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Problem-Solving Litigation for the Elderly: An Eventual Shift with a Cautionary Approach

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PROBLEM-SOLVING LITIGATION FOR THE ELDERLY:

AN EVENTUAL SHIFT WITH A CAUTIONARY APPROACH

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The relationship between the Baby Boom generation and the court system resembles the Rocky saga. Rocky Balboa is the state courts and the Baby Boomers are his opponents in the various movies. Anyone who has seen the Rocky movies knows that Rocky had to change his style of fighting in order to beat the otherwise unbeatable opponent. The state courts, likewise, have had to reform to respond to the Apollo Creed, Clubber Lane, and Ivan Dragos of this century, better known as the Baby Boomers. The Baby Boom generation has molded state courts in each of its life stages. In its teen years, the Baby Boom generation flooded the juvenile courts, prompting policy makers to reconsider how to best handle delinquency and status-offense cases. When the population bulge grew into young adulthood, policy makers developed caseflow management to handle the record setting number of cases that were being handled in the criminal courts. The Baby Boomers' wrath did not stop there. The generation started getting married and having children of its own. Unsurprisingly, matrimonial and domestic violence issues were thrust into the legal debate. State courts reacted by creating more alternative dispute resolution programs. State courts have one last fight, and even though the Baby Boom generation is heading into its elder years, they pose a formidable opponent.

Nothing is more unequal than the equal treatment of unequal people.

-Thomas Jefferson[1]

[1] Thomas Jefferson

INTRODUCTION

The increase in the number of senior citizens in the United States is shocking.[2] In the next thirty years, the number of Americans over the age of 65 will double.[3] With the Baby Boom generation[4] entering its golden years, guardianship and the other issues surrounding a mentally incapacitated adult will soon be at the forefront of legal debate and reform. This debate should not come as a surprise because the Baby Boom generation has reformed the state court system at each of its life stages.[5]

First, the Baby Boom generation brought the juvenile courts into the legal debate.[6] Juvenile courts were created in the late 19th and early 20th centuries because society generally believed that it was better for a child going through the criminal court system to be tried in a special proceeding, rather than in the same forum as adults.[7] The child would face a nice,

[2] *See, e.g.*, RICHARD VAN DUIZEND, NAT'L CTR. FOR STATE CTS., THE IMPLICATIONS OF AN AGING POPULATION FOR THE STATE COURTS 1 (2008) ("According to U.S. Census Bureau projections, the percentage of Americans age 65 or older will increase from 12.4 percent in 2000, to 19.6 percent in 2030."); *see also* Clifford E. Cardone, *Feature: Battling Nursing Home Neglect: Finding the Right Legal Pieces*, 44 LA. B.J. 508, 509 (1997) ("[T]he older population is expected to increase rapidly between the years 2010 and 2030 when the "baby boom" generation reaches age 65.").

[3] *See, e.g.*, DUIZEND, *supra* note 2, at 1 ("This represents a doubling of the number of older people from 35 million in 2000 to 71.5 million in 2030. By 2050, 5 percent of the U.S. population will be age 85 or older."); *see also* Cardone, *supra* note 2, at 509 ("In 1994, there were 33.2 million persons in the United States 65 years or older. By the year 2050, the elderly population is expected to swell to 80 million as the baby boomers and their children mature.").

[4] The Baby Boom Generation is a group of Americans born approximately between the years 1946-1964. *See* Dowell Myers & John Pitkin, *Demographic Forces and Turning Points in the American City*, 1950-2040, 626 ANNALS AM. ACAD. POL. & SOC. SCI. 91, 97 (2009) (noting that the "giant baby boom generation" was born from 1946 to 1964); *see also* Andrew F. Susko, *The Importance of Getting Involved,* 29-OCT. PA. LAW. 2, 2 (2007) (identifying baby boomers as being born between 1946 and 1964).

[5] *See* DUIZEND, *supra* note 2, at 2 ("The Baby Boom generation has greatly affected the state courts at each of its life stages."); *see also* Molly Biklen, *Healthcare in the Home: Reexamining the Companionship Services Exemption to the Fair Labor Standards Act,* 35 COLUM. HUM. RTS. L. REV. 113, 142 (2003) ("It is likely that this trend [that home healthcare provide the same services in nursing homes] will continue as more baby boomers age and need long term care.").

[6] *See, e.g.*, Hon. Jeremiah S. Jeremiah, Jr., *Truancy Court: A Child of the Juvenile Justice System*, 49 R.I. B.J. 5, 5 (2000) (The baby boom "generation created a population increase that lead to increased crime rates. The rise in juvenile crime during the 1960's evoked fear which slowly began to erode support for the reformers' ideal. During this time period, the Supreme Court rendered decisions which afforded juveniles certain constitutional rights not otherwise recognized. These decisions reflected a more punitive tone within the courts at that time and remain ever present in our court system today."); *see also* DUIZEND, *supra* note 2, at 1 ("When this population bulge was in its teen years during the 1960s and 1970s, there was a deluge of delinquency and status-offense cases, and the juvenile courts found themselves in the constitutional and policy spotlight.").

[7] *See, e.g.*, Charles J. Aron & Michele S.C. Hurley, *Juvenile Justice at the Crossroads*, 22 CHAMPION 10, at 11 (1998) ("[T]he underlying philosophy of the juvenile system was: [t]he child who has gone wrong, who is incorrigible, who has broken a law or ordinance, is to be taken in hand by the state, not as an enemy, but as a protector, as the ultimate guardian, because of either the unwillingness or inability of the natural parents to guide the child toward good citizenship has compelled the intervention of the public authorities."); *see also* Patrick T. Murphy, *Diverting Abuse Cases from*

warm-hearted judge who, together with social workers, attempted to rehabilitate the child. If necessary, the judge had the authority to remove the child from his or her dysfunctional family. During this time, lawyers were seen as unnecessary, and played little or no role in the fate of the child.[8] The lack of a need for lawyers was changed by the Baby Boomers in the 1960s and 1970s.[9] Because more children were being tried in juvenile courts at this time, more attention was focused on the juvenile court scheme. The influx of children in the juvenile system resulted in what is sometimes referred to as the "Due Process revolution" in juvenile court.[10] Lawyers and legal scholars argued that juvenile courts were unjustly taking children away from their parents and dumping these children into mental hospitals and detention facilities.[11] The state courts took notice of this problem and reformed the juvenile court system accordingly. Presently, it is not uncommon to see many lawyers in a juvenile court room. There is often a lawyer for the parents, a lawyer for the state, a lawyer for the child welfare agency, and most importantly, a lawyer for the child.

Second, the Baby Boom generation changed the makeup of the state criminal courts.[12] The unprecedented number of cases being tried in the

Juvenile Court: Has the Due Process Revolution Gone Too Far?, 10 CHI. B. ASS'N REC. 30, at 30 (1996) ("In the late 1960s and early 1970s lawyers like myself forged the due process revolution at Juvenile Court. We argued that the lack of good lawyering in abuse and neglect cases ripped some children from salvageable parents and, to add insult to injury, the state not infrequently abused the children by dumping them into mental health hospitals and detention centers.").

8 *See, e.g.*, Murphy, *supra* note 7, at 30 ("At the turn of the century, reformers argued that delinquent and abused children had much in common and should be mixed together in the same court. Due process and lawyers would not be required in a court where a kindly judge, with the assistance of social workers, would patch up dysfunctional families and, where necessary, pull the kids out."); *see also* Kenneth A. Schatz, *Children and the Law: Juvenile Justice: Reflections on 100 Years of Juvenile Court*, 24 VT. B.J. & L. DIG. 50, 50 (1998) ("Supreme Court Justice . . . wrote '[t]here is evidence, in fact, that there may be grounds for concern that the child receives the worst of both worlds: that he gets neither the protections accorded to adults not the solicitous care and regenerative treatment postulated for children.'").

9 *See* Jeremiah, *supra* note 6, at 6-7 (detailing the reforms made to the juvenile system); *see also* Schatz, *supra* note 8, at 50 (noting that in 1974, during the period of expanding due process rights, Congress became active in the area of juvenile justice, enacting the Juvenile Justice and Delinquency Prevention Act).

10 *See, e.g.*, Murphy, *supra* note 7, at 30 (revealing that the author, an attorney, was part of the due process revolution in the late 1960s and early 1970s); *see also* David N. Sandberg, *Resolving the Gault Dilemma*, 48 N.H. B.J. 58, 61(2007) (stating that the due process revolution started to occur in many states before the decision in *Gault*).

11 *See* Murphy, *supra* note 7, at 30 (showing the weaknesses of the juvenile court system); *see also* Ira M. Schwartz et al., *Will The Juvenile Court System Survive? Myopic Justice? The Juvenile Court and Child Welfare Systems*, 564 ANNALS AM. ACAD. POL. & SOC. SCI. 126, 127 (1999) (noting that the pervasiveness of the blindness and lack of understanding in the juvenile court system is eye opening).

12 *See* DUIZEND, *supra* note 2, at 1 (revealing that after the juvenile courts were forced into reform, the "[a]ttention shifted to the criminal courts as this generation moved into young adulthood"); *see also* Barry C. Feld, *Unmitigated Punishment, Adolescent Criminal Responsibility and LWOP Sentences*, 10

criminal courts forced the states to rethink how they handle their caseloads.[13] This internal evaluation within the criminal court system led to what is now known as case-flow management. Case-flow management is the process by which courts handle cases from filing to closing.[14] Using the case-flow technique, states focus more on how a trial is organized, how to best use the court system's resources, and how to best implement new technology.[15]

Third, when the Baby Boom generation began marrying and having children, state courts were inundated with matrimonial and child-abuse cases.[16] The state courts were again forced into reform. This time, the state courts responded with an increase in alternative dispute resolution programs.[17] Alternative dispute resolution[18] provided some relief for the trial courts where previously, divorce and child abuse cases would have gone to trial, and now were being handled swiftly in an arbitration setting.

J. L. & FAM. STUD. 11, 24 (2007) (explaining that decisions such as *Gault* "transformed juvenile courts into scaled-down criminal courts" and that "[d]uring the 1960's the Court's criminal and juvenile procedure coincided with rising youth crime rates and urban race riots . . . [which] rose as 'baby boom' youths reach adolescence").

13 *See* DUIZEND, *supra* note 2, at 1 (noting that there was an "unprecedented number of [criminal] cases" as the Baby Boomers reached adulthood); *see also* Eric L. Jensen, *The Waiver of Juveniles to Criminal Court: Policy Goals, Empirical Realities, and Suggestions for Change*, 31 IDAHO L. REV. 173, 174 (1994) (stating that juvenile justice has experienced significant changes as a result of high levels of juvenile crime in the 1960's and early 1970's).

14 *See, e.g.*, Ted Stellwag, *The Verdict on Juries: Juries Are Critical to Our System of Justice. A Look at What's Being Done to Help the Jury System Work More Effectively*, 27 PA. LAW.14, 18 (2005) (explaining that case-flow management has reduced the number of potential jurists on any given day); *see also* NAT'L ASS'N FOR CT. MGMT., CASEFLOW MANAGEMENT: WHAT THIS CORE COMPETENCY IS AND WHY IT IS IMPORTANT, (2011), http://www.nacmnet.org/CCCG/PDF/3CFM.pdf (pointing out that "[c]aseflow management is the process by which courts move cases from filing to closure").

15 *See* DUIZEND, *supra* note 2, at 1 (stating that when attention was shifted to the criminal courts, it resulted "in the development of case-flow management to move the unprecedented number of cases through the judicial process"); *see also* Jeff Palmer, *Abolishing Plea Bargaining: An End to the Same Old Song and Dance*, 26 AM. J. CRIM. L. 505, 510 (1999) (noting that plea bargaining greatly increased in the 1960's); *and* Alfred Blumstein, *Prison Crowding: Planning for Future Prison Needs*, 1984 U. ILL. L. REV. 207, 220 (1984) (noting that the post-World War II baby boom had a significant effect on the criminal justice system).

16 *See* DUIZEND, *supra* note 2, at 1 (revealing that the next reform took place because of "divorce, domestic-violence, and child-neglect-and-abuse caseloads ballooned as boomers married and began raising families"); *see also* William H. Stolberg & Jane Hawkins, *Alimony for the Heiress? Imputing Income to Assets*, 79 FLA. B.J. 1, 1 (2005) (explaining that "[t]he aging of the baby boomers in the U.S. has resulted in many late-in-life divorces").

17 *See* DUIZEND, *supra* note 2, at 1("The courts responded with increased use of alternative dispute resolution and specialized calendars and programs to handle the surge of cases."); *see also* Elena Nosyreva, *Alternative Dispute Resolution in the United States and Russia: A Comptive Evaluation*, 7 ANN. SURV. INT'L & COMP. L. 7, 8 (2001) ("Beginning in the late 1960's, American society witnessed an extraordinary flowering of interest in alternative forms of dispute resolution.").

18 It should be noted here that many have argued that "[n]o field of law has experienced more growth or had a greater impact on the law in the last 25 years that alternative dispute resolution." Richard Chernick, Alternative Dispute Resolution: The Growth and Maturation of Mediation, 25 L.A. LAW. 8 (2002); see Kenneth Lasson, Lawyering Askew: Excesses in the Pursuit of Fees and Justice, 74 B.U. L. REV. 723, 773 (1994) ("The ADR field is expanding rapidly . . . .").

The Baby Boom generation is not done. It has one last punch for the state court system. This time, it is within the realm of elder law. The unprecedented amount of cases that will reach the probate courts will force state court systems into reform yet again.[19] In order to have a sense of what this reform will look like, it is important to understand another state court reform currently taking place, the creation of the problem-solving court.

A problem-solving court is a break from the traditional court model.[20] The traditional court system is designed to have adverse parties litigate against each other.[21] Ideally, both parties are represented by zealous advocates, which will result in a fair outcome when the parties appear against each other in court.[22].However, the traditional court system proved to be inadequate in certain areas of the law.[23] For instance, the high recidivism rate for drug possession led many legal scholars to reconsider how effective the traditional adversarial model really is.[24] This investigation led to the formation of the drug court: a problem-solving court.[25] Problem-solving courts, therefore, "attempt to understand and address the underlying problem that is responsible for the immediate dispute, and to help the individuals before the court to effectively deal with

19 *See* DUIZEND, *supra* note 2, at 1 ("As the post-World War II generation enters the latter portions of its life cycle, the probate courts will become the focus."); *see also* Karen J. Sneddon, *Beyond the Personal Representative: The Potential of Succession without Administration*, 50 S. TEX. L. REV. 449, 491 (2009) ("The baby boom generation will have a big impact on the courts['] ability to administer estates.").

20 *See, e.g.*, Russell Engler, *Ethics in Transition: Unprecedented Litigants and the Changing Judicial Role*, 48 N.H. B.J 32, 34 (2008) (explaining that "judges in problem-solving and community courts go beyond the traditional role of judges developed in the adversarial setting"); *see also* Bruce J. Winick, *Therapeutic Jurisprudence and Problem Solving Courts*, 30 FORDHAM URB. L.J. 1055, 1055 (2003) (noting the "remarkable" shift from the traditional court setting to the problem-solving scheme).

21 *See, e.g.*, KAREN FREEMAN-WILSON, RONALD SULLIVAN & SUSAN P. WEINSTEIN, NAT'L DRUG CT. INST., CRITICAL ISSUES FOR DEFENSE ATTORNEYS IN DRUG COURT, at 1 (Series 4, 2003) (hypothesizing the reason for the shift away from the "conventional notions" of this country's adversarial system); *see also* Thomas W. Lyons, *Building Public Trust and Confidence in the Rhode Island Judicial System*, 49 R.I. B.J. 17, 46–47 (2001) (noting that Americans usually do not understand that the traditional-adversarial system is intended to produce winners and losers).

22 *See* FREEMAN-WILSON ET AL., *supra* note 21, at 1 (explaining the paradigm between zealous advocacy and advancing therapeutic ideals on the part of advocates).

23 *See, e.g.*, FREEMAN-WILSON ET AL., *supra* note 21, at 3 ("Drug courts were created in response to the perception that the traditional, adversarial criminal justice system does not adequately address the issues of nonviolent drug offenders"); *see also* Tamar M. Meekins, *"Specialized Justice:" The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1, at 13 (2006) ("Many officials and scholars theorize that frustration with the adversary system has in large measure led to the proliferation of specialty courts.").

24 *See* FREEMAN-WILSON ET AL., *supra* note 21, at 63 (realizing the need to analyze traditional adversarial models); *see also* Lyons, *supra* note 21, at 46–47 (noting that Americans do not understand that the traditional-adversarial system is intended to produce a winner and a loser).

25 *See* FREEMAN-WILSON ET AL., *supra* note 21, at 39 (stating that problem solving courts could result in more onerous alternatives to traditional court systems); *see also* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1357 (noting that the traditional adversary system has proven to be inadequate in applying sufficient remedies).

the problem in ways that will prevent recurring court involvement."[26]

Problem-solving courts generally employ two themes in order to fix the underlying problem.[27] The first is the team approach. Unlike in the traditional adversarial model, everyone in the courtroom is part of the same team with a common goal to fix the underlying problem.[28] The players on the team are the judge, the prosecution, the outside agencies that provide resources and services to the court, the defendant, and the defense attorney.[29] The team approach is intended to assure the individual that everyone is working for his well-being. In fact, one of the problem-solving court's characteristics is that the individual is more likely to be responsive to the treatment if he trusts the court and feels comfortable in that setting.[30]

The other central theme of problem-solving courts is the integration of all the pending issues surrounding the individual who has the "problem."[31] This means that the individual would be in one courtroom and in front of one judge, throughout the entire process.[32] The integration of issues is intended to create a more comfortable setting for the individual by placing the individual in front of one judge who is familiar with every legal issue

26 Winick, *supra* note 20, at 1055.

27 *See* Meekins, *supra* note 23, at 22 ("While the drug court model emerged earliest and fully embodies aspects of therapeutic justice, other models have emerged which utilize some of the same principles, particularly the team-oriented, multi-disciplinary, and non-adversarial approach."); *see also* James L. Nolan, Jr., *Redefining Criminal Courts: Problem-Solving and the Meaning of Justice*, 40 AM. CRIM. L. REV. 1541, 1543 (2003) ("The various problem-solving courts that emerged in the wake of the drug court movement are similarly team-oriented, multi-disciplinary, and non-adversarial in approach.").

28 *See, e.g.*, FREEMAN-WILSON ET AL., *supra* note 21, at 1, 3 (The drug court "encourages teamwork in accordance with therapeutic models of justice" and favors a "system where the universally shared goal, the defendant's recovery from drug addiction and increased public safety is . . . shared by the parties and the court alike."); *see also* Meekins, *supra* note 23, at 20 ("Specialty courts make use of a team approach.").

29 *See, e.g.*, Meekins, *supra* note 23, at 20 (listing the players a problem-solving team typically has); *see also* Max B. Rothman & Burton D. Dunlop, *Judicial Responses to an Aging America*, 48 CT. REV. 8, 11(2005) (noting that the team usually consists of the "judge, prosecutor, defense counsel, treatment provider, and correctional staff").

30 *See* Meekins, *supra* note 23, at 21 (stating that the "face-time" an individual has with a judge is intended to ensure that that the individual will likely continue his treatment); *see also* BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT. OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS, at 15 (1997) (positing that the relationship the participant has with the court increases the likelihood that the participant will remain in treatment and shows the participant that the court cares about them).

31 *See* Meekins, *supra* note 23, at 16 (revealing that the defendant is assigned to one particular judge trained to address certain social problems); *see also* J. Peggy Fulton Hora, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 471-72 (1999) (explaining how one judge becomes intimately familiar with the defendant's drug and other problems).

32 *See* Erik Kriss, *One Court to Handle Domestic Violence; Top State Judge Announces Integrated Domestic-Violence Court to Save Time, Money*, THE POST-STANDARD, Jan. 15, 2002, http://www.nycourts.gov/courts/problem_solving/idv/home
.shtml (noting the convenience of the domestic violence court in that it integrates all the issues into one court and in front of one judge).

that the individual faces. The idea is that, if the setting is more convenient, it is likely to be less stressful for the individual, and therefore the individual is more likely to cooperate.

Problem-solving courts have proven to be effective.[33] As a result, they are rapidly spreading throughout the country, with public satisfaction being very high.[34] With the success of the problem-solving courts, it is likely that elder law matters, and more specifically, adult guardianship proceedings, will end up in this type of forum. Adult guardianship proceedings are generally commenced when family members believe that an older relative is no longer able to make certain life choices. The family members petition the court in order to get the authority to make those life choices for the individual, essentially stripping away that individual's decision-making ability.[35]

The nature of this proceeding lends itself to a problem-solving scheme. There is an underlying problem, the incapacity of the individual, and there are also usually a number of issues surrounding the allegedly incapacitated individual.[36] For such a scenario, both the team approach and integration seem to be appropriate.

State court reform to deal with the Baby Boom generation is inevitable. The question becomes, with the backdrop of the problem-solving courts, should the state court reform emulate that of a problem-solving court? With the apparent success of the problem-solving courts this may seem like

[33] *See, e.g.*, Hon. Susan Finlay & Robert E. Wosje, *Judges As Change Agents*, 10 NEV. LAW. 22, 23 (2002) (noting the success and expansion of the problem-solving courts); *see also* Kevin S. Burke, *The Tyranny of the "Or" Is the Threat to Judicial Independence, Not Problem-Solving Courts*, 41 CT. REV. 32, 34 (2004) (speaking of the success of the drug courts).

[34] *See, e.g.*, David B. Rottman, *Procedural Fairness As a Court Reform Agenda*, 44 CT. REV. 32, 33 (2007) (revealing that "[t]here is solid evidence that the general public also perceives the key elements of problem-solving courts as desirable"); *see also* Meekins, *supra* note 23, at 22 (noting that other models of problem-solving courts are emerging).

[35] *See* N.Y. MENTAL HYG. LAW § 81.02 (2010) (providing the reasons a guardian may be appointed in New York State); *see also* N.Y. MENTAL HYG. Law § 81.06 (2010) (detailing who may commence a guardianship proceeding in New York); *see also* Audrey S. Garfield, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L.J. 859, 899 (1991) (positing that "[g]uardianships and conservatorships not only strip elders of the right to make basic choices regarding daily living, but deny them the right to more important life choices and ultimately diminish, if not extinguish, their fundamental rights to self-determination"); *see generally* Neil B. Posner, *The End of Parens Patriae in New York: Guardianship Under the New Mental Hygiene Law Article 81*, 79 MARQ. L. REV. 603, 614-633 (1996) (explaining the numerous sections of N.Y. Mental Hygiene Law § 81 which, taken as a whole, provide the guidelines of guardianship over an allegedly incapacitated adult).

[36] *See* David Hardy, *Who is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*, 4 NAT'L ACAD. ELDER L. ATT'YS J. 1, 6-7 (2008) (listing challenges people often face as they "travel through the last season of their lives"); *see also* H. Patrick Leis III, *The Model Guardianship Part: A Novel Approach*, 78-JUN. N.Y. ST. B.J. 10, 12 (2006) (providing examples of some of the various issues that may require attention when dealing with an allegedly incapacitated adult).

an obvious solution. However, there is one main criticism with problem-solving courts: the role of the defense attorney.

The traditional role of the defense attorney is to be a zealous advocate of the defendant.[37] Traditionally, the defense attorney is one of, if not the most, important player in the courtroom.[38] In the problem-solving scheme, the defense attorney's role is quite different than in the traditional role.[39] Defense attorneys in this new type of court often feel compelled to act as a team player for the common goal of curing the underlying problem. What the team wants, and what the defendant wants, are often different and conflicting goals.[40] In a guardianship proceeding, this problem could be amplified.

This Note analyzes the new role of defense attorney in problem-solving courts and how it might work in a guardianship proceeding context. Part I explains what a problem-solving court is and how it works. Part I describes two well-known problem-solving courts, the drug court and the integrated domestic violence court, and explains the central tenets in both courts: integration and the team approach. Part II focuses on the advantages and disadvantages of integration and the team approach. Part III applies integration and the team approach to a guardianship context and describes a court already attempting to do so. Finally, Part IV makes suggestions on how a problem-solving guardianship court should look.

I. THE PROBLEM-SOLVING COURT

The creation of the problem-solving court was a reaction by the state courts, which recognized that the traditional court model did not adequately accomplish society's goals.[41] This Part of the note gives a brief description

37 *See* FREEMAN-WILSON ET AL., *supra* note 21, at 4 (noting that the traditional role of the defense attorney was to act as a zealous advocate); *see also,* Meekins, *supra* note 23, at 3 (identifying the traditional role of criminal defenders as "zealous advocates fighting against the system").

38 *See* Meekins *supra* note 23, at 3 (discussing the important roles the defense attorney has traditionally played in the adversary process); *see also* discussion *infra* Part II.D (speaking to the importance of the defense attorney in American jurisprudence).

39 *See, e.g.*, FREEMAN-WILSON ET AL., *supra* note 21, at 4 (noting the shift from the traditional role of the defense attorney); *see also* Meekins, *supra* note 23, at 21(stating that problem-solving courts disavow adverseness).

40 *See, e.g.*, FREEMAN-WILSON ET AL., *supra* note 21, at 1 (revealing the ethical conundrums a defense attorney faces in a drug court); *see also* Meekins, *supra* note 23, at 4–6 (showing a hypothetical dialogue between a defense attorney and a defendant that displays the tension between the role of the defense attorney as the zealous advocate, and the role of the defense attorney as "team player").

41 *See, e.g.*, FREEMAN-WILSON ET AL., *supra* note 21, at 3 (stating that there is a "perception that the traditional, adversarial criminal justice system does not adequately address the issues of nonviolent drug offenders."); *see also* Meekins, *supra* note 23, at 13 (positing that "[m]any officials and scholars theorize that frustration with the adversary system has in large measure led to the proliferation of specialty courts").

of how the problem-solving court works and provides examples of how these types of courts function today.

A. How it Works

Problem-solving courts developed in this country because the traditional type of court system did not produce results that met society's expectations.[42] The traditional type of court system is adversarial in nature.[43] In this system, both parties are usually represented by attorneys who zealously litigate against each other and, ideally, this advocacy leads to a just outcome.[44] The adversarial system is designed to resolve the current issue.[45] For instance, an individual arrested for drug possession would be prosecuted for his crimes by a prosecutor who would zealously attempt to prove that the defendant possessed the drugs. Meanwhile, the defendant's attorney would zealously defend the accused by attempting to disprove the prosecutor's case. The jury's verdict on the crime would be a result of the arguments made by these two opposing parties. However, in certain areas of law this traditional-adversarial court system did not meet society's expectations, and as a result, problem-solving courts were created.[46]

Problem-solving courts usually employ two central themes: the team approach and integration.[47] Some problem-solving courts use both approaches, while some employ one or the other. The team approach is discussed below in relation to the drug court. The integration theme is analyzed below through a description of the domestic-violence court.

42 *See* Meekins, *supra* note 23, at 13 (noting that the adversarial system failed to get to the root of certain problems because sometimes the "adversarial advocacy is too adversarial" and failed to provide a solution to many of the issues that caused defendants to get into trouble in the first place).

43 *See, e.g.*, FREEMAN-WILSON ET AL., *supra* note 21, at 1 (detailing the shift away from the "conventional notions" of this country's adversarial system); *see also* Lyons, *supra* note 21, at 46-47 (noting that Americans usually do not understand that the traditional-adversarial system is intended to produce winners and losers).

44 *See supra* note 37 and accompanying text (describing the traditional role of an attorney as a zealous advocate); *see also* Meekins, *supra* note 23, at 13 (identifying adversarial advocacy as "too adversarial").

45 *See* FREEMAN-WILSON ET AL., *supra* note 21, at 3 (explaining that the traditional system employs a judge who resolves the issues chosen by the parties); *see also* Angela M. Laughlin, *Learning from the Past? Or Destined to Repeat Past Mistakes?: Lessons from the English Legal System and Its Impact on How We View the Role of Judges and Juries Today*, 14 WIDENER L. REV. 357, 374-75 (2009) (revealing that the trier of fact makes a decision based on the evidence presented by the parties).

46 *See* Meekins, *supra* note 23 ("Many officials and scholars theorize that frustration with the adversary system has in large measure led to the proliferation of specialty courts.").

47 *See, e.g.*, Daniel J. Becker & Maura D. Corrigan, *Moving Problem-Solving Courts into the Mainstream: A Report Card from the CCJ-COSCA Problem-Solving Courts Committee*, 39 CT. REV. 4, 6 (2002) (describing New York's integrated domestic violence courts); *see also* Meekins, *supra* note 23, at 22-23 (noting the emergence of the team-oriented and multi-disciplinary models).

B. The Drug Court

Specialized drug courts were created because of the public sentiment that the traditional adversarial court system did not work.[48] The creators of the drug court realized that drug addiction is often the underlying problem that leads to criminal offenses. They further realized that a prison sentence will not cure an addiction.[49] Traditionally, an addict would be arrested for possession of an illegal substance, serve a few months in prison, return to the streets still addicted to the drugs, and get arrested again for drug possession.[50] Drug courts are designed primarily to reduce recidivism of the crimes resulting from drug addiction. The best way to do this is to treat the addict for his addiction. The traditional-adversarial process is not the best way to treat the addiction. The drug court, therefore, uses an approach that is non-adversarial.[51]

The drug court scheme employs the team approach.[52] Everyone in the courtroom is part of the same team with a common goal, to cure the addict. The players on the team are the judge, the prosecutor, the non-legal actors that provide the treatment, the defendant, and the defense attorney.[53] The

[48] *See, e.g.*, Anat Maytal, *Specialized Domestic Violence Courts: Are They Worth the Trouble in Massachusetts?*, 18 B.U. PUB. INT. L.J. 197, 198-99 (arguing that Massachusetts should expand the use of specialized domestic violence courts to better address domestic violence); *see also* Hora et al., *supra* note 31, at 467 (emphasizing that the traditional adversarial system, designed to solve legal disputes, is ineffective at addressing drug abuse).

[49] *See* John S. Goldkamp, *The Drug Court Response: Issues and Implications for Justice Change*, 63 ALB. L. REV. 923, 930 (explaining that "[t]he new [drug court] model incorporates a mixture of values with a decided shift toward treatment and restoration"); *see also* Paul W. Shapiro, *Volunteers Are Vital to the Success of the Collaborative Courts*, 50 ORANGE COUNTY LAW. 10, 10 (2008) (proposing the drug courts as a solution to the "revolving door of incarceration and re-arrest for certain kinds of offenders").

[50] *See, e.g.*, J. Mary Muehlen Maring, *North Dakota Juvenile Drug Courts*, 82 N. DAK. L. REV. 1397, 1399 (2006) ("Before the . . . introduction of the drug court model, the increased number of drug offenders and repeat drug offenders, combined with a tough on drug crimes approach, weighed heavily on the criminal justice system."); *see also* Dan Haude, *Ohio's New Sentencing Guidelines: A "Middleground" Approach to Crack Sentencing*, 29 AKRON L. REV. 607, 647 (1996) ("Crack offenders have the worst criminal history and also have the highest recidivism rates of any drug offenders.").

[51] *See* Anthony C. Thompson, *Courting Disorder: Some Thoughts on Community Courts*, 10 WASH. U. J. L. & POL'Y 63, 77-78 (2002) (noting that "two of the defining concepts of drug courts are non-adversarial proceedings and teamwork"); *see also* Hora et al., *supra* note 31, at 467 (urging that the traditional adversarial system, designed to solve legal disputes, is ineffective at addressing drug abuse).

[52] *See* Lisa Lightman & Francine Byrne, *Courts Responding to Domestic Violence: Addressing the Co-occurrence of Domestic Violence and Substance Abuse: Lessons From Problem-Solving Courts*, 6 J. CTR. FOR FAM. CHILD. & CTS. 53, 59 (2005) explaining that "[o]nce the defendant is participating in drug court, the court, the prosecutor, and the defense attorney are all focused on the defendant's success, so they adopt a 'team approach'"); *see also* Hora et al., *supra* note 31, at 453 (outlining the common elements of drug courts: 1) immediate intervention; 2) non-adversarial processes; 3) "hands-on" judiciary; 4) clearly defined rules and goals; and 5) a "team" concept among all players).

[53] *See* Nicole A. Kozdron, *Midwestern Juvenile Drug Courts: Analysis & Recommendations*, 84 IND. L.J. 373, 374 ("The hallmark of drug courts is a team approach; effective drug courts 'bring the full weight of all interven[e]rs (e.g., the judge, probation officers, correctional and law enforcement

team approach is intended to provide the individual with the assurance that everyone is working for his well-being. In fact, one of the problem-solving court's underlying themes is that the addict is more likely to be responsive to the treatment if he trusts the court and feels comfortable in the setting.[54]

The drug court's team captain is the judge. In this type of court system, "the judge is responsible not just for resolving disputes identified by the parties but also for actively directing, controlling and supervising the defendant's rehabilitation from drug addiction."[55] Because there are fewer procedural limitations in this type of court system,[56] the "court judge controls the agenda; has informal conversation with the parties, the treatment providers and correctional officials; and ultimately does almost 'whatever is needed' to ensure that everyone promotes the shared goal of . . . helping the defendant recover from drug addiction."[57]

The judge retains the ability to give prison sentences to defendants who do not cooperate with the treatment program.[58] This results in the drug court having two methods of treatment. The first is that the team encourages the drug addict to comply with the treatment. The second is that there is still judicial pressure on the drug addict to comply with the treatment. This approach is intended to maximize the chances that the defendant will recover from his addiction, resulting in him staying out of the court system in the future.

C. The Integrated Domestic-Violence Court

Another example of a problem-solving court is the integrated-domestic violence (IDV) court. The IDV court, like the drug court, provides services

personnel, prosecutors, defense counsel, treatment specialists and other social services personnel) to bear, forcing the offender to deal with his or her substance abuse problem or suffer the consequences.'") (internal quotations omitted); *see also* Mae C. Quinn, *Whose Team am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 38 ("[T]he new model purportedly makes a fundamental change in the traditional litigation-based process by espousing a non-adversarial, 'team work' approach among all of the court's players - judge, prosecutor, and defense attorney - to move drug-addicted persons to sobriety.").

54 *See* J. Kevin S. Burke, *Just What Made Drug Courts Successful?*, 36, NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 39, 53-55 (arguing that in order for drug courts to be perceived as legitimate, or work at all, litigants and the public must be able to trust the integrity of the system).

55 FREEMAN-WILSON ET AL., *supra* note 21, at 3.

56 *See id.* (noting that "[t]his sort of informal, flexible system can work toward the long-term benefit of defendant by increasing the chances that they will be able to overcome drug addiction"); *see also supra* note 53 and accompanying text (describing the changes to the traditional method to incorporate a non-adversarial, teamwork approach).

57 FREEMAN-WILSON ET AL., *supra* note 21, at 3.

58 *See* Meekins, *supra* note 23, at 15–16 (noting that in many of the problem-solving courts, coercion by the threat of incarceration is used); *see also* Thompson, *supra* note 51, at 94 (acknowledging that with the promise of treatment comes the threat of incarceration).

to the defendant or respondent (in this case the individual could be the respondent if it is a civil trial) in order to fix the underlying problem. Like how drug courts provide treatment services to cure the drug addiction, many IDV courts provide "anti-violence therapy,"[59] which is designed to cure the underlying aggression that causes the domestic-violence.

Another similarity with the drug court is the role of the judge. The judge in an IDV court has the same role as a judge in a drug court. The IDV "judge often engages the defendant directly during court hearings and 'assumes multiple roles including acting as authority, motivator, problem solver and monitor.'"[60] The IDV judge, like any other problem-solving court judge, is there not only as referee of court rules and procedure, but as an active participant in curing the individual.[61]

The IDV court is best known for its integration of legal disputes. This means that the individual would be in one courtroom and in front of one judge throughout the entire process.[62] The integration of issues is intended to make a more convenient setting for the family.[63] The idea is that, if the setting is more convenient, it would likely be less stressful for the individual, and therefore the individual would be more likely to cooperate. The integration of issues also leads to the individual trusting the court system because he will be familiar with the one judge handling his legal issues.[64] For instance, an IDV court can hear a case that involves divorce, child neglect and abuse, spousal abuse, custody, visitation, as well as any criminal issues.[65] The family members thus have a more convenient forum

[59] *See* Meekins, *supra* note 23, at 23 (stating that IDV courts often use anti-violence therapy, but many IDV courts focus on retribution rather than rehabilitation).

[60] *Id.*

[61] *See id.* (explaining that a specially trained judge is characterized by close monitoring and supervision); *see also* Nolan, *supra* note 27, at 1544 (describing the therapeutically oriented encounter between the defendant and the judge).

[62] *See supra* notes 31 & 32 and accompanying text (discussing the integrated role of an IDV judge); *see also* Hon. Judith S. Kaye, *My Story in Six Life Lessons*, 45 JUDGES J. 31, 33 (2006) (revealing that "IDV Courts combine in a single judge comprehensive criminal, family, and matrimonial jurisdiction, so that a family touched by violence can be spared the additional stress of having to deal with multiple judges in multiple courthouses").

[63] *See supra* notes 31 & 32 and accompanying text (noting that integrating all of the defendant's legal issues allows the court to address all of the issues in one place); *see also* Betsy Tsai, *The Trend Toward Specialized Domestic Violence Courts: Improvements on an Effective Innovation*, 68 FORDHAM L. REV. 1285, 1302 (2000) (explaining that an integrated community approach to domestic violence focuses on providing support to victims).

[64] *See supra* note 30 and accompanying text (positing that the integrated system is for the benefit of the defendant's recovery); *see also* Tsai, *supra* note 63, at 1295 (noting that this system has a therapeutic effect of enhancing the defendant's social functioning).

[65] *See* Kriss, *supra* note 32 ("Victims of domestic violence, already greatly distressed, face the added burden in New York state of litigating in several separate trial courts – typically, Family Court for child custody or visitation, a criminal court for an assault, Supreme Court for a matrimonial matter."); *see also* Tsai, *supra* note 63, at 1309 ("Aside from the basic legal claims in a case, issues of

to litigate all of these issues in the IDV court.[66]

II. ADVANTAGES AND DISADVANTAGES OF THE TEAM APPROACH AND INTEGRATION STRATEGIES

The problem-solving scheme often uses one or both of the two central themes of the team approach and integration.[67] These two themes, when employed, have proven to be effective in solving the underlying problem of the individual.[68] In certain situations however, these themes have been shown to be ineffective and potentially dangerous.[69] This Part analyzes the advantages and disadvantages of the team approach and integration. Additionally, it also focuses on the situations when these themes are likely to be most effective and those situations where it would not be effective.

A. Strengths of the Integration Approach

The integration of issues allows one court to hear all of the cases against the individual who has the problem before the court.[70] This scheme has two main strengths. First, it provides convenience to people already under a lot of stress.[71] Second, the integration of issues saves the court system a lot of time and resources.[72]

victim advocacy and support, perpetrator accountability and monitoring, and general mental health concerns of all parties involved are emerging as important considerations.")..

66 *See supra* note 63 and accompanying text (explaining that all legal issues are integrated into one court for the benefit of the family involved); *see also* Tsai, *supra* note 63, at 1309 (exploring the fact that "[t]hese model domestic violence programs reflect a growing trend toward greater recognition of the seriousness of domestic violence, and seek to increase the resources and programs available to address this issue.").

67 *See infra* note 85 (noting that problem-solving courts combine the issues which the court has specific jurisdiction over along with other civil matters); *see also* Kathryn C. Sammon, *Therapeutic Jurisprudence: An Examination of Problem-Solving Justice In New York*, 23 ST. JOHN'S J. LEGAL COMMENT. 923, 925 (2008) (revealing that problem-solving courts focus on the outcome and in individual).

68 *See supra* note 33 and accompanying text (discussing the effectiveness of problem-solving courts).

69 *See* Meekins, *supra* note 23, at 22 ("These other models often encompass issues which cannot, and should not, fully embrace the use of treatment as a central tenet."); *see infra* note 82 and accompanying text (There are concerns about integrating several issues, particularly when their domestic violence issues are being addressed.).

70 *See supra* note 32 and accompanying text (discussing the creation of an integrated domestic violence court that can address all the problems of one family before one judge); *see also* Becker & Corrigan, *supra* note 47, at 17 (examining the first multi-jurisdictional community court, which hears civil, criminal and family court cases in the same courtroom and expressing the desirability of expanding this program due to its ability to more effectively solve problems).

71 *See supra* note 32 and accompanying text (observing that the problems of victims of domestic violence are sensibly addressed by one judge); *see also* Becker & Corrigan, *supra* note 47, at 17 (examining the enthusiasm among users of the IDV).

72 *See* Kriss, *supra* note 32 (explaining Judge Kaye's opinion that integration saves money for the

The integration of issues works best when the issues are related. For instance, in the IDV court, the issues that could be integrated into one court might be custody, visitation, child support, criminal charges, and divorce.[73] When these issues are related to the domestic violence, it makes sense to hear them all together. As Chief Judge Judith Kaye stated when implementing the first IDV courts in New York, "[v]ictims of domestic violence, already greatly distressed, face the added burden in New York State of litigating in several separate trial courts – typically, Family Court for child custody and visitation, a criminal court for an assault, [and] Supreme Court for a matrimonial matter."[74] Once all of these issues are addressed together, it is in front of one judge who is better able to understand the whole picture and make a ruling takes into account all of the other pending issues.[75]

The integration of issues also saves the court system a lot of time and resources.[76] Referring to the IDV court, Judge Kaye noted that families would save a lot of time and money if they only had to go to court with one lawyer.[77] She also noted that this will reduce taxpayer spending because the court will work more efficiently.[78] Judge Kaye noted, for instance, that "110 families have used an IDV court in three months in the Bronx, which, along with Westchester and Rensselaer counties, began the state's first IDV courts last year."[79] These cases, if they went through an un-integrated New York court system would have been "220 or 330 or more separate cases splintered among the several courts, multiplying and duplicating the work

family, court system, and taxpayer); *see also* Becker & Corrigan, *supra* note 47, at 17 (noting that the taxpayers save money via the integration process).

73 *See* Kriss, *supra* note 32 (discussing that the IDV addresses the problems of one family before one judge regarding a wide range of issues); *see also* Becker & Corrigan, *supra* note 47, at 17 (stating that the first multi-jurisdictional community court hears civil, criminal and family court cases relating to a single family).

74 Kriss, *supra* note 32 (quoting Chief Judge Judith Kaye).

75 *See, e.g.*, Kriss, supra note 32 ("The IDV court sensibly puts the problems of one family before one judge, who is then better able to deal with all the issues . . . ."); *see also* Becker & Corrigan, *supra* note 47, at 17 (It is difficult for parties to navigate through the judicial system in the traditional court system).

76 *See supra* note 32 and accompanying text (explaining the utility of the integrated approach); *see generally* Hon. Judy Harris Kluger, N.Y. ST. UNIFIED CT. SYS., INTEGRATED DOMESTIC VIOLENCE COURTS: OVERVIEW (2011), http://www.nycourts.gov/courts/problem_solving/idv/home.shtml (stating the overall benefits of using the "one family-one judge" court system).

77 *See* Hon. Judith S. Kaye, N.Y. ST. UNIFIED CT. SYS., THE STATE OF JUDICIARY 2001, at 5-6 (2001), www.nycourts.gov/admin/stateofjudiciary/soj2001.pdf (2001) ("I've made no secret of the urgent need to restructure our courts, to simplify the labyrinth we have the temerity to call the 'Unified Court System.'"); *see also* Kluger, *supra* note 76 ("By connecting one judge with one family, IDV courts . . . reduc[e] the number of court appearances.").

78 *See* Kriss, *supra* note 32; *see also*, Kaye *supra* note 77, at 2 (expressing concern over the large number of civil cases initiated in the new millennium and the resources needed to address them all).

79 Kriss, *supra* note 32.

of judges and court personnel."[80]

It is easy to see that integration helps everyone involved in the court system. It makes it better for the parties involved in the action, it makes it easier for the court system, and, finally, it is beneficial for our wallets.[81]

B. Weakness of the Integration Approach

The main criticism with integration is a practical concern.[82] Often, the integration of issues results in numerous parties being present in the courtroom, all with differing perspectives and concerns.[83] Even though these parties may have the same broad goals to fix the problem, implementing a course of action that furthers these goals creates practical conflicts between these parties.[84]

An example of this problem can be found in the IDV courts. The IDV court places the family offense crimes, which are civil, in the same courtroom as the criminal offenses.[85] As a result, judges will know whether an accused batterer has the means of getting to and from batterer intervention programs, or the financial resources to pay for such a program.[86] Therefore, the IDV judge could be hesitant to mandate this order if he knows it would be impractical for the accused to comply.[87] If the IDV judge was not involved with the other issues, like child support or

80 *Id.*

81 *See* Kriss, *supra* notes 76–80 and accompanying text (exploring the financial and administrative benefits of the problem-solving courts).

82 *See* Patricia E. Erickson, *Domestic Violence Courts, in* ENCYCLOPEDIA OF DOMESTIC VIOLENCE 265–66 (Nicky Ali Jackson ed., 2007) (noting the practical concerns with integrating issues surrounding domestic violence litigation); *see also* Tsai, *supra* note 63, at 1309-10 (describing the concerns critics have with domestic violence courts).

83 *See* Erickson, *supra* note 82, at 265 (discussing the effect of having numerous parties with a variety of perspectives present in the court room); *see also* Tsai, *supra* note 63, at 1310 (revealing that the multidisciplinary approach of many domestic violence court programs involves numerous parties with a variety of perspectives, beliefs, and goals).

84 *See* Erickson, *supra* note 82, at 265 (explaining that the potential for conflict exists when there are multiple parties with a variety of beliefs present in domestic violence court); *see also* Tsai, *supra* note 63, at 1310 (stating the problem with conflicting goals of the numerous parties involved in domestic violence courts).

85 *See* Erickson, *supra* note 82, at 265 (noting that IDV courts combine domestic violence cases with other family matters); *see also* EMILY SACK, CREATING A DOMESTIC VIOLENCE COURT: GUIDELINES AND BEST PRACTICES 26 (Lindsey Anderson et al. eds., Family Violence Prevention Fund 2002) (explaining how the IDV court combines both criminal domestic violence cases and related civil matters).

86 *See* Erickson, *supra* note 82, at 265 (revealing how the IDV court hearing a domestic violence case has complete information on a family); *see also* SACK, *supra* note 85, at 26 (exploring how IDV courts address problems comprehensively).

87 *See* Erickson, *supra* note 82, at 265-66 (positing that an IDV judge may hesitate to mandate batterer intervention programs for men who have travel or job restrictions); *see also* SACK, *supra* note 85, at 26 (explaining that when civil matters are handled with criminal cases it becomes a challenge to keep them appropriately separate).

spousal maintenance, the judge might not be aware of the alleged constraints on the batterer, and would mandate the intervention.

Therefore, the integration of issues can result in unequal treatment under the law. Someone that goes through an integrated system would be treated differently than someone in a traditional court setting. This difference is only due to the fact that one individual had more domestic related issues to be litigated than the other.

C. Strengths of the Team Approach

The team approach seems to be an effective tool but.it is difficult to isolate the team approach from the other aspects of the problem-solving court in order to see whether it is actually effective. Therefore, the best way to analyze the degree of effectiveness of the team approach is to study the success of the court that employs it the most, the drug court.

When looking at statistics, the drug court is very successful.[88] Data collected to determine the effectiveness of drug courts "clearly show reduced rates of recidivism,"[89] a higher rate of "drug-free babies born to participating mothers, and hundreds of program graduates who have reclaimed their lives to become sober and productive members of society." [90] In some counties, recidivism rates have dropped to shockingly low levels, such as a recidivism rate that went from 80 percent to 20 percent after the implementation of a drug court.[91] With these statistics clearly showing reduced levels of recidivism, it is logical to conclude that the drug court's implementation of a collaborative team approach is effective.

D. Weakness of Team Approach

Should statistics be the sole indicators of whether the team approach in problem-solving courts is a good thing? With the apparent success of the

[88] *See infra* note 89 and accompanying text (revealing that drug courts are effective because they lead to reduced rates of recidivism); *see also* Warren W. Matthews, *Chief Justice Tracks Judicial Issues*, 24 ALASKA B. RAG 1, 30 (2000) (noting that remarkable successes have been reported in drug courts across the nation).

[89] Shapiro, *supra* note 49, at 11 (explaining the successes of collaborative courts).

[90] *Id.*

[91] *See* Ronald M. George, *Working on the Components of Judicial Independence*, 41 CT. REV. 4, 8 (2005); *see also* James Chamberlain, *Methamphetamine: Tools and Partnership to Fight the Threat*, 32 J. L. MED. & ETHICS 104, 105 ("We have one drug court in Salt Lake City that has been running for a number of years. The court has tracked those who come through this system to make sure they know what is happening with them. The statistics are sound: 17 percent recidivism rate versus 70 percent repeat offenders without the drug court. The fact is that for a lot of these offenders, their addiction drives their criminal activity. If we get them into the right frame of mind, they won't need to be criminals. The drug court model is a good one. It shows its proof.").

problem-solving courts many of its flaws have gone unchallenged and simply ignored.[92] However, there is one problem that deserves more attention: the new role of the defense attorney.[93]

In the traditional court system, a defense attorney has a clear and well established role: she has to be "a zealous, partisan advocate for the client's interest, to avoid taking actions that might conflict with the client's interests in any way and to carefully guard and maintain the secrecy of all information learned about the client or from the client during the course of the representation."[94] The defense attorney's role in the problem-solving court is substantially different.[95] In this untraditional forum, the defense attorney often acts as a team player in that she is expected to work with the prosecution and judge to reach a shared goal.[96] This common goal is curing the underlying problem that presumably brought the defendant to court in the first place.[97] As a result, the adversarial nature of the trial dissipates. The loss of adverseness in these problem-solving courts has led legal scholars to debate whether this is truly the best result for the defendant.

Though literature of the possible negative consequences of the new role of the defense attorney is scarce,[98] there has been an overwhelming amount

92 *See infra* note 96 and accompanying text (exploring the decreased role of the defense attorney).

93 An additional concern many critics of problem-solving courts assert is the new role of the judge. The traditional role of the judge has been a referee of court procedure. In a problem-solving court, the judge has "greater interaction with the litigants than judges in traditional courts." *See* Sammon, *supra* note 67, at 925. The problem-solving court judge often works with several social agencies to ensure that the individual is being treated and is acting in good behavior. *See* Cheryle A. Fletcher, *Collaborative Practice: Divorce Without Litigation*, 85 MICH B.J. 25, 26 (2006) ("Collaborative practice uses an interdisciplinary 'collaborative team' to act as cooperative, rather than adversarial, problem-solvers."). Some critics of the problem solving courts "have asked whether problem-solving courts 'inappropriately blur the lines between the branches of government . . . .'" *See* Steven Leben, *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts*, 26 JUST. SYS. J. 109, 112 (2005).

94 FREEMAN-WILSON ET AL., *supra* note 21, at 4 (discussing the defense attorney's role in a collaborative practice).

95 *See infra* note 96 and accompanying text (illustrating the differences between the traditional system and the collaborative one).

96 *See, e.g.*, FREEMAN-WILSON ET AL., *supra* note 21, at 3 ("[T]he drug court judge . . . ultimately does almost whatever is needed to ensure that everyone promotes the shared goal of, among other things, helping the defendant recover from drug addiction."); *see also* Meekins, *supra* note 23, at 4 ("In the majority of criminal specialty courts that have been developed and implemented in recent years, the defense lawyer is relegated to the role of team player whose only purpose serves to fulfill a constitutional mandate.").

97 *See generally,* Kaye, *supra* note 77 (explaining that various problem-solving courts, like the IDV courts, the model family courts, and the drug courts, specifically address the problems of the defendant); *see also* Meekins *supra* note 23, at 2 (revealing that "specialty courts or 'problem-solving courts' are the embodiment of the therapeutic and restorative justice movement").

98 *See* Meekins, *supra* note 23, at 3, 7 ("An unintended and, as yet, largely ignored consequence of this burgeoning movement, however, may spell a threat to our adversary system. The standard premise behind these courts is the emasculation of the traditional role of the criminal defender as a zealous advocate fighting against the system. . . . In fact, a review of the literature suggests that few legal scholars, court administrators, judges, and policy officials are willing to critique the effect of these courts on the litigants, the administration of justice, and the criminal justice system as a whole."); *see*

of literature that praises the traditional role of the defense attorney.[99] "Case law, scholarly commentary, and popular writings extol the criminal defense lawyer and her mission."[100]

In the traditional notion of justice, the defense attorney is the critical linchpin.[101] *Gideon v. Wainwright*[102] is the leading Supreme Court case expressing the importance of the Sixth Amendment's assurance of a right to counsel. The Court stated "[t]he assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not still be done."[103]As this case was decided in 1963, it is safe to assume that the Supreme Court was contemplating the defense attorney in her traditional role, as a zealous advocate for the defendant.[104]

The new role of the defense attorney has not evolved without some criticism. Judge Karen Freeman-Wilson's monograph, "Critical Issues for Defense Attorneys in Drug Court" explains how the shift from the traditional role of the defense attorney to the new role of the defense

also Tamar M. Meekins, *Risky Business: Criminal Specialty Courts and the Ethical Obligations of the Zealous Criminal Defender*, 12 BERKELEY J. CRIM. L. 75, 92 (2007) ("In a non-adversarial specialty court, the professional role and duties of a defense attorney are diminished or even extinguished. Clients and observers may not even understand why the defense attorney is present, as he does not appear to have a functional representational role.").

99 *See,* U.S. CONST. amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defen[s]e."); *see also* Meekins, *supra* note 23, at 8 (The author cites Supreme Court cases and law reviews that have praised the role of the defense attorney).

100 Meekins, *supra* note 23, at 8.

101 *See supra* note 99 and accompanying text (exploring the importance of the defense attorney's role in the history of the United States court system).

102 Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963) ("The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." (citing Powell v. Alabama, 287 U.S. 45, 68-69 (1932)).

103 *Id.* at 343 (citing Grosjean v. Am. Press Co., 297 U.S. 233, 243-44 (1936)).

104 It should be noted here that the new role of the problem-solving attorney did exist when Gideon v. Wainwright was decided. The first problem-solving court was the juvenile court, which was developed in 1898 in Chicago. *See* Burke, *supra* note 33, at 32–33 ("The original problem-solving court, a juvenile court, was created a century ago in Chicago, and within 25 years the concept had spread nationwide."); *see also* Thomas F. Geraghty, *Juvenile Justice: Centennial of the Juvenile Court: What Would Jane Addams Think?*, 13 CHI. B. ASS'N REC. 50, 51 (1999) ("Indeed, there is ample historical support for the proposition that Jane Addams didn't have Joseph (the "serious offender") in mind when she and others founded the first Juvenile Court here in Chicago in 1899."). Even though this was many years before the decision in Gideon v. Wainwright, criticism of the new role of the defense attorney in these problem-solving courts is a recent phenomena. *See* Geraghty, *supra* note 104, at 51 ("It was not until 1965, with the passage of the passage of the Illinois Juvenile Justice Act, that the boundaries of juvenile and adult court jurisdiction were clearly defined, permitting trial of children in criminal court only after a discretionary transfer hearing.").

attorney in a drug court setting is a difficult transition. She states that "[f]or the defense attorney, this paradigm shift may come with some ethical . . . and practical conundrums."[105]

An ethical problem with the new role of the defense attorney is the difference in goals in the traditional-adversarial court and the problem-solving court. For instance, a defense attorney acting as a team player "creates the risk that the . . . [problem-solving] court judge will count on the attorney to provide information that might otherwise be deemed privileged and confidential in the traditional . . . court context."[106] The defense attorney must balance the concern of the problem-solving court, which is to act as a team player to fix the underlying problem, and the interests of the client, which is to eliminate or reduce punishment.[107]

A practical conundrum is that defendant may not trust his attorney because the attorney appears to be colluding with the opposing counsel and judge. The defendant could very well believe that in the problem-solving court no one is on his side.[108] With a possible loss of confidence in one's defense attorney, the defendant will be less inclined to disclose information, and therefore, resolving the underlying problem becomes even more difficult.

III. THE APPROPRIATENESS OF USING A PROBLEM-SOLVING COURT SCHEME IN GUARDIANSHIP COURTS

Due to the Supreme Court's praise of the defense attorney and the ethical and practical challenges that occur in problem-solving courts relating to the defense attorney's new role, along with the practical issues relating to the integration of issues, it should be an imperative of state court administrations to only use a problem-solving scheme where appropriate. One inquiry that must be made when deciding whether to use such a

105 FREEMAN-WILSON ET AL., *supra* note 21, at 1.

106 *See id.* at 7.

107 *See id.* at 4 ("In short, the goals and aspirations of the drug court system may appear to conflict with well-established ethical rules formulated in the adversary context and require defense attorneys to try to reconcile their behavior with these competing goals."); *see also* Nolan, *supra* note 27, at 1559 ("[D]rug court clients typically sign forms waiving a host of constitutional rights in order to participate in drug court . . . .").

108 *See* FREEMAN-WILSON ET AL., *supra* note 21, at 7 ("Apart from the ethical concerns presented in such circumstances, clients who see their lawyers disclose secrets and confidences to the treatment team over their objections may believe that cannot trust anyone in the process because no one is truly on their side."); *see also* Meekins, *supra* note 23, at 40 ("The transactional trust that underlies the transitional adversarial defense attorney-client relationship may never develop, or where there was at least some predisposition by the defendant to trust the defense attorney by virtue of her position, it may be lost.").

scheme is whether fixing the underlying problem would prevent the reoccurrence of issues.[109] After all, problem-solving courts cannot solve all of society's problems.[110] Adult Guardianship proceedings traditionally take place in the probate courts. Typically, a family member of an allegedly incapacitated adult petitions the court in order to receive guardianship rights for that adult.[111] The petitioner does this because she feels that the incapacitation of the adult has rendered this person unable to make certain life decisions.[112] First, the court must determine if the allegedly incapacitated adult is indeed incapacitated.[113] Second, if the adult is deemed incapacitated, the court must determine whether this particular petitioner should be granted guardianship.[114] If the petitioner is granted guardianship power, the petition's power could include decisions regarding the incapacitated adult's finances, property, and health issues.[115]

109 *See, e.g.*, Finlay & Wosje, *supra* note 33, at 22 ("What the models have in common are the partnership between the treatment or services community and the court system and a common goal of stopping the revolving door in the justice system by addressing the underlying cause of the criminality or court case. While each of these models addresses a different problem, they all use the authority of the courts to improve the outcome for victims, communities and defendants by changing the focus of the courts from simply processing cases to achieving tangible results."); *see also* Shapiro, *supra* note 49, at 10 ("The Collaborative Courts are specialized court tracks that offer a therapeutic alternative to the revolving door of incarceration and re-arrest for certain kinds of offenders.").

110 *See, e.g.*, PAMELA M. CASEY & DAVID B. ROTTMAN, NAT'L CTR. FOR STATE CTS., PROBLEM-SOLVING COURTS: MODELS AND TRENDS 10 (2003) ("Although generally positive, the evaluation data indicate that these [problem-solving] courts are not a panacea for solving complex societal problems."); *see also* Meekins, *supra* note 23, at 22 ("While the drug court model emerged earliest and fully embodies aspects of therapeutic justice, other models have emerged which utilize some of the same principles, particularly the team-oriented, multi-disciplinary, and non-adversarial approach. These other models often encompass issues which cannot, and should not, fully embrace the use of treatment as a central tenet.").

111 *See* N.Y. MENTAL HYG. LAW § 81.06(a) (2010) (identifying the parties who may commence a guardianship proceeding and including persons with whom the alleged incapacitated person resides or persons concerned for the alleged incapacitated person's welfare, which presumably would include family or loved ones); *see also supra* note 35 and accompanying text (citing N.Y. MENTAL HYG. LAW § 81 (2010) and stating that the family members or loved ones of the person alleged to be incapacitated petition the court for authority over that person in the form of guardianship).

112 *See* N.Y. MENTAL HYG. LAW § 81.02 (2010) (providing the standards for appointing a guardian for a person found to be incapacitated which include when such an appointment would be necessary to "provide for the personal needs of that person"); *see also supra* note 35 and accompanying text (referencing N.Y. MENTAL HYG. LAW § 81 (2010) and noting that the petition is filed to get the authority to make life decisions for the alleged incapacitated person).

113 *See* N.Y. MENTAL HYG. LAW § 81.02(b) (2010) (outlining the standards which the court would use to determine whether an individual is incapacitated such that the appointment of a guardian would be necessary); *see also supra* note 35 and accompanying text (citing N.Y. MENTAL HYG. LAW § 81 (2010) and stating that the petition is made to the court which would follow the guidelines provided out in the aforementioned statute to determine whether guardianship should be granted).

114 *See* N.Y. MENTAL HYG. LAW § 81.02(a) (2010) (providing the standards for appointing a guardian for a person found to be incapacitated); *see also supra* note 35 and accompanying text (referencing N.Y. MENTAL HYG. LAW § 81 (2010) and noting that the petition is filed to get guardianship of the alleged incapacitated person).

115 *See* N.Y. MENTAL HYG. LAW § 81.02(a)(1) (2010) (stating that the appointment of the petitioner as a guardian for a person found to be incapacitated would be made "to provide for the

A. Adult Guardianship Proceedings with a Problem-Solving Approach

The legal issues surrounding a mentally incapacitated adult seem to lend themselves to being resolved in a problem-solving court. The alleged incapacitation of the adult is presumably what spurred the petitioner to file with the court in order to gain guardianship of that adult. A family member, for instance, notices the adult's inability to handle his finances. The family member assumes that this inability is due to an incapacitation of the adult. When the petitioner gains guardianship rights, he obtains decision-making power, at which point the alleged "problem" is solved and the financial issues that occurred will hopefully not reoccur. But the assignment of a guardian for the incapacitated adult in order to prevent the reoccurrence of legal issues for that adult is what adult guardianship proceedings have always attempted to do. The question to consider is whether it is beneficial for the new problem-solving court for adult guardianship proceedings to incorporate the team approach and integration in order to meet this end.

B. Integration and the Team Approach in a Guardianship Proceeding

One of the main criticisms of the team approach in the problem-solving court scheme is the role of the defense attorney.[116] Though the traditional role of the defense attorney is praised in American jurisprudence as a linchpin for justice,[117] the team approach in a problem-solving scheme changes that role. The defense attorney is now part of the team. Critics suggest that the new role of the defense attorney presents an ethical problem that defense attorneys must face: balancing the interests of the court and the interests of the defendant.[118] Critics also suggest that this poses a practical problem in that the defense attorney might lose the

personal needs of that person, including food, clothing, shelter, health care, or safety and/or to manage the property and financial affairs of that person"); *see also supra* note 35 and accompanying text (citing N.Y. MENTAL HYG. LAW § 81 (2010) and stating that the petitioner could be granted the authority to make life decisions for the alleged incapacitated person).

116 *See* FREEMAN-WILSON ET AL., *supra* note 21, at 4 (describing the paradigm shift for the defense attorney away from the traditional, adversarial setting of a criminal court and explaining that the defense attorney will have to balance between the zealous representation of his or her client, while at the same time, facilitating the cooperation and participation of that same client with the drug court); *see also supra* note 107 (stating that defense attorneys must reconcile their behavior when representing clients in drug court by balancing their ethical obligations as defense attorneys with the purpose and tenets of the drug court system).

117 *See supra* note 99 and accompanying text (noting that much praise has been bestowed upon the traditional role of a defense attorney, such as the Sixth Amendment right to an attorney in a criminal prosecution).

118 *See supra* notes 40, 107, and accompanying text (discussing ethical conundrums that an attorney might face and competing interests that he must balance when the team approach is used).

confidence of her client.[119]

Advocates of the team approach justify these weaknesses by citing the apparent success of the team approach.[120] The team approach, even with its weaknesses, has proven to be a great tool to solve underlying problems. However, in a guardianship proceeding the team approach would be superfluous. The reason is simple. After the adult is deemed incapacitated, either through the consent of the adult or through a finding of the court, the problem is solved. Any similar issues that may arise would be at the fault of the guardian. The incapacitation of the adult still exists, but would not cause any further legal issues.

The weaknesses of the team approach would be exacerbated if the guardianship court also integrated its issues. After the adult is deemed incapacitated and a guardian is assigned, an integrated court would then move on to the other issues surrounding the incapacitated adult.[121] A fundamental flaw with this approach is the assumption that the incapacitation led to the other legal issues. For instance, in a drug court setting, it is safe to assume that the underlying addiction of the individual led to the other criminal issues surrounding the individual. A guardianship context is different. The incapacitation of the adult cannot always be presumed to have led to that adult's divorce, criminal offenses, foreclosure, or any other legal issue. As a result, the combined team and integrated approach in a guardianship context would leave the incapacitated person with inadequate representation of counsel.

This problem can be seen in a New York State court experiment using a problem-solving scheme in a guardianship context. This new problem-solving court is called the Model Guardianship Part. When creating this court, the New York State Office of Court Administration stated that it

119 *See supra* note 108 and accompanying text (explaining that a client may feel like no one is on his side since the attorney may have disclosed confidences and secrets to the treatment team); *see also* Meekins, *supra* note 98, at 76 (recounting how a client lost faith in the court system because she did not believe there was anyone on her side to help her achieve her goals).

120 *See* Meekins, *supra* note 23, at 19 ("Specialty court advocates argue that the imposition of automatic sanctions is counterbalanced by a set of rewards that are essential to behavior modification and acceptance of treatment."); *see also* Jeffrey Selbin & Mark Del Monte, *A Waiting Room of Their Own: The Family Care Network as a Model for Providing Gender-Specific Legal Services to Women with HIV*, 5 DUKE J. GENDER L. & POL'Y 103, 127 (1998) ("[B]enefits from the multidisciplinary team approach of health care providers, social workers, peer support, and attorneys who together with the client can best address her medical, psychological, logistical and legal needs . . . .").

121 *See* Leis, *supra* note 36, at 12 ("Once the core issues are resolved, the collateral proceedings are often disposed of more effectively."); *see also* Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 ELDER L.J. 53, 74 (2004) ("Critics may object that, by lumping parens patriae civil commitment and guardianship proceedings together in an analysis of their therapeutic or antitherapeutic effects, unwarranted assumptions are made about similarities in outcomes from the two proceedings.").

wanted to take the "key principles underlying its highly successful problem-solving courts, such as Drug Treatment Courts and Integrated Domestic Violence Courts."[122]

The team approach is used in the Model Guardianship Part. The court refers to the team approach as mediation.[123] Judge Leis,[124] the presiding judge in this part, stated "mediation is a valuable tool the court uses in helping to resolve conflicts that arise in the incapacitated person's family." [125] The court, however, does not address the new role of the attorney representing the incapacitated adult in this mediation. After the adult is deemed incapacitated, the attorney representing that adult may be in the position to represent her client's interests in mediation. In the mediation, the attorney is put in a similar situation to the defense attorney in the drug court. The client is already deemed incapacitated, and as a result, representing that client's interests in mediation would seem to be difficult. Counsel for the incapacitated adult must balance the interests of the incapacitated adult, which at the time may be irrational, with the interests of the other parties and the court.

This problem is exacerbated in light of the fact that these mediation sessions are intended to help to resolve other issues surrounding the incapacitated adult.[126] The Model Guardianship Part attempts to integrate all of the issues surrounding the incapacitated adult.[127] "The following types of cases have been heard in . . . [this] court: foreclosure actions; summary eviction proceedings; civil forfeiture proceedings; felony and misdemeanor criminal proceedings, including elder abuse; matrimonial actions; various civil proceedings; and applications for orders of protection

122 N.Y. ST. UNIFIED CT. SYS., REPORT OF THE COMMISSION ON FIDUCIARY APPOINTMENTS 27 (2005), http://www.courts.state.ny.us/reports/fiduciary-2005.pdf.

123 *See* Leis, *supra* note 36, at 14 (discussing the use of mediation in the Model Guardianship Part); *see also* J.J. Macken & Gail Gregory, *Mediation of Industrial Disputes*, 18 COMP. LAB. L. & POL'Y J. 315, 316 (1997) (explaining that mediation also changes organization culture to a team approach, as opposed to an individualist approach).

124 "Justice Leis has served on the bench for 20 years, presiding over criminal law, matrimonial, family law, guardianship and general civil litigation." Laura Lane, *Justice for the Weakest*, NEW YORK LAW JOURNAL, Sept. 26, 2006; *see also* Leigh Jones, *New Leader in Suffolk*, NEW YORK LAW JOURNAL, Dec. 2, 2003 (noting Justice Leis' litigant-centered approach to judging).

125 Leis, *supra* note 36, at 13.

126 *See id.* at 14 (positing that the use of mediation in the model part has helped restore communication and harmony between family members of the incapacitated person); *see also* Mary F. Radford, *Professional Contribution: Advantages and Disadvantages of Mediation in Probate, Trust, and Guardianship Matters*, 1 PEPP. DISP. RESOL. L.J. 241, 241 (2001) (explaining that privacy is an advantage of mediation involving incapacitated persons).

127 *See* Leis, *supra* note 36, at 11 (explaining that the model court integrates all of the issues surrounding the incapacitated adult); *see also* Radford, *supra* note 126, at 247, 249 (noting the advantages of integrating cases, such as flexibility and efficiency).

in the family and district courts."[128] Counsel for the incapacitated adult must represent the client's interests in these related issues as well. Because the team approach is used in these issues, the ethical and practical conundrums will exist in these issues. For instance, counsel for the incapacitated adult would find herself in a divorce or foreclosure proceeding with the ethical dilemma of weighing her client's interests with the interests of the parties and court. At this point, the client is already deemed incapacitated and the mediation could pressure the client's attorney to disclose information detrimental to the client's stated interests. As a result, this attorney could confront the practical dilemma of losing her client's trust and confidence in these mediation proceedings.

The ethical and practical concerns that develop when combining integration and the team approach cannot be justified in a guardianship context. There is a fundamental difference between problem-solving courts such as the drug or IDV courts and a problem-solving guardianship court.[129] In other problem-solving courts, the other issues surrounding the individual or family who has the problem can be presumed to relate to the underlying problem. This assumption cannot be made in a guardianship context. For instance, the adult's incapacitation may not have necessarily led to her divorce or her foreclosure. Having these issues addressed by an attorney who is not a zealous advocate for her client results in the client not having adequate representation.[130]

IV. WHAT THE PROBLEM-SOLVING GUARDIANSHIP COURT SHOULD LOOK LIKE

Even though the ethical and practical concerns with any problem-solving court may be more apparent in a guardianship context, this does not mean that the state courts should not implement a problem-solving court for guardianship. Instead, this new problem-solving court must look different.

128 Leis, *supra* note 36, at 12.

129 *See* Meekins, *supra* note 23, at 22 (noting that equating drug courts to other problem solving courts could be dangerous); *see also* Nolan, *supra* note 27, at 1541 (2003) (describing how problem-solving courts addresses social ills "because of the 'failure of traditional non-legal dispute resolution mechanisms in society,' such as 'church, community, neighborhood, friends and family'").

130 It should also be noted here that Guardianship courts in New York apply Article 81of the Mental Hygiene and Health law, which provides two types of guardians. One guardian can be appointed for the property decisions of the incapacitated adult. This adult handles all the property and financial decisions of the incapacitated adult. Another guardian could be appointed for the personal needs of the incapacitated adult, which include medical and living situations. When appointing these guardians, the court *must* tailor the guardians' power in the least restrictive form of intervention. Allowing an attorney of an incapacitated adult to adequately represent her client on issues not relating to the incapacitation would be the least restrictive means.

This Part of the note discusses how this problem-solving guardianship court should use the integration approach of many problem-solving courts, but should leave issues not necessarily relating to the incapacitation of the adult in a traditional court setting.

A. Integration Without the Team

Integrating the issues surrounding an incapacitated adult can prove very useful. Integration, as stated above, provides convenience for the parties involved.[131] Integration can save a lot of money for the parties, the court system, and the taxpayers.[132] These benefits would be especially important in a guardianship context.

The goal of every state court system in guardianship proceedings should be to integrate the issues in a case for the convenience of the parties. Traditionally, an incapacitated adult, her family, and loved ones would have to go from court to court in order to resolve disputes surrounding the individual. With integration, the incapacitated adult can go to one courtroom and appear before one judge to have her issues resolved. In guardianship proceedings, the allegedly incapacitated individual often has feelings of vulnerability, fear, and hopelessness.[133] Going to court and seeing a judge that is familiar with the issues should relieve some of those concerns.

Being that the Baby-Boom generation will flood the probate courts in the next couple of decades,[134] it would be prudent for the state courts to start

131 *See supra* note 32 and accompanying text (revealing the convenience to the parties of integrating all of the issues into one proceeding); *see also* Susan N. Gary, *Mediation and the Elderly: Using Mediation to Resolve Probate Disputes Over Guardianship and Inheritance,* 32 WAKE FOREST L. REV. 397, 431 (1997) (examining the many benefits of integration, including reducing the high cost of litigation for both litigants and courts).

132 *See* N.Y. ST. UNIFIED CT. SYS., THE BUDGETARY IMPACT OF TRIAL COURT RESTRUCTURING 14 (2002), http://www.courts.state.ny.us/reports/trialcourtrestructuring /ctmerger2802.pdf (finding that it is more efficient and less expensive to try related cases before a single judge in one court, than before different judges in a number of different courts); *see also* Kriss, *supra* note 32, at B2 (reporting that IDV courts reduce costs for parties, taxpayers and the court system itself through the "elimination of duplication and inefficiency").

133 *See* Leis, supra note 36, at 12 ("In the pilot court, empathy is the defining force. Envisioning oneself in the position of an alleged incapacitated person and attempting to understand his or her feelings of vulnerability, fear and hopelessness allows the judge to determine core issues and facilitates restorative jurisprudence."); *see also* Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act,* 81 U. COLO. L. REV. 157, 168 (2010) (acknowledging that guardianship involves the potential invasion of individual freedoms, personal liberties, and human dignities of the subject of such proceedings).

134 *See* Randall T. Shepard, *Four Big, Dumb Trends Affecting State Courts,* 43 IND. L. REV. 533, 536 (2010) (suggesting that with the aging population, courtrooms, like nursing homes, will be "reeling under the pressure of certain expanding dockets"); *see also* DUIZEND, *supra* note 2, at 1 (finding that

integrating cases involving guardianship of adults to deal with the large caseload. As seen with the IDV courts in New York, integrated courts substantially reduce the number of cases handled in the court system.[135] Integration is also a more cost-efficient method to resolve these issues.[136] Traditionally, guardianship cases took place in the probate court. The probate court is notorious for being slow-paced and expensive in comparison to other legal proceedings.[137] Therefore, since integration will reduce court costs in one of the most expensive areas of any state court system, states would save a substantial amount of money by integrating the issues in a guardianship context.

This integration should not incorporate a team approach. As seen, the team approach could leave the individual with inadequate representation of counsel. Therefore, when other issues are integrated which do not necessarily result from the adult's incapacitation, these issues will be litigated by an attorney in her traditional role as a zealous advocate for her client. This is not to say that treatment should not be used. Problem-solving courts typically use a treatment regimen that helps to fix the underlying problem. However, this treatment should be used to help the individual with her incapacitation, not because this problem caused her to be in court. This way, the incapacitated adult will get help with her incapacitation, and at the same time have adequate representation of counsel.

CONCLUSION

The Baby Boom generation will force the state court systems into reform

the increase in the number and proportion of older Americans in the coming years will increase the caseload in most areas of traditional probate-court jurisdiction); *and supra* text accompanying note 19 (explaining that as the Baby Boom generation ages, it will have a substantial impact on the probate courts).

135 *See* Kriss, *supra* note 32 (describing how IDV courts can consolidate 220 or 330 cases splintered among many courts into 110 cases held before one judge); *see also* Judith S. Kaye, *Refinement or Reinvention, The State of Reform in New York: The Courts*, 69 ALB. L. REV. 831, 838-39 (2006) (proposing IDV as a means to achieve the most efficient flow of cases through the New York court system).

136 *See* Kriss, *supra* note 32 (discussing the economic advantages of IDV courts to the parties, taxpayers and the court system itself); *see also* Leis, *supra* note 36, at 12 (listing cost reduction among several benefits of integration, including comprehensive decision making and the prevention of contradictory determinations of factual issues).

137 *See* Justice Denise Johnson et al., *Working Group on the Restructuring of, and Access to, the Judiciary: Report to the Vermont Commission on Judicial Operation*, 35 VT. B.J. & L. DIG. 38, 40–41 (2009) (graphing the costs of the probate courts as compared to the rest of the courts in Vermont); *see also* Liz Pulliam Weston, *Saving for the Future Is Good, but There's Such a Thing as Overdoing It*, LOS ANGELES TIMES, Jan. 30, 2000, at C3 (remarking on the lengthy and costly probate processes in New York and California, and the resulting trend to avoid them through living trusts).

to deal with the overwhelming caseload that will run through the probate court. Before the Baby Boom generation gets to that stage, is would be highly prudent for the state courts to start contemplating what the structure of the court should look like.

Due to the success of problem-solving courts, it would make sense for the state court systems to develop a court system that emulates these courts to some degree. This should be done with caution however, because cases of adult guardianship are fundamentally different than those that reach the traditional problem-solving courts. The difference exacerbates a problem already discovered in those courts, mainly, the new role of the attorney representing the individual who has the "problem."

This new court system should be implemented to accomplish two goals that the traditional problem-solving court confronts. The first is to reduce and manage caseloads in the state court system. The second is to provide a convenient forum for the parties litigating issues involving an incapacitated adult. Both of these goals can be accomplished by creating a system that integrates all of the issues surrounding an incapacitated adult. This integration of issues should be approached with caution so as to not lose the adversarial nature, like that of its sister problem-solving courts. That way, the court will still promote zealous representation to adults who are deemed incapacitated.