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Family Law - Interested Person's Lack of Advocacy Approach Awareness Prompts Motion to Intervene Denial - In Re Guardianship of B.V.G., 27 N.E.3D 842 (Mass. App. Ct. 2015)

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**FAMILY LAW—INTERESTED PERSON’S LACK
OF ADVOCACY APPROACH AWARENESS
PROMPTS MOTION TO INTERVENE DENIAL—*IN
RE GUARDIANSHIP OF B.V.G.*, 27 N.E.3D 842
(MASS. APP. CT. 2015).**

In guardianship cases of incapacitated persons, the court may appoint a qualified person¹ to make decisions regarding the incapacitated person’s care, support, education, health, and welfare.² However, the court also has the ability to “limit the powers of a guardian . . . and thereby create a limited guardianship.”³ In *In re Guardianship of B.V.G.*, the Massachusetts Appeals Court considered whether the trial judge erred in denying a motion to intervene based upon the petitioner’s lack of standing as an “interested person” under the Massachusetts Uniform Probate Code (hereinafter referred to as “MUPC”), chapter 190B, section 5-306(c) of Massachusetts General Laws.⁴ The Court concluded that the petitioner, the maternal grandfather of B.V.G., did qualify as an “interested person,” but held that the trial court’s denial of his motion to intervene with the current guardianship (B.V.G.’s father) was nevertheless valid and appropriate.⁵ The grounds upon which the Appeals Court based their affirmation was a close reading of the trial court judge’s decision, which expressed the belief that B.V.G.’s interests were being “adequately represented without [her] grandfather’s participation as a party.”⁶

¹ MASS. GEN. LAWS ch. 190B, § 5-305 (2009) (including incapacitated person’s spouse, parent(s), previously nominated guardian, or person deemed appropriate by court). Guardianships are “creatures of statute.” See *Care and Prot. of Jamison*, 4 N.E.3d 889, 901 (Mass. 2014) (distinguishing statutory rights as guardian with fundamental parental rights in relationships with their children). See also MASS. GEN. LAWS ch. 190B, § 1-302 (2012) (granting Probate and Family Court jurisdiction over appointment and management of guardians).

² See MASS. GEN. LAWS ch. 190B, § 5-309 (2009) (establishing scope of guardian’s decisional capacity).

³ See MASS. GEN. LAWS ch. 190B, § 5-306(c) (2009) (establishing court’s power to place limitations on guardian). See also MASS. GEN. LAWS ch. 190B, § 5-209(a) (2009) (noting guardians, subject to conditions, are statutorily granted “the powers and responsibilities of a parent”).

⁴ See *In re Guardianship of B.V.G.*, 27 N.E.3d 842, 843 (Mass. App. Ct. 2015) (considering appropriateness of “interested person” standard and subsequent denial of motion).

⁵ See *id.* at 847-49 (affirming motion to intervene denial, however citing grounds differing from those of trial court).

⁶ *Id.* at 848 (examining court’s decision to infer probable holdings regarding adequate representation issues in event of remand). The court states remand would ordinarily occur to allow the trial court to address the issue of adequate representation, but the court maintains the

In *In re Guardianship of B.V.G.*, the maternal grandfather of B.V.G. sought to restore and strengthen his relationship with his adult granddaughter (hereinafter referred to as “B.V.G.”), whose father was serving as her temporary guardian.⁷ B.V.G.’s grandfather (hereinafter referred to as “Grandfather”) claimed an intervention of right and subsequently filed a motion to intervene⁸ with Norfolk County’s Probate and Family Court guardianship proceedings regarding B.V.G. on the grounds that he was an interested person in the matter.⁹ The temporary guardianship awarded to B.V.G.’s father provided for email contact between B.V.G. and Grandfather, but Grandfather alleged B.V.G.’s father prevented her reception of Grandfather’s emails.¹⁰ B.V.G.’s father did not dispute his restriction of B.V.G.’s contact with Grandfather; rather, he maintained he had the right to do so as her guardian and stated that Grandfather did not qualify as an “interested person” as defined by the Massachusetts Uniform Probate Code.¹¹ The Probate and Family Court

trial judge found the best interest advocacy for B.V.G. could be attained without B.V.G.’s grandfather as an interested party in the matter. *Id.* at 849.

⁷ See *In re Guardianship of B.V.G.*, 27 N.E.3d at 843 (establishing parties’ respective objectives in proceedings). B.V.G., although an adult, was assessed as needing a guardian due to her diagnoses of various impairments, including: “intellectual disability, Tourette syndrome, and emotional difficulties.” *Id.* B.V.G.’s parents separated when she was young and her father was awarded sole legal and physical custody. *Id.* He retained sole legal and physical custody until B.V.G. reached the age of majority, at which time the temporary guardianship began. *Id.* During this period, B.V.G.’s contact with her mother and maternal relatives was non-existent, including with her grandfather. *Id.*

⁸ See *id.* at 843, 847-48 (detailing grandfather’s purpose for the motion). Grandfather filed his motion to intervene based on a claimed intervention of right, which states:

[A]nyone [applying timely] shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a particular matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

MASS. R. CIV. P. 24(a)(2); see *In re Guardianship of B.V.G.*, 27 N.E.3d at 847-48 (explaining MASS. R. CIV. P. 24(a)(2), relied on by grandfather).

⁹ See *In re Guardianship of B.V.G.*, 27 N.E.3d at 843 (explaining grounds for pleadings); see also MASS. GEN. LAWS ch. 190B, § 5-306(c) (2009) (establishing court’s ability to limit, remove, or modify guardianships).

¹⁰ See *In re Guardianship of B.V.G.*, 27 N.E.3d at 844 (noting terms of guardianship’s allowed communications and interception of such communications). The guardianship terms provided for B.V.G. and Grandfather to each send one daily email to one another, as the relationship between B.V.G. and Grandfather was undisputedly non-detrimental. *Id.*

¹¹ See *id.* at 844-45 (outlining B.V.G.’s father’s stance against Grandfather’s allowance as interested person). An “interested person” is defined as:

[I]nclud[ing] heirs, devisees, children, spouses, creditors, beneficiaries, and any others

judge denied Grandfather's motion based upon the conclusion that he lacked standing as an "interested person" under chapter 190B, section 5-306(c) of Massachusetts General Laws.¹² Upon review, the Massachusetts Appeals Court affirmed the denial on the grounds B.V.G.'s interests were being represented adequately,¹³ therefore Grandfather's intervention was unnecessary, despite his qualification as an "interested person."¹⁴ Further, the intervention of right claimed by Grandfather did not meet the sufficient standard due to B.V.G.'s interests already being adequately represented.¹⁵

In *Gardiner v. Jardine*,¹⁶ the Supreme Judicial Court of Massachusetts (hereinafter referred to as "SJC") addressed former guardian statute chapter 201, section 14 of Massachusetts General Laws (hereinafter referred to as "Section 14"),¹⁷ which permitted petitions for appointments of temporary guardians by, inter alia, "other person[s] of interest."¹⁸ John

having a property right in or claims against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons.

MASS. GEN. LAWS ch. 190B, § 1-201(24) (2009).

¹² See *In re Guardianship of B.V.G.*, 27 N.E.3d at 843 (denying Grandfather as "interested person"). The court may limit the powers of a guardianship by its own motion or appropriate petition made by the incapacitated person "or other interested person," therefore creating a limited guardianship. See MASS. GEN. LAWS ch. 190B, § 5-306(c) (2009) (granting court authority for limiting power of guardians).

¹³ See *In re Guardianship of B.V.G.*, 27 N.E.3d at 848-49 (finding adequate representation is supported by motion judge's assessment). The attorney appointed to represent B.V.G. did not express a definitive stance on whether Grandfather's motion to intervene should be allowed, but rather expressed his own understanding of B.V.G.'s support regarding increasing her contact with Grandfather. See *id.* at 844 (explaining B.V.G.'s attorney's assertions during motion hearing).

¹⁴ See *id.* at 849 (explaining denial of motion to intervene because of adequate representation of B.V.G.). The Probate and Family Court judge highlighted that counsel appointed to B.V.G. "indicated he was largely in agreement that fostering a relationship with the grandfather would be beneficial for B.V.G., and [Grandfather] has made no showing that B.V.G.'s attorney [would] fail to press that issue going forward." *Id.*

¹⁵ See *id.* (eliminating intervention of right for guardianship modification when adequate representation is present); see also *Alexander v. Rendell*, 246 F.R.D. 220, 229 (W. D. Pa. 2007) (establishing necessary factors for valid intervention of right). *Alexander* states that all components to establish an intervention of right are met when:

(1) the application for intervention of right is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation.

Id.

¹⁶ 139 N.E. 481 (Mass. 1923).

¹⁷ See MASS. GEN. LAWS ch. 201, § 14 (repealed in 2009) (detailing guardian standards).

¹⁸ See *Gardiner*, 139 N.E. at 481 (allowing for broader, more general category of persons to

D. Gardiner, uncle and heir presumptive of the incapacitated person, Dorothy Davies Gordon, filed a petition with the court seeking removal of Gordon's appointed guardian, William F. Jardine.¹⁹ Jardine objected on the grounds that Section 14 stated a "person in interest" permitted to intervene must have a pecuniary interest, which Gardiner lacked.²⁰ The SJC held a person of interest within the meaning of Section 14 did not require having a pecuniary interest in the matter,²¹ but rather any person would qualify as such "if, acting in good faith, he believes that the welfare of [a minor/incapacitated person] requires that a temporary restraint should be immediately placed upon such person or his property."²² The court construed the meaning of Section 14 to be "broad enough to include those who have a genuine humanitarian interest in the persons . . . unable properly to care for themselves or their property," thus Gardiner had standing to petition the court for removal of Jardine as Gordon's guardian.²³

Post *Gardiner*, chapter 190B, section 1-201 of Massachusetts General Laws has provided general definitions of terms used in a variety of probate cases, including guardianships, and begins by stating the definitions are "[s]ubject to additional definitions contained in the subsequent articles that are applicable to specific articles, parts, or sections, and *unless the context otherwise requires*, in this chapter."²⁴ Chapter 190B, section 1-201(24) of Massachusetts General Laws declares, by definition, that an interested person:

[I]ncludes heirs, devisees, children, spouses, creditors,

serve as temporary guardians).

¹⁹ See *id.* at 481 (outlining pleadings of both parties, also grounds for respondent's objection).

²⁰ See *id.* at 481-82 (outlining pleadings of both parties, also grounds for respondent's objection); see also *In re Guardianship of Santrucek*, 896 N.E.2d 683, 686 (Ohio 2008) (including interest relating to property or transaction sufficient to be declared interested person).

²¹ See *Gardiner*, 139 N.E. at 482. The SJC also held that Section 14 did not require that a "person of interest" have private rights affected, nor that said person have a familial relation to the incapacitated person. *Id.*

²² See *id.* (authorizing interest in ward's welfare to establish standing, even absent pecuniary interest).

²³ See *id.* (interpreting applicable statute to encompass petitioner within "interested person"); see also *Morrison v. Jackman*, 8 N.E.2d 18, 18-19 (Mass. 1937) (factoring urgency in interested person's guardian appointment). The court in *Morrison* deemed that the appointment of a guardian via petition of any person of interest is appropriate if the welfare of the incapacitated person requires such immediate appointment. See *Morrison*, 8 N.E.2d at 19 (holding appointment of temporary guardian appropriate when welfare of insane person is in jeopardy).

²⁴ MASS. GEN. LAWS ch. 190B, § 1-201 (2009) (emphasis added) (conveying flexibility in application of terms defined in Section 1-201).

beneficiaries, and any others having a property right in or claims against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having a priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.²⁵

*Commonwealth v. Durham*²⁶ interpreted the word “including” to bespeak “an expansion rather than an exclusion.”²⁷ It was *In re Guardianship of Williams*²⁸ that utilized this expansion of the category of interested persons by allowing the petitioner, with no apparent financial or property interest in the guardianship of her brother, to “participate fully” in the proceedings, wherein her sisters were being appointed co-guardians.²⁹ The Supreme Court of New Hampshire highlighted the conclusion that it was legislative intent to allow petitions by “interested persons” to be wide-ranging in order to “promote the broadest possible protection for a proposed ward by granting generous standing to any adult with an interest in the proposed ward’s welfare.”³⁰

In regards to intervention of right being domineered by adequate representation, the standard in Massachusetts dates back to 1974 when Massachusetts Rules of Civil Procedure provided for intervention of right “when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his

²⁵ MASS. GEN. LAWS ch. 190B, § 1-201(24) (2009).

²⁶ 843 N.E.2d 1035 (Mass. 2006).

²⁷ See *id.* at 1041 (broadening category of persons by examining diction); *Doe v. Superintendent of Schs. of Worcester*, 653 N.E.2d 1088, 1094-95 (Mass. 1995) (stating use of word “including” did not dictate exhaustive list). The legislature’s use of the phrase “including but not limited to a gun or a knife,” in describing dangerous weapons not permitted to be possessed on school premises, left discretion to the principal as to whether a particular object constituted a dangerous weapon. See *Doe*, 653 N.E.2d at 1095 (defining “including: in statute).

²⁸ 986 A.2d 559 (N.H. 2009).

²⁹ See *In re Guardianship of Williams*, 986 A.2d at 560-61 (granting standing for participation in proceedings without pecuniary interest).

³⁰ See *id.* at 564 (explaining legislative intent behind guardianship statute); see also *In re Conservatorship of Kloss*, 109 P.3d 205, 207 (Mont. 2005) (“meaning of interested person ‘may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.’”); *In re Guardianship & Conservatorship of Cordel*, 741 N.W.2d 675, 680 (Neb. 2007) (“To limit the persons ‘interested in the welfare’ of the protected person . . . would be superfluous and incongruent with the term ‘any.’”).

ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."³¹ When petitioning the court claiming an intervention of right, "[t]he burden of showing the inadequacy of the representation is on the applicant [seeking to intervene]."³² *Hoots v. Pennsylvania*³³ highlights the minimal burden and explains that representation can be deemed inadequate on any of the following three grounds: (1) that although the applicant's interests are similar to those of a party, they diverge sufficiently that the existing party cannot devote proper attention to the applicant's interests; (2) that there is collusion between the representative party and the opposing party; or (3) that the representative party is not diligently prosecuting the suit.³⁴

*Pennsylvania v. Rizzo*³⁵ established a general presumption of adequate representation when the representative is either an officer charged by law with representing interests of another or is a governmental body representing interests of another.³⁶

In *In re Guardianship of B.V.G.*,³⁷ the Massachusetts Appeals Court focused on the language of chapter 190B, section 5-306(c) of Massachusetts General Laws, which states, in relevant part: "The court, at the time of appointment or later, on its own motion or on appropriate petition or motion of the incapacitated person or other interested person, may limit the powers of a guardian . . . and thereby create a limited guardianship."³⁸ The court then highlighted the MUPC's general definition and scope of an "interested person," which delineates that the category:

[I]ncludes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or

³¹ MASS. R. CIV. P. 24(a)(2).

³² See *Mass. Fed'n of Teachers v. Sch. Comm. of Chelsea*, 564 N.E.2d 1027, 1029 (Mass. 1991) (quoting *Att'y Gen. v. Brockton Agric. Soc'y*, 456 N.E.2d 1130, 1132 (Mass. 1983)) (allocating burden of proof to moving party when alleging inadequate representation).

³³ 672 F.2d 1133 (3d Cir. 1982). This case focuses on Federal Rule of Civil Procedure 24(a), which is identical to Massachusetts Rule of Civil Procedure 24(a). See *id.* at 1134-35 (discussing intervention right under FED. R. CIV. P. 24 (a)(2), (b)(2)).

³⁴ *Hoots*, 672 F.2d at 1135. See *Harris v. Pemsley*, 820 F.2d 592, 601 (3d Cir. 1987) (stating incidentally affected claims insufficient). There must be a "tangible threat" to applicant's legal interest and the threatened legal interest must be "legally cognizable" in order for right to intervene. *Id.* at 601; see *United States v. Perry Cnty. Bd. of Educ.*, 567 F.2d 277, 279 (5th Cir. 1978) (denying applicant's motion due to lack of substantial legally protected interest).

³⁵ 530 F.2d 501 (3d Cir. 1976).

³⁶ See *id.* at 505 (noting when presumption of adequate representation replaces burden of proof standard).

³⁷ 27 N.E.3d 842 (Mass. App. Ct. 2015).

³⁸ See *id.* at 845 (explaining order of appointment statute); see also MASS. GEN. LAWS ch. 190B, § 5-306(c) (2009) (granting court's ability to limit, modify, or remove guardianships).

claims against a trust estate or the estate of a decedent, ward, or protected person. It also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and shall be determined according to the particular purposes of, and matter involved in, any proceeding.³⁹

Based upon these two statutes, the Court rejects the assertion made by B.V.G.'s father that Grandfather lacks standing as an "interested person" because the use of the word "include" in this context indicates the list was not intended to be exhaustive.⁴⁰ The Court reinforced this reasoning by emphasizing the MUPC notes that definitions may not apply in varying probate proceedings if "the context otherwise requires" and, additionally, that the meaning of "interested person" has the capacity to vary "and shall be determined according to the particular purposes of, and matter involved in, any proceeding."⁴¹

The surrounding sections of the statute were viewed in unison by the Court as well, as they stressed said sections must be "construed in harmony with one another."⁴² Specifically, the Court referenced chapter 190B, section 5-303(a) of Massachusetts General Laws, which – instead of using the term "interested person" – mentions that "any person interested in the welfare of the person alleged to be incapacitated" may file a petition for guardianship.⁴³ In analyzing the consequences, were the Court to require an interested person to have a pecuniary interest, the court found there would be discordance with statutory intent, wherein Grandfather would have standing to file his own petition for a limited guardianship pursuant to Section 5-303(a), yet lack standing to petition the court to impose a limited guardianship pursuant to chapter 190B, section 5-306(c) of Massachusetts General Laws.⁴⁴ By this logic, the Court concluded that "interested

³⁹ See MASS. GEN. LAWS ch. 190B, § 1-201(24) (2011) (defining interested person); see also *In re Guardianship of B.V.G.*, 27 N.E.3d at 845 (noting MUPC definition of "interested person").

⁴⁰ *In re Guardianship of B.V.G.*, 27 N.E.3d at 845-46 (adopting former reasoning to expand scope of interested persons).

⁴¹ See *id.* at 846 (identifying situations where static definitions would be inappropriate); see also MASS. GEN. LAWS ch. 190B, § 1-201(24) (2011) (noting flexibility of provided terms and definitions).

⁴² See *In re Guardianship of B.V.G.*, 27 N.E.3d at 846 (approaching meanings of applicable statutes in conjunction with one another rather than separately).

⁴³ See *id.* (identifying differing language between MASS. GEN. LAWS ch. 190B, § 5-303(a) and § 5-306(c)).

⁴⁴ See *id.* (highlighting logical discrepancies in establishing qualified standing between

person” and “person interested in the welfare of the [incapacitated] person” were intended to be equivalent under the MUPC, therefore Grandfather *did* have standing to file his motion to intervene, and thus the trial court was incorrect on this matter.⁴⁵

In support of this reasoning regarding interested persons, the Court logically paralleled *In re Guardianship of B.V.G.* with *In re Guardianship of Williams*,⁴⁶ wherein the New Hampshire Supreme Court deemed a petitioner with no pecuniary interest to be an “interested person” because legislative intent was to “promote the broadest possible protection for a proposed ward by granting generous standing to any adult with an interest in the proposed ward’s welfare.”⁴⁷ However, the Court in *In re Guardianship of B.V.G.* affirmed the denial of Grandfather’s motion to intervene by relying on Massachusetts Rules of Civil Procedure 24(a)(2), which provides for intervention of right “. . . unless the applicant’s interest is adequately represented by existing parties.”⁴⁸ Here, the court examined the trial judge’s assessment which noted that B.V.G.’s counsel agreed that a relationship for his client with Grandfather would be beneficial, and that Grandfather made no showing that said counsel would fail to raise that concern or interest when proceeding.⁴⁹ For this reason, the Court affirmed the trial court’s denial of Grandfather’s motion to intervene.⁵⁰

The Court’s comprehensive scrutiny of the MUPC and consideration of its statutory intent of uniformity renders a sound conclusion and illuminates approaches to be successful when filing motions to intervene.⁵¹ As in *Gardiner v. Jardine*, an individual should qualify as a

similarly intentioned statutes).

⁴⁵ See *id.* (noting trial court error by expressing statutory intent would grant standing to Grandfather).

⁴⁶ 986 A.2d 559 (N.H. 2009).

⁴⁷ *In re Guardianship of B.V.G.*, 27 N.E.3d at 847 (conceding Grandfather lacked pecuniary interest, but promoted B.V.G.’s wellbeing and protection); *In re Guardianship of Williams*, 986 A.2d at 564 (promoting protection for ward compensated for lack of pecuniary interest in establishing interested person). The court in *In re Guardianship of B.V.G.* emphasizes the MUPC’s requirement for judges to impose limitations on a capacitated person’s liberty only to the extent said person’s needs “cannot be met by less restrictive means,” which encourages limitations on guardianships, therefore allowing a broader class of people to seek such limitations and further the MUPC’s goal to support liberty. 27 N.E.3d at 847.

⁴⁸ See MASS. R. CIV. P. 24(a)(2) (outlining permissible circumstances for intervention of right).

⁴⁹ See *In re Guardianship of B.V.G.*, 27 N.E.3d at 848-49 (examining B.V.G.’s representation and said representation’s anticipated advocacy on her behalf).

⁵⁰ See *id.* at 849 (deeming Grandfather’s advocacy for B.V.G.’s wellbeing unnecessary when representation for same purpose already present).

⁵¹ See *id.* at 846 (referencing inferred intent of legislature in diction of statutes). A person without pecuniary interest should have standing to file his own petition for a limited guardianship

person of interest “if, acting in good faith, he believes that the welfare of [a minor/incapacitated person] requires that a . . . restraint should be . . . placed upon such person or his property,” regardless of presence of a pecuniary interest.⁵² However, even with a valid interest, a motion to intervene must be made to protect that interest.⁵³ The MUPC emphasizes the importance of protecting the greatest extent of liberty for all persons,⁵⁴ and as such, a person filing a motion to intervene with the intent to limit a guardianship should advocate personal interest in the principal’s liberty and promote less restrictive means, if possible, to meet said principal’s needs, which is interpreted as acting in the principal’s best interest.⁵⁵ As the Court in *In re Guardianship of Williams*⁵⁶ held, allowing more people to file motions to intervene and limit guardianships creates more advocacy for the broadest possible protection for the principal.⁵⁷ It appears that, when filing a motion

pursuant to MASS. GEN. LAWS ch. 190B, § 5-303, as well as have standing to petition the court to impose a limited guardianship pursuant to MASS. GEN. LAWS ch. 190B, § 5-306(c) and, as such, an “interested person” and a “person interested in the welfare of the [incapacitated] person” under the respective statutes are equivalent. *Id.*

⁵² See *Gardiner v. Jardine*, 139 N.E. 481, 482 (Mass. 1923) (holding ward’s welfare interest more important than presence of pecuniary interest in guardianship proceedings).

⁵³ See *In re Guardianship of Santrucek*, 896 N.E.2d 683, 686 (Ohio 2008) (denying protection of valid interest due to interested person’s lack of motion to intervene). This court notes that, although numerous family members, friends, or even neighbors could be impacted by the outcome of guardianship proceeding, not all persons will have a “legally sufficient interest to allow them to become parties to the proceedings . . .” *Id.* Being related to a ward is insufficient to confer party status on a person, as is being served with notice of proceedings. *Id.* at 687. Further, intervening parties only have standing “to the extent necessary to protect the interest that justifies the intervention.” *Id.* at 686-87.

⁵⁴ See MASS. GEN. LAWS ch. 190B, § 5-306(a) (2009) (“The court shall exercise the authority conferred in this part so as to encourage the development of maximum self-reliance and independence of the incapacitated person and make appointive and other orders only to the extent necessitated by the incapacitated person’s limitations or other conditions warranting the procedure.”); see also *In re Sylvester*, 598 A.2d 76, 83-84 (Pa. Super. Ct. 1991) (noting ward’s nomination is to be made unless said nominee is deemed unsuitable).

⁵⁵ See *In re Guardianship of B.V.G.*, 27 N.E.3d at 847 (opining best interest of ward includes least restrictive means to achieve welfare). Allowing more people to advocate for an individual’s liberty coincides with the MUPC’s goal of promoting individualism to the greatest possible extent. See *id.* (articulating foals of MUPC); see also *In re Guardianship of Smitt*, 684 N.E.2d 613, 616 (Mass. App. Ct. 1997) (highlighting importance of ward’s guardianship nomination). The *Smith* court stated its obligation to make a guardianship appointment in accordance with the ward’s nomination, absent disqualification or good cause to do otherwise. See *id.* at 616. (explaining Massachusetts Uniform Durable Power of Attorney Act, G. L. c. 201B guardianship appointment mandate).

⁵⁶ 986 A.2d 559 (N.H. 2009).

⁵⁷ See *id.* at 564 (acknowledging heightened likelihood of achieving best interest by broadening class able to advocate for ward); see also *Azarian v. First Nat’l Bank of Boston*, 423 N.E.2d 749, 750 (Mass. 1981) (emphasizing interested persons are entitled to his or her “day in court”); *Porotto v. Fiduciary Trust Co.*, 75 N.E.2d 17, 20 (Mass. 1947) (declaring matter not “finally determined and adjudicated” if interested person never received notice); *Dowd v. Morin*,

to intervene, approaching the court by promoting the best interest of the principal is more impactful in having the motion allowed, rather than promoting a pecuniary interest, despite presence of a pecuniary interest once being considered the standard.⁵⁸

Another beneficial strategy when approaching the court as a petitioner seeking to limit a guardianship may include emphasizing any uniqueness of the subjective circumstances in conjunction with highlighting the MUPC's definition section, which states definitions given stand "unless the context otherwise requires."⁵⁹ This approach could demonstrate an appropriateness in the court expanding interested persons,⁶⁰ as *Commonwealth v. Durham* exhibited such ideals by examining diction and emphasizing that the use of the word "includes" bespeaks expansion rather than an exhaustive definition.⁶¹ Encouraging a broad category of persons with standing to file motion for guardianship intervention, as in *In re Guardianship of Williams*,⁶² allows for a petitioner to advocate his or her sincere interest in the principal's wellbeing, which heightens the likelihood said motion will be allowed by the court.⁶³

Even with established standing a person interested in the welfare of the principal, it is imperative for that person to demonstrate, in good faith, that the principal has inadequate representation in order to successfully intervene in guardianship proceedings.⁶⁴ As *Hoots v. Pennsylvania*⁶⁵

471 N.E.2d 120, 123-24 (Mass. App. Ct. 1984) (noting proceedings can be reopened if notice not given to interested person).

⁵⁸ See *In re Guardianship of Williams*, 986 A.2d at 560-61 (stating pecuniary interest requirement for interested person qualification changes standard); see also *In re Guardianship of Santrucek*, 896 N.E.2d 683, 686 (Ohio 2008) ("[T]he disposition of the action may ... impair or impede [the petitioner's] ability to protect [an] interest, unless [said] interest is adequately represented by existing parties.").

⁵⁹ See MASS. GEN. LAWS ch. 190B, § 1-201 (2011) (identifying diverse circumstances among variety of probate proceedings wherein static definitions would be inappropriate).

⁶⁰ In jurisdictions where the definition of "interested persons" is still interpreted as requiring a pecuniary interest, advocating for the best interest of the principal and petitioner's involvement as being imperative to such interest would nevertheless demonstrate fairness in the judicial system and primary concern for principal's wellbeing. See *Bauer v. Shepard*, 634 F. Supp. 2d 912, 917 (N.D. Ind. 2009).

⁶¹ See *Commonwealth v. Durham*, 843 N.E.2d 1035, 1041 (Mass. 2006) (examining word selection and subsequent impact on procedural outcomes).

⁶² 986 A.2d 559 (N.H. 2009).

⁶³ See *id.* at 564 (broadening definition for persons with standing). See also MASS. GEN. LAWS ch. 190B, § 5-207(b) (2009) (noting any interested party may petition to limit guardian's power); MASS. GEN. LAWS ch. 190B, § 5-212(a) (2009) (stating any interested person over fourteen years old may petition to remove guardian).

⁶⁴ See *In re Guardianship of B.V.G.*, 27 N.E.3d 842, 848-49 (Mass. App. Ct. 2015) (maintaining interested person advocating interests already represented shall not be allowed to intervene); see also *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3d Cir. 1975)

outlined, a petitioner could show inadequate representation by demonstrating the presence of one of the following: diverging interests wherein counsel cannot devote proper attention to the principal's interests, collusion between counsel and opposing party, or counsel is not diligent in the suit.⁶⁶ In *In re Guardianship of B.V.G.*, Grandfather should have stated to the court that the neutrality of B.V.G.'s attorney in regards to Grandfather's motion did not foster the best interests of B.V.G., and thus diligence was lacking or interests were diverted due to counsel's lack of promotion regarding the contact B.V.G. expressed she wanted with Grandfather.⁶⁷ Although *Pennsylvania v. Rizzo*⁶⁸ demonstrated a presumption of adequate representation can be present, emphasizing to the court a flaw in counsel's advocacy can aid in refuting that general presumption.⁶⁹ This discrepancy in adequate representation, regardless of the position of the advocate, should be compelling because, as a nation, the court system is intended to promote and values "judicial fairness, impartiality, independence, integrity, competence, the principles of justice, and the rule of law."⁷⁰

(referencing importance of case-specific circumstances in determining adequate representation). Adequate representation in context of class claims rests on attorney being "qualified, experienced, and generally able to conduct the proposed litigation" as well as no presence of antagonistic interests between those of the plaintiff and those of the class. *Id.*; see also *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 562 (2d Cir. 1968) (deeming diverse interests can weaken ability of attorney to adequately represent parties in class action). Although an interested person does not require litigation experience to obtain standing for intervention in guardianship proceedings, an advocate's interests logically cannot be antagonistic to those of the ward, otherwise promoting the best interests of the ward is inherently unattainable. *In re Guardianship of B.V.G.*, 27 N.E.3d at 847.

⁶⁵ 672 F.2d 1133 (3d Cir. 1982).

⁶⁶ *Id.* at 1135 (enumerating methods to demonstrate inadequate representation present in proceeding). See *Harris v. Pernsley*, 820 F.2d 592, 601 (3d Cir. 1987) (stating incidentally affected claim is insufficient; rather "tangible threat" to applicant's legal interest required).

⁶⁷ See *In re Guardianship of B.V.G.*, 27 N.E.3d at 844 (acknowledging B.V.G.'s attorney's stance in regards to Grandfather's involvement in proceeding). B.V.G.'s attorney found her relationship with Grandfather to be non-detrimental, admitted B.V.G. desired contact with Grandfather, but nevertheless did not promote Grandfather's contact with her or his involvement in proceeding. See *id.* (explaining B.V.G.'s attorney's assertions in court).

⁶⁸ 530 F.2d 501 (3d Cir. 1976).

⁶⁹ See *id.* at 505 (presuming adequate representation when advocate embodies specific roles). By stressing weaknesses in said advocate's representation, the roles of advocate – as an officer charged by law to represent another or a governmental body representing another (providing a presumption of adequate representation) – may diminish in importance when compared to the quality of ward's representation to the extent that representation is flawed.

⁷⁰ See *Bauer v. Shepard*, 634 F. Supp. 2d 912, 917 (N.D. Ind. 2009) (stressing rules of conduct should adhere to historical values important to administration of justice). The *Bauer* court also expresses value placed on promoting public confidence in the independence and impartiality of the judiciary, which would logically be compromised if the presumption of adequate representation could not be refuted simply by a position or title belonging to the

The Court in *In re Guardianship of B.V.G.* examined whether a petitioner seeking to limit a guardianship, by way of filing a motion to intervene, has standing without having a pecuniary interest. The Court affirmed the trial court's denial of Grandfather's motion to intervene, not on grounds that Grandfather lacked standing as an "interested person," but because B.V.G.'s interests were adequately represented by counsel without Grandfather's intervention. By examining this case, advocacy strategies to increase likelihood of allowance of a motion to intervene are exposed. Promoting the best interests and liberty of the ward, emphasizing subjective uniqueness of circumstances to broaden the class of "interested persons," and demonstrating in good faith inadequate representation likely increases the rate of allowed motions to intervene in guardianship proceedings.

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