Unguarded: He asked for a lawyer. The person charged with protecting his rights said she thought he didn't need one.

BY BRIDGET BALCH Richmond Times-Dispatch

Guardianship, the legal process of taking away an adult's rights to make life decisions, is intended to protect vulnerable people from neglect and abuse.

In Richmond, VCU Health System and other health care providers have used the process to remove poor patients from hospital beds, sometimes against the wishes of family members, with the help of a local law firm.

Days after what would have been Richard Richardson's 40th birthday, his three sisters stood in silence on a bridge in Bryan Park, where they'd played as kids, staring into the pond where they'd just scattered his ashes.

Around them, people were out enjoying the first cool day of October — playing Frisbee, biking and jogging — the kinds of things Richard hadn't been able to do in his final years.

Jennifer, the middle sister, remembered a time years ago when she and Richard had been here with their kids. She laughed thinking about how Richard had joked about throwing his nephew into the pond if he didn't behave.

That was before the accident, back when Richard was a fit, young father who rode his bike everywhere and practiced mixed martial arts.

But then, on Thanksgiving 2014, a fall from a second-floor balcony paralyzed him from the shoulders down.

Afterward, he had been shuffled from nursing home to hospital to nursing home. His serious medical needs and the fact that he was on Medicaid made it hard to find a decent place. He'd been most stable in the year he spent living with Jennifer, but after he started having seizures, he ended up back in the hospital.

"It was a terrible life for a person to have to live," said Richelle Richardson-Hayes, Richard's oldest sister.

He spent the last year of his life in a nursing home where, his sisters say, he often went hungry and was rarely moved out of his bed. They say the staff was rude to the family when they visited and spoke up for their brother.

It was a nursing home that he was sent to against his will.

While Virginia guardianship law lays out certain protections intended to safeguard individual rights, a yearlong Richmond Times-Dispatch investigation has found that, in Richmond Circuit Court, these safeguards regularly falter as scores of people lose their rights to make decisions about their medical care, where they live and how their money is spent. In more than 150 cases over the past six years, those rights were given to an attorney with ThompsonMcMullan law firm, which represented 95% of health care providers asking the court to take away the patient's rights, often without the patient being present at the hearing nor having a defense attorney to represent them in the brief court proceedings.

Glossary of terms

A **guardian** is someone appointed by the court to be responsible for the personal affairs of an incapacitated person, including making decisions about the person's support, care, health, safety, education, medical treatment and residence.

A **guardian ad litem** in Virginia is an attorney appointed by a judge to investigate a case for the court. In guardianship cases, the guardian ad litem is charged with providing independent recommendations to the court about an individual's best interests, but the guardian ad litem is not a lawyer working for the person being evaluated for guardianship. A guardian ad litem typically speaks to the person being evaluated as well as doctors and family members before writing a report for a judge.

A **conservator** is someone appointed by the court who is responsible for managing the estate and finances of an incapacitated person. The same person can serve as guardian and conservator.

An **incapacitated person** is an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to surroundings and lacks the capacity to meet the essential requirements for health, care, safety or therapeutic needs without a guardian or to manage property or financial affairs or provide for support without a conservator. A finding that the individual displays poor judgment is not considered sufficient evidence that the individual is incapacitated, according to state law.

A **limited guardian** is someone appointed by the court whose only responsibilities are specified in the court order, rather than taking away all of the incapacitated person's rights. In some court orders, the limited guardian gains control of medical and residential decisions, but the person may retain the right to vote.

A **public guardian** is a person who works as a professional guardian for an agency that is paid by the state of Virginia. Public guardianship services are reserved for people who are indigent and friendless, meaning that they cannot afford to pay a guardian and they have no appropriate family member or friend to serve as guardian. Virginia law limits public guardians to 20 wards, requires public guardians to visit each person under guardianship at least monthly, requires an annual report be filed with the local department of social services, and holds public guardians to high standards for person-centered planning and encouraging wards to direct their own lives.

A **private guardian** is any person who is not compensated by the state for guardianship services. This can include a family member or friend as well as private professional guardians. Private guardians are required to submit an annual report to the local department of social services, but are not limited to a certain number of wards nor are they required to visit the ward a specific number of times.

Sources: Code of Virginia and the Supreme Court of Virginia

An analysis of more than 250 guardianship cases filed from January 2013 through June 2019 by health care providers in Richmond found that the city court exercises little oversight over private, professional guardians, both before and after the guardian is appointed.

In all guardianship proceedings, state law requires there be a guardian ad litem. The guardian ad litem is charged with visiting the person, informing him of the date and time of the hearing and letting him know that the hearing could take away some of his most basic rights. The person must be told he has a right to court-appointed counsel, to request a jury trial and to be present at the hearing. The guardian ad litem may speak with any family members or friends before the proceedings.

The guardian ad litem then puts together a report giving a recommendation to the judge. This report holds significant weight with the judge, particularly in cases where neither the person whose capacity is in question nor family or friends attend the hearing.

Many hearings last no longer than 15 minutes, according to court records and observation of six hearings by The Times-Dispatch.

One case file included an email exchange between the secretary for the ThompsonMcMullan attorney and the judge's assistant regarding scheduling for the hearing. The attorney's secretary asked if they could switch the hearing to a different day to accommodate the guardian ad litem's schedule.

"That's fine," the judge's assistant wrote. "But there is a jury trial set at 10 a.m. so he has to be here promptly at 9 a.m. and it can't take more than 15 minutes (:"

ThompsonMcMullan always files a request to waive the legal requirement that the petitioner, in this case the health care provider, must mail a copy of the hearing notice and the petition to any known family of the allegedly incapacitated person at least seven days before the scheduled hearing, according to Majette, an attorney with the firm. This means that if a hearing date opens up within seven days, the hearing can be held within a week of mailing the notices.

The reason, he said, is that it's often difficult to schedule a hearing and the hospital has usually already been searching for and attempting to contact any family members before the petition is filed.

"Where we are at the point in this law firm of getting the call [from a hospital to file for guardianship] is at the end of the beginning," Majette said. "And by that, I mean we have had what I think — in any of the clients that I serve — [is] a superb effort to try every other alternative than this."

Still, court records show that some family members, like the Richardsons, say they didn't receive notice before the hearing impacting their loved one.

"[Richelle] said that she did not get notice and that's bad," Majette said. "I know we send it out every time ... I'm sorry she didn't [but] I don't apologize for the post office. We did what the law requires us to do."

But Sally Balch Hurme, a Virginia-based elder law attorney and author who has served on the board of directors for the National Guardianship Association and advised on the drafting of the Uniform Law Commission's model guardianship law, said that regularly waiving the seven-day notice requirement was an inappropriate use of the exception to the law. (Hurme is not related to the reporter.)

"The waiver is only if there is a case of an emergency," Hurme said. "In this case, the emergency is only the hospital's emergency because they are no longer getting paid by this patient and they want to discharge them. The person is well-cared for, the emergency is only of the hospital's own making, therefore, the waiver of the seven-day notice is inappropriate and I would say in violation of the statute and the intent of the statute."

One morning in March, Majette and Cannon stood before Richmond Circuit Judge W. Reilly Marchant for a double-header of guardianship hearings.

The first case was to decide whether Majette, representing VCU Health System, would be appointed the guardian of a 38-year-old man who'd been admitted to the hospital after a motorcycle accident.

"We are trying our best to get him well enough to get discharged to a rehab hospital," Majette said.

Cannon, the guardian ad litem, told the judge that the 38-year-old had "a habit of alcohol and substance abuse," and that he might have been attempting to commit suicide when his motorcycle crashed. She said he was capable of making some decisions, but not the decision to go to a rehab facility.

"He doesn't have any family?" the judge asked.

"They're alienated," Cannon said. She recommended that Majette be appointed guardian so the man could be admitted to a physical rehab facility.

According to Cannon's written report, the man had asked if his friend, who was present at the hearing, could be granted his power of attorney instead of having a guardian appointed for him, but Cannon wrote that a power of attorney "might not be sufficient to help with the admission to a rehabilitative facility nor to the expedited goal of obtaining Medicaid benefits."

Virginia law says the court must consider less restrictive options to guardianship, including an advance directive and durable power of attorney, before resorting to guardianship. It also says that poor judgement alone is not sufficient reason to declare a person incapacitated.

Majette emphasized that the court order would give him complete discretion to resign if he saw fit. "I can file a Medicaid application, reimburse my client [VCU] to some degree and make him a more agreeable patient at the next hospital," Majette said.

Majette then called the man on FaceTime to speak with the judge.

"Do you understand what we're doing today?" the judge said, incorrectly telling the man that Cannon had been appointed his lawyer. "She's talked to me about your tragic accident. … I think the proposal is we appoint Mr. Majette to be your temporary guardian and get you the medical care you need."

"I am agreeable to it," the man said.

"Mr. Majette does this frequently," the judge said. "They're very good lawyers and good people."

The judge signed the order. Reports filed with the court months later would show that, after being discharged from the hospital, the man would check into an Extended Stay America hotel and refuse Majette's services.

The next guardianship hearing began immediately.

"This is an ordinary — if there is such a thing — guardianship," Majette said, describing the patient, a 67-year-old man with substance abuse disorder who had been brought in to the hospital with frostbite and gangrene.

Majette said his plan was to have the man admitted to a rehab facility and then to a nursing home. He would also retain his right to suspend his duties as guardian. "I can't keep up with a fellow like that after he leaves the facility," Majette said.

"This was a too-easy case," Cannon told the judge. "He was not of this world. … Could not tell me where he was from."

The judge said he always wondered what happened to the homeless people he often saw on the street. Cannon said the man had left his nursing home in a wheelchair to find a drink and had been begging on the street.

"Doesn't sound very encouraging," the judge said. "As long as you represent to me there's sufficient findings, that's fine."

The guardian ad litem in 85% of all guardianship cases filed by a health care provider over the past 5½ years was Cannon, despite there being more than 50 attorneys certified to serve as guardians ad litem in Richmond.

Cannon's obituary, published in The Times-Dispatch after she died in May, said that she served as guardian ad litem "for almost all of the guardianship cases for VCU Medical Center over the past 20-plus years." VCU accounted for 76% of all health care guardianship petitions filed in the Richmond area from 2013 to 2018.

How we reported this story

In a yearlong investigation, the Richmond Times-Dispatch requested guardianship petitions from around the state from the Supreme Court of Virginia, then identified more than 550 Richmond cases from the thousands of results from 2013 through June 2019.

Using case information available on the Richmond Circuit Court's website, we created a database to identify all guardianship petitions brought by a health care provider, including a hospital or nursing home, and to track attorneys representing the petitioner. We then spent several months at Richmond Circuit Court analyzing public documents related to the more than 250 guardianship cases filed by health care providers over the past 6½ years and created a database of details from the cases, including the time elapsed from filing the petition to the court order granting guardianship, whether family members or friends were active in the proceedings, how many annual guardianship reports were filed and how many visits were recorded in the reports, what fees were awarded, where the person was placed after guardianship was granted, how long the person was in the hospital before the petition was filed, and who was appointed guardian.

The Times-Dispatch also reviewed 11 cases filed by health care providers in Henrico County Circuit Court and 10 in Norfolk Circuit Court from the same time period to understand how cases play out with different petitioners and in different courts. We attended six guardianship hearings in Richmond, as well as the state's guardianship advisory board meeting.

We interviewed nearly three dozen people, including national guardianship experts, public guardians, attorneys, a court official, hospital administrators and family members of people put under guardianship, and researched guardianship law, history, practices and reform efforts nationally and in Virginia. Sources included the Code of Virginia, the National Guardianship Association Standards of Practice, Virginia's public guardianship program biennial report to the state General Assembly, the U.S. Senate Special Committee on Aging's 2018 report on guardianship, law review articles on guardianship procedures and practices, and various news reports on guardianship from around the country.

The Times-Dispatch spent three hours interviewing attorneys at ThompsonMcMullan, and an hour interviewing officials with VCU Health System. We also spent hours with family members of people who had been under ThompsonMcMullan's guardianship. We reviewed email exchanges and medical records released by family members, visited the family members at their homes, and listened to their stories.

Court records show Cannon was paid at a rate of $100 per hour for her work on VCU Health System cases. In those cases, the health system paid her bill. On other cases, she was paid by the commonwealth of Virginia at a rate of $55 an hour for out-of-court time and $75 an hour for in-court time, rates set by the state Supreme Court.

State law requires the petitioner, in these cases VCU Health System, to pay the guardian ad litem fees except in indigent cases, when the fee can be paid through the state Supreme Court. However, although almost all of the VCU Health System cases were indigent cases, VCU still footed the bill.

Pam Lepley, vice president of university relations for VCU, said that the health system followed the law and was saving the state money by paying Cannon's attorney fees.

"I would say ... that $100 an hour for a lawyer is very reasonable, especially a good lawyer," Lepley said.

VCU Health's chief medical officer, Dr. Ron Clark, said that he had never met Cannon.

"I assume she was someone that was known and respected by the court that they turn to on a frequent basis," he said.

VCU Health System officials emphasized that it pursues guardianship for its patients rarely and only as a last resort and that, once the petition is filed, it is out of the hospital's hands.

"The court makes the appointment," Lepley said. "We don't."

Cannon frequently worked closely with the ThompsonMcMullan attorneys who represented not only VCU Health System, but Chippenham Johnston-Willis Medical Center and a number of nursing homes in the Richmond area. In most cases, she recommended that the health care provider's attorney be appointed guardian, even in cases where she thought a family member or friend could also be an appropriate guardian, according to court records.

"The guardian ad litem is supposed to be an independent person and should not be compensated by the petitioner," said Hurme, the Virginia lawyer who served on the board of the National Guardianship Association. "If the guardian ad litem is being paid by the hospital to grease the skids — to make the appointment of the guardianship go without a hitch — obviously the guardian ad litem is not going to recommend a need for counsel to represent the interests of the individual. You cannot serve two masters."

Charles Ellis IV had never heard of guardianship before he got the notice in the mail that ManorCare Health Services-Imperial had petitioned Richmond Circuit Court to have a guardian appointed for his father, Charles Ellis III.

In the weeks before the hearing notice, Ellis had received a couple of threatening letters from his father's nursing home because the retirement income that he'd been collecting from his 30-year career as a city of Richmond firefighter had finally run dry. The letters said that if ManorCare didn't receive the $37,569.72 that was owed them soon, they would evict him.

Ellis reached out to an ombudsman to figure out what to do. He was his father's power of attorney and the agent of his advance medical directive. He'd tried applying for Medicaid twice, but both times was rejected because his father owned a home. It didn't matter that the home was in serious disrepair and had gone into foreclosure.

Before Ellis could come up with a plan, the nursing home had hired Paul Izzo, an attorney working for ThompsonMcMullan, to petition the court to become the older Ellis' guardian and conservator. Cannon was appointed the guardian ad litem. Ellis asked Cannon to allow him to continue to make his father's medical decisions. The advance directive that the older Ellis had signed said, "I intend to avoid the necessity of guardianship or conservatorship proceedings by the creation of" the life-planning document, according to a copy of the document filed in court records.

Still, Cannon recommended that the power of attorney be suspended until Medicaid benefits could be obtained.

Since Ellis couldn't attend the hearing, his aunt attended to speak up on the family's behalf. Ellis said she cried and pleaded with the judge to allow the family to retain the medical power of attorney.

But Ellis said that the judge told her that it was going to be all or nothing. Izzo was appointed both guardian and conservator.

"That is the court serving as a debt collector," Hurme said of the Ellis case. "The use of the guardianship system to save hospitals money and to collect nursing home debts, in my view, is an abuse of the court process."

Majette said that, "No power of attorney is suspended unless there is cause shown."

A few months later, the older Ellis was taken to Bon Secours St. Mary's Hospital for pneumonia, his son said. He was in the intensive care unit for a few days before he was discharged back to the nursing home, but his son said he wasn't consulted or informed about the discharge.

Within days, the older Ellis died at the nursing home.

Ellis believes that Izzo may have been too quick to allow his father to leave the hospital. If he had had the power to make the decision, he would have wanted the doctors to continue to treat his father.

"At that point it was out of my hands. I felt kind of helpless as a son not being able to speak on his behalf," Ellis said. "I have mixed feelings on it. I feel like somewhere the system — whether that's the state or the federal government — failed my dad."

Christopher Malone, the president of ThompsonMcMullan, said a judge could look at the facts of a case, determine that the power of attorney was not acting in the best interests of the incapacitated person and choose to appoint one of their attorneys instead.

“But that’s not our job,” Malone said. “It’s the guardian ad litem [who] makes a recommendation and the court hears the evidence.”

Erica Wood, assistant director of the American Bar Association Commission on Law and Aging, has conducted national studies on public guardianship and guardianship monitoring. She said some courts and some states have implemented a guardian ad litem rotation to avoid the appearance of a conflict.

“If you just have the one guardian ad litem that’s always got the cases, it gives an appearance of a lack of an arm’s length relationship,” she said. “The idea of broadening it and opening it up — a rotation with some judicial discretion — is something to think about.”

In Florida, where every allegedly incapacitated person is appointed a defense attorney by law, there is a rotation in order to avoid the “pick my pal” scenario the courts have seen in the past, according to Ed Boyer, an elder law attorney who works guardianship cases there.

“When the same guardian ad litem pops up over and over, it looks like favoritism,” Boyer said.

The cases

In reviewing more than 250 health care provider-initiated guardianship cases in Richmond, the Richmond Times-Dispatch identified dozens of cases that raised questions about the guardianship process and results. Here are some of those cases:

CL1600048700 — 2016 — VCU Health System initiated guardianship proceedings for a 51-year-old man with heart problems and a degenerative brain disorder because when asked if he wanted to be resuscitated or have a “do not resuscitate” order, the man said he didn’t want to be shocked, but that he wanted to live. Guardian ad litem Henrietta Cannon visited him at his home and said she thought he was generally able to care for himself, but needed a guardian for medical decisions. She recommended R. Shawn Majette. A VCU evaluation said he seemed to have capacity. The man told Cannon he wanted to stay home with his girlfriend. Cannon found that acceptable, but Majette was appointed guardian only to make medical decisions when the man was in any hospital. No reports in the court file explained what happened to him after that.

CL1500193100 — 2015 — VCU Health System filed a guardianship petition for a 61-year-old woman with dementia and chronic psychosis due to a head injury who lived with her daughter before being admitted to VCU. Cannon recommended the daughter be appointed guardian, and the daughter was at the court hearing, but Majette was appointed. The woman was admitted to Envoy of Stratford Hills, which was terminated from Medicare for health violations in 2015. Majette retained guardianship of the woman until her death in 2018, but visited her only in the first year.

The attorneys at ThompsonMcMullan said Cannon was selected by the court to serve as guardian ad litem so frequently because she was trusted by the court.

“We do not in this firm, the hospital does not, the petitioner … does not appoint the guardian ad litem. The court and only the court appoints the guardian ad litem,” Majette said, while acknowledging that the court usually did so at his request. “We, practically, tell the court that we have a person that the court can use … and the courts throughout the commonwealth decide who they know, who does a good job and who they are going to appoint. We propose, the court disposes. I don’t make that decision.”

Majette also said Cannon regularly made herself available to work at an hourly rate lower than what most attorneys are paid.

“Penny Cannon did phenomenally good work,” Malone said. “I’d stack up her guardian ad litem report against any I’ve seen. … You know when you have her on the case, you’ve got a 12-15 page report. I feel really good about that if I’m representing the hospital because I know that that job has been done well.”

In one case in which Majette was appointed a man’s guardian against the wishes of the man’s aunt, the aunt later hired an attorney and filed a counter petition to have her appointed her nephew’s guardian. The petition also requested that the court appoint a guardian ad litem other than Cannon, who had been appointed for the first proceeding. “Preferably [one] who does not regularly work on cases where Mr. Majette is the proposed guardian and conservator,” the petition said.

Majette filed a response defending Cannon, saying that she was familiar to the judges and that the aunt had “presented no basis to impugn the integrity of Ms. Cannon in the exercise of her duties as guardian ad litem for [the man] or any other individual.”

The court appointed a different guardian ad litem, Robert Lesniak, who later took on most of VCU Health System’s cases for a few months after Cannon’s death and was also compensated at the rate of $100 per hour, according to court documents.

Lesniak said that Majette, who he’s known for about 25 years, asked him to fill in as guardian ad litem on his cases after Cannon died earlier this year. He said that it’s difficult to find an attorney to work for $100 an hour, let alone the $55-$75 an hour paid by the Supreme Court.

While Cannon’s reports indicate that she always fulfilled her obligation to notify the person whose capacity was in question of their rights, she almost never recommended that they exercise them. None of the cases reviewed had a jury trial and only a handful had defense attorneys. Only occasionally was the person whose capacity was in question present at the hearing, and even then, usually by teleconference.

In a 2015 case filed by Bon Secours Health System with the Henrico County Circuit Court with a different guardian ad litem, the hearing was held in the patient’s hospital room at the guardian ad litem’s request.

Once a guardian is appointed, Richmond Circuit Court does little to ensure that the guardian is fulfilling the responsibility to protect a person’s best interests.

“For the most part, the clerk’s office only receives filings and compiles the record, prepares bonds and gives oaths,” said Edward Jewett, clerk of the Richmond courts, in an email. “We do not have any decision making powers in these cases. In the clerk’s office, we do not do any monitoring of guardianship cases.”

The presiding judge of the Richmond City Court, Joi Jeter-Taylor, declined to be interviewed through Jewett.

It’s also a long and difficult process to have a person’s rights restored, according to Majette. “It takes a lot of time and it takes a lot of energy and it takes, sometimes ... a lot of money,” he said.

The disAbility Law Center of Virginia, which advocates for the rights of people with disabilities, takes on about a dozen cases to help people have their rights restored each year, but Colleen Miller, the center’s executive director, said there could be hundreds of people under a guardianship unnecessarily.

“We’re really limited in how many cases we can take on,” Miller said.

And the Virginia Indigent Defense Commission, which was created by state law to oversee public defenders and, according to its website, "to protect the Constitutional right to counsel for people who cannot afford to hire their own lawyer," is not involved in guardianship cases.

The law requires that all private guardians submit an annual report to the local Department of Social Services and that the report be filed with the court that granted the guardianship.

But annual reports were missing from court files in at least 50 court cases reviewed by The Times Dispatch. Most of the reports that were filed contained little detail and often indicated that the private guardians had rarely or never visited their wards during the year.

The Richmond Department of Social Services has never identified an abusive or neglectful guardian based on reviewing annual guardianship reports and has not recommended to the court that a guardian be removed since at least January 2013, according to Shunda Giles, the department director.

Wood, of the American Bar Association, said Virginia's guardianship laws are strong on paper, but that it's the only state in the nation that does not require the guardianship reports be monitored directly by the court. Instead, they go to the local department of social services.

Across the state, social services workers have seen a 33% increase from 2014 to 2018 in the number of guardianship reports they are tasked with monitoring, according to the state Adult Protective Services 2018 annual report.

At the same time the demand for attention and services has increased, funding has stayed almost static, said Paige McCleary, APS director.

The social workers are also limited in how much oversight they can provide based on the annual guardianship reports.

"The difficulty is these are self-reports by the guardian," McCleary said, adding that many times, the only way the worker can tell if there's abuse or neglect of a person under guardianship is if a complaint is made to APS.

Gail Nardi, who was previously director of APS for nearly a decade, said that the lack of funding meant that many case workers have to juggle high caseloads and few have the time to closely monitor guardianship reports.

"I — and anyone else who cares about the well-being of elders and adults with disabilities in our communities — would hope that those reports get the scrutiny that they deserve," Nardi said. "It is not my experience that that is the case."

Pamela Teaster, a professor of gerontology at Virginia Tech and a national expert on guardianship, said the safeguards in Virginia law are lacking and that relationships within the court are too friendly to ensure due process.

It's a problem that faces almost every state in the nation.

"Unfortunately and too frequently, the fate of people under guardianship ... is poorly monitored in sufficient, meaningful, and diligent ways," Teaster wrote in her testimony before the U.S. Senate Special Committee on Aging in April 2018. "This inattention threatens to unperson them, leaving them open to exploitation, abuse,

and neglect. The awesome power over highly vulnerable adults wielded by the guardianship system … demands adherence to the accountability protections already in place, but that are not well implemented ..."

Although an estimated 1.5 million people in the U.S. were under guardianship in 2018 — a number likely to grow as the population ages — no state maintains a list of those people, making it "impossible to have an appropriate level of accountability for each person who has a guardian," according to Teaster.

The Senate Special Committee on Aging published a report in November 2018 outlining how states could strengthen their guardianship systems.

"Aside from incarceration or civil commitment, potentially no other court process infringes upon an individual's personal liberties more significantly than the appointment of a guardian," the report says. "In order to protect individuals subject to guardianship from abuse, exploitation, and neglect, governments and courts must be vigilant in their enforcement of laws and procedures that provide oversight of these relationships. While all states have laws designed to protect due process rights and to ensure that guardians are performing their fiduciary duties, these laws are not always consistently enforced, and more must be done to protect individuals subject to guardianship."

The report found that there was a lack of national and state data on guardianship, making it particularly difficult to identify trends and make policies to address problems.

Still, some states are trying to improve their oversight of guardianship cases.

Nevada enacted a wave of reforms in 2017 — including requiring that the allegedly incapacitated person have a defense attorney — after an article in the New Yorker exposed one professional guardian in the state who had used a court order to seize guardianship of an elderly couple and control of their assets without advance notice to them or their adult daughter, according to the Senate report.

The state now has a permanent guardianship commission that investigates problematic guardianship cases. Last year, the commission investigated 165 guardianship cases and identified $2 million in estates that were at risk of loss due to mishandling or exploitation, according to Kate McCloskey, Nevada's guardianship compliance manager.

In 2016, Texas established the Guardianship Compliance Project, a special office dedicated to auditing guardianship cases to determine the effectiveness of existing safeguards. The auditors found that 41% of cases were out of compliance with state law, including missing required annual reports and financial accountings.

Minnesota tracks all guardianship transactions. Texas passed a law in 2017 requiring all guardians to be registered in a central database. Pennsylvania is working to launch a statewide guardianship tracking system and Indiana has a 60-county guardianship registry.

"The problem is not with the state of the law as written but as practiced," wrote Patricia M. Cavey, a Wisconsin-based elder law attorney, in a 2000 article for the Marquette Elder's Advisor Law Review. "I have had the opportunity to work as a social worker and lawyer in a state with very progressive mental health laws, yet for almost two decades, I have shared many experiences with attorneys and advocates in states with much less 'progressive' laws. Over the last 10 years, many states have modernized their guardianship and adult protective service statutes. Few states fail to provide the theoretical right to either a lawyer for the defendant or a guardian ad litem. However, the benefits of good model statutes or case law protections are not realized for defendants unless the participants in the process know, follow, and enforce the law."

In many places, like Richmond, whether a person is truly protected lies largely in the hands of the court system — a system that the attorneys at ThompsonMcMullan know well.

“I think I have the confidence of most courts throughout the commonwealth,” Majette said. “I hope I do.”

Richelle Richardson-Hayes of Richmond holds the funeral program of her late brother, Richard Richardson, who passed away on Feb. 18, 2019. DANIEL SANGJIB MIN/RTD

Once Richard Richardson’s family found out that VCU Health System and the court had bypassed them to get Richard discharged from the hospital, they were furious. His sister Richelle contacted Cannon and asked her how she could get guardianship of her brother.

A second hearing was scheduled, and Cannon visited Richard again to decide what would be best for him.

This time Richard asked to have an attorney appointed for him, but Cannon said in her report that, because his sister was planning to attend the hearing, she didn’t think that was necessary.

“When you think about the gravity of having your rights taken away from you, I would think you’d need some legal representation,” Richelle said. She said she didn’t know that her brother had told Cannon that he wanted an attorney until months after Richard’s death because she wasn’t provided a copy of the report before or at the hearing.

Richard also told Cannon he’d like to be present for the hearing, but Cannon wrote in her report that transporting him to the courthouse “cannot be easily done” and that including him by telephone conference also wasn’t possible “due to the present lack of a telephone adaptable for that purpose.”

Cannon spoke with Richelle and wrote that she believed that Richelle basically had her brother’s best interests at heart, but didn’t think that her plan to eventually have her brother brought to live with her mother, Jackie, and

sister, Jennifer, was advisable. She recommended that, if the judge should decide to appoint Richelle guardian, the court order include a mandate that Richard remain in a nursing home unless Richelle could present the court with a "suitable" discharge plan.

When the court order was signed, Richelle was just relieved to be able to make decisions for her brother again. She wasn't a lawyer. She'd never been through guardianship proceedings before. In spite of how she felt she'd been treated by the hospital staff, she trusted that a health system like VCU would be fair, and that the judge would protect her brother's rights.

She didn't realize that the court order she'd signed said that Majette could override her as guardian at VCU Health System's request, or that she wouldn't be allowed to make any medical decisions for Richard in disagreement with his attending physician at the nursing home where Richard would spend his final year.

Advocates in Virginia and across the country have called for stronger protections for people brought to court for guardianship proceedings.

"Guardianship is the most restrictive option that we have for assisting somebody with a disability to make decisions," said Miller, from the disAbility Law Center of Virginia. "There are many, many other options available that don't have to take away their [rights]. … We really believe that guardianship should be a last resort in every situation and we also think that that is what the law requires."

Miller said that supportive decision making — allowing a person to retain their rights but putting resources in place to help him make those decisions — should be used more.

David Hutt, an attorney with the National Disability Rights Network, said that national reform efforts are placing a greater emphasis on the guardian seeking out the interests and wants of the person under guardianship. This requires frequent interactions between the guardian and the person.

He said that courts could do more to make sure that people receive due process before they have any rights taken away, including ensuring there is advance notice to the appropriate people, that there is a fair hearing, that the judge sees the person, and that less-restrictive alternatives are seriously explored.

"Courts are too quick to order guardians," Hutt said.

Wood said that the American Bar Association approved a new model law on guardianship reform to use as an example for state legislatures two years ago, but only two states — Maine and Washington — have adopted it.

“There’s a very strong emphasis on less restrictive options,” Wood said of the model law. “The judge cannot find that an individual is incapacitated and order a guardian without fully examining less restrictive options.”

Miller said that the disAbility Law Center of Virginia supports efforts to better educate judges in the state about the limits of guardianship and the alternatives that exist.

In 2016, the Supreme Court of Virginia launched its Working Interdisciplinary Networks of Guardianship Stakeholders, or WINGS, a group that brings together representatives of the courts and community to work on improving guardianship practices and providing less restrictive decision-making options. The group has worked on improving state-level data collection on guardianships, creating a tutorial, FAQ document and pamphlet on the guardianship process to be given to people wishing to be appointed a person’s guardian, and advocating for a change in the law enacted this year that now allows the court to issue a summons to a guardian if the annual report is not filed on time.

But according to Cavey, the Wisconsin elder law attorney, the only chance of truly protecting the rights of the vulnerable is to abandon the assumption that all parties in guardianship proceedings are looking out for the incapacitated person’s best interests and to create an adversarial system with a strong emphasis on defense, much like in criminal court, according to her article, “Realizing the Right to Counsel in Guardianship: Dispelling Guardianship Myths.”

“The only hope for a constitutionally sound guardianship system is to ensure that those with the most at stake, the guardianship defendants, are able to access real advocates,” Cavey wrote. “For those of us who will age and be subject to this system, we hope that our lawmakers understand the conflicts and self-interest of those who advocate the [disassembling] of the adversary system. Since we all age, it is in the self-interest of practitioners and policy makers in the field to develop systems in which advocacy is fostered. Very good words on paper are just not enough. There is too much at stake to hope for self-activating justice because the ‘help’ we get isn’t always the ‘help’ we need or want.”

Richard Richardson's family visited him on Father's Day in 2017.

Richard Richardson wasted away in his final months at Petersburg Healthcare Center.

He'd complain to his sisters that he wasn't being turned to prevent bed sores, that he wouldn't be fed for hours and that his roommate would crank up the heat and stifle him.

The staff wouldn't allow his wheelchair in the building, so he was often left in his bed, according to his sisters. Even when he seemed to be near death, the nursing staff would insist that only two people could visit him at a time, they said.

Fred Stratmann, a spokesperson for Petersburg Healthcare Center, said he couldn't speak about a specific case because of patient confidentiality, but said that the center encourages its administrators and staff to be sensitive to the needs of the residents.

Richard would go back and forth about whether he wanted to start hospice.

Before his accident, he didn't believe in God. After he became paralyzed, he became a Christian for a while, but his faith waned again with the way he was treated by the hospitals and nursing homes.

He told Richelle he didn't really know what happened after death, but he thought anything had to be better than what he was going through.

But as he and his family discussed the possibility of stopping his life-sustaining treatment toward the end of 2018, he said he wasn't ready. He wanted to wait to see if his favorite football team, the Los Angeles Chargers, made it to the playoffs.

He held on to see them win one playoff game before losing to the New England Patriots in January.

Later that month, his condition worsened. The nursing home sent him to Southside Regional Medical Center in Petersburg. In the beginning of February, Richard was nonresponsive, but he started to come back within a few days, Richelle said.

In his weeks at Southside Regional, Richelle felt like the hospital staff continually tried to exclude her from conversations about her brother's care. One time, a staff member said they'd already called Majette, who was listed on Richard's medical records as his next of kin, about treatment options. Richelle had been Richard's guardian for a year.

"How are y'all calling Shawn Majette?" Richelle asked. As far as she was concerned, Majette had been removed from speaking for Richard at the court hearing the year before when she was made his successor guardian.

Majette said that he never acted as Richard's guardian after Richelle took over. A spokesman for Southside Regional Medical Center said that lawyers at Majette's firm have been appointed guardians of patients after the medical center has petitioned for guardianship on occasion, but he had "found no facts that support the narrative" that Richelle described.

Richelle sent the hospital a copy of her court order, but she still felt like her right to speak for her brother was not respected.

Richard's family decided to have him transferred to Retreat Doctors' Hospital in Richmond to be placed on hospice care so his family would be nearby to spend his final days with him. But before Richelle could complete the arrangements, the medical staff at Southside Regional put Richard on comfort care — ceasing all efforts to keep him alive — without her permission, she said.

When a doctor realized two days later that the family hadn't consented, he ordered the staff to restart Richard's regular medical care, Richelle said. The same day, a hospital staff member called Richelle and told her that they would be transferring Richard to Retreat Doctors' Hospital.

Richard's mother, three sisters, sons, nieces and nephews had planned to meet him at the hospital that night, but they'd never get the chance to say goodbye.

He died on the way.

Ashes of Richard Richardson are scattered at Bryan Park on October 5, 2019.