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Wyoming is More Likely Than Not Behind in Guardianship Proceedings: The Unconstitutional Standard for Guardianship Under Wyoming Statute § 3-2-104

Kasey J. Benish

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COMMENT

**Wyoming is More Likely Than Not Behind in
Guardianship Proceedings: The Unconstitutional Standard
for Guardianship Under Wyoming Statute § 3-2-104**

*Kasey J. Benish**

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I. INTRODUCTION

Guardianship is the greatest restriction on an individual's rights outside of incarceration or involuntary commitment.¹ Individuals under a guardianship are

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¹ See A. Frank Johns, *Ten Years After: Where Is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?*, 7 ELDER L.J. 33, 37 (1999) (“[G]uardianship

deprived of many rights, such as the right to enter into contracts, make their own decisions about where to live, and decide when and how to start a family.² The purpose of a guardianship is to help incompetent individuals who cannot help themselves—including the elderly and some individuals with physical disabilities or mental illnesses.³ Wyoming allows for individuals to be placed into a guardianship if the petitioner proves by a simple preponderance of the evidence that a guardianship is necessary and that the individual is incompetent.⁴ Wyoming is the only state using a preponderance of the evidence standard in guardianship proceedings.⁵ Unfortunately, this low standard of proof required for guardianships results in the implementation of guardianships for individuals who do not need such intrusive assistance.⁶ The standard of proof does not provide adequate protection to individuals who are at risk of losing fundamental rights and, therefore, the standard is unconstitutional.⁷ Since the Wyoming guardianship statute is unconstitutional in its entirety, a higher degree of protection is required.⁸

Part II of this Comment begins with an overview of guardianship proceedings and discusses Wyoming's guardianship statute, Wyoming Statute § 3-2-104.⁹ Then, Part III illustrates why Wyoming Statute § 3-2-104 is unconstitutional on

is a legal process or arrangement under which one person (a guardian) is granted the authority, legal right, and duty to care for another person (the ward) and his or her property.” (quoting *Guardianship*, BLACK'S LAW DICTIONARY (6th ed. 1990)); ERICA WOOD ET AL., ABA COMM'N ON LAW AND AGING WITH THE VIRGINIA TECH CTR. FOR GERONTOLOGY, RESTORATION OF RIGHTS IN ADULT GUARDIANSHIP: RESEARCH AND RECOMMENDATIONS 6 (2017), https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration%20report.authcheckdam.pdf. (“[G]uardianship is one of society's most drastic interventions in which fundamental rights are transferred to a surrogate, leaving an individual without choice and self-determination.”). See also generally WYO. STAT. ANN. § 3-2-201 (2019).

² Susan G. Haines & John J. Campbell, *Defects, Due Process, and Protective Proceedings*, 2 ELDER'S ADVISOR 13, 15–16 (2000) (“The constitutionally protected individual interests implicated in a guardianship proceeding include the right to choose where to live and with whom to associate, the right to make medical decisions regarding one's body, the right to marry and to freely associate, the right to travel or pursue in privacy the activities of daily living, and the right to be free from unwanted constraints or incarceration.”).

³ Jenica Cassidy, *State Statutory Authority for Restoration of Rights in Termination of Adult Guardianship*, 24 BIFOCAL 123, 123 (2018); see also Haines & Campbell, *supra* note 2, at 13, 15–16.

⁴ WYO. STAT. ANN. § 3-2-104.

⁵ Am. Bar Ass'n, *Conduct and Findings of Guardianship Proceedings Statutory Revisions as of August 7, 2018*, ABA COMM'N ON L. & AGING 14 (2018), https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartconduct.pdf.

⁶ See *infra* notes 76–244 and accompanying text. An unknown number of individuals are placed in guardianships who never needed it or remain in a guardianship past the point of need. WOOD ET AL., *supra* note 1, at 6. Additional evidence obtained after proceedings may show the guardianship was unnecessary. *Id.* at 20.

⁷ See *infra* notes 76–244 and accompanying text.

⁸ See *infra* notes 245–50 and accompanying text.

⁹ See *infra* notes 12–75 and accompanying text.

procedural due process grounds under *Mathews v. Eldridge*.¹⁰ Accordingly, Part III proposes that the evidentiary standard of “clear and convincing evidence” should replace the “preponderance of the evidence” standard currently required by statute in Wyoming.¹¹

II. BACKGROUND

Guardianship provides the state with a mechanism to protect those who can no longer care for themselves; this concept is derived from the *parens patriae* doctrine.¹² The United States first adopted guardianship proceedings from English common law.¹³ In England, the *parens patriae* doctrine allowed the monarch to assert paternalistic control over orphans and incompetent persons.¹⁴ The purpose of the doctrine was to benefit those who could not care for themselves.¹⁵ To this day, state law controls guardianship proceedings.¹⁶ Guardianships may be put in place for two different types of people: minors and those who are found to be incompetent.¹⁷ This Comment will focus on those who are appointed guardians based on incompetence.¹⁸ With regard to incompetent individuals, the justification for the *parens patriae* doctrine is the protection of the individual’s best interests.¹⁹

In a guardianship proceeding, the court grants one individual (the guardian) authority to act in the best interest of another individual who can no longer care for herself (the ward).²⁰ The process of appointing a guardian begins when an individual petitions the court; this person, called the petitioner, is usually the individual who would like to be appointed as the guardian.²¹ The person who will potentially be placed under guardianship is called the proposed ward.²²

¹⁰ See *infra* notes 76–226 and accompanying text.

¹¹ See *infra* notes 227–37 and accompanying text.

¹² Cassidy, *supra* note 3, at 123; see also Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1850 (2000).

¹³ Ratliff, *supra* note 12, at 1850.

¹⁴ Nicole M. Arsenault, *Start with a Presumption She Doesn’t Want to Be Dead: Fatal Flaws in Guardianships of Individuals with Intellectual Disability*, 35 L. & INEQ. 23, 26 (2017); see also Ratliff, *supra* note 12, at 1850.

¹⁵ Cassidy, *supra* note 3, at 123; Arsenault, *supra* note 14, at 26; Haines & Campbell, *supra* note 2, at 13.

¹⁶ Arsenault, *supra* note 14, at 32.

¹⁷ WYO. STAT. ANN. § 3-2-101 (2019).

¹⁸ See *infra* notes 76–244 and accompanying text.

¹⁹ Haines & Campbell, *supra* note 2, at 16.

²⁰ WYO. STAT. ANN. § 3-2-104, -201.

²¹ *Id.* § 3-2-101.

²² *Id.*

When someone other than the proposed ward petitions the court, it is termed an involuntary petition.²³ The proposed ward can also voluntarily petition the court for a guardianship to be placed over herself.²⁴ In either situation, Wyoming courts only appoint a guardian if the petitioner proves by a preponderance of the evidence that the proposed ward is incompetent and that the appointment is necessary.²⁵

First, the petitioner must prove the proposed ward is incompetent.²⁶ Incompetency may result from a number of causes, including developmental disabilities, serious mental illnesses, Alzheimer's, dementia, genetic conditions, brain injuries, or substance abuse disorders.²⁷ Incompetence can also arise from something as simple as advanced age.²⁸ The petitioner can prove the proposed ward is incompetent through medical records, social service records, and testimony from family, friends, caregivers, or educators.²⁹

Second, the court will only appoint a guardian if the petitioner also proves by a preponderance of the evidence that the appointment is necessary.³⁰ Under this standard of proof, the petitioner must only prove that the guardianship is more necessary than not.³¹ In *In re Guardianship and Conservatorship of Parkhurst*, the Wyoming Supreme Court defined necessity as “a condition arising out of circumstances that compels to a certain course of action.”³² The court further interpreted this definition to require a case-by-case consideration of various

²³ *McNeel v. McNeel (In re McNeel)*, 2005 WY 36, ¶ 23–24, 109 P.3d 510, 518 (2005). There are even instances when a lawyer may be a petitioner. MODEL RULES OF PROF'L CONDUCT 1.14(b) (AM. BAR ASS'N 2018) (“When a lawyer reasonably believes that the client has diminished capacity . . . the lawyer may take reasonably necessary protective action, including . . . in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.”). The lawyer is also authorized to provide any information necessary about the client, which is usually prohibited by Model Rule 1.6(a). *Id.* at 1.14(c).

²⁴ WYO. STAT. ANN. § 3-2-105.

²⁵ *Id.* § 3-2-104.

²⁶ *Id.*

²⁷ *Id.* § 3-1-101(ix). In Wyoming, an “incompetent person means an individual who, for reasons other than being a minor, is unable unassisted to properly manage and take care of himself or his property as a result of the medical conditions of advanced age, physical disability, disease, the use of alcohol or controlled substances, mental illness, mental deficiency or intellectual disability.” *Id.*

²⁸ *Id.*

²⁹ A. KIMBERLY DALTON ET AL., ADVISING THE ELDERLY CLIENT § 34:10 (2018).

³⁰ WYO. STAT. ANN. § 3-2-104.

³¹ *J.J.F. v. State*, 2006 WY 41, ¶ 9, 132 P.3d 170, 174 (2006).

³² *Boykin v. Parkhurst (In re Parkhurst)*, 2010 WY 155, ¶ 22, 243 P.3d 961, 968 (2010) (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1510–11 (1986)).

factors.³³ For example, in *In re Guardianship of Sands*, the petitioner established necessity by showing the individual lived in an unsanitary environment, misused financial funds, overdosed on his medication, and received a diagnosis of both dementia and Asperger's.³⁴

If the petitioner proves by a preponderance of the evidence that the guardianship is necessary and that the proposed ward is incompetent, the court will appoint a guardian.³⁵ Under Wyoming law, "guardian" means a person the court appoints to exercise certain powers on behalf of an incompetent person.³⁶ The guardian has the power to make decisions and care for the ward.³⁷ When the court appoints a guardian, the law requires the guardianship terms to be minimally restrictive, allowing the ward to keep as much autonomy as practical in any given situation.³⁸

A guardian is in a fiduciary position, rooted in trust, wherein she is required to act in the best interests of the ward.³⁹ A fiduciary is an individual "who is required to act for the benefit of another person on all matters within the scope of their relationship . . . one who owes to another the duties of good faith, trust, confidence, and candor."⁴⁰ The guardian, as a fiduciary, has two duties: a duty of loyalty and a duty of care.⁴¹ The duty of loyalty requires the guardian to put the interests of the ward first, and to refrain from acting for personal benefit.⁴² The duty of care requires the guardian to "act as an ordinary prudent person would act in the management of his or her own affairs."⁴³ Ultimately, the guardian must act as a prudent person would, in the best interest of the ward.⁴⁴

³³ *Id.* at ¶ 23, 243 P.3d at 968 ("[N]o general rule exists as to the conditions warranting the appointment of a guardian for an incompetent person, due to the variances in the statutes among the jurisdictions and because the necessity for a guardian generally is determined on the circumstances of the particular case." (quoting 39 AM. JUR. 2D *Guardian and Ward* § 24 (2008))). Some of the factors weighed for necessity include whether an individual is able to feed, dress, and provide personal hygiene for themselves. *Id.* ¶ 28, 243 P.3d at 970.

³⁴ *Sands v. Brown (In re Sands)*, 2013 WY 60, ¶ 17, 19–25, 301 P.3d 128, 132–34 (2013).

³⁵ WYO. STAT. ANN. § 3-2-104.

³⁶ *Id.* § 3-1-101(v).

³⁷ *See id.* § 3-2-201; *infra* notes 119–35 and accompanying text.

³⁸ WYO. STAT. ANN. §§ 3-1-206(a)(i), 3-2-104.

³⁹ John F. Mariani et al., *Understanding Fiduciary Duty*, 84 FLA. B.J. 20, 22 (2010).

⁴⁰ *Fiduciary Duty*, BLACK'S LAW DICTIONARY (4th Pocket ed. 2011).

⁴¹ Mariani et al., *supra* note 39, at 22.

⁴² *Id.* ("[The duty of loyalty] gives rise to more specific duties, such as the prohibition against self-dealing, conflicts of interest, and the duty to disclose material facts.").

⁴³ *Id.* ("If the [guardian] has special skills, or becomes a fiduciary on the basis of representations of special skills or expertise, the fiduciary is under a duty to use those skills.").

⁴⁴ *See supra* notes 39–43 and accompanying text.

There are many advantages to having the court appoint a guardian.⁴⁵ For individuals who require assistance in decision-making and overall personal well-being, guardianship may be the ward's only option for protection against harm and exploitation.⁴⁶ Appointing guardians to incompetent individuals provides consistency and security by allowing wards to have one individual or entity make essential decisions for them.⁴⁷ A guardian can diminish the conflict between family members by making decisions such as where the ward will live or who will take care of the ward.⁴⁸ Guardians also have access to third-party professionals who can evaluate the ward's personal or financial affairs.⁴⁹ For example, the guardian can place the ward in an individual care facility, develop an individualized care plan, and monitor her daily activity logs and medical records to ensure the care plan is being met.⁵⁰ The guardian can also retain counsel for the ward in situations where the ward has been abused financially or denied appropriate health care.⁵¹ Placing an incompetent individual under a guardianship may have a positive impact on the ward's life.⁵²

Although there are many advantages to court-appointed guardians, there are also several disadvantages.⁵³ Guardianships cost the ward a substantial amount of money and time; the ward incurs all of the court fees and legal expenses.⁵⁴ If the proposed ward has a substantial estate, the proceeding is often highly contested, causing the proposed ward to pay even more.⁵⁵ Every part of the guardianship proceeding exposes intimate details of the ward's life, including finances, social activities, medical records, and living situations.⁵⁶ Although guardianship may

⁴⁵ See *infra* notes 46–52 and accompanying text.

⁴⁶ DALTON ET AL., *supra* note 29, at § 34:10.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.* (“[The guardian] can take steps to enhance the ward’s quality of life, as by hiring companions to visit the ward, taking him on excursions or vacations, and otherwise providing contact with the community.”).

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *supra* notes 45–52 and accompanying text.

⁵³ See *infra* notes 54–62 and accompanying text.

⁵⁴ DALTON ET AL., *supra* note 29, § 34:9 (“Even the most pro forma, efficient, and non-adversarial guardianship or conservatorship proceeding may take 20 to 30 days The petitioner’s expenses to adjudicate the guardianship are usually borne by the ward’s estate . . . such as attorney’s fees, travel expenses, meals, expert witnesses [on both sides]. . . . Additionally, the ward generally bears the expenses associated with retaining a guardian ad litem [and] additional counsel other than the guardian ad litem”).

⁵⁵ DALTON ET AL., *supra* note 29, § 34:9 (“If the [proposed ward’s] estate is substantial, the expenses . . . may also include fees for the testimony of accountants, financial planners, trust officers, bank officers, and any other expert witnesses with information regarding the property of the alleged incompetent adult . . . adding exponentially to its costs.”).

⁵⁶ *Id.*

resolve certain family conflicts, they also have the potential to create family disputes.⁵⁷ The guardian has the power to limit the information the family of the ward receives.⁵⁸ Consequently, the family may not know of the decisions made by the guardian on the ward's behalf, such as where the ward is living (if the guardian decides it is in the best interest for the ward to move) or if the ward is hospitalized.⁵⁹ The guardian has the discretion to decide how much interaction and communication family members or friends can have with the ward.⁶⁰ By far, the biggest disadvantage to a guardianship is the ward's loss of fundamental rights when she is appointed a guardian.⁶¹ Because of these many disadvantages, an erroneous appointment of a guardianship has a substantial negative impact on a competent individual's life.⁶²

If and when the ward's condition improves, it is very difficult for a ward to terminate the guardianship and restore her rights.⁶³ If the court determines the guardianship is no longer in the best interests of the ward and that the ward is competent and able to manage her personal and financial affairs, the court can terminate the guardianship and restore the individual's rights.⁶⁴ The ward may regain capacity in cases where the incapacity was only "temporary or the individual has responded to treatment" for the incapacity.⁶⁵ Under Wyoming law, only the ward may petition for termination and restoration of her rights.⁶⁶ A majority of the states allow for the ward or any interested party to petition for termination.⁶⁷ Wyoming is again an anomaly with regard to the timing of the

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*; WYO. STAT. ANN. § 3-2-201(a)(i) (2019) ("The guardian shall . . . [d]etermine and facilitate the least restrictive and most appropriate and available residence for the ward . . .").

⁶⁰ DALTON ET AL., *supra* note 29, § 34:9.

⁶¹ See *infra* notes 124–38 and accompanying text.

⁶² See *supra* notes 53–61 and accompanying text.

⁶³ See *infra* notes 64–70 and accompanying text.

⁶⁴ WYO. STAT. ANN. § 3-3-1101 ("A guardianship shall cease, and a conservatorship shall terminate, upon the occurrence of any of the following circumstances: (i) If upon attaining the age of majority when the ward is a minor who has not been adjudged an incompetent person or a mentally incompetent person; (ii) The death of the ward, subject to W.S. 3-2-109(a)(iii) and 3-2-201(a)(x); (iii) A determination by the court that the ward is competent and capable of managing his property and affairs, and that the continuance of the guardianship or conservatorship is not in his best interest; (iv) A determination by the court that the guardian or conservator is not acting in the best interest of the ward. In such case, the court shall appoint another guardian or conservator; (v) Upon determination by the court that the conservatorship or guardianship is no longer necessary for any other reason.").

⁶⁵ Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 3 ELDER L.J. 83, 84 (2015) (citing MASS. GUARDIANSHIP ASSOC., HANDBOOK FOR MASSACHUSETTS GUARDIANS 11 (2010)).

⁶⁶ WYO. STAT. ANN. § 3-3-1105(a); Cassidy, *supra* note 3, at 124.

⁶⁷ Cassidy, *supra* note 3, at 124.

petition: wards placed in guardianships are unable to petition for termination until six months have passed since the appointment.⁶⁸ Forty-six states do not place limitations on the time in which requests for restoration may be filed.⁶⁹ Altogether, these limitations engender substantial impediments on the ward's ability to terminate an erroneous guardianship.⁷⁰

A. *Wyoming Statute § 3-2-104*

In Wyoming, the court appoints guardians under Wyoming Statute § 3-2-104, which provides that “[t]he court may appoint a guardian if the allegations of the petition as to the status of the proposed ward and the necessity for the appointment of a guardian are proved by a preponderance of the evidence.”⁷¹ This statute thereby sets the evidentiary standard for the process that empowers the court to take away fundamental rights from the proposed ward.⁷² Preponderance of the evidence is the lowest standard of proof, with clear and convincing evidence and beyond a reasonable doubt requiring much higher thresholds.⁷³ The Wyoming Supreme Court defines preponderance of the evidence as “proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence.”⁷⁴ Requiring proof only by a preponderance of the evidence in guardianship proceedings violates procedural due process because the standard does not provide adequate protection to individuals whose fundamental rights are at stake in the proceeding.⁷⁵

III. ANALYSIS

A. *Due Process*

The United States Constitution discusses the right to due process twice.⁷⁶ Both the Fifth and Fourteenth amendments provide that the government shall not “deprive any person of life, liberty, or property without due process of law.”⁷⁷ For a due process claim to arise, the deprivation of life, liberty, or property must

⁶⁸ WYO. STAT. ANN. § 3-3-1105(a); Cassidy, *supra* note 3, at 126.

⁶⁹ Cassidy, *supra* note 3, at 126.

⁷⁰ See *supra* notes 64–69 and accompanying text.

⁷¹ WYO. STAT. ANN. § 3-2-104.

⁷² See *infra* notes 124–38 and accompanying text.

⁷³ J.J.F. v. State, 2006 WY 41, ¶ 24, 132 P.3d 170, 178 (2006).

⁷⁴ *Id.* at ¶ 9, 132 P.3d at 174.

⁷⁵ See *infra* notes 76–244 and accompanying text.

⁷⁶ U.S. CONST. amend. V, § X; U.S. CONST. amend. XIV, § X.

⁷⁷ U.S. CONST. amend. V, § X; U.S. CONST. amend. XIV, § X.

occur due to a violation by the government.⁷⁸ The Fourteenth Amendment applies when there is state action.⁷⁹ Since the State of Wyoming defines guardianship proceedings, and because state courts are substantially involved in guardianship appointments, guardianship proceedings constitute state action.⁸⁰ Therefore, this Comment focuses on a Fourteenth Amendment analysis.⁸¹

Due process comes in two forms: substantive and procedural due process.⁸² Substantive due process requires the government to prove that the deprivation of the individual's life, liberty, or property was justified.⁸³ Courts apply varying levels of scrutiny to determine if there is justification for the deprivation.⁸⁴ Procedural due process requires the government to provide certain procedures before depriving a person of life, liberty, or property.⁸⁵ This requirement ensures consistency in governmental proceedings.⁸⁶ At the core of procedural due process is fundamental fairness.⁸⁷ Procedural due process requires "adequate notice and the opportunity to be heard at a meaningful time and in a meaningful manner."⁸⁸ The "meaningful manner" requirement considers procedures such as time and the standards of proof.⁸⁹ The requirement has also been found to include the "concept of reasonableness."⁹⁰ Thus, the standard of proof must be reasonable

⁷⁸ See ROB B. KEITER, *THE WYOMING STATE CONSTITUTION* 59–60 (2d. ed. 2017).

⁷⁹ *Hanesworth v. Johnke*, 783 P.2d 173, 176 (Wyo. 1989); *Garnett v. Brock*, 2 P.3d 558, 563 (Wyo. 2000) ("The Fourteenth Amendment insures that a state may not 'deprive any person of life, liberty, or property without due process of law.'").

⁸⁰ *Arsenault*, *supra* note 14, at 32 ("There is no national procedure for appointment of a guardian; the practice belongs to the individual states to define."); *In re Guardianship of Hilton's Estate*, 265 P.2d 747, 748 (Wyo. 1954); *Hanesworth*, 783 P.2d at 176 ("We hold that the involvement of the district court in the probate proceedings is so pervasive and substantial that it must be considered such state action as to invoke the due process clause of the United States and Wyoming Constitutions.").

⁸¹ See *infra* notes 94–113 and accompanying text.

⁸² ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW PRINCIPLES AND POLICIES* 570 (5th ed. 2015).

⁸³ KEITER, *supra* note 78, at 59–60.

⁸⁴ *Id.*

⁸⁵ *Id.* at 59 ("Although the language in this provision parallels the federal due process clause, the Wyoming Supreme Court has held that it provides more protection for individuals than does its federal counterpart.").

⁸⁶ *Id.* at 60.

⁸⁷ *Id.* at 61 (citing *Munoz v. Maschner*, 590 P.2d 1353, 1355 (Wyo. 1979)).

⁸⁸ *Id.* (citing *ELA v. AAB*, 2016 WY 98, 382 P.3d 45 (2016); *Patterson v. State*, 2012 WY 90, 279 P.3d 535 (Wyo. 2012); *DH v. Wyo. Dep't of Family Servs. (In re "H" Children)*, 2003 WY 155, 79 P.3d 997 (2003); *Robbins v. S. Cheyenne Water & Sewage Dist.*, 792 P.2d 1380 (Wyo. 1990)).

⁸⁹ *ELA*, ¶ 21, 382 P.3d at 50; *J.J.F. v. State*, 2006 WY 41, ¶ 13, 132 P.3d 170, 175 (2006).

⁹⁰ *J.J.F.*, ¶ 13, 132 P.3d at 174–75 (citing *Commonwealth v. Maldonado*, 838 A.2d 710, 714 (Penn. 2003)).

for the type of proceeding.⁹¹ For example, in criminal law, due to the severity of the deprivation, the government must prove the underlying charge beyond a reasonable doubt.⁹² The standard of proof employed in guardianship proceedings implicates procedural due process concerns because the proceedings require the lowest standard of proof, which may not be reasonable due to the substantial loss the ward faces.⁹³

1. *Procedural Due Process*

Wyoming uses a two-part test to determine whether the government has violated procedural due process.⁹⁴ The first prong analyzes whether there is a deprivation.⁹⁵ Procedural due process rights “are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property.”⁹⁶ Guardianship implicates a deprivation of liberty and property interests and, due to the difficulties in terminating guardianships, these deprivations are effectively permanent.⁹⁷

In *Board of Regents v. Roth*, the United States Supreme Court defined deprivation of liberty as a loss of a right provided explicitly or implicitly from the constitution or a statute.⁹⁸ Individual rights can be found in both the Declaration of Independence and the Wyoming Constitution.⁹⁹ Guardianships deprive wards of their fundamental rights, signifying a deprivation of liberty.¹⁰⁰ For example, guardianships deprive wards of their right to travel, to vote, to maintain

⁹¹ *Id.*

⁹² *Maldonado*, 838 A.2d at 718.

⁹³ See *infra* notes 94–113 and accompanying text.

⁹⁴ *Garnett v. Brock*, 2 P.3d 558, 563 (Wyo. 2000) (quoting *Gardetto v. Mason*, 854 F. Supp. 1520, 1533–34 (D. Wyo. 1994)).

⁹⁵ *Id.* (quoting *Gardetto*, 854 F. Supp. at 1533–34).

⁹⁶ *Carey v. Phipus*, 435 U.S. 247, 259 (1978).

⁹⁷ See *supra* notes 63–70 and accompanying text; *infra* notes 98–109 and accompanying text.

⁹⁸ *Bd. of Regents v. Roth*, 408 U.S. 564, 572 (1972) (internal cites omitted) (“In a Constitution for a free people, there can be no doubt that the meaning of ‘liberty’ must be broad indeed.”); CHEMERINSKY, *supra* note 82, at 590.

⁹⁹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1976) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness.”); WYO. CONST. art. I, §§ 2, 6, 36 (amended 1996) (“In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal. . . . No person shall be deprived of life, liberty or property without due process of law. . . . The enumeration in this constitution, of certain rights shall not be construed to deny, impair, or disparage others retained by the people.”).

¹⁰⁰ *Roth*, 408 U.S. at 572; U.S. CONST. amend. XIV; see also *infra* notes 124–38 and accompanying text.

privacy, and to marry—all major losses.¹⁰¹ When a guardianship proceeding deprives a ward of these fundamental rights, the proceeding deprives the ward of liberty interests.¹⁰²

A guardianship may also deprive a ward of her property rights.¹⁰³ In *Roth*, the Supreme Court defined property as a “legitimate claim of entitlement” to a property interest.¹⁰⁴ A court will generally find that an individual has entitlement to a property interest if there is a “reasonable expectation to continued receipt of a benefit.”¹⁰⁵ Guardianships may limit or diminish a ward’s access to their own property.¹⁰⁶ For example, in *In re Guardianship of Hilton’s Estate*, the guardian sold real and personal property belonging to the ward to raise funds for the ward’s maintenance, medical care, and hospitalization.¹⁰⁷ The ward contested the sale of her property, but the court confirmed the sale.¹⁰⁸ In that case, the guardian deprived the ward of her “legitimate claim of entitlement” to her real and personal property—signifying a deprivation of a property interest.¹⁰⁹

The first prong of the of the due process violation test requires there to be a deprivation of a protected interest.¹¹⁰ By depriving wards of both liberty and property interests, guardianship proceedings meet the first prong of the test.¹¹¹ However, in Wyoming, establishing a deprivation is only the first part of a two-part test by which a court decides whether there has been a due process violation.¹¹² The second prong analyzes whether the procedures were sufficient, and this analysis is guided by the balancing test set forth in the seminal case of *Mathews v. Eldridge*.¹¹³

¹⁰¹ See *infra* notes 124–38 and accompanying text; Haines & Campbell, *supra* note 2, at 15.

¹⁰² See *supra* notes 98–101 and accompanying text.

¹⁰³ See *infra* notes 104–09 and accompanying text.

¹⁰⁴ *Roth*, 408 U.S. at 577; CHEMERINSKY, *supra* note 82, at 584.

¹⁰⁵ See CHEMERINSKY, *supra* note 82, at 585.

¹⁰⁶ See *infra* notes 107–09 and accompanying text.

¹⁰⁷ *In re Guardianship of Hilton’s Estate*, 265 P.2d 747, 748 (Wyo. 1954). The real property in this case was the ward’s current home and the place she resided for many years. *Id.* The personal property included 180 head of cattle, 300 sheep, and some farm equipment. *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See *supra* notes 104–08 and accompanying text.

¹¹⁰ *Garnett v. Brock*, 2 P.3d 558, 563 (Wyo. 2000) (quoting *Gardetto v. Mason*, 854 F. Supp. 1520, 1533–34 (D. Wyo. 1994)).

¹¹¹ See *supra* notes 94–109 and accompanying text.

¹¹² *Garnett*, 2 P.3d at 563 (quoting *Gardetto*, 854 F. Supp. at 1533–34).

¹¹³ *Id.*

B. Mathews v. Eldridge *Balancing Test*

In *Eldridge*, the Government requested additional proof of George Eldridge's continued disability to prevent termination of his social security disability benefits on the grounds that the government believed his disability had ceased.¹¹⁴ Eldridge complied with the Government's requests; however, the Government determined its original finding that the disability had ceased was correct, and terminated Eldridge's benefits.¹¹⁵ Eldridge filed suit claiming the termination procedures were unconstitutional because the government did not provide him with an evidentiary hearing before terminating his benefits.¹¹⁶ The district court found in favor of Eldridge, and the court of appeals affirmed.¹¹⁷ The Supreme Court granted certiorari and developed a three-part balancing test to determine whether a procedure satisfies constitutional due process requirements, under which a court must weigh the following interests:

first the private interest that will be affected by the official action; second the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.¹¹⁸

Although *Eldridge* involved an administrative hearing, the Court noted in *Parham v. J.R.* that the balancing test may also be used as a "general approach for testing challenged state procedures under a due process claim."¹¹⁹ The Wyoming Supreme Court has previously employed this test to determine whether constitutionally-required burdens of proof have been met.¹²⁰ Under the balancing

¹¹⁴ *Mathews v. Eldridge*, 424 U.S. 319, 320 (1976).

¹¹⁵ *Id.* at 324.

¹¹⁶ *Id.* at 324–25.

¹¹⁷ *Id.* at 325–26.

¹¹⁸ *Id.* at 335.

¹¹⁹ *Parham v. J.R.*, 442 U.S. 584, 599 (1979).

¹²⁰ *J.J.F. v. State*, 2006 WY 41, ¶ 10, 132 P.3d 170, 174 (2006). The factors weighed include: "(1) the private interest affected by the official action; (2) the risk of the erroneous deprivation of such interest through the procedures used; (3) the probable value of any alternative procedures; and (4) the government's interest." *Id.* This analysis will include the probable value of any alternative procedures as a subsection of the risk of erroneous deprivation of such interest through the procedures used factor. *See id.* *See also* *Painter v. Abels*, 998 P.2d 931, 941 (Wyo. 2000) (holding that a disciplinary proceeding involving a professional license must be proved by clear and convincing evidence); *J.J.F.*, ¶ 34, 132 P.3d at 181 (holding that the preponderance of the evidence standard adequately protected sex offenders' rights); *State ex rel. Dep't of Transp. v. Robbins*, 2011 WY 23, ¶ 18, 246 P.3d 864, 867 (2011) (holding that the disqualification of a commercial driver's license did not require proof by clear and convincing evidence).

test outlined in *Eldridge*, the burden of proof afforded for appointment of a guardian under Wyoming Statute § 3-2-104 is unconstitutional.¹²¹

1. *The Private Interest Affected by the Official Action*

Under *Eldridge*, the first step is to consider the importance of the interest to the individual.¹²² With guardianship comes harsh consequences: “[it] is the only proceeding in American courts in which adults can be permanently deprived of rights solely in order to protect their well-being when they are unable to care for themselves.”¹²³ The private interests at stake during guardianship proceedings include property interests, liberty interests, and other fundamental rights.¹²⁴ Fundamental rights are those rights identified in the Constitution that are a significant component of liberty and require a higher degree of protection from governmental intrusion.¹²⁵ As noted earlier, guardianships deprive individuals of many rights, including the right to work in certain professions, raise children, consent to medical treatment, make decisions about property, vote, make end-of-life decisions, marry, possess firearms, contract, and file lawsuits.¹²⁶ Since many of these rights are fundamental, courts should require more procedural safeguards before an individual will be deprived of them.¹²⁷

The specific fundamental rights implicated by Wyoming’s guardianship proceedings include the right to marry, the right to vote, the right to privacy, and the right to travel.¹²⁸ In *Loving v. Virginia*, the Supreme Court found that “marriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival.”¹²⁹ Wyoming Statute § 3-2-201(vi) states that a guardian

¹²¹ See *infra* notes 245–52 and accompanying text.

¹²² CHEMERINSKY, *supra* note 82, at 606.

¹²³ Cassidy, *supra* note 3, at 123.

¹²⁴ See *supra* notes 94–113 and accompanying text; *infra* notes 128–37 and accompanying text.

¹²⁵ *Fundamental Right*, BLACK’S LAW DICTIONARY, *supra* note 1; Kingston v. Honeycut (*In re Honeycut*), 908 P.2d 976, 979 (Wyo. 1995) (“A fundamental right is a right which is guaranteed explicitly or implicitly by the constitution.” (citing Mills v. Reynolds, 837 P.2d 48, 53–54 (Wyo. 1992))).

¹²⁶ Haines & Campbell, *supra* note 2, at 15–16.; Jennifer L. Wright, *Guardianship for Your Own Good: Improving the Well-Being of Respondents and Wards in the USA*, 33 INT’L J.L. & PSYCHIATRY 350, 351 (2010); WYO. STAT. ANN. § 3-2-202 (2019) (“Upon order of the court, after receiving notice and hearing and appointment of a guardian ad litem, the guardian may: . . . consent to the following treatments for the ward: . . . sterilization [and] other long-term or permanent contraception . . . relinquish the ward’s minor children for adoption . . .”). See *supra* notes 94–113 and accompanying text; see *infra* notes 187–94 and accompanying text.

¹²⁷ See CHEMERINSKY, *supra* note 82, at 606–07, 826; *infra* notes 128–37 and accompanying text.

¹²⁸ See *infra* notes 129–34 and accompanying text.

¹²⁹ *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (citing *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942)).

may “consent to the marriage . . . of the ward;” thus guardianships may deprive an individual of her fundamental right to marriage.¹³⁰ The Supreme Court also found the right to vote to be a fundamental right.¹³¹ In Wyoming, when the court finds a person mentally incompetent and appoints a guardian, she is also prohibited from voting, therefore depriving the ward of her fundamental right to vote.¹³² Although the Constitution does not specifically identify a right to privacy, the Supreme Court has held that a “right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.”¹³³ Areas included in this zone of privacy are marriage, procreation, contraception, and family relationships.¹³⁴ Guardianship affects many of these areas: the guardian may be required to consent to the marriage of the ward, to authorize or withhold authorization for medical treatment (including contraceptive care), and to facilitate social activities, which can include family members—all of which can deprive the ward of her right to privacy.¹³⁵ Similarly, the Court has long recognized the right to travel as being fundamental.¹³⁶ A guardian’s implicit control over the ward’s movements and location undoubtedly implicate this fundamental right.¹³⁷ Accordingly, the first prong of the *Eldridge* test reveals that the private

¹³⁰ See WYO. STAT. ANN. § 3-2-201(vi) (2019) (implying that when a guardian is granted this power by the court, the ward must have the guardian’s permission in order to marry).

¹³¹ *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 632–34 (1969).

¹³² WYO. CONST. art. VI, § 6 (amended 1996) (“All persons adjudicated to be mentally incompetent or persons convicted of felonies, unless restored to civil rights, are excluded from the elective franchise.”); WYO. STAT. ANN. § 3-2-104 (2019). In order for a guardian to be appointed, the petitioner is required prove the status of the ward. *Id.* In the petition, the petitioner must state the status of the ward as “a minor, an incompetent person or a mentally incompetent person.” *Id.* § 3-2-101(ii). In Wyoming, a “mentally incompetent person” means an individual who is unable unassisted to properly manage and take care of himself or his property as the result of mental illness, mental deficiency, or intellectual disability” *Id.* § 3-1-101(xii).

¹³³ *Roe v. Wade*, 410 U.S. 113, 152 (1973).

¹³⁴ *Id.* at 152–53 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942) (procreation); *Eisenstadt v. Baird*, 405 U.S. 438, at 453–54 (1972) (White, J., concurring in result) (contraception); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (family relationships)).

¹³⁵ WYO. STAT. ANN. §§ 3-2-201(vi), -202(ii); DALTON ET AL., *supra* note 29, § 34:9 (“A family member’s or friend’s access to and involvement with the ward is available at the guardian’s discretion . . .”).

¹³⁶ *Shapiro v. Thompson*, 394 U.S. 618, 629–31 (1969) (“The constitutional right to travel from one State to another occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized . . . freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.” (quoting *United States v. Guest*, 383 U.S. 745, 757–58 (1966))).

¹³⁷ Haines & Campbell, *supra* note 2, at 15; WOOD ET AL., *supra* note 1, at 20 (citing Fred Bayles, *Guardianship of the Elderly: An Ailing System Part II: Many Elderly Never Get Their Day in Court*, ASSOCIATED PRESS (Sept. 20, 1987), <https://www.apnews.com/8ea94c1c992fd97e7eea7fe72a924f73>); see also *In re Estate of Schooler*, 204 S.W.3d 338, 341 (Mo. Ct. App. 2006) (explaining how a guardian removed a ward from her current care facility, stating he was taking her to lunch but instead relocated her to a new facility two hours away).

interest at stake during guardianship proceedings includes property interests, liberty interests, and other fundamental rights, all of which are of vital importance and all of which should require a higher degree of protection before they are taken away from any individual.¹³⁸

2. *The Risk of Erroneous Deprivation through the Procedures Used*

The second prong of the *Eldridge* balancing test is “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”¹³⁹ This prong measures the likelihood of an erroneous guardianship appointment and how detrimental such an appointment would be to the ward.¹⁴⁰ Wyoming’s current guardianship statute requires proof by a preponderance of the evidence.¹⁴¹ The purpose of the standard of proof is to instruct the factfinder of the “degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.”¹⁴² The standard of proof also allocates risk of error for the particular type of hearing at issue.¹⁴³ To satisfy due process requirements, the standard of proof must reflect the societal value of the individual right of which the ward is deprived.¹⁴⁴ The court may require a higher standard of proof if “the challenged standard of proof does not comport with the minimum requirements of due process.”¹⁴⁵ In order to compensate for the high risk of error and the detrimental consequences stemming from a guardianship, Wyoming should require at least the heightened standard of clear and convincing evidence for guardianship proceedings.¹⁴⁶

¹³⁸ See *supra* notes 122–37 and accompanying text.

¹³⁹ *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

¹⁴⁰ See CHEMERINSKY, *supra* note 82, at 606; *Mathews*, 424 U.S. at 343 (“An additional factor to be considered here is the fairness and reliability of the existing pretermination procedures”); see also Haines & Campbell, *supra* note 2, at 15.

¹⁴¹ WYO. STAT. ANN. § 3-2-104 (2019).

¹⁴² *Davis v. State*, 2018 WY 40, ¶ 46, 415 P.3d 666, 681–82 (2018) (citing *Cooper v. Oklahoma*, 517 U.S. 348, 362 (1996)).

¹⁴³ *J.J.F. v. State*, 2006 WY 41, ¶ 15, 132 P.3d 170, 176 (2006); Josephine Fiore, *Constitutional Law: Burden of Proof—Clear and Convincing Evidence Required to Terminate Parental Rights*, 22 WASHBURN L.J. 140, 148 (1982); Barbara S. Shulman, *Fourteenth Amendment—The Supreme Court’s Mandate for Proof Beyond a Preponderance of the Evidence in Terminating Parental Rights*, 73 J. CRIM. L. & CRIMINOLOGY 1595, 1599–601 (1982).

¹⁴⁴ Fiore, *supra* note 143, at 143; see also *J.J.F.*, 132 P.3d at 175 (citing *Addington v. Texas*, 441 U.S. 418, 423 (1979)).

¹⁴⁵ Shulman, *supra* note 143, at 1601.

¹⁴⁶ See *infra* notes 147–82 and accompanying text.

a. *Due to the Risk of Error Involved, the Preponderance of the Evidence Standard is Not Appropriate in Guardianship Proceedings*

The preponderance of the evidence standard is defined as “proof which leads the trier of fact to find that the existence of the contested fact is more probable than its non-existence.”¹⁴⁷ This standard is most appropriate when civil litigants share the risk of error equally.¹⁴⁸ The risk of error is considered equal when “it is viewed as being no more serious for there to be an error in the plaintiff’s favor than for there to be an error in favor of the defendant.”¹⁴⁹ In guardianship proceedings, the risk of error is not equal, making a preponderance of the evidence standard inappropriate in this context.¹⁵⁰

In a guardianship proceeding, the balanced errors are the proposed ward’s risk of an erroneous appointment of guardianship versus the petitioner’s risk of an erroneous rejection of guardianship.¹⁵¹ A false positive in a guardianship proceeding results when the court erroneously appoints a guardian.¹⁵² A false positive carries substantial ramifications, such as the deprivation of the ward’s liberty and property interests, the loss of fundamental rights, and placing the ward in a position susceptible to abuse.¹⁵³ Indeed, “[g]uardianship . . . has been said to ‘unperson’ individuals.”¹⁵⁴ The guardian has control of the ward’s finances and personal property.¹⁵⁵ Money and property paid or delivered to the ward may be received and used by the guardian for the ward’s current needs, including care and education.¹⁵⁶ The court grants the guardian complete control of the ward’s education and social activities, and may even allow the guardian to make critical decisions regarding the ward’s medical or other professional care.¹⁵⁷ With the court’s approval, the guardian can gain more substantial power, such as the

¹⁴⁷ *J.J.F.*, 132 P.3d at 174 (citing *Thornberg v. State ex rel. Wyo. Workers’ Comp. Div. (In re Thornberg)*, 913 P.2d 863, 866 (Wyo. 1996)).

¹⁴⁸ *Id.* at 176 (citing *Santosky v. Kramer*, 455 U.S. 745, 766 (1982); *Painter v. Abels*, 998 P.2d 931, 942 (Wyo. 2000) (internal cites omitted)).

¹⁴⁹ Fiore, *supra* note 143, at 144.

¹⁵⁰ See *infra* notes 151–82 and accompanying text.

¹⁵¹ See *infra* notes 153–59 and accompanying text.

¹⁵² See *infra* notes 153–59 and accompanying text.

¹⁵³ See *supra* notes 122–38 and accompanying text; *infra* notes 160–66 and accompanying text.

¹⁵⁴ WOOD ET AL., *supra* note 1, at 20 (citing Bayles, *supra* note 137).

¹⁵⁵ See *supra* notes 98–104 and accompanying text; WYO. STAT. ANN. § 3-2-201(iv) (2019). However, this control is not to be confused with the control of a conservator. *Id.* § 3-1-101(iii). The conservator is in charge of the ward’s property, while the guardian is in control of the ward’s person. *Id.* The guardian and the conservator can be the same person and can be appointed in the same proceeding. *Id.* § 3-1-105.

¹⁵⁶ WYO. STAT. ANN. § 3-2-201.

¹⁵⁷ WYO. STAT. ANN. § 3-2-201(ii)–(iii).

authority to commit the ward to a mental health hospital or to consent to certain treatments, such as electroshock therapy or sterilization.¹⁵⁸ Thus, a false positive poses a major risk of error with the loss of these rights.¹⁵⁹

Another risk of error implicated by a false positive is the placement of a guardian in an authoritative position where she can abuse her power or take advantage of the ward.¹⁶⁰ Abuse of the guardianship position may come in multiple forms, from stealing money or property to overcharging for guardianship fees.¹⁶¹ Many states, including Wyoming, have enacted statutes addressing complaints against guardians in order to provide wards with adequate redress in instances of guardian abuse.¹⁶² For example, in New York, the court in *In re Joshua H.* found that the guardian had improperly taken funds out of a trust account to compensate herself.¹⁶³ Another New York court removed a co-guardian in the case of *In re Francis M.* due to the co-guardian treating the ward in a demeaning and condescending way.¹⁶⁴ In Missouri, a court removed a guardian after finding the guardian had not acted in the ward's best interest by moving her to another city without discussing the move with her doctors or the court.¹⁶⁵ The proposed ward's risks of being erroneously deprived of fundamental rights and being placed in a position that makes her more susceptible to guardian abuse are considerable risks of error implicated by an erroneous appointment.¹⁶⁶

Conversely, a false negative in a guardianship proceeding results in the court failing to appoint a guardian when one is needed.¹⁶⁷ This error deprives an individual of the care she needs when the individual is a threat to herself due to the loss of capacity.¹⁶⁸ Although a false negative is a costly error because

¹⁵⁸ WYO. STAT. ANN. § 3-2-202(i)-(ii).

¹⁵⁹ See *supra* notes 151-58 and accompanying text.

¹⁶⁰ See *infra* notes 161-66 and accompanying text.

¹⁶¹ KTNV Staff, *The Guardian is Guilty: April Parks, Others Plead Guilty in Guardianship Abuse Case* (Nov. 15, 2018), KTNV LAS VEGAS, <https://www.ktnv.com/news/contact-13/april-parks-others-plead-guilty-in-guardianship-exploitation-case>. In Nevada, four individuals, including a guardian, her two business partners, and an attorney who represented her in guardianship cases, collectively committed forty-two counts of theft and thirty-seven counts of exploitation during a span of nearly five years. *Id.* These charges were supported by multiple billing scams and charges for unneeded services. *Id.* The guardian was also accused of overmedicating and isolating the wards in her care. *Id.* It was the largest guardianship abuse case to take place in the state. *Id.*; WYO. STAT. ANN. § 3-2-104 (2019) (proceedings against persons suspected of concealing ward's property).

¹⁶² WYO. STAT. ANN. § 3-1-111.

¹⁶³ *In re Joshua H.*, 62 A.D.3d 795, 797 (N.Y. App. Div. 2009).

¹⁶⁴ *In re Francis M.*, 58 A.D.3d 937, 939 (N.Y. App. Div. 2009).

¹⁶⁵ *In re Estate of Schooler*, 204 S.W.3d 338, 344-45 (Mo. Ct. App. 2006).

¹⁶⁶ See *supra* notes 160-65 and accompanying text.

¹⁶⁷ See *infra* notes 168-72 and accompanying text.

¹⁶⁸ DALTON ET AL., *supra* note 29, § 34:10.

guardianship provides protection for incompetent individuals, other alternatives to guardianships exist, such as supported decision-making.¹⁶⁹ Supported decision-making also provides protection to incompetent individuals in need.¹⁷⁰ Therefore, the risks are not equal because the detrimental consequences of a false positive outweigh the consequences of a false negative.¹⁷¹ Thus, the preponderance of the evidence standard is not appropriate in guardianship proceedings.¹⁷²

The preponderance of the evidence standard is improper for guardianship proceedings because it “tolerates a substantially higher error rate.”¹⁷³ Under this standard, the trier of fact should look to the persuasiveness of the evidence, not the quantity of the evidence.¹⁷⁴ However, the standard is often confused, and the factfinder may simply consider the quantity.¹⁷⁵ Under the preponderance of the evidence standard, the fact-finder can often be indifferent about the outcome, again leading to a higher risk of error.¹⁷⁶ A proceeding with significant repercussions such as the loss of fundamental rights should not employ a standard that may result in such a high risk of error.¹⁷⁷

Applying the preponderance of the evidence standard would mean an erroneous appointment of guardianship is just as costly of an error as an erroneous rejection of guardianship; however, this is not true.¹⁷⁸ When balancing these errors, a false positive finding that the proposed ward should be appointed a guardian

¹⁶⁹ Kristen Booth Glen, *What Judges Need to Know about Supported Decision-Making, and Why*, 58 JUDGES J. 26, 27 (2019) (“Supported decision-making simply reflects that persons with a variety of intellectual, developmental, or cognitive disabilities also may need supports [in making a decision, including] . . . gathering relevant information, explaining that information in simplified language, weighing the pros and cons of a decision, considering the consequences of making—or not making—a particular decision, communicating the decision to third parties, and assisting the person with a disability to implement the decision.”).

¹⁷⁰ See *id.* at 27–28.

¹⁷¹ See *supra* notes 151–70 and accompanying text.

¹⁷² See *supra* notes 167–71 and accompanying text.

¹⁷³ Christoph Engel, *Preponderance of the Evidence Versus Intime Conviction: A Behavior Perspective on a Conflict Between American and Continental European Law*, 33 VT. L. REV. 435, 444 (2009) (citing James Brook, *Inevitable Errors: The Preponderance of the Evidence Standard in Civil Litigation*, 18 TULSA L.J. 79, 85 (1982)).

¹⁷⁴ Fiore, *supra* note 143, at 144; Brook, *supra* note 173, at 81.

¹⁷⁵ See Shulman, *supra* note 143, at 1599; Brook, *supra* note 173, at 81 (“The standard is not construed to mean more evidence in a strictly quantitative sense as in the volume of evidence or the number of witnesses who have appeared. Rather, the amount of evidence is a qualitative standard, weighed in terms of its ability to convince. The standard is translated into a requirement that, based on the totality of evidence produced, it appears that X is more likely to be true than false.”).

¹⁷⁶ Engel, *supra* note 173, at 437–39.

¹⁷⁷ CHEMERINSKY, *supra* note 82, at 592–632 (discussing the appropriate standard in other proceedings involving fundamental rights).

¹⁷⁸ See *supra* notes 147–71 and accompanying text.

is much more serious than a false negative.¹⁷⁹ A false positive appointment erroneously carries dire consequences because it deprives the ward of many of her most fundamental rights as determined by our Founding Fathers and the Supreme Court of the United States.¹⁸⁰ The erroneous appointment also deprives a ward of liberty and property interests.¹⁸¹ Therefore, the current Wyoming guardianship statute's evidentiary standard leads to a high risk of error in a proceeding that involves detrimental ramifications, indicating that the standard is inappropriate.¹⁸²

b. Proceedings Depriving Individuals of Fundamental Rights or Important Individual Interests Require the Clear and Convincing Evidence Standard

Wyoming courts that have applied the *Eldridge* balancing test in cases involving the deprivation of an individual's fundamental rights required a clear and convincing evidence standard of proof.¹⁸³ As previously noted, the preponderance of the evidence standard applies when the risk of error on both sides is deemed equal.¹⁸⁴ When the individual interest is "both 'particularly important' and 'more substantial than a mere loss of money,'" the court requires a clear and convincing evidence standard.¹⁸⁵ The deprivation of fundamental rights satisfies the clear and convincing evidence requirement; fundamental rights are more substantial than a mere loss of money and are important.¹⁸⁶

The Wyoming Supreme Court requires a clear and convincing evidence standard of proof in a wide variety of proceedings, including revocation of professional licenses.¹⁸⁷ Revocation proceedings involve an individual's right to earn a living, and can deprive an individual of her property interest in a professional license.¹⁸⁸ In *Painter v. Abels*, the court found that the deprivation of a professional license was more than a mere loss of money.¹⁸⁹ After balancing all three factors of

¹⁷⁹ See *supra* notes 151–77 and accompanying text.

¹⁸⁰ See *supra* notes 122–38 and accompanying text.

¹⁸¹ See *supra* notes 94–113 and accompanying text.

¹⁸² See *supra* notes 178–81 and accompanying text.

¹⁸³ Cf. *State ex rel. Dep't of Transp. v. Robbins*, 2011 WY 23, ¶ 18–19, 246 P.3d 864, 867 (2011).

¹⁸⁴ *J.J.F. v. State*, 2006 WY 41, ¶ 15, 132 P.3d 170, 176 (2006); see also *infra* note 148 and accompanying text.

¹⁸⁵ *Santosky v. Kramer*, 455 U.S. 745, 756 (1982).

¹⁸⁶ See *supra* notes 122–38, 185 and accompanying text.

¹⁸⁷ *Painter v. Abels*, 998 P.2d 931, 939 (Wyo. 2000).

¹⁸⁸ *Id.* at 940.

¹⁸⁹ *Id.* at 941 ("Potential loss of a license is 'more substantial than mere loss of money and some jurisdictions reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof.'" (quoting *Johnson v. Bd. of Governors of Registered Dentists of Okla.*, 913 P.2d 1339, 1345 (Okla. 1996))).

the *Eldridge* test, the court held the preponderance of the evidence standard did not adequately protect the individual's interests, and that the State was required to prove its professional revocation cases by clear and convincing evidence instead.¹⁹⁰

Even though the court held that clear and convincing evidence was required, certain professionals may have their license revoked based on the finding that the professional is mentally incompetent.¹⁹¹ If the court appoints a guardian in a proceeding involving an individual with a professional license, the court may adjudicate a professional mentally incompetent by only a preponderance of the evidence.¹⁹² Therefore, through a guardianship proceeding in Wyoming, a professional may have her license revoked under a lower standard than the required clear and convincing evidence.¹⁹³ If the Wyoming Supreme Court requires the clear and convincing evidence standard for a proceeding that only takes away an individual's right to earn a living, the court should also require it in guardianship proceedings, which involve not only the potential deprivation of the right to earn a living, but many other fundamental rights.¹⁹⁴

In *State v. Robbins*, the Wyoming Department of Transportation challenged the district court's holding requiring the clear and convincing evidence standard to uphold a commercial driver's license disqualification.¹⁹⁵ The Wyoming Supreme Court interpreted Wyoming Statute § 31-7-102(a)(xxv) to define a commercial driver's license as a privilege, not a fundamental right.¹⁹⁶ The court also rejected the argument that a commercial driver's license was equal to a professional licensure requiring the clear and convincing evidence standard.¹⁹⁷ Since the commercial driver's license was a privilege instead of a fundamental right, the court reversed the lower court's holding and found that the preponderance of the evidence

¹⁹⁰ *Id.* (“(1) The private interest in a professional license is substantial. In these administrative proceedings, Dr. Painter faced the potential loss of: (a) a protected property right; (b) her livelihood; and (c) her professional reputation. (2) The state's interest in protecting the health, safety, and welfare of its citizens from a medical licensee's incompetence or misconduct is legitimate and substantial. (3) The risk of error is high in a proceeding seeking to revoke a medical license.”).

¹⁹¹ WYO. STAT. ANN. § 33-46-103 (2019) (midwives); 19-9 WYO. CODE. R. § 7 (LexisNexis 2019) (teachers); 22-7 WYO. CODE. R. § 2 (LexisNexis 2019) (professionals involved with respiratory care); 56-7 WYO. CODE. R. § 2 (LexisNexis 2019) (optometrists); 43-9 WYO. CODE. R. § 2 (LexisNexis 2019) (dietitians).

¹⁹² WYO. STAT. ANN. § 3-2-104.

¹⁹³ *Supra* notes 191–92 and accompanying text.

¹⁹⁴ *Supra* notes 183–93 and accompanying text.

¹⁹⁵ *State ex rel. Dep't of Transp. v. Robbins*, 2011 WY 23, ¶ 1, 246 P.3d 864, 864 (2011).

¹⁹⁶ *Id.*, ¶ 14, 246 P.3d at 866.

¹⁹⁷ *Id.*, ¶ 18, 246 P.3d at 867 (“Moreover, we note the distinct difference between a professional license, such as a medical license and a driver's license. One involves a fundamental right, and one does not. A commercial driver's license is a privilege and not a right, and thus does not rise to the level necessitating a clear and convincing evidence burden of proof.”).

standard was properly applied to disqualification proceedings.¹⁹⁸ In *Robbins*, the court discussed the differences between a “right” and a “privilege,” and held that when only a privilege is at risk, preponderance of the evidence is the correct standard.¹⁹⁹ In contrast, when a right is at risk, the courts must use the clear and convincing evidence standard.²⁰⁰ It follows, then, that since guardianship deprives an individual of fundamental rights and not merely privileges, Wyoming should require clear and convincing evidence as the standard of proof.²⁰¹

The United States Supreme Court requires clear and convincing evidence in situations where important individual interests are implicated in civil cases.²⁰² These situations include the termination of parental rights, civil commitment, and deportation.²⁰³ In *Santosky v. Kramer*, the Court held that the state must prove its allegations by clear and convincing evidence before depriving parents of their fundamental right to the care, custody, and management of their children.²⁰⁴ Similarly, in *Addington v. Texas*, the Court found that an individual in a civil commitment proceeding has an important interest in not being involuntarily confined.²⁰⁵ Thus, the Court required a finding by clear and convincing evidence.²⁰⁶ Deportation proceedings involve individual interests such as familial, economical, and societal ties to the United States.²⁰⁷ The Court found these interests important and required the State to prove the necessity for deportation by clear and convincing evidence.²⁰⁸ Proceedings that deprive an individual of important interests or fundamental rights require a higher standard of proof, implying that there is a high risk of error associated with the preponderance of the evidence standard.²⁰⁹ Because guardianship proceedings similarly implicate important individual interests and fundamental rights, the clear and convincing evidence standard should be required.²¹⁰

¹⁹⁸ *Id.*, ¶ 19, 246 P.3d at 867.

¹⁹⁹ *Id.*, ¶ 18, 246 P.3d at 867.

²⁰⁰ *Id.*

²⁰¹ See *supra* notes 122–38, 183–98 and accompanying text.

²⁰² *Addington v. Texas*, 441 U.S. 418, 424 (1979); *Santosky v. Kramer*, 455 U.S. 745, 768–70 (1982); *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 286 (1966).

²⁰³ *In re FM v. Laramie Cty. Dep’t of Family Servs.*, 2007 WY 128, ¶ 7, 163 P.3d 844, 847 (2007) (citing *Santosky v. Kramer*, 455 U.S. 745, 768–70 (1982)); *Addington v. Texas*, 441 U.S. 418, 424 (1979); *Woodby v. Immigration & Naturalization Serv.*, 385 U.S. 276, 286 (1966).

²⁰⁴ *Santosky*, 455 U.S. at 768–70. The Wyoming Supreme Court noted this holding in *FM*, 163 P.3d at 847.

²⁰⁵ *Addington*, 441 U.S. at 425.

²⁰⁶ *Id.* at 433.

²⁰⁷ *Woodby*, 385 U.S. at 286.

²⁰⁸ *Id.*

²⁰⁹ See *supra* notes 202–08 and accompanying text.

²¹⁰ See *supra* notes 98–109, 122–38 and accompanying text.

In situations involving the ultimate deprivation of liberty—incarceration—accused individuals receive the highest degree of protection: proof beyond a reasonable doubt. In a congressional hearing nearly thirty years ago, it was stated “[t]he typical ward has fewer rights than the typical felon.”²¹¹ Criminal law errs on the side of caution, as Benjamin Franklin once said, “it is better a hundred guilty persons should escape than one innocent person should suffer.”²¹² Wards lose substantial rights when placed in a guardianship.²¹³ In guardianship proceedings, the court should also err on the side of caution in order to protect the “innocent”—those who do not truly need a guardian—by requiring the petitioner to prove necessity and incompetence by clear and convincing evidence.²¹⁴

c. The Weight of Authority Suggests the Preponderance of the Evidence Standard Leads to a High Risk of Error in Guardianship Proceedings

Wyoming is the last state to require only a preponderance of the evidence standard in guardianship proceedings.²¹⁵ New Hampshire goes so far as to provide proposed wards with the highest degree of protection, requiring incapacity and necessity of guardianship to be proven beyond a reasonable doubt.²¹⁶ The National Probate Court Standards propose that, in order to ensure a ward receives due process of law, guardianship appointments be based on clear and convincing evidence.²¹⁷

Further, Wyoming’s neighbor, Utah, faced this question in the case *In re Boyer*.²¹⁸ In *Boyer*, the Utah Supreme Court held that guardianship appointments

²¹¹ Wright, *supra* note 126, at 351 n.9 (“By appointing a guardian, the court entrusts to someone else the power to choose where they will live, what medical treatment they will get and, in rare cases, when they will die. It is, in one short sentence, the most punitive civil penalty that can be levied against an American citizen, with the exception, of course, of the death penalty.” (quoting CHAIRMAN OF SUBCOMM. ON HEALTH & LONG-TERM CARE OF THE H. SELECT COMM. ON AGING, 100TH CONG., ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE (Comm. Print 1987) (prepared statement of Chairman Claude Pepper))).

²¹² Doron Teichman, *Convicting with Reasonable Doubt: An Evidentiary Theory of Criminal Law*, 93 NOTRE DAME L. REV. 757, 758 (2017) (citing Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), in 11 THE WORKS OF BENJAMIN FRANKLIN 13 (John Bigelow ed., 1904)).

²¹³ See *supra* notes 122–38 and accompanying text.

²¹⁴ See *supra* notes 6, 211–13 and accompanying text.

²¹⁵ Am. Bar Ass’n, *supra* note 5 (showing charts indicating seven states list no standard of proof, one state requires proof beyond a reasonable doubt, and forty-one states require clear and convincing evidence).

²¹⁶ N.H. REV. STAT. ANN. § 464-A:9 (2019).

²¹⁷ NAT’L PROB. CT. STANDARDS § 3.3.9 cmt. (“The appointment of a guardian or conservator should be based on clear and convincing evidence. . . . Evidentiary rules and requirements are needed to ensure that due process is afforded and that competent evidence is used to determine incapacity.”).

²¹⁸ *In re Boyer*, 636 P.2d 1085, 1091 (Utah 1981).

for incompetent persons was unconstitutional under the evidentiary standard of preponderance of the evidence.²¹⁹ The court found that the preponderance of the evidence standard did not adequately protect the proposed ward's interests.²²⁰ In support of this finding, the court stated that the "preponderance of the evidence test allows for considerable doubt in the fact finder's mind as to the correctness of the judgment."²²¹ The court concluded by noting that the clear and convincing evidence standard was "therefore necessary to minimize error in guardianship cases to the extent possible without undermining or frustrating the important purposes served by the guardianship statutes"²²² Similarly, the Iowa Supreme Court held that, "[b]ecause the liberty interest of the individual is at stake in civil commitment and guardianship proceedings, we think the clear and convincing evidence standard is the appropriate one to apply in guardianship proceedings, whether those proceedings involve appointment, applications to modify, or applications to terminate."²²³

Almost thirty years ago, both Utah and Iowa resolved the constitutionally required standard of proof issue and granted further protection for proposed wards.²²⁴ Wyoming is the *last* state that requires only a preponderance of the evidence in guardianship proceedings, and the weight of authority suggests the preponderance of the evidence standard leads to a high risk of error.²²⁵ Therefore, the Wyoming State Legislature or the Wyoming Supreme Court should provide proposed wards with greater protection by requiring the necessity of the guardianship and status of the ward in guardianship proceedings to be proven by clear and convincing evidence.²²⁶

d. The Value of Requiring the Clear and Convincing Evidence Standard

The clear and convincing evidence standard should be the standard of proof required for Wyoming's guardianship proceedings.²²⁷ The clear and convincing evidence standard is the intermediate standard between preponderance of the evidence and beyond a reasonable doubt.²²⁸ The Wyoming Supreme Court defined

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ *Id.*

²²² *Id.* at 1091–92.

²²³ *In re Hedin*, 528 N.W.2d 567, 581 (Iowa 1995).

²²⁴ *Id.*; *In re Boyer*, 636 P.2d at 1091.

²²⁵ See *supra* notes 6, 215–24 and accompanying text.

²²⁶ See *supra* notes 215–25 and accompanying text.

²²⁷ See *infra* notes 228–37 and accompanying text.

²²⁸ *J.J.F. v. State*, 2006 WY 41, ¶ 13, 132 P.3d 170, 175 (2006).

clear and convincing evidence as the “kind of proof which would persuade a trier of fact that the truth of the contention is highly probable.”²²⁹ In *Santosky*, the Court stated that clear and convincing evidence is required “when the individual interests at stake in a state proceeding are both particularly important and more substantial than mere loss of money.”²³⁰ Although the guardianship proceeding is a civil proceeding, the ward’s interests far exceed a mere loss of money.²³¹

As held by the Wyoming Supreme Court, the clear and convincing evidence standard is required in cases involving fundamental rights.²³² The ward has substantial interests at stake in a guardianship proceeding, including the possibility of losing fundamental rights.²³³ The second prong of the *Eldridge* test dictates that if another standard “increases the accuracy of the factfinding” it should be required.²³⁴ The preponderance of the evidence standard has a high risk of error that the clear and convincing evidence standard could remedy, because the clear and convincing evidence standard requires a higher degree of belief: that “the contention is highly probable.”²³⁵ If the factfinder’s degree of the belief is higher, the factfinder’s degree of confidence will also be higher, which then reduces the risk of error for the proposed ward.²³⁶ Therefore, since guardianship proceedings involve substantial deprivations, including the loss of fundamental rights, and a higher standard would lead to more accurate appointments of guardians, Wyoming should require the clear and convincing evidence standard in guardianship proceedings.²³⁷

3. *The State’s Interest*

The third prong of the *Eldridge* test looks to the State’s interest.²³⁸ Under the *parens patriae* doctrine, the State of Wyoming has an interest in protecting its citizens, and one way the State provides this protection is through guardianship proceedings.²³⁹ The State’s protection under its *parens patriae* power includes not

²²⁹ *In re Adoption of AMP*, 2012 WY 132, ¶ 11, 286 P.3d 746, 749 (2012); see also *J.J.F.*, ¶ 8–13, 132 P.3d at 174.

²³⁰ *Santosky v. Kramer*, 455 U.S. 745, 756 (1982) (internal quotations omitted).

²³¹ See *supra* notes 122–38 and accompanying text.

²³² *State ex rel. Dep’t of Transp. v. Robbins*, 2011 WY 23, ¶ 18, 246 P.3d 864, 867 (2011); see also *supra* notes 195–201 and accompanying text.

²³³ See *supra* notes 98–109, 122–38 and accompanying text.

²³⁴ *CHEMERINSKY*, *supra* note 82, at 606.

²³⁵ *J.J.F. v. State*, 2006 WY 41, ¶ 9, 132 P.3d 170, 174 (2006); see also *supra* notes 147–225 and accompanying text.

²³⁶ *Fiore*, *supra* note 143, at 145; *Engel*, *supra* note 173, at 457.

²³⁷ See *supra* notes 98–109, 122–236 and accompanying text.

²³⁸ *CHEMERINSKY*, *supra* note 82, at 335.

²³⁹ See *Haines & Campbell*, *supra* note 2, at 15–16; *Shulman*, *supra* note 143, at 1600.

only an individual's physical health, but also her economic well-being.²⁴⁰ *Parens patriae*, translated literally, means "father of the country."²⁴¹ The Supreme Court has stated "the State has a legitimate interest under its *parens patriae* power in providing care to the mentally-ill who are unable to care for themselves."²⁴² Although the *parens patriae* doctrine is a vital doctrine that assists those in need, it should not be easily exercised with a low standard of proof in a proceeding that implicates fundamental rights.²⁴³ Therefore, before Wyoming can exercise the *parens patriae* doctrine in guardianship proceedings, a higher standard of proof should be required.²⁴⁴

4. *The Eldridge Test Demonstrates that Wyoming Statute § 3-2-104 is Unconstitutional*

The evidentiary standard required by Wyoming Statute § 3-2-104 is unconstitutional.²⁴⁵ This Comment applied the *Eldridge* test, weighing "the private interest that will be affected by the official action; . . . the risk of an erroneous deprivation of such interest through the procedures used, and the probable value . . . of additional or substitute procedural safeguards; and . . . the Government's interest."²⁴⁶ The first prong of the *Eldridge* test, the importance of the interest to the individual, shows that the rights taken by the court appointing a guardian are of vital importance, as the ward is deprived of fundamental rights, thus requiring a higher degree of protection.²⁴⁷ There is a high risk of erroneous guardianship due to the preponderance of evidence standard.²⁴⁸ The weight of authority shows that the clear and convincing evidence standard reduces the risk of error and adequately protects proposed wards.²⁴⁹ Before exercising the *parens patriae* doctrine, the State should raise the burden of proof in guardianship proceedings to at least the clear and convincing evidence standard.²⁵⁰ All three

²⁴⁰ Ratliff, *supra* note 12, at 1853.

²⁴¹ Michael Malina & Michael D. Blechman, *Parens Patriae Suits for Treble Damages under the Antitrust Laws*, 65 NW. U. L. REV. 193, 197 (1970).

²⁴² Donald Stone, *There Are Cracks in the Civil Commitment Process: A Practitioner's Recommendations to Patch the System*, 43 FORDHAM URB. L.J. 789, 792 (2016) (citing *Addington v. Texas*, 441 U.S. 418, 426 (1979)).

²⁴³ See WOOD ET AL., *supra* note 1, at 6; *supra* notes 122–38 and accompanying text.

²⁴⁴ See *supra* notes 239–43 and accompanying text.

²⁴⁵ See *supra* notes 76–246 and accompanying text.

²⁴⁶ *Mathews v. Eldridge*, 424 U.S. 319, 355 (1976).

²⁴⁷ See *supra* notes 122–38 and accompanying text.

²⁴⁸ See *supra* notes 139–237 and accompanying text.

²⁴⁹ See *supra* notes 227–37 and accompanying text.

²⁵⁰ See *supra* notes 238–44 and accompanying text.

prongs weighed under the *Eldridge* test demonstrate that Wyoming Statute § 3-2-104 is unconstitutional because the preponderance of the evidence standard is inadequate to protect the rights implicated by the appointment of a guardian.²⁵¹ Therefore, either the Wyoming Supreme Court should find this statute unconstitutional, or the Wyoming State Legislature should revise the statute to require the clear and convincing evidence standard.²⁵²

IV. CONCLUSION

In some situations, a guardianship can result with the ward living as a prisoner in her own life, because she is deprived of many fundamental rights similar to those who are incarcerated.²⁵³ Yet, in Wyoming, the standard of proof in guardianship proceedings is only a preponderance of the evidence.²⁵⁴ This evidentiary standard does not adequately protect the fundamental rights of individuals and, thus, the statute is unconstitutional.²⁵⁵ In order to protect its citizens and their fundamental rights, Wyoming should require at least the clear and convincing evidence standard in guardianship proceedings.²⁵⁶

²⁵¹ See *supra* notes 76–244 and accompanying text.

²⁵² See *supra* notes 76–244 and accompanying text.

²⁵³ See *supra* notes 122–38, 211 and accompanying text.

²⁵⁴ See *supra* notes 25–34, 71–75 and accompanying text.

²⁵⁵ See *supra* notes 245–52 and accompanying text.

²⁵⁶ See *supra* notes 76–244 and accompanying text.