity” is “the attribute of persons which enables them to perform civil or juristic acts.” BLACK’S LAW DICTIONARY, supra note 1 at 261. The legal title is designated in the guardian’s name to vest legal capacity in the guardian.
holders in the ward’s surrounding circumstances. For example, a guardian will review care contracts, medical consents, health care benefits, financial arrangements (such as insurance policies), and leases or consents for living arrangements. Knowledge is gained from observation, interviews, document review, and input from the ward to the extent available. Once knowledge about the ward’s interests is gained, the guardian uses the knowledge and legal title as a basis for action (or not). In the framework presented here, a guardian protects the ward’s rights and interests against those of other interest holders, and recognizes other holders may have differing objectives.

4.3.5.3 Acting in the ward’s “best interests”

The third and final process in a theory of use is taking actions (or not) in the “best interests” of the ward. “Best interests” is variously defined or conceptualized. It is typically recognized in the field as a person-centered equitable standard or principle for the guardian’s decision-making. For persons with profound ID, in a context of informed consent (evaluating information and consenting to medical care) the term has been defined as incorporating a “reasonableness” standard. A more definitive elaboration of it has escaped capture until now.

A theory of use considers “best interests” grounded in the ward’s rights and interests within the circumstances of the ward. “Best interests” first refers to the content of the ward’s equitable right as a proxy for the ward’s civil and constitutional rights. Second, “best interests” reflects the wide discretion of the guardian to take action to protect the ward’s rights and interests.

217 See, e.g., Griffith, supra note 190.
218 Cantor, supra note 48.
A theory of use measures discretion with the equitable principle of “best interests.” A guardian is acting in the best interests of a ward when it is reasonably possible a proposed action will protect the ward’s interests, and the proposed action is feasible. When a guardian follows this principle, the guardian is acting in the best interests of the ward. Thus, a guardian identifies reasonable possibilities as options, and determines whether action is feasible or not, given legal, financial, and practical limits which might exist.

A theory of use recognizes a wide discretion in the guardian to protect the ward’s rights and interests. The control of the court over the guardian is largely theoretical absent wrongdoing or requested instructions, and ordinarily the court will not micro-manage the guardianship. The discretion is necessarily broad in order to meet the varied, diverse and unique rights and interests which surround a ward in the real world.

Under a theory of use, the wide discretion of the guardian is subject to supervision by the court. The court has the opportunity to review a case for non-use, misuse or abuse of office. The court also has the opportunity to review a case when the ward’s rights and interests are in conflict with other interest holders in order to ensure the guardian is protecting the ward’s interests and not those of others. Further, the court can review the case for compliance with court orders and instructions. The court is available to review the guardian’s past exercise of discretion and provide guidance, instructions, and orders for future actions in order to ensure that the ward’s rights and interests were and will be protected.

219 See, e.g., In re Fujimoto’s Guardianship, 226 P. 505, 130 Wash. 188 (1924).
In determining whether an action is in the best interests of the ward or not, however, the guardian’s discretion is not unlimited. The guardian’s discretion faces two substantive limits: (1) the “substitute” decision-making standard; and, (2) the legal, financial, and practical limits.

First, once a guardian has identified an action as reasonably possible, the substituted-judgment standard requires the guardian to obtain knowledge of the ward’s preference relating to a proposed action. The ward’s preference is the single-most important inquiry of a guardian. The ward’s preferences limit the guardian’s discretion: all else being equal, a guardian must use this knowledge as a basis for taking action, and respect and support the preference of the ward. One variable, however, is when a ward provides inconsistent information or indicates different choices at different times. Under such circumstances, the substituted-judgment standard no longer imposes a limit because the ward’s preferences cannot be sufficiently determined.

The objective of protecting the ward’s rights and interests is informed by the ward’s view on how those rights and interests should be protected. Even some wards with profound ID are able to express signs of like or dislike, or express emotions, or other behavior, about routines or circumstances in the surrounding environment. These signs can sometimes provide a basis for protecting the ward’s rights and interests with respect to a past, present, or future change in that environment. Linking such changes to the expressive behavior of a ward with profound ID can only be learned through observation, familiarity and expertise with the ward over time.

Second, a theory of use considers that actions may not be feasible and therefore impose a limit on discretion. Within the ward’s surrounding circumstances, the protection of a specific right or
interest may encounter legal, financial, or practical limits.\footnote{220} An action may be reasonably possible, but if it is limited, it is not feasible, and should not be undertaken.

One such limitation on discretion is legal. Understanding the substantive area of law containing the right or interest involved is critical to determining whether there is a legal limit. Some examples demonstrate legal limits. The terms of a contract might define the limits of discretion of parties to a contract to terminate the contract. Because there is a legal limit on terminating the contract, it is not feasible to do so. On the other hand, there is typically no limit on filing a grievance against a nursing facility for violating state or federal regulations. Filing one on behalf a ward is feasible. Finally, a statute might impose a legal limit on the discretion of a guardian to consent to involuntary sterilization. Consenting to such a procedure is not feasible.

Another limitation on discretion is a financial. Financial conditions may limit or preclude a guardian from acting. If a ward has no resources, it is not feasible for a guardian to search for assets, engage in extensive contract negotiations or regulatory processes, or assert or defend the ward’s rights and interests. The lack of resources also raises larger issues about who should bear those costs, the sustainability of protecting a ward’s rights and interests, and access to the court system to obtain that protection. Those issues cannot be addressed here. However, the costs of guardianship are ordinarily incurred by a ward. A guardian is not required to privately subsidize wards by providing labor or advancing costs, though volunteers often do so. In summary, if there are no resources available to take an action, a limit is reached and the action is not feasible.

\footnote{Cf. Deborah J. Bowen et al., \textit{How We Design Feasibility Studies}, 36 AM. J. PREV. MED. 452–457 (2009) (identifying eight areas of focus for a feasibility study within a broader research context).}
Finally, the discretion of a guardian might be limited by practicality. Some examples involving moving a resident from one home to another illustrate practical limits. When a ward is non-ambulatory and a proposed new home is designed only for ambulatory individuals, a practical limit is reached. The same is true when a ward has limited vision, but a proposed new home is designed for those with full vision. Or when a single apartment is available but a ward prefers to be surrounded by peers in a group setting. When a practical limit is reached, the action is not feasible.

A theory of use contemplates an inquiry into all the dimensions of the ward’s rights and interests\textsuperscript{221} to determine if an action is feasible. Though discretion might be informed by ideals such as autonomy, discretion might also be factually limited by other dimensions of interests, including civil rights other than autonomy, health or safety, or needed proximity to family or others. The connection between a guardian’s discretion and social values needs further development, perhaps with reference to a concept of vulnerability\textsuperscript{222} which encompasses all those dimensions of interests.

In summary, the process of acting in the ward’s best interests a highly individualized problem-solving process. Though a guardian uses a wide discretion, this discretion is limited by substitute decision-making, and by legal, financial, and practical limits which might make otherwise reasonably possible actions not feasible and therefore not in the ward’s best interests.

\textsuperscript{221} See supra note 213.
\textsuperscript{222} Martha Albertson Fineman, \textit{The Vulnerable Subject: Anchoring Equality in the Human Condition}, 20 \textit{Yale J. L. & Feminism} 1 (2008).
4.3.6 Features of a Court of Equity

The second feature of a doctrine of use (the first was the separation of title) is the protection of the ward’s equitable interest in a court of equity. According to a theory of use, a court of equity remains the best-suited institution to protect the ward’s equitable right because its features are designed to meet that objective.

Equity is defined generally here as a system of standards and processes with exclusive jurisdiction over certain subjects. Originally, the features of equity were designed to protect the monarch’s interest. Today, they contribute to the goal of protecting a ward’s rights and interests represented through the ward’s equitable right. The following are some of the features of equity essential for protecting a ward’s equitable right and making it well-suited for that task.

First, the form of a guardianship case in equity is distinguished from other civil cases. A guardianship case is designed for only one party and is not focused on resolving a dispute. In the technical rather than procedural sense, the case is an *ex parte* (one party) proceeding, meaning a proceeding with only one person and his or her property or *res* (things). Unless another interest holder is joined as a party, or intervenes, a guardianship case is not an adversarial *inter partes* (between parties) case and does not contain a dispute. Thus, quite unlike most cases, a guardianship case consists of ongoing stages of proceedings rather than a trial and final judgment.


224 See Section 3.2.
Secondly, the subject matter of the proceedings is the ward’s equitable right. As mentioned earlier, the equitable right of a ward is *in rem*. A ward is the true or effective owner and a guardian’s legal title yields to the equitable ownership.\(^{225}\) The reason for a guardianship case is the existence of an equitable right in a ward. Equity is organized around it.

Third, court review is structured around an individualized review of the ward’s equitable right. Equity accommodates all the diverse possibilities of life. Orders are made based on all the ward’s surrounding circumstances. Alternative venues are not as likely to be available to protect the human rights of a person with profound ID.\(^{226}\)

Fourth, review in a court of equity for guardianship issues is exclusive,\(^{227}\) with a “catch all” jurisdiction which captures and resolves all issues related to the guardianship.\(^{228}\) By providing a single forum and an efficient “catch all” jurisdiction, equity provides complete relief, cost efficiency for the courts, and cost savings for a ward.

Finally, equity has remedies available to use in connection with other interest holders. Giving legal title to a guardian positions a guardian to protect the ward’s rights and interests against other interest holders. In addition, a ward holds the equitable right *in rem*, paving the way for remedial constructive trusts and tracing property.

\(^{225}\) Walsh, *supra* note 189.


\(^{227}\) STORY, *supra* note 193 at 557 (stating jurisdiction exercised over the persons and property of persons with disability is “another portion of the exclusive jurisdiction of Courts of Equity.”).

\(^{228}\) 1 POMEROY, *supra* note 191 at 168-172 (including the principle that where equity has jurisdiction for any partial purpose, it may retain the cause for all purposes, and where equity originally had jurisdiction, that jurisdiction continues).
In summary, the features of equity in guardianship law today – a special form of the case, structured around individualized review, in an exclusive forum, with remedies to fit the situation – were originally intended to protect the monarch’s beneficial interest and now are well-suited to protecting the ward’s equitable right. The three processes of assuming legal title, protecting the ward’s equitable right from other interest holders, and acting in the “best interests” of the ward, dovetail with these features of a court of equity to protect the ward’s equitable right.

4.4 Conclusion

In this Chapter, a theory of use was developed to provide structural support for the bridge from law to society, from there to here, and from then to now. The framework provides both doctrinal continuity and a theoretical framework by relating concepts of equitable right, legal title, and protection in equity to guardianship practice. Some brief observations about this framework follow.

First, and perhaps most importantly, the framework focuses on the centrality of the ward’s life, rather than an appeal to royal prerogatives or state power. The framework is also a gestalt (the whole is greater than the sum of its parts). Though fiduciary duties must be enforced and guardians must be ethical, the framework organizes the law around the ward’s equitable right and the intrinsic objection to protect it. New and existing institutions, programs, laws, standards, and processes can be evaluated by asking how well they contribute to achieving the objective.


Second, in order to act in a ward’s best interests, a guardian relies on extensive background knowledge and familiarity with the ward’s circumstances. Typically, no other person has that breadth of factual knowledge, though others may have more or better knowledge in specialized areas. The guardian is the one who uses this knowledge to address uncertainties, equalize the ward’s rights and interests vis-à-vis other interest holders, and ensure the security of the ward’s equitable right.

Third, the principle of acting in the “best interests” of the ward is a key aspect of a theory of use.231 A guardian’s otherwise wide discretion is subject to legal, financial and practical limits as applied to possibilities or options, and must also take into account the preferences of the ward to the extent they can be determined. The guardian is in the best position to exercise discretion by engaging in a real-world, one-to-one relationship with the ward.

Fourth, though the theory of use developed in Chapter 4 is not a complete framework. For that reason, it provides an invitation for further theoretical development. There are many contemporary legal and social issues in guardianship which were not covered here. Access to justice is a pressing social issue. As guardianship law becomes more complex, it is more costly232 and therefore limits access to wards who can afford it.

Fifth, the framework is based on and adapted from a theory of use for wards with profound ID. Wards with profound ID are the most vulnerable and least able to identify, express or exercise


their own interests as a product of knowledge or action. A theoretical framework which works to protect those who least can protect themselves also works for those who are more able to do so.

In conclusion, the initial motivation of this thesis was to bring intelligibility to the concept of “best interests.” The thesis then evolved into a broader doctrinal work to address an obscure and changing legal environment. Recognizing the principle of “best interests” within the framework of a theory of use helps ensure the rights and interests of all wards are asserted, defended, and protected.
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