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**Study on the Tennessee Public Guardianship for the
Elderly Program**

Final Report

Presented to

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Lieutenant Governor
Speaker of the Senate

and

Representative Beth Harwell
Speaker of the House of Representatives

Dedication

Many thanks go out to the numerous individuals who helped to craft and shape the development of this report. Thank you to all of those participants in the community forums and working group who gave voice to issues, concerns, and proposals for the improvement of this program. It is hoped that the implementation of the recommendations in this report will result in a Public Guardianship for the Elderly Program that is more accessible to citizens in Tennessee and better able to meet the ever-increasing demands for public guardianship services. Specifically, the following individuals deserve special recognition for making this Study possible:

Governor Bill Haslam and the Tennessee General Assembly

Senator Rusty Crowe

Senator Mark Norris

Representative Cameron Sexton

Representative Dale Carr

Representative Patsy Hazlewood

Representative Mark White

Representative G.A. Hardaway

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Executive Summary

Research indicates that there are a number of factors that contribute to the steady increase in the percentage of the population over the age of sixty (60). Unfortunately, due to a myriad of reasons, some individuals age sixty (60) and over are unable to make decisions regarding their health, safety and resources due to mental or physical impairments. Regrettably, these individuals sometimes do not have a trustworthy person to assist them in making important decisions. As a result, some of these individuals become the target of fraud, abuse, neglect, and undue influence.

Since 1986, the Tennessee Public Guardianship for the Elderly program has ensured the health and welfare of some of Tennessee's most vulnerable residents by serving as the court-appointed guardian for individuals age sixty (60) and over who are unable to make decisions and who have no one else ready, willing, or able to assist.

The need for the Tennessee Public Guardianship for the Elderly Program is evident. In state fiscal year 2016, The Annual Statistical Report of the Tennessee Judiciary, produced by the Tennessee Administrative Office of the Courts, noted that 3,259 conservatorship and guardianship cases were filed in chancery, probate, and circuit courts in counties across Tennessee. While this data includes guardianship and conservatorship cases filed for all ages, this data reflects a steady growth in the number of conservatorship and guardianship cases filed over the last several years. It should be noted that a total of 8,474 guardianship and conservatorship cases have been filed in courts all across Tennessee over the last three state fiscal years.

Public Chapter 427 was sponsored by Tennessee Senators Rusty Crowe and Mark Norris as well as House of Representatives members Cameron Sexton, Dale Carr, Patsy Hazlewood, Mark White, G.A. Hardaway, Rick Staples, John Crawford and Brenda Gilmore. This piece of legislation was passed by the 110th General Assembly. Governor Bill Haslam signed the bill into law on May 18, 2017. Public Chapter 427 required the Tennessee Commission on Aging and Disability (herein referred to as "TCAD") to work with several state agencies and other stakeholders to complete a review of the current system of public guardianship in Tennessee. TCAD was instructed to examine the public guardianship for the elderly program's existing procedures and resources, accessibility to the program, current and potential future caseloads of the program, and best practices from other states with similar programs. In order to fulfill this mandate, TCAD conducted nine (9) community meetings throughout the state of Tennessee and met with stakeholders involved in guardianship.

The research, community forums, and special interest group meetings conducted pursuant to the requirements of Public Chapter 427 demonstrate that the need for guardianship services is increasing just as the population in Tennessee over the age of sixty (60) is increasing. This study provided a unique opportunity to examine the existing public guardianship system and work with stakeholders to brainstorm ideas and potential solutions to bridge the gap between the current resources of the public guardianship for the elderly program and the anticipated need for the program in the future. TCAD

strongly believes that implementation of all or part of the recommendations included in this report could ensure that those Tennesseans who are the most vulnerable have access to guardianship services needed to promote the highest quality of life.

Preface

This report was drafted and prepared by the Tennessee Commission on Aging and Disability (hereafter "TCAD"). Public Chapter 427 required TCAD to establish a working group and complete a review of the current system of public guardians in Tennessee. TCAD has worked with the Tennessee Department of Human Services, division of Adult Protective Services, the Council on Developmental Disabilities, the Administrative Office of the Courts, the Tennessee Department of Intellectual and Developmental Disabilities, the Area Agencies on Aging and Disabilities, and other stakeholders involved with guardianship as well as aging and disability services. The recommendations put forth by TCAD are based on the information compiled from review of the public guardianship system in Tennessee, discussion and suggestions from the community forums held across the state, input from special interest group meetings, input from the working group, and from research on best practices of other states with similar public guardianship programs.

Guardianship and Public Guardianship

Guardianship, also referred to as conservatorship, is a legal proceeding that, when deemed necessary by a court, removes rights from an individual, allowing a surrogate decision maker to be appointed by a court to make decisions for the individual. Pursuant to a study entitled “Wards of the State: A National Study of Public Guardianship”, authors Teaster, Woods, Laurence and Schmidt (2007) define the purpose of guardianship to “protect at-risk individuals” and provide for the individuals’ needs “while at the same time, removing fundamental rights.” (p. 196). Guardianship is generally only considered if alternatives to guardianship have proven ineffective or unavailable. Types of guardianship can include: person only (where the guardian makes healthcare and related decisions), property only (where the guardian makes financial related decisions), and person and property (where the guardian makes healthcare and financial decisions for an individual). Private or corporate guardians, family members, and public guardians can be appointed by a court as surrogate decision makers and provide guardianship services to individuals in need of such services.

Guardianship has been defined as:

A relationship created by state law in which a court gives one person (the guardian) the duty and power to make personal and/or property decisions for another (the ward or the incapacitated person). The appointment of a guardian occurs when a judge decides an individual lacks capacity to makes decisions on his or her own behalf. (Teaster, et al., 2007, p. 196)

Public guardians are an important subset of guardians generally. In general, public guardianship programs are creations of state statute and provide guardianship services to a particular population. There is some discussion around the exact definition of a public guardian. An article by Siemon, Hurme, and Sabatino (1993) entitled “Public Guardianship: What Is It and What Does it Need?”, the authors define a public guardian as:

a non-private individual or agency (including an employee of the state or county, a governmental office, quasi-governmental program, or volunteer program that receives some state or county government funding and/or oversight) lawfully invested with the power and duty to take care of people and manage their property and rights because they are considered incapable of managing their own affairs by reason of some peculiarity of status. (p. 588).

A huge difference between a private or family guardian and a public guardian is that a public guardian or public guardian program receives “most, if not all, of it’s funding from a governmental entity” (Teaster et al., 2007, p. 201). In most instances, these funds are provided through state appropriates, county funds, fees, and Medicaid or any combination of these sources of funding. (Teaster et al., 2007, p. 201).

Research indicates that the vast majority of states have a public guardianship program that operates in some form or fashion. (Siemon et al., 1993, pp. 590-594). Some of the public guardianship programs serve elderly incapacitated individuals only, while other programs serve both the elderly and younger individuals who do not have decisional capacity. (Teaster et al., 2007, p. 201). Research shows that for almost all public guardianship programs “statutes generally provide that the public guardian has the same duties and powers as any other guardian” while some state statutes set forth additional duties and responsibilities unique to public guardians. (Teaster et al., 2007, p. 201).

Regardless of exactly how the term “public guardian” is defined, there is little dispute that there are trends in society that have “escalated the need for guardianship.” (Teaster et al., 2007, p. 195). These trends include the graying of America as more and more Baby Boomers turn 65, the aging of adults with disabilities, advancements in modern medical care that allows for longer life, the rise in instances of elder abuse, and globalization and the increased movement of society that leads to family members living further and further apart. (Teaster et al., 2007, p. 195).

Survey Research on Public Guardianship Programs

The National Guardianship Association (NGA) held its annual conference on October 28 through October 30, 2017. One of the breakout sessions entitled "An Examination of the Models of the Offices of Public Guardian" concentrated on the structure of public guardianship programs in eleven (11) states. Shannon Alvey, Director for the State of Utah Office of Public Guardian conducted a survey of the state level Public Guardianship offices in California, Utah, Arizona, New Mexico, North Dakota, New England, Texas, Iowa, Tennessee, Ohio, and Delaware (Public Guardian Survey et al., 2017, p. 3-12).

The survey yielded several interesting information and statistics relative to the eleven (11) programs surveyed. The survey revealed that sixty-four (64) percent of the states studied have state affiliate organizations. All of the programs studied reported managing an array of services for clients including management of person/health care decisions, real property, client visitation, and consent of medical, educational, vocational, socialization and transportation decisions. Of note, all of the states required the public guardianship program to file an annual status report on the status of clients as well as an annual accounting detailing income and assets for each client. All of the states studied required public guardians to conduct monthly or quarterly visits of individuals under guardianship.

The public guardianship programs surveyed served different populations with ninety-two (92) percent serving the elderly population; seventy-six (76) percent targeting the intellectual and developmental disabled population and eighty-four (84) percent targeting the eighteen (18) and over population. The information surrounding the budgets for the programs was informative. Around thirty-one (31) percent of the states reported public guardianship budgets of between five-hundred thousand (\$500,000) and one (1) million dollars, while seven (7) percent of the states studied reported budgets between six (6)

million and ten (10) million dollars. Forty-five (45) percent of the states received funds through an appropriation from their states' general fund. Additionally, sixty-nine (69) percent of the states empower the public guardian programs to collect fees from clients in certain circumstances.

An examination of staffing levels revealed that thirty-three (33) percent of the states reported caseloads of between 151 and 300 individuals under guardianship. However, forty-one (41) percent of the states studied employ between one (1) and ten (10) staff members providing public guardianship services. The result was that thirty (30) percent of the states operate with caseloads of between twenty-one (21) and thirty (30) cases per staff member. Thirty-eight (38) percent of states surveyed required public guardians to be certified through the NGA.

This study provided a great deal of information about the eleven (11) states surveyed. The data seems to indicate that the eleven (11) programs have many similarities, many of the same requirements for public guardians, large caseloads, and few staff members.

Overview of four other State Public Guardianship Programs

Pursuant to the requirement of Public Chapter 427, TCAD examined the public guardianship programs in four states, Kentucky, Texas, Utah and Florida. While the programs in the four states differ in some ways from the Tennessee Public Guardianship for the Elderly Program, much can be learned from studying the best practices, requirements, and structures of the public guardianship programs of the four states.

Kentucky

Kentucky has a public guardianship program that is administered by the Division of Guardianship within the Department for Aging and Independent Living that is housed in the Kentucky Cabinet for Health and Family Services. While Kentucky law does permit the appointment of private or family conservators, if there is no one willing to care for the disabled person, the relevant court can appoint the Cabinet for Health and Family Services as the state guardian. The public guardianship program requires that applicants to the program are individuals eighteen (18) years of age or older with a cognitive impairment that prevents the individuals from making informed decisions. In addition, the public guardianship program can be appointed when no appropriate individual has applied to be the guardian for an individual with a disability. In order for the public guardianship program to be appointed, a court must declare that a client is both wholly or partially disabled, and unable to manage his or her personal affairs and/or financial resources.

Individuals in need of public guardianship services are served by ten (10) regional offices that can be found throughout the state of Kentucky. The duties of the state guardianship program can include full or limited guardianship or conservatorship. Once appointed, the public guardianship program can manage the client's existing resources, assist the client with decisions, ensure that the client receives benefits that the client qualifies for, visit the client and perform many other duties as set forth by the appointing court. In 2016, a

presentation by Jessica Wayne, Assistant Director, about the public guardianship program, presented data that shows almost 900 new guardianship appointments.

Texas

The Texas Health and Human Services Commission (HHSC) operates a Guardianship Services Program. Individuals potentially eligible to become client of the program include adults or youths aging out of conservatorship and adults who either have a disability or who are sixty five (65) years of age or older and a victim of abuse, neglect, or exploitation. In general, potential clients are referred to the program by the Texas Department of Family and Protective Services agency, the Texas Adult Protective Services agency or in some instances, a court may refer a potential client directly to the program. Once appointed, the Program can assist clients as set forth in the Court order appointing the Program as the guardian of the client.

Utah

Utah maintains the Office of the Public Guardian (OPG) within the Utah Department of Human Services. The OPG was created in 1999. When the OPG is appointed by a court, it can provide guardianship and conservatorship services for adult individuals age eighteen (18) and older who are unable to make basic life decisions for themselves due to conditions such as aging-related illness, intellectual disabilities, brain injuries and mental illness.

Utah code states that:

- (1) Individuals who have been found or are likely to be found legally incapacitated and in need of guardianship and/or conservatorship, and who have no other responsible, willing and able person to serve as their guardian, may be eligible for the services provided by Human Services, Office of Public Guardian "Office". Utah Admin. Code R549-1-4.

The OPG is the program of last resort and other options are explored prior to a request to appoint the OPG.

Florida

In Florida, the Statewide Public Guardianship Office was established in 1999, and since 2004, has been administratively housed within the Department of Elder Affairs. The office has the responsibility for both the registration of professional guardians and the appointment and oversight of public guardians. In 2013, the Statewide Public Guardianship Office provided public guardianship programs through seventeen local (17) offices throughout the state to every county in Florida. The office is instructed, via statute, to provide guardianship services to individuals who do not have adequate income or assets to afford a private guardian and who have no family or friend willing to serve.

Overview of the Tennessee Public Guardianship for Elderly Program

The Tennessee Public Guardianship for the Elderly Program (hereinafter the “Program”) is a statutorily created program that began in Tennessee in 1986. In creating the program, the Tennessee General Assembly noted that there are many Tennesseans age sixty (60) and over who are unable to make decisions related to healthcare or manage financial resources. Tenn. Code Ann. 34-7-102. For many of these individuals, the General Assembly noted that, due to the lack of resources and/or willing and responsible family members, private conservatorship is not always an option for these individuals. Tenn. Code Ann. 34-7-102. As a result, the General Assembly established a “statewide public conservatorship program to aid disabled persons who are sixty (60) years of age or older who have no family member or friend who is willing and able to serve as conservator.” Tenn. Code Ann. 34-7-102. Tennessee statute requires that the least restrictive alternative be explored for all potential clients and the Program serves as the last resort for individuals who cannot be served through less restrictive options.

Pursuant to statute, TCAD was given the administration and oversight of the Program and the ability to adopt policies to govern “the operation of district public guardians within” each of the nine development districts. Tenn. Code Ann. 34-7-103. The District Public Guardians are charged with serving as guardians for “... disabled persons who are sixty (60) years of age or older who have no family members or other person, bank or corporation willing and able to serve as conservator.” Tenn. Code Ann. 34-7-201.

A court of competent jurisdiction appoints the District Public Guardians and they are responsible to carry out the duties as outlined in the appointing court order. Tenn. Code Ann. 34-7-201. The District Public Guardians are held to the same standards as conservators and guardians as outlined in Tennessee statute. In addition to serving as guardians, District Public Guardians can accept durable powers of attorney for individuals.

The Program is funded through an appropriation from the Tennessee General Assembly to the TCAD. TCAD has contractual agreements with the nine Area Agency on Aging and Disability (hereinafter “AAAD”). To implement the Program, TCAD employs a state level coordinator.

In order to provide services throughout the state, each of the nine AAADs, at a minimum, employs one-full time staff person as that area’s District Public Guardian. The District Public Guardian in each AAAD is responsible for the day-to-day operations of that District Program. As long as the client is not eligible for SSI, the District Public Guardianship for the Elderly programs (hereinafter “District Programs”) may collect fees from clients in certain situations. Tenn. Code. Ann. 34-7-103. Each District Public Program is responsible for retaining an attorney to represent the program as the attorney of record in guardianship cases. Tenn. Code Ann. 34-7-103. In addition, the District Public Guardians provide many serves to clients including visiting all clients on a monthly basis, assisting clients with making decisions, and managing client assets.

Throughout the years, the nine District Programs have maintained, and continue to maintain, very robust caseloads. The following table sets forth the most recent caseload for each of the District Programs, the total number of staff dedicated to the Program as well as the funding for each program, through November of fiscal year 2018:

Public Guardianship Aggregate Case Load Data - Nov 2018							
AAAD	DPOA	Person	Property	Person & Property	Total # Clients	Total # PG Staff	State Public Guardianship Appropriation
ACMS	1	1	4	52	58	6	\$122,000.00
ETHRA	0	2	6	29	37	1	\$102,900.00
FTDD	0	2	0	33	36	2	\$106,100.00
GNRC	0	3	0	60	63	3	\$93,300.00
NWTDD	3	5	0	22	31	2	\$89,800.00
SCTDD	2	3	2	36	42	3	\$136,800.00
SETDD	0	3	1	53	57	2	\$115,900.00
SWTDD	5	2	1	16	23	2	\$87,500.00
UCDD	5	1	1	58	65	3	\$155,700.00
Totals	16	22	15	359	412	24	\$1,010,000.00

As the data illustrates, the majority of the District Programs maintain caseloads of more than forty (40) clients. The majority of the clients are under guardianship for both person and property. For a variety of reasons, including the complexity of the cases, variations in court appointments, and the urban/rural distinction, the caseloads vary significantly from District to District

Some District Programs include additional sources of funding outside of funding supplied by TCAD. For example, GNRC includes local funding from city and county sources to support and supplement the program. However, a constant and shared reality among all of the District Programs is that current State Appropriation has become insufficient to adequately fund the Programs. This will be particularly true in the context of the larger discussion of expanding the Program by lowering the age requirement from sixty (60) to forty (40).

The Tennessee Administrative Office of the Courts publishes an annual statistical report inclusive of information gathered from State Trial Courts; Chancery, Probate, and Circuit Courts in Tennessee (Tennessee Judiciary Report et al., 2015-2016). For fiscal year 2015-2016, there were 2,183 conservatorship/guardianship cases filed in Chancery Court while in Probate Court, there were 1,024 conservatorship/guardianship cases filed. In Circuit Court, there were 52 conservatorship/guardianship cases filed. All total, the reports indicate that 3,259 conservatorship/guardianship cases were filed during the 2015-2016 fiscal year.

Annual Reporting Tennessee Judiciary - 2000 - 2016
State Trial Court Data

Fiscal Year	Court	Number Conservatorship / Guardianship Filings
2015-2016	Chancery, Probate, Circuit	3,259
2014-2015	Chancery, Probate, Circuit	2,532
2013-2014	Chancery, Probate, Circuit	2,683

Based on historical statistical trends over the last two reporting years, the trend for conservatorship/guardianship cases filed at the State Trial Court level is forecasted to

increase. This forecast in future filings, is further evidence that the need for guardianship services will also increase. Based on the research and the continued aging of Tennessee's population, there is no indication that the increase in the need for the Program will slow down or decrease in the foreseeable future.

Overview of the Tennessee Public Guardianship for the Elderly Program Study

Public Chapter No. 427 required TCAD to complete a review of the current system of public guardianship in Tennessee. TCAD established a working group that included members from the Tennessee Department of Human Services, the division of Adult Protective Services, Tennessee Council on Developmental Disabilities, the Administrative Office of the Courts, the Tennessee Department of Intellectual and Developmental Disabilities, the Area Agencies on Aging and Disabilities and other stakeholders. The recommendations put forth by TCAD are based on the information compiled from review of the public guardianship system in Tennessee, community forums held across the state, special interest group meetings, and research on best practices of other states with similar programs.

TCAD held nine (9) community forums across the state of Tennessee. The forums included related professionals, city agencies, state agencies, and the legal community with a vested interest in the public guardianship program. The forms were designed in a two (2) hour format with an open discussion platform. The first forum was held on September 7th, 2017 at the South Central Tennessee Development District in Mount Pleasant, Tennessee followed by the second forum held in the Greater Nashville Regional Council area at the Metro Nashville Police Department West Precinct. The third forum was held at the East Tennessee Human Resource Agency in Knoxville, Tennessee on Sept 18, 2017. The fourth forum was held in Johnson City, Tennessee at the First Tennessee Development District on September 19, 2017. The fifth forum was held in Cookeville, Tennessee at the Upper Cumberland Development District on September, 21, 2017. The sixth forum was held in Martin, Tennessee at the Northwest Tennessee Development District offices on Sep 22, 2017. The seventh forum was held in Chattanooga, Tennessee at the Family Justice Center on September 26, 2017 with the Southeast Tennessee Development District. The eighth forum was held in Memphis, Tennessee at the Aging Commission of the Mid-South followed by the ninth and final forum in Jackson, Tennessee at the Southwest Tennessee Development District on September 27, 2017.

In addition to the community forums, special interest forums were held with members of the disability community, long-term care community, and Adult Protective services. The participants in these forums provided invaluable insight and recommendations on how guardianship affects the populations they serve.

Finally, a working group comprised of stakeholders from the disability community, long-term care community, legal community, Adult Protective Services, and AAADs met

twice during the course of this study. The working group provided direct input on recommendations contained in this report.

The feedback gleaned from these individuals, groups, and agencies were an invaluable part of the study. Although there were a myriad of thoughts and opinions, general consensus of opinion regarding several key issues and recommendations were identified. The forums and working group noted that the need for guardianship services has increased in conjunction with the baby boomer generation and more Tennesseans entering the sixty (60) and over age group. Other factors that affect the demand for more guardianship services include the Opioid epidemic and the pervasiveness of deteriorating cognitive mental health issues such as Dementia and Alzheimer's.

In addition, as the current Program only serves Tennesseans age sixty (60) and over, the gap continues to widen among Tennesseans age nineteen (19) to fifty-nine (59) that are in need of guardianship. Lowering the age restriction of the Program to age forty (40) or fifty (50) was a consistent theme throughout the forums. The Department of Intellectual and Developmental Disability indicated that there some persons 40 years of age or older who could potentially be served by the Public Guardian Program. An informal survey of Adult Protective Services, as well as members of the disability community, revealed that there is a demand for guardianship services for individuals aged forty (40) to fifty-nine (59). At this time, it is believed that there are approximately fifty (50) individuals between forty (40) and fifty-nine (59) years of age that may potentially be eligible for services from the Program.

Several forum participants supported the idea of lowering the eligibility age for individuals who are residents of institutions and long-term care facilities. While the age restriction of sixty (60) applies to both institutionalized and home based clients alike, lowering the age eligibility of institutionalized clients would allow the Program to serve younger Tennesseans in long-term care facilities.

Another topic of discussion during the forums and work group concerned funding for the Program. Funding for the Public Guardianship program has been stagnant since the program's inception in 1986, with state appropriations at just over one million dollars. Based on staffing, resources, and caseloads, the Program is operating at or near capacity. Without additional money and resources, the Program may not be able to effectively address and handle the ever-increasing demand for guardianship services across the state.

The manner in which the terms "Guardianship" and "Conservatorship" are referenced in statute was mentioned throughout the forums. In general, guardianship refers to the legal relationship between a minor child and a guardian, whereas conservatorship is generally used to refer to the legal relationship between an adult and a court-appointed surrogate decision maker. The Public Guardianship for the Elderly Program statute uses both terms interchangeably throughout the code section. As the Program serves those adult individuals who are sixty (60) years or older, it was discussed that the Program should be called the Public Conservatorship for the Elderly Program.

The need for continuing education and outreach was another consistent theme from the community forums. Increased outreach to Judges, Chancellors, Court clerks, Social services professionals and the general public via informational brochures, personal presentations, and online media content would promote a better understanding about the Guardianship program. The need to establish a statewide stakeholder group, beyond the working group for this study, to continue to examine the conservatorship/guardianship system in Tennessee would be beneficial in promotion of education and legislative change.

Recommendations from the Public Guardianship for the Elderly Study

The recommendations in this report are based on an examination of existing procedures and resources, current and potential future caseload, program accessibility, input from the nine public community forums, input from the three special interest group meetings, and research on legislation and best practices from other states.

1. **Education & Outreach:**

A common theme heard throughout the community and special interest forums was the need for more education and outreach to court clerks, chancellors, judges, and the general public. The participants in the forums indicated that it would be extremely helpful to have standard materials to provide information on the Public Guardianship for the Elderly Program as well as to family members who are interested in becoming a guardian for a loved one. Additionally, it would be beneficial to explore the possibility of creating a training program for family guardians that would help them understand the duties and responsibilities of serving as a guardian.

a. Action Steps

- i. Increased outreach to court clerks, chancellors, and judges who are involved in the Public Guardianship for the Elderly Program. This could include in-person visits and informational brochures from both the District Public Guardians and the State Public Guardianship for the Elderly program.
- ii. Research the feasibility of implementing a family conservatorship/guardianship education program in Tennessee such as the one currently in place in Florida. The Florida education program requires that all new family conservators and guardians participate in four (4) hours of training on the duties and responsibilities of a conservator/guardian prior to the issuance of letters of conservancy.
- iii. Augment education and outreach to the general public through additional education and informational brochures, fact sheets, videos, webinars and other on-line content.

2. **Statutory Change:**

During the forums, the topic of potential public guardianship statutory changes was discussed at length.

- a. Action Steps
 - i. Consider the implications of updating the statute to change the term Guardianship to Conservatorship.
 - ii. Consider a statutory provision that would allow the Executive Director of the Tennessee Commission on Aging and Disability to waive the minimum age requirement in extenuating circumstances.
 1. Extenuating circumstances could include, but not be limited to, unbefriended individuals under age sixty (60) who would suffer imminent harm if the Public Guardianship for the Elderly Program is not appointed to assist the individual.
 - iii. Allow guardianship of individuals starting at age forty (40) instead of age sixty (60).
 1. It is anticipated that this statutory change would result in the need for increased staffing and result in increased cost to the Program.

3. **Continued Examination of System & Resources:**

One common theme from the forums and working group, as well as the review of the existing structure of the Program, was the need to improve and expand the infrastructure of the Program. The suggested changes will enable the Program to meet the anticipated increase in the need for guardianship services.

- a. Action Steps
 - i. Continue to explore the feasibility of implementing a statewide Public Guardianship Software Management System for all Programs.
 - ii. Based on the review of the Public Guardianship for the Elderly Program, best practices from the National Guardianship Association, anticipated growth in the population age 60 and over and growth in the anticipated number of individuals requiring assistance from the Tennessee Public Guardianship for the Elderly program, increase the number of Program staff to meet the current and expected increased demand for guardianship services particularly if the program begins accepting clients beginning at age forty (40).
 - iii. Provide additional training to the District Public Guardians and staff on emerging issues that impact clients in the program.
 1. The emerging issues identified during the study include mental health concerns and resources, the opioid epidemic, and health care resources.

4. **Collaborative Stakeholder Group:**

This study provided a great deal of information and ideas on how to improve and expand the existing Program. However, due to its very nature, this study

was time limited. The community forums, as well as the working group, expressed an interest in continuing the work begun by this study in a more formal, organized group that would meet on a regular basis to encourage relationships between those involved in guardianship and to work on ways to streamline and improve the provision of guardian/conservatorship services in Tennessee.

a. Action Step

- i. Explore the possibility of forming a statewide stakeholder group, similar to the Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS), to continue to examine the conservatorship/guardianship system in Tennessee.

This group could continue to meet to examine the conservator/guardianship system in Tennessee including consistent statewide data.

1. The 2011 Third National Guardianship Summit, sponsored by the National Guardianship Network called for coordinated state court-community partnerships or “WINGS.” (Shea, T. M. (Vol 27 No.3). Broad-based, collaborative working groups can drive change that will affect the ways courts and guardians practice, and improve the lives of people who have or may need guardians. Over the past twenty-five (25) years, adult guardianship reform recommendations repeatedly have urged the creation of court-community partnerships.

Conclusion

The current state of aging in the State of Tennessee suggests a steady population increase in its citizenry over the age of 65. Unfortunately, some of these citizens are unable to make personal decisions regarding their health, safety and managing resources due to mental or physical impairments. Regrettably, some of the most vulnerable members of this population are often the target of fraud, undue influence and have no other family, friends or corporate entity willing and able to act on their behalf. The research, community forums, and special interest group meetings conducted pursuant to the requirements of Public Chapter 427 demonstrate that the need for guardianship services has grown in conjunction with an increase among the elderly population. It is the hope that this study will inform, educate, and begin to bridge the gap between the current system and resources of the public guardian program and the growing need for guardianship services in the state of Tennessee.

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- Utah Administrative Code § RS49(1-1 – 1-4)
<https://rules.utah.gov/publicat/code/r549/r549-001.htm#E5>
- Wayne, J. *Kentucky State Guardianship* [PowerPoint slides]. Retrieved from <https://www.ardfky.org/sites/ardfky.org/files/Jessica%20Wayne%20-%20PPT%20%28KY%20State%20Guardianship%29.pdf>

Attachments

- TN Public Chapter 427
- Annual Report of the Tennessee Judiciary (Summarized)
- WINGS (Improving Service Delivery to Protected Persons and their Guardians)
- Public Guardian Survey Results conducted by UTAH after NGA conference
- State of Utah Admin. Code R549-1-4
- State of Kentucky
- Stetson Law Review – National Study of Public Guardianship
- <http://www.stetson.edu/law/lawreview/media/wards-of-the-state-a-national-study-of-public-guardianship.pdf>
- American Bar Association – Public Guardianship: Where is it and What does it need
https://www.americanbar.org/content/dam/aba/administrative/law_aging/2011_aging_artg7290_pblgrds_tb.authcheckdam.pdf



State of Tennessee

PUBLIC CHAPTER NO. 427

SENATE BILL NO. 1287

By Crowe, Norris

Substituted for: House Bill No. 415

By Carr, Hazlewood, Mark White, Hardaway, Staples, Crawford, Gilmore

AN ACT to amend Tennessee Code Annotated, Title 4; Title 33; Title 34; Title 38; Title 39; Title 45; Title 47; Title 68 and Title 71, relative to vulnerable persons.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. The executive director of the commission on aging and disability shall establish within the commission a public guardian working group that shall include representatives of the division of adult protective services of the department of human services, the council on developmental disabilities, the administrative office of the courts, the department of intellectual and developmental disabilities, the area agencies on aging and disabilities, and such other groups as the commission may deem necessary to complete its review. The working group shall examine and explore the current system of public guardians in Tennessee, as established pursuant to Tennessee Code Annotated, Title 34, Chapter 7, along with the system's existing procedures and resources. The working group shall also review the current and potential future caseloads of the program, who has access to the services of a public guardian and who does not, and what, if any, best practices are available from other states that have similar programs. The commission shall report to the general assembly by January 15, 2018, with a report that outlines the information requested to be reviewed by this working group along with recommendations, including statutory changes, designed to make the program more effective and more accessible.

SECTION 2. Tennessee Code Annotated, Section 33-2-1202(b), is amended by deleting the first sentence of the subsection and substituting instead the following:

Each organization shall have a criminal background check completed on any employee or volunteer who will be in a position that involves providing direct contact with or direct responsibility for service recipients. The background check shall be completed before allowing the person to have any direct contact with or direct responsibility for service recipients.

SECTION 3. Tennessee Code Annotated, Section 68-11-256, is amended by deleting the section and substituting instead the following:

(a) All nursing homes, as defined in § 68-11-201, and assisted-care living facilities, as defined in § 68-11-201, shall have a criminal background check completed prior to employing any person who will be in a position that involves providing direct care to a resident or patient.

(b) Any person who applies for employment in a position that involves providing direct care to a resident or patient in such a facility shall consent to any of the following:

(1) Provide past work and personal references to be checked by the nursing home or assisted-care living facility;

(2) Agree to the release and use of any and all information and investigative records necessary for the purpose of verifying whether the individual has been convicted of a criminal offense in this state, to either the assisted-care living facility or nursing home, or its agent, or to any agency that contracts with this state, or to any law enforcement agency, or to any other legally authorized entity;

(3) Supply a fingerprint sample and submit to a state criminal history records check to be conducted by the Tennessee bureau of investigation, or a state and federal criminal history records check to be conducted by the Tennessee bureau of investigation and the federal bureau of investigation; or

(4) Release any information required for a criminal background investigation by a professional background screening organization or criminal background check service or registry.

(c) A nursing home or an assisted-care living facility shall not disclose criminal background check information obtained under subsection (b) to a person who is not involved in evaluating a person's employment, except as required or permitted by state or federal law.

(d) Any costs incurred by the Tennessee bureau of investigation, professional background screening organization, law enforcement agency, or other legally authorized entity, in conducting the investigations of applicants may be paid by the nursing home, the assisted-care living facility, or any agency that contracts with this state requesting the investigation and information, or the individual who seeks employment or is employed. Payments of the costs to the Tennessee bureau of investigation are to be made in accordance with §§ 38-6-103 and 38-6-109. The costs of conducting criminal background checks shall be an allowable cost under the state medicaid program, if paid for by the nursing home.

(e) This section shall also apply to any company, organization, or agency that provides or arranges for the supply of direct care staff to any assisted-care living facility or nursing home licensed in this state. The company, organization, or agency shall be responsible for initiating a criminal background check on any person hired by that entity for the purposes of working in a nursing home or assisted-care living facility and shall be required to report the results of the criminal background check to any facility in which the organization arranges for that individual to work upon such a request by a facility.

(f) A nursing home or assisted-care living facility that declines to employ or terminates a person based upon criminal background information provided to the facility under this section shall be immune from suit by or on behalf of that person for the termination of or the refusal to employ that person.

SECTION 4. This act shall take effect July 1, 2017, the public welfare requiring it.

SENATE BILL NO. 1287

PASSED: May 5, 2017


RANDY McNALLY
SPEAKER OF THE SENATE

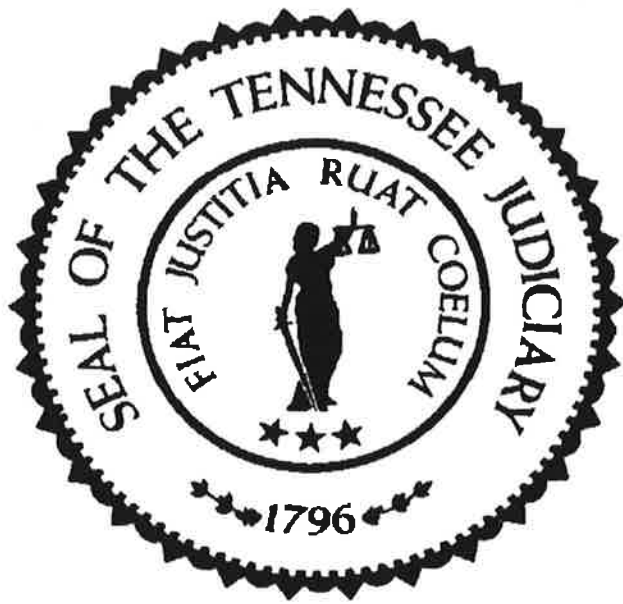

BETH HARWELL, SPEAKER
HOUSE OF REPRESENTATIVES

APPROVED this 18th day of May 2017


BILL HASLAM, GOVERNOR

Annual Report of the Tennessee Judiciary

Fiscal Year 2015-2016



Statistics

This publication is the statistical portion of the *Annual Report of the Tennessee Judiciary* for Fiscal Year 2015-2016. Included in this report is information gathered from the offices of the Appellate Court Clerk in Nashville, Knoxville, Jackson and the state clerks of court in Tennessee. The collection of this information is mandated by the Tennessee General Assembly and is used primarily as a tool to measure the effectiveness of the court system in Tennessee. The report is divided into three major sections: appellate (Supreme Court, Court of Appeals and Court of Criminal Appeals) caseload data, state trial court (chancery, probate, circuit and criminal) filings and dispositions data and jury & non-jury damages and torts data.

The state trial court information is being reported by judicial district. All information disseminated in this report has been distributed to and verified by the judges and clerks of court of their respective districts.

In the state trial court information for this reporting period, medical malpractice has been separated from the damages and torts reporting category. Medical malpractice statistics are included in the damages and torts section of this report.

It is hoped that this report will be both informative and helpful. If you have questions or concerns about this report please contact the Administrative Office of the Courts at (615) 741-2687.

**Chancery, Probate, Circuit & Criminal
Caseload
Data**

Fiscal Year 2015-2016

STATEWIDE CHANCERY COURT SUMMARY

FILINGS AND DISPOSITIONS

Case Type	Filings	Dispositions
Adoption/Surrender	2,485	2,547
Appeal from Administrative Hearing	212	233
Conservatorship/Guardianship	2,183	2,327
Contract/Debt/Specific Performance	2,076	2,693
Damages/Torts	118	132
Divorce with Minor Children	6,904	7,178
Divorce without Minor Children	8,828	9,166
General Sessions/Juvenile Appeal	0	1
Interstate Support	274	272
Judicial Hospitalization	115	113
Legitimation/Paternity	354	411
Medical Malpractice	3	2
Miscellaneous General Civil	7,006	7,975
Orders of Protection	2,119	2,228
Other Domestic Relations	395	676
Probate/Trust	12,226	18,152
Real Estate Matter	1,416	1,649
Residential Parenting/Child Support	10,337	11,791
Workers Compensation	996	1,382
TOTALS:	58,047	68,928

DISPOSITIONS BY MANNER

Manner	Dispositions
Compromise/Settlement-No Hearing	9,917
Court Approved Settlement	25,218
Dismissal	11,061
Other	7,047
Transferred	456
Trial-Jury	31
Trial-Non-Jury	8,344
Uncontested/Default	5,634
Withdrawn	1,220
TOTALS:	68,928

STATEWIDE PROBATE COURT SUMMARY

FILINGS AND DISPOSITIONS

Case Type	Filings	Dispositions
Adoption/Surrender	0	0
Appeal from Administrative Hearing	0	0
Conservatorship/Guardianship	1,024	388
Contract/Debt/Specific Performance	0	0
Damages/Torts	0	0
Divorce with Minor Children	0	0
Divorce without Minor Children	0	0
General Sessions/Juvenile Appeal	0	0
Interstate Support	0	0
Judicial Hospitalization	41	24
Legitimation/Paternity	0	0
Medical Malpractice	0	0
Miscellaneous General Civil	1,377	871
Orders of Protection	0	0
Other Domestic Relations	0	0
Probate/Trust	3,085	2,469
Real Estate Matter	0	0
Residential Parenting/Child Support	0	0
Workers Compensation	0	0
TOTALS:	5,527	3,752

DISPOSITIONS BY MANNER

Manner	Dispositions
Compromise/Settlement-No Hearing	1,503
Court Approved Settlement	1,891
Dismissal	343
Other	1
Transferred	9
Trial-Jury	0
Trial-Non-Jury	0
Uncontested/Default	0
Withdrawn	5
TOTALS:	3,752

STATEWIDE CIRCUIT COURT SUMMARY

FILINGS AND DISPOSITIONS

Case Type	Filings	Dispositions
Adoption/Surrender	1,013	1,061
Appeal from Administrative Hearing	161	175
Conservatorship/Guardianship	52	44
Contract/Debt/Specific Performance	3,451	3,449
Damages/Torts	10,224	10,819
Divorce with Minor Children	5,256	5,600
Divorce without Minor Children	7,457	7,708
General Sessions/Juvenile Appeal	239	354
Interstate Support	1,025	1,938
Judicial Hospitalization	602	598
Legitimation/Paternity	168	199
Medical Malpractice	388	340
Miscellaneous General Civil	5,411	6,178
Orders of Protection	6,237	6,249
Other Domestic Relations	927	1,048
Probate/Trust	37	27
Real Estate Matter	218	381
Residential Parenting/Child Support	8,966	9,211
Workers Compensation	2,116	2,313
TOTALS:	53,948	57,692

DISPOSITIONS BY MANNER

Manner	Dispositions
Compromise/Settlement-No Hearing	11,269
Court Approved Settlement	14,345
Dismissal	15,831
Other	2,211
Transferred	714
Trial-Jury	241
Trial-Non-Jury	5,937
Uncontested/Default	4,929
Withdrawn	2,215
TOTALS:	57,692

Public Guardian Survey

Thank you for attending the breakout session "An Examination of the Models of the Offices of Public Guardian" at the NGA conference. Please complete the following survey about the Public Guardian office in your State or County. Forward this link to anyone you think would like to participate.

I look forward to sharing the results with you and to identifying next steps related to information exchange between Public Guardians across the nation.

If you have any questions email Shannon Alvey at salvey@utah.gov.

Thank you for your participation and for the great work you all do everyday!

FILL OUT FORM

[Create your own Google Form](#)

Here are the findings from the survey of Public Guardians conducted in response to the NGA Conference.

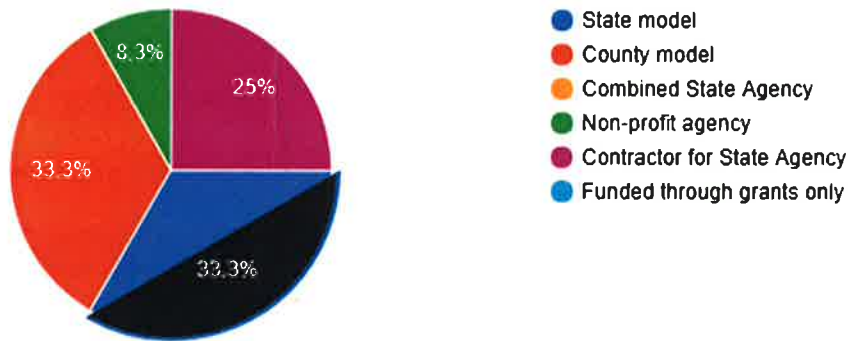
Eleven states responded:

CA, UT, AZ, NM, ND, NE, TX, IA, TN, OH, DE

I am working on developing next steps and would love to hear any ideas or feedback you have based on this preliminary data.

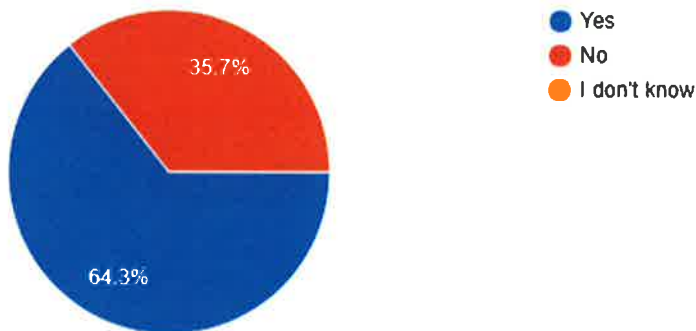
What model does your Public Guardian office follow?

12 responses



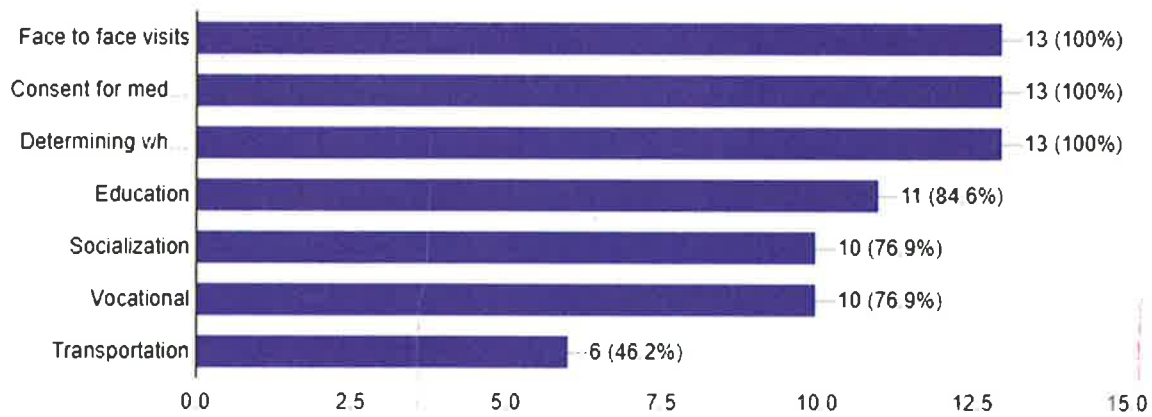
Does your state have a State Affiliate Organization?

14 responses



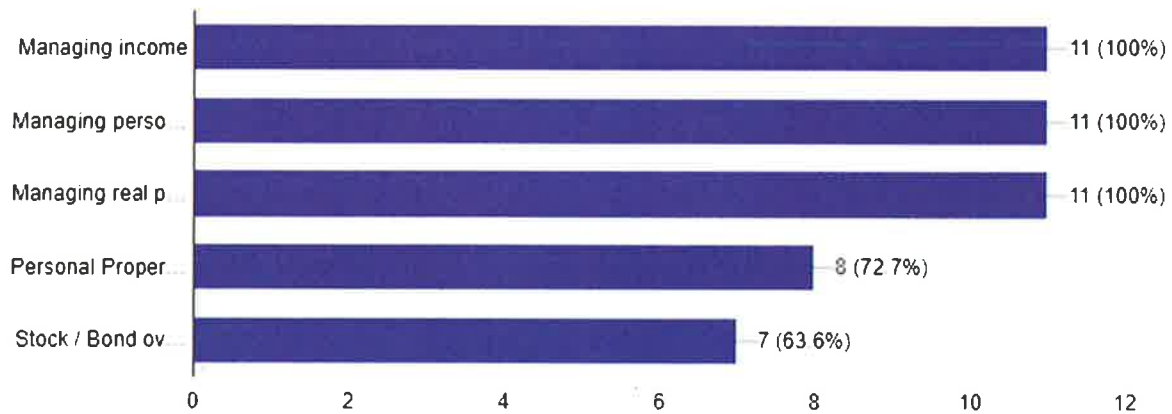
What guardianship services does the Public Guardian office provide in your State? (Select all that apply)

13 responses



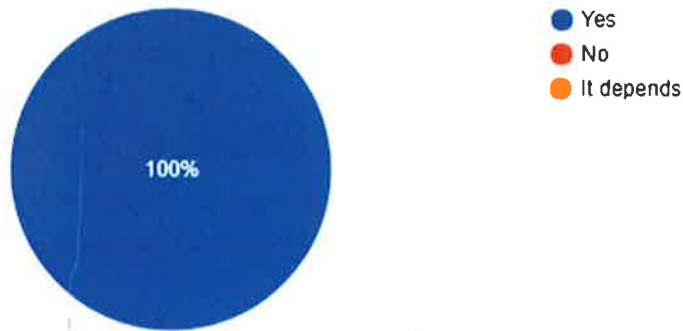
What estate services does the Public Guardian office provide in your State? (Select all that apply)

11 responses



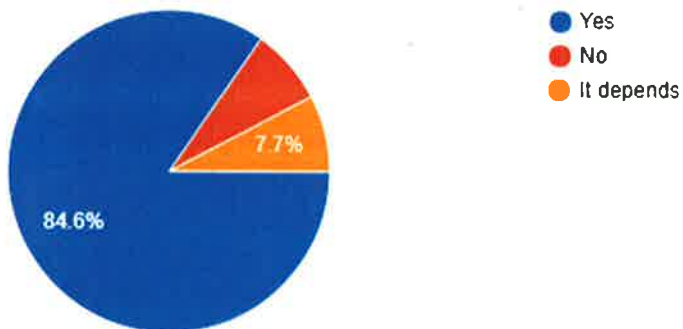
Is the Public Guardian office required to file court reports on the status of the protected person?

13 responses



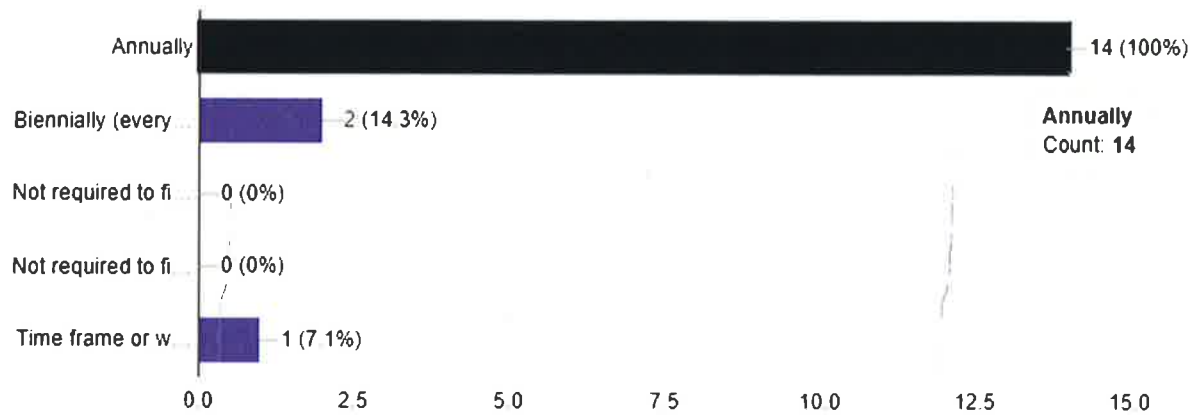
Is the Public Guardian office required to file accounting's (reporting on the protected person's income and assets)?

13 responses



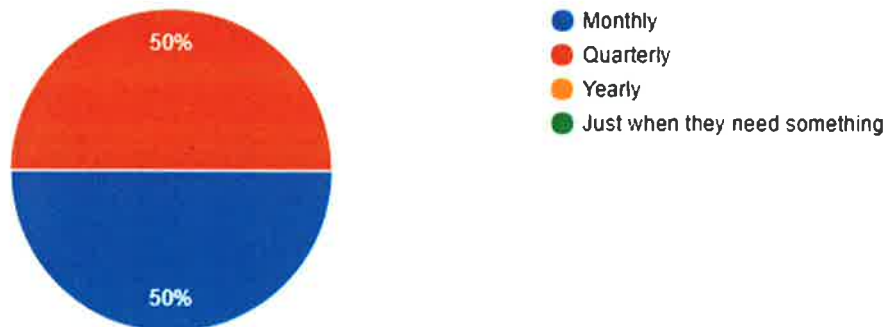
How often are you required to file annual status reports and accountings? (Select all that apply)

14 responses



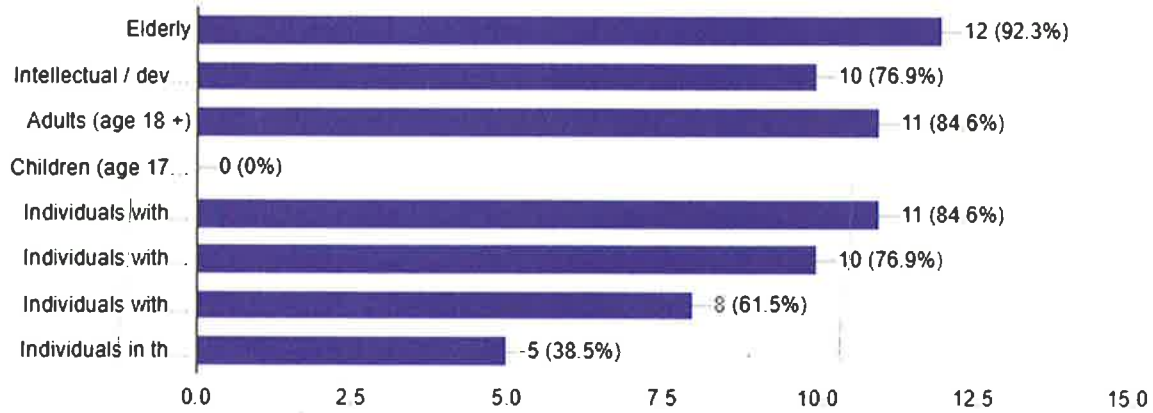
How often are guardians required to visit person's under guardianship?

14 responses



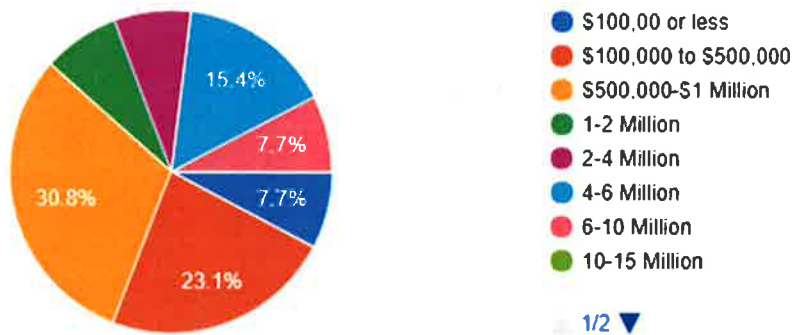
What target population does the Public Guardian office serve in your State? (Select all that apply)

13 responses



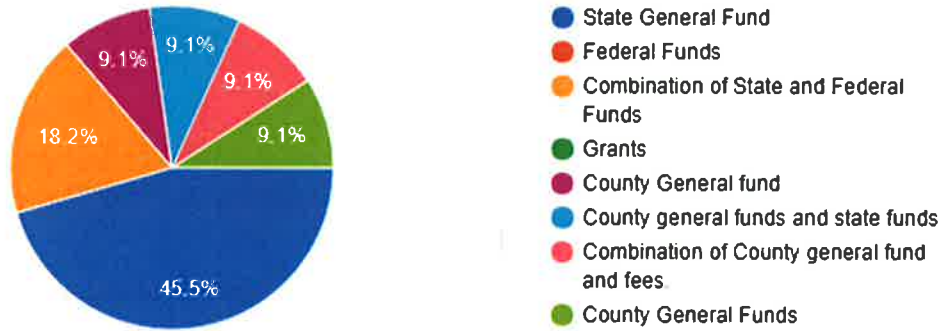
What is the Public Guardian's annual budget in your state or county depending on your state model?

13 responses



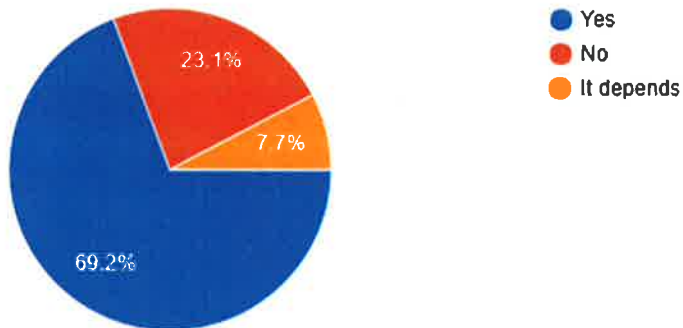
How is the Public Guardian funded in your State?

11 responses



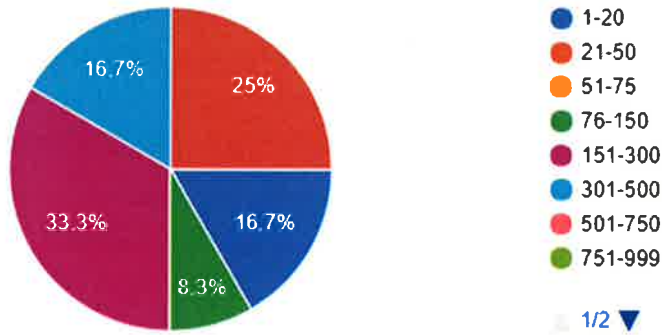
Does the Public Guardians office have the ability to charge/collect a fee in your State?

13 responses



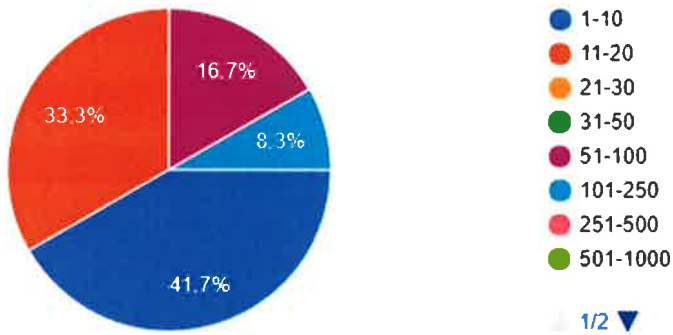
How many protected persons is the Public Guardian office the guardian and/or Conservator for?

12 responses



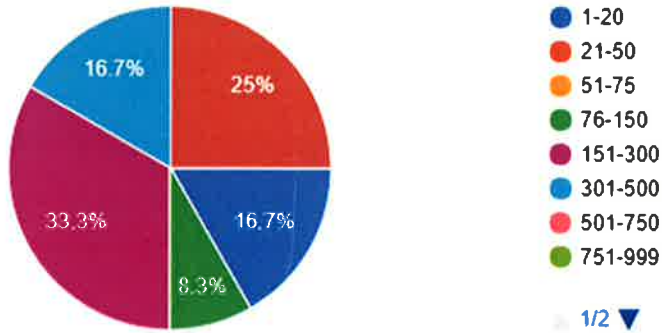
How many staff providing direct guardianship services are employed in the Public Guardian office?

12 responses



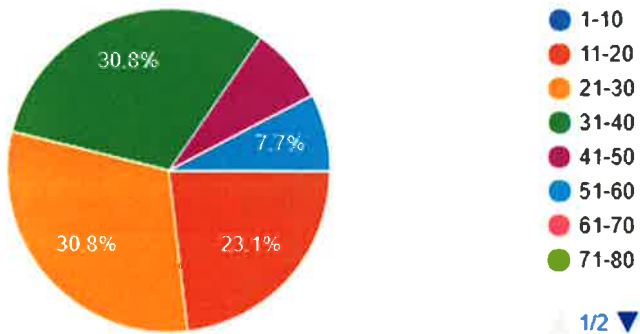
How many protected persons is the Public Guardian office the guardian and/or Conservator for?

12 responses



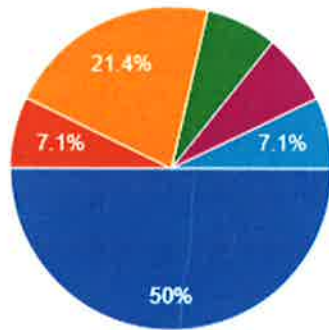
What is the average caseload size per employee

13 responses



Does your office determine which cases it will become guardian or conservator for or is your office appointed by another office or the courts?

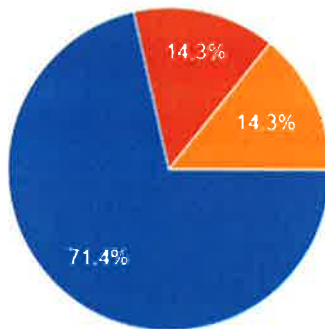
14 responses



- Our office determines which cases it will take
- Our office receives cases from another agency
- Our office is appointed by the court
- The Court appoints AAAD / Guardian
- Our non profit agency determines if we want to take the guardianship through out own applicaiton and as
- No State office

Does your State statute require that the proposed protected person have an attorney?

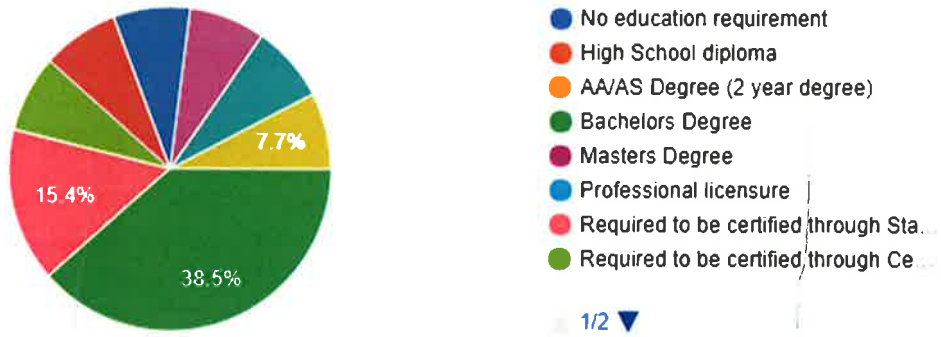
14 responses



- yes
- no
- It depends

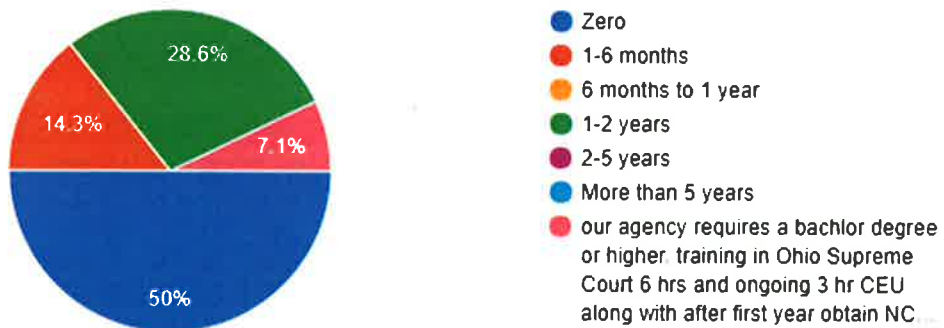
What are the minimum qualifications required to become a Public Guardian in your State?

13 responses



How many years of experience are required to be a Public Guardian in your state?

14 responses



WINGS: Improving Service Delivery to Protected Persons and Their Guardians

by Timothy M. Shea

This article and the two that follow are products of the Working Interdisciplinary Network of Guardianship Stakeholders (WINGS). A bit cumbersome, perhaps, but an accurate description. WINGS is a multidisciplinary body, focusing on guardianship issues from different perspectives. Forming WINGS is one of many recommendations of the *Third National Guardianship Summit: Standards of Excellence* held at the S.J. Quinney College of Law at the University of Utah in 2011. (The 2011 summit followed the Wingspread Conference in 1988 and the Wingspan Conference in 2001.)

The Judicial Council, the Utah District Courts, and the Administrative Office of the Court (AOC) have been pursuing efforts to improve the law and process of guardianships for many years. A volunteer court visitor program designed to provide judges with neutral information from which to make difficult decisions about incapacity has expanded to include fourteen counties. Volunteer visitors throughout the state help the district court enforce the guardians' annual reporting requirement and help judges review the reports that are filed. The AOC has prepared a bench book on guardianship for judges and a training manual for clerks. The AOC has published on its website information and forms to assist in the appointment of guardians and has published a wealth of information for the benefit of guardians and putative guardians. The judiciary's latest effort is WINGS.

In 2013, the Judicial Council received a small grant from the State Justice Institute and the Borchard Foundation Center on Law & Aging, administered through the National Guardianship Network, with which to form a Utah WINGS, one of seven in the country. (New York, Oregon and Texas also received grants to form WINGS. Ohio and Missouri have existing WINGS programs, and Indiana has a statewide task force with similar

characteristics.) The judiciary thanks those organizations for making our efforts possible. And the judiciary thanks all of the members of the WINGS steering committee, especially those from outside the courts, for their participation and contributions. The Utah WINGS conducted a guardianship summit on November 6, 2013, attended by almost sixty people from around the state. For most of the day, the summit participants formed into three workgroups, which focused on one of three topics:

- agency cooperation and coordination;
- medical and functional evidence of incapacity; and
- person-centered planning and supported decision making.

This article reports on the first topic and the succeeding articles report on the other two. The judiciary also thanks the Editorial Board of the *Utah Bar Journal* for reserving space for these articles in the issue for May, which is National Elder Law Month.

The Need for Agency Coordination and Cooperation

Utah has the largest increase in the number of people with Alzheimer's disease – not all occurring with the elderly – of any state. See Utah's State Plan for Alzheimer's Disease and Related Dementias: Action Plan 2012-2017 (2011). Improvements in medical care help those with developmental disabilities and

TIMOTHY M. SHEA is the appellate administrator for the Utah Supreme Court and the Utah Court of Appeals and is a member of Utah WINGS.



traumatic brain injuries live much longer. Individuals with severe and persistent mental illness often need assistance with making decisions to meet their basic needs. All this has changed the complexion of guardianship.

Nothing could have more keenly brought home the message of the need for agencies – not just government agencies, but for-profit and non-profit private providers as well – to improve the delivery of services to guardians and protected persons than a panel of five non-professional guardians. For over an hour, the panelists described for an audience of almost sixty judges, lawyers, healthcare providers, peace officers, administrators, and others the hardships faced by a caregiver for a person under guardianship: the difficulty in getting information; the misinformation from professionals who should have the right answers; the bureaucratic barriers; the delay; and the daily challenge of putting fine legal concepts into practice.

When a judge decrees that an adult is incapacitated, that person becomes, in the eyes of the law, a minor once more. *See* Utah Code Ann. § 75-5-312(2) (LexisNexis 2013). The protected person's guardian assumes ultimate authority for making the protected person's decisions. These guardians act in incredibly trying circumstances.

Making decisions for and with a person under guardianship because of a mental illness, a developmental disability, a traumatic brain injury, or cognitive decline is difficult under the best of circumstances. All of the panelists described the added frustration of working through a confusing patchwork of local, state and federal programs, and non-government services. Organizations used to working directly with a principal struggle when working with an agent. An organization's representative may not accurately understand his or her own organization, let alone the services provided by some other.

All of the panelists described a strong, committed relationship to the person in their charge. All described the burnout caused by stress; burnout that can lead to giving up, to mistakes, to neglect – or worse. The panelists displayed incredible courage and strength in sharing with sixty strangers very private and personal stories.

The panelists also described moments of success. An effort that turned out not to be a dead end. A person who helped deliver a

service or who explained how to take the next step. A webpage with current information. These moments, they concluded, show that the systems can work.

The panelists might have said that the “system” can work, but anyone with any experience knows that ours is not an integrated system. We all remain separate: federal; state; local; public; private; courts; law enforcement; healthcare; residence; transportation; behavioral health; disability; aging; and legal. We all try to do our best, but these are human institutions with human failures. Some days are better than others, and some people are better at it than others. From the panelists' perspectives, whether one gets a good person on a good day was entirely the luck of the draw.

Summit Recommendations

The workgroup that focused on agency cooperation and coordination identified two issues it said need to be addressed:

- Guardians sometimes misunderstand their role; what they must do, can do, and cannot do. The guardianship laws and

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the process for being appointed as guardian are complex. There needs to be more education for protected persons, for their guardians, for their family and friends, and for the organizations that serve them.

- The organizations that serve protected persons are fragmented. Protected persons and their guardians benefit when organizations know about what services a person might need, what services are available in the community, and how to obtain them.

And the workgroup summarized two recommendations for addressing those needs:

- Inventory and coordinate webpages that explain the procedures for getting a guardianship, the authority and limitations of guardians, alternatives to guardianship, and resources for guardians and other information.
- Integrate the Aging and Disability Resource Connection model of options counseling to help people understand and access alternatives and services. Ensure that the counseling is culturally accessible to the client.

The workgroup identified a third issue – the cost of appointing a guardian and the cost of services – but that topic will have to wait for another day.

Coordinating Information About Guardianship

Websites

The AOC has published several webpages (<http://www.utcourts.gov/howto/family/gc/>) that describe alternatives to guardianship, nominating someone to serve as guardian, authority and responsibilities of a guardian, and procedures and forms for appointing a guardian. The AOC also has published several pages of information about serving as a guardian; resources to help guardians; decisions about healthcare, residence, and financial management; information about banking, budgeting, and record keeping; and other topics.

Even a simple list of topics is long and shows the complexity of making decisions for another adult. Simplicity cannot be imposed on a process and on a relationship that is necessarily complex, so education about those complexities is the next best thing.

At meetings subsequent to the summit, other WINGS members

have described their commitment to include on their websites a brief description of guardianships with a link to the court's site for a fuller description. The AOC encourages any organization, public or private, that wants to include in its information a section on guardianship to simply link to the court's website. The information and forms are public and free, and the AOC will work to keep them current. The information necessarily focuses on guardianships – because that is the business of the courts – but much of the information and resources will benefit any caregiver, regardless of circumstances.

The AOC website also links to sites of several federal, state, and local agencies, describing briefly the information, programs, and services that those agencies offer. Again, while focusing on guardianships, the information can also be helpful to a wider population. Some examples:

- Benefits Checkup, a free service of the National Council on Aging. Answer questions to find benefit programs that can help pay for medications, health care, food, utilities, and more.
- Caregiver Support Program, published by Division of Aging and Adult Services.
- Caring for Your Parents: The Complete Family Guide, published by AARP.
- Dictionary of Legal and Medical Terms, published by the Administrative Office of the Courts.
- Eldercare Locator, published by the Department of Health and Human Services.
- Financial Steps for Caregivers, published by Women's Institute for a Secure Retirement.
- Help for Families – When Loved Ones Have Substance Abuse Problems, published by Division of Substance Abuse and Mental Health.
- Legal Guide for the Seriously Ill, published by the American Bar Association.
- Managing Someone Else's Money guides, published by the Consumer Protection Financial Bureau.

- Prepare to Care: A Planning Guide for Families, published by AARP.
- Senior Centers, published by Utah Division of Aging and Adult Services.
- Senior Resource Directory, published by Salt Lake County Aging Services.
- Ucare, published by the Department of Human Services. Find support and services for yourself as a caregiver and for people receiving care.
- Utah Coalition for Caregiver Support. A diverse group of caregiver advocates provides information about caregiving issues, coordinates a support network for caregivers, and facilitates access to caregiver resources.

Ultimately, a webpage is not education but an education opportunity. It relies on a guardian or other caregiver having enough motivation to read and understand the information provided. Live classes would be the best method of educating

guardians about their responsibilities and the process of being appointed, but the costs are high, and the geographic reach is wide. The panel participants uniformly expressed a preference for video information, rather than text, and video may be a cost-effective compromise between text and live classes.

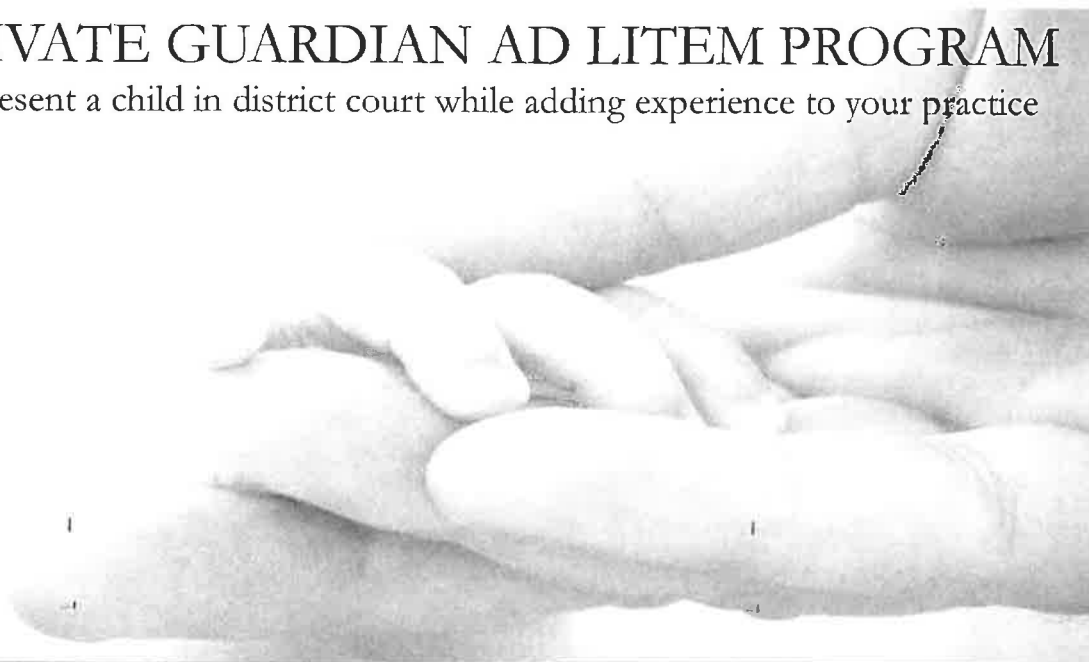
Listserv

WINGS has initiated a listserv on guardianship topics. Those who participated in the summit have already been included. Any who would like to subscribe can do so by sending an email to karolinaa@utcourts.gov with "subscribe to wings" in the subject line or text. Some of the information sent around that you may have missed:

- University of Utah College of Social Work free Lecture Series on Aging: Music & Memory: How Many Memories Does an iPod Hold?
- 2014 World Congress on Adult Guardianship features the Utah Volunteer Court Visitor Program.

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- 12th Annual Rocky Mountain Geriatrics Conference: Unlocking Doors across the Long Term Services and Support Spectrum.
- University of Utah – Center on Aging Newsletter: Katherine Supiano, PhD, LCSW, FT received funding from the Alzheimer's Association for her studies on grief experiences of caregivers for patients who had dementia.
- The Veterans Health Administration Office of Rural Health has developed an education series designed to aid caregivers who are helping a loved one suffering from dementia, including home safety, legal matters, dealing with problem behaviors and learning relaxation techniques.

Although not yet published as of the deadline for this article, WINGS will publish a Facebook page for the public with the hope of connecting people to the organizations and services that they need.

There is a surprising amount of information that can help lawyers and other professionals help their clients. Stay connected. Subscribe.

The Aging and Disability Resource Connection

(ADRC) (www.utadrc.org/)

The ADRC operates in nineteen counties, but it is a largely unknown organization in Utah. That needs to change because the ADRC can be a significant resource to guardians, other caregivers, the public generally, and the organizations that serve them.

The ADRC centers provide information and assistance to individuals needing public or private resources, professionals seeking assistance on behalf of their clients, and individuals planning for their future long-term care needs.

Perhaps the ADRC's most significant service is options counseling, in which a counselor will interview an individual and:

- help that client identify his or her needs and goals;
- identify options for meeting those needs and goals;
- help the client to obtain services from the organizations that offer them; and

- follow up over time to ensure that the client is achieving his or her desired goals and obtaining desired services.

The ADRC does not evaluate incapacity; it does not investigate abuse of vulnerable adults; it does not have residential facilities or prepare tax returns. Rather, the ADRC counselor helps a client develop a plan specific for that individual, and the ADRC counselor helps the client connect with the organizations that provide these and other services.

Suppose, for example, that Ms. Garcia is seventy-five years old and generally in good health. However, she has developed severe arthritis in her right knee. She lives in a two-story home and has difficulty getting from one level to another. She needs help with meal preparation and taking medications. Is a guardianship in order? Or perhaps Ms. Garcia's needs can be met by physical therapy and periodic assistance with transportation, food purchasing and preparation, and

medication. Is there a family member who can help? An ADRC counselor can help Ms. Garcia or her caregiver identify and contact local services.

We have all been left with a toll-free telephone number or

a link to a website and the expectation that "just click on it" is going to meet our needs. An ADRC counselor is more. The ADRC counselor is something of a navigator, piloting a client through the network of aging and disability organizations, programs and services, allowing the organizations to continue to specialize in whatever program or service they may happen to offer. Although guardianship is the topic that ties our WINGS effort together, the population served by the ADRC is much more varied. For the ADRC counselors and the people they serve, guardianship may be just one option among many.

Options counseling is available at seven ADRC sites, including three of the six Utah Centers for Independent Living – private, nonprofit agencies providing services and advocacy with persons with disabilities of all ages that are a part of the Utah Office of Rehabilitation – and four of the twelve Area Agencies on Aging (the aging network). Currently, five Utah ADRC sites

"There is a surprising amount of information that can help lawyers and other professionals help their clients. Stay connected."

are participating on a project with the Veterans Affairs Office of Rural Health, "Connecting Rural Veterans to Aging and Disability Resource Centers for Options Counseling." The ADRC hopes to expand to other Area Agencies on Aging and Centers for Independent Living to provide statewide coverage.

The cooperation of ADRC personnel and other WINGS members will soon produce a resource guide designed to enable personnel of any organization, public or private, to help a client find the organization that can best provide the information or service that is needed. Assuming the client needs information about guardianship but contacts the Division of Services to Persons with Disabilities (DSPD), the resource guide will direct the DSPD support coordinator – and his or her client – to the Utah State Courts' Self-Help Center. Does that client need an attorney? The Self-Help Center knows to direct the client to the Bar's referral program, including pro bono and modest means. WINGS hopes that the resource guide will be available on the websites of several organizations for their counselors and the public to use.


Summary

WINGS is a hub of professionals and others from a variety of networks collaborating to improve services to those in need of protection and their guardians. We hope that WINGS' efforts, built on the seed money provided through the National Guardianship Network, can grow, assisted by other grants and by contributions from the agencies involved.

WINGS is committed to pursuing the action steps identified at the Utah summit. Education about guardianships was a theme common to all three of the workgroups, and so education will be a high priority: education for the public, for guardians, and for the organizations that serve them. A listserv helps professionals stay connected with the efforts of others in the guardianship network. Websites with information and forms help. Classes, either live or recorded, are needed.


WINGS is also committed to cooperation among organizations to better provide the services needed by vulnerable adults and stressed caregivers. The ARDC, which counsels on the needs of an individual client, is the best model for the delivery of services. WINGS can help educate the counselors so the client receives accurate information and the correct referrals.

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Kentucky State Guardianship

Department for Aging and Independent Living
Cabinet for Health and Family Services

Objectives

- Knowledge of State Guardianship Statutes and Regulations
- Types of Guardianship and process
- What state guardianship can and cannot do
- State guardianship data
- State guardianship region and how to contact

Guardianship Mission Statement

To preserve individual dignity,
self respect and independence
of Kentucky's elders
and individuals with disabilities
through leadership, education
and delivery of programs and
services

CABINET FOR HEALTH AND FAMILY SERVICE
 Department for Aging and Independent Living
 Division of Guardianship

Vacant
 Commissioner

Lola Williams
 Deputy Commissioner
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Division of Operations & Support

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 Director
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Benefits
 Management
 Branch
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Fiduciary
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 Vacant
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Division of Guardianship Field
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 Vacant

Assistant Director
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Branch Manager
 Heather Holland
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Northern
 Branch

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 Central
 Region
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Jefferson
 Region
 502-595-4052

Eastern
 Branch

Northern
 Bluegrass
 Region
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 Eastern
 Region
 Opt. 3
 606-920-2050

Eastern
 Mountain
 Region
 606-889-1736

Western
 Branch

Western
 Region
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 Ext. 387

Midwestern
 Region
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South-
 Western
 Region
 270-746-7438

Southern
 Branch

Southern
 Bluegrass
 Region
 859-245-5748

Cumberland
 Region
 606-677-4210

Statutes & Regulations

- Kentucky Guardianship Law - Legislative Purpose KRS 387.500
- Kentucky Law – Definitions KRS 387.510
- Kentucky Law - Appointment -- Consideration of preference of respondent. KRS 387.600
- Kentucky Law - Powers and Duties of a Guardian KRS 387.660
- Kentucky Law - Cabinet may act as fiduciary -- Duties -- Powers. KRS 210.290
- Responsible parties authorized to make health care decisions. KRS 311.631
- Service provisions for adult guardianship- 910 KAR 2:040
-

GUARDIANSHIP BY DEFINITION

- **Guardianship** is a legal relationship between a guardian and an adult client.
- A Guardian is a court appointed person or entity with the duty and power to make personal and/or property decisions for another (the client).
- In Kentucky, public guardianship results when the courts appoint the Cabinet for Health and Family Services to serve as legal guardian, instead of a private citizen or professional organization.
- A state (public) guardian is usually appointed due to the absence of willing and suitable family members or friends, or the absence of resources to employ a private guardian. State Guardianship is administered by the Department for Aging and Independent Living within the Cabinet for Health and Family Services.

TYPES OF GUARDIANSHIP

The court determines which civil rights the person can retain and which are given to the guardian. These may include the right to vote, the right to drive a car, the right to make medical decisions, the right to determine where to live, the right to sell property, and the right to sign legal documents such as checks, marriage licenses or wills.

- **Full Guardian/Full Conservator** –responsible for both the personal and financial affairs of the client.
- **Personal Guardian** -responsible for only personal affairs of the client.
- **Conservator** – A conservator may be appointed if the disabled person only needs help with managing financial or fiduciary affairs.
- **Limited Guardian** – A limited guardian may be appointed if the disabled person is declared partially disabled and can manage some personal needs but may need assistance with others.
- **Limited Conservator** – A limited conservator may be appointed if the disabled person only needs help with managing some financial or fiduciary affairs.

State Guardianship Clients

Individuals 18 or over with a cognitive impairment that prevents their ability to make informed decisions and where no appropriate individual has applied to be guardian. The client has been declared by the court to be either wholly or partially disabled, and unable to manage their personal affairs and/ or financial resources.

Examples of disabilities* may include:

- Developmental/Intellectual disability
- Acquired/Traumatic brain injury
- Severe and Persistent Mental Illness
- Elderly-Alzheimer's/Dementia

* Not everyone with a disability is cognitively impaired and in need of a state guardian.



WHAT STATE GUARDIANSHIP DOES:

- Regular visits with the client
- Routine medical/end of life decisions
- Approval of residential placement
- Arrange transportation when funds are available
- Establishing burial arrangements
- Contracting with providers for a client's services
- Keeping in contact with a client's family
- Attending court hearings and meetings on the behalf of the client

WHAT STATE GAURDIANSHIP DOES CONTINUED:

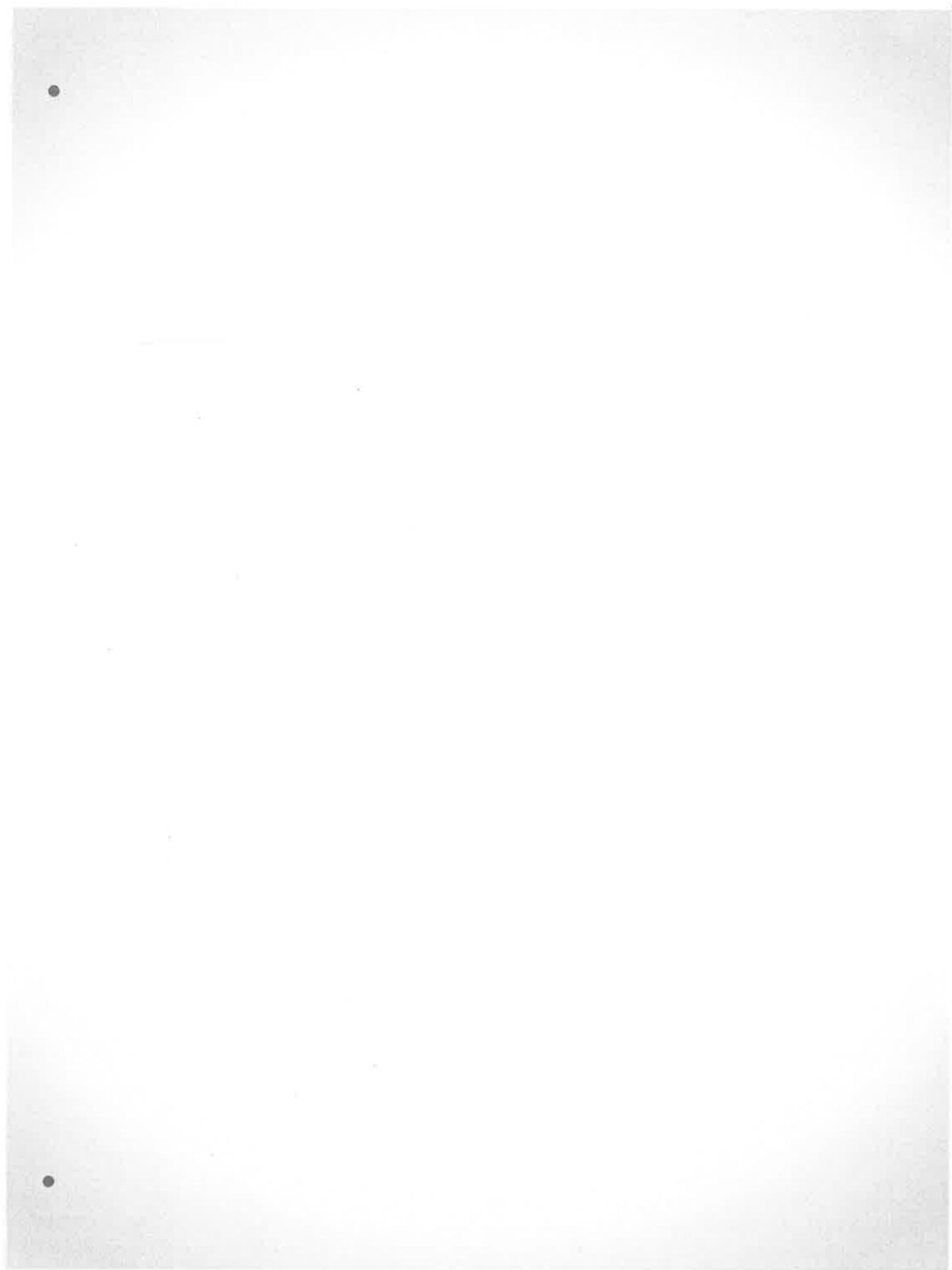
- Applying for benefits (Medicare, Medicaid, SSA, VA, food stamps, Medicaid waivers, etc.)
- Setting up budgets/paying reoccurring bills
- Managing and investing a client's funds
- Filing state and federal taxes
- Securing and/or liquidating assets

STATE GUARDIANSHIP

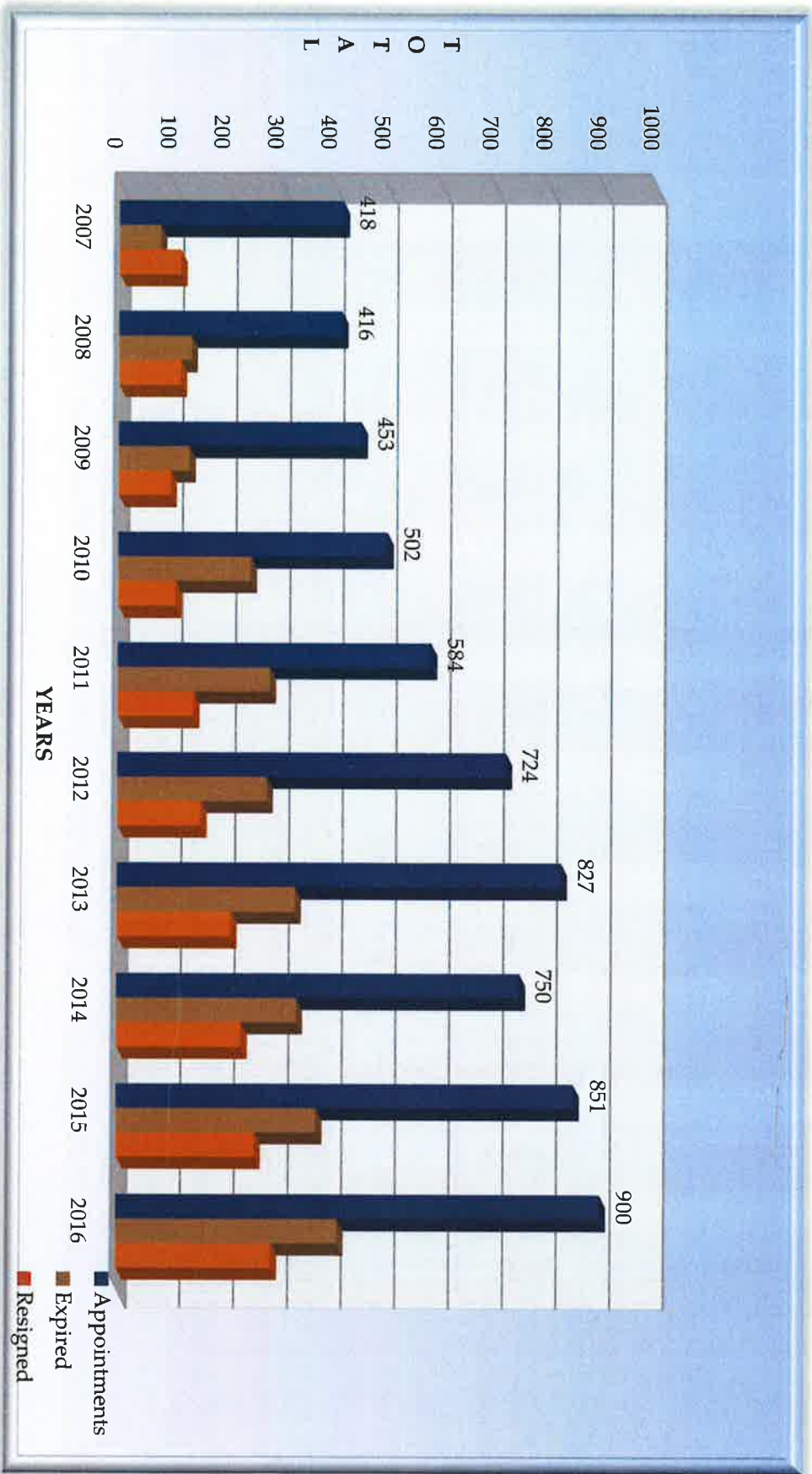
- Is not a placement agency
- Cannot force treatment, medications or control behaviors
- Cannot lock up or restrain individuals. There are NO secure settings in Kentucky for violent, drug seeking or behaviorally disruptive individuals. Guardianship is not a substitution for jail or a psychiatric hospital.
- Cannot keep a violent perpetrator from harming another person
- Cannot force providers to serve individuals
- Cannot create resources or benefits for illegal aliens
- Is not a funding agency or a funding assistance program and does not have funding to provide placements, living expenses or resources. A guardian manages whatever resources the client has personally, or is entitled to under public assistance programs for which they may qualify.

Limited Placement Options

- Kentucky has limited community placement options for most disabled populations.
- If a client displays negative behaviors they are frequently discharged from placements including crisis units, often with little or no advance notice.
- There are limited funds for crisis services especially for the mentally ill.
- Hospitals, including state hospitals, refuse to admit clients even after major explosive behaviors if the patient is not deemed to meet clinical admission criteria.
- Providers often have unrealistic expectation of the state guardianship program.
- Most hospital discharge planners look to guardianship to find placements for the most difficult clients.



New Appointments 2010-2016



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Rhonda Riddle,
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Vacant,
Branch Manager
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*Watts, Lorie: 3478

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**AFTER HOURS, WEEKENDS
& HOLIDAYS -
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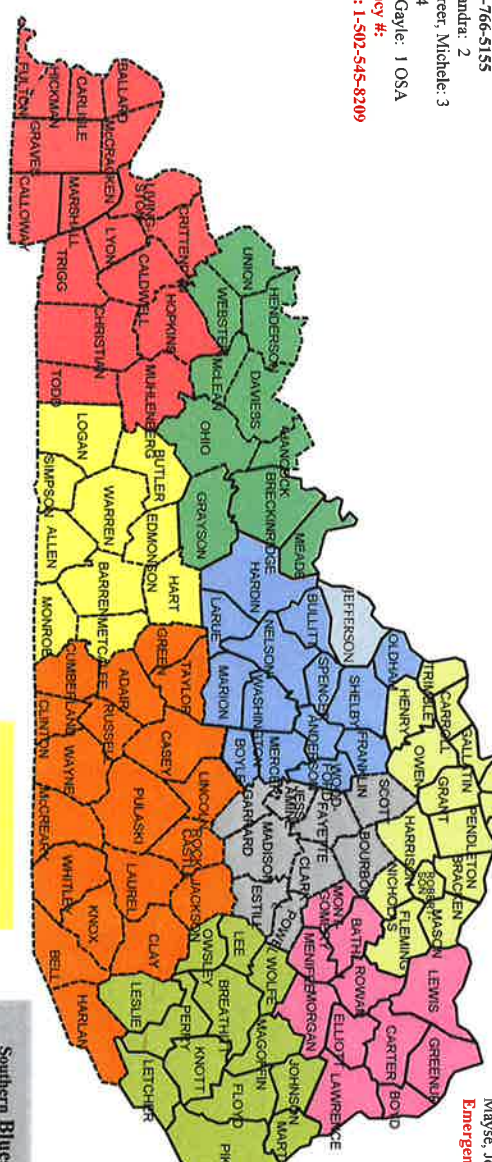
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Thank You

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Utah Office of Administrative Rules

Utah Administrative Code

The Utah Administrative Code is the body of all effective administrative rules as compiled and organized by the Office of Administrative Rules (see Subsection [63G-3-102\(5\)](#); see also Sections [63G-3-701](#) and [702](#)).

NOTE: For a list of rules that have been made effective since December 1, 2017, please see the [codification segue](#) page.

NOTE TO RULEFILING AGENCIES: Use the RTF version for submitting rule changes.

Download the [RTF file](#)

R549. Human Services, Public Guardian (Office of).

Rule R549-1. Eligibility and Services Priority.

As in effect on December 1, 2017

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- [R549-1-5. Priority.](#)
- [KEY](#)
- [Date of Enactment or Last Substantive Amendment](#)
- [Notice of Continuation](#)
- [Authorizing, Implemented, or Interpreted Law](#)

R549-1-1. Purpose.

(1) The purpose of this rule is to provide:

(a) Procedures and standards for the determination of eligibility and establish services as required by Title 62A, Chapter 14, Part-1, Utah Code.

R549-1-2. Authority.

(1) This rule is authorized pursuant to UCA 62A-14-105(2).

R549-1-3. Definitions.

(1) Terms used in this rule are defined in Section 62A-14-102.

R549-1-4. Eligibility.

(1) Individuals who have been found or are likely to be found legally incapacitated and in need of guardianship and/or conservatorship, and who have no other responsible, willing and able person to serve as their guardian, may be eligible for the services provided by Human Services, Office of Public Guardian "Office".

R549-1-5. Priority.

(1) The Office will give priority to incapacitated individuals whose need for guardianship and/or conservatorship is more critical than other incapacitated individuals, as follows and in the following order:

(a) Individuals who are in life-threatening situations, where immediate guardianship assistance or intervention is necessary for the preservation of life or the prevention of serious harm or injury.

(b) Individuals who are experiencing abuse, neglect or self-neglect or financial exploitation.

(c) Individuals who are at significant risk of experiencing abuse, neglect or self-neglect or financial exploitation.

KEY

eligibility and priority, incapacitated, guardianship

Date of Enactment or Last Substantive Amendment

July 9, 2007

Notice of Continuation

November 28, 2016

Authorizing, Implemented, or Interpreted Law

62A-14-101 et seq.

Additional Information

Contact

For questions regarding the *content* or *application* of rules under Title R549, please contact the promulgating agency (Human Services, Public Guardian (Office of)). A list of agencies with links to their homepages is available at <https://www.utah.gov/government/agencylist.html>.

WARDS OF THE STATE: A NATIONAL STUDY OF PUBLIC GUARDIANSHIP*

Pamela B. Teaster**
 Erica F. Wood***
 Susan A. Lawrence****
 Winsor C. Schmidt*****

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I. INTRODUCTION AND BACKGROUND

When Winsor C. Schmidt and colleagues conducted their landmark national study¹ in the late 1970s, public guardianship was a fairly new phenomenon and public guardianship practices were highly irregular. No further study on a national level was conducted and published until that of Pamela B. Teaster and colleagues in 2005.² In the twenty-five intervening years, the following converging trends escalated the need for guardianship: the “graying” of the population (with a sudden upward spike anticipated around 2010 when the Boomers begin to come of age); the aging of individuals with disabilities and the aging of their caregivers; the advancements in medical technologies affording new choices for chronic conditions and end-of-life care; the rising incidence of elder abuse; and the growing mobility that has pulled families apart. In response, most states reformed their adult guardianship laws, and many enacted public guardianship programs. Private non-profit and for-profit guardianship services emerged alongside public guardianship, with little known about how they function. Against this backdrop, and because of the length of time elapsed, it was imperative to conduct a second national study of public guardianship. The purpose of the 2005 study was to make findings and recommendations to improve care for public guardianship wards—persons unable to care for them-

1. Winsor Schmidt, Kent Miller, William Bell & Elaine New, *Public Guardianship and the Elderly* (Ballinger Publ. Co. 1981).

2. Pamela Teaster, Erica Wood, Naomi Karp, Susan Lawrence, Winsor Schmidt & Marta Mendiondo, *Wards of the State: A National Study of Public Guardianship* (Apr. 2005) (available at <http://www.abanet.org/aging/publications/docs/wardofstatefinal.pdf>) [hereinafter *Public Guardianship Study*]. Although the data used in the study were collected in 2004, this Article includes updated statutory information added after the project report. Those changes are reflected beginning in Part II(A). This Article relies heavily on the results and summaries developed by the Authors in *Public Guardianship Study*, *supra* note 2.

selves and typically poor, alone, or “different,” with no other recourse than to become wards of the state.³

A. Adult Guardianship

1. Overview of Reform

Guardianship is a relationship created by state law in which a court gives one person (the guardian) the duty and power to make personal and/or property decisions for another (the ward or incapacitated person). The appointment of a guardian occurs when a judge decides an individual lacks capacity to make decisions on his or her own behalf.⁴

Adult guardianship protects at-risk individuals and provides for their needs, while at the same time removing fundamental rights. Guardianship can “unperson” individuals and make them “legally dead”:⁵ it can be a double-edged sword—half Santa and half ogre.⁶

Early and localized studies of protective proceedings, including guardianship, found little benefit to the ward and concluded that many petitions were filed for the benefit of third parties or from well-meaning but ineffective motives to aid vulnerable groups.⁷ For example, a 1982 Dade County, Florida grand jury investigation found a disturbing lack of monitoring.⁸ Despite early

3. In this study, the Authors use the term, “ward.” The use of “ward” conveys a sense of total dependence of the individual on the state, which is a fundamental characteristic of public guardianship. Thus, the Authors justify its use in this study, even though it is not a term that signifies the importance of an individual’s autonomy and self-determination. The trend in statutory language is toward use of the term “incapacitated person” or other such terms.

4. *Public Guardianship Study*, *supra* n. 2, at 1.

5. Fred Bayles & Scott McCartney, *Guardians of the Elderly: An Ailing System* pt. 1, ¶¶ 1–8 (AP Spec. Rpt.) (Sept. 20, 1987).

6. John Regan & Georgia Springer, *Protective Services for the Elderly: A Working Paper* 27 (Sen. Spec. Comm. Aging 1977).

7. George Alexander & Travis Lewin, *The Aged and the Need for Surrogate Management* 8–9 (Syracuse U. 1972); Margaret Blenkner, Martin Bloom, Margaret Nielson & Ruth Weber, *Final Report: Protective Services for Older People: Findings from the Benjamin Rose Institute Study* 2, 161 (The Benjamin Rose Inst. 1974).

8. Dade Co. Grand Jury, *Final Report of the Grand Jury* 36 (Off. St. Atty., Miami, Fla. 1982) (available at http://www.miamisao.com/publications/grand_jury/1980s/gj1982s4.pdf); Winsor Schmidt, *The Evolution of a Public Guardianship Program*, 12 J. Psych. & L. 349–372 (1984).

reform efforts in the 1970s and 1980s, state guardianship remained a backwater area governed by archaic terms, inconsistent practices, drastic paternalistic interventions, little attention to rights, and meager accountability.⁹

In 1986, the Associated Press (AP) undertook a year-long investigation of adult guardianship in all fifty states and the District of Columbia. It examined more than 2,200 randomly selected guardianship court files, including multiple interviews with a range of informants.¹⁰ The resulting six-part national series published in 1987, *Guardians of the Elderly: An Ailing System* (AP Series), described a troubled system that declared elders as “legally dead.”¹¹ The report alleged that “the nation’s guardianship system, a crucial last line of protection for the ailing elderly, is failing many of those it is designed to protect.”¹²

In quick response, the United States House Select Committee on Aging convened a hearing, which revealed a plethora of problems in both law and practice.¹³ The AP series and the House hearing triggered an interdisciplinary national guardianship symposium in 1988, bringing together experts in law, disability, mental health, aging, judicial practices, medicine, and government.¹⁴ The conference resulted in recommendations covering procedural issues, capacity assessment, and accountability of guardians.¹⁵

These events precipitated a rush to reform state guardianship laws, highlighted by the following five marked trends:

9. Peter Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 Missouri L. Rev. 215–236 (1975); Annina Mitchell, *Involuntary Guardianship for Incompetents: A Strategy for Legal Services Advocates*, 12 Clearinghouse Rev. 451–468 (1978); Regan & Springer, *supra* n. 6; Unif. Guardianship & Protective Proc. Act, 8A U.L.A. 435 (1982) (superseded 1997); Ctr. Soc. Gerontology, *Guidelines for Guardianship Service Programs* (Ann Arbor, MI 1986); ABA Commn. Mentally Disabled & Commn. Leg. Problems of the Elderly, *Guardianship, an Agenda for Reform: Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* 19–22 (ABA 1989).

10. Bayles & McCartney, *supra* n. 5.

11. *Id.*

12. *Id.*

13. Claude Pepper, Chairman of Subcomm. on Health and Long-Term Care, Briefing, *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace* (H.R. Select Comm. Aging 1987) (H.R. Comm. Pub. No. 100–641).

14. *Public Guardianship Study*, *supra* n. 2, at 3.

15. ABA Commn. Mentally Disabled & Commn. Leg. Problems of the Elderly, *supra* n. 9, at 1–44.

(1) enhanced procedural due process in the appointment of a guardian, including provisions for a hearing, notice, presence of the respondent, and representation by counsel; (2) a more robust determination of capacity based not only on medical condition, but on functional ability, cognitive impairments in receiving and evaluating information, risks to the respondent, and respondent's values; (3) an emphasis on limited orders more tailored to the specific capacities of the individual; (4) bolstered court monitoring of guardians, including reports and accountings, court review of reports and accountings, investigation, and appropriate sanctions for guardian malfeasance; and (5) development of public guardianship programs.¹⁶

The guardianship practices of judges, attorneys, guardians, and other players, however, did not automatically follow statutory reforms. Guardianship experts contend that although many legislative changes have occurred, commensurate changes in practice, and in effect on the lives of vulnerable wards and proposed wards, were uneven or difficult to determine.¹⁷ Indeed, in 1997, A. Frank Johns charged that changes in law were nothing but "a mask of virtual reality, hiding what is actually being done in the process, and what is done to older Americans caught in it."¹⁸

2. Empirical Research

Few empirical studies of guardianship exist. In 1972, George Alexander and Travis Lewin studied over 400 guardianships and concluded that, as a device of surrogate management, third parties largely use guardianship to protect their own interests.¹⁹ Another study conducted through the Benjamin Rose Institute addressed risks of well-meaning intervention in the lives of vulnerable older persons, finding that intervention resulted in a high

16. For state statutory charts on adult guardianship, as well as the annual update at the Web site of the ABA Commission on Law and Aging, see ABA, *Commission on Law & Aging Legislative Updates*, <http://www.abanet.org/aging/legislativeupdates/home.shtml>.

17. *Public Guardianship Study*, *supra* n. 2.

18. A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of Its Crumbling Linkage to Unprotected Older Americans in the Twenty-First Century—A March of Folly? Or Just a Mask of Virtual Reality*, 27 *Stetson L. Rev.* 1, 88 (1997).

19. Blenkner et al., *supra* n. 7.

rate of institutionalization.²⁰ The contribution of elder protective referral, including guardianship, to institutionalization was revisited and reconfirmed thirty years later.²¹

In 1994, The Center for Social Gerontology conducted a national study that examined the guardianship process intensively in ten states through observation of guardianship hearings, examination of court files, and telephone interviews with petitioners.²² The study found that only about one-third of respondents were represented by an attorney during the guardianship process; medical evidence was present in the court file in most cases, but medical testimony was rarely presented at the hearing; the majority of hearings lasted no more than fifteen minutes, and twenty-five percent of hearings lasted less than five minutes; the court granted ninety-four percent of guardianship requests; and only thirteen percent of the orders placed limits on the guardian's authority.²³

3. Recent Developments

Significant events during the past several years have refocused public attention on the nation's adult-guardianship system. In 2001, eleven national groups convened The Second National Guardianship Conference (the "Wingspan" conference) to assess progress on reform.²⁴ The conference again resulted in recommendations for action, as well as a landmark series of articles on mediation, the role of counsel, use of limited guardianship, fiduciary and lawyer liability, and guardian accountability in the 2002 *Stetson Law Review*.²⁵ In 2004, many groups reconvened to develop steps for implementing selected Wingspan recommendations.²⁶

20. *Id.* at 175–183.

21. Mark S. Lachs, Christianna S. Williams, Shelley O'Brien & Karl A. Pillemer, *Adult Protective Service Use and Nursing Home Placement*, 42 *The Gerontologist* 734, 737–738 (Dec. 2002).

22. Lauren Barritt Lisi, Anne Burns & Kathleen Lussenden, *National Study of Guardianship Systems: Findings and Recommendations* 3 (Ctr. Soc. Gerontology 1994).

23. *Id.* at 44, 55–56, 61–63.

24. *Wingspan—The Second National Guardianship Conference*, 31 *Stetson L. Rev.* 573, 573–574 (2002).

25. *Id.*

26. Natl. Acad. Elder L. Attys., Natl. Guardianship Assn., Natl. College Prob. JJ., *2004 National Wingspan Implementation Session: Action Steps on Adult Guardianship*

Meanwhile, in 2002, the District of Columbia Court of Appeals overturned a lower court decision, *In re Mollie Orshansky*,²⁷ that highlighted critical guardianship issues. This case and other guardianship rumblings prompted a hearing in 2003 by the United States Senate Committee on Aging, "Guardianships over the Elderly: Security Provided or Freedoms Denied?"²⁸—which in turn prompted a Senate request for a study on guardianship by the Government Accountability Office (GAO Study). The GAO Study, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, surveyed courts in New York, Florida, and California. Findings included variations in guardianship oversight, lack of data on guardianship proceedings and wards, problematic interstate guardianship issues, and lack of coordination between state courts handling guardianship and federal representative payment programs.²⁹ In 2005, Mary Joy Quinn produced a comprehensive text for community health and social services practitioners.³⁰ Also in 2005, the *Los Angeles Times* published a comprehensive series entitled *Guardians for Profit*, highlighting problems with professional conservators in southern California.³¹

Progress 1 (2004) (available at <http://www.maricopa.gov/pubfid/pdf/wingspanreport.pdf>).

27. 804 A.2d 1077, 1079, 1104 (D.C. 2002).

28. Sen. Spec. Comm. Aging, *Guardianship over the Elderly: Security Provided or Freedom Denied?* 108th Cong. (Feb. 11, 2003).

29. U.S. Govt. Accountability Off., Rpt. to Sen. Spec. Comm. Aging, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, GAO-04-655, 2 (July 2004) [hereinafter GAO Study].

30. Mary Joy Quinn, *Guardianships of Adults: Achieving Justice, Autonomy and Safety* xi, xv (Springer Publg. Co. 2005).

31. Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit: State Could Turn Elsewhere for Conservatorship Remedies*, L.A. Times 1 (Nov. 27, 2005); Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit: For Most Vulnerable, a Promise Abandoned*, L.A. Times 1 (Nov. 16, 2005); Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit: Judge Orders Review of Vet's Contested Will*, L.A. Times 22 (Nov. 16, 2005); Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit: Missing Money, Unpaid Bills and Forgotten Clients*, L.A. Times 1 (Nov. 15, 2005); Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit: Judges' Inaction, Inattention Leave Many Seniors at Risk*, L.A. Times 1 (Nov. 14, 2005); Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit: In O.C., a Lower Fee for that Milk Run*, L.A. Times 16 (Nov. 14, 2005); Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit: When a Family Matter Turns into a Business*, L.A. Times 1 (Nov. 13, 2005); Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit: 'Ruling over Someone' Has Paid Off Handsomely*, L.A. Times 47 (Nov. 13, 2005).

B. Public Guardianship

1. Definition and Overview

An important subset of guardianship is *public* guardianship, which provides a last resort when, usually for some at-risk low-income incapacitated adults, there is no one willing or appropriate to help.³² A public guardian is an entity that receives most, if not all, of its funding from a governmental entity.³³ Public guardianship programs are funded through state appropriations, Medicaid funds, county monies, fees from the ward, or some combination of these sources.³⁴ Public guardianship programs may serve the following two distinct populations: (1) older incapacitated persons who have lost decisional capacity; and (2) individuals with mental retardation and/or developmental disabilities who may never have had decisional capacity.³⁵ State programs may operate from a single statewide office or have local/regional components.³⁶ They may be entirely staff-based or may operate using both staff and volunteers.³⁷ Public guardians may serve as guardian of the property, guardian of the person, and sometimes representative payee or other surrogate decision-maker.³⁸ They can also provide case management, financial planning, public education, social services, and adult protective services—or they may serve as *guardians ad litem*, court investigators, or advisors to private guardians.³⁹

2. Empirical Research

As with private guardianship, little data exist on the need for public guardianship and on the operation of public guardianship programs. In 1987, Winsor C. Schmidt and Roger Peters studied the unmet need for guardians in Florida.⁴⁰ The project surveyed

32. *Public Guardianship Study*, *supra* n. 2, at 5.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Winsor Schmidt & Roger Peters, *Legal Incompetents' Need for Guardians in Florida*, 15 *Bull. Am. Acad. Psych. & L.* 69, 69 (1987).

the state mental health institutions, community mental health centers, offices on aging, and other agencies. They found that over 11,000 individuals in Florida needed a guardian, and that these individuals typically were female, elderly, and predominantly white with many having both medical and psychiatric conditions.⁴¹ In 1990, David Hightower, Alex Heckert, and Schmidt assessed the need for public limited guardianship and other surrogate mechanisms among elderly nursing home residents in Tennessee and found over 1,000 residents needing a surrogate decisionmaker.⁴² A 2000 report by Florida's Statewide Public Guardianship Office stated that the need for public guardianship is approaching crisis proportions and estimated that 1.5 guardianships could be needed per 1,000 individuals in the population.⁴³

In 1981, Schmidt and his colleagues published a landmark national study of public guardianship.⁴⁴ The study sought to "assess the extent to which public guardianship assists or hinders older persons in securing access to their rights, benefits, and entitlements."⁴⁵ The study reviewed existing and proposed public guardianship laws in all states and focused intensively on Maryland, Delaware, Illinois, Arizona, California, and one state without public guardianship.⁴⁶

The findings of the study focused on individuals served, staff size and qualifications, legal basis, procedural safeguards, oversight, funding, and other areas.⁴⁷ The study confirmed the need for public guardianship.⁴⁸ It stated that "public guardianship offices seem to be understaffed and under-funded, and many of them are approaching the saturation point in numbers."⁴⁹ The study indicated that, consequently, many wards received little

41. *Id.* at 71.

42. David Hightower, Alex Heckert & Winsor Schmidt, *Elderly Nursing Home Residents: Need for Public Guardianship Services in Tennessee*, 2 *J. Elder Abuse & Neglect* 105, 105-122 (1990).

43. *Id.*; Fla. Statewide Pub. Guardianship Off., Dept. of Elder Affairs, *Forgotten Faces of Florida* (SPGO 2000).

44. Schmidt et al., *supra* n. 1, at 3.

45. *Id.*

46. *Id.* at 5. The one state without public guardianship at the time of the study was Florida, which has since enacted a public guardianship statute. Fla. Stat. §§ 744.701-744.715 (2005).

47. *Id.* at 168-170.

48. *Id.* at 173.

49. *Id.* at 172.

personal attention, and noted that there were identified instances of abuse.⁵⁰ Using John Regan and Georgia Springer's 1977 taxonomy, Schmidt classified public guardianship programs into the following models: (1) court; (2) independent state office; (3) division of a social service agency; and (4) county.⁵¹ The report maintained that naming social service agencies to act as public guardians represented an inherent or potential conflict of interest.⁵² In addition, it urged programs that petition for adjudication of incapacity not also to serve as guardians, and strict procedures should accompany public guardianships.⁵³

Schmidt followed this seminal research with a focused examination of public guardianship, collected in *The Court of Last Resort for the Elderly and Disabled*.⁵⁴ In 2003, Pamela B. Teaster studied the role of the public guardian from the viewpoint of public administration, through contact with public guardian offices in four states (Delaware, Maryland, Tennessee, and Virginia).⁵⁵

Evaluative studies of public guardianship were conducted in the following three states: Florida, Virginia, and Utah.⁵⁶ First, Schmidt examined the evolution of public guardianship in Florida and found the volunteer model required significant staff time for volunteer management at the cost of providing direct service to wards.⁵⁷ Second, in the mid-1990s, the Virginia Department for the Aging contracted for two pilot public guardianship programs.⁵⁸ A program evaluation compared the staff versus volunteer models and collected information on public guardianship functions and clients, using much the same model as Schmidt pioneered in Florida.⁵⁹ The evaluation found the pilots viable.⁶⁰ A

50. *Id.* at 172–173.

51. *Id.* at 181, 183.

52. *Id.* at 183.

53. *Id.*

54. Winsor Schmidt, *The Court of Last Resort for the Elderly and Disabled* (Carolina Academic Press 1995).

55. Pamela Teaster, *When the State Takes Over a Life: The Public Guardian as Public Administrator*, 63(4) *Pub. Admin. Rev.* 396, 399 (2003).

56. *Public Guardianship Study*, *supra* n. 2, at 19.

57. *Id.*

58. *Id.*

59. *Id.*

60. Pamela Teaster, Winsor Schmidt, Hillel Abramson & Richard Almeida, *Staff Service and Volunteer Staff Service Models for Public Guardianship and 'Alternatives' Services: Who Is Served and with What Outcomes?* 5(2) *J. Ethics, L. & Aging* 131, 148

later legislatively mandated evaluation of ten Virginia projects by Teaster and Karen A. Roberto collected detailed information on program administration, ward characteristics, and ward needs.⁶¹ The study determined that the programs were performing reasonably well in serving the needs of incapacitated persons and recommended that the geographic reach be extended to cover all areas of the state.⁶² Other recommendations addressed the need for rigorous standardized procedures and forms for ward assessment, care plans and guardian-time accounting, regular program review of these documents, an established guardian-to-ward ratio, increased fiscal support, and more attention to meeting the needs outlined in the care plans.⁶³ Importantly, the study determined that the public guardianship program saved the state a total of over \$2.6 million for each year of the evaluation period, through placements in less restrictive settings and recovery of assets, at a total program cost of \$600,000.⁶⁴

Finally, when the Utah legislature created an Office of Public Guardian in 1999, it required an independent program evaluation by 2001.⁶⁵ The evaluation included on-site visits, interviews, and case file reviews.⁶⁶ The study recommended additional resources and staff, continued location within the Department of Human Services, development of a unified statewide system in which the office would not act as petitioner, as well as additional record-keeping and educational suggestions.⁶⁷

II. ANALYSIS OF PUBLIC GUARDIANSHIP STATUTES

The 2005 national public guardianship study by Teaster and colleagues included an extensive analysis of public guardianship law as well as a comparison with the law existing at the time of

(Fall/Winter 1999).

61. Pamela B. Teaster & Karen A. Roberto, *Final Report: Virginia Public Guardian and Conservator Programs: Evaluation of Program Status* i–ii (2003) (copy on file with *Stetson Law Review*).

62. *Id.* at iv.

63. *Id.* at 71.

64. *Id.*

65. Ctr. for Soc. Gerontology, Inc., *Utah Office of Public Guardian: Program Evaluation 1* (2001) (copy on file with *Stetson Law Review*).

66. *Id.*

67. *Id.* at 5, 6.

the 1979–1981 Schmidt review.⁶⁸ The study identified state statutory provisions for public guardianship⁶⁹ and examined relevant caselaw,⁷⁰ revealing that much has changed in the quarter century since the earlier project.

Provisions for public guardianship most frequently are included as a section of the state guardianship code but may be located in separate statutory sections, such as services for the aging, adult protective services, mental health, or services for individuals with disabilities.⁷¹ The 2005 study defined public guardianship as

the appointment and responsibility of a public official or publicly funded organization to serve as legal guardian in the absence of willing and responsible family members or friends to serve as, or in the absence of resources to employ, a private guardian.⁷²

The Schmidt study used a similar definition.⁷³ According to this definition, forty-one states now have some sort of statutory provision for a public guardian, as compared with thirty-four states in 1981.⁷⁴ Ten states have no statutory program for public guardianship, although in practice, several of them do provide for public

68. *Public Guardianship Study*, *supra* n. 2.

69. *Id.* at 31–44. This Article includes updated statutory information added after the project report. A total of fourteen states made changes in statutory provisions for public guardianship in 2007. Erica Wood, *State Adult Guardianship Legislation: Directions of Reform—2007*, 1 (ABA Commn. L. & Aging 2007) (available at http://www.abanet.org/aging/legislativeupdates/docs/State_Grd_07_final_1_08_V2.pdf). Therefore, the various numbers of statutes referenced throughout the Article differ slightly from those in the *Public Guardianship Study*, *supra* note 2.

70. The project summarized court cases specifically involving public guardians, describing decisions focused on: (1) the appropriateness of appointment; (2) powers and duties of the public guardian; (3) the standard for removal of a public guardian; and (4) when a public guardianship terminates. The caselaw will not be reviewed here, but is set out in the project report. *Public Guardianship Study*, *supra* n. 2, at 44–55.

71. *E.g.* Fla. Stat. § 415.1051 (2007); Fla. Stat. § 744.7021 (2007); Fla. Stat. § 400.148 (2007).

72. *Public Guardianship Study*, *supra* n. 2, at 152.

73. Schmidt et al., *supra* n. 1, at 3–4.

74. See *Public Guardianship Study*, *supra* n. 2, at i (including the status as of 2004 in Table 3.1). The project did not include a systematic search of all state adult-protective-services statutes, which might reveal additional guardianship provisions.

guardianship services.⁷⁵ The project examined several key aspects of public guardianship statutes.⁷⁶

A. Explicit versus Implicit Provisions

The 1979–1981 Schmidt study distinguished between “explicit” and “implicit” public guardianship programs:

One can distinguish between explicit public guardianship statutes that specifically refer to a “public guardian” and implicit statutes that seem to provide for a mechanism equivalent to public guardianship without actually denominating the mechanism as “public guardian.” The distinction is often nominal at best. Although an explicit scheme often indicates a progressive trend in this field, this is not always true. Indeed, several of the implicit schemes are even more progressive than the typical explicit statute.⁷⁷

Twenty-five years ago, Schmidt found twenty-six implicit statutory schemes in twenty-six states and fourteen explicit schemes in thirteen states, with some states having more than one scheme.⁷⁸ Today, research shows a total of twenty-two implicit statutory schemes in nineteen states and twenty-five explicit schemes in twenty-four states.⁷⁹ Implicit schemes often name a state agency or employee as guardian of last resort when there are no willing and responsible family members or friends to serve,⁸⁰ whereas explicit schemes generally provide for an office and the ability to hire staff and contract for services.⁸¹ Over time states shifted markedly toward enactment of explicit public guardianship schemes—which are more likely to have budgetary appropriations and which may have greater oversight than is required for private guardians or for guardians under an implicit scheme.⁸²

75. *Id.*

76. Since the publication of the project report, fourteen states made changes in their public guardianship provisions in 2007, and those changes are reflected in the next Section. Wood, *supra* n. 69, at 1.

77. Schmidt et al., *supra* n. 1, at 26.

78. *Id.* at 27 tbl. 3.1.

79. *Public Guardianship Study*, *supra* n. 2, at i tbl. 3.1.

80. *Id.* at 2.

81. *Id.* at 39.

82. *Id.* at 2.

B. Eligibility—Clients Served

In 1981, the Schmidt study found that, of the thirty-four states under analysis, twenty generally provided public guardianship services for “incompetents,” seventeen specifically provided for services for individuals with mental retardation who needed a guardian, nineteen targeted incapacitated elderly persons, and eleven provided a form of public guardianship for minors.⁸³ The majority of public guardianship schemes served limited categories of beneficiaries. Less than half of the thirty-four states had provisions to aid three or more targeted groups.⁸⁴ Schmidt noted that the specific needs of individuals with mental retardation and elders “[came] into focus only recently.”⁸⁵

Today, the overwhelming majority of state statutes provide services to incapacitated individuals who are determined to be in need of a guardian under the adult guardianship law but have no person or private entity qualified and willing to serve.⁸⁶ Modern guardianship codes rely more on a functional determination of incapacity and less on specific clinical conditions, and thus, may be less likely to segregate specific categories of individuals for service.

However, a few statutory provisions target specific groups of incapacitated persons. Four state statutes limit public guardianship services to incapacitated persons who are elderly.⁸⁷ Two states—Maryland⁸⁸ and New York⁸⁹—limit services to those requiring adult protective services. New York further limits the reach of its community guardianship program by specifying service only to those living outside of a hospital or residential facility.⁹⁰ Approximately ten states specifically allow the adult-protective-services agency to serve as guardian of its client, either

83. Schmidt et al., *supra* n. 1, at 26.

84. *Id.* at 33.

85. *Id.*

86. *Public Guardianship Study, supra* n. 2, at 150.

87. Conn. Gen. Stat. § 45a-651(a)(1) (2003); N.J. Rev. Stat. Ann. § 52:27G-22(b) (West 2002); Tenn. Code Ann. § 34-7-104(a)(1) (Lexis 2001); Vt. Stat. Ann. tit. 14, § 3092(a) (2003). These statutes limit service to those who are 60 years of age or older.

88. Md. Fam. Law Code Ann. § 14-307(b)(1) (2006).

89. N.Y. Soc. Serv. Law § 473-d(2)(a) (McKinney 2003).

90. *Id.* at § 473-d(2)(c).

on a temporary or permanent basis.⁹¹ Additionally, four state statutory schemes are directed to persons with specific mental disabilities.⁹² Finally, a number of state statutes specify that services are reserved for persons with financial limitations.⁹³ For example, Connecticut limits services to those with assets not exceeding \$1,500.⁹⁴

C. Scope of Service

In Schmidt's study, only one state with public guardianship provisions, Wyoming, did not clearly provide for public guardianship of both person and property.⁹⁵ Today, thirty-two laws in twenty-nine states clearly indicate the public guardian program can provide services as both guardian of the person and the estate.⁹⁶ Two states appear to cover property only—Alabama provides for the appointment of a general county conservator or sheriff⁹⁷ and South Carolina allows the director of the mental health department to serve as conservator for limited amounts.⁹⁸ Two states, Arkansas⁹⁹ and Maryland,¹⁰⁰ authorize public agencies to serve only as guardian of the person. In the remainder, there is no specific statement in the public guardianship provisions granting or restricting services but reliance on the overall guardianship code indicates coverage of both.

D. Public Guardian as Petitioner

A question central to the operation of any public guardianship program is whether it can petition to serve as guardian. Such

91. ABA Commn. L. & Aging, *Adult Protective Services Agency Authority to Act as Guardian of a Client: Guidance and Provisions from Adult Protective Services Laws by State* (forthcoming on the NCEA Web site, <http://www.ncea.aoa.gov>).

92. Cal. Welf. & Inst. Code Ann. § 5354.5 (West 1998); 18 Me. Rev. Stat. Ann. § 5-601(b) (1998); Ohio Rev. Code Ann. § 5123.58 (Lexis 2004); S.C. Code Ann. § 62-5-105 (1987).

93. *E.g.* N.M. Stat. Ann. § 45-5-407(D)(1)–(3) (West 2003) (restricting guardianship services to persons with financial limitations).

94. Conn. Gen. Stat. Ann. § 45a-651(a)(1).

95. Schmidt, *supra* n. 1, at 34.

96. *Public Guardianship Study*, *supra* n. 2, at 38.

97. Ala. Code § 26-2A-138(a) (Lexis 1992).

98. S.C. Code Ann. § 62-5-105.

99. ABA Commn. L. & Aging, *supra* n. 91.

100. Md. Est. & Trusts Code Ann. § 13-707(a) (2001).

petitioning could present several conflicts of interest. First, if the program relies on fees for its operation, or if its budget is dependent on the number of individuals served, it could be inclined to petition more frequently, regardless of individual needs. On the other hand, it might, as Schmidt points out,

only petition for as many guardianships as it desires, perhaps omitting some persons in need of such services.¹⁰¹ Or it could “cherry pick”—petitioning only for those individuals easiest or least costly and time-consuming to serve.¹⁰² The Schmidt study did not specifically address statutory provisions allowing the public guardianship agency to petition for its own wards.¹⁰³ Today, statutes in fifteen states explicitly allow this.¹⁰⁴

Only one state—Vermont—explicitly prohibits it.¹⁰⁵ The remainder of the states do not address the issue.

E. Administrative Location

Perhaps the most fundamental feature in analyzing the statutes is the administrative location of the public guardianship function in the state government. Schmidt relied on an earlier administrative classification by Regan and Springer,¹⁰⁶ which used the following four models: (1) a court model; (2) an independent state office; (3) a division of a social service agency; and (4) a county agency, noting that there were “many exceptions and variations” and that “[f]ew states fit the exact organization described in the models.”¹⁰⁷ The current project uses the same classification with the same caveat.

101. Schmidt et al., *supra* n. 1, at 34.

102. *Public Guardianship Study*, *supra* n. 2, at 38.

103. *Id.*

104. *Id.*

105. Vt. Stat. Ann. tit. 14, § 3092(b) (2002).

106. Regan & Springer, *supra* n. 6, at 111–114.

107. Schmidt et al., *supra* n. 1, at 60.

1. Court Model

Schmidt found that six states established the public guardianship office as an arm of the court.¹⁰⁸ Today, statutory provisions show three states with a court model—Delaware,¹⁰⁹ Hawaii,¹¹⁰ and Mississippi.¹¹¹

2. Independent Agency Model

Schmidt found three states in which the public guardianship program was an independent state office in an executive branch of the government that does not provide direct services for wards.¹¹² Today, statutory provisions show four states that approximate this model—Alaska, in which the office of Public Advocacy is located in the Department of Administration;¹¹³ Illinois, in which the Office of State Guardian (one of the state's two schemes) is located in the Guardianship and Advocacy Commission;¹¹⁴ Kansas, in which the Kansas Guardianship Program is independent, with a board of directors appointed by the governor;¹¹⁵ and New Mexico, in which the Office of Guardianship is in the Developmental Disabilities Planning Council.¹¹⁶

3. Social Service Agency Model

In 1981, the Schmidt study strongly maintained that placement of the public guardianship function in an agency providing direct services to wards presents a clear conflict of interest.¹¹⁷ The study explained that

[t]he agency's primary priority may be expedient and efficient dispersal of its various forms of financial and social assistance. This can be detrimental to the effectiveness of the agency's role as guardian. If the ward is allocated insuffi-

108. *Id.*

109. Del. Code Ann. tit. 12, § 3991 (Lexis 2001).

110. Haw. Rev. Stat. § 551A-1 (2006).

111. Miss. Code Ann. § 93-13-21 (2004).

112. Schmidt et al., *supra* n. 1, at 60.

113. Alaska Stat. § 44.21.400 (2006).

114. 20 Ill. Comp. Stat. Ann. 3955/3 (West 2001).

115. Kan. Stat. Ann. §§ 74-9603-9604 (2002).

116. N.M. Stat. Ann. § 28-16B-2 (2003).

117. Schmidt et al., *supra* n. 1, at 38.

cient assistance, if payment is lost or delayed, if assistance is denied altogether, or if the ward does not want mental health service, it is unlikely that the providing agency will as zealously advocate the interests of that ward.¹¹⁸

Schmidt found that over one-half of the states studied placed the public guardianship function so as to present a conflict of interest between the role of guardian (monitoring and advocating for services) and the role of social services agency (providing services).¹¹⁹ That is largely still true today. In fact, “[t]he percentage of states with statutes providing a potential for conflict appears to have increased.”¹²⁰ Some twenty-eight or more of the forty-one states with public guardianship statutory provisions name a social services, mental health, disability, or aging services agency as guardian, or as the entity to coordinate or contract for guardianship services.¹²¹

Schmidt noted that some of the states with potential conflict had sought to alleviate the problem within the statutory scheme—for example, by providing that the agency is “not to serve unless there is no other alternative available.”¹²² The majority of statutes include such language today. Moreover, most indicate that a key duty of the public guardian is to attempt to find suitable alternative guardians.¹²³

4. County Model

Approximately eleven of the statutory schemes locate the public guardianship function at the county level, and a number of others have designed programs coordinated at the state level but carried out administratively or by contract at the local or regional level.¹²⁴ For instance, in Arizona, the county board of supervisors appoints a public fiduciary,¹²⁵ and in California, the county board

118. *Id.*

119. *Id.*

120. *Public Guardianship Study, supra* n. 2, at 40.

121. *Id.*

122. Schmidt et al., *supra* n. 1, at 38.

123. *Public Guardianship Study, supra* n. 2, at 40.

124. *Id.*

125. *Id.*; Ariz. Rev. Stat. Ann. § 14-5601(A) (West 2005).

creates an office of public guardian.¹²⁶ A 2005 Georgia law established a unique model in which individuals and entities may register as public guardians with the county probate courts under a system established by the Division of Aging.¹²⁷

F. Duties and Powers of Public Guardian

Every state guardianship code sets out a basic array of duties and powers for guardians of the person and of the estate.¹²⁸ In some states, guardians have a great deal of flexibility in their authority to sell property, invest assets, make major healthcare or end-of-life decisions, or relocate the individual; while in other states, guardians must obtain a court order to take some of these actions.¹²⁹

Public guardianship statutes generally provide that the public guardian has the same duties and powers as any other guardian.¹³⁰ Virtually all state guardianship codes now include language allowing or encouraging the court to limit the scope of the guardianship order to areas in which the ward lacks decisional capacity and, in a number of states, statutory language specifically mentions that the public guardianship program may serve as limited guardian.¹³¹

Many statutes list additional duties and powers for public guardianship programs beyond those of private guardians, such as specified ward visits, development of individualized service plans, periodic reassessments, visits to the facility of proposed placement, and intervention in private proceedings if necessary.¹³² Statutes also may list programmatic duties or powers, such as maintaining professional staff, contracting with service providers, assisting petitioners or private guardians, providing

126. *Public Guardianship Study*, *supra* n. 2, at 40; Cal. Govt. Code Ann. § 27430(a) (West Supp. 2007).

127. Ga. Code Ann. § 29-10-4 (2006).

128. *Public Guardianship Study*, *supra* n. 2, at 40.

129. *Id.* at 40-41; Sarah B. Richardson, Student Author, *Health Care Decision-Making: A Guardian's Authority*, 24 *Bifocal* (newsltr. ABA Commn. Law & Aging) 1, 6 (Summer 2003).

130. *Public Guardianship Study*, *supra* n. 2, at 41.

131. *Id.* at 42.

132. *Id.* at 41.

public information, recruiting volunteers, and maintaining records and statistics.¹³³

G. Costs of Program

In 1981, the Schmidt study observed that the funding of public guardianship programs “[was not] given much mention in the statutory schemes” and the lack of explicit funding may leave programs subject to “the vicissitudes of an annual budget.”¹³⁴ Today, thirty of the forty-one states with statutory provisions make some mention of cost.¹³⁵ Some fourteen states include reference to specific state appropriations,¹³⁶ while others have not made any provision statutorily, leaving the public guardianship function financially at risk.¹³⁷ Twenty-two states reference the governmental agency (state or county) as being responsible for payment of costs;¹³⁸ and twenty-two reference the ward.¹³⁹ Fifteen reference both the governmental agency and the ward for payment of guardianship services as well as costs and fees associated with initiation of the guardianship.¹⁴⁰ A common scenario appears to be that the ward’s estate pays; but if the ward is unable to pay, the county or state makes up the difference. A few states mention recovery from the ward’s estate after death.¹⁴¹

H. Court Oversight and Program Review

Public guardianship programs are subject to the same provisions for guardianship accountability and monitoring as private guardians.¹⁴² However, in twenty-one states the public guardianship statute either mentions specifically that the program must report to court and abide by state requirements for guardian review or provides for special additional oversight.¹⁴³ At least five

133. *Id.*

134. Schmidt et al., *supra* n. 1, at 39.

135. *Public Guardianship Study, supra* n. 2, at 41.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 41–42.

141. *Id.*

142. *Id.*

143. *Id.*

states specify an annual report to the court on each ward.¹⁴⁴ Delaware requires court review of each public guardianship case every six months to determine whether the guardianship should be continued.¹⁴⁵ Maryland has a unique oversight mechanism, providing for county review boards to conduct reviews of each public guardianship case every two years, including annual face-to-face hearings by volunteer multidisciplinary panels.¹⁴⁶ In addition, several statutes call for annual reports on the program to governmental entities or for independent audits.¹⁴⁷ Two states—Utah and Virginia—require an independent evaluation of the program.¹⁴⁸ Finally, a majority of the statutes specify bonding requirements for the public guardianship program.¹⁴⁹

I. Staffing Ratios

In 1981, the Schmidt study endorsed public guardianship only “with adequate funding and staffing, including specified staff-to-ward ratios.”¹⁵⁰ It is significant that seven states now provide for a staffing ratio.¹⁵¹ The Florida statute provides for a one-to-forty ratio of professional staff to wards.¹⁵² Georgia specifies that an individual serving as a public guardian may serve no more than five wards, and a public guardianship entity may serve no more than thirty wards.¹⁵³ In the remaining five states, statutes provide for ratios to be determined by regulations, state units on aging or other governmental entities, or through contracts with public guardian providers.¹⁵⁴

144. *Id.*

145. *Id.*; Del. Code Ann. tit. 12, § 3996 (2001).

146. Md. Fam. Code Ann. § 14-404 (2006).

147. *Infra* n. 148.

148. *Id.*; see Utah Code Ann. § 62A-14-112 (2007) (requiring a one-time evaluation); see also Va. Code Ann. § 2.2-712(B)(9) (2007) (requiring an evaluation every four years, provided funds are appropriated).

149. *Public Guardianship Study*, *supra* n. 2, at 42.

150. Schmidt et al., *supra* n. 1, at 174.

151. *Public Guardianship Study*, *supra* n. 2, at 42.

152. Fla. Stat. § 744.708(7) (2007).

153. Ga. Code Ann. § 29-10-7(f) (2007).

154. *Public Guardianship Study*, *supra* n. 2, at 43.

III. KEY RESULTS OF 2005 NATIONAL STUDY

The central element of the 2005 national public guardianship study by Teaster and colleagues was the administration of a survey to each of the fifty-one jurisdictions¹⁵⁵ within the United States. The survey was developed in consultation with the project's advisory committee and included definitions of terms for participants.¹⁵⁶ Responses were uneven at best, but the study did get at least *some* response from *each* of the fifty-one jurisdictions. The project data's analysis was primarily descriptive due to its marked unevenness. For instance, many of the state surveys received included little or no information on the wards, suggesting either that data were not collected or were not maintained in such a way as to be readily available to disseminate. The survey sought information regarding the following five major aspects of public guardianship:

- (1) administrative structure and location in government;
- (2) functions of the public guardianship program, including whether the program provides education for the public, as well as assistance to or oversight of private guardianship programs;
- (3) staffing;
- (4) ward information including referral source, diagnosis, residential location, and basic demographic information such as gender, age and race; and
- (5) a series of open-ended questions seeking to elicit detailed reports of strengths and weaknesses of each state's program.

Of the fifty-one jurisdictions surveyed, thirty-six responded that they had public guardianship programs, while seventeen responded that they did not.¹⁵⁷ Upon closer examination of the surveys, in conjunction with the statutes, it became evident that

155. *Id.* at 60 (noting that for this study Washington D.C. was treated as a state).

156. *Id.* at 58.

157. *Id.* at 59. The number responding is greater than fifty due to the fact that some states (e.g. Illinois and Hawaii) have more than one public guardianship program.

forty-eight states do, in fact, have some form of public guardianship (in which the government provides funding for the public guardianship function), while only three do not: District of Columbia, Nebraska, and Wyoming.¹⁵⁸ There has been a seventy percent increase in the number of states with some form of public guardianship since the Schmidt study, increasing from thirty-four to forty-eight in number.

A. Governmental and Administrative Location¹⁵⁹

The governmental and administrative location of public guardianship programs is of significant concern to practitioners, advocates, researchers, and policymakers. As noted earlier, the study relied on the taxonomy developed by Regan and Springer¹⁶⁰ and refined by Schmidt and colleagues, which includes the following four models:

The *court* model establishes the public guardian as an official of the court that has jurisdiction over guardianship and conservatorship. The chief judge of this court appoints the public guardian. The chief administrative judge of the state has rulemaking power for the purpose of statewide uniformity.

The *independent state office* would be established in the executive branch of government with the public guardian appointed by the governor.

Model three [*division of a social service agency*] establishes the public guardian office within a pre-existing social service agency. The public guardian is appointed by the governor. This model may be considered a conflict of interest model. In this situation, an agency is providing services to the same clients for whom they are guardian, thus encouraging use of services that may not be in the best interests of the ward.

158. *Id.* Wyoming previously had a statutory provision for public guardianship, which was repealed in 1998. Wyo. Stat. Ann. §§ 3-7-101–3-7-105 (1993). Washington D.C. passed an emergency act in 2007 that revises temporary guardianship provisions; however, it will expire unless the D.C. Council adopts a permanent version of the act. Wood, *supra* n. 69, at 10 (describing Act 17-161).

159. The following Section draws heavily from *Public Guardianship Study*, *supra* note 2, at 39.

160. Regan & Springer, *supra* n. 6, at 27–28.

The *county model* establishes a public guardian within each county. The local official may be more sensitive to the needs of the elderly [or incompetent] in a particular county. The public guardian is appointed by the county government. The state attorney general would regulate these county offices.¹⁶¹

Inclusion of each state within a given model was based not only upon responses the project received from individual jurisdictions, but also upon the careful examination of state statutes and the triangulation of that information. By far, the majority of public guardianship programs (n = 33)¹⁶² were administratively housed within existing social service agencies, followed by the county model (n = 10),¹⁶³ and the independent state office¹⁶⁴ and court model¹⁶⁵ (n = 4 each). Of note is the shift of models in the intervening years between the 1981 Schmidt study and the 2005 study, showing that clearly the predominant model is that of an entity also providing social services—a model that could be subject to some degree of conflict of interest.

B. Administrative Features and Funding

In most states, under the court model (75%) and the independent state agency model (100%), the public guardianship program provides statewide coverage.¹⁶⁶ The social service provision agency model has statewide coverage in just over half (53%) the states reporting,¹⁶⁷ while the county model provides the least

161. Schmidt et al., *supra* n. 1, at 59–60.

162. *Public Guardianship Study*, *supra* n. 2, at 60. The following states' public guardianship programs were housed within an existing social service agency: Arizona, Colorado, Connecticut, Florida, Georgia, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, New Hampshire, New Jersey, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin (volunteer and corporate guardian). *Id.* at 61 tbl. 4.1.

163. *Id.* The following states' public guardianship programs were determined to be county models: Alabama, Arizona, California, Idaho, Illinois (OPG), Nevada, North Carolina, North Dakota, Oregon, and Wisconsin. *Id.* at 61 tbl. 4.1.

164. *Id.* at 60. The following states had public guardianship as an independent state office: Alaska, Illinois (OSG), Kansas, and New Mexico. *Id.* at 61 tbl. 4.1.

165. *Id.* at 60. The following four states used a court model of guardianship: Delaware, Hawaii (large), Hawaii (small), and Mississippi. *Id.* at 61 tbl. 4.1.

166. *Id.* at 62, 67.

167. *Public Guardianship Study*, *supra* n. 2, at 2.

statewide coverage (20%).¹⁶⁸ In total, some twenty-seven states now have statewide coverage of public guardianship services.¹⁶⁹

The study examined the extent to which states contract out the public guardianship function. It found that at least eleven states contract for such services.¹⁷⁰ The court model is the only one that does not contract out services, followed by the county model (two of ten), the independent state office model (one of four), and the social service agency model (eight of thirty-four).

A surprising number of programs were unable to provide information on their fiscal year 2003 budget, and it was impossible to compare this information across models. However, the source of funding differed significantly across the models. Three of the four states using the court model were supported solely with state funds.¹⁷¹ The states whose public guardianship programs were classified as independent state offices all received state funding;¹⁷² one received Medicaid funds¹⁷³ and two received some funds from client fees.¹⁷⁴ Only two of the ten programs falling under the county model reported receiving state funds.¹⁷⁵ These were supplemented by county funding (five of ten), Medicaid funds (two of ten), client fees (six of ten), estate recovery (three of ten), and unspecified "other" sources (three of ten). The majority of programs under the social service agency model did receive state funds (twenty-one of thirty-four). This was the only model that availed itself of all the possible sources of funding that were listed: federal funds, county funds, Medicaid funds, grants/foundations, private donations, client fees, estate recovery, and unspecified "other."

C. Functions of Public Guardianship Programs

At least half of the states within each model reported that they make decisions regarding a ward's personal affairs, and nearly half make decisions about a ward's financial affairs. The

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

programs under the social service model were less likely to make decisions about financial affairs than the programs falling under the other models. States falling into the county and social service model had programs that were more likely to serve as representative payee. To their credit, social service agency model programs were slightly less likely (forty-one percent versus fifty to sixty percent) to petition for adjudication of incapacity or to petition for themselves to be appointed as guardian.¹⁷⁶

Plenary guardianships of both person and property provided for five percent of wards within the court model, twenty percent of wards within the independent state office model, thirty-five percent of wards within the social service agency model, and ninety percent of wards within the county model. There were no limited guardianships for wards within the court model, and fewer than ten percent of wards within the remaining models were under limited guardianship.¹⁷⁷

D. Staffing of Public Guardianship Programs¹⁷⁸

The study found significant variation in program size and staffing—and overall chronic understaffing. Staffing for the court model ranged from a low of seven to a high of eight. Staffing for the independent state office model ranged from two to seventy-three, for the social service agency model from one-half to sixty-two, and for the county model from eight to ninety. Most states adopted standardized policies and procedures, and many adopted hiring requirements. Both the independent state office model and the social service agency model programs appear to have more procedural mechanisms in place for staff training and evaluation than do the court and county models.

176. However, note that the forty-one percent represents fourteen of the thirty-four reporting programs, and thus a significant number of social service agency programs may petition. *Id.* at 91.

177. The independent state office model reported the extent of guardianship at five percent limited person and two percent limited property; the social service agency model reported seven percent limited person and one percent limited property; and the county model reported one percent each limited person and limited property. *Id.* at 93.

178. The following Section draws heavily from *Public Guardianship Study*, *supra* note 2, at 155. Again, this Article includes updated statutory information collected by the Authors after publishing *Public Guardianship Study*, *supra* note 2.

The reported ward census was also quite diverse. Census figures ranged from 226 to 771 for the court model; 345 to 5,383 for the independent state office model; 2 to 3,224 for the social service agency model, and 150 to 3,400 for the county model. Extremely low numbers for some programs are likely to reflect nascent programs just beginning to fill their available slots for clients.

Few states could provide an estimate of the unmet need for public guardians, although most did indicate that they were chronically, and in some instances, dangerously understaffed. An alarming number of programs have extremely high ratios. The highest reported was 1 to 173 in New Mexico.

E. Ward Information¹⁷⁹

Programs reported that the majority of wards were between the ages of eighteen and sixty-four except in the social service model which only had forty-three percent of wards between those ages. The most frequent primary diagnoses of wards under public guardianship were mental illness, developmental disabilities, and mental retardation. All programs reporting residential setting of wards indicated that well over half the wards were in institutional settings.

Based on these reports, individuals under guardianship have shifted somewhat from an older adult population (for example, over age sixty-five) to a younger population (for example, ages eighteen to sixty-four). These younger wards seem to reflect a more challenging client mix. Unlike the finding in the 1981 Schmidt study, where the primary diagnosis of wards was dementia, this study found the primary diagnoses were mental illness, mental retardation, and developmental disability. Wards were fairly evenly split between men and women, again representing a shift from the 1981 study which found the majority of wards to be older white women. Finally, despite an improvement in the proportion of wards who are institutionalized, it is still clear that far too many wards are relegated to institutional settings. The lowest percentage of wards in institutions was in Kansas (thirty-seven

179. Again, the following Section draws heavily from *Public Guardianship Study*, *supra* note 2, at 64.

percent), while the highest was in Los Angeles (ninety-seven percent).

F. Strengths, Weaknesses, Opportunities, and Threats

Overwhelmingly, when respondents provided information on strengths, weaknesses, opportunities, and threats of public guardianship programs, the single greatest strength was that of the public guardianship staff. Most staff worked under difficult conditions with less than adequate remuneration and with difficult clients. Despite these conditions, turnover of staff was surprisingly low.

The primary reported weakness of the public guardianship programs was the lack of funding. The most consistently reported opportunity for the public guardian programs appeared to be education of the public although, out of necessity, this took a back seat to providing guardianship services. Not surprising, and similar to the findings in the 1981 study, was the assertion by virtually every program in every state of a critical lack of funding, which translated into circumscribed services for wards and inadequate staffing to meet wards' needs. This remains the overarching threat to effective public guardianship programs, particularly as demographic shifts portend more individuals needing guardianship services.

Despite the uneven nature of the data provided, these data represent the most accurate information on public guardianship in the country and highlight both similarities and changes since the 1981 study. This very unevenness illustrates the necessity of implementing data-gathering tools, such as this survey, which will allow agencies, courts, states, and local and national policymakers to make educated and informed decisions about the lives of vulnerable populations.

IV. SELECTED STATE PUBLIC GUARDIANSHIP PROFILES¹⁸⁰

A. Methods for In-Depth Interviews and Site Visits

The original concept for this study was to gather in-depth information on three states without public guardianship and four states with public guardianship. These states were chosen because the benefactor of the study, The Retirement Research Foundation, specified that research efforts be focused on them. The research team, in consultation with the advisory committee, developed an interview guide for states in both categories. The team's early knowledge of which states did and did not have public guardianship programs was informed chiefly by public guardianship statutes. However, as the researchers conducted interviews with key informants, the team found that each of the seven states studied—those thought to have no programs (Missouri, Iowa, and Wisconsin) and those thought to have public guardianship programs (Florida, Kentucky, Illinois, and Indiana)—did have some form of public guardianship. Thus, the following Sections are presented to reflect the study's findings: "Case Studies of States with In-Depth Interviews," and "Case Studies of States with Site Visits."

The research team obtained information from these states not only through the national survey discussed earlier, but also from an in-depth telephone interview conducted by the investigatory team. Researchers arranged in-depth interviews with the state contact person (i.e., the individual the researchers discovered, via word of mouth, position held within the state, and other documents) expected to be the most knowledgeable in the state regarding public guardianship. The team then sent interview questions to the study participants well in advance of the interview. The interviews were tape-recorded with full knowledge of the participants involved. The audiotapes were later transcribed at the University of Kentucky, and the transcriptions were checked for accuracy. Interviews ranged from one to two and a half hours in

180. Much of the summary regarding state public guardianship profiles set forth in this Part was developed by the Authors in *Public Guardianship Study*, *supra* note 2. The text draws heavily from *Public Guardianship Study*, and for this reason the footnotes are minimal in this Part. For more detailed information on the following states or for other state profiles, see *Public Guardianship Study*, *supra* note 2, at 96-149.

duration with follow-up telephone calls or emails for clarification and additional documentation as needed. When requested and wherever possible, the interview participant read a draft of the interview summary for accuracy.

Given the unique statewide approaches and geographic and demographic differences in the states, no single approach emerged in filling the public guardianship void. Thus, each state's answer to addressing the need for public guardianship is discussed as unique. Information is presented in the order in which the key informants in the states were interviewed.

B. Case Studies of States with In-Depth Interviews

1. *Indiana*

The state's sixteen-year-old public guardianship program is coordinated by the state unit on aging with regional programs through Area Agencies on Aging and mental health associations. The program is state-funded. Some regional programs use Medicaid funding to pay for guardianship services.

The program served approximately 289 individuals in the 2003 fiscal year. The local programs petition for guardianship. A rough estimate of time spent on each case was five hours. Caseloads per individual guardian ranged from twenty-five to forty-four wards. Wards are visited at least monthly, but wards in nursing homes are visited every ninety days.

While a statewide needs assessment is underway, the unmet need is perceived as substantial, and the funding is limited. The programs are at "maximum capacity" at current caseloads, and the program does not serve as guardian of last resort with unlimited intake.

2. *Iowa*

Current public guardianship needs in Iowa are met in piecemeal fashion and in many areas not at all. State legislation creating a system of volunteer guardianship programs was enacted but not funded, and only one county has such a program. An additional county operates an independent staff-based program that provides guardianship, conservatorship, and representative payee services. Also, under a state law, seven counties have established

substitute medical decisionmaking boards of last resort for individuals without the capacity to give informed consent if there is no one else to do so. This leaves much of the state without public guardianship. Practitioners and advocates are acutely aware of the gap and are assessing unmet need and developing proposals to create a statewide public guardianship program.¹⁸¹

3. Missouri

Missouri law provides for an elected county public administrator to serve as guardian of last resort in each of the state's 115 jurisdictions. There is wide variability throughout the state in the following: the background and experience of the public administrators; the method of payment; the additional functions they perform; the caseloads; the extent of support from county commissioners and judges; and whether the administrators petition for guardianship cases. This system of public administrators as public guardians is unique. On the positive side, the system covers the state. On the negative side, using elected officials to perform this critical role interferes with continuity and works against the development of a cadre of qualified, stable, and experienced surrogate decisionmakers. Moreover, funding is uneven and patently insufficient, sometimes resulting in dangerously high caseloads.

4. Wisconsin

While there is no statewide public guardianship program and no statutory provision, Wisconsin does have three mechanisms that are paid for or approved by the state to provide for guardianship of last resort. First, corporate guardians are incorporated entities that provide guardianship services with payment by counties or from the estate of the ward. They are state-approved and located in all parts of the state. Second, volunteer guardianship programs are operated by county agencies or non-profit entities and were originally funded by small state grants. And third, county-paid guardians serve five or fewer wards. A Guardianship

181. See Iowa Dept. of Elder Affairs, *Legislative Update*, Vol. 1, Issue 13 (Apr. 15, 2005). Subsequent to the interview, state legislation established a statewide Office of Substitute Decision-Maker in the Department of Elder Affairs. Federal funding contributed to support for the Office.

Support Center provides technical assistance on guardianship and surrogate decisionmaking issues statewide. Unlike other states studied, the interview did not make reference to a large unmet need for public guardianship services.

C. Case Studies of States with Site Visits

The study included intensive site visits in three states—Florida, Kentucky, and Illinois. Each visit included focus groups of public guardianship staff, judges and court administrators, attorneys, adult-protective-services staff, and professionals in aging and disability fields. The visits also included interviews with selected wards.

1. Florida

The Statewide Public Guardianship Office is located in the Florida Department of Elder Affairs. The Office contracts with sixteen local programs, generally non-profit entities that cover twenty-three of the sixty-seven counties in the state. The programs serve as both guardian of the person and of property as well as representative payee. Most of the local programs have a mixture of funding sources, but many rely heavily on court filing fees. A recent change in the Florida Constitution resulted in removal of the counties' authority to direct filing fees toward public guardianship.

Although a matching grant program was enacted, funds were not allocated to the program, and the Office assisted the local programs in identifying alternative sources of funding. The Office was moving toward establishment of uniform procedures across programs. Florida law provides for a one to forty staff-to-ward ratio. Once programs reach this level, for any additional cases there is an unmet need in the locality with no last-resort decisionmaker. Moreover, many informants perceived the lack of resources to support the filing of guardianship petitions as a serious barrier to securing public guardianship for individuals in need. Finally, the *guardian ad litem* system appeared irregular, with little training for attorneys who take on this role.

2. Kentucky

In the 1990s, the Office of the Public Guardian was placed within the Department of Social Services, now the Department for Community Based Services in the Cabinet for Health and Family Services. This shift dramatically increased the number of wards without a commensurate increase in staffing or funding. More recently, the public guardianship program came under the supervision of the service regions in the state.

There are sixteen service regions and six guardianship regions. Staff-to-ward ratios are approximately one to eighty with many staff shouldering caseloads far higher along with their administrative duties. The mixture of rural and urban locations in the state created additional difficulties in meeting ward needs and visiting them in a timely manner. That the coordinator for the public guardianship program also has responsibilities for adult protective services appeared to present a marked conflict of interest, and attempts are underway to rectify this.

3. Illinois

Illinois has a dual system of public guardianship. The Office of State Guardian (OSG) is located within the Illinois Guardianship and Advocacy Commission. It functions statewide through seven regional offices and serves wards with estates of less than \$25,000. The Office of Public Guardian is a county-by-county program serving wards with estates of \$25,000 and over, with the largest and most sophisticated program located in Cook County.

The OSG serves approximately 5,500 wards. It has one of the highest staff-to-ward ratios in the study at 1 to 132 for guardianship of only the person and 1 to 31 for guardianship of the property. OSG aims to compensate for its high caseload by providing extensive staff training, including having nearly all staff certified as Registered Guardians through the National Guardianship Foundation. OSG also engages in significant cross-training with other entities. Staff come from a variety of disciplines, predominately social work and law. Visits to wards occur once every three months or less. Focus group participants stressed that OSG, plagued by a grave lack of funding, serves far too many wards and is stretched too thin. They noted wards frequently receive insuffi-

cient personal attention because of inadequate staffing. OSG rarely petitions to become guardian.

The Cook County Office of Public Guardian, for the past twenty-five years (until very recently), had been directed by a highly visible attorney who has garnered significant resources, media attention, and support for the program. Cook County OPG serves approximately 650 adult wards and 12,000 children. Approximately forty percent of the adult OPG wards were living in the community, and twenty-five percent were exploited prior to being served by the program. Cook County OPG petitions to become guardian and filed a number of critical lawsuits to protect the interests of wards. OPG programs in the rest of the state, those not covered in our site visit, appeared uneven.

Each of the seven states profiled presents a unique cross-section of public guardianship. While the programs have a high degree of variation, some common themes emerged. Particularly, most were struggling with caseloads that were too high and budgets that were too low. In four of the states studied in this Section, public guardianship was not available in all parts of the state. The research team registered high concern for states without statewide coverage, with chronic understaffing, and with insufficiency of government services for a growing unmet need for public guardianship.

V. CONCLUSIONS AND RECOMMENDATIONS

The conclusions and recommendation presented in this Article emerge from the national survey as well as the in-depth interviews of key informants in the seven states examined. The major conclusions follow the research design of the Schmidt study¹⁸² to facilitate a direct comparison over time. This research expands on the Schmidt study by presenting additional information not previously available. Some conclusions are less empirically based than others and constitute preliminary findings necessitating future research.

The analysis of public guardianship statutes and programs identifies forty-eight states with either explicitly or implicitly defined public guardianship programs. Like the 1981 Schmidt

182. Schmidt et al., *supra* n. 1.

study, some explicit statutes have no programs, while some implicit programs are highly evolved. Also consistent with Schmidt's study is the variation in both the interstate and intrastate public guardianship programs. The taxonomy of organizing models (i.e., court, independent state office, social service providing agency, and county) remains viable. The social service agency model was the predominant model in nineteen states in 1981, and its implementation increased to thirty-three states. As in the earlier work, the heterogeneity of public guardianship is stressed as conclusions and recommendations are delineated.

A. Conclusions

1. *Individuals Served*

Public guardianship programs serve a wide variety of individuals. The overwhelming majority of state statutes provide for services to incapacitated individuals who are determined to need guardians under the adult guardianship law but who have no person or private entity qualified and willing to serve. However, four state schemes limit services to elderly people, four focus exclusively on individuals with specific mental disabilities, three specifically reference minors, and some target services only to adult-protective-services clients.

Public guardianship programs serve younger individuals with more complex needs than twenty-five years ago. The 2005 study found that individuals age sixty-five and over constitute between thirty-seven percent and fifty-seven percent of public guardianship wards, while those age eighteen to sixty-four comprise between forty-three percent and sixty-two percent of total wards. Younger clients include a range of individuals with mental illness, mental retardation, developmental disability, head injuries, and substance abuse.

Among states with data on institutionalization, a majority of public guardianship wards are institutionalized. In the national survey, fifteen programs, located in fourteen states, reported the proportion of wards institutionalized—ranging from thirty-seven percent to ninety-seven percent. Eleven of fifteen programs providing this information indicated that between sixty percent and ninety-seven percent of their wards lived in institutional settings.

Twelve jurisdictions indicated that between sixty percent and one-hundred percent of their wards lived in institutional settings.

The Olmstead v. L.C. ex rel. Zimring case provides a strong mandate for re-evaluation of the high proportion of public guardianship clients who are institutionalized. The United States Supreme Court's 1999 *Olmstead* decision serves as a charge to public guardianship programs to assess their institutionalized wards for possible transfer to community settings and to vigorously promote home and community-based placements when possible.

2. Program Characteristics

Public guardianship programs are categorized into four distinct models. In 1977, Regan and Springer outlined four models of public guardianship: (1) a court model; (2) an independent state office; (3) a division of a social service agency; and, (4) a county agency.¹⁸³ The 1981 Schmidt study used these same four models but recognized that there were many exceptions and variations and that public guardianship in some states did not fit neatly into this classification.¹⁸⁴ The national survey for the 2005 study used a variation on the classification and, in reviewing the responses, found that the original categories remain appropriate. It found that three states (four programs) use the court model, four states use the independent state office model, an overwhelming thirty-three states place public guardianship in a division of a social service agency (either state or local), and ten states use a county model (Illinois uses two distinct models as does Wisconsin).¹⁸⁵

All but two states (and Washington, DC) have some form of public guardianship. In 1981, the Schmidt study found that thirty-four states had provisions for public guardianship. The 2005 study defined "public guardianship" as "the appointment and responsibility of a public official or publicly funded organization to serve as legal guardian in the absence of willing and responsible family members or friends to serve as, or in the absence

183. Regan & Springer, *supra* n. 6, at 111.

184. Schmidt et al., *supra* n. 1.

185. Subsequently, Georgia enacted a statute providing that individuals and entities may register as public guardians with the county probate courts under a system established by the Division of Aging. Ga. Code Ann. §§ 29-10-1–29-10-11 (2005).

of resources to employ, a private guardian.”¹⁸⁶ Using this definition, the study found that all states except Nebraska, Wyoming, and the District of Columbia have some form of public guardianship.¹⁸⁷

A clear majority of the states use a social services model of public guardianship. A striking finding is the increase in the number of states (thirty-three) falling under the social services agency model. This compares with nineteen states in the earlier study. This model presents a grave conflict of interest in that the guardian cannot objectively evaluate services provided to wards—nor can the guardian independently advocate for the interests of the ward.

Some governmental entities providing public guardianship services do not perceive that they are doing so. The study definition of public guardianship is broad and is based on governmental funding. The definition includes some administrative arrangements that are not explicitly labeled as “public guardianship” in state law. The definition also includes some instances in which state or local governments pay for private entities to serve as guardians of last resort. A number of states with such implicit or *de facto* systems maintain that they do not have public guardianship.

A number of states contract for public guardianship services. Eleven states contract for public guardianship services. While this may allow states to experiment with various models, it also may pose a threat if the lines of authority are unclear.¹⁸⁸

3. Program Functions

Many public guardianship programs serve as both guardian of the person and property, but some serve more limited roles. A high number of clients receive only guardian-of-the-person ser-

186. *Public Guardianship Study*, *supra* n. 2, at 152.

187. *See supra* n. 158 (explaining that as of 2007 the District of Columbia has an emergency act authorizing limited guardianship).

188. *See Winsor Schmidt, Pamela Teaster, Hillel Abramson & Richard Almeida, Second Year Evaluation of the Virginia Guardian of Last Resort and Guardianship Alternatives Demonstration Project* (July 1997) (unpublished report) [Appendix B: Criteria for Public or Private (Contracting-Out) Models in the Provision of Guardian of Last Resort Services, 2] concerning the “privatization premise” in contracting for highly complex governmental services of this nature.

vices. The vast majority of state statutes provide for public guardianship programs to serve as both guardian of the person and property.

Public guardianship programs vary in the extent of community education and outreach performed. Thirty out of thirty-four respondents indicated that they educate the community about public guardianship. Nineteen programs provide technical assistance to private guardians, and four programs monitor private guardians. Not all programs are performing this important function.

Petitioning is a problematic role for public guardianship programs. The 1981 Schmidt study concluded that public guardianship programs that petition for their own appointment are subject to clear conflicts of interest. On the other hand, if the public guardianship program may not or does not petition, frequently there is a backlog of cases in which at-risk individuals in need are simply not served or preventable emergencies are not avoided.

Court costs and filing fees are a significant barrier to use of public guardianship services. Interview respondents in several states indicated that court costs and filing fees can present an insurmountable obstacle to filing petitions for court appointment of the public guardian.

4. Program Funding and Staffing

States have significant unmet needs for public guardianship and other surrogate decisionmaking services. A striking majority of survey respondents could not estimate the unmet need for public guardianship in the state. Only sixteen of fifty-three jurisdictions are able to provide this critically important information. A number of states have conducted unmet need surveys (e.g., Florida, Utah, and Virginia), and so gathering sufficient data for this purpose is neither difficult nor highly expensive. Not only should each state establish its unmet need numbers (with an unduplicated count), but also each state should conduct such surveys on a periodic basis, rather than on a one-time basis.

Staff size and caseload in public guardianship programs show enormous variability. Staff size varied from one individual in a single program to ninety individuals in one county alone. Caseloads also varied widely with a low of two (a program in its

infancy) to a high of 173 per staff person (a program in New Mexico). The average ratio of staff to wards was one to thirty-six. The total number of wards per program ranged from two (in the nascent program in Florida) to a high of 5,383 (in the OSG, Illinois program). The median number that any program served was 216 wards. Though these numbers are still too high, in most cases they represent a decrease in numbers from Schmidt's study with ratios cut fifty percent in some instances. Reported time spent with individual wards ranged from one hour biannually to over twenty hours per week.

Educational requirements for staff in public guardianship programs varied. Educational requirements for staff in programs varied considerably with some requiring a high school diploma (two programs), while others required an advanced or terminal degree, such as a J.D. or Ph.D. Certification of guardians, including public guardians, is required in some states. The National Guardianship Association (NGA) conducts an examination that certifies both Registered and Master Guardians. NGA developed a Code of Ethics and Standards of Practice, portions of which many programs now use.¹⁸⁹

Public guardianship programs are frequently understaffed and underfunded. Virtually all states reported that lack of funding and staffing is their greatest weakness and greatest threat. The study identified staff-to-ward ratios as high as 1 to 50, 1 to 80 and even 1 to 173. Eleven states estimated a need for additional funding to support adequate staff ranging from \$150,000 to \$20 million.

Although some public guardianship programs use ratios to cap the number of clients, most serve as a guardian of last resort without limits on intake. Statutes in seven states provide for a recommended staff-to-ward ratio. In selected additional jurisdictions, caps are imposed administratively. But most public guardianship programs serve as a true "last resort" and must accept cases regardless of staffing level.

Funding for public guardianship is from a patchwork of sources, none sufficient. In the prior study, state statutes typically

189. *Id.*; Natl. Guardianship Assn., *Standards of Practice* 1 (3d ed., 2007). Chapter 8 of this publication is the Model Public Guardianship statute. *Id.* at ch. 8. The Model offers specific recommendations that will improve public guardianship laws. *Id.*

were silent on funding for public guardianship. Today, although almost half of state statutes reference authorization for state or county monies, actual appropriations are frequently insufficient or not forthcoming. Most states reported multiple funding channels with state general funds the leading source, followed by fees collected from clients with assets. Fifteen states used client fees as reimbursement for services. In particular, seven states used Medicaid dollars to fund the establishment of guardianship or for guardianship services. Some states listed guardianship in their Medicaid plan. At least one state, Illinois, uses an “administrative claiming” model to access Medicaid funds in which the federal government provides a match for state funds used to pay for guardianship services that help incapacitated individuals to apply for Medicaid funds. At least one state, Kentucky, bills Medicaid for guardianship services under its Targeted Case Management program. The State of Washington uses Medicaid dollars to supplement funding for private guardians.

The Olmstead case provides a strong impetus to support public guardianship. The landmark 1999 U.S. Supreme Court *Olmstead* case¹⁹⁰ requires states to fully integrate people with disabilities into community settings when appropriate as an alternative to institutional placements. The *Olmstead* case serves as a charge to states to address the unmet need by establishing and more fully funded public guardianship programs.

*5. Public Guardianship as Part of State Guardianship System:
Due Process Protections and Other Reform Issues*

Very little data exist on public guardianship. Many states have insufficient or uneven data on adult guardianship in general¹⁹¹ and on public guardianship specifically. The study found no state that maintains outcome data on changes in wards over the course of the guardianship.

Courts rarely appoint the public guardian as a limited guardian. In the national survey, there were eleven times more plenary than limited guardianships of property and four times more plenary than limited guardianships of the person. In focus groups

190. 527 U.S. at 607.

191. GAO Study, *supra* n. 29, at 4, 29.

and interviews, estimates of the proportion of limited appointments ranged from one percent to twenty percent with many reporting that plenary appointments are made as a matter of course. This is in accordance with observations about limited guardianship by other sources.¹⁹²

The guardian ad litem system, as currently implemented, is an impediment to effective public guardianship services. The in-depth interviews with key informants and with various groups in all site visits revealed flaws in the use of *guardians ad litem* (GALs). There is a movement toward eliminating GALs from court proceedings, a position consistent with some commentary and with court decisions or guidelines in Florida, Montana, Nebraska, Pennsylvania, South Carolina, Vermont, and Washington.¹⁹³ The 2004 study proposes the establishment of an adequately staffed and funded GAL system similar to the public defender system, so that the GAL function is uniform in the state and similar across states.

Oversight and accountability of public guardianship are uneven. Monitoring of public guardianship was assessed at two levels—internal programmatic auditing procedures and court oversight. State public guardianship programs with responsibility for local or regional offices showed great variability in their monitoring practices. However, uniform internal reporting forms generally are lacking. In many states there is no state-level public guardianship coordinating entity, leaving localities that perform public guardianship functions adrift.

Public guardianship programs generally are subject to the same provisions for judicial oversight as private guardians and must submit regular accountings and personal status reports on the ward. Public guardianship statutes in twenty-one states specifically provide for court review or for special additional court

192. Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. Toledo L. Rev. 189, 202–203 (1994); Larry Frolik, *Plenary Guardianship: An Analysis, a Critique and a Proposal for Reform*, 23 Ariz. L. Rev. 599, 654 (1981); Sally Hurme, *Limited Guardianship: Its Implementation Is Long Overdue*, 28 Clearinghouse Rev. 660, 663 (1994); Quinn, *supra* n. 30, at 152–153; Winsor Schmidt, *Assessing the Guardianship Reform of Limited Guardianship: Tailoring Guardianship or Expanding Inappropriate Guardianships?* 2 J. Ethics, L. & Aging 5, 9 (1996).

193. Margaret K. Dore, *The Stamm Case and Guardians Ad Litem*, 16 Elder L. 3 (Winter 2004–2005) (newsltr. ABA Sec. Elder L.).

oversight. Most interview respondents found no difference in court monitoring of public and private guardians, frequently pointing out the need for stronger monitoring of both sectors. Judges did not report additional oversight measures for public guardianship cases in view of the large caseloads and chronic understaffing.

6. Court Cases Involving Public Guardianship

Litigation is an important but little used strategy for strengthening public guardianship programs. The 1981 study found that litigation in the public guardianship arena was “a recent phenomenon” and that its impact on programs was “not clear.”¹⁹⁴ The study predicted a rapid expansion. More recently, lawsuits are used effectively but surprisingly sparingly to improve public guardianship programs and to improve conditions for public guardianship wards. In general, however, litigation is used infrequently to confront deficiencies in public guardianship programs as well as by public guardianship programs to provide for their wards. The *Olmstead* case may open the door to more litigation challenges on both fronts.

B. Recommendations

1. Individuals Served

States should provide adequate funding for home and community-based care for wards under public guardianship. Public guardianship wards need basic services as well as surrogate decisionmaking. The *Olmstead* case offers a powerful mandate for funding such services to integrate individuals with disabilities into the community.

The effect of public guardianship services on wards over time merits study. Although some guardianships are still instituted primarily for third-party interests, the purpose of guardianship is to provide for ward needs, improve or maintain ward functioning, and protect the assets of those unable to care for themselves. What is needed to improve guardianship services is to capture the benefit of this state service to the wards. Longitudinal ward stud-

194. Schmidt et al., *supra* n. 1, at 171.

ies utilizing social and medical information would facilitate comparisons within states and between models.

2. Program Characteristics

States would benefit from an updated model public guardianship act. Model public guardianship acts were proposed in the 1970s and by the Schmidt study in 1981.¹⁹⁵ An updated model act and commentary would clarify the most effective administrative structure and location and would offer critical guidance.

States should avoid a social services agency model. At the time of this writing, thirty-three states had a social services agency model of public guardianship with its inherent conflicts of interest. At stake is the inability of the public guardian program to effectively and freely advocate for the ward.

3. Program Functions

State public guardianship programs should establish standardized forms and reporting instruments. To achieve consistency and accountability, state public guardianship programs should design and require local entities to use uniform reporting forms and should provide for regular electronic summary and submission of this information for periodic compilation at the state level.

Public guardianship programs should limit their functions to best serve individuals with the greatest needs. The study found that public guardianship programs serve a broad array of functions for their wards and many also serve third-party clients other than wards. The Second National Guardianship Conference (Wingspan) recommendations urged that “[g]uardians and guardianship agencies [should] not directly provide services such as housing, medical care, and social services to their own wards, absent court approval and monitoring”.¹⁹⁶ *When programs are inadequately staffed and funded, as indicated by nearly every program surveyed, programs should only perform public guardianship and public guardianship services alone.*

195. *Id.* at 179–203.

196. *Wingspan—The Second National Guardianship Conference, Recommendations*, *supra* n. 24, at 573.

Public guardianship programs should adopt minimum standards of practice. Some but not all public guardianship programs have written policies and procedures. Written policies provide consistency over time and across local offices.

Public guardianship programs should not petition for their own appointment, should identify others to petition, and should implement multidisciplinary screening committees to review potential cases. Because of the inherent conflicts involved, public guardianship programs should not serve as both petitioner and guardian for the same individuals. Moreover, whether programs petition or not, they should establish screening panels that meet regularly to identify less restrictive alternatives, identify community petitioners and/or community guardians, seek to limit the scope of the guardianship order, and consider the most appropriate plan of care.

Public guardianship programs should track cost savings to the state and report the amount regularly to the legislature and the governor. To our knowledge, only one state (Virginia) has adequately tracked cost savings. The presentation of cost savings figures in the Commonwealth of Virginia provided justification for the establishment of the programs in 1998 and aided in advocacy for expanding the system.¹⁹⁷ Each state should begin collecting this information, using the Virginia model as a reference.

Public guardianship programs should undergo a periodic external evaluation. Some states (Virginia and Utah) and some localities (Washoe County, Nevada) have built periodic evaluation into their statutes and settlement agreements, respectively. Periodic external evaluations should encourage input from guardianship stakeholders and evaluators alike.

4. Program Funding and Staffing

Public guardianship programs should be capped at specific staff-to-ward ratios. The 1981 report strongly endorsed use of staff-to-ward ratios, indicating that a one-to-twenty ratio would best enable adequate individualized ward attention. States could

197. See Pamela B. Teaster & Karen A. Roberto, *Virginia Public Guardian and Conservator Programs: Evaluation of Program Status 2* (Va. Dept. Aging Dec. 2003) (finding that the public guardianship programs produced substantial cost savings and funded themselves).

begin with pilot programs to demonstrate the ward outcomes achieved with specified ratios.

States should provide adequate funding for public guardianship programs. Each state should establish a minimum cost per ward. State funding should enable public guardianship programs to operate with specified staff-to-ward ratios.

Research should explore state approaches to use of Medicaid to fund public guardianship. This study demonstrated that an increasing number of states are using Medicaid funds to help support public guardianship services and that states use different mechanisms to access Medicaid funds. The extent and creative use of various Medicaid provisions for guardianship merits further examination.

*5. Public Guardianship as Part of State Guardianship System:
Due Process Protections and Other Reform Issues*

State court administrative offices should move toward the collection of uniform, consistent basic data elements on adult guardianship, including public guardianship. The GAO supported the uniform collection of data on guardianship in a recent study.¹⁹⁸ States should use a uniform standard of minimum information for data collection, using this national public guardianship survey as a baseline and guide. Computer records should be configured to accomplish information extraction.

Courts should exercise increased oversight of public guardianship programs. Courts should establish additional monitoring procedures (e.g., annual program report, regular random file reviews and audits, periodic meetings with program directors) for public guardianship beyond regular statutorily mandated review of accountings and reports required of all guardians.

Courts should increase the use of limited orders in public guardianship. Routine use of limited orders could be enhanced by check-off categories of authorities on the petition form, directions to the court investigator to examine limited approaches, and templates for specific kinds of standard or semi-standard limited orders.¹⁹⁹

198. GAO Study, *supra* n. 29, at 32.

199. Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardian-*

Courts should waive costs and filing fees for indigent public guardianship wards. Indigent individuals needing help from the public guardianship program have no other recourse and should have access to a court hearing and appointment. Court fees create an obstacle that is not consistent with the function of providing a societal last resort.

Courts should examine the role of guardians ad litem and court investigators, especially as it bears on the public guardianship system. There is wide variability in interpretation and performance of the GAL role, and it merits critical evaluation.

Research should explore the functioning of the Uniform Veterans' Guardianship Act as implemented by the states. About a third of states have adopted the Uniform Veterans' Guardianship Act that provides for coordination between the Department of Veterans Affairs and state courts handling adult guardianship, ensuring special safeguards when the ward is a veteran. In 2004, the United States Government Accountability Office (GAO) recommended the strengthening of such coordination.²⁰⁰ State implementation of the Act directly affects veterans who are public guardianship wards and merits examination.

C. Hallmarks of an Efficient and Effective Public Guardianship Program

We conclude our recommendations with hallmarks of an excellent program. We propose the following attributes as benchmarks against which any reputable program should be measured:

- a statutory staffing ratio;
- a screening committee (i.e., for funneling appropriate cases to the public guardian);
- uniform computerized forms (e.g., intake, initial assessment, care plan, decisional accounting, staff time logs, changes in ward condition, values history);
- consistency and uniformity of local or regional components of a state program;

ship, 31 Stetson L. Rev. 735, 749–750 (2002).

200. GAO Study, *supra* n. 29, at 32.

- conduct of regular meaningful external evaluations;
- tracking of cost savings to state;
- support and recognition of staff;
- development and updating of written policies and procedures, using National Guardianship Association Standards as a guide;
- establishment of strong community links;
- avoidance of petitioning for own wards;
- an advisory council;
- regular visits to wards—once a month, at a minimum;
- multiple funding sources including Medicaid;
- exploration of use of a pooled trust to maximize client benefits;
- maximized use of media and lawsuits;
- information for policymakers and the general public about guardianship services and alternatives; and
- development of a reputable, computerized database of information that uses information requested in this study as a baseline.

D. Final Thoughts

Simply put, we conclude with the following statement from Winsor Schmidt's 1981 study, as true now as it was in 1981:

Public guardianship is being endorsed, but only if it is done properly. By "properly" we mean with adequate funding and staffing, including specified staff-to-ward ratios, and with the various due process safeguards that we have detailed The office should be prepared to manage guardianship of person and property, but it should not be dependent upon the collection of fees for service.

The functions of the office should include coordinating services, working as an advocate for the ward, and educating professionals and the public regarding the functions of guardianship. "The of-

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lice should also be concerned with private guardianship, in the sense of developing private sources and to some extent carrying out an oversight role."²⁰¹

201. Schmidt et al., *supra* n. 1, at 175.

Public Guardianship: Where Is It and What Does It Need?

by Dorothy Siemon, Sally Balch Hurme,
and Charles P. Sabatino*

I. Introduction

This article describes the current status of public guardianship in the United States and suggests directions for reform and further study. The only extensive study on public guardianship was done over ten years ago by Professor Winsor Schmidt.¹ Since Schmidt's study, many states have adopted new laws attempting to protect the ward's due process rights and to correct other abuses in the guardianship system. However, new problems concerning public guardianship programs have arisen.

II. Statutory Survey

A. What Is a Public Guardian?

In examining each of the 50 states' statutes to determine if there was a public guardianship provision, a preliminary problem was the difficulty in defining a public guardian because of the overwhelming variety among public guardian schemes. It was challenging to define public guardian in a way to include statutory provisions that function like public guardianship as well as those statutes that explicitly create a public guardian.

The necessary element is government (state or county) involvement through funding or monitoring. For this project, public guardian is defined as

a nonprivate individual or agency (including an employee of the state or county, a governmental office, quasi-governmental program, or volunteer program that receives some state or county government funding and/or oversight) lawfully invested with the power and duty to take care of people and manage their property and rights because they are considered incapable of managing their own affairs by reason of some peculiarity of status.

B. Explicit and Implicit Enabling Provisions

"Explicit" and "implicit" public guardianship provisions are distinct. Explicit statutory provisions specifically refer to a public guardian. For example, Delaware has a statutory provision setting up an office of the public guardian.² Implicit provisions "provide for a mechanism equivalent to public guardianship, without actually denominating the mechanism as 'public guardian.'"³ For example, Wisconsin's statute does not have a specific enabling provision but the state provides funds to coun-

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¹ WINSOR C. SCHMIDT ET AL., A NATIONAL STUDY: PUBLIC GUARDIANSHIP AND THE ELDERLY (1979). Schmidt concluded that public guardianship should be continued but only if done properly. He maintained that less restrictive alternatives must be considered in each case so guardianship is used only as a last resort; the determination of

incompetency and the appointment of a guardian must be done in an adversarial setting to protect wards' rights; and partial, voluntary, and time-limited guardianships should be encouraged. Schmidt further stated that proper public guardianship services required improved accountability and adequate funding and staffing including specified staff-ward ratios; public guardians should be able to serve as guardian of the person or the estate; the budget cannot depend on fees for services; they should not only advocate for their wards but also educate the public about guardianship; public guardians should promote and assist the development of private guardians and provide some oversight of private guardians' performance.

² DEL. CODE ANN. tit. 12, § 3991.

³ SCHMIDT, *supra* note 1, at 11.

ties to operate the functional equivalent of a public guardianship program.⁴ This distinction is useful for classification purposes, but there is no positive correlation

Created in 1984, Alaska's Office of Public Advocacy serves as public guardian and provides visitors and experts in guardianship proceedings when the state has been nominated as guardian.

between nomenclature and program efficacy. Implicit schemes can be and sometimes are more effective than some explicit schemes.⁵

C. Statutory Survey Results

Chart A on pages 590 through 593 gives the results of the state statutory survey, addressing whether a public guardian (serving the elderly) is available.⁶ Chart B on page 594 classifies the type of public guardianship program (or lack of one) in each state. The 50 states are classified into five models for providing public guardianship services.⁷

⁴ See WIS. STAT. ANN. § 880.01-.39.

⁵ See SCHMIDT, *supra* note 1, at 31. For this research, a public guardian was available if the state has either explicit or implicit provisions. See Chart A on page 590.

⁶ Public guardians can be provided for minors, incompetents, mentally retarded persons, mentally or physically disabled persons, and the elderly. The research focused on public guardianship schemes serving the elderly, if not expressly, at least in part.

⁷ The five models are:

(1) *Independent State Public Guardianship Agency:* Although seven states have an independent office of public guardian funded and operated by the state, the location, funding source, staffing, statutory guidelines, and the population served all vary greatly.

(2) *Government Agency also Providing Social Services:* The public guardian office is established within a preexisting social service agency at the state or county level. Although the agency providing the guardianship services varies greatly, programs are all housed in government departments that also provide social services to wards. Thus, serious potential conflicts of interest exist.

(3) *Private Sector via Volunteers or by Contract:* The county or state government contracts with a nonprofit or for-profit organization or a volunteer board to provide guardianship services.

III. Interview Results

The following is a more detailed description of the programs in 5 of the 11 states studied more extensively, including one from each of the five models.⁸

A. Independent State Public Guardianship Agency: Alaska

Created in 1984, Alaska's Office of Public Advocacy (OPA)⁹ serves as public guardian and provides visitors and experts in guardianship proceedings when the state has been nominated as guardian.¹⁰ OPA is appointed guardian as a last resort when no person or private guardianship association is willing and qualified to serve. OPA serves adults adjudged incapacitated or minors subject to protective proceedings. The public guardian's powers and duties are the same as a private guardian or conservator.¹¹

Established in the Alaska Department of Administration, OPA's main office in Anchorage consists of the chief public guardian, four public guardians, an accounting technician, and an accounting clerk. One public

(4) *Government Employee Not Providing Social Services:* Public employees serve as public guardian either because they are specifically given such duties or they are required to serve as guardian of last resort when no one else is available. They may be a judge, sheriff, public fiduciary, or administrator.

(5) *Other:* Courts use some mechanism different from the other four models or have no mechanism functionally equivalent to public guardianship.

⁸ After classifying each state into one of the five models, a questionnaire was sent to selected states and telephone interviews with pertinent staff were conducted to obtain more detailed information on their public guardianship program. The information available varied in scope and detail; thus the descriptions below vary in content and length.

⁹ ALASKA STAT. § 44.21.410.

¹⁰ AUDIT REP. NO. 02-4421-92, Alaska Legislative Budget and Audit Committee 1 (Mar. 16, 1992). OPA's other major functions are to provide legal representation and assistance to abused and neglected children and to indigent criminal defendants when a conflict of interest exists with the Public Defender Agency.

¹¹ See ALASKA STAT. §§ 13.26.150, .380. The guardian's (over the person) and conservator's (over the property) responsibilities include ensuring the ward's health care, shelter, and nutrition; managing the ward's assets and personal property; preparing court reports; and visiting the ward at least quarterly.

Chart A: Public Guardianship Statutory Survey Results

State	Is Public Guardianship Available?	Notes
Alabama	Yes	General guardian for the county; if no general guardian the sheriff must be appointed guardian. Ala. Code § 26-2-50 (1987).
Alaska	Yes	Office of Public Advocacy located in Dep't of Administration. Alaska Stat. §§ 13.26.360-.26.410 (1985 & Supp. 1991).
Arizona	Yes	County-supported Public Fiduciary petitions & serves as guardian/conservator. Ariz. Rev. Stat. Ann. § 14-560:1-2 (Supp. 1988).
Arkansas	Yes	Public agency employee can be appointed guardian. Ark. Code Ann. § 28-65-101 (1987).
California	Yes	County-funded Office of Public Guardian. Cal. Gov't Code § 27430 & Cal. Welf. & Inst. Code § 8000 (1989).
Colorado	Yes	County Dep't of Social Services petitions for or accepts appointment as guardian/conservator. Colo. Rev. Stat. §§ 15-14-301 to 432 (1987).
Connecticut	Yes	Commissioners on Aging & of Human Resources authorized to serve as conservator of last resort of person or estate. Conn. Gen. Stat. Ann. § 45a-651 (West 1981 & Supp. 1989).
Delaware	Yes	State-wide Office of Public Guardian. Del. Code Ann. tit. 12, § 3991 (1987).
District of Columbia	No	In exchange for fee-generating appointments, private attorneys appointed as guardians on a pro bono cases. D.C. Code Ann. § 21-2043(a) (Supp. 1987).
Florida	Yes	County Public Guardianship system authorized. Fla. Stat. Ann. § 744.701-709 (West 1992). Programs only exist in three counties. Each is a different demonstration program.
Georgia	Yes	Dep't of Family & Child Services is responsible for guardianships if no one else available. Ga. Code Ann. § 29-5-2 (1985 & Supp. 1989).
Hawaii	Yes	Office of the Public Guardian runs state-wide system. Haw. Rev. Stat. § 551A-1 (1985 & Supp. 1988). If no guardian, including public guardian, Dir. of Health can be appointed.
Idaho	Yes	Counties have authority to appoint Boards of Community Guardians, volunteers willing to act as guardians of last resort. Idaho Code § 15-5-601 (1979 & Supp. 1989).
Illinois	Yes	Office of State Public Guardian responsible for wards with \$25,000 or less; County Public Guardian handles those with \$25,000 or more. Ill. Ann. Stat. § 4-28-17 (Smith-Hurd 1978 & Supp. 1989).

Chart A: Public Guardianship Statutory Survey Results—continued

State	Is Public Guardianship Available?	Notes
Indiana	Yes	Dep't of Human Services administers Adult Guardianship Services Program. Services provided to incapacitated adults who are indigent or unable to obtain private guardianship services, Ind. Code Ann. § 4-28-17-5 (1989), AND who are patients in state facilities or participants in state funded programs and for whom guardianship would result in reduced state expenditures, Ind. Code Ann. § 4-28-17-21. DHS contracts in each region with not-for-profit corporation to provide least restrictive services or guardianship. Ind. Code Ann. § 4-28-17-19 (1989).
Iowa	No	No authorization. Iowa Code §§ 633.566, 633.559 (1989).
Kansas	Yes	No explicit provision for a public guardian. However, Kansas Advocacy and Protective Services, Inc. (KAPS) Guardianship Program provides guardians/conservators for indigent wards with no one available to serve as guardian. State-wide program; legislative appropriation. See Kan. Adult Services Manual § 3100 (1989).
Kentucky	Yes	Dep't of Human Resources is guardian of last resort even if providing service to ward. Ky. Rev. Stat. Ann. § 210.290 (1983 & Supp. 1989).
Louisiana	Yes	Governor authorized to designate a nonprofit organization to provide curatorship services to indigent persons with limited capacity. La. Rev. Stat. Ann. § 9:1031 (1991).
Maine	Yes	Dep't of Human Services can be appointed guardian if no one else is available. 18A Me. Rev. Stat. Ann. § 5-601 (1991).
Maryland	Yes	Dep'ts of Human Services & on Aging serve as guardians of last resort. Md. Est. & Trusts Code Ann. § 14-102 (1974 & Supp. 1989). Volunteer, county-based Adult Public Guardianship Review Boards monitor cases semi-annually.
Massachusetts	Yes	No specific authorization although the Dep't of Public Welfare can serve. Mass. Ann. Laws ch. 186-201A § 6 (Law. Co-op. 1981).
Michigan	Yes	County is authorized to appoint a public guardian. Mich.Comp. Laws. Ann. §§ 27.5401-.5461 (1980 & Supp. 1989).
Minnesota	Yes	State Commissioner appointed guardian but delegates authority to County Welfare Dep't to provide (or contract with a nonprofit organization to provide) services to vulnerable adults eligible for Medical Assistance. Minn. Stat. Ann. § 252A (West 1989). Court may appoint Commissioner of Dep't of Human Services to serve as guardian/conservator of person with mental retardation. Persons with mental illness, chemical dependency or who are elderly not eligible for public guardianship. Minn. Stat. Ann. § 525 (Supp. 1989).
Mississippi	Yes	Clerk of Chancery Court serves as guardian of last resort. Miss. Code Ann. § 93-13-121-267 (1972 & Supp. 1989).

Chart A: Public Guardianship Statutory Survey Results—continued

State	Is Public Guardianship Available?	Notes
Missouri	Yes	Public administrator of each county serves as "ex officio" Public Guardian. Mo. Rev. Stat. § 475.010-340 (1956 & Supp. 1989).
Montana	No	Dep't of Family Services can act as temporary guardian. Officially approved, nonprofit organizations or private associations can also serve, although no state supervision or funding. Mont. Code Ann. § 72-5-312 (1989).
Nebraska	No	No authorization. Neb. Rev. Stat. §§ 30.2617-.2661 (1985).
Nevada	Yes	Board of County Commissions establishes county public guardian for 4-year term. Nev. Rev. Stat. §§ 253.0415, .0444 (1986 & Supp. 1987).
New Hampshire	Yes	State contracts with Office of Public Guardian. N.H. Rev. Stat. Ann. §§ 547-B:1 - B:18 (Supp. 1988).
New Jersey	Yes	Office of Public Guardian for Elderly Adults. Governor appoints Director. Functions as department of state government. N.J. Stat. Ann. §§ 3B:1-1 to 4:83-12 (1983 & Supp. 1989).
New Mexico	Yes	Any person deemed qualified by the court may be appointed guardian. New Mex. Stat. Ann. § 45-5-311 (1989). In practice state contracts with private, nonprofit organizations to provide guardianship services to incapacitated individuals who have no one else.
New York	Yes	Community Guardian Program/Social Services Agency contracts with nonprofit organizations to provide services. N.Y. Mental Hyg. Law §§ 77.01 to 78.31 (McKinney 1989).
North Carolina	Yes	Clerk of Superior Court appoints county Public Guardian for 8-year term. N.C. Gen. Stat. §§ 35-A-1101 to 1217 (1987 & Supp. 1988).
North Dakota	Yes	No specific authorization. Nonprofit organization or gov't agency, including Social Service, can be appointed as long as no conflict. N.D. Cent. Code §§ 30.1-26-01 to -29-32 (1976 & Supp. 1989).
Ohio	Yes	County Board of Mental Retardation and Developmental Disabilities can contract for services. Ohio Rev. Code Ann. § 5123-5-01 (1990).
Oklahoma	Yes	Dep't of Human Services contracts for guardianship services. Okla. Stat. Ann. tit. 30, §§ 1-101 to 5-101 (West 1981 & Supp. 1989).
Oregon	Yes	County Court or Board of County Commissioners can create county Public Guardian. Or. Rev. Stat. § 126.905 (1984).
Pennsylvania	Yes	Corporate entities and county agencies may serve as guardian. 20 Pa. Cons. Stat. Ann. §§ 5501-5537 (Supp. 1992).
Rhode Island	No	No public guardian but a legislative commission has recently examined feasibility. R.I. Gen. Laws §§ 33-15-1 to -45 (1985 & Supp. 1989).

Chart A: Public Guardianship Statutory Survey Results—continued

State	Is Public Guardianship Available?	Notes
South Carolina	Yes	Probate Judge can act as public guardian. S.C. Code Ann. § 62-5-311 (1984 & Supp. 1989).
South Dakota	Yes	State-wide public guardianship system. S.D. Codified Laws Ann. §§ 30-26-1 to -29-52 (1984 & Supp. 1989).
Tennessee	Yes	Each county empowered to appoint or elect a public guardian. Tenn. Code Ann. § 34-7-102 (1986). Commission on Aging funds statewide Public Guardianship for the Elderly Program. Basic funding through General Assembly appropriation.
Texas	No	No specific authorization. Tex. Prob. Code Ann. § 108-1300 (West 1980 & Supp. 1989). Active task force is examining guardianship.
Utah	No	No authorization. Utah Code Ann. §§ 75-5-301 to 433 (1978 & Supp. 1989).
Vermont	Yes	Office of Public Guardian located in Division of Licensing & Protection within Dep't of Aging & Disabilities. Statewide public guardianship program created to make guardianship services available to mentally disabled persons 60 years of age or older when court is unable to appoint guardian from private sector. Vt. Stat. Ann. tit. 14, § 3091 (1992). Director employs persons to serve as public guardians in each planning area served by area agencies on aging. Public guardian must make reasonable effort to locate a suitable private guardian; annually report this effort to the court; monitor the ward's care through minimum of quarterly visits; and may provide assistance to private guardians.
Virginia	Yes	Sheriff is guardian of last resort. Va. Code Ann. §§ 37.1-130 (1989).
Washington	No	No specific authorization. Wash. Rev. Code Ann. §§ 11.88.005-.92.190 (West 1987 & Supp. 1989). State allows Medicaid disregard for guardian, attorney and guardian ad litem fees.
West Virginia	No	No specific authorization. W. Va. Code §§ 27-11-1 to 44-10A-6 (1986 & Supp. 1989).
Wisconsin	Yes	No specific authorization. Wis. Stat. Ann. §§ 880.01-.39 (West 1988). Dep't of Health and Social Services gives grants to county agencies to recruit, train, monitor volunteers.
Wyoming	Yes	Recently enacted law creates an office of the state public guardian under the governor's planning council on developmental disabilities.

Chart B: Classification of State Public Guardian Efforts

Independent State Agency	Government Agency also providing Social Services	Private Sector Via Volunteers or Contract	Government Employee not Providing Social Services	None or Other
Alaska	Arkansas	Florida	Alabama	D.C.
Delaware	Colorado	Idaho	Arizona	Iowa
Hawaii	Connecticut	Indiana	California	Nebraska
Illinois	Georgia	Kansas	Michigan	Rhode Island
New Jersey	Kentucky	Louisiana	Missouri	Texas
South Dakota	Maine	Montana	Mississippi	Utah
Wyoming	Maryland	New Hampshire	Nevada	Washington
	Massachusetts	New Mexico	North Carolina	West Virginia
	Minnesota	New York	North Dakota	
	Pennsylvania	Ohio	Oregon	
	Tennessee	Oklahoma	South Carolina	
	Vermont	Wisconsin	Virginia	

guardian is also located in Juneau and one in Fairbanks. OPA also uses VISTA, Jesuit and community volunteers, student interns, and trainees through the JTPA and the JOBS program.¹²

OPA currently serves about 405 wards statewide with the majority in Anchorage where half the state's population reside. Approximately one-third of the wards have mental illnesses, one-third have developmental disabilities, and one-third are elderly. About one-fourth of the wards are in nursing homes.¹³

OPA also contracts for court visitors in guardianship cases. The court visitor assesses alternatives to guardianship and makes recommendations to the court during initial guardianship proceedings as well as reports to the court every three years on the ward's mental, physical, and financial status. Court visitors essentially oversee both public and private guardianships.¹⁴ A potential conflict of interest exists here because OPA funds the court visitor. It is the court visitor who essentially recommends

whether a guardianship is necessary; OPA may then serve as guardian. OPA maintains that this conflict of interest has not been a problem.¹⁵

Once a petition is filed OPA contracts for the court visitor and attorney for the proposed ward. Staff attorneys formerly represented the wards. However, now that they are too busy responding to needs of abused and neglected children and indigent criminal defendants, OPA must contract with private attorneys to represent the potential wards.¹⁶

Although court visitors are required to search for alternatives to public guardianship, few alternative services are available. One program provides representative payees for mentally ill individuals, but this program is reluctant to take difficult cases. Many individuals do not want the same program providing their mental health services and controlling their money. Thus, the representative payee services available are too limited to accommodate all those in need. Case management and other

¹² Telephone Interview with Dorcus Jackson, Public Guardian of Alaska (Sept. 1992). OPA was purposefully not placed in the department of social services to avoid a conflict of interest.

¹³ *Id.*

¹⁴ AUDIT REP., *supra* note 10, at 6.

¹⁵ Telephone Interview with Jackson, *supra* note 12.

¹⁶ *Id.*

types of social services are simply not available in the quantity needed. Often when OPA is appointed guardian of the estate only, and the person also needs social services, OPA arranges for these services because no other alternatives exist.¹⁷

According to Alaska's public guardian, the only source of guardians other than private guardians or OPA is a private, nonprofit organization that provides guardianship services. However, to be eligible for this organization's services a ward must have at least \$3,000 per month in income or more than \$10,000 in assets. Another problem OPA cited in finding suitable private guardians is that family members who initially serve as guardian often prove to be unreliable.¹⁸

OPA attributes the rising need for public guardianship to Alaska's rapidly growing elderly population, to greater awareness of what OPA does, and to nursing homes in Alaska interpreting the Nursing Home Reform law as requiring guardians for all incapacitated residents.¹⁹

The Legislative Budget and Audit Committee of the Alaska state legislature recently directed a review and audit of OPA's Public Guardian Program. The preliminary audit report, issued in March 1992, found deficiencies particularly in the monitoring of financial matters.²⁰ OPA believes that the audit unfairly represents the program because the assessment focuses too heavily on financial accountability and does not examine the services it provides. In addition, OPA staff actively partici-

pated in the audit, and many of the audit recommendations were issues the staff had identified as areas of concern and were addressing. OPA identified one positive result of the audit to be an increased attention level by state legislators to the office's needs.²¹

B. Government Agency Also Providing Social Services: Georgia

In Georgia, the director of the county Department of Family and Children Services (DFCS) serves as guardian of last resort for adults with disabilities over age 18.²² With 159 Georgia counties, an equal number of county directors serve as guardian of last resort but cannot serve as guardian of the property or for minors.²³

The probate judge appoints the county director as guardian if no one else is willing to serve. The judge can also name the county director, passing over others who want to serve if the judge deems in the ward's best interest to do so.²⁴ Although the law allows judges to tailor guardianship orders to the ward's abilities and needs, the majority of judges favor plenary guardianships. A county director, named individually as guardian in his or her capacity as county director, is responsible for seeing that the ward has food, shelter, clothing, appropriate medical treatment, and habilitation. As the guardian of last resort the county director is unable to refuse appointment.²⁵

The county Adult Protective and Placement Services (APPS) provides day-to-day guardianship services when the county director is appointed guardian. The same case-

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* Public guardianship programs in other states have also reported that many nursing homes routinely seek guardianships for their incapacitated residents. Since the Nursing Home Reform Amendments, Omnibus Reconciliation Act of 1987 (OBRA-87), went into effect October 1, 1990, advocates have maintained that nursing homes are simply misinterpreting the law in this area. See Citizens for Better Care, *Inappropriate Use of Guardianship Caused by Misinterpretation of the Federal Nursing Home Reform Law of 1987*, National Legal Aid & Defender's Association Substantive Law (Health) Training (July 1992). See also Michael R. Schuster & Bruce Vignery, *Surrogate Decisionmaking under the Omnibus Budget Reconciliation Act of 1987: A Flawed Remedy*, 24 CLEARINGHOUSE REV. 572 (Oct. 1990). The OBRA section the nursing homes are misinterpreting does not discuss when a guardian is needed, but rather states that when a guardian is appointed the guardian is to exercise the resident's rights. 42 U.S.C. § 1396r(c)(1)(C). Nonetheless, nursing homes interpreted this section as requiring the appointment of a guardian. In

1991, in response to advocates' complaints, the following section was added to try to remedy any misinterpretation: "In the case of a resident who has not been adjudged incompetent by the State court, any legal surrogate designated in accordance with State law may exercise the resident's rights to the extent provided by State law." 56 Fed. Reg. 48,867 (Sept. 26, 1991).

²⁰ AUDIT REP., *supra* note 10, at 3.

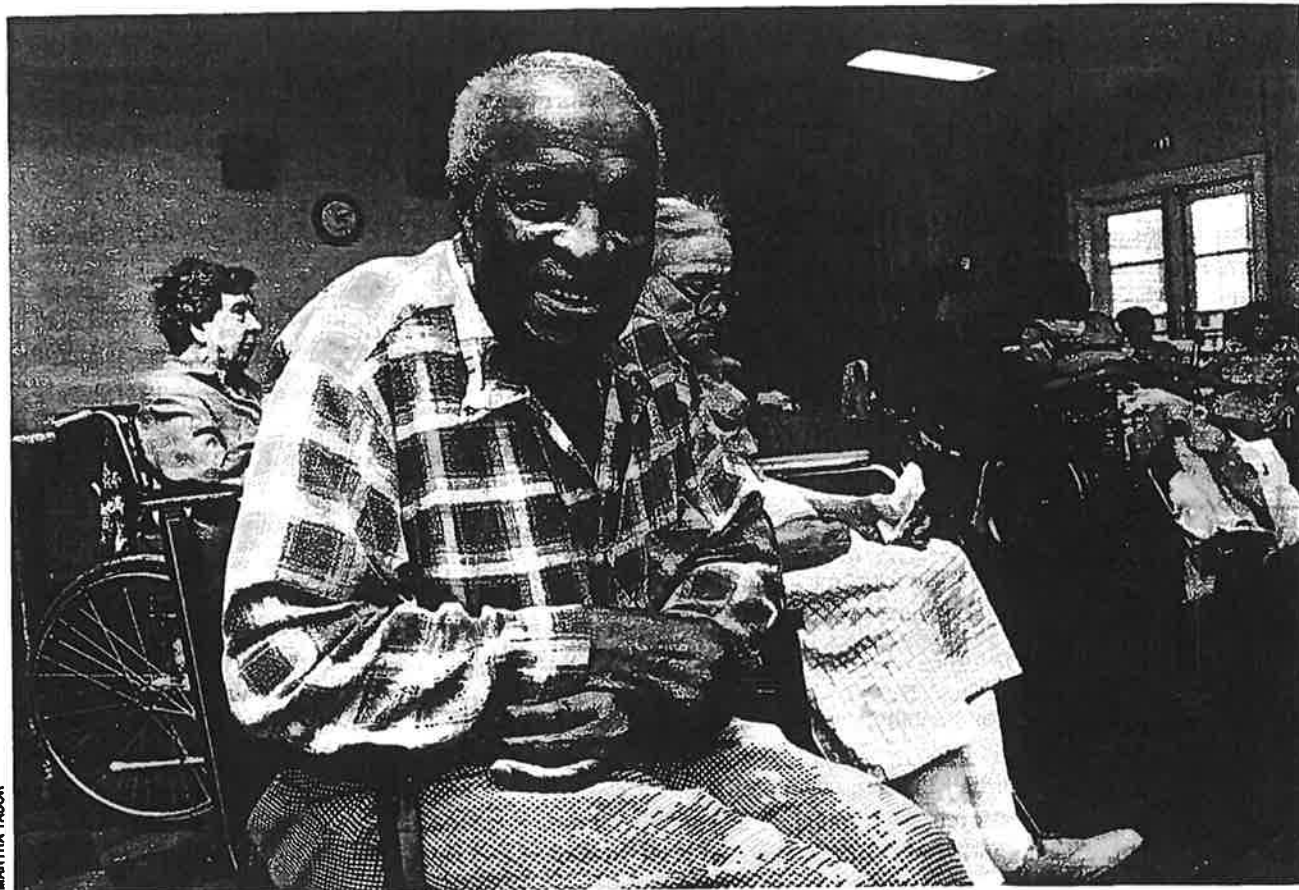
²¹ Telephone Interview with Jackson, *supra* note 12.

²² GA. CODE ANN. § 29-5-2.

²³ Survey response from Sara Brownlee, Coordinator, Adult Protective & Placement Services, Georgia Division of Family & Children Services (Aug. 1992).

²⁴ Most states do not allow family members willing to serve to be passed over. The Department of Family and Children Services views this unique provision as a problem and is often uncomfortable with a judge's decision to pass over a family member. Telephone Interview with Sara Brownlee, Coordinator, Adult Protective & Placement Services, Georgia Division of Family and Children Services (Sept. 1992).

²⁵ Survey response from Brownlee, *supra* note 23.



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workers who investigate and provide adult protective services also serve as the case managers for wards. Because DFCS contains APPS as well as other departments (e.g., Mental Health) providing services to wards, a direct conflict of interest exists. For example, in a situation when the case manager needs a residential alternative for a mentally ill ward, the case manager must have the cooperation of the mental health worker who is supposed to locate these placements. If the mental health worker does not cooperate, the case manager can do little. The case manager can complain, but the inability to sue seriously undercuts advocacy efforts.²⁶

Each worker's caseload varies greatly, but the average is approximately 40. The total number of wards in the state currently is 648. About two-thirds are elderly, and the rest are adults with mental illness or developmental disabilities. Agency policy requires that the case managers visit the ward at least monthly and that they keep looking for a private guardian.²⁷

The department is receiving increasing requests from nursing homes.²⁸ Georgia nursing homes are interpreting the Patient's Self-Determination Act as requiring guardianship for all those who have no decisionmaker such as a family member or friend to appoint as agent. The nursing homes have also requested that the department authorize "no codes" ("do not resuscitate" orders) in all cases when the department is serving as a resident's guardian. The department does a great deal of outreach into nursing homes to educate the administrators and other staff on when guardianship and no codes are appropriate.²⁹

Another problem adding to the case manager's work load is that no public or private organization provides guardianship services for wards who have assets but no family members or friends to serve as guardian. Private attorneys serve as guardian of the property for these wards and collect fees for managing the ward's estate, but they will not serve as guardian of the person. APPS case

²⁶ Telephone Interview with Brownlee, *supra* note 24.

²⁷ Survey response from Brownlee, *supra* note 23.

²⁸ Telephone Interview with Brownlee, *supra* note 24.

²⁹ *Id.*

managers end up serving as guardian of the person for wards who have assets and could pay for services.³⁰

The Georgia legislature may appoint a committee in its next session to study the problems with guardianship. One likely alternative is establishing an independent Office of the Public Guardian.³¹

C. Nonprofit Volunteer Board: Idaho

The Idaho legislature authorizes each county's board of commissioners to create a board of community guardian.³² A board of community guardian consists of at least 7 but not more than 11 volunteer members. A board member who has previously provided or is currently providing services to a ward must disclose this information to the board and abstain from any decisionmaking regarding that ward. No board member can be a district court employee.³³

When the court finds an individual is incapacitated and needs a guardian or conservator, the court contacts the local board of community guardian. The board's first task is to locate an individual or corporation to serve as guardian. If a suitable guardian cannot be found, the board petitions the court to be appointed guardian of the person and/or conservator of the property. Once appointed, the board has an ongoing duty to try to find a suitable individual or corporation to take its place.³⁴

The board has all the powers given to any other guardian or conservator under Idaho law. It also has access to all confidential records concerning its wards and must review and monitor ongoing need for services provided by public or private agencies.³⁵

Boards are required to assess fees for their services and are compensated as is any other Idaho guardian or conservator. If the ward has no funds, the court waives

the fee.³⁶ The board, individual members, employees, or visitors they appoint are exempt from civil liability for the medical decisions they make for their wards as long as the board acted in good faith, within its scope of authority, and not in a "wanton or grossly negligent" way.³⁷

The Ada County Board of Community Guardians, covering the largest county in Idaho, has been operating for about five years. The board consists of ten members who currently work in elder law or social services or are retired professionals. When the board receives a referral of an alleged incapacitated person, it first investigates to determine if guardianship is really needed. The board emphasizes the importance of an individual retaining whatever decisionmaking capacity possible. Because the board has such limited resources, it must focus on the truly needy. Most persons the board serves are to-

tally incapacitated. Many requests are received where a representative payee, for example, is sufficient; the petitioner is referred to an agency providing these services. In some cases a limited guardianship is sought.³⁸

If the board determines a guardianship is necessary, it tries to locate a volunteer guardian and petitions to have the volunteer appointed guardian. If the ward has assets, the board will try to refer the case to a nonprofit organization providing guardianship services. If no volunteer or nonprofit guardianship agency is located, the board will petition to serve as guardian itself. One board member functions as the ward's case manager (serves as the contact person between the ward and service agencies, pays the ward's bills, etc.) and makes emergency decisions on behalf of the board when necessary.³⁹

The board currently is working with about 30 cases, either acting as guardian, seeking a volunteer, or evalu-

Under Alabama law, when no suitable person is available to serve as guardian the county's general conservator must be appointed. Since there are no general conservators, however, the sheriff serves as the guardian of last resort.

³⁰ *Id.*

³¹ *Id.*

³² IDAHO CODE § 15-5-601.

³³ *Id.* § 15-5-602.

³⁴ *Id.* § 15-5-602(c).

³⁵ *Id.* § 15-5-408, -424.

³⁶ *Id.* § 15-5-602(f). A lien, created for all unpaid fees, is enforceable when the guardianship or conservatorship ends. Unpaid fees can be postponed or gradually repaid if immediate repayment would be a hardship.

³⁷ *Id.* § 15-5-602(g). Each board files an annual report to its board of county commissioners containing a fiscal report, number of volunteer guardians, number of incapacitated persons served, and recommendations for improving guardianship services. The board of county commissioners reviews these annual reports and can dissolve the board.

³⁸ Telephone Interview with Al Herzfeld, Chairman of the Ada County Board of Community Guardian (Sept. 1992).

³⁹ *Id.*

ating the need for a guardian. Requests are up about 100 percent over the past several months. Until recently the board mostly served elders often suffering from organic brain syndrome. The change in the nursing home law produced a flood of applications for guardianships for younger nursing-home residents with developmental disabilities.⁴⁰ The board has been unable to accommodate all of these requests because it has had difficulty finding volunteer guardians willing to commit themselves to serve as guardians for potentially many years. Further, the board members themselves have no expertise in working with individuals with developmental disabilities.⁴¹

The board's major problems are lack of funding (the board operated on less than \$200 for the past year), the statutory requirement that the board must petition for guardianship, and the difficulty in recruiting volunteer guardians. Board members are concerned that the county provides no resources (not even in-kind), and yet the board must petition to be guardian if an alleged incapacitated person is in need. Recently adopted legislation gives the board of county commissioners the power to budget for boards of community guardians.⁴²

The Guardianship Forum, a statewide group (sponsored by the Idaho Office on Aging) of judges, legislators, and lawyers working on guardianship reform, is considering the problems the Ada Board identified. The Forum supported recently adopted legislation that clarifies the local boards' authority not only to recruit and train volunteers but to maintain the legal responsibility for guardianship at the board level as well as at the volunteer level. The legislation also authorizes boards to place liens on the ward's property and collect on the liens when guardianship terminates. This should provide a much-needed source of income for the boards.⁴³

D. Government Employee Not Providing Social Services: Alabama

Under Alabama law, when no suitable person is available to serve as guardian the county's general conservator must be appointed. If there is no general conservator then the sheriff must be appointed.⁴⁴ In practice, however, there are apparently no general conservators in any Alabama county. Therefore, the sheriff serves as the guardian of last resort.

This system does not work well for anyone involved. In a particularly egregious case, a sheriff had been appointed guardian for a woman wrongfully committed to a mental hospital. When advocates began helping the ward, they discovered that the sheriff did not even know he had been appointed guardian for the ward.⁴⁵ Any alternative to the sheriff is explored before the sheriff is appointed, even though not many services are available. Often the county department of human

resources, when it has been providing services for a person who becomes incapacitated, will take on the added responsibility of decisionmaking for that person even though no court has appointed the department to serve in any capacity.⁴⁶

Attorneys who serve low-income elders report that most of their time is spent representing wards who are trying to remove their guardians. It is not clear why there are so many unwanted guardianships. Alabama's system needs reform. Unfortunately, efforts to pass any type of social legislation requiring funds are likely to fail in the state legislature.⁴⁷

E. Ad Hoc System: Washington State

Although Washington law has no specific authorization for a public guardian, it has a mechanism to pay for guardianship services for indigent, incapacitated individuals. The state authorizes a Medicaid disregard allowing Medicaid funds to pay for guardian, attorney, and guardian ad litem fees, as well as for the initial assess-

Although Washington law has no specific authorization for a public guardian, the state authorizes a Medicaid disregard allowing Medicaid funds to pay for guardian, attorney, and guardian ad litem fees.

⁴⁰ See note 19, *supra*.

⁴¹ Telephone Interview with Herzfeld, *supra* note 38.

⁴² Idaho H.B. No. 461, 51st Legis., 2d Sess. (1992) (Health & Welfare Comm.).

⁴³ Telephone Interview with Arlene Davidson, Idaho Office on Aging (Sept. 1992); Idaho H.B. 5 (1993).

⁴⁴ ALA. CODE §§ 26-2-50, -40.

⁴⁵ Telephone Interview with Patti Drake, Human Services Planner and Manager of the Legal Assistance Program for Title III, Alabama Comm'n on Aging (Sept. 1992).

⁴⁶ *Id.*

⁴⁷ *Id.*

ment to determine if a guardianship is appropriate and for services to the ward once the guardianship is established. These guardians are not monitored other than through the usual annual report to the court. No guardianship standards exist other than the state's general fiduciary laws.⁴⁸

The Attorney General decided to allow Medicaid to reimburse for guardianship services some ten years ago, but it was not used very often until a few years ago. Now Medicaid dollars are often used to pay for guardianship services. This is in part a result of the need (or perceived need) for more guardianships, particularly by nursing homes concerned about their liability if they do not obtain a guardianship for residents. No statistics are available on how much this system is costing Medicaid.⁴⁹

A recent analysis of the Washington system suggests that financial incentives lead to more institutionalization and unnecessary guardianships. The study recommends capping the fees or instituting a state public guardianship system.⁵⁰

IV. Summary of Research Findings

This research reaffirmed many of the same issues, problems, and proposed solutions the Schmidt study identified over ten years ago. It also revealed a few new problems. The following are the major recommendations that emerged from this research:

- States should put more effort toward avoiding guardianship or conservatorship by creating and funding less restrictive alternatives.
- Education and outreach must be done with nursing homes on when a guardianship is appropriate and on the available alternatives to guardianship.
- Adequate funding must be provided to enable existing public guardianship programs to serve all those in need and to meet statutory mandates for services, and to enable new public guardianship programs to be started when there is a need.
- Potential conflicts of interest must be eliminated in programs with a division of the state or local government serving as public guardian.
- National standards are needed to set minimum requirements of service, monitoring, financial accountability, among others.
- Greater efforts must be made to recruit, train, and maintain volunteers to serve as long-term guardians, particularly for persons with developmental and mental disabilities.

Despite general awareness of many of the problems and their solutions, many states have not been able to implement solutions. Some further research and much greater advocacy efforts in the states are necessary to implement change.⁵¹ □

⁴⁸ Telephone Interview with Jackie Beery-Day, Nursing Home Servs., Washington Aging & Adult Servs. Admin. (Sept. 1992).

⁴⁹ *Id.*

⁵⁰ Letter from Vicki Gottlich, Staff Attorney, National Senior Citizens Law Center, to Chairperson of the State Council on Aging of Washington (Mar. 25, 1992).

⁵¹ Questions for future research:

- (1) What are the most effective, least restrictive alternative services or combination of services (representative payee, bill payor, health care representatives) to avoid guardianship?
- (2) How can these less restrictive alternatives be funded?

(3) Are nursing home liability concerns for residents without guardians justified?

(4) How can advocates and nursing homes work together to balance the nursing homes' concerns with the overall goal of using guardianship only as a last resort?

(5) What are realistic potential sources of funding to provide public guardianship services?

(6) How can volunteers best be used to provide public guardianship services or support?

(7) What problems occur when using volunteers?

➤ This material was posted in electronic form on the LegalAid/Net forum, on the HandsNet information and communications network, on September 3, 1993.