

Public Guardianship After 25 Years: In the Best Interest of Incapacitated People?

**National Study of Public Guardianship
Phase II Report**

Pamela B. Teaster, Ph.D.

Erica F. Wood, J.D.

Winsor C. Schmidt, Jr., J.D., LL.M.

Susan A. Lawrence, Ph.D.

Funded by The Retirement Research Foundation

Mission

The mission of the Graduate Center for Gerontology at the University of Kentucky is to provide advanced interdisciplinary research training in gerontology, to conduct interdisciplinary research with an emphasis on aging and health considered from a cell to society perspective, and to make service and policy contributions to improve the quality of life of elders individually and as a population within the commonwealth, the nation, and the world.

The mission of the American Bar Association Commission on Law and Aging is to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training. The Commission consists of a 15-member interdisciplinary body of experts in aging and law, including lawyers, judges, health and social services professionals, academics, and advocates.

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association.

This report was developed with a grant from The Retirement Research Foundation.

Copyright 2007 Pamela B. Teaster, Winsor C. Schmidt, Jr., Susan A. Lawrence, and the American Bar Association.

Table of Contents

Acknowledgements	4
Executive Summary	5
Chapter 1: Introduction to the Study	13
Chapter 2: Methods	21
Chapter 3: Analysis of State Public Guardianship Statutes	27
Chapter 4: Site Visit Studies.....	39
Los Angeles County, California.....	39
Delaware	46
Maryland	54
Maricopa County, Arizona.....	62
Pima County, Arizona	68
San Bernardino County, California	76
Wyoming	81
Chapter 5: Models of Public Guardianship Programs	85
Chapter 6: Conclusions and Recommendations.....	89
Chapter 7: Model Public Guardianship Act	107
Introductory Overview	107
Model Public Guardianship Act	115

Appendixes

Appendix A: State Public Guardianship Profiles	123
Appendix B: State Public Guardianship Statutory Charts	161
Table 1: Statutory Authority and Type of Program.....	162
Table 2: Procedural Due Process Safeguards in Guardianship.....	168
Table 3: Assessment; Civil Liberties; Selection of Guardian	176
Table 4: Powers and Duties of Guardians; Costs	181
Table 5: Additional Guardianship Provisions	185
Appendix C: Criteria for Contracting Out	188
Appendix D: Hallmarks of an Excellent Public Guardianship Program from 2005 Phase I National Public Guardianship Report	192
Appendix E: Conclusions and Recommendations from 2005 Phase I National Study on Public Guardianship	193

Acknowledgements

The authors are grateful for the support they received throughout this project. The public guardianship staff, judges, lawyers, adult protective services workers, aging and disability advocates, and incapacitated persons who participated in our site visit interviews contributed greatly to our findings.

In particular, we thank the following people who assisted with the project: Anita Royal, Pima County, Arizona, Office of the Public Fiduciary; Richard Vanderheiden, Phoenix, Arizona, Maricopa County Office of the Public Fiduciary; Jane Adams, San Bernardino County, California, Office of the Public Guardian; Christopher Fierro, Los Angeles County, California, Office of the Public Guardian; Robin Williams-Bruner, Delaware, Office of the Public Guardian; and Valarie Colmore, Suzanne Lord, and Sue Vaeth, the Maryland Adult Public Guardianship Program.

Our advisory committee offered valuable perspectives that improved our report: Karen Roberto, Virginia Polytechnic Institute and State University; Joy Duke, Virginia Guardianship Association; David English, University of Missouri-Columbia School of Law; Naomi Karp, AARP Public Policy Institute; Sally Hurme, AARP Financial Security; and Marty Ford, The Arc of the United States.

We appreciate the assistance of Julie Kaufman at The Retirement Research Foundation and the grant from the foundation that made this project possible.

We acknowledge all of the incapacitated persons served by the public guardians and hope this report will contribute to their quality of life.

We thank Jamie Philpotts of the ABA Commission on Law and Aging for her excellent editorial assistance.

Finally, we thank our colleagues, friends, and families for supporting us as we worked on this project.

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

Public Guardianship After 25 Years: In the Best Interest of Incapacitated People?

Executive Summary

Guardianship is a relationship created by state law in which a court gives one person or entity (the guardian) the duty and power to make personal and/or property decisions for another person (the ward or incapacitated person). The appointment of a guardian occurs when a judge decides an individual lacks legal capacity to make decisions on his or her own behalf. Guardians often are family members or willing friends, but sometimes they are attorneys, corporations, government agencies, or even volunteers. For some persons, there is no one to help and a “last resort” situation occurs.

Public guardianship is 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. Since the 1960s, states and localities have developed a variety of mechanisms to address this “unbefriended” population and serve as “guardian of last resort.”

The only previous study, *Public Guardianship and the Elderly*,ⁱ was conducted by professor Winsor Schmidt and colleagues. Their project included a statutory and case law analysis, a survey of public guardianship options, and intensive site visits in six states. This study, conducted by researchers from the University of Kentucky, the American Bar Association Commission on Law and Aging, and Washington State University, sought to compare the state of public guardianship in 2007 with the findings of the 1981 Schmidt study.

Methods

The study methods for Phase II included eight steps: (1) securing IRB (institutional review board) approval to conduct Phase II research; (2) updating and reviewing the public guardianship social science literature since the 2005 report (Phase I);ⁱⁱ (3) legal research of any court cases involving public guardianship programs since the end of Phase I (April 2005); (4) completion of in-depth e-mail surveys and follow-up telephone calls as needed, with key public guardianship program staff in Arizona (Maricopa and Pima counties), California (Los Angeles and San Bernardino counties), Delaware, and Maryland; (5) conducting site visits involving key informant and ward interviews in Arizona (Maricopa and Pima counties), California (Los Angeles and San Bernardino counties), Delaware, Maryland, and Wyoming in order to gain a deeper understanding of each site’s public guardianship program and practices, as well as to replicate the 1981 study; (6) transcribing interviews from each site visit; (7) performing in-depth analysis of data collected from each of the sites; and (8) preparing and distributing a final report.

Models of Public Guardianship

Originally proposed by Regan and Springer,ⁱⁱⁱ used in 1981, and still applicable for this study, models of public guardianship are described as follows:

The **court model** (emphasis added) 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

i. Winsor C. Schmidt, Jr., Kent S. Miller, William G. Bell & B. Elaine New, *Public Guardianship and the Elderly* (Ballinger Publ. 1981).

ii. Pamela B. Teaster, Erica F. Wood, Naomi Karp, Susan Lawrence, Winsor C. Schmidt, Jr. & Marta Mendiondo, *Wards of the State: A National Study of Public Guardianship* (2005).

iii. John Regan & Georgia Springer, *Protective Services for the Elderly: A Working Paper*, U.S. Senate Special Comm. on Aging 27 (GPO 1977).

guardian. The chief administrative judge of the state has rulemaking power for the purpose of statewide uniformity.

The **independent state office** (emphasis added) is established in the executive branch of government with the public guardian appointed by the governor. This resembles the public defender model.

Model three establishes the public guardian office within a pre-existing **social service agency** (emphasis added). 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 interest of the ward.

The **county model** (emphasis added) establishes a public guardian within each county. The local official may be more sensitive to the needs of the (incapacitated person) in a particular county. The public guardian is appointed by the county government. The state attorney general would regulate these county offices.^{iv}

Analysis of State Public Guardianship Statutes

As of 2007, a total of 44 states have specific statutory provisions on public guardianship, whereas seven states include no such reference in their code. In 1981, the landmark Schmidt study distinguished between “explicit” statutes that specifically refer to a “public guardian” or “public guardianship program” and implicit schemes that provide for an equivalent mechanism without so denominating it, often naming a state agency or employee as guardian when there is no one else to serve. Schmidt found 14 explicit statutory schemes and 26 implicit schemes. Today, research shows a total of 28 explicit statutory schemes and 18 implicit statutory schemes (with some states having two schemes). States, over time, have clearly shifted toward enactment of explicit public guardianship schemes, frequently providing for an office, budget, and ability to hire staff and contract for services.

Governmental Location. The statutory provisions concerning governmental location of public guardianship are particularly important. In 1981, Schmidt used four models in analyzing public guardianship statutes regarding governmental administrative structure: (1) a court model; (2) an independent state office; (3) a division of a social service agency; and (4) a county agency. This study uses the same classification. While additional states may fit into the classifications programmatically (*see* Chapter 4), the *statutory findings*, and comparison with a quarter of a century ago, are as follows:

- Court model—In 1981 there were six states with such statutes. The 2007 study found five.
- Independent state offices—There were three states with such statutes in 1981. In 2007 there were four.
- Social service agency—More than half of the states with statutory public guardianship provisions named a social services, mental health, disability, or aging services agency as guardian in 1981, presenting a conflict of interest. That remains true in 2007.
- County level—In 1981 there were 10 states with such statutes. In 2007 approximately 13 of the statutory schemes locate the public guardianship function at the county level, and others have designed programs coordinated at the state level but carried out administratively or by contract at the local or regional level.

Cost and Staffing. While there was little mention in 1981 of funding in statutory schemes, some 31 of the 44 states with statutory provision in 2007 make some mention of cost. At least 10 states include reference to state appropriations, while others target the estate of the incapacitated person or some combination as responsible for costs.

iv. *Supra* n. 1, at 59-60.

The 1981 study placed great emphasis on the need for required staff-to-client ratios, but at that time there were no statutory provisions for such a ratio. In 2007, seven states reference staffing ratios, either set out in law or in administrative rules or contracts.

Procedural Protections. Because an understanding of public guardianship requires a close look at the state guardianship codes in which it is lodged, the 2007 statutory analysis includes basic elements of state guardianship and conservatorship statutes, as well as the more specific provisions concerning public guardianship.

This research assesses statutory provisions on the key parameters originally named by Schmidt: eligibility for public guardianship; scope of public guardianship services; potential petitioners (including the public guardianship program itself); procedural due process protections (notice, hearing, presence of alleged incapacitated person, appointment of counsel, standard of proof, right to jury trial, assessment of capacity, rights retained by individual under guardianship); who may serve as guardian; powers and duties of guardians (and, specifically, public guardians); and provisions for court review, termination, emergency orders, and use of limited orders. (See statutory charts in Appendix B.)

Site Visits to the States

Los Angeles County, California. This *county model program* serves two target populations: older or dependent persons (probate conservatorships) and persons of all ages with mental illness who are found “gravely disabled” by a court (Lanterman-Petris-Short conservatorships). The annual budget for the office is \$9.9 million, including salaries, benefits, attorney costs, supplies, and other administrative costs. The program includes 90 full-time equivalent professional staff on payroll, including support staff, and has the authority to collect a fee or charge to the incapacitated person for services. The program was serving 3,400 incapacitated persons in March 2004, and, for that year, accepted 700 new incapacitated persons into the program. After a *Los Angeles Times* exposé in 2005,^v changes resulted in California law that addressed all types of guardianship. A major change to the Los Angeles Public Guardian (LAPG) was that the county board of supervisors approved an additional 32 new positions for the probate conservatorship program, representing an increase of over 100%. The LAPG has computerized records dating back from 1984, allowing an important before and after picture of incapacitated persons over time. Based on a guardian-to-ward ratio of 1:30,^{vi} staff-to-client ratios were too high in 1979 (average load of 105 persons per caseworker) and have not declined significantly (84 per deputy public guardian) in over 20 years.

Delaware. A *court model program* established in 1974, the Delaware Office of the Public Guardian (DOPG) is operated statewide with no regional or local public guardianship programs. By statute, the office provides public guardianship, trusteeship, and personal representation of decedents’ estates to all citizens in the state who qualify. The DOPG is a state agency under the Delaware judiciary. Staff members consist of the public guardian, deputy public guardian, three full-time senior social worker/case managers, a part-time senior social worker/case manager (vacant), an administrative officer, and a financial case manager. The agency receives 100% of its budget through state of Delaware appropriations, with an FY 2006 budget of \$458,570. Caseloads are reported as approximately 55 incapacitated persons per staff member. The DOPG has the authority to collect an administrative fee approved by the court, but in practice rarely does so. Until 2006, the DOPG had a public guardian with many years of experience and exceptional institutional knowledge. She was not an attorney, but she nonetheless represented the office in court. There is a clear unmet need for public guardian services, especially since the office had issued a moratorium on new cases for four months and had to institute moratoria in the past.

Maryland. This *division of a social service agency program* is a bifurcated system, established in 1977. For all persons deemed incapable of managing their affairs, a guardian of the property, generally an attorney, is appointed. For incapacitated adults age 18-64, guardianship of the person is provided by the Maryland Department of Human Resources, which then follows them as they age. For incapacitated adults age 65+, guardianship of the person is provided by the Maryland Department of Aging (MDoA). Office directors of the

v. Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit* (4-part series) L.A. Times (Nov. 13-16, 2005), retrieved June 4, 2006, from <http://www.latimes.com>.

vi. *Supra* n. 1.

24 local departments of social services (LDSS) are the named guardian of incapacitated persons aged 18-64 as a last resort, when no other person is available to serve as guardian. The director of the local area agency on aging is the court-appointed named guardian for persons over age 65, but in most cases, a guardian manager provides the services. Maryland law establishes a system of public guardianship review boards for each county, although two or more counties may agree to establish a single multi-county review board. In the few cases where the incapacitated person has the resources, fees are collected for services rendered. The majority of guardianship petitions reportedly originate in hospitals. Based on our recommended guardian-to-ward ratio of 1:20, caseloads are far too high. Attorneys serving as guardian of the property, but also serving as attorney for hospitals and nursing homes in which the incapacitated persons live, are filing petitions for guardianship. This dual role is a conflict of interest.

Maricopa County, Arizona. The *county model* Maricopa County Public Fiduciary (MCPF) is not housed with any other department and has its own county government budget. The MCPF administers decedent estates and is responsible for the county indigent burial program. In 1995, the Arizona Supreme Court enacted administrative rules requiring certification of all public and private fiduciaries receiving payment for services. With 36 full-time equivalent staff, the office contained guardian administrators, estate administrators, estate analysts, division managers, and in-house legal coordination. The average caseload was approximately 65 incapacitated persons per guardian administrator. In FY 2003, the cumulative total of incapacitated persons served by the public fiduciary was 550. At the time of the site visit, the MCPF anticipated significant staff attrition. The MCPF has the authority to collect fiduciary fees approved by the court that amount to about \$850,000 *per annum*. Both programs and the staff are certified by the state, something that the Maricopa office regards as positive in that it increases the cumulative knowledge in the office. The major referral source is the probate court. The unmet need for guardians for incapacitated persons is not well understood. The level of professionalism in this office is impressive. A strength of the office is its leadership by an attorney.

Pima County, Arizona. The *county model* Pima County Public Fiduciary (PCPF) is one of 26 departments under the Pima County Board of Supervisors. The PCPF is appointed by the board of supervisors and serves at its will. A general fund allocation is supplemented by fee revenue generation by the PCPF (\$430,000 in FY 2003). For FY 2004, the PCPF received a general fund allocation of approximately \$1.435 million. Caseloads are between 60-65 incapacitated persons per case manager. The office maintains a pooled checking account from which incapacitated persons' monthly bills are paid; excess funds are placed in interest-bearing accounts. Incapacitated persons are reportedly far more dangerous than earlier in the history of the program. Many interviewees believe that resources for the office are limited in relation to the population served and that the county had an unmet need for public guardian service that is exploding. The PCPF has a wealth of institutional knowledge in the people who have worked with the office for many years. The role of the court investigator is especially strong in Pima County, and one court investigator recently served as president of the National Guardianship Association. The office uses a nurse for medical case management.

San Bernardino, California. As a result of political realignment, the *county model* office was moved from its previous location within the coroner's office to the Department of Aging and Adult Services (DAAS). There are 27 staff persons in the office, including resource management, clerks, and deputies. Approximately 500 incapacitated persons are served. A San Bernardino County court investigator investigates new cases. Lanterman-Petris-Short conservatorships are by far the most common cases that the San Bernardino County Public Guardian serves. The San Bernardino Department of Behavioral Health (DBH) provides the office with \$1.3 million for such services as assuming control of the incapacitated person's property, care of the person, providing services to support treatment and/or placement, establishing treatment plans (which are supported by DBH) and care assessments, and serving as liaison to state, county, and private agencies. The average LPS conservatorship caseload is between 55-70 incapacitated persons per staff member. The probate conservatorship ratio is 55:1. Interviewees think that the office needs more funding and more staff members. The office, due to the shortfall, does not visit clients as much as needed and is not as responsive as needed to other partners in the care collective in the county. The office did not produce answers to relatively simple questions on clients and staff in the office.

Wyoming. After repeal of the state's public guardianship statute in 1998, the Wyoming Guardianship Corporation (WGC), a private nonprofit entity with over 80 volunteer guardians, assumed the cases. The cor-

poration executive director is named individually as guardian in some cases, and the corporation is named in other cases. The Developmental Disabilities Division and the Wyoming State Hospital fund the corporation. The corporation also receives federal funding as a Social Security Representative Payee and Veterans Affairs Fiduciary, as well as from fees for private guardianship services. In addition, the corporation runs the Mental Health Ombudsman Program and the Wyoming Guardianship Corporation Pooled Trust. A board of directors governs the WGC. While anachronistic then, Wyoming seems to have progressed only to the point of its public service providers contracting with WGC to fulfill a similar, seemingly perfunctory public guardianship role. This public guardianship role may more clearly benefit the third party interests of public service providers than the best interests of incapacitated persons.

Conclusions

Individuals Served

- Public guardianship programs serve a wide variety of individuals.
- Public guardianship programs serve younger individuals with more complex needs than 25 years ago.
- In most states, a majority of individuals under public guardianship are institutionalized.

Program Characteristics

- Public guardianship programs are categorized into four distinct models: court, independent state office, social services agency, and county.
- All states except one have some form of public guardianship, yet major areas remain uncovered and the unmet need is compelling.
- The clear majority of states use a social services (conflict of interest) model of public guardianship.
- Some governmental entities providing public guardianship services do not perceive that they are doing so.
- A number of states contract for public guardianship services.

Functions of Public Guardianship Programs

- Many public guardianship programs serve as both guardian of the person and property, but some serve more limited roles.
- Public guardianship programs vary in the extent of community education and outreach performed.
- Petitioning for appointment of itself is a problematic role for public guardianship programs.
- Court costs and filing fees are a significant barrier to use of public guardianship.

Funding and Staffing of Programs

- States have significant unmet needs for public guardianship and other surrogate decision-making services, but they frequently cannot quantify the unmet need.
- Education requirements for staff in public guardianship programs vary considerably.
- Staff size and caseload in public guardianship programs show enormous variability.
- Public guardianship programs are frequently significantly understaffed and underfunded.
- Although some public guardianship programs use ratios to cap the number of clients, most serve as guardian of last resort without limits on demand.
- Funding for public guardianship is from a patchwork of sources, none sufficient.
- Data on costs per case are sparse, but estimates are in the range of \$1,850 yearly per case in significantly understaffed environments.
- The Supreme Court *Olmstead* case provides a strong mandate to enhance public guardianship.

Public Guardianship As Part of a State Guardianship System: Due Process Protections and Other Reform Issues

- Very little data exists on public guardianship.

- Courts rarely appoint the public guardian as a limited guardian.
- The guardian *ad litem* system, as currently implemented, is an impediment to effective public guardianship services.
- Oversight and accountability of public guardianship are uneven.

Court Cases Involving Public Guardianship

- Litigation is an important but little used strategy for strengthening public guardianship programs.

Recommendations

Individuals Served

- States should provide adequate funding for home- and community-based care for individuals under public guardianship.

Program Characteristics

- States should consider the characteristics in the Model Public Guardianship Act presented in this study, adopt or adapt the Model Act legislatively, and implement it rigorously.
- States should avoid a social services agency (conflict of interest) model.

Functions of Public Guardianship Programs

- State public guardianship programs should establish standardized forms and reporting instruments.
- Individuals should be accepted into public guardianship programs on a first come, first served basis.
- Public guardianship programs should limit their functions to best serve individuals with the greatest needs.
- Public guardianship programs should adopt minimum standards of practice.
- Public guardianship programs should not petition for their own appointment.
- Public guardianship programs should develop and monitor a written guardianship plan setting forth short-term and long-term goals for meeting the needs of each incapacitated person.
- Public guardianship programs should routinely and periodically perform client reassessment and develop an updated guardianship plan.
- Public guardianship programs should ensure that decision-making staff personally visit clients at least twice a month.
- Public guardianship programs should establish and maintain relationships with key public and private entities to ensure effective guardianship services.
- Public guardianship programs at the local and state level would benefit by regular opportunities to meet and exchange information.
- Public guardianship programs should maintain and regularly analyze key data about clients and cases.
- Public guardianship programs should track cost savings to the state and report the amount regularly to the legislature and the governor.
- Public guardianship programs should undergo regular periodic external evaluation and financial audit.

Funding and Staffing of Programs

- Public guardianship programs should be staffed at a specific staff-to-client ratio. The recommended ratio is 1:20.
- States should provide adequate funding for public guardianship programs.
- The public guardian (or director of the public guardianship program) has a duty to secure adequate funding for the office.

Public Guardianship As Part of a 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.
- Courts should exercise increased oversight of public guardianship programs.
- Courts should increase the use of limited orders in public guardianship.
- Courts should waive costs and filing fees for indigent public guardianship clients.

Recommendations for Public Guardianship Research

- The effect of public guardianship services on incapacitated individuals over time merits study.
- Research should examine the role of public guardianship for individuals with mental illness, and the relationship of guardianship to civil commitment.
- Research should analyze the operation, costs, and benefits of review boards or committees for public guardianship programs.
- Research should examine the costs and benefits of allowing public guardianship programs, once adequately staffed and funded, to provide additional surrogate services less restrictive than guardianship.
- Research should explore state approaches to use of Medicaid to fund public guardianship.
- Research should examine the role of guardians *ad litem* and court investigators, especially as they bear on the public guardianship system.

Model Public Guardianship Act

The Model Public Guardianship Act is intended to translate the findings and recommendations of this study into policy and law. Key themes are independence of the public guardianship function, avoidance of conflict of interest, use of the least restrictive form of intervention, emphasis on self-determination and autonomy of incapacitated persons to the greatest extent possible, quality assurance, and public accountability.

The Model Act incorporates not only the findings and recommendations of the Phase I and Phase II studies, but also stands as a distillation and compilation of existing state statutes and a series of earlier model public guardianship statutes. The Model Act uses the Model Public Guardianship Statute from the 1981 public guardianship study as a base. Highlights include:

- Location of the public guardianship office at the county level.
- Prohibition of the contracting out of the public guardianship function.
- Provisions for the independence of the public guardianship office from any service providing agencies.
- A required staff-to-client ratio of 1:20.
- A background in law for the public guardian; and in law, social work, or psychology for paid professional staff.
- Specific duties of the public guardianship office regarding: use of substituted judgment; individualized plans and reports; required visitation; prohibition of direct services; and adoption of standards of practice.
- Specific powers of the office regarding: intervening in private guardianship cases in the best interest of an incapacitated person; serving as representative payee for guardianship clients; and making arrangements after the death of the incapacitated person.
- Prohibition of petitioning for appointment of the office as guardian.
- A right to services for public guardianship clients.
- Two alternatives concerning basic procedural protections in the guardianship process, depending on existing protections in state law.
- Functions of the state court administrative office in aiding county offices in training, data collection, and promoting exchange of information.
- Independent external evaluation and financial audit of the office.
- A statewide public guardianship advisory committee.

Chapter 1: Introduction to the Study

Noted bioethicist Nancy Dubler observes that

the single greatest category of problems we encounter are those that address the care of decisionally incapable [individuals] . . . who have no living relative or friend who can be involved in the decision-making process. These are the most vulnerable . . . because no one cares deeply if they live or die, no one's life will be fundamentally changed by the death of the resident. We owe these [individuals] the highest level of ethical and medical scrutiny; we owe it to them to protect them from over-treatment and from under-treatment; we owe it to them to help them to live better or to die in comfort and not alone.¹

These “unbefriended” incapacitated people are the clients of public guardianship programs. The “unbefriended” are persons unable to care for themselves and are typically poor, alone, often “different,”² persons with no other recourse than to become wards of the state. Serving them well is a challenge for government, especially under budgetary constraints. Their lives have remained largely unexamined, a part of the backwater of the governmental social service and welfare machinery. “When examined in the larger context of social programming through which we purport to help the less advantaged, involuntary guardianship emerges as an official initiation rite for the entry of the poor and the inept into the managed society.”³ This study aims to shed light on how governments are carrying out their basic *parens patriae* role for those who have no one else.

When Schmidt and colleagues conducted the landmark national study of public guardianship⁴ in the late 1970s, it was a fairly new phenomenon and public guardianship practices were highly uneven. No further study on a national level was conducted and published until *Wards of the State: A National Study of Public Guardianship* in 2005.⁵ In the nearly 25 intervening years, 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.

Against this backdrop and because of the length of time elapsed since the first investigation, it was imperative to conduct a new national study of public guardianship. The study provided a compelling 2004 snapshot based on a national survey, as well as in-depth case studies in seven states. The study aimed for a direct empirical comparison over time with the pioneering 1981 work. However, systemic research on the remaining sites studied by Schmidt but not included in the 2005 study (*i.e.*, Arizona, California, Delaware, and Maryland) remained unfinished.

To answer fundamental questions about public guardianship, the Retirement Research Foundation commissioned Phase II of the national public guardianship study to complete the site comparisons (including one

-
1. Nancy Dubler in Naomi Karp & Erica Wood, *Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly* 1 (ABA Commn. L. & Aging 2003).
 2. Cf. Peter Conrad & Joseph W. Schneider, *Deviance and Medicalization: From Badness to Sickness* (Temple Univ. Press 1992); Nicholas N. Kitzrie, *The Right to Be Different: Deviance and Enforced Therapy* (Johns Hopkins Press 1971).
See also Sandra Reynolds, *Guardianship Primavera: A First Look at Factors Associated with Having a Legal Guardian Using a Nationally Representative Sample of Community-Dwelling Adults*, 6(2) *Aging & Mental Health* 109 (2002) (“particularly for older adults, increasing age, having physical or emotional limitations, a small family network, and not living with a spouse are associated with having a guardian”).
 3. Annina M. Mitchell, *Involuntary Guardianship for Incompetents: A Strategy for Legal Services Advocates*, 12 *Clearinghouse Rev.* 451, 466 (1978). See also Kent Miller, *Managing Madness: The Case Against Civil Commitment* (Free Press 1976).
 4. Winsor C. Schmidt, Jr., Kent S. Miller, William G. Bell & B. Elaine New, *Public Guardianship and the Elderly* (Ballinger Publg. 1981).
 5. Pamela B. Teaster, Erica F. Wood, Naomi Karp, Susan Lawrence, Winsor C. Schmidt, Jr. & Marta Mendiondo, *Wards of the State: A National Study of Public Guardianship* (2005). The data for the study were collected in 2004.

additional site), as well as to update statutory analysis, produce a model statute, and develop detailed profiles of each state's public guardianship situation. This Phase II report seeks to aid policymakers, public guardianship practitioners, and advocates to promote better public guardianship programs and, thus, more meaningful lives for "unbefriended" incapacitated persons under the care of the state.

Adult Guardianship⁶

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. Adult guardianship protects at-risk individuals and provides for their needs while at the same time removing fundamental rights.⁷ Guardianship can "unperson" individuals and make them "legally dead."⁸ Guardianship can be a double-edged sword, "half Santa and half ogre."⁹

Early and localized studies of protective proceedings, including guardianship, found little benefit to the incapacitated person and concluded that many petitions were filed for the benefit of third parties, or from well-meaning but ineffective motives to aid vulnerable groups.¹⁰ Despite early reform efforts in the 1970s and 1980s, state guardianship remained an unexamined area governed by archaic terms, inconsistent practices, drastic paternalistic interventions, little attention to rights, and meager accountability.¹¹

In 1986, the Associated Press undertook a year-long investigation of adult guardianship in all 51 jurisdictions, including more than 2,200 randomly selected guardianship court files and multiple interviews with a range of informants. The resulting six-part national series presented in 1987, *Guardians of the Elderly: An Ailing System*, described a troubled process: "a crucial last line of protection for the ailing elderly, [that] is failing many of those it is designed to protect."¹² In quick response, the U.S. House Select Committee on Aging convened a hearing,¹³ which, in turn, triggered an interdisciplinary National Guardianship Symposium in 1988 (the Wingspread conference) that resulted in recommendations covering procedural issues, capacity assessment, and accountability of guardians.¹⁴

6. Portions of this Introduction were based on Pamela B. Teaster, Erica F. Wood, Susan A. Lawrence & Winsor C. Schmidt, Jr., *Wards of the State: A National Study of Public Guardianship*, Stetson L. Rev. (forthcoming 2007). The article describes the Phase I national study and results.

7. In most states, a finding of legal incapacity restricts or takes away the right to: make contracts; sell, purchase, mortgage, or lease property; initiate or defend against suits; make a will, or revoke one; engage in certain professions; lend or borrow money; appoint agents; divorce, or marry; refuse medical treatment; keep and care for children; serve on a jury; be a witness to any legal document; drive a car; pay or collect debts; manage or run a business (Robert N. Brown, *The Rights of Older Persons* 286 (Avon Books 1979)).

8. Fred Bayles & Scott McCartney, *Guardians of the Elderly: An Ailing System*, Associated Press Special Report (Sept. 1987). See also Winsor C. Schmidt, Jr., *Guardianship of the Elderly in Florida: Social Bankruptcy and the Need for Reform*, in *Court of Last Resort for the Elderly and Disabled* 6 (Winsor C. Schmidt, Jr., ed., Carolina Academic Press 1995) ("The loss of any one of these rights can have a disastrous result, but taken together, their effect is to reduce the status of an individual to that of a child, or a nonperson. The process can be characterized as legal infantilization.")

9. John Regan & Georgia Springer, *Protective Services for the Elderly: A Working Paper*, U.S. Senate Special Comm. on Aging 27 (GPO 1977).

10. George Alexander & Travis Lewin, *The Aged and the Need for Surrogate Management* (Cornell Univ. Press 1972); Margaret Blenkner, Martin Bloom & M. Nielson, *A Research and Demonstration Project of Protective Services*, 52 Soc. Casework 483 (1971); Margaret Blenkner, Martin Bloom, M. Nielson, & Ruth Weber, *Final Report: Protective Services for Older People: Findings from the Benjamin Rose Institute Study* (Benjamin Rose Inst. 1974).

11. Peter Horstman, *Protective Services for the Elderly: The Limits of Parens Patriae*, 40 Mo. L. Rev. 215-236 (1975); Annina M. Mitchell, *supra* n. 3 at 451-468 (1978); Regan & Springer, *supra* n. 9; National Conference of Commissioners on Uniform State Laws, *Uniform Guardianship and Protective Proceedings Act* (1982); The Center for Social Gerontology, *Guidelines for Guardianship Service Programs* (Ctr. Soc. Gerontology 1986); *Statement of Recommended Judicial Practices* (Erica F. Wood, compiler, ABA Comm. Leg. Problems of the Elderly & Nat. Jud. College 1986).

12. Bayles & McCartney, *supra* n. 8.

13. U.S. House of Representatives, Select Comm. on Aging, *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace*, Comm. Pub. No. 100-641 (GPO 1987).

14. ABA Commn. on Mentally Disabled & Commn. on Legal Problems of the Elderly, *Guardianship: An Agenda for Reform—Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* (ABA 1989).

These events precipitated a rush to reform state guardianship laws, highlighted by five marked trends: (1) enhanced procedural due process in the appointment of a guardian; (2) a more robust determination of capacity based not only on medical condition, but on functional ability, cognitive impairments, risks, and values; (3) an emphasis on limited orders more tailored to the specific capacities of the individual; (4) bolstered court monitoring of guardians; and (5) development of public guardianship programs.¹⁵ A Uniform Guardianship and Protective Proceedings Act was developed in 1982 and updated in 1997.¹⁶

However, guardianship practices by judges, attorneys, guardians, and other players 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 respondents in guardianship proceedings are uneven or difficult to determine.¹⁷

Empirical Research

Few empirical studies of guardianship exist. In 1972, Alexander and Lewin studied over 400 guardianships and concluded that as a device of surrogate management, it is used largely by third parties to protect their own interests:

Under the present system of “Estate Management by Preemption” we divest the incompetent of control of his property upon the finding of the existence of serious mental illness whenever divestiture is in the interest of some third person or institution. The theory of incompetency is to protect the debilitated from their own financial foolishness or from the fraud of others who would prey upon their mental weaknesses. In practice, however, we seek to protect the interest of others. The state hospital commences incompetency proceedings to facilitate reimbursement for costs incurred in the care, treatment, and maintenance of its patients. Dependents institute proceedings to secure their needs. Co-owners of property find incompetency proceedings convenient ways to secure the sale of realty. Heirs institute actions to preserve their dwindling inheritances. Beneficiaries of trusts or estates seek incompetency as an expedient method of removing as trustee one who is managing the trust or estate in a manner adverse to their interests. All of these motives may be honest and without any intent to cheat the aged, but none of the proceedings are commenced to assist the debilitated.¹⁸

A 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 rate of institutionalization.¹⁹ The contribution of elder protective referral, including guardianship, to institutionalization was revisited and re-confirmed 30 years later.²⁰

15. See state statutory charts on adult guardianship, as well as annual update, on the Web site of the ABA Commission on Law and Aging, at <http://www.abanet.org/aging/legislativeupdates/home.shtml>.

16. National Conference of Commissioners on Uniform State Laws, <http://www.law.upenn.edu/bll/archives/ulc/ugppa/guardsh2.htm>.

17. 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 (1997).

18. Alexander & Lewin, *supra* n. 10, at 136.

19. Blenkner, Bloom & Nielson, *supra* n. 10.

20. Mark S. Lachs, Christianna S. Williams, Shelly O'Brien & Karl A. Pillemer, *Adult Protective Service Use and Nursing Home Placement*, 42 *Gerontologist* 734 (2002) (“[I]t is remarkable that controlled studies of differential outcomes of APS have not been conducted. A review of the literature shows no systematic attempt to evaluate program outcomes or to examine unintended consequences of APS intervention”). See also Sandra Reynolds & L. Carson, *Dependent on the Kindness of Strangers: Professional Guardians for Older Adults Who Lack Decisional Capacity*, 3(4) *Aging & Mental Health* 301 (1999) (“wards with family guardians were more likely to be living in the community than those with professional guardians”). Cf., e.g., Robert Davis & Juanjo Medina-Ariza, *Results from an Elder Abuse Prevention Experiment in New York City* (Nat'l. Inst. Justice Sept. 2001) (“new incidents of abuse were more frequent among households that both received home visits and were in housing projects that received public education”), at <http://www.ojp.usdoj.gov/nij>. See also Winsor C. Schmidt, Jr., *Quantitative Information About the Quality of the Guardianship System: Toward a Next Generation of Guardianship Research*, 10 *Probate L. J.* 61 (1990).

In 1994, the Center for Social Gerontology conducted a national study that examined the guardianship process intensively in 10 states, finding that: only about one-third of respondents are represented by an attorney during the guardianship process; medical evidence is present in the court file in most cases, but medical testimony is rarely presented at the hearing; the majority of hearings are very brief, with 25% less than five minutes in duration; some 94% of guardianship requests are granted by the court; and only 13% of the orders place limits on the guardian's authority.²¹

Recent Developments

Significant events during the past several years have refocused public attention on the nation's adult guardianship system. In 2001, seven national groups convened a second national guardianship conference (the Wingspan conference) to assess progress on reform. The conference resulted in recommendations for action on mediation, the role of counsel, use of limited guardianship, fiduciary and lawyer liability, and guardian accountability.²² In 2004, many groups re-convened to develop specific steps for implementation of selected Wingspan recommendations.²³

Meanwhile, in 2002, a District of Columbia court of appeals overturned a lower court decision, *In re Mollie Orshansky*,²⁴ that highlighted critical guardianship issues. This case and other guardianship rumblings prompted a hearing in 2003 by the U.S. Senate Committee on Aging, "Guardianships Over the Elderly: Security Provided or Freedoms Denied,"²⁵ which, in turn, prompted a study by the U.S. Government Accountability Office. The GAO study, *Guardianship: Collaboration Needed to Protect Incapacitated Elderly People*, included findings on variations in guardianship oversight, lack of data on guardianship proceedings and incapacitated persons, problematic interstate guardianship issues, and lack of coordination between state courts handling guardianship and federal representative payment programs.²⁶

In 2005, Quinn produced a comprehensive text about guardianship for community health and social services practitioners.²⁷ Also in 2005, the *Los Angeles Times* published a comprehensive series entitled *Guardians for Profit* highlighting problems with professional conservators in Southern California,²⁸ which sparked state legislative action in 2006. A survey by Karp and Wood in 2006 found continued wide variation in guardianship monitoring practices, a frequent lack of guardian report and accounts verification, limited visitation of individuals under guardianship, and minimal use of technology in monitoring.²⁹ In 2007, the National Conference of Commissioners on Uniform State Laws produced a Uniform "Adult" Guardianship and

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

22. Symposium, *Wingspan—The Second National Guardianship Conference*, 31(3) *Stetson L. Rev.* (Spring 2002).

23. National Academy of Elder Law Attorneys, National Guardianship Association & National College of Probate Judges, *2004 National Wingspan Implementation Session: Action Steps on Adult Guardianship Reform* (2004), <http://www.guardianship.org/associations/2543/files/WingspanReport.pdf>.

24. 804 A. 2d 1077 (D.C. 2002).

25. U.S. Senate Special Committee on Aging, *Guardianship Over the Elderly: Security Provided or Freedom Denied?* Serial No. 108-3 (GPO 2003).

26. U.S. Government Accountability Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, GAO-04-655 (GAO 2004).

27. Mary Joy Quinn, *Guardianships of Adults: Achieving Justice, Autonomy and Safety* (Springer Publ. 2005).

28. Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit* (4-part series) *L.A. Times* (Nov. 13-16, 2005), retrieved June 4, 2006, from <http://www.latimes.com>. See also Winsor C. Schmidt, Jr., Fevzi Akinci & Sarah Wagner, *The Relationship Between Guardian Certification Requirements and Guardian Sanctioning: A Research Issue in Elder Law and Policy*, 25(5) *Behavioral Sci. & L.* 641 (Sept.-Oct. 2007) ("83.3% of [General Equivalency Diploma] or [high school] graduates are likely to have more severe sanctions compared to 76.4% undergraduate or higher education, and 47.7% with an [Associate of Arts] or [Technical] degree, respectively. Guardians with an A.A. or Tech degree are 0.28 times less likely to have more severe sanctions than guardians with an undergraduate degree or higher education (p < 0.01).")

29. Naomi Karp and Erica Wood, *Guardianship Monitoring: A National Survey of Court Practices* (AARP Pub. Policy Inst. 2006); Naomi Karp and Erica Wood, *Guarding the Guardians: Promising Practices for Court Monitoring* (AARP Pub. Policy Inst. (in press, Sept. 2007).

Protective Proceedings Jurisdiction Act.³⁰ States continued to make changes in their laws, with at least eight states passing a total of 16 adult guardianship bills in 2006.³¹

Public Guardianship

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. A public guardian is an entity that receives most, if not all, of its funding from a governmental entity. Public guardianship programs are funded through state appropriations, Medicaid funds, county monies, legislated fees from the ward, or some combination of these. Public guardianship programs may serve several distinct populations: (1) older incapacitated persons who have lost decisional capacity, (2) individuals with mental retardation and/or developmental disabilities who may never have had decisional capacity, and (3) adults of all ages with mental illness or brain injury.

State public guardianship programs are operated from a single statewide office, or have local or regional components. They are either entirely staff-based or may operate using both staff and volunteers. Public guardians may serve as guardian of the property, guardian of the person, and sometimes representative payee or other surrogate decision-maker. They can also provide case management, financial planning, public education, social services, adult protective services, or serve as guardian *ad litem* or court investigators, and as advisors to private guardians.

Empirical Research

As with private guardianship, little data exists on the need for public guardianship and on the operation of public guardianship programs. In 1987, Schmidt and Peters studied the unmet need for guardians in Florida and found over 11,000 individuals in need, typically female, elderly, and predominantly white, with many having both medical and psychiatric conditions.³² In 1990, Hightower, Heckert, and Schmidt assessed the need for public limited guardianship, conservator, and other surrogate mechanisms among elderly nursing home residents in Tennessee and found over 1,000 residents needing a surrogate decision-maker.³³ A 2000 report by Florida's Statewide Public Guardianship Office stated that the need for public guardianship was approaching crisis proportions and estimated 1.5 guardianships needed per 1,000 people in the population.³⁴

Schmidt and colleagues conducted their landmark national study of public guardianship, published in 1981. 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."³⁵ The study reviewed existing and proposed public guardianship laws in all states and focused intensively on Maryland, Delaware, Illinois, Arizona, and California, as well as one state without public guardianship (Florida—which has since enacted a public guardianship statute).

The study findings focused on individuals served, staff size and qualifications, legal basis, procedural safeguards, oversight, funding, and other areas. The study confirmed the need for public guardianship. However, it stated that "public guardianship offices seem to be understaffed and underfunded, and many of

30. National Conference of Commissioners on Uniform State Laws, Proposed Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, For Discussion Only, http://www.law.upenn.edu/bll/archives/ulc/ugjjaea/2007may30_style.wpd (accessed June 2007).

31. Erica Wood, *State Adult Guardianship Legislation: Directions of Reform—2006*, <http://www.abanet.org/aging/docs/gdlegisupdate0106.doc>.

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

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

34. Florida Statewide Public Guardianship Office, *Forgotten Faces of Florida* (2000).

35. Schmidt *et al.*, *supra* n. 4, at 3.

them are approaching the saturation point in numbers.”³⁶ The study indicated that, consequently, many incapacitated persons received little personal attention, and noted that there were identified instances of abuse. Using Regan and Springer’s 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. The book maintained that naming social service agencies to act as public guardians represents an inherent or potential conflict of interest. In addition, it urged that programs that petition for adjudication of incapacity should not also serve as guardians, and that strict procedures should accompany public guardianships.

Schmidt followed this seminal research with a focused examination of public guardianship, collected in *The Court of Last Resort for the Elderly and Disabled*.³⁷ In 2003, 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).³⁸

Evaluative studies of public guardianship were conducted in three states: Florida, Virginia, and Utah. First, Schmidt examined the evolution of public guardianship in Florida and found that the volunteer model required significant staff time for volunteer management, at the cost of providing direct service to incapacitated persons.³⁹

Second, in the mid-1990s, the Virginia Department for the Aging contracted for two pilot public guardianship programs. A program evaluation compared the staff versus volunteer models and collected information on public guardianship functions and clients, using much the same model as pioneered by Schmidt in Florida.⁴⁰ The evaluation found the pilots viable.⁴¹ A later legislatively-mandated evaluation of 10 Virginia projects by Teaster and Roberto collected detailed information on program administration, client characteristics, and needs. The study determined that the programs were performing reasonably well and recommended extension of the geographic reach to cover all areas of the state. Other recommendations addressed the need for rigorous standardized procedures and forms for client assessment, care plans, guardian time accounting, regular program review of these documents, the need for an established guardian-to-client ratio, increased fiscal support, and more attention to meeting the needs outlined in the care plans. Importantly, the study determined that the public guardianship program saved the state a total of over \$2,600,000 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).⁴²

Finally, when the Utah Legislature created an office of public guardian in 1999, it required an independent program evaluation by 2001. The evaluation included on-site visits, interviews, and case file reviews. The study recommended additional resources and staff, continued location within the Department of Human Services, development of a unified statewide system, a system in which the office would not act as petitioner, as well as additional record-keeping and educational suggestions.⁴³

36. *Id.* at 172. See also Schmidt, *supra* n. 7, at 14:

The success of public guardianship is dependent upon several clear considerations. The public guardian must be independent of any service providing agency (no conflict of interest), and the public guardian must not be responsible for both serving as guardian, and petitioning for adjudication of incompetence (no self-aggrandizement). The public guardian must be adequately staffed and funded to the extent that no office is responsible for more than 500 wards, and each professional in the office is responsible for no more than thirty wards. A public guardian is also only as good as the guardianship statute governing adjudication of incompetence and appointment. Failure of any of these considerations will tip the benefit burden ratio against the individual ward, and the ward would be better off with no guardian at all.

37. Schmidt, *supra* n. 8.

38. Pamela B. Teaster, *When the State Takes Over a Life: The Public Guardian As Public Administrator*, 63(4) Pub. Admin. Rev. 396-404 (Blackwell 2003).

39. Winsor C. Schmidt, Jr., *The Evolution of a Public Guardianship Program*, *supra* n. 8, at 135 -143.

40. Winsor C. Schmidt, Jr., Pamela B. Teaster, Hillel Abramson & Richard Almeida, *Second Year Evaluation of the Virginia Guardian of Last Resort and Guardianship Alternatives Demonstration Project, Final Report for the Virginia Department for the Aging* (1997).

41. Pamela B. Teaster, Winsor C. Schmidt, Jr., 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 (Fall-Winter 1999).

42. Pamela B. Teaster & Karen A. Roberto, *Virginia Public Guardian and Conservator Programs: Summary of the First Year Evaluation, for the Virginia Department for the Aging* (2002).

43. Center for Social Gerontology, *Utah Office of Public Guardian: Program Evaluation* (Ctr. Soc. Gerontology 2001).

Study Justification

There is widespread agreement among experts in the aging and disability fields on the need for increased attention to guardianship practices in general and public guardianship in particular. The 2001 national Wingspan conference on guardianship⁴⁴ recommended that “Research be undertaken to measure successful practices and to examine how the guardianship process is enhancing the well-being of persons with diminished capacity.” Concerning public guardianship specifically, the recommendations urged that “states provide public guardianship services when other qualified fiduciaries are not available;” that “the public guardianship function [should] include broad-based information and training;” that “guardianship agencies [. . .] should not directly provide services, such as housing, medical care, and social services to their own wards, absent court approval and monitoring;” and that “funding for development and improvement of public [. . .] guardianship services should be identified and generated.”

Despite massive social and demographic changes since the 1981 Schmidt study, only a handful of state and local studies examined the institution of public guardianship until the 2005 national study. The comprehensive 2005 study provided a first-ever national overview of public guardianship practice and painted detailed pictures of selected programs, outlining their varying strengths and weaknesses. The study identified serious systemic problems, especially regarding funding, staffing, conflicts of interest, institutionalization, and continuing unmet needs.

The 2005 study was not a complete analog to the 1981 research, as it did not include four of the states examined by Schmidt and colleagues 25 years earlier. The Phase II effort extended to these sites, enabling a more accurate and extensive “then and now” look. Moreover, Phase II seeks to aid states currently grappling with compelling issues of public guardianship design and planning by updating the 1981 model statute, statutory charts, and state profiles. The intent of these tools is to spur good public guardianship that will improve the lives of “unbefriended” individuals who are otherwise “voiceless and vulnerable; marginal to society and without advocates.”⁴⁵

44. *Wingspan*, *supra* n. 22.

45. Karp & Wood, *supra* n. 1.

Chapter 2: Methods

In the first national public guardianship study, Schmidt and colleagues⁴⁶ offered recommendations to improve the effectiveness of public guardianship. The recommendations included the following:

- Adequate funding and staffing;
- Safeguards for due process;
- Specified staff-to-client ratios;
- Office should not be dependent upon collection of fees for service; and
- Office should coordinate services, work as an advocate for the client, and educate professionals and the public regarding guardianship.

In 2004, Teaster and colleagues from the University of Kentucky undertook a replication of the 1981 study. In Phase I of the study, and due to geographical constraints, the team was only able to replicate site visits for a portion of the study (*i.e.*, Florida and Illinois). However, the Retirement Research Foundation funded Phase II of the study, which allowed complete replication of the 1981 study. Although a departure from the Phase II proposal, the withdrawal of Alameda County provided us the opportunity to visit a state with no statutory provision for public guardianship (Wyoming), as was true in the case of Florida in the original study.⁴⁷

We have attempted to replicate the 1981 study, but because more than 25 years has elapsed, our study obviously has a different starting point. Significant growth has occurred in the number of states with public guardianship for both implicit and explicit models. Like its 1981 predecessor, our study used the same methodology (multiple case studies) to understand the face of public guardianship. To improve the science of the study, we refined the original data-gathering instruments (*e.g.*, survey), and increased the disciplines from which we gathered our pool of informants. Our approach is consistent with the iterative nature of qualitative inquiry.⁴⁸ Using Schmidt's 1981 criteria as a baseline against which to measure, we have attempted to discover how public guardianship has changed since the original study (*i.e.*, data collection in 1979).

Overview of Study Procedures

Our Phase II study procedures included eight steps: (1) securing institutional review board approval to conduct Phase II research; (2) updating and reviewing the public guardianship social science literature since the 2005 report; (3) legal research of any court cases involving public guardianship programs since the end of Phase I of the study (April 2005); (4) completion of in-depth e-mail surveys and follow-up telephone calls as needed, with key public guardianship program staff in Arizona (Maricopa and Pima counties), California (Los Angeles and San Bernardino counties), Delaware, and Maryland; (5) conducting site visits to have key informant and ward interviews in Arizona (Maricopa and Pima counties), California (Los Angeles and San Bernardino counties), Delaware, Maryland, and Wyoming, to gain a deeper understanding of each site's public guardianship program and practices, and to replicate the original study; (6) transcribing interviews from each site visit; (7) performing in-depth analysis of data collected from each of the sites; and (8) preparing and distributing a final report.

Study Sites

To replicate the original study, we investigated the public guardianship programs in Arizona (Maricopa and Pima counties), California (Los Angeles and San Bernardino counties), Delaware, Maryland, and

46. *Supra* n. 4.

47. *Id.*

48. John W. Creswell, *Research Design: Qualitative and Quantitative Approaches* (Sage Publ. 1994); Matthew B. Miles & A. Michael Huberman, *An Expanded Sourcebook: Qualitative Data Analysis* (2nd ed., Sage Publ. 1994).

Wyoming. We deviated from the original study in one instance. The original study included Alameda County in California. Although we had letters of support from the public guardianship program in Alameda County for the Phase II study, Alameda withdrew after funding was granted.⁴⁹ After significant team consideration, and with approval from the funding agency, we opted to visit a state that we believed had no provision for public guardianship. During our site visit, we found that Wyoming does, in fact, provide public guardianship services to counties in the state, although there is no statutory provision for public guardianship.

The Phase II study sites exemplify three different approaches to public guardianship: the county model, the court model, and the social service agency model. Salient features of the programs are as follows:

- Arizona: A county-based program, established in 1975, in which independent public fiduciaries are appointed by the county board of supervisors. The Pima County program served approximately 500 wards in FY 2003.
- California: A county-based program, established in 1945, in which each county board creates local offices of the public guardian. Counties have different organizational configurations, with the public guardianship office independent in some counties (*e.g.*, Los Angeles), and under local departments of social services, aging, or mental health in others (*e.g.*, San Bernardino). In FY 2004, the program was serving 3,400 wards.
- Delaware: A court model of public guardianship, the Office of the Public Guardian was created in 1974 and is housed administratively in the judiciary. In FY 2003, the program served approximately 274 wards.
- Maryland: A bifurcated program that serves individuals aged 18-64 in the APS system, and those aged 65+ in the Maryland Department of Aging. Two additional unique features of the system in Maryland are: (1) the separation of responsibility for guardianship of property and person; and (2) the existence of an adult public guardianship review board that monitors each case semi-annually. At the time of the site visit (2005), the 65+ program was serving 772 wards.
- Wyoming: One of only three jurisdictions (Washington, D.C., Nebraska, and Wyoming) found during the Phase I to have no statutory provision for public guardianship. Despite having no statutory provision, public guardianship is available in Wyoming and is located within an agency providing social services.

Lessons Learned in Phase I

Based on our Phase I study, we implemented four improvements to Phase II. These were: (1) employing a 20-hour a week project manager to assist with all phases of the study; (2) including professor Schmidt as a co-principal investigator; (3) having the in-depth survey completed electronically, rather than conducting in-depth telephone interviews; and (4) interviewing key informants one-on-one rather than conducting focus groups consisting of 5-20 people.

First, having a project manager allowed for smoother mechanics of running the project, and freed up the investigators to more thoroughly and appropriately focus on data collection, analysis, report writing, and dissemination.

Second, Schmidt had accompanied Teaster, principal investigator, and other members of the research team on two of the three site visits in Phase I (Florida and Illinois), and it became apparent that his presence

49. The following is the verbatim e-mail response from Alameda County. "I'm sorry, but our County Counsel indicated to you previously that Alameda County will not be participating in this survey. Sorry the information did not reach you!" The research team never received such information from the county counsel. Subsequent entreaties by the principal investigator and project manager to conduct a limited version of the site visit went unanswered.

was substantively and historically important to conducting the interviews. In both states, persons whom he had interviewed more than 25 years earlier were still working within the public guardianship system. Schmidt was able to make comparisons to his previous work and to follow a line of questioning that lent increased insight and credibility to our work. During the visits, professor Schmidt also conducted interviews and made running notes. Because his presence and insight were so valuable, and because he gave a health policy and legal practice focus to the study, we included him in Phase II as a co-principal investigator—fully participating in all phases of the study.

Third, in Phase I, we conducted in-depth interviews by telephone. We audio-taped the telephone interviews and took running notes. Subsequently, the interviews were transcribed. Upon reading transcripts and notes, we discovered many areas needing clarification, which required additional telephone interviews or e-mail messages. As an improvement for efficiency and clarification, for Phase II, we submitted the in-depth questions to participants by e-mail, asking them to take two to three weeks to thoughtfully complete all questions and return them to us. This change in methodology resulted in clearer, more complete responses, and resulted in a decreased need to contact these key informants for clarification and to pay a transcriptionist.

As a final improvement, we shifted from focus group interviews to one-on-one interviews. In Phase I, we conducted our site visit interviews using a focus group format. While this is ostensibly a sensible use of resources, in practice, we found that the presence of some members produced a chilling effect on others, particularly when we asked sensitive questions. Moreover, during some focus group interviews, it was necessary to include participants via teleconference. This significantly complicated transcription of the interviews, and in some cases it became impossible to determine who had said what. Although we received excellent information from many participants, opinions and experiences of others were not shared fully. In some cases, individuals who were present at the focus group interview, but who had not felt comfortable expressing their opinion or experience, telephoned or wrote us to provide us information. The shift from a focus group methodology to individual interviews allowed us to gather more detailed in-depth information from participants.

Similar to Phase I, in the Phase II study we interviewed key actors from the following domains: (1) judges/courts, (2) public guardian office and staff, (3) elder law attorneys and legal services developers, (4) APS staff, (5) ombudsman and aging network professionals, (6) aging and disability advocates, and (7) wards of the public guardian. In an attempt to gain an even more thorough understanding of the public guardianship landscape and at the suggestion of the grant reviewers, we also contacted people from the following areas: AARP; attorneys dealing with the disability community; geriatric nurse practitioners; developmental disability council members; guardians *ad litem*; mental health and aging advocates; and nursing home and assisted living facility staff, including nurses, caseworkers, CNAs, and medical directors.

Measures

In addition to the in-depth survey completed by the participating jurisdictions, the investigators used an interview guide that included questions developed by the research team and the advisory committee during Phase I of the study. The questions built upon the e-mail survey questions and addressed topics including client referral to the program, screening for least restrictive alternatives, sufficiency of program's client-staff ratio, relationship of program with the court, relationship with providers of care and services, the nature of the program's case management, internal and external accountability mechanisms, decision making by program staff, needs of special populations, the role of clients in institutional settings and wards' perceptions of the program. Site visits were pre-arranged with cooperation and input from site-specific key informants and utilized a snowball method of informant identification.

Procedures

Re-application to the University of Kentucky Institutional Review Board. Re-application was made to the Institutional Review Board of the University of Kentucky, and approval was received. The IRB provided stamped copies of informed consent forms for use during the study.

Dissemination of the in-depth survey. The project manager (Lawrence) sent the in-depth surveys via e-mail to each of the seven jurisdictions studied: Alameda and San Bernardino counties in California; Maricopa and Pima counties in Arizona; APS and Maryland Department of Aging in Maryland; and Delaware. The site visit to the Los Angeles County Public Guardian was conducted after the Phase I study, but prior to the Phase II study, with funding from the University of Kentucky and Washington State University. Contacts were provided approximately a month to complete surveys, and the project manager followed up with each. Because our contact at the Alameda County Office of the Public Guardian later chose not to participate, the team determined to substitute Wyoming for Alameda County.

Arrangement and implementation of site visits. Project manager (Lawrence) made arrangements for travel to each of the seven sites. The project manager contacted the key informant at each site to determine who they felt must be interviewed during the site visit in order to develop a clear picture of public guardianship in that jurisdiction. In addition to the key informant(s) from the office of the public guardian, key informants were also sought from the various entities involved in issues surrounding public guardianship and from recommendations from other key informants.

Participants were chosen from the domains listed above (*e.g.*, courts, APS, etc.). In many cases, Web searches were conducted to determine who the key informant within the domain might be. During this phase, Lawrence also solicited names of other individuals whose knowledge and experience were deemed crucial to our understanding public guardianship in the given jurisdiction. Site visits took two to three days to complete. Two investigators were present at all site visits, some involved three, and the Maryland site visit, because of the bifurcated nature of the system and the concomitant number of persons interviewed, also included the project manager as interviewer.

Interview transcription. Interviews were transcribed by three professional transcriptionists and were checked for accuracy by the principal investigator and project manager. Copies of the interviews were sent to the other members of the investigation team (Schmidt and Wood) for reading and coding. Primary responsibility for the analysis of the data was distributed among the investigators, with each site visit having a primary and a secondary analyst. Transcribed interviews were read by all members of the team. Using standard qualitative methodology,⁵⁰ team members determined patterns and themes arising from the interviews. Conference calls and e-mail correspondence were used to discuss content of the transcriptions and the emerging themes.

Formulation of draft model statute. The complexity of drafting a model statute necessitated that Teaster, Schmidt, and Wood meet face-to-face specifically to accomplish this task. The team spent two days developing a draft. Schmidt took the lead responsibility for this portion of the project. Team members did additional research regarding aspects of the model statute (*e.g.*, investigating the addition of powers of attorney and representative payee to the functions of the office of the public guardian) and its comparison with the Uniform Guardianship and Protective Proceedings Act (UGPPA). Additional discussion regarding the Model Act was conducted via numerous e-mail messages and telephone conferences.

State statutory comparisons, program profiles, and site visit descriptions. Wood had primary responsibility for using the statutory information collected in Phase I to construct a broad-based guardianship table that included both elements of public guardianship law and other aspects of state guardianship law (*e.g.*, procedural safeguards and assessment) that directly affect operation of the public guardianship programs. The resulting table replicates the table produced by Schmidt 25 years earlier, thus affording a direct comparison on all relevant parameters.

Wood also had primary responsibility for creating one to two paragraphs providing a profile of the public guardianship program in each of the 51 jurisdictions. Additionally, Wood sent the state profiles to identified state contacts in order to verify that the descriptions written were factually accurate.

State site visit descriptions for Arizona (Maricopa and Pima counties), California (Los Angeles and San Bernardino counties), Delaware, Maryland, and Wyoming were written by all members of the team with

50. Robert C. Bogdan & Sari Knopp Biklen, *Qualitative Research for Education: An Introduction to Theory and Methods* (Allyn and Bacon, 1998); Jane F. Gilgun, *Qualitative Research and Family Psychology*, 19(1) *J. Family Psych.* 40-50 (2005); Anselm L. Strauss & Juliet M. Corbin, *Basics of Qualitative Research: Grounded Theory, Procedures, and Techniques* (Sage Publ. 1990).

Teaster serving as primary analyst and writer for the majority. All members of the team read and critiqued the final report.

Review of report by advisory committee and others. Draft copies of individual site visits were provided to key informants at each of the seven sites for review and comment. Drafts of the full report were provided to members of the advisory committee for comments and suggestions. Comments and suggestions by state informants and advisory committee members were considered and discussed. Teaster, Wood, Schmidt, and Lawrence revised the report and arrangements were made with the printer for production of hard copies of the report.

Data Analysis

Qualitative analytic techniques⁵¹ were used to analyze the data from the interviews. These techniques included multiple readings, by all investigators, of the transcripts of the interviews; reading of field notes taken during each interview; reflection on the content of the field notes; and examination of pertinent documentation provided by the individual public guardianship systems. The multiple data sources allowed for robust triangulation of data.⁵²

The major analytic strategy in qualitative inquiry consists of various levels of coding of text or data. The purpose of coding in qualitative inquiry, unlike in quantitative studies, is not to count instances so much as to “chunk the data”⁵³ and rearrange it into categories that facilitate comparison between things both in the same category and between categories.⁵⁴

The first level of coding, open coding, “attaches labels of concrete instances of phenomena identified in texts.”⁵⁵ These labels become the codes. We used an open coding process to generate a comprehensive understanding of themes and patterns in the data.⁵⁶ The next level of coding, axial coding, seeks to identify various dimensions comprising a concept. If adequate dimensions to result in a well-described concept do not emerge, researchers either gather more data or discard the concept and seek others more central to the topic under investigation. If the concept is well described, it becomes a core concept. The final level of coding, selective coding, involves re-reading and re-analyzing the data seeking additional documentation of these core concepts.⁵⁷

Because ours was a replication study and we were aware of the significance of the findings in the original study (*e.g.*, the need for adequate funding and staffing, safeguards for due process, specified staff-to-client ratios, independence of the office regarding collection of fees for service, office coordination of services and advocacy for the client, and education of professionals and the public regarding guardianship) we specifically sought evidence of the findings from the initial study, as well as examined the data using constant comparison of the individual state programs for alternate or additional themes. Thus, our inquiry combined deductive qualitative analysis, which assumes that the theoretical dimensions of interest were identified *a priori*,⁵⁸ and an inductive or grounded theory approach, which makes no such assumptions.⁵⁹

The variety of responses to our interview questions was the focus of our analysis, rather than *how many* informants necessarily expressed a particular belief or attitude. Customary in qualitative studies, analysis of the data occurred throughout the study. The first phase of data analysis occurred during the interview sessions, when interviewers decided which responses to probe further. The second phase of data analysis occurred during semi-formal debriefing sessions held at the end of each day of interviews. Further analysis took place after interviews were transcribed and the body of interviews from each site visit could be viewed *en toto*.

51. Bogdan & Biklen, *supra* n. 50.

52. Joseph A. Maxwell, *Designing a Qualitative Study*, in Leonard Bickman & Debra J. Rog eds., *Handbook of Applied Social Research Methods* (Sage Publ. 1998).

53. Anselm L. Strauss, *Qualitative Analysis for Social Scientists* (Cambridge Univ. Press 1987).

54. *Supra* n. 52.

55. Gilgun, *supra* n. 50, at 43.

56. Bogdan & Biklen, *supra* n. 50; Strauss & Corbin, *supra* n. 50.

57. Gilgun, *supra* n. 50.

58. *Id.*

59. Bogdan & Biklen, *supra* n. 50; Strauss & Corbin, *supra* n. 50.

In the final phase of data analysis, we reviewed transcripts and notes to generate key ideas and to identify major categories and subcategories of responses. Due to geographical constraints, multiple teleconferences were conducted among investigators and the project manager to discuss the emerging themes and categories. Based on multiple readings of the transcripts and reflective process notes written by the interviewers, and provided to each member of the research team, a draft of each state program was developed and subsequently critiqued by the team, by the informants, and by the advisory board, with the team determining the final version.

Chapter 3: Analysis of State Public Guardianship Statutes

As with the 1981 study, one of the first tasks of this project was to research state statutes to identify what jurisdictions have provisions for public guardianship. The Phase I report included an analysis of public guardianship law and a table entitled *2005 Compilation of State Public Guardianship Statutes*.⁶⁰ The investigator's report found that in 2005, a total of 40 states had some statutory provision for public guardianship, as compared with 34 in 1981.

In Phase II of the study, the investigators expanded and updated the statutory research and analysis to 2007, constructing a larger table matching that set out in the original 1981 work by Schmidt *et al.* (The 2007 table is broken into five sub-tables for ease of reading.)⁶¹ The tables (Appendix B), as well as the commentary below, generally use the framework of the 1981 table, thus providing two directly comparative snapshots over a period of 26 years. (However, it is important to note that the 1981 Schmidt table includes only the 34 states with statutory provisions for public guardianship, whereas the current table includes all states.) Both tables integrate basic elements of state guardianship and conservatorship statutes with more specific provisions concerning public guardianship, (with the current table tracking the order used by the 1981 table), as an understanding of public guardianship statutes requires a close look at the state guardianship codes on which they are based. Indeed,

the public guardian, and the public guardian process, do not exist in isolation . . . [but are] an end point in the process of guardianship, which itself seems to exist in a continuum of protective services and civil commitment. In fact, the success of a public guardian seems to be quite dependent upon the quality of the state's guardianship statute.⁶²

Public guardianship programs are shaped by the overall contours of state guardianship codes that determine the procedures for appointment, the definition of incapacity, the powers and duties of guardians, and the mechanisms for judicial oversight. (For state guardianship tables with citations for each provision, *see* the Web site of the ABA Commission on Law and Aging, at <http://www.abanet.org/aging/legislativeupdates/home.shtml>.)

Statutory Provisions

Adult guardianship is a state, rather than federal, function. All states have a general guardianship code. These laws have undergone very significant change in the past two decades, with particular emphasis on procedural protections, determination of capacity, limited guardianship, and court oversight.⁶³ They provide the foundation for public guardianship.

As of 2007, a total of 44 states⁶⁴ have specific statutory provisions on public guardianship; seven states include no reference in their code. Such public guardianship provisions most frequently are included as a section of the state guardianship code. But in some states, the public guardianship provisions are located in sep-

60. Teaster *et al.*, *supra* n. 5. The current analysis relies on, incorporates, and updates the 2005 analysis.

61. Schmidt *et al.*, *supra* n. 4.

62. *Id.* at 179.

63. For state statutory charts on adult guardianship, *see supra* n. 15. *See also Phase I Report*, Teaster *et al.*, at 33- 37; and Erica Wood, in Quinn, *supra* n. 27.

64. In mid-2007, after the completion of this chapter, Arkansas passed a public guardianship bill, S.B. 820, creating an office of public guardian for adults within the Division of Aging and Adult Services. The Act does not take effect until and unless the director of the division determines that adequate appropriations or other funding are available and appoints a public guardian.

arate statutory sections, for example in services for the aging, adult protective services, or services for individuals with disabilities.⁶⁵

In 1981, Schmidt distinguished between “explicit” and “implicit” public guardianship provisions:

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.⁶⁶

Twenty-six years ago, Schmidt found 26 implicit statutory schemes in 26 states, and 14 explicit schemes in 13 states, with some states having more than one scheme. In 2007, research shows a total of 18 implicit statutory schemes in 18 states, and 28 explicit schemes in 27 states (with one state having both an implicit and explicit scheme). 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. Clearly, states have shifted over time toward enactment of explicit public guardianship schemes, frequently but not always providing for an office, budget, and ability to hire staff and contract for services.

Eligibility for Public Guardianship

In 1981, the Schmidt study found that of the 34 states under analysis, 20 provided for public guardianship services for “incompetents” generally, 17 provided specifically for services for individuals with mental retardation who needed a guardian, 19 targeted incapacitated elderly persons, and 11 provided a form of public guardianship for minors. The majority of public guardianship schemes served limited categories of beneficiaries. Less than half of the 34 states had provisions to aid three or more targeted groups. Schmidt noted that the specific needs of individuals with mental retardation and elders had “come into focus only recently,” and that the needs of minors are temporary and could perhaps be served adequately by private resources.

In 2005, the overwhelming majority of the 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. Modern guardianship codes rely more on a functional determination of incapacity and less on specific clinical conditions. Thus, states may be less likely to segregate specific categories of individuals for service, instead filling the void created when a judge determines a person to be incapacitated but no one is there to act as guardian.

However, a few statutory provisions nonetheless do target specific groups of incapacitated persons. Four state statutes limit public guardianship services to incapacitated persons who are elderly. Connecticut, New Jersey, Tennessee, and Vermont serve only those who are 60 years of age or older. Four states (Maryland, New York, Arkansas, and Texas) limit services to those requiring adult protective services, or to those in a state of abuse, neglect, or exploitation.

Four statutory schemes are directed to persons with specific mental disabilities. In California, a specific provision allows appointment of the county public guardian for “any person who is gravely disabled as a result of mental disorder or impairment by chronic alcoholism.” In Maine, one state agency serves as public guardian for persons with mental retardation and another agency serves for “other incapacitated persons” in need. The Ohio public guardianship statutory scheme solely targets persons who have mental retardation or developmental disabilities. In South Carolina, the director of the mental health department or the director’s designee may serve as conservator for patients of mental health facilities, only for amounts not in excess of \$10,000 per year.

65. This project did not include a systematic search of all state adult protective services statutes, which might reveal additional guardianship provisions. See ABA Commn. on Law and Aging, *Adult Protective Services Agency Authority to Act As Guardian of A Client: Guidance and Provisions from Adult Protective Services Law, By State* (forthcoming on the NCEA Web site: www.NCEA.aoa.gov). Throughout this chapter, the District of Columbia is counted as a state.

66. Schmidt *et al.*, *supra* n. 4, at 26.

In addition, a number of state statutes specify that services are for persons with financial limitations. Connecticut limits services to those with assets not exceeding \$1,500. Florida indicates that services are primarily for those of “limited financial means.” In Indiana services are for indigent adults, as defined administratively. In Illinois, one scheme serves individuals with estates of \$25,000 or less and another serves individuals whose estate exceeds \$25,000. The Illinois Office of State Guardian serves those with estates under \$25,000. In Virginia, the public guardianship program serves incapacitated persons whose resources are insufficient to fully compensate a private guardian or pay court costs and fees. Under Washington law, enacted in 2007, the office of public guardianship is to serve individuals whose income does not exceed 200% of the federal poverty level and who are receiving Medicaid long-term care services. On the other hand, Mississippi law specifies that appointment of the clerk as guardian is only for “a ward who has property.”

Scope of Public Guardianship Provisions

As clearly indicated by Schmidt, guardianship terminology differed by state in 1981, and still does, making for confusion in statutory comparison. The Schmidt study cautions that a careful reading of state guardianship code definitions is required to determine the scope of public guardianship services. Today, the Uniform Guardianship and Protective Proceedings Act⁶⁷ makes a clear distinction between “guardianship” of the person and “conservatorship” of property, and close to 20 states have adopted this distinction. But state terminology varies considerably.

In Schmidt’s study, only one state with public guardianship provisions, Wyoming, did not clearly provide for public guardianship of both person and property. Today, all but four state laws indicate the public guardian program can provide services as both guardian of the person and the estate. Two states appear to cover property only: Alabama provides for the appointment of a general county conservator or sheriff; and South Carolina allows the director of the mental health department to serve as conservator for limited amounts. One state, Arkansas, authorizes adult protective services to provide “custodian” services of the person only and to identify a guardian of the estate if needed.

In many states, there is no provision specifically in the public guardianship statute granting or restricting services, but reliance on the overall guardianship code indicates coverage of both. (In some states, program services may be limited by rule or by practice. For example, in Maryland, the area agencies on aging serve as public guardian of the person only.) Schmidt observed that in many states there was only a slight mention of guardianship of the person, and the emphasis was on providing for property management. This may be less so today (at least on paper), as guardianship codes have changed to more clearly delineate the duties of the guardian of the person in procuring services and benefits, as well as maximizing autonomy.

Potential Petitioners in Guardianship Proceedings

The process of appointing a public guardian generally begins with the filing of a petition in the court of appropriate jurisdiction. Schmidt reported in 1981 that at least 26 of the 34 states studied permitted a relative or interested person to petition, and that 12 of these states allowed the proposed ward to file.

Today, virtually all states allow “any person” including the alleged incapacitated person to file, with many listing a string of categories of potential filers, and ending with the catch-all “or any person” or in some cases “any interested person.” Such provisions are in line with the *Uniform Guardianship and Protective Proceedings Act*, which allows “an individual or a person interested in the individual’s welfare” to file. This could include both public and private guardianship agencies, raising the specter of possible conflict of interest.

Indeed, a question central to the operation of any public guardianship program is whether the program can petition to have itself appointed as guardian. Such 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

67. National Conference of Commissioners on Uniform State Laws, *supra* n. 11.

served, the program might petition more frequently, regardless of individual needs. On the other hand, the program might, as Schmidt points out, “only petition for as many guardianships as it desires, perhaps omitting some persons in need of such services.” Or it could “cherry pick,” petitioning only for those individuals easiest or least costly and time-consuming to serve. The Schmidt study did not specifically address statutory provisions allowing the public guardianship agency to petition for its own wards. Today, statutes in 12 states explicitly allow this. Only two states (Vermont and Washington) explicitly prohibit the public guardianship agency to petition for its own wards. The remaining statutes do not address the issue.

Investigation of Individuals in Need

The Schmidt study included a section on state approaches toward “discovering the identity of those individuals who are in need of public guardianship services.”⁶⁸ He pointed out that this problem was addressed in “only a handful of states” through an investigative body or professional reporting laws.

Today the landscape has changed completely. Every state has enacted and administers an adult protective services law⁶⁹ with: reporting requirements for various professions; investigation of possible abuse, neglect, or exploitation; and mechanisms to address problems of at-risk adults, including the initiation of a guardianship. Indeed, adult protective services programs in many cases are a primary referral source for public guardianship programs. Because of these developments in adult protective services, as well as the aging of the population, many more cases are likely to come to the attention of public guardians than in 1981. (Note that the APS laws are not shown in Table 1, but statutory charts are on the Web site of the National Center on Elder Abuse at <http://www.elderabusecenter.org/default.cfm?p=lawstoc.cfm>.)

Due Process Protections in Guardianship Proceedings

In the quarter century since the Schmidt study, state procedural protections for respondents in guardianship proceedings have undergone a paradigm shift, with virtually all states bolstering requirements for due process protections. Schmidt indicated that five of the 34 states studied made no provision for a hearing. Today, all states provide for a hearing. Schmidt reported in 1981 that 29 of the states studied required notice to the respondent, as well as to family members and other interested parties. Today, all states require notice. Moreover, many state notice provisions now require large print and plain language, as well as information about hearing rights and rights potentially lost as the result of the hearing. In addition, states generally provide that the respondent has a right to be present at the hearing. An increasing number go beyond this to require the respondent’s presence unless it would be harmful or there is other good cause. Today’s courts are subject to provisions of the Americans with Disabilities Act that call for reasonable accommodations at the person’s request.

Right to Counsel. A key to providing procedural due process for respondents in guardianship proceedings is representation by counsel. The Schmidt study noted that approximately 22 of the states studied in 1981 provided a right to counsel during guardianship proceedings. Today, there is a growing recognition of the “right to counsel” as an empty promise for a vulnerable indigent individual. Thus, over 25 states require the appointment of counsel, generally making counsel available without charge to indigent respondents. The remaining states allow a “right to counsel” or in a few instances do not address the issue. Some states require appointment only under designated circumstances: if the respondent requests counsel, if the guardian *ad litem* recommends it, or if the judge determines counsel is necessary.

Free Counsel for Indigents. In 1981, Schmidt found that 17 states made counsel available free of charge to indigent persons. Today, over 20 states provide for such free counsel in their guardianship statutes, and there may be additional states with relevant provisions in other parts of the code.

68. Schmidt *et al.*, *supra* n. 4, at 34.

69. See <http://www.elderabusecenter.org/default.cfm?p=lawstoc.cfm>.

Right to Jury Trial. Schmidt noted that 11 of the states studied in 1981 gave the individual the opportunity to have a trial by jury. Today, 27 states provide for trial by jury, generally if requested by the respondent. It is particularly notable that Kentucky makes a jury trial mandatory in every adult guardianship case.

Right to Cross-Examine. The Schmidt study found that in 1981 only nine states made explicit provision for the respondent or counsel to cross-examine any witnesses who testified against the alleged incapacitated person. This is critical in preserving the integrity of the hearing process. Today 35 state guardianship statutes provide for this important right, and there are probably additional states with relevant provisions in the rules of evidence or civil procedure.

Standard of Proof. The Schmidt study found only a couple of states that used a “clear and convincing evidence” standard of proof. Today, a total of 36 states require clear and convincing proof that the respondent lacks decisional capacity and requires a guardian. One state (New Hampshire) uses a standard of “beyond a reasonable doubt;” two (North Carolina and Washington) use a standard of “clear, cogent, and convincing evidence;” one (Wyoming) uses a mere “preponderance of the evidence;” two (Idaho and South Carolina) indicate that the court must be “satisfied” that a guardian is necessary; and the remaining eight states provide no statutory standard.

Appeal/Review. In 1981, Schmidt identified only three states that provided for a direct and immediate review of the findings of a guardianship proceeding. Today, some 29 states make reference to an appeal or review within their guardianship statutes. However, there may be additional states with relevant provisions in the rules of civil procedure.

Examination of Alleged Incapacitated Individual

Clinical examinations provide important evidence for judicial determinations.⁷⁰ Schmidt found that in 1981 over half of the 34 states studied required a medical examination prior to a determination of need for a guardian; 14 provided for a psychological examination, and 10 provided for other examinations. He also noted that some states required a more comprehensive capacity-specific assessment.

Today at least 40 states refer to examination by a physician and 31 specifically include a psychologist. Other examiners named by state statutes include psychiatrists, mental health professionals, social workers, nurses, and “other qualified professionals.” The Uniform Guardianship and Protective Proceedings Act calls for examination by “a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent’s alleged impairment.” A growing number of states provide for a comprehensive, interdisciplinary team approach. For instance, Florida uses a three-member examining committee; Kentucky calls for an interdisciplinary evaluation by a physician, psychologist, and social worker; North Carolina alludes to a “multi-disciplinary evaluation;” and Rhode Island sets out a detailed clinical assessment tool.⁷¹

Rights of Incapacitated Person

One aspect examined by Schmidt *et al.*, in 1981 was the preservation of individual civil rights under guardianship. Some fundamental rights (such as the right to vote), are personal in nature and not delegable to the guardian. Thus, they are either retained or lost under guardianship, but not transferred. Other fundamental rights are delegable, but state law may include a presumption that the individual retains them unless specifically removed in the court order (*see* section on limited guardianship below). Schmidt found that only ten state statutes explicitly preserved the civil liberties of incapacitated persons.

70. *See* ABA Commn. on Law and Aging, American Psychological Association & Natl. College of Probate Judges, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings* (ABA & APA 2006).

71. Michael Mayhew, *Survey of State Guardianship Laws: Statutory Provisions for Clinical Evaluations*, 27 BIFOCAL (newsletter of the ABA Commn. L. & Aging) 1 (Oct. 2005); *see also* Jennifer Moye, Barry Edelstein, Jorge C. Armesto, Julie A. Harrison, Emily H. Bower & Erica Wood, *Clinical Evidence in Guardianship of Older Adults Is Inadequate: Findings From a Tri-State Study*, *Gerontologist* (forthcoming 2007).

Today, 27 state laws include a provision aimed at preserving basic rights. For example, such a provision may state that the individual under guardianship “retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted by order to the guardian by the court.” Florida has one of the most extensive provisions, setting out rights retained by the individual (such as rights to retain counsel, receive visitors and communicate with others, right to privacy); rights that may be removed by court order, but not delegated to the guardian (such as right to marry, vote, have a driver’s license); and rights that are removable and delegable to the guardian (such as right to contract, to sue, and defend lawsuits).

Who Serves As Guardian

Guardians are family members, other individuals, professionals, private non-profit or for-profit agencies, or public guardianship entities. In 1981, Schmidt found that about one-third of the states used “the usual probate priority scheme,” that is, a hierarchy that provides for the appointment of spouse, adult child, parent, or other relative. Such a list often states that any suitable person or institution may serve, and that the court should make the selection in the best interest of the individual.

Today, most states continue to provide for such a hierarchical scheme, building in sufficient court discretion to act in the person’s best interest. In addition, 43 states include a mechanism for input of the incapacitated person through advance nomination of a guardian, most recent nomination of an agent under a durable power of attorney, “in accordance with the incapacitated person’s stated wishes,” or, “person preferred by incapacitated person.”

A recent examination of adult protective services laws found that approximately 10 states specifically allow the adult protective services agency to serve as guardian of an APS client, either on a temporary or permanent basis.⁷²

Governmental Location of Public Guardianship

Perhaps the most fundamental feature in analyzing public guardianship statutes is: where in the governmental administrative structure is the public guardianship function placed? This question was a basic element of Schmidt’s 1981 study, as well as the project’s national survey in Phase I. As indicated above, an important distinction evident in comparing the statutory schemes is between states that merely name a state agency or employee as a last resort guardian (generally “implicit” schemes) and states that establish an office with the sole mandate of serving as public guardian (generally “explicit” schemes). States that establish a public guardianship office (such as Delaware, Florida, Virginia, New Jersey, Utah, and a number of others), have much more detailed statutory provisions on powers and duties, staffing, funding, record keeping, and review.

Schmidt relied on an earlier classification by Regan and Springer using four models: (1) a court model; (2) an independent state office; (3) a division of a social service agency; and (4) a county agency. He noted, however, that while the four models “at first appeared to provide a useful classification,” upon further analysis, there were “many exceptions and variations” and that “few states fit the exact organization described in the models.” This study uses the same classification, with the same caveat.

Court Model. Schmidt described the court model as one that establishes the public guardianship office as an arm of the court that has jurisdiction over guardianship and conservatorship. Schmidt found six states with a court model for public guardianship. In 2007, statutory provisions show five states with a court model. In Delaware, Hawaii, Mississippi, and Washington the public guardian is located in the judiciary. In Georgia, recent legislation created a public guardianship program in which qualified and trained individuals are approved and registered by the county probate court to serve as public guardians, yet the training, administration, and funding of the program is through the Division of Aging in the Department of Human Resources, which must maintain a master list of registered public guardians.

72. ABA Commn. on Law and 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: www.NCEA.aoa.gov).

Independent Agency Model. Schmidt described the independent state office model as one in which the public guardianship office would be established in an executive branch of the government that does not provide direct services for wards or potential wards. Schmidt found three independent state offices. Today, statutory provisions show four states that approximate this model: Alaska, in which the office is located in the Department of Administration; Illinois, in which the Office of State Guardian (one of the state's two schemes) is located in the guardianship and advocacy commission; Kansas, in which the Kansas Guardianship Program is independent, with a board appointed by the governor; and New Mexico, in which the office of guardianship is in the developmental disabilities planning council.

Social Service Agency. 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. The study explained that:

The 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 insufficient 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.⁷³

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 (deciding on, monitoring, and advocating for services) and the role of social services agency (providing services). That is largely still true today. The percentage of states with statutes providing a potential for conflict appears to have increased. More than half of the 44 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. For example, Connecticut names the Commissioner of Social Services. New Hampshire authorizes the Department of Health and Human Services to contract for public guardianship services. Vermont, Virginia, Florida, and other states charge the Department on Aging with administration of the public guardianship program.

Schmidt noted that some of the states with potential conflict of interest 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. 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. In Florida, the statewide Office of Public Guardian must report within six months of appointment on efforts to find others to serve. A few statutes include more specific language addressing conflict of interest. For instance, the Illinois Office of State Guardian may not provide direct residential services to wards. North Dakota allows the appointment of any appropriate government agency, unless the agency provides direct care and custody of the incapacitated person (except if the court makes a specific finding of no substantial risk). Indiana requires that regional guardianship programs have procedures to avoid conflict of interest in providing services. Montana prohibits the appointment of guardians who provide direct services to the incapacitated person, but makes an exception for the agency serving in the public guardianship role.

County Model. Approximately 13 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. For example, in Arizona, the county board of supervisors appoints a public fiduciary, and in California the county board creates an office of public guardian. In Idaho, the board of county commissioners creates a "board of community guardian." In Missouri, the county public administrators serve as public guardian.

73. Schmidt *et al.*, *supra* n. 4, at 38.

Powers of the Guardian and Public Guardian

Every state guardianship code sets out an array of duties and powers of guardians of the person and of the estate. In some states, guardians have a great deal of flexibility in authority to sell property, invest assets, make major health care 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.

Public guardianship statutes generally provide that the public guardian has the same duties and powers as any other guardian. However, many of the statutes list additional duties and powers for public guardianship programs. For example, mandatory duties may include specifications about visits to the incapacitated person. At least eight states dictate the frequency of public guardianship ward visits or contacts. A few states require the public guardianship program to take other actions, such as developing individualized service plans, making periodic reassessments, visiting the facility of proposed placement, and attempting to secure public benefits.

Most of the additional listed duties, though, are programmatic in nature. Statutes may require the public guardianship entity to maintain professional staff; contract with local or regional providers; assist petitioners, private guardians, or the court; provide public information about guardianship and alternatives; contract for evaluations and audits; and maintain records and statistics. Public guardianship statutes frequently set out additional powers as well as duties, for example, the authority to contract for services, recruit and manage volunteers, and intervene in private guardianship proceedings, if necessary.

Termination of Guardianship; Restoration

The Schmidt study discussed termination of a guardianship, indicating that 20 of the states studied had an explicit termination mechanism. The most common reason for termination, of course, is death of the incapacitated person. Additional reasons cited by Schmidt include restoration to capacity or, in some cases, other changes, such as exhaustion of the person's estate or institutionalization of the ward.

Today the Uniform Guardianship and Protective Proceedings Act provides that a guardianship may terminate upon the death of the ward or upon order of the court, "if the ward no longer needs the assistance or protection of a guardian."⁷⁴ The Uniform Act sets out a procedure for terminating a guardianship. Virtually all states provide a termination procedure, including restoration of the rights of the individual. At least 45 states indicate that the incapacitated person may petition for restoration if a guardian is no longer needed.

Costs of Public Guardianship

In 1981, the Schmidt study observed that the funding of public guardianship programs "has not been given much mention in the statutory schemes" and that the lack of explicit funding may leave programs subject to "the vicissitudes of an annual budget." Equally unclear, the study noted, was whether the ward's estate or the governmental agency must bear the cost of guardianship services. The lack of clarity could result in hardship for wards with few resources. The study found that statutes in 11 of the states studied indicated that the agency must bear the cost, and statutes in 15 states provided that the ward must pay for public guardianship services.

Today, some 31 of the 44 states with statutory provision make some mention of cost. At least 10 states include reference to state appropriations. Some states may have separate statutory provisions for appropriations, but others may not have made any provision, leaving the public guardianship program financially at risk. Florida has especially elaborate provisions, referencing inclusion of the program's annual budget as a separate item in the budget of the Department of Elderly Affairs legislative request; establishment of a "direct support organization" to raise funds for the program; and establishment of a matching grant program to assist counties in supporting public guardianship. Utah allows for acceptance of private donations; and Virginia

74. U.G.P.P.A., §318.

allows local or regional programs to accept private funds for supplemental services for incapacitated persons. At least four states (Idaho, Illinois for its county program, Nevada, and Oregon) provide specifically for the county to budget for the public guardianship program.

Twenty-four states reference the governmental agency (state or county) as responsible for payment of costs; and 22 reference the estate of the incapacitated person. Seventeen reference both the governmental agency and the estate for payment of guardianship services, as well as costs and fees associated with initiation of the guardianship. A common scenario is that the ward's estate pays, but if the ward is unable to pay, the county or state makes up the difference. A number of states mention recovery from the estate after death, and two states (Indiana and New Jersey) allow for a lien on the estate. Washington references payment of guardianship fees from Medicaid funds. Statutes in seven states (Idaho, New Jersey, Ohio, Oregon, Tennessee, Utah, and Washington) provide either that the court may, or the court must, waive filing fees and court costs at least for indigent wards.

Court Review of Guardianship

At the time of the 1981 Schmidt report, guardianship monitoring was fairly rudimentary. Schmidt maintained that "a greater emphasis upon improved review might effect a significant improvement in the guardianship scheme as a whole." Schmidt reported that 20 of the 34 states studied had some provision for review, with 16 providing for an annual report to court. He also noted that what review was provided focused primarily on property, neglecting examination of the condition of the ward.

Currently, all states provide for regular financial accountings and all except two states (Delaware and Massachusetts) provide for regular status reports on the personal well-being of the incapacitated person. In some 40 states, the accounting and/or the personal status report are submitted to the court on an annual basis. Most states set out sanctions for failure to report. Some 18 states provide for post-hearing investigators to visit the ward and verify the accuracy of the report, at least if the judge finds it necessary. California has the most comprehensive model of review, with a regular visit to each incapacitated person by a court investigator six months after appointment and every year thereafter. Unfortunately, in practice, state courts often lack sufficient resources fully to implement a monitoring scheme.⁷⁵

Public guardianship programs are subject to the same provisions for guardianship accountability and monitoring as other guardians. However, in close to 20 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. States such as Maine, Minnesota, and New Hampshire call for an annual report on each public guardianship case to court; and one state (Delaware) specifies court review of public guardianship cases every six months. In Florida the public guardianship office must report to court on efforts to locate a successor guardian and on potential restoration within six months of appointment.

In addition to reporting to court, several statutes call for annual reports on the program or on cases to governmental entities. For instance, in Hawaii the office must submit an annual report to the chief justice; and in Kansas the program must report annually to the governor, legislature, judiciary, and the public. Five state statutes (Florida, Indiana, Kansas, Tennessee, and Vermont) call for an annual audit of the program. Several states call for local or regional programs to report annually to the coordinating state agency. Maryland has a unique oversight mechanism, providing for county review boards to conduct biannual reviews of each public guardianship case, including face to face hearings by volunteer multidisciplinary panels. Two states (Utah and Virginia) require an independent evaluation of the program. Finally, a majority of the statutes specify bonding requirements for the public guardianship program.

75. Karp & Wood, *supra* n. 29. See also Sally Hurme & Erica F. Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 *Stetson L. Rev.* 867-940 (Spring 2002).

Emergency Procedures

The Schmidt study also referred to the need for emergency procedures when the “needs of an individual may be so acute as to require immediate aid.” This is particularly relevant for public guardianship, as frequently vulnerable individuals without societal contacts (candidates for public guardianship appointment) experience crises that put them in jeopardy. Schmidt indicated that in 1981, only “a handful of states” had emergency procedures, and that these were set out in adult protective services legislation and emergency guardianship procedures in “some states.”

Currently, as indicated above, all states have adult protective services legislation and programs in place, which frequently funnel cases to public guardianship programs. In addition, virtually all states have provisions for emergency guardianships. One issue is that due process safeguards for emergency guardianship typically are less than for permanent guardianship, yet emergency guardianship is often a door to the more permanent status. Thus, some individuals may end up in a guardianship with less than full due process protection.⁷⁶

Limited Guardianship

In 1981, the Schmidt study touched on the issue of limited guardianship, which at that time was “becoming more prevalent of late.” The principle underlying limited guardianship is that there is no “bright line” of capacity; incapacity is not all or nothing. A limited guardian has powers only in those areas in which the person lacks capacity, allowing the incapacitated person to retain as much independence and autonomy as possible. This is in accordance with the principle of using the “least restrictive alternative.”

In 1982, the Uniform Guardianship and Protective Proceedings Act included limited guardianship provisions, giving a major boost to adoption of the concept in state law. Today virtually all state guardianship statutes include provisions for limiting or tailoring the court order (in some cases stating a preference for limited guardianship over plenary guardianship), and most include language acknowledging the importance of “maximizing self-determination and independence” of the individual. Such language on limited guardianship, however, is difficult to put into practice. A 1994 study found that nationwide the overall rate for use of limited guardianships (excluding one high-use state) was about 5%.⁷⁷

In nine states, statutory language specifically mentions that the public guardianship program may serve as limited guardian, thus emphasizing the legislative intent. In some of these states (such as California and Illinois), the public guardianship program may petition to serve, and could thus petition for a limited order. In the recent Washington legislation, the public guardianship providers annually must certify that they have reviewed the need for continued public guardianship services and the appropriateness of limiting or further limiting the scope of the order.

Appraisal of Statutory Changes

Clearly, much has changed since the Schmidt statutory review in 1981. Schmidt remarked on the variability of state guardianship law and the need for “renewed impetus for uniform state laws” on public guardianship specifically and guardianship generally. Since that time, the Uniform Guardianship and Protective Proceedings Act has undergone two revisions and is adopted in whole or piecemeal in a number of

76. See P. Barrett, *Temporary/Emergency Guardianships: The Clash Between Due Process and Irreparable Harm*, 13 BIFOCAL (newsletter of the ABA Commn. on Legal Problems of the Elderly) 3 (1992-1993). See also *Grant v. Johnson*, 757 F. Supp. 1127 (D. Or., 1991), ruling a state emergency guardianship statute unconstitutional because it lacked sufficient due process protection.

77. Center for Social Gerontology, *National Study of Guardianship Systems: Findings and Recommendations* (1994). See also Sally Hurme, *Current Trends in Guardianship Reform*, 7(1) Md. J. Contemp. Leg. Issues 143-189; Lawrence Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31(3) Stetson L. Rev. 735-755 (Spring 2002); Winsor C. Schmidt, Jr., *Assessing the Guardianship Reform of Limited Guardianship: Tailoring Guardianship or Expanding Inappropriate Guardianships?* 2(1) J. Ethics, L. & Aging 5-14 (1996).

states. However, as shown by the ABA Commission on Law and Aging statutory tables, state guardianship law remains variable, causing particular problems when guardianship jurisdiction issues arise. State statutes have made very significant progress in affording procedural protections, including a more functional determination of incapacity, promoting limited orders, and bolstering court oversight procedures.

State public guardianship statutes are markedly variable as well. There is no uniform public guardianship law. A “then and now” statutory comparison shows that some nine additional states have adopted explicit public guardianship legislation. Explicit provisions provide for an actual “program,” rather than simply a governmental entity to serve as guardian of last resort, and can articulate standards with much greater specificity. These explicit provisions are more likely to provide for budgetary appropriations and to set out greater oversight than is required for private guardians. Finally, it is important to note that seven states now have reference to staffing ratios. This is a great leap forward, probably attributable to the 1981 Schmidt study’s emphasis on adequate staffing. However, a substantial portion of states still locate public guardianship programs in a governmental agency with the potential for conflict of interest. While some attempt to mitigate this with statutory language, the conflicting agency roles remain problematic.

Chapter 4: Site Visit Studies

The Los Angeles County, California, Public Guardian

In November 2005, the *Los Angeles Times* published a four-part series on guardianship, the final part of the report focusing specifically on public guardianship. The article, *For Most Vulnerable, a Promise Abandoned*, stressed that the Los Angeles County Public Guardian (LAPG) was stripped of its funding for more than a decade, and, because of such an overwhelming and chronic lack of funds, turned many needy citizens away from the state guardian of last resort. The article cited a rejection rate higher than four out of five older adults and alleged that, since 1998, at least 660 older adults died waiting for the public guardian office to determine if it could help them. In 2002 alone, more than 330 people were reported on the LAPG's waiting list. For younger vulnerable adults, the agency accepted approximately 16% of over 4,000 requests from 1998-2003.

To stem crushing inadequacies in funding, the LAPG attempted to reduce its fiscal hemorrhaging by using such tactics as keeping the difference between the interest rate it received on clients' cases and the lower state-authorized rate, charging over \$70 an hour for work, collecting fees from qualified Medi-Cal wards (results in more visits to the ward than non-Medi-Cal wards), and making fiscal arrangements with private hospitals to prioritize their patients for investigation and acceptance into the public guardian program.

Statutory Authorization

The LAPG program is established statutorily under California Govt. Code §§27430 through 27436; California Prob. Code §§2920 through 2944; and California Welf. & Inst. Code §5354.5. (Note: Under California law, the term "conservatorship" means a guardianship of the person and/or property of an adult, whereas the term "guardianship" refers to minors. However, this report uses the more generic term "guardianship" for court appointments concerning adults.

Recent Litigation

Although the LAPG was not the subject of recent litigation, neighboring counties were, including suits against the public guardian in San Joaquin, Riverside (Orange), and Amador counties.

Organization and History

In California, public guardianship programs are located in county government, as authorized by the California government code. Public guardians are county-appointed positions. Each county may name a public guardian. The public guardian serves two target populations: older or dependent persons and persons of all ages with mental illness who are determined "gravely disabled" by a court. The public guardian typically serves the older or dependent adult population, while the public conservator usually serves the mentally ill population, including minors.

Each county has a distinct program that has evolved as a result of the organizational design of the public guardian office and local court rules. Each county also interprets the government, probate, and welfare and institutional codes differently. No state office of the public guardian exists in the state. Most county public guardians are members of the State Association of Public Administrators/Public Guardians/Public Conservators and participate in regional meetings and bi-annual training conferences. Regional meetings are designed to provide trainings and problem solving forums.

Typically, the public guardian/public conservator is housed in one office. However, some counties divide functions between two offices. The office of the public guardian is either an independent office or is combined with other county functions. For example, a common organizational function combines the public guardian with the public administrator. The public administrator handles decedent estates when no family members are

available or willing to come forward. In other counties, the public guardian is combined with the office on aging, social services, or mental health.

Public guardianship was authorized in Los Angeles County in 1945. The LAPG was separated from the public administrator's office in 1987 and placed under the jurisdiction of the Los Angeles County Department of Mental Health. The public administrator's office was placed under the jurisdiction of the county treasurer and tax collector. When the public guardian office was divided, all the estate support functions were placed with the treasurer tax collector, and the public guardian was required to contract for estate services with the treasurer and tax collector.

In our study of the LAPG (during fall 2004 and winter 2005—site visit, January 2005), we worked directly with Mr. Christopher Fierro, the deputy director of the office of the public guardian, who has direct oversight of the LAPG. Mr. Fierro, who began his work at the agency in 1975 as an entry-level caseworker, provides planning, direction, and control over the functions of the office. He provides direct supervision for two division chiefs and a mental health coordinator. Each division chief has supervising deputy public guardians who, in turn, provide direct supervision for deputy public guardians. Mr. Fierro attempts to have a ratio of one supervisor for every five deputy public guardians.

Probate Conservatorships

The LAPG receives referrals from community members, agencies, and hospitals asking the public guardian to investigate the appropriateness of an individual for guardianship. The public guardian may conduct an investigation to determine if the alleged incapacitated person qualifies for a conservatorship pursuant to Calif. Prob. Code §1800 *et seq.* The LAPG is the guardian of last resort. If the public guardian determines that a case is appropriate for intervention, the public guardian files a petition for appointment (the county attorney draws up the petition on behalf of the public guardian). Each petition is reviewed by a superior court investigator to determine if the proposed conservatee agrees with or opposes the conservatorship. Fifteen days' notice is required if the petition is mailed, and ten if it is delivered personal service.

If there is no objection, the public guardian is appointed. If the alleged incapacitated person objects to the guardianship or the court investigator so recommends, the court appoints an attorney for the client who will (a) consent to the appointment, (b) set the matter for a court trial, or (c) set the matter for a jury trial. The standard of proof is clear and convincing evidence. The client has a right to a jury trial.

Lanterman-Petris-Short Conservatorships

Lanterman-Petris-Short (LPS) conservatorships are part of the LAPG's responsibility and are reserved for clients who require involuntary psychiatric treatment. Under an LPS conservatorship, a client is typically involuntarily hospitalized (some are in jail) for three days based upon a request for evaluation by a mental health professional or police officer. Such an evaluation is regarded as a 5150 evaluation after the applicable welfare and institutions code section. A client is involuntarily hospitalized for three days for the following conditions: (a) danger to self, (b) danger to others, or (c) gravely disabled. *Gravely disabled* means that, as a result of a mental disorder, a person is unable to provide for his or her own food, clothing, or shelter. Also, the client is not willing or able to accept treatment voluntarily and is unable to accept assistance from third parties. Within the three days, physicians must evaluate the client. Should a treating physician determine that the client is either a danger to herself, a danger to others, or gravely disabled, an additional 14 days of hospitalization is possible. During the 14 day period, the client may file a *writ of habeas corpus* requesting release from an acute psychiatric hospital.

The 14-day period is regarded as a certification period. If the treating physician determines that the client remains gravely disabled, the doctor may complete a declaration requesting LPS conservatorship, including the appointment of a temporary conservator. This application is sent to the public guardian. If the doctor's declaration is legally sufficient and the hospital is approved by the county mental health director as a designated LPS facility, the public guardian will advise legal counsel to petition for LPS temporary conservatorship. Should a judge rule that the petition is sufficient, the public guardian is appointed temporary conservator. At

the same time, a petition for general conservatorship is filed. During the 30 days of temporary guardianship, the public guardian conducts an intensive court investigation to determine if the alleged incapacitated person is still gravely disabled. If that is the case, a recommendation for permanent LPS conservatorship is made, and the court investigator recommends the appointment of a family member, friend, or the public guardian. Approximately 60% of the cases result in the appointment of the public guardian.

An attorney, usually a public defender, represents the alleged incapacitated person at the hearing. The alleged incapacitated person may consent to the appointment or oppose it. If the alleged incapacitated person consents, a conservator is appointed. If he or she is in opposition, the alleged incapacitated person has the right to a court hearing or jury trial. The standard of proof is beyond a reasonable doubt.

Lanterman-Petris-Short conservatorships are for one year only and are subject to re-evaluation by two physicians, who may recommend the extension of the conservatorship for another year. Clients have a right to re-hearing of the status of the conservatorship once every six months, as well as a right to a placement hearing every six months.

Application of 1981 Criteria

Adequate Funding and Staffing

The LPS program is funded by state mental health realignment funds, conservatorship fees, and targeted case management (TCM) funds provided through the Medi-Cal program. The probate program is funded by conservatorship fees and TCM. Funds for LPS and probate conservatorship programs are awarded on an “encounter basis,” meaning that the encounter costs are based on cost records. Targeted case management is generally restricted to persons living in board and care facilities (some exceptions include clients in hospitals within 30 days of discharge). Services include assessment, service plan development, linkages and consulting, accessing services, periodic review of cases, and crisis assistance planning.

Unlike LPS funding, probate conservatorship services are also provided by contract. These contracts are held between the public guardian and (a) the Hospital Association of Southern California, (b) selected country hospitals via the LA County health department, and (c) APS. Unlike many other counties in California, the LAPG does not receive any funds from the county general fund.

The annual budget for the office is \$9.9 million, including salaries, benefits, attorney costs, supplies, and other administrative costs. Mr. Fierro indicated that it would take an additional \$20 million in funds for adequate public guardian program support. For a 1:20 ratio of full-time equivalent paid professional staff to wards, the budget needed an additional \$50 million.

For FY 2003-2004, the program spent \$1,113 to complete a probate investigation and \$1,384 for each LPS investigation. The office spent \$1,897 to maintain a probate conservatorship per annum and \$1,433 to maintain an LPS conservatorship. No cost savings to clients were tracked by the office.

The program included 90 full-time equivalent professional staff on payroll, including support staff. On average, a full-time equivalent paid professional staff spent 16 hours working each case. The 16 hours does not include the amount of time spent by support or contract staff. More than 16 hours is required during the first year of establishing the guardianship. A professional staff member is required to hold a bachelor’s degree, and for full-time equivalent staff making binding decisions for wards, there is a two-year experience requirement. A minimum of 16 hours is estimated for deputy staff to work on the case of an individual ward, with that figure exclusive of support of contract staff. The program no longer directly utilizes volunteers due to liability issues.

Collection of Fees for Services. The program has the authority to collect a fee or charge to the incapacitated person for services. Each year the office of the LAPG conducts a cost study in order to determine the cost of service. Base on the cost study, fees are determined and approved by the Los Angeles County Office of the Auditor Controller.

Three major losses affected the program in the past ten years, all due to county budget reductions. First, the public guardian’s medical consultation team was disbanded. This team included one psychiatrist, a part-time physician, and two public health geriatric nurses to provide consultation and oversight when there were

requests for surgery, unusual medical treatment or procedures, issuance of no codes, and removal of life support. Second, mental health department professionals, who provided assistance in placing clients out of acute hospitals and long-term psychiatric care facilities into board and care facilities were no longer available. The program was a centralized one designed to assist the public guardian division. When the mental health department director de-centralized the office and services, the services were discontinued. Finally, TCM funding was reduced to exclude clients residing in skilled nursing facilities (SNFs). The Centers for Medicaid and Medicare Services recently requested the state's Department of Health Services to amend the state plan, jeopardizing TCM revenue. Other priorities of the public health department also resulted in budget reductions for the LAPG.

Structure and Function

Conflict of Interest—Ability to Petition. The program petitioned for legal incapacity 2,300 times in FY 2003. The program petitioned for itself as guardian 1,500 times in FY 2003.

Incapacitated Persons

The program was serving 3,400 wards in March of 2004, and, for that year, accepted 700 new incapacitated persons into the program. In FY 2003, and based on a one month analysis, the majority of incapacitated persons served came through referrals from a mental health facility (2,400 wards), followed by hospitals (372), nursing homes (240), and APS (84). An interesting feature of the referrals is that contracts are held between the public guardian and (1) the Hospital Association of Southern California, (2) selected county hospitals through the county health department, and (3) APS. The contracts are to address cases that were not handled by the office or not handled quickly. The purpose of the arrangement was to expedite probate investigations and to have a dedicated staff member to address cases referred by these sources.

For FY 2003, the program served as guardian for person and property for 4,200 people, serving 50 incapacitated persons solely as guardian of the person, and 50 incapacitated persons solely as guardian of the property. In California, limited guardianship refers to clients who are developmentally disabled and are served by regional centers. Of the population of incapacitated persons served, there were 2,322 men and 1,978 women; and of that breakdown, the program served 86 minors, 2,709 persons 18-64, and 1,505 persons aged 65+. Of this group, approximately 2/3 (or 2,236) were white and 1,032 were black or African American. Other populations served included 344 Asians or Pacific Islanders and 43 Native Americans.

The program predominately serves incapacitated persons with mental illness (3,200), as well as 746 dual diagnosed people with substance abuse, 337 persons with Alzheimer's disease, and 35 people with developmental disabilities. The vast majority (3,354) had annual incomes of \$2,000 or less, and for FY 2003, 210 incapacitated persons died. The primary living setting of the incapacitated persons was in nursing homes (1,720) followed by board and care homes (1,132) and mental health facilities (674), those living at home (86), in group homes (43), and in jail (43). In FY 2003, 820 incapacitated persons were restored to legal capacity, and 650 had a family member appointed as conservator instead of the public guardian. The *Los Angeles Times* reported a staff to guardian to incapacitated person ratio of 1:84 (average caseloads per deputy).

Adequacy of Criteria and Procedures

For each public guardianship ward, the following records are maintained:

1. Functional assessment (updated quarterly)
2. Care plan (updated quarterly)
3. Computerized time logs
4. Advance directives (only if the ward executed one prior to the guardianship)
5. Periodic report to the court
 - a. Mental health conservatorships (annually)

- b. Probate conservatorships (at initial appointment, 14 months after establishment of conservatorship, and biannually thereafter)
6. Program review of wards' legal incapacity (quarterly)
7. Review of appropriateness of public guardian to serve in that capacity (quarterly)
8. Documentation regarding how and why decisions are made on behalf of each ward

Various reports are used to monitor different aspects of the program: (a) internal control certification program, in which each month an assistant division chief reviews a percentage of each deputy's caseload, (b) an audit tool to evaluate each case, and (c) departmental risk management meetings.

The *Los Angeles Times* stated that the "agency has been consistently late in filing court reports showing how it handled wards' money, often missing deadline by a year or more. As of August 2005, reports were overdue in 192 cases."

The office has a policy for DNR and withdrawal of life support.

Decision making. Typically, a best interest standard is used in decision making. The program was in the process of collecting additional information for staff members to use a substituted judgment standard when possible and appropriate. Court authorization is required to sell a conservatee's personal residence and stocks not traded over a recognized stock market.

Variations in LPS and probate conservatorships. In LPS cases, the court must authorize any surgery or medical treatment for which the conservatee lacks the capacity to authorize. In probate cases, if the conservator does not have exclusive medical authority to consent on behalf of the conservatee, the conservator must petition for authority to petition for surgery or other medical treatment where the client lacks the capacity to consent. For persons with a dementia diagnosis, California law allows the public guardian the power to place incapacitated persons in a locked facility and to consent to the administration of appropriate medications.

Outside Assessments of the Office

The local unmet need for public guardian services was deemed huge. Because the agency could not meet the need, most people interviewed admitted that the program was highly criticized by many agencies. One commentator stated, "I think the county abandoned the public guardian a long, long time ago in terms of probate in particular." Most acknowledged that the root of the negative view was due to the program's gross underfunding. Another commentator suggested that higher salaries were needed for the public guardians, and the same individual believed that Los Angeles County had a disproportionate number of persons needing public guardianship.

Outside commentators believed that the office sets case limits per month, which limited the number of alleged incapacitated persons either investigated or accepted. Many commentators considered acceptance of alleged incapacitated persons into the program as capricious, with one person in particular suggesting the need for the program to assess people in a systematic way using standard protocols for accepting them. Tensions were notable with several agencies. As an example, APS was often confused regarding the nexus of the missions of the agencies: for APS, to protect the safety of the client, and for the public guardian to protect the right of the client.

One of the features of the office that was deemed cost effective was the interdisciplinary team, which was abandoned due to fiscal constraints. The interdisciplinary team was wired into available services, which expedited assistance to needy incapacitated persons.

Some commentators suggested separation of the LAPG from county mental health so that the agency could better advocate for itself, although for at least one commentator, guardianship overall was viewed as house arrest. Conversely, one participant in the interviews suggested that guardianship could facilitate people seeking treatment as compared to an involuntary commitment system.

Notable Features of the Office

- (A) The specter of the looming *Los Angeles Times* exposé created uncertainty for the office and its administration. Once the *Los Angeles Times* story was published, changes resulted in California law that addressed all types of guardianship. A major change to the office of the public guardian was that the county board of supervisors approved an additional 32 new positions for the probate conservatorship program, representing an increase of over 100%.
- (B) The LAPG has computerized records dating back from 1984. This allows an important before and after picture of wards over time in order to assess outcomes of guardianship.

Concluding Assessment

Strengths

1. Committed and experienced staff.
2. 24/7 accessibility to service.
3. An internal computerized system that served as client database, banking/accounting, and case documentation, the Los Angeles Public Administrator/Public Guardian Information System (LAPIS).

Weaknesses

1. Severely inadequate budget.
2. Inordinately high caseloads.
3. Large numbers of retiring staff.
4. At the time of the site visit, an audit commissioned by the board of supervisors was occurring. The audit reportedly⁷⁸ found funds so chronically short that the LAPG took up to six months to consider cases and turned down 84% of referrals. Staff supervise 75 to 90 cases apiece, twice as many as comparable agencies. Unlike most counties in California, Los Angeles County had allocated no funds to probate conservatorships since the early 1990s. The auditors recommended adding three employees, two to manage cases and one to investigate potential cases, at a cost of \$201,021.
5. At the time of the site visit, Mr. Fierro was waiting for the release of press coverage on guardianship by the *Los Angeles Times*. Mentioned earlier, a four-part series on guardianship, one part devoted exclusively to public guardianship, was released in fall 2005.

Opportunities

1. To bolster income, as well as to increase efficiencies to the wards, the program was exploring serving as a representative payee for clients.
2. The program was exploring serving in an oversight function for private conservators.
3. The program stood to ingratiate itself in the public eye by conducting public education regarding surrogate decision making. The program could also potentially reduce the number of guardianships it was undertaking through educational efforts.

Threats

1. The chronically underfunded budget serves as a constant threat to the program's viability and integrity.
2. Privatization of this public function is another threat to the program.

78. Robin Fields, *Adult Caretaker Program Overworked, Underfunded: Report Finds That the County Office That Serves As Conservator for Incapacitated Clients Is Beset by Problems*, L.A. Times (May 12, 2005).

3. Public scandals from programs in Amador and in San Joaquin tainted other public guardian programs in surrounding counties, including the LAPG.

Assessment of Then and Now

When researchers studied the LAPG in late 1979, the agency had one of the largest offices in the state. In 2005, the LAPG did, in fact, have the heaviest caseload in the state. There were approximately 100 staff members in 1979 and 90 full-time equivalent paid professional staff in 2005. Caseloads were 105 per staff in 1979 and a reported 84 per deputy in 2005. The office was reported to have a history of unrest, and so it again appeared in 2005 when we visited.

We were pleased that a LAPG career employee, Mr. Fierro, was running the office. This was not true in 1979, when a former journalist was running the office. Mr. Fierro reportedly had experience in all phases of the office and over a long period of time. He was a relatively new employee when the first study was conducted and remembered the original research.

We found that, just as in 1979, the office was highly underfunded and understaffed, and that, in order to meet the grave lack of funding, the office had taken on “creative” measures in order to prioritize clients. Although we understood the reasons for the creativity, we were very uncomfortable with an office employing measures that incentivize the investigation and acceptance of one class or cohort of incapacitated persons versus another. We were struck by the comment of one of the individuals we interviewed and repeat again here: “I think the county abandoned the public guardian a long, long time ago in terms of probate in particular.”

We were impressed that the office could provide statistics regarding the program, but we were surprised that more in-depth studies of the program were not encouraged or conducted (we were aware of only one study, that of Kate Wilber and Sandy Reynolds in 1999).⁷⁹ We were not aware that the study netted any changes in structure and functioning of the office.

We raise concerns regarding the following features of the LAPG:

1. The office can petition for its own incapacitated persons, which creates the potential for self-aggrandizement.
2. We do not support the mechanisms in place allowing the office to inappropriately prioritize investigation and acceptance of clients and take fees for services.
3. We do not support the collection of client fees for public guardian services, as we believe it is a mechanism to justify underfunding of the office.
4. Clients are not visited in a timely fashion, and reporting lags deadlines in a number of cases.
5. Staff-to-client ratios were too high in 1979 and have not declined in over 20 years.
6. There are inherent systemic differences in the LPS conservatorships and probate conservatorships that result in inequities for older incapacitated persons. We believe such an arrangement, as it stands, appears ageist.
7. We are surprised that the computerized records, which present a wealth of potential evaluative information, have apparently not been utilized for that purpose.
8. Although there are internal audits of the program and media press coverage, audits by persons knowledgeable in the area of public guardianship have not been conducted.
9. The agency should accumulate information on its cost savings to the county.
10. We support the 2005 county allocation of funding for more public guardian staff. Qualified staff should be adequately recruited, trained, supported, and retained. The agency stands to lose a vast amount of institutional knowledge through retirements within the next five years.
11. Our greatest concern is the significant underfunding of the LAPG and the inattention of the county board of supervisors in making it a funding priority. We, the researchers, find that such a lack

79. Sandra Reynolds & Kathleen Wilber, *Protecting Persons with Severe Cognitive and Mental Disorders: An Analysis of Public Conservatorship in Los Angeles County*, 1 *Aging & Mental Health* 87 (Feb. 1997).

of funding places scores of vulnerable California citizens at great risk for criminal victimization, institutionalization, and early death.

The Delaware Office of the Public Guardian

The Delaware Office of the Public Guardian (DOPG) was visited in September 2005. Robin Williams-Bruner, M.S.W., R.G., was appointed public guardian in 1993 after previously serving as deputy public guardian since 1990. Ms. Williams-Bruner was anticipating retiring from her position in 2006, an action that she did take in 2006. All persons interviewed characterized her tenure as Delaware's public guardian an excellent one. Many people were concerned about her possible successor after her visible and unwavering dedication to the office. Of the many individuals interviewed in Delaware, it was significant that a state representative was among the persons interested and available for interview about public guardianship in the state, something that occurred in no other state that was visited.

Statutory Authorization

The office was established statutorily in 1974 because of the plight of elderly persons and other adults subject to abuse, neglect, or exploitation, and the loss of ability to manage their personal or financial affairs. Statutory provision for the office is found under Del. Code §§6-3991 through 3997. The program is operated statewide with no regional or local public guardianship programs. By statute, the DOPG is mandated to provide public guardianship, trusteeship, and personal representation of decedents' estates to all citizens in the state who qualify. In practice, however, the DOPG rarely serves as trustee or personal representative absent an initial appointment as guardian.

Recent Litigation

None reported.

Fee-for-Service Guardianship Programs

In addition to the public guardian, and for persons with the ability to pay, Delaware has four fee-for-service guardianship programs. One of the four, and the first established, is run by a former Delaware public guardian. People interviewed said that there were more complaints about the fee-for-service programs than the DOPG. Commentators reported that there is little oversight of the fee-for-service agencies. There was some disagreement regarding which fee-for-service program is best equipped to take specific presenting problems with the guardianship (*e.g.*, social work issues, medical issues). At least one commentator said that there are cases contracted to the fee programs for which the public guardian is more appropriate.

Another commentator acknowledged that the fee-for-service guardianship programs have grown up ad hoc and are not supervised to the extent of the DOPG. Fee-for-service guardianship programs are required to provide a report to the court once a year versus the bi-annual report requirement for the DOPG. Also, the DOPG is required to have an overall bond, whereas the fee-for-service guardians must have individual bonds.

One of the fee agencies mysteriously left the state, and the court had to divide up its incapacitated persons among the other agencies and the DOPG. According to Ms. Williams-Bruner, "It is my understanding that this fee-for-service agency was bought by Life Solutions, Inc. . . . also in 2003, another fee-for-service agency, Adult Guardianship Services, Inc., went out of business, and all of their cases were transferred to DOPG—about 26 cases." Said one individual interviewed, "I don't know what the status today is of private agency guardianship appointments in the state of Delaware, but they have certainly incurred some disfavor fairly recently in the courts." Some respondents indicated that they would make sure, prior to petition, that the DOPG would get the guardianship over a fee-for-service agency.

Organization and History

Delaware's Office of the Public Guardian is a state agency under the Delaware judiciary. The agency is considered a non-judicial social service agency of the Delaware courts. The public guardian is generally regarded as the same as any other guardian under Delaware law. The public guardian, appointed by the chancellor of the Court of Chancery, serves at the chancellor's pleasure and is considered the administrative head of the DOPG. At the time of the site visit, the staff consisted of the public guardian, deputy public guardian, three full-time senior social worker/case managers, a part-time senior social worker/case manager (vacant), an administrative officer, and a financial case manager. Referrals are received from all of the APS agencies, state and private long-term care facilities, hospitals, the courts, and private individuals. The DOPG is the guardian of last resort.

The agency is housed under the judicial branch of Delaware's government. Adult guardianship matters are heard in the Court of Chancery. This location is favorable in view of the potential conflict that could exist if the agency was housed with other social service agencies, such as the Department of Health and Social Services. However, given that the agency is small and with a very specific mission, the DOPG is reportedly not always well understood by the court's administration and cannot compete well with the larger courts or agencies when competing for funding and administrative support. The agency's relationship with the Court of Chancery itself can present areas of conflict when the office is the petitioner to the court or is asked to serve as a neutral guardian in a contested matter. The courts have considered other alternatives for the location of the agency, including one suggestion of removal to the executive branch of government under the governor.

The Miller Trust

In its fiduciary role, the office administers "Miller Trusts," which are trusts used to qualify a Medicaid applicant with income in excess of the Medicaid eligibility limit for long-term care assistance. Such a trust can be named as recipient of the individual's income from a pension plan, Social Security, or other source. The office reported that it uses this type of income-only trust for the purpose of depositing an incapacitated person's income. The only part of the incapacitated person's income for deposit into the trust is the monthly income over the Medicaid income limit. Income paid into the trust monthly is paid out monthly for purposes of the incapacitated person only, and cannot accrue in the account. Two months of income overage cannot stay in the trust. The funds are used for patient payments in a facility, including personal needs allotment.

Guardian ad litem

In Delaware a guardian *ad litem* (GAL) is appointed in every guardianship case and represents/advocates for the indigent person, and also serves as the eyes and ears of the court (*i.e.*, best interest standard). A GAL is appointed by the court from an established panel of attorneys. The court can appoint an attorney as fact finder only, but, in practice, this rarely happens. The dual function of the GAL role in Delaware was reportedly creating confusion among the state bar. Commentators echoed the confusion and said there is consideration of changes or amendments to the role. Though awareness of the problem exists, the state bar has not taken much action on it. No commentators knew of instances in which the GAL became the guardian after serving as GAL, unlike other states visited.

Application of 1981 Criteria

Adequate Funding and Staffing

The agency receives 100% of its budget through state of Delaware appropriations. The budget for FY 2006 (July 1, 2005, through June 30, 2006) was a total of \$458,570. The following are the specific budget allocations:

Personnel	\$427,500
Travel	\$3,000
Contractual	\$16,000
Supplies	\$3,200
Special Need	\$3,000
Special Need	\$5,870 (rolls over year to year)

At the time of our 2004 survey, the budget was deemed inadequate. To make it adequate, approximately \$160,000 in state funds were needed to fund four additional full-time equivalent paid professionals. This amount was needed to bring the full-time equivalent paid professional staff-to-incapacitated person ratio to 1:20. On average, caseloads were reported as approximately 55 incapacitated persons per staff member. According to one staff member, “In order to visit everybody every month, it can’t happen at one to 65. So you’re pretty much on an as needed basis, and you make the best of the quarterly meetings you do have or the annual meetings.”

Another member of the DOPG stressed that the job of public guardian (*i.e.*, case manager) is completely different from that of any other state agency employee. “Our job title and state classification is the same as an individual doing financial eligibility for food stamps. And our job responsibilities [include] making ... end-of-life decisions. I think the level of decisions that we make have far more reaching consequences and in thirty-seven and a half hours, with public assistance or eligibility or whatever, you do your job during that period of time. Our job extends well beyond that time. We’re responsible 24-hours a day pretty much for our folks.”

A bachelor’s degree is required for a full-time equivalent paid professional staff member who makes binding decisions for incapacitated persons, as well as experience in providing social service case management. In 2004, the program employed seven full-time equivalent paid professional staff. The DOPG does not have the staff to devote to the development of a cadre of volunteers, including overseeing recruitment, training, and monitoring. Ms. Williams-Bruner, the public guardian, regarded the development of a volunteer pool as an area that the state of Delaware could utilize to expand guardianship services yet retain quality in its service to the larger number of persons in need.

Collection of Fees for Services. The DOPG has the authority to collect an administrative fee approved by the court, but in practice it rarely does so. Fees are determined by an administrative fee schedule and have not been reviewed or revised for many years. Any funds that the office receives are returned to the general fund for the state of Delaware.

Structure and Function

Conflict of Interest—Ability to Petition. The public guardian may petition for the appointment of the agency as guardian and is recognized by the court as a *pro se* litigant in doing so. If the petitioner for the appointment of the public guardian is a state agency, then the attorney general’s office makes the petition. If no other alternatives to the appointment of the state agency as guardian exist, then the case is assigned to the DOPG. The court requires that the office consent to act as guardian in those cases in which the DOPG is not the petitioner, as well as those cases in which the office is the proposed guardian. The court generally notifies the office in advance of appointment, if not previously involved in the case. Generally, if the court requests that DOPG take a case, the office assumes the case. However, there are occasions when the office suggested alternatives to its appointment.

The public guardian can represent the office in petitioning for appointment as guardian and in matters before the court involving the public guardian. However, the Department of Justice assigns a deputy attorney general (DAG) to serve as counsel to the DOPG. The assignment for the DAG is part-time, and the assigned DAG serves as counsel for several other state agencies and represents the state in other matters, including civil commitment hearings. In FY 2003, the office petitioned for adjudication of legal incapacity 77 times and petitioned for the appointment of itself as guardian 77 times.

The present public guardian is not an attorney. She represents her agency and presents the petitions herself. The present public guardian requests counsel in the attorney general's office to represent her in difficult or contested matters. She also represents herself in complicated contested cases, although a DAG can represent the public guardian. Although a DAG was appointed for that purpose in the past, the public guardian currently represents herself. In the latter years of her tenure as public guardian, she rarely represented herself in complicated, contested guardianship cases but would routinely ask the DAG to enter her appearance on behalf of the DOPG.

Pertinent to this problem, one commentator suggested dividing the roles of the public guardian. It was suggested that a court investigator, as an arm of the court, but not the DOPG, should make a determination about the condition of the incapacitated person. The same person remarked that, due to the DOPG's location in the court, if the public guardian did have a breach of its fiduciary duty (which had never occurred), then the court is investigating and adjudicating itself.

Incapacitated Persons

For FY 2003, the office served 174 incapacitated persons. Of that number, 154 were women. The office served as guardian of the person only for 161 people, as guardian of the property only for two people, and as both guardian of the person and guardian of the property for 89 people. There were no limited guardianships reported. During that time period, two people were restored to legal capacity, and five were transferred to a private guardian. In FY 2003, 47 incapacitated persons died.

Referrals to the office in FY 2003 came from a variety of sources, with an equal number (21 each) from the Court of Chancery and nursing homes (8 from private homes and 13 from state facilities). Other sources included hospitals (18 referrals) and APS (14 referrals).

The DOPG serves persons with mental retardation and developmental disabilities, older mental retardation and developmental disabilities populations, older adult population, and persons with mental illness. The social workers/case managers who act as guardian case managers are assigned based on the area of knowledge, experience, and expertise. For instance, a case manager who came to the office with over 15 years of experience working with the Division of Developmental Disabilities Service (DDDS, formerly DMR) is assigned almost exclusively those persons with mental retardation and developmental disabilities diagnoses.

The staff standard for visiting incapacitated persons is monthly, but the DOPG is unable to comply due to large client to staff ratios. Thus, visits are on an as needed basis. Staff attends quarterly care plan meetings for nursing home residents, which creates the opportunity for a quarterly visit.

Considerations of cultural diversity are a part of an evaluation of need for service, decisions on behalf of the persons for whom the office is asked to serve, and in the interactions with family members and others who are also working with the incapacitated persons. Sensitivity to the incapacitated person's cultural perspective is reportedly paramount in office interactions and decision making. Staff is encouraged to participate in training in cultural diversity and in decision making. In case reviews and discussions, case managers are required to take a cultural perspective in analyzing a decision, a care plan, and/or a behavior or an interaction with a family member or close friend.

Two incapacitated persons served by the DOPG were interviewed. Both were men working at a sheltered workshop, with working hours from 8:30-3:00. At the time of the interview, one of the men was working a press machine. The incapacitated persons said that they both came to the attention of the public guardian through social services, but that they did not know how. Both were happy with services they received and remarked that they were treated well. Said one incapacitated person, "...you know, 'cause the public guardian is really doing [] a big favor [to us]. They really are."

The second incapacitated person emphasized this: "We could wind up as, I could wind up in the streets."

One of the men said that he and his male guardian get along very well and that if there are any problems, the incapacitated person is able to contact the guardian. The incapacitated person believed that his guardian knows him well. The incapacitated person was able to contact his guardian by cell phone when he needed to do so.

Both men reported their health as good, although one man reported having elephantitis and having to wear supportive stockings. One man said he had a girlfriend and enjoyed spending time with her on weekends. The other man was a devoted baseball fan and enjoyed watching games on television.

According to office staff, new incapacitated persons are increasingly younger people in their 40s and 50s, as well as children under the age of 18. A third of the caseload is people receiving services from DDDS. Incapacitated persons are more frequently people with drug addictions, HIV/AIDs, and are abusing alcohol. Oftentimes, the incapacitated persons are not receiving benefits due them or services that they need, such as housing, programming, and other services. The public guardians are forced to work quickly to make linkages with various agencies in order to procure services to meet client needs.

Unmet Need. To its credit, the DOPG participated in a study of need (2004) that was conducted by a graduate student seeking an M.S.W. and employed by the office. The study identified an increasing need for guardianship services and changing profiles of persons needing guardianship services (*e.g.*, young adults aging out of children's homes).

Many persons interviewed stated that an unmet need for the services of the public guardian exists and is growing. This appeared substantiated by the periodic imposition by the office of a moratorium, discussed later. One person interviewed suggested that many older adults are moving to Delaware because of its beach, absence of sales tax, and negligible property tax. This same person also stressed that there were many Delawareans, who, when they finally "surfaced," would need referral to the DOPG: "I think there's lots of them out there just waiting to be found." Another population, an increasingly younger and Hispanic group, particularly in downstate Delaware, was also regarded as needing public guardianship services.

Adequacy of Criteria and Procedures

Records kept for each incapacitated person included these:

1. Advance directives (if executed).
2. Reports to the courts (every six months on each guardianship—a review and request for continuance).
3. Periodic program review of the incapacitated person's legal incapacity, as part of the six month report.
4. Periodic review of the appropriateness of the DOPG to serve as guardian, as part of the six month report.
5. Documentation of the rationale for why and how decisions are made on behalf of each incapacitated person.

Case management software was purchased to use in conducting functional assessments and care plans, as well as implementing time logs or time keeping records. Regular staff meetings are not held due to workload. According to Ms. Williams-Bruner, the DPOG abandoned the use of the software when it could not obtain approval from the tech support unit of the judiciary to install it for use. Additionally, the public guardian had no access to the software company to provide technical assistance and updates as needed.

Decision Making. As a first standard, the office uses substitute decision making. However, in cases in which the office is unable to determine or have no knowledge of the incapacitated person's prior wishes, it relies heavily on the best interest standard. If an incapacitated person is able to discuss a decision, staff arranges for the discussion, sometimes with treatment team staff or family or both. The DOPG returns to the court regarding decisions related to selling real estate, and DNR orders, and adverse medical treatment. Moreover, the DOPG returns to court for direction, instructions, and clarification in any case where authority to make a decision is unclear. The DOPG must grapple with an increasing number of procedures that need informed consent, but the law does not cover the many medical procedures that people receive presently, and the public guardians are not as well versed in medical training as needed for authorization. The DOPG can contract out with a fee service (*e.g.*, completing Medicaid applications). In practice this is rarely done. The office is more likely to arrange for a fee-for-service agency to assume a successor guardianship to handle property issues where the estate of the incapacitated person would support this service.

During the referral process the office attempts to obtain as much information as possible regarding family and friends in seeking an alternative to DOPG services, for notification, and to determine level of interest or involvement. The office promotes family involvement even after appointment, maintains correspondence with family members, and encourages visitation and contact, as well as attendance at care planning meetings. At times their inclusion is met with considerable resistance in some long-term care facilities, whose staff refuses to engage a family member because the resident is a “ward of the public guardian.”

When it is deemed necessary to place an incapacitated person in a facility (the location of most incapacitated persons), the decision is made based on the incapacitated person’s level of care needs and available community and family supports. There is no review process. Many incapacitated persons were already placed in a long-term care facility by APS prior to appointment of the DOPG. The office reviews these cases in order to determine that the placement is the least restrictive one possible and to explore other viable alternatives. However, gaps in availability of competent, affordable, and reliable home and community services, combined with the limited staffing of the office needed to broker for, monitor, and maintain needed services, makes de-institutionalization of nursing home incapacitated persons difficult if not impossible.

Most incapacitated persons receiving services through DDDS are not institutionalized. Instead, the DOPG advocates for the incapacitated persons’ discharge to an appropriate residential placement in the community. The DOPG is not legally authorized to consent to voluntary mental health services in an institution. Delaware law requires involuntary commitment of the incapacitated person to mental health services under a separate statute.

Internal Issues for the Program

The office reported working with such entities as the long-term care system, the courts, Social Security, the Department of the Attorney General, the mental health community, the hospitals, DDDS, and APS.

Relationship with APS. Adult Protective Services staff members thought that annually, approximately 30% of their cases, typically abuse or neglect cases, are resolved by guardianship, and of that percentage, most are referred to the public guardian. If APS petitions for guardianship, it is done through the deputy attorney general. If the public guardian cannot accept a case or a case is inappropriate, Ms. Williams-Bruner may refer the case to one of the four fee-for-service guardianship programs in Delaware. Adult Protective Services cannot refer a case to a private agency. If the public guardian is appointed as interim guardian, APS keeps the case until a permanent guardianship is established and works hand in hand with DPOG staff in case management and decision making. The public guardian and APS do cross-training, and had done so annually.

The APS staff, as well as others interviewed, noted that due to limited resources, the DOPG had issued a moratorium on cases they could accept. The APS staff indicated that it was in effect for approximately a year. (We later learned from Ms. Williams-Bruner that it was actually instituted in May 2005 and the office continued to take cases, specifically emergencies and court cases.) They indicated that the office had also issued a moratorium nearly two years earlier. (According to Ms. Williams-Bruner, she was not aware of any official moratorium in 2003. At that time, DOPG was taking the cases of adult guardianship services and so were likely looking closely at all cases to determine alternatives to DPOG services). The APS staff members indicated that the public guardian would accept cases on an emergency and interim basis (30 days only). When asked what APS does with people needing public guardianship services with a moratorium in force, one person indicated, “We have to be very creative. At times it could be just a situation where we have to do a protective placement until we can get all the players identified and come up with other individuals who may be appropriate and willing to petition.”

The APS staff considered that their relationship with the DOPG was a positive one, but that some staff members became frustrated when their request for a guardianship is turned down, feeling “like they have to beg.” Staff members acknowledged that their frustration was sometimes because there was a family member available who was not explored fully.

Another complaint mentioned was that the DOPG had allowed perpetrators of the incapacitated person’s neglect to return to a home or had allowed an unsupervised visit with a perpetrator. However, Ms. Williams-Bruner stated,

The DOPG would not knowingly permit contact between an incapacitated person and someone charged with or found guilty of abusing an incapacitated person. In the majority of the APS cases no charges were ever filed. The court often required or requested that the guardian facilitate reunification with the incapacitated person's family. The APS staff may be blaming the DPOG for allowing an incapacitated person to return to the home of a perpetrator when they did so after the court denied the appointment of the DOPG. Therefore, this paved the way for the incapacitated person to return to the care of the family. I recall clearly supervising visits between an incapacitated person and her daughter, who stood accused of abuse and did so several times at the request of APS staff because they were unable to do so.

Outside Assessments of the Office

Of the guardianship cases that flow through the courts, commentators estimated that at least 25% are public guardianship cases. Of that 25%, 15% begin as interim guardianships. Interviewees noted that the program helps lay people considering serving as private guardians. No difference was reported in incapacitated person restoration to competency between public and private guardians. No problems were reported with timeliness or thoroughness of completing reports.

If the court appoints the DOPG, then, in all cases, the DOPG must take the appointment, but the nexus of the court and the office is helpful in that the courts are apprised of the limitations of resources and their effect on the office and the quality of public guardianship services provided.

Despite information about the helpfulness of the office and the small size of the state, many people interviewed perceived that the office is largely misunderstood by many state agencies, which believe that the DOPG possesses "mystical powers" to fix problems no one else is able to fix. Said one individual, "Robin and her staff are certainly to be commended for their closet full of magic wands, but I don't really think they have them."

Commentators stressed that accountability for the DOPG is greater than that of a private guardian, with the reasoning that the public guardian is a state agency representing a private person. Even though the private person may not have appropriate family members or friends, it is important to account for the state's decisions on his or her behalf, as well as to deflect any criticism of the office that might arise from disgruntled family members. Another reason for greater accountability is to bring the court up to date on the guardianship so that issues or concerns are not missed. One person confessed, "It's a rule of money that the more assets the individual has, then the [greater] challenge there is [to the guardianship]."

The DOPG was regarded as a vital linkage with persons needing guardianship services in nursing homes. The DOPG's work was extolled by persons associated with the hospitals. In particular, Ms. Williams-Bruner was much appreciated and beloved: "Robin...has been our longest-standing public guardian and will be extremely hard to ever have to replace." The office was well regarded across the state.

All persons interviewed remarked upon the professionalism and dedication of the staff, saying that they are involved at the very personal level of the individual. One interviewee said, "They become advocates for these people, and actually, in this particular case, they became, at least in this disabled person's eyes, her friend."

Another person had this to say, "When there is nobody else, the public guardian automatically steps in, especially when people are indigent. They're lifesavers. You know, without them, these people would have nothing; most people would have nothing."

Commentators indicated that several attorneys and others would go to bat for the office in an instant if given the opportunity. Yet, universally, for all persons interviewed, the office simply did not have enough funding or staffing. The comment by this individual was enlightening and poignant: "I feel that historically, the DOPG has been crippled somewhat by their staffing constraints. I think now they have 7.5 full-time equivalents, maybe. I think that's what they have today. And they've got approximately 240, maybe 250 wards. That, I think, is doable. I think when they had three people in the office covering the state of Delaware, which wasn't that long ago, that they really could not perform the function [of the guardian]. I've never heard a complaint about the public guardianship process except from the public guardian, who will tell me, she said, 'I don't know how we can keep doing this without, without adequate staffing.'"

Notable Features of the Office

- (A) The DOPG has a public guardian with many years of experience and exceptional institutional knowledge. She is not an attorney, but she represents the office in court, nonetheless.
- (B) The DOPG is the only court model program visited.
- (C) The DOPG is located in a small state that facilitates greater networking than achieved by offices in larger states.

Concluding Assessment

Strengths

- 1. The public guardian shares knowledge with all people with whom she works.
- 2. The DOPG has highly experienced and dedicated staff personally involved with the incapacitated persons and are their true advocates.
- 3. The office has greater independence for serving incapacitated persons, and higher visibility, in the Court of Chancery than if it were in a Department of Social Services.
- 4. Four of the seven DOPG staff are certified by the National Guardianship Association.

Weaknesses

- 1. The office needs an individual with a medical background on staff.
- 2. Funding is highly inadequate, while requests for services are steadily increasing.
- 3. The office needs legal representation in the form of at least a part-time deputy attorney general.
- 4. Caseloads are far too high.
- 5. The office lacks an effective and efficient data management system.

Opportunities

- 1. The office should cross-train with the medical community.
- 2. The office could focus advocacy efforts toward people with mental health needs.
- 3. The office should partner with organizations and entities in the state in order to increase visibility and clout.
- 4. The office should provide greater public education about itself.
- 5. The office should have the ability to authorize mental health care.

Threats

- 1. Chronic underfunding and understaffing of the office.
- 2. Influx of older adults into Delaware; growth of younger adults needing services.
- 3. Increasingly complex needs of all incapacitated persons.
- 4. Litigation, if there is a breach by the DOPG of its fiduciary role.

Assessment of Then and Now

The previous study visited the office in 1979, and researchers for this study visited the office 26 years later. At the time of the first site visit, there were no protective services in the state. The office budget was nearly \$400,000 less than it was in 2005. The DOPG was not headed by an attorney during the earlier visit and was not headed by one 26 years later. There were 42 incapacitated persons served by the office in 1979 and 174 in 2005. The percentage of annual referrals from hospitals is remarkably similar across the years

(23% versus 18%). Staffing shortages remain across the years, which are reflected in the inability of the office to accept clients. A hand review of client files was possible in 1979 because the number of incapacitated persons was low. The data system could not generate quantitative information about where incapacitated persons resided.

These recommendations for the Delaware Office of the Public Guardian are offered:

1. When the DOPG collects fees from incapacitated persons, the fees should go back to the use of the office rather than the general funds of the state.
2. The office should explore cross-training with the medical community.
3. The office should employ a staff member with a strong medical background.
4. The state of Delaware should move to quickly resolve the dual and sometimes conflictual role of the GAL, as the function of attorneys serving in this capacity is frustrated and does a disservice to clients.
5. The DOPG needs an accessible and easily understood data system for management of client needs. Data entered and retrievable from the system should include information, at a minimum, requested by the survey conducted for this study.
6. The head of the office should be an attorney.
7. There is a clear unmet need, especially since the office has had a moratorium on new cases for over a year and has had to institute moratoria in the past.
8. The office should marshal its support from the state bar to leverage more funds for its chronic problems with understaffing and underfunding.
9. The DOPG should educate the professional and lay community about its function. Linkages could be explored with a law school or school of social work.
10. Formation of a multidisciplinary team could help with accessing services for incapacitated persons.
11. Smooth relationships with APS. Cross-training sessions appear an excellent opportunity.
12. Hospitals petition for a large percentage of DOPG cases, something much more rare in the other states visited. This phenomenon is a long-standing one. While hospitals petition for emergency guardians, many cases eventually become permanent ones, as summarized by one person interviewed, "I think there should be a concern on the part of the public guardian's office that they're taking on patients at the request of the hospital for some sort of emergency and then they have them for the rest of their lives. And, I mean, that's a drain on resources."
13. The office has an exceptional reputation, and its dedicated staff members were highly praised by every person interviewed.
14. Departure of the head of the office is imminent. The office may suffer in quality due to the departure of such a well-regarded and strong leader. At the very least, Ms. Williams-Bruner could be retained as a consultant to the new public guardian, if Ms. Williams-Bruner is willing to continue her role with the office.

The Maryland Adult Public Guardianship Program

Introduction

The Maryland Adult Public Guardianship Program was established in 1977 and is a dually bifurcated system. For all persons deemed incapable of managing their affairs, a guardian of the property—generally an attorney—is appointed. For incapacitated adults age 18 to 64, guardianship of the person is provided by the Maryland Department of Human Resources (DHR/APS), which then follows them as they age. For incapacitated adults age 65+, guardianship of the person is provided by the Maryland Department of Aging (MDoA).

The office directors of the 24 local departments of social services (LDSS) are the named guardian of the person for incapacitated adults aged 18-64 as a last resort, when no other person is available to serve as

guardian. The adult services administrators within LDSS keep the statewide program specialist for APS and the Adult Public Guardianship Program apprised of changes or issues surrounding incapacitated persons.

The director of the local area agency on aging is the court-appointed named guardian for persons over the age of 65, but in most cases, a guardianship case manager provides the services. According to the state long-term care ombudsman, there are instances where the local ombudsmen are also the guardianship program managers. She pointed out that in these cases, the incapacitated person may complain to the ombudsman, who is also the incapacitated person's guardian. She recognized that this clearly constitutes a conflict of interest.

Despite this clear delineation between the providers of services dependent upon age, there are counties where public guardianship for both the younger cohort and the older cohort are handled in the same office (*e.g.*, Montgomery County). Professionals from this county indicated that this is an advantage. One participant indicated that the public guardianship system is viewed by the general public as an "unfortunate necessity," but that it is also a significant protection.

Statutory Authorization

Maryland has two statutory schemes for public guardianship—one for elders and another for younger incapacitated adults. Both provide for guardianship of the person only. For adults less than 65 years old, the director of the LDSS may serve as guardian; and for adults 65 years old or older, the secretary of aging or the director of the area agency on aging may serve. These officials may delegate responsibilities of guardianship to staff whose names and positions are registered with the court. Md. Code Ann. §13-707(a)(10); §14-203(b); and §14-307(b). The legislative intent is that the provisions for appointment of public officials as guardian of the person be used sparingly, with utmost caution, and only if an alternative does not exist. Md. Code Ann. §14-102(b).

Maryland law also establishes a system of public guardianship review boards. Each county must have one review board, but two or more counties may agree to establish a single multi-county review board. Each review board consists of 11 members appointed by the county commissioners (in Baltimore City by the mayor with advice of the city council, and in any county with a county executive, by the county executive with advice of the county council), or if the board is for more than one county, appointment jointly by the appropriate officials. The members include a professional from a local department of social services, two physicians, including one psychiatrist from a local health department, a representative of a local commission on aging, a representative of a local nonprofit social service organization, a lawyer, two lay individuals, a public health nurse, a professional in the field of disabilities, and a person with a physical disability. Members serve for a term of three years.

The board must review each public guardianship case at least every six months. Once a year the review is an in-person review, alternating with a file review (except for the first year when the review is in-person both times). The review is based on a report submitted by the public guardianship agency concerning the placement and health status of the incapacitated person, the guardian's plan for preserving and maintaining the future well-being of the incapacitated person, the need for continuation or cessation of the guardianship, any plans for altering the powers of the guardian, and the most recent dates of visits by the guardian. The review board must recommend to the court that the guardianship be continued, modified, or terminated. The individual under guardianship must attend each in-person review board hearing (unless waived by his/her attorney) and have representation by a lawyer he or she chooses or who is appointed by the court. Md. Code Ann. §§14-401 through 404.

Recent Litigation

There is no recent litigation involving the public guardian in Maryland.

Recent Legislation

In the 2007 Maryland General Assembly session, H.B. 672 was passed into law. The bill authorizes a petition for guardianship of a disabled person to include signed and verified certificates of competency by a specified licensed physician and a specified licensed certified social worker-clinical (LCSW-C). Licensed clinical social worker-clinical will be added to the law that allows a licensed physician and licensed psychologist to authorize certificates of competency for disabled person's guardianship petitions. House Bill 672 will become effective October 1, 2007.

Organization and History

Age 18-64. The statewide program specialist for the APS and APGP in Maryland has held this position since 2000. She has 13 years of experience in APS, with eight of those as a direct services case manager. The program is administered through the 24 jurisdictions of LDSS. The LDSS office directors are the named guardians of the incapacitated persons. The LDSS adult services supervisors supervise case management staff who provide services to the incapacitated persons.

The statewide program specialist was unable to provide cost-per-incapacitated person information, but indicated interest in knowing how to calculate this information. The APGP includes a performance measure system that "randomly selects APS cases under the guardianship project code for annual review and Council of Accreditation compliance standards."

Court approval is required to change the abode of the incapacitated person, except that court approval is not required within certain categories such as nursing home to nursing home or group home to group home, to consent to medical treatment that involves significant risk to the incapacitated person's life, and to withhold or withdraw life sustaining procedure(s). The majority of petitions for those aged 18-64 have been filed by APS, but in recent years Maryland has seen an increase in health facilities (hospitals) filing petitions for guardianship. If an incapacitated person below the age of 65 is appointed a guardian within the APGP, they remain incapacitated persons of the APGP regardless of their age.

Age 65+. The statewide guardianship program manager had been in the position for 10 months at the time of the interview. She holds a master's degree in aging studies, has more than 15 years of experience in the field of disabilities, and had served on the Adult Protective Guardianship Review Board for four years. Either the state secretary of aging or the director of the local area agency on aging serves as guardian of the person for adults aged 65+. The director of the area agency on aging is the named guardian, and local guardianship managers manage the duties of guardianship. When the state secretary of aging is the named guardian, the statewide guardianship manager handles those cases.

The statewide guardianship manager oversees distribution of state grants to each of the local area agencies on aging. Oversight of local/regional programs consists of annual monitoring visits for file review and an "interview session with lead guardianship managers on their accomplishments and challenges with the program." One county area agency on aging (Calvert) has never served as public guardian, so the statewide manager serves as guardian to incapacitated persons in this county. Adult Protective Services and hospitals are usually the petitioning parties.

Adequate Funding and Staffing

The annual budget for fiscal year 2003 for APS programs (LDSS), which includes the public guardianship functions, was \$4,638,788, broken down as follows:

Local Funding	\$127,042
State Funding	\$786,327
Social Svc. Block Grants (Title XX)	\$3,030,062
Title IV-E	\$519,509
MD Medical Assistance Program	\$175,848

The statewide program specialist was unable to provide cost-per-incapacitated person information, but indicated that in FY 2003 they had 494 incapacitated persons.

The annual budget for fiscal years 2005 and 2006 for MDoA (age 65+) was \$642,692, reflecting a 14% decrease from the budgeted amount in 2003. In fiscal year 2003, the budgeted amount was \$739,272; and for 2004, it was \$644,424. These funds are for the MDoA and include public guardianship funding, although it is not broken out separately. The statewide public guardianship program manager stated that some of the budget reductions “were taken in the guardianship program.” According to the statewide public guardianship program manager, Medicaid funds are not directly used for guardianship services. The 65+ public guardian program in Maryland had 772 incapacitated persons at the time of the interviews (December 2005). They do not track cost-per-incapacitated person, but are interested in having the wherewithal to do so.

Collection of Fees for Services

In the few cases where the incapacitated person has the resources, fees are collected for services rendered. This is the exception rather than the rule.

Structure and Function

The MDoA sponsors statewide training sessions on a quarterly basis. The statewide guardianship manager (65+) and statewide program specialist for APS and APGP meet quarterly with local managers and conduct annual monitoring visits in each jurisdiction. National Guardianship Association standards are not used, but some of the local guardianship managers are NGA certified and do adhere to the NGA standards.

The MDoA guardianship program (incapacitated persons aged 65+) contracts with a physician, who provides consultation on incapacitated persons’ medical and end-of-life issues. Some local programs seek court and physician assistance with formulating advance directives in consultation with incapacitated persons.

Court permission is required for change of abode unless the change is within the same category of abode, medical procedures involving substantial risk to an incapacitated person’s life, and the withholding or withdrawal of life-sustaining procedures.

Many guardianship cases are routed to the fast track system, which does not involve a jury. One judge with extensive tenure indicated that in a given day, the fast track system might adjudicate 25 cases, of which seven to ten would be guardianship cases, and fifteen percent of those would be public guardianship cases. Petitioner is generally either a health care facility (*e.g.*, hospital) or a person believing that an individual is incompetent to make decisions for him/herself, and prefers placement of the individual in a nursing home. There is a pool of attorneys willing to undertake representing an alleged incapacitated person. The Department of Human Resources administers contracts for legal services to indigent adults in need of a guardian and represent indigent adults at review board hearings; these contractors are often appointed by the court to represent the alleged incapacitated person as payment is guaranteed. Their role includes interviewing the alleged incapacitated person, getting a sense of the case and exploring alternate less restrictive alternatives to guardianship, and they represent the alleged incapacitated person during the court proceedings. According to one judge, the judge is actually appointed guardian of the alleged incapacitated person, and she or he may then delegate a representative who is then responsible for implementing the wishes of the court regarding the alleged incapacitated person. Often the alleged incapacitated person is not present at the guardianship proceeding; this is of concern to some judges.

Conflict of Interest—Ability to Petition

The majority of guardianship petitions reportedly originate in hospitals. This occurs when a patient has reached the reimbursement limit of the Diagnostic Related Group (DRG) for which they were admitted. The discharge social worker will attempt to determine feasibility of release to home, but often finds that the patient does not recall the reason for hospitalization. The social worker will then contact a physician who may determine that the patient is no longer competent. At this point, the relevant APS program is notified of the hospi-

tal's intent to file a petition for guardianship. The age of the patient determines whether LDSS or MDoA is appointed guardian of the person. Hospitals have attorneys on retainer to serve as petitioning attorney.

Incapacitated Persons

The statewide program specialist for the APS and APGP was unable to provide a diagnostic profile of incapacitated persons. A Guardianship Characteristics Report is completed quarterly by LDSS, at the time of the interview, the quarterly results for October-December 2005 were not due into her until January 31, 2006.

There is a gap into which those who are aging out of the foster care system, who have had a public guardian as children, fall out of the program when they reach 18. A state disability professional found this of significant concern. Under Maryland law, a child in foster care is not emancipated until 21 years of age. That child in some instances is not eligible for adult services while under the foster care system, even though he or she is 18 years of age.

The majority of the incapacitated persons aged 65+ is in nursing or assisted living facilities. Those in facilities are visited at least once each quarter. Those incapacitated persons residing in the community are visited at least monthly, sometimes more often.

Upon the death of an incapacitated person aged 65+, the guardianship staff arranges for burial services and facilitates payment of funeral arrangements through the guardian of the property and/or other family members as available. The bodies of those incapacitated persons without the means to cover burial expenses are donated to the state anatomy board or local DSS funds are accessed.

Questions regarding practices and procedures that are culturally and ethnically sensitive yielded the following response "This is not addressed in the policy and procedure [sic] of the guardianship handbook."

Two individuals (incapacitated persons of Baltimore City MDoA) were interviewed, both of whom have benefited as incapacitated persons of the public guardian. One of the incapacitated persons was a man whose son was originally appointed guardian. Within two weeks of appointment as guardian, the son had moved his father to a nursing home. Eighteen months later, due to a failure to submit annual mandatory reports to the court, a judge appointed a public guardian to serve. Both incapacitated persons we interviewed have experienced improved health, including fewer admissions to psychiatric hospitals, and enrollment of one in a medical adult day care program, and regular attendance at a local senior center for the other. Both are currently residents in assisted living facilities.

A surprising proportion in one jurisdiction was placed in facilities after adjudication as incapacitated persons. Five to six caseworkers handle a caseload of 250 to 300 incapacitated persons. In some cases, visiting incapacitated persons was delegated to para-professionals.

Baltimore County makes an effort to ensure that pre-death burial arrangements are put in place because, as one of the participants said, "once that person [incapacitated person] dies, we have no authority." The participant also said that working with attorneys as guardians of the property has fewer pitfalls than working with family members who are named guardian of the property.

Adequacy of Criteria and Procedures

The LDSS, in its role as APS, petitions for guardianship, even in cases of persons over the age of 65. The LDSS is represented in court by the LDSS-appointed agency attorney, paid for with LDSS budgeted funds or the county attorney's office.

The courts require that the guardian submit an annual report on each incapacitated person. The Adult Public Guardianship Review Board reviews each case semi-annually and at least monthly in larger jurisdictions, such as Baltimore City and Prince George's County. The board's recommendations are submitted to the court.

Maryland Public Guardianship Review Board

Each case is reviewed twice a year by the local Adult Public Guardianship Review Board, an entity established by statute (Md. Code Ann. §§14-401 through 14-404). A review board is established in each county, but two or more counties may agree to establish a multi-county board. The local department of social services staffs the board. Each public guardianship case has a file review every six months, but in alternating reviews, once a year, there is an in-person hearing (except the first year when there are two in-person reviews). The board does not review temporary guardianship cases, even though some cases termed temporary are open for an extended period.

At each board meeting, several cases are presented. The board members discuss each case in turn, and make recommendations to court for continuation, modification, or termination of the guardianship. Members sometimes make suggestions for resources or contacts, or comment on the guardian's options for care and placement. It is unclear to what extent the court considers these recommendations in its review.

The review hearings are informal and recorded; evidentiary rules do not apply. The hearings vary in length depending on the issues. The guardian (guardian's representative agency case manager) files a report with the board giving the background of the case, diagnosis, current status and living arrangements, medications, any changes since the last hearing, prognosis, protective services planned, and a recommendation about continuation or modification of the guardianship. The court-appointed attorney (frequently an attorney awarded a contract under the Maryland Legal Services Program's legal representation contract program, *i.e.*, Maryland Legal Aid Bureau) appears and represents the individual. The attorney remains on the case after appointment for this purpose. The case manager appears as the guardian's representative. The incapacitated person attends, if possible. In the review board hearing attended during the site visit, six cases were considered, but no incapacitated individuals were able to attend. Of the six cases, four concerned individuals in nursing homes or group homes, and two concerned a couple living at home. In all six cases, the guardianship was continued. Review board members may conduct hearings at nursing home facilities, in order to observe the ward in his or her current living setting.

Previously, there was a council of review boards, and a 1987 handbook described the role and function of the boards. However, at the time of our site visit, the handbook had not been updated since December 1998.

Variations in DHR and MDoA Guardianships

There are instances where the guardianship program manager in MDoA is also the long-term care (LTC) ombudsman, creating, at the very least, the appearance of a conflict of interest. In the case of persons we interviewed who serve as ombudsmen, they stated concerns about the actual conflict of interest that exists.

One county (Montgomery) has not separated DHR and MDoA. In fact, this county has a large DHHS program that includes the services of the public guardian for all ages.

Outside Assessments of the Office

A number of participants, including attorneys, judges, APS workers, and others expressed concerns—some serious—about the guardian of the property. A guardian of the property was interviewed who described his role as “all aspects except guardianship of the person . . . I don't like that role because it's twenty-four seven. And you actually have to eyeball the person. If you make a mistake you cannot correct it.”

Some attorneys reportedly not only serve as guardian of the property, but also serve as the attorney for hospitals and nursing homes who are filing petitions for guardianship. This dual role may set up a conflict of interest.

Notable Features of the Office

- (A) The LDSS office director serves at the pleasure of the governor, and is the court-appointed guardian of the person for incapacitated persons aged 18-64.

- (B) One of the participants mentioned that MDoA was appointed guardian of the person for an individual who is a multi-millionaire. This participant said, “There is no private guardianship in Maryland, it’s either family or it’s us.” He also indicated that this happens quite frequently.

Concluding Assessment

Strengths

1. Generally thought to do a creditable job protecting vulnerable adults who can no longer make wise choices.
2. Personnel and their dedication to the job they perform.
3. Specific judges who are well-versed in public guardianship issues.
4. The DHR has a training budget that includes training for APS staff and staff involved in guardianship cases through a contract with the University of Maryland, School of Social Work.

Weaknesses

1. Lack of coordination and communication between provision agencies and public guardian.
2. Workload overload and lack of time.
3. In some cases the LTC ombudsman also serves as guardianship manager (thus, effectively serving as both advocate and guardian).
4. Limited or no use of temporary or limited guardianships to address specific issues.
5. Unmet need in nursing homes (residents are increasingly incapacitated, and unable to make decisions, but no public guardian is appointed).
6. The continuing priority assigned to child welfare cases versus adult cases.
7. Lack of attorneys within MDoA to provide services during court hearings to determine capacity. The Maryland DHR has contracted attorneys that represent indigent adults and children under CINA cases through the Maryland Legal Services Program (MLSP). These contracted attorneys are listed through the court system and are monitored yearly by MLSP staff. The Maryland DHR assistant attorney general’s attorneys do represent the LDSS, staff, and court-appointed wards in complex guardianship cases, as needed.
8. Lack of inter-county communication.
9. Budgetary constraints.
10. The public guardian is situated within a state human services agency. The program is administered under the APS program through the 24 local departments of social services.
11. Unwieldy court reporting mechanisms.
12. Guardians of the property (attorneys) are not in adequate contact with guardians of the person.
13. Elder law attorneys need more education regarding public guardianship
14. Unevenness across the state makes it difficult to get a sense of the statewide public guardianship program.
15. Lack of recognition of the burgeoning developmentally disabled adult (DDA) population that is aging and increasingly making demands of the MDoA program.
16. No uniform statewide data collection forms, including incapacitated person characteristics, diagnoses, living arrangements, and the like. However, the DHR has a statewide data collection system in place to record the various guardianship characteristics listed above for each LDSS. Also, data are monitored under the statewide Client Information System for Adult Services programs.

Opportunities

1. Education of public.
2. Availability of cross-training, dual roles, and clear communication.

3. Role as representative payee. A Maryland reviewer states that DHR no longer provides statewide monitoring of the former representative payee program, as of November 2005. This program service area is only offered within certain local jurisdictions. The DHR's assistant attorney general's office will continue to provide legal advice and consultation to representative payee program advisory boards, upon request.
4. Training of family members about the role and responsibility of guardianship.
5. Technical assistance to family members who agree to serve as guardians, particularly with regard to court-mandated reporting procedures.
6. A volunteer program that would provide a pool of college students who could serve as friendly visitors, or act as public guardian ombudsmen.
7. Find ways to use Medicaid funding for public guardianship costs.
8. Use of social service/social work interns to assist in provision of services to older incapacitated persons.
9. Encourage judges to specialize in public guardianship cases.

Threats

1. Budgetary constraints.
2. Persons in LTC facilities have no one monitoring major decisions (*e.g.*, Medicare Part D, and which program to select).
3. Hospital and nursing home interpretations of Health Insurance Portability and Accountability (HIPAA) requirements make the job of the public guardian difficult.
4. Physical location results in cross-jurisdictional issues; Maryland is in close proximity to Washington, D.C., and public guardians have encountered difficulty getting Maryland court orders recognized in hospitals in the district.
5. The expected doubling of need in the MDoA program due to Baby Boomers.

Assessment of Then and Now

During the site visit in 1979, it was not unusual for the court to assign guardian of the property responsibility to the public guardian. This has changed, and, at this time the guardian of the property in the state of Maryland is usually an attorney. The APGP, due to its location within DHR, is a conflict of interest model. The public guardianship role of the MDoA may still be thought of as minimizing the extent of conflict of interest, in that services are provided by DHR. However, of significant concern are those instances where the LTC ombudsman is serving a dual role: that of LTC ombudsman, as well as the guardianship program manager. The latter is, in effect the provider of services, thus setting up a significant conflict of interest. An incapacitated person residing in an LTC facility, who might normally seek redress through the LTC ombudsman, is in an untenable situation.

These recommendations for the Maryland Adult Public Guardianship Program are offered:

1. Coordination and communication between provision agencies and public guardian needs to be strengthened.
2. Caseloads are far too high.
3. Attorneys serving as guardian of the property, but also serving as attorney for hospitals and nursing homes in which the incapacitated persons live, are filing petitions for guardianship. This dual role is a conflict of interest.
4. Funding should be provided for training, particularly in the community.
5. In some cases the LTC ombudsman also serves as guardianship manager (thus, effectively serving as both advocate and guardian).
6. Use of temporary or limited guardianships to address specific issues should be increased.
7. Unmet need in nursing homes (residents are increasingly incapacitated, and unable to make decisions, but no public guardian is appointed).

8. Adult cases should have the same priority as child welfare cases.
9. Lack of attorneys within MDoA to provide services during court hearings to determine capacity. The DHR has contracted attorneys that represent indigent adults and children under CINA cases through MLSP. These contracted attorneys are listed through the court system and are monitored yearly by MLSP staff. The DHR assistant attorney general's attorneys do represent the LDSS, staff, and court-appointed wards in complex guardianship cases, as needed.
10. Budgetary constraints.
11. The public guardian is situated within a social service provision agency.
12. Court reporting mechanisms should be streamlined.
13. Mechanisms should be in place so that guardians of the property (attorneys) are in adequate contact with guardians of the person.
14. Elder law attorneys need more education regarding public guardianship.
15. The office should prepare for the burgeoning developmentally disabled adult population that is aging.
16. The office should provide easily retrievable and accessible uniform statewide data collection, including incapacitated person characteristics, diagnoses, and living arrangements.

Maricopa County, Arizona, Office of the Public Fiduciary

The Maricopa County Office of the Public Fiduciary in Phoenix, Arizona, was visited in January of 2006. Richard T. Vanderheiden, J.D., had served as the head of the Office of the Public Fiduciary (the term used for public guardian and public administrator in Arizona) since 1991. The office has enjoyed a stable administration with many staff members who have served for long periods of time, some since the inception of the public fiduciary in 1975. However, as explained in greater detail below, although the office had amassed 624 years of fiduciary experience among 33 Maricopa County Public Fiduciary associates, with 27% having worked there for over 20 years, 64% of the associates were planning to retire by 2010.

Statutory Authorization

An Office of the Public Fiduciary is located in all counties in Arizona. The office was established statutorily in 1975, and is authorized by Arizona law at Ariz. Rev. Stat. §§14-5601 through 14-5606. Per statute, the public fiduciary is appointed by the county board of supervisors and authorized to hire staff to carry out the duties of the office.

In 1995, in response to perceptions of widespread abuses within the guardianship system, the Arizona Supreme Court enacted administrative rules requiring certification of all public and private fiduciaries deriving payment for services. Contemporaneous with enactment of these certification requirements was the establishment of the Fiduciary Certification Program, which is under the auspices of the Arizona Supreme Court's Administrative Offices of the Court. The Fiduciary Certification Program provides education, certification, and discipline for public and private fiduciaries in Arizona. A state organization of fiduciaries, both public and private, is able to meet and discuss subjects of mutual interest.

In the offices of the public fiduciary, certification of both the public fiduciary and his or her staff members are required. Staff members are certified individually, and the office is also certified as an entity.

Litigation

Though not in the recent past, *Arnold v. Sarn* (1985) was a major class action lawsuit against the state of Arizona and Maricopa County. The county was originally named as the defendant, and Sarn was, at the time, director of the Department of Health Services. The case addressed the performance of seriously mentally ill providers with whom the public fiduciary was involved due to its service as guardian for incapacitated per-

sons under court ordered treatment. Charles Arnold, plaintiff, and the head of the Office of the Public Fiduciary, believed that his fiduciary responsibility exceeded his employment responsibility, and so he filed a class action lawsuit and was fired the very next day. He was reinstated by the court because of its finding that a guardian cannot be fired. The county can fire an employee, but only the court can remove a guardian. The case is ongoing.

Organization and History

The public fiduciary office in Maricopa County is not housed with any other department. It operates as an independent county office with its own budget within Maricopa County government. Pursuant to state statute, there is a priority list established of those persons eligible for appointment as guardian and/or conservator for persons. When no one else is qualified or otherwise able to serve, the Maricopa County Public Fiduciary (MCPF) is appointed by the court. The MCPF also administers decedent estates and is responsible for the county indigent burial program.

Mental Health Powers

If a person in the state of Arizona is a guardian and is also granted mental health powers through Title 14, then the guardian is authorized to sign an incapacitated person into a level one secured mental health facility (inpatient authority) without going through the civil commitment process. Without that authority, a guardian must seek court approval for civil commitment through Arizona's title 36 regarding civil commitment.

Title 14 mental health powers are renewed on a yearly basis. Mental health powers are obtained through a lengthy court process (approximately 45-60 days), during which the proposed incapacitated person has court-ordered representation and a hearing with notice. Alternately, the title 36 civil commitment process is more compressed (approximately seven days). During that time period, the person is given notice and an attorney, but in nearly every case, that person is also confined to hospital. In fact, the Maricopa County Mental Health Court is physically located in the hospital.

In some cases, a guardian may want both title 36 civil commitment authority and title 14 mental health powers. Such power moves the incapacitated person up on a level of priority for a bed at a state hospital. Thus, if there is dual Court Ordered Treatment (COT), both court ordered treatment and the authority of a guardianship with mental health powers exist. Sometimes having the mental health powers along with the guardianship creates tension between the public fiduciary and the county's regional behavioral health agency (RBHA). The tension occurs when the RBHA's treatment team determination of what is best for the incapacitated person and the public fiduciary's best interest determination diverge. When the differences are unresolved, the two go to court to determine whose decision prevails. One commentator perceives that "Our population of seriously mentally ill is enormous relative to many other states. [I]t's also a battle of funding, and it becomes a tug of war sometimes between a treatment provider or coordinator and the guardian, with or without the mental health powers."

Application of 1981 Criteria

Adequate Funding and Staffing

The requirements for a full-time equivalent paid professional staff member, who makes binding decisions for incapacitated persons, were a bachelor's degree and three years' experience. With 36 full-time equivalent staff, the office contained guardian administrators, estate administrators, estate analysts, division managers, and in-house legal coordination. There were 18 certified fiduciaries in the office; they are required to have 20 hours of mandatory fiduciary education every two years. A guardian administrator staffs each case and is expected to become knowledgeable about the incapacitated person's unique condition and needs. Periodically, staff members are also provided with in-service training, often using outside speakers. There had been no

increase in staff in the past 15 years. The MCPF reported that, because they were a state mandated and county funded organization, there were no threats to their funding, but alternately, because the MCPF is an appointed county office (as opposed to elected), securing adequate funding is difficult.

The average caseload was approximately 65 incapacitated persons per guardian administrator. In FY 2003, the cumulative total of incapacitated persons served by the public fiduciary was 550, with approximately 100 incapacitated persons accepted into the program for that year. For approximately half of these persons, the public fiduciary served as guardian of the person only. For around 20 cases, the program had limited authority over the person and for about 15, limited guardian of the property. The majority of the program's referrals came from probate court.

On average, a full-time equivalent paid professional staff member spent 25 hours per year working on the case of a single incapacitated person. The program provides services other than public guardianship, including serving as conservator, representative payee, and personal representative of decedent's estates. Half of the clients of the public fiduciary were persons with incomes under \$20,000 and who had mental illness. Most were non-Hispanic. For FY 2003, about 20 incapacitated persons were restored to partial or full legal capacity.

In the near future, the Maricopa public fiduciary was going to experience significant staff attrition. One of the strategic goals of the program was to develop a *Succession Management Plan*. Information from a succession survey completed in April 2005 revealed that although the office had amassed 624 years of fiduciary experience among 33 MCPF associates and of that group, 401 years of fiduciary experience directly with the MCPF office, 64% planned to retire in five years' time, and 30% were currently eligible for full state retirement benefits. The MCPF estimated that there could be as few as six current associates, or 10% of the current workforce, remaining in 2010. As confirmation of that information, 15% of the staff had retired since the April 2005 survey.

To implement the management plan referred to earlier, staff members were asked to determine the core competencies and behavior traits they regarded as necessary to serve as a guardian or estate administrator. The top ranked in three categories were the following: knowledge (tax laws, investment management, banking); skills (negotiation, drafting legal documents, investment skills); and behavioral traits (forward thinking, compassion, perseverance).

Collection of Fees for Services. The MCPF has the authority to collect fiduciary fees approved by the court that amount to about \$850,000 per annum. The fees include guardianship, conservatorship, and probate services. Fees that are collected are deposited directly with the Maricopa County treasurer.

Structure and Function

Conflict of Interest—Ability to Petition. The MCPF petitions for legal incapacity and petitions for appointment of itself as guardian. In FY 2003, the public fiduciary reported petitioning for adjudication of legal incapacity 105 times and petitioning for appointment of itself as guardian 105 times. The county attorney's office represents the office in appointment hearings, although the public fiduciary prepares or coordinates 90% of the legal pleadings.

When queried on the problem of conflict of interest, most people interviewed did not see one. However, one commentator remarked that a real conflict comes in when the court orders that the public fiduciary must file the petition and the public fiduciary is in objection with the need for a guardian/conservator. For example, the court has a court investigator who investigates the need for a guardian and informs the court as to who should be a guardian. The public fiduciary can, in such instances, file a report saying they object but, if an individual needs a guardian, and there is no one else, the public fiduciary is by statute guardian of last resort and is appointed the guardianship.

The public fiduciary office stated that, even if ordered by the court to petition, if the office determines at the evidentiary hearing that a demonstrated need for a guardian does not exist, they argue against their own petition. "It is a continual education process to keep the court, attorneys, and social services agencies informed about alternatives to guardianship."

Incapacitated Persons

In March 2004, the MCPF reported serving 575 incapacitated persons. Approximately 100 new wards were accepted into the program in the previous fiscal year. The annual budget for the program was \$1.8 million. The estimated cost per year per incapacitated person was \$1,850. The public fiduciary suggested that the program might end up costing the county, as the public fiduciary is likely to advocate for appropriate services, which may be more expensive than the generally minimal services the incapacitated persons receive prior to appointment. Referral of incapacitated persons to the program came predominantly through the probate court, followed by a private attorney, a mental health facility, nursing home, or family. The program tended to serve as only guardian of the person in most of its cases, and only guardian of the property, and both of the person and property, in equal amounts. The program also served as limited guardian of the person and limited guardian of the property for fewer than 20 incapacitated persons respectively. While the program did not provide the gender breakdown of its incapacitated persons, the majority of its incapacitated person population were persons with mental illness, of low income (less than \$20,000), and non-Hispanic. In FY 2003, 12 people were restored to legal capacity and eight were restored to partial legal capacity. Fifteen were transferred to a private guardian. All incapacitated persons are visited quarterly or more often if needed. Approximately 80% of the incapacitated persons are impoverished, although approximately 60% of the conservatorship clients had real property, which is their most significant asset.

Only one incapacitated person, a male, who lived at an assisted living facility, was interviewed. The ward was 46 years old at the time of interview, and received Social Security disability and Veterans' benefits. He was diagnosed as bipolar, manic, and schizoaffective. Before living in the assisted living facility, where he had resided for the past five years, he resided in a state hospital. Before the state hospital, he resided in jail for six months for three to four felony convictions related to damaging property. He was under the care of the public fiduciary since he was 18 years of age. The public fiduciary had mental health powers along with the guardianship.

The incapacitated person smoked, and his health was not good, attributable to his smoking. He took his own medications with staff supervision. He enjoyed reading the newspaper, especially sports news. He enjoyed going to the library. He reported that he liked his guardian and that she makes sure he receives his monthly checks (*e.g.*, cable, incidentals, groceries). He stated that he needed his guardian. He believed that she knew him well, that she made good decisions for him, and that, without her, he would be in a state institution or in jail.

Adequacy of Criteria and Procedures

Records kept for each incapacitated person included the following:

1. Functional assessment, updated quarterly.
2. Care plans, updated quarterly.
3. Time logs for each incapacitated person.
4. Values histories (one of the rare instances).
5. Advance directives.
6. Periodic reports to the courts, and annual reports of guardian to the court.
7. Documentation of the rationale for why and how decisions are made on behalf of each incapacitated person.

Documentation is reviewed on an ongoing basis, and decisions are discussed and reviewed with a guardian administration manager. Statistics are kept on filing timelines of required reports, and the requirements are part of the strategic plan for the department. Managers at monthly fiduciary committee meetings conduct an annual review of cases. The office uses the Computrust computer system for accounting purposes and case management. The office had their internal IT person create an online accounting review process.

Several different staff members audit cases. One person enters the assets into the computer, several people do the accounting, and an accounting review sheet is sent to the guardian administrator and estate administrators approximately three months prior to when the accounting is due for filing with the court.

Decision Making. The office uses a substituted judgment standard when such information can be obtained and a best interest standard if not. The office has a formal policy related to do-not-resuscitate and end-of-life decisions. The office is able to authorize removal of support systems (e.g., breathing machines, medications), as well as withholding of nutrition and hydration. If the incapacitated person made advance directives when competent, the public fiduciary follows the guidelines and requirements of that document.

Internal Issues for the Program

The office reported that they do not have a formal relationship established with other entities. However, they regularly network with APS, Veteran's Services, the attorney general, and the Alternatives to Guardianship Program.

The Alternatives to Guardianship Program, a program unique to the area, meets once a month and includes members from APS, the public fiduciary, VA's fiduciary, detectives working with the geriatric population, attorneys for the VA, social services for the VA, the attorney general's office, the LTC ombudsman, and an attorney for APS. The group has worked together for seven years. They triage cases and work on systems issues. The group produced a surrogate identification worksheet that they were trying to get into hospitals, nursing homes, and assisted living facilities that identify the health care surrogate for those who did not have a power of attorney. The worksheet helps identify people who can make decisions, thus ensuring that persons receive the care they need as quickly and efficiently as possible. The head of that group thought that there was little unmet need for guardians, rather that the investigation for someone to serve was often not as thorough as necessary.

Relationship with APS. One of the persons interviewed thought all that was needed to make the public fiduciary take a case was to locate a petitioner, often the attorney general. This person considered the reason that APS would seek guardianship is self-neglect. The person stated that the wait period for the public fiduciary is too long—six months or longer. One interviewee believes the office needs more than one investigator and more than one person making decisions about acceptance. "My experience with the public fiduciary was they will probably end up being placed, and that is a sad commentary." The interviewee suggested that it was easier for the public fiduciary to take care of someone in the facility than to care for him or her in his or her own home. Another suggestion was to formalize the relationship with APS through memorandums of understanding, particularly related to referrals and time frames.

Outside Assessments of the Office

Most persons interviewed outside the office felt that once the public fiduciary was involved they did a good job. Many expressed that the county board of supervisors should hire more people for the office. Some commentators suggested reconfiguring the office as an independent office outside the county or establishing a statewide system. Some commentators stated that a conflict of interest existed within the county system, since the county system was also providing human and mental health services to the incapacitated persons, as well as guardianship services. Several interviewees remarked that they would like to see the office take more cases, but they also understood that funding for the office was a problem.

Notable Features of the Office

- (A) The public fiduciary has a wealth of institutional knowledge in the people who have worked with the offices for many years.
- (B) The mental health powers afforded to the public fiduciary may stem the numbers of persons who become involuntarily civilly committed and help secure priorities in the mental health system in the county. The mental health powers may keep incapacitated persons out of the penal system.
- (C) The office assists the probate court in investigating cases.
- (D) Having an attorney who heads the office efficiently and expeditiously helps resolve legal problems and issues.

- (E) The public fiduciary provides information for private guardians and the fiduciary profession at www.maricopa.gov/pubfid/default.asp.

Concluding Assessment

Strengths

1. Highly experienced and dedicated staff.
2. Public fiduciaries are certified by the state.
3. Low staff turnover.

Weaknesses

1. Funding is inadequate.
2. The court does not adequately understand the role of the public fiduciary as last resort only, and the limits as to numbers of clients it can adequately take on.
3. The public fiduciary does not have similar systems across the state, which allows for uneven offices. The site visits were conducted only in the two most populous areas. There were generally fewer resources reported in the rural counties.
4. The public fiduciary was often directed to petition for cases, as opposed to writing a report regarding whether it was appropriate to serve.

Opportunities

1. Strengthening the relationship with APS.
2. Educating the service community on what the public fiduciary can and cannot do.
3. Developing a public relations plan.

Threats

1. Apparent underfunding of the office.
2. Over-regulation of the program by the administrative offices of the courts.
3. Dumping of unnecessary cases by the probate court onto the public fiduciary.
4. Increased caseloads and complexity of cases.
5. Lack of awareness by many commentators in various service sectors of the rising and unmet need of persons needing services of the public fiduciary.

Assessment of Then and Now

The research team of the 1970s decided to study the public fiduciary in Maricopa County because it understood that a well-developed program existed there. At that time, as today, the office was headed by attorneys and was funded by county funds and by funds generated by incapacitated person's estates. The same is still true today.

What is different is that the programs and the staff are licensed, something that was not present in the 1970s, but something that the Maricopa office regards as positive in that it increases the cumulative knowledge in the office. The major referral source had also changed from the county health department to the probate court. Relationships with APS were present, but referrals were far fewer in number from APS than other sources. The total caseload of the office had not changed appreciably in over 25 years, although the type of incapacitated persons and their problems clearly had. Some problems of the office were similar—some agencies and commentators thought the office was slow to respond to some referrals.

Although over 25 years ago a citizen board was recommended to help with agency policy, this was not mentioned at the site visit, with the exception of one external interviewee. What seemed different was a group of people who were questioning the administrative location of the office—that it should be an independent state-funded office not in a conflict of interest situation in a county that both provided guardianship services and provided other services for the incapacitated persons.

These final observations are made regarding the Maricopa County Office of the Public Fiduciary:

1. The office can petition for its own incapacitated persons, which creates the potential for self-aggrandizement.
2. The office does have computerized information and the office has created an informational Web site. However, some basic data appeared too difficult to produce. The office should institute a system whereby more data, more easily retrievable, are collected on each ward, on the program in general, and on a statewide basis.
3. The unmet need for guardians for incapacitated persons is not well understood. The office should educate various service sectors and the state bar regarding this rising and unmet need for public guardians.
4. The level of professionalism in this office was impressive. As the office identified, the potential for huge staff turnover due to retirements poses a clear threat to office functioning. The office is applauded for developing a succession management plan.
5. A strength of the office is its leadership by a person who is an attorney.
6. Having an investigator for the Office of the Public Fiduciary helps the office screen cases and provide for early intervention when incapacitated persons are appointed.
7. Staff-to-client ratios remain too high.
8. The office, despite its many positive features, is underfunded and is subject to pressures to accept clients that it cannot serve adequately. Staff-to-incapacitated person ratios (1:20) should be added to the public guardianship statute.
9. More states should adopt mental health powers in tandem with the authority granted to public guardians.

The Pima County, Arizona, Office of the Public Fiduciary

The Pima County Office of the Public Fiduciary in Tucson, Arizona, was visited in February 2006. Anita Royal, M.S.W., J.D., has served as the head of the Office of the Public Fiduciary (the term used for public guardian in Arizona) since 1991. Like Maricopa County, the Pima office has enjoyed a stable administration, with many staff members who have served for long periods of time—some since the inception of the office in 1975. Ms. Royal is fortunate to follow highly prominent elder law attorneys who were her predecessors in office. One of them, Alan Bogutz, served as the second head of the Pima County Office of the Public Fiduciary and was interviewed in 1979 for Schmidt's first study. Fortunately, Mr. Bogutz was available for another interview in 2006. Since the inception of the office, a licensed attorney has always held the position of Pima County Public Fiduciary.

Statutory Authorization

Like Maricopa County, the office was established statutorily in 1975 under Ariz. Code Rev. Stat. §14-5601. By statute, the public fiduciary is mandated to provide court-ordered guardianship, conservatorship, and probate services to county residents. Each county must ensure funding of the Office of the Public Fiduciary. The staff and the office are certified by the Fiduciary Certification Program, which operates through the Arizona Supreme Court's Administrative Offices of the Court.

Recent Litigation

None reported.

Organization and History

The Pima County Public Fiduciary (PCPF) is one of 26 departments under the Pima County Board of Supervisors. The PCPF is appointed by the board of supervisors and serves at its will. The PCPF provides comprehensive, full-service fiduciary services to residents of Pima County in need and who qualify. Specifically, the office investigates community referrals; petitions for court appointment (where appropriate); case manages incapacitated persons using substituted judgment or best interest standards; ensures that the incapacitated persons receive all entitlements and benefits for which they are qualified; inventories, manages, stores, and disposes of and accounts for all real property and personalty; manages all financial assets of its clients and decedent estates; administers an indigent burial program and coordinates funeral arrangements for incapacitated persons; and probates estates. In discharging its statutory duties, the PCPF is guided by the Arizona Fiduciary Certification Program, standards of the National Guardianship Association, its own internal procedures, and prudent practices. The director, Ms. Royal, is hired by the Pima County Board of Supervisors. Ms. Royal provides supervision and oversight of the office and maintains primary responsibility for departmental risk management.

Application of 1981 Criteria

Adequate Funding and Staffing

The PCPF annually receives a general fund allocation from the Pima County Board of Supervisors. The general fund allocation is supplemented by fee revenue generation by the PCPF (\$430,000 in FY 2003). For FY 2004, the PCPF received a general fund allocation of approximately \$1.435 million. The office does not receive funds from private, state, or federal sources. The state auditor general audits the PCPF office annually. The county does a quasi financial audit, conducting internal audits of cash and accounts.

Requirements for a full-time equivalent paid professional staff member who makes binding decisions for incapacitated persons included a bachelor's degree, and the experience requirement was approximately two years. There were 37 full-time equivalent paid professional staff during FY 2003/04, 24 of which provided "professional" service delivery. Caseload information requested was not been compiled for us due to staff involvement in other essential tasks and because the computer program used by the PCPF could not generate such information accurately or easily. It was confirmed to us much later that caseloads were between 60 to 65 incapacitated persons per case manager.

Ms. Royal indicated that she managed a fairly independent staff and that it was essential that persons in positions such as hers learn how to manage professionals. She reported that she possesses some independence and autonomy in managing clients and their assets, but is accountable at all times to both the Pima County Administrator and the board of supervisors for all funds under her control, including general funds allocations. She reported, like other similarly situated governmental managers, she does not possess absolute authority to hire, compensate, promote, and/or terminate subordinate employees because she is subject to Pima County Human Resources policies and procedures.

Ms. Royal was emphatic that the demands of the office had changed and that it was very important to have legal expertise in the office. "Years ago I would have said that a social worker could have this job. I think because it has changed so over the course of the last decade, you almost have to have a lawyer." She reportedly was the only licensed attorney in the public fiduciary system in Arizona. Since the site visit and the writing of this report, another licensed practicing attorney was hired as the Pima County Public Fiduciary.

One staff member reported carrying a caseload of 70 clients, which he reported was down from 120 incapacitated persons when the office also provided representative payee services. Staff members carry mixed caseloads, but Ms. Royal was considering switching to a specialized approach. She remarked, "I found it very

intellectually dishonest for me to ask case managers to make medical decisions. Even though they have the support and input from the medical community, I still find that to be dishonest I believe that there are people who appreciate populations better than others and work well with that population—do I think they should predominately have that population? Probably not.”

Ms. Royal stated that the office maintains a pooled checking account from which incapacitated persons’ monthly bills are paid. Excess funds are placed in interest bearing tools. For short-term investments, the office utilizes money market accounts and CDs; for long-term investments, it retains services of at least two brokerage firms to invest and monitor clients’ investments. Interest accrued on short- and long-term investments are credited to each incapacitated persons account—none of this interest is forfeited or used by the PCPF. While these client funds are maintained in a pooled account, the office manages individual accounts for each client at no cost to his/her estate. The pooled checking account accrues earned interest credits which offset monthly bank charges that typically would be assessed for each client’s account. Earned interest credits are utilized for monthly maintenance fees for office accounting and asset management software products.

Collection of Fees for Services. The PCPF has the authority to collect a fee approved by the court, and in FY 2003 generated \$430,000 in fee revenues.

Structure and Function

Conflict of Interest—Ability to Petition. The PCPF petitions for legal incapacity and petitions for appointment of itself as guardian. Court appearances are handled by attorneys in-house. Only in extraordinary cases does Ms. Royal testify in court or handle litigation.

Some commentators discussed a conflict between a limited mental health guardian and agencies. While any guardian has a duty to pursue rehabilitation of an incapacitated person, the guardian is placed in the position of watchfulness such that once the public fiduciary gets the incapacitated person through the mental health process, then the incapacitated person is checked on, and if he or she moves out of placement or stops taking medication, then he or she is put back in the mental health system and under closer supervision. Thus, the guardian serves in two and conflicting roles—with the “carrot” of advocating and promoting the freedoms of the incapacitated person, but also with the “stick” of severely constricting them if the incapacitated person does not comply. The court is the gatekeeper but not necessarily a supervisor of the guardian’s actions. However, when these conflicts occur, the PCPF routinely petitions the probate court for guidance on how to proceed. Moreover, in some cases, court appointed counsel remains involved in the case and provides advocacy for the incapacitated persons.

Pursuant to applicable Arizona statutes governing priority of appointment, public fiduciaries are deemed “entities of last resort.” As such, when investigating community referrals, the PCPF is mandated to locate qualified persons with statutory priority to serve in a fiduciary capacity before seeking its own appointment. Due to a statutory mandate the PCPF must also investigate all reasonable “least restrictive alternatives” to the appointment of a fiduciary. Absent a person or entity with priority or a less restrictive alternative plan, the PCPF does petition for its appointment in appropriate cases. Said one judge on the conflict of interest issue,

What I have done is appoint the PCPF as limited mental health [guardian]—a limited guardian for persons with medical consent and which doesn’t take on placement issues. So I am saying this—typically, the public fiduciary is not out there trying to get business—they are out there—their funding just doesn’t [allow aggrandizement]—I don’t see a conflict of interest there.

Incapacitated Persons

Ms. Royal said that the program, which utilizes an accounting and case management software system Computrust, keeps data gathered upon intake, including referral source, incapacitated person demographics, and type of guardianship or conservatorship. However, she indicated that retrieval of information was cumbersome and at times, inaccurate. Ms. Royal estimated that 90% of the persons who received guardianship services were indigent. Seven persons served by the program had died during FY 2003. Typical guardianship

clients included elderly persons with dementia, who lacked familial involvement or support, and men with mental illness in their late 30s to mid 40s who had problems with substance abuse. The office also provided fiduciary services to developmentally disabled adults.

Three incapacitated persons served by the PCPF were interviewed. The first was a female who was 36 years old and had the public fiduciary as guardian since she was 18 years of age. She needed help staying on her medications and admitted that she made “wrong” decisions sometimes. One of her bad decisions included setting fires and damaging vehicles, which resulted in arrests and jail time, then time in a state hospital. The woman said she was taking a variety of medications. She said that she felt good about her health. She stated that she had two case managers and a guardian. She said that the public fiduciary, who was with her for 10 years, was “there when she needed them.” However, she also said that she would rather not have a guardian at all and that sometimes her telephone calls were not returned.

The second incapacitated person interviewed was a male. He was an older gentleman, who said that he was pleased with his guardian, whom he said was with him a long time. He said that his guardian was “very competent and very helpful and very pleasant to work with.” He reportedly served time in the Air Force but was forced to leave because he was color blind. He said that he enjoyed reading during the day, especially history.

The third incapacitated person interviewed was a 73-year-old male. He had experienced problems with alcohol, drugs, and exploitation. He had experienced other health problems also. He did not think that conservatorship was good for him, as he had restrictions on spending money, but he also acknowledged that he was not going hungry. At one point in his life he was a government employee.

According to Ms. Royal and the case manager, incapacitated persons are far more dangerous than they were earlier in the life of the program. Some incapacitated persons carry weapons and are aggressive. Some younger clients are violent. Incapacitated persons are more frequently using illicit drugs, such as crack cocaine and methamphetamines. Also, persons preying on the incapacitated persons are more dangerous than 20 years ago. Persons more openly exploit older adults and are criminals themselves, sometimes exploiting the older adult for money or drugs. The office seeks law enforcement assistance when warranted to protect its clients and/or their estates against dangerous and unscrupulous elements.

Said Ms. Royal,

Also what is dangerous is when we take people’s rights away and citizenship away, because we are getting more and more callous about the needs of the vulnerable population that we serve. I think that this population is in danger. But, see, you really have to look at what we are doing to these people—we take their personage away—we take all their legal rights away from them—we take their sense of being citizens away from them, we control whether they drive or vote, the talk and walk and the pain that I see is that people are not particularly incapacitated in all facets of their lives. They are functionally incapacitated in areas of their lives, and what we do is we may turn them into, what I call, legal zombies. Once they become legal zombies, what happens is they have no value to society and they become these people other people prey on and exploit, and that to me is the biggest thing that is a threat.

Adequacy of Criteria and Procedures

Records were kept for each incapacitated person included the following:

1. Functional assessment, updated quarterly.
2. Care plans.
3. Time logs or record keeping logs for each incapacitated person.
4. Values histories (one of the rare instances).
5. Advance directives (if executed).
6. Annual reports to the courts.
7. Periodic program review of the incapacitated person, both ongoing informally and annually as part of the annual report.

8. Documentation of the rationale for why and how decisions are made on behalf of each incapacitated person.

Staffings are held on a quarterly basis and more frequently as needed. They consist of information provided by a representative from each unit working in the office involved with a case. Each case is reviewed quarterly and as needed. Case managers can only approve personal needs monies of \$65 to \$75. Approval of greater sums of cash requires Ms. Royal's approval. There are two signators on accounts.

Decision Making. The office uses a substituted judgment standard when such information is available, and a best interest standard otherwise. The office has authority to approve DNRs (do not resuscitate orders). Ms. Royal is typically the individual who makes end-of-life decisions, although she indicated that the office will frequently go to court and ask for instruction in areas that seem troublesome or where there is a competing interest.

Internal Issues for the Program

The office reported working with such entities as the long-term care system, DDD, the courts, Social Security, Access (Medicaid), the mental health community, Community Partners of Southern Arizona, Jewish Family Services, Catholic Charities, VOCA, and the office of the attorney general. The PCPF reported trying to use every resource available.

Relationship with APS. Adult Protective Services staff members perceived that a healthy relationship existed with the PCPF and that they referred cases to each other and shared information. An estimated 10% of cases ended up with the public fiduciary annually. Occasionally APS petitions for guardianship by using the office of the attorney general as a last resort. Adult Protective Services reported that very few persons already in placement were accepted by the public fiduciary. Interns of the public fiduciary shadow Adult Protective Services staff when they begin. The APS cases close once the public fiduciary is appointed. Adult Protective Services staff members commended the especially fine work of the public fiduciary investigators and that they maintained an excellent relationship with them. They remarked that they become frustrated when cases were not accepted, which was frequent, and they believed due to the need for fee generation. Said one interviewee, "...if the person doesn't have resources, that often will not be a person they [public fiduciary] will accept." One frequent question of the investigators seems to be, "What is there to conserve?"

Adult Protective Services reported that a couple of times a year the public fiduciary freezes case acceptance when the office gets to the point at which they feel they cannot manage the work with the staff and resources that they have. That situation is communicated to APS staff.

Outside Assessments of the office

As in the other states, stakeholders from many professions outside the office of the PCPF were interviewed and asked to comment on its performance. Most people interviewed felt that once the public fiduciary became involved it did a good job, especially with the lack of resources the county gives the office. The professionalism of the PCPF staff was regarded as one of its outstanding features.

Many commentators believed that resources for the office were limited in relation to the population it served and the county had an unmet need that was exploding. Some persons interviewed said that the public fiduciary did not want to do much outreach, because that would increase client numbers.

Interview with Mr. Bogutz

Allan Bogutz, the second head of the office of the PCPF, was interviewed during the study over 25 years ago. It was fortunate to interview him again, as his "long view" of the office afforded an important commentary on changes of the office over time. Mr. Bogutz thinks that a strength of the office is committed staff and its careful oversight by the courts.

He stressed that over time, the program had become increasingly institutionalized. With each new public fiduciary, there was an “enthusiasm of creation.” Mr. Bogutz suggested term limits for the PCPF, perhaps similar to the management rule in the Peace Corps, in which volunteers, as well as key staff, are limited to a tenure of five years, what he characterized as an “inspired number.” “In that five years, people figure you spend the first year getting the lay of the land and getting an assessment of what is going on. In the second year you start to develop a plan, the third and fourth you implement and refine that plan, the fifth you sit back, enjoy and maybe do a little tweaking. The sixth year you start to coast.” He supported that notion by saying that in Canada the public trustee has a six-year limited term, with one possible re-appointment. He emphasized that it is consistent with civil service, also, but is perhaps not a political reality.

Mr. Bogutz addressed the fee-generating ability of the program, stressing that he would not eliminate it. He stated that he believed that there was no reason that the government should provide free services to people who could afford to pay for them. He thought that the program was not established as a program for indigent people, but to make it a program for those with no one willing and qualified to serve. He suggested greater aggressiveness by the court in weeding out the fee-generating cases in which a private attorney is willing to serve and the maintenance of a referral file of those professionals willing to take such cases. He emphasized that the fee feature should not be used as a measure of the success of the office.

Mr. Bogutz said that the public fiduciary stands in the unique position of a public advocate. He stated that a number of systemic issues face incapacitated persons, including complications of eligibility for Medicaid benefits or quality of care in nursing homes. He analogized the public fiduciary to legal reform units in legal aid offices in the U.S. in the 1970s, and said that the public fiduciary was the ideal entity to take on such work for this group of people. He used the example of the public trustee in British Columbia, who recently settled an action for women with developmental disabilities who were sterilized in the 1970s and who received damage settlements for them, as well as changed policy so that it would not happen again. He stressed that a private practitioner would not bring such cases, but a guardian with several hundred incapacitated persons would bring such cases, and that a public official in such a position should look for such issues.

Finally, he suggested that every public fiduciary office in every jurisdiction should generate an annual report that sets forth: the number of cases; types of cases; activities in which the office is engaged in terms of making the incapacitated person’s situation better; how the office is involved in advocacy, litigation, legislation, and local rulemaking; caseload characteristics and statistics; fees generated; and adequacy of fiscal support. He remarked that such information should be sent to the presiding judge, the chief justice of the Supreme Court, the county board of supervisors, and the state bar association. “If you had to really account for what you are doing, and you had to put out what the achievements were, what the failures were, you will be a whole lot more attentive during the course of the year as to what it is you are doing.” He went further to suggest requiring this information through the courts as part of the court’s rulemaking authority.

Mr. Bogutz spoke about the unmet need for guardians, saying,

But what is happening as the Boomers turn 60 at the rate of 7,000 a day. [We are] Completely unprepared in all levels for that—the Baby Boomers will be geographically distant from their families They are, as much as they look like they are driving BMWs, they are owned by the bank—the average retirement plan is less than \$10,000 in value for the Boomers—85% of women over 60, according to AARP, have to work until they are 74. And so what is public guardianship across the county going to be doing to meet that need other than standing back and saying “We will put you on a waiting list?”

He stressed that with society becoming more and more geographically isolated, the public fiduciary needs to fill a greater and greater role.

Notable Features of the Office

- (A) The public fiduciary has a wealth of institutional knowledge in the people who have worked with the offices for many years.

- (B) The role of the court investigator is especially strong in Pima County, and one court investigator recently served as president of the National Guardianship Association.
- (C) The PCPF has had a practicing attorney as head of the office since its inception.

Concluding Assessment

Strengths

1. Highly experienced and dedicated staff.
2. Public fiduciaries are certified by the state.
3. Low staff turnover in a 15-year period.
4. Use of a nurse in the office for medical case management.

Weaknesses

1. Funding is inadequate, while requests for services are steadily increasing.
2. Mentioned in our commentary about Maricopa County, the public fiduciary does not have similar systems across the state, which reduces uniformity for the offices, but allows tailoring to local needs. Site visits were conducted only in the two most populous areas. There were generally fewer resources reported for the rural counties.
3. Staff-to-incapacitated person ratios are too high.
4. Interest from the pooled trust was used to purchase office equipment. (Ms. Royal reports: “earned interest credits accrue to pay for accounting, and case management software, which defrays the cost to each estate. Moreover, due to this arrangement, clients are not subjected to regularly monthly banking service fees. It should be noted that the amount of interest that would accrue to each individual account is *de minimus* and thus, is not construed as an unlawful taking of client property. Finally, since most checking accounts do not accrue interest, overall this arrangement has proven to be extremely cost effective and in the collective best interest of our client population.”)⁸⁰
5. The office lacks an efficient and effective data and asset management system.

Opportunities

1. Continued development of a medical case management model.
2. Expansion of the office to include guardians of minors, but only with adequate staffing and funding. (Ms. Royal notes that such an expansion is not currently statutorily authorized.)
3. Continued use of limited guardianships.
4. Maintenance of national, state, and local collaborations and partnerships to ensure adequate knowledge bases, inspire innovation, and enhance staff development.
5. Secure voting rights for incapacitated persons who are able to do so.
6. Creative approaches to running the office.

80. Cf. Washington Certified Professional Guardian Board Standard of Practice 406.10:

A guardian shall not commingle the funds of an incapacitated person with funds of the guardian or the funds of staff. A guardian may consolidate client accounts, using appropriate accounting software and procedures, including pro-rata assignment of interest earned and fees paid and accurate individual accounting for each client's funds, provided the guardian has received specific authority from the court to do so. Each payment from a consolidated account shall be from funds held in the account on behalf of the individual for whom the payment is made.

See http://www.courts.wa.gov/committee/?fa=committee.child&child_id=30&committee_id=117.

Threats

1. Under funding of the office.
2. Phenomenal growth of older adults in the Pima County area.
3. Fragmentation of the mental health and social service systems.
4. Aging of the public fiduciary workforce.
5. Litigation.

Assessment of Then and Now

Like Maricopa County, the research team of the 1970s studied the office of the public fiduciary in Pima County because of its reputation of having a well-run program with a visionary leader. Since its inception, the office has been headed by an attorney and funded by county funds and that generated by the estates of incapacitated persons.

The inclusion of a court investigator and the overall maturation of the office has increased the efficiency and service of the office, but the caseload numbers are too high, especially when cases are increasingly complex and more dangerous.

These final observations are made regarding the Pima County Office of the Public Fiduciary:

1. The collection of a fee-for-service has become a marker for the effectiveness of the office. Discontinuing the county's requirement of fee generation for the office is recommended. (Ms. Royal states that she totally disagrees "Since only clients who can afford to pay are required to do so subject to court approval.")
2. The PCPF should not use a pooled trust for any purpose other than for the direct benefit of the individual incapacitated person. Use of the interest of the incapacitated person's accounts for purchasing office computers is not using the monies for the direct benefit of the individual incapacitated person. Such needs should be part of a budget request to the county. (However, see Ms. Royal's previous explanation under #4 Weaknesses).
3. The office can petition for its own wards, which creates the potential for self-aggrandizement.
4. The office was unable to produce information on the number of incapacitated persons under its service, and no comparison is possible to the number of incapacitated persons (353) in 1979. The office should prioritize installing a system of easily retrievable data on each incapacitated person and on the program in general. (Ms. Royal says: "This information is readily available, but we were in the midst of a conversion and bank change at the time, so it was not a priority to expend precious staff time to retrieve this information. It should be further noted that monthly reports are generated, which provide an abundance of essential statistical data.")
5. Related to #4 above, the office, at a minimum, should provide an annual report that sets forth the number of cases, types of cases, activities in which the office is engaged in terms of making the incapacitated persons situation better, activities of the office related to advocacy, litigation, legislation, local rulemaking, caseload characteristics and statistics, fees generated, and adequacy of fiscal support. This information should be sent to the presiding judge, the chief justice of the Supreme Court, the county board of supervisors, and the state bar association.
6. The office should explore further its potential for advocacy on behalf of its incapacitated persons.
7. The unmet need appears real and imminent, especially given that interviewees reported that the office had instituted a freeze twice in one year. Ms Royal reported "when resources are overextended and staff are swamped," a freeze on new cases is permitted as a preventative measure and "its duration is typically for only one week at a time.") The explosion of the population of older adults in Pima County and the need for guardians for incapacitated persons is not well understood. The office should educate various service sectors and the state bar regarding this rising and unmet need for public guardians.
8. The level of professionalism in this office is impressive. Present staff members are active at national levels, a circumstance that infuses the office with knowledge of best practices, as well.

9. The long history of excellent heads of the PCPF is impressive. All have left the office and continued distinguished careers as elder law attorneys. More use should be made of their collective wisdom to improve offices of the public guardian at both state and national levels.
10. Departure of some long-time office personnel appears imminent. The office should develop a staffing plan similar to that of the Maricopa County Public Fiduciary.
11. The PCPF needs more funding to meet its current unmet need, as evidenced by having to “freeze” case acceptances twice yearly and by the burgeoning population of older adults.

The San Bernardino County, California, Public Guardian

The San Bernardino County Office of the Public Guardian (SBPG) was undergoing administrative changes when we arrived for our site visit in March 2006. As a result of political realignment in the county, in January 2005, the office was moved from its previous location within the coroner’s office. In the same office the board of supervisors placed the public administrator, the treasurer, and the coroner. The SBPG was moved to the Department of Aging and Adult Services (DAAS). At the time of our visit, the director of that program was also responsible for the area agency on aging adult programs, including in-home supportive services and APS. The public guardian office was physically moving to a different office in Redlands, which increases some travel times for all the deputy public guardians.

The upper level administrator with whom we met was Jane Adams, the deputy director of the Department of Aging and Disability Services. Ms. Adams was transferred from a position in the traditional assistance department six months previously. She brought 20 years of experience working in San Bernardino County and held a master’s degree in business administration.

Ms. Adams explained that the recent structural change was prompted by a need to have greater administrative efficiency. In interviews it was revealed that before the administrative change, the office experienced a budget shortfall of \$300,000. Apparently, the office anticipated receiving an amount of targeted case management funds that were not forthcoming from the federal government. These funds were not necessarily deemed appropriate for the functions that public guardians perform. The office had counted on these as hard monies, but this calculation proved fiscally unwise. At the time of our site visit, the SBPG was undergoing a study to improve office efficiencies, with the issue of TCM funding as an area of particular scrutiny. The office determined not to expend any further efforts pursuing that funding stream. Instead, the office will pursue Medical Administrative Assistance funding.

Statutory Authorization

The SBPG, like the LAPG, is established statutorily under Calif. Govt. Code §274340.

Recent Litigation

Although the SBPG was not the subject of recent litigation, in the 1990s, the neighboring county of Riverside had a scandal involving a private conservator who was taking money from conservatees. Also involved were the conservator’s attorney (both were serving prison sentences) and a judge, who was reportedly funneling cases to her. As a result of the case, all conservators were required to provide more detailed accounting records than were required previously.

Organization and History

Prior to our site visit we sent a survey requesting basic information concerning the office. Unfortunately, very little information was provided, and so our picture of the administrative organization of the office was very sketchy. The office was under the direction of a first-line supervisor, who was leading the office while a

second level manager was out of the office on extended medical leave. The lack of detail about the structure and functioning of the office continued during our visit. We were not provided with exact information about the budget under which the office operated or the number of wards served. Ms. Adams indicated that there were 27 staff persons in the office, including resource management, clerks, and deputies. She said that approximately 500 incapacitated persons were served by the office.

A San Bernadino County court investigator, who holds a law degree and 26 years of experience with the position, investigates new cases. The investigator visits the proposed incapacitated person under Prob. Code §1826 and attempts to obtain medical information on the person's condition. The court investigator serves as the eyes and ears of the court and, upon investigation, submits a report to the judge, generally five days prior to the hearing. The court investigator investigates complaints about conservators that may arise, as well as monitoring existing conservatorship cases. The court investigator regarded approximately half of complaints concerning guardianship cases as bogus. Many of the bogus cases involve relatives who were denied service as conservators.

Lanterman-Petris-Short Conservatorships

The LPS conservatorships, discussed in detail in the LAPG site visit discussed earlier, were by far the most common cases that the SBPG served.

The San Bernardino Department of Behavioral Health (DBH), referred to by Ms. Adams as the “customer of the SBPG,” provides the office with \$1.3 million for such services as assuming control of the incapacitated person's property, care of the person, providing services to support treatment and/or placement, establishing treatment plans (which are supported by DBH) and care assessments, and serving as liaison to state, county, and private agencies. This arrangement was specified in a memorandum of understanding (MOU) between the Public Guardian/Conservator Program and the Department of Behavioral Health.

Some of the DBH conservatorships are authorized dementia powers (discussed below), and some are probate conservatorships, but all are LPS conservatorships. The Department of Behavioral Health prefers public guardianship rather than private guardianship for the persons it serves, due to problems regarding placement. A representative from the department indicated that, with a public guardian, there is no conflict of interest regarding placement, emotional attachment to the client, or managing money. The public guardian manages the finances and allows DBH to make placement decisions, an agreement in the MOU.

Probate Conservatorships

Probate conservatorships comprised a lower number of the incapacitated persons served by the office and were explained in detail in the description for the LAPG.

One streamlining measure that the DBH was considering was to “drop 50 or so probate conservatorships [of persons] who are old and no longer mentally ill or demented.” Some of the DBH staff thought there were persons on the public guardian rolls who did not need their attention. The belief was that the condition of those persons was stable, that nothing clinical was appropriate for them, and that the public guardian rolls were inflated by the care of such individuals. The DBH concluded that there was no real need for services and that there were other cases that warranted the attention of the public guardian rather than the older persons.

We were told that DBH did not serve such persons. Dementia is not an allowable diagnosis under Medical/Medicaid, and so DBH was unable to treat. “Drop,” as best we understood from the interview, meant drop from the public guardian rolls, but what would happen to them—restoration of capacity or location of a family successor—was not explained clearly to us.

Dementia Powers

Dementia powers came into existence in the 1990s as a mechanism to avoid the LPS conservatorship. The LPS conservatorships are initiated by a public authority. Practitioners and the courts recognized that some categories of individuals needed 1) the administration of psychotropic medications, and 2) to place persons in a

secured perimeter facility. Until the establishment of dementia powers, if an individual needed either, an LPS conservatorship was required. Reportedly, restrictions on LPS conservatorships are difficult to administer and require much time and public resources. Thus, the law was amended to allow probate conservators to have those powers if they were warranted medically and to add an additional layer of protection for advocacy. Thus, for petitioners requesting “dementia powers,” it is mandatory for the court to appoint an attorney for the proposed incapacitated person. The petitioning attorney does not typically continue on the case after the conservatorship hearing.

Application of 1981 Criteria

Adequate Funding and Staffing

Requirements for full-time equivalent professional staff were completion of department training and four years of experience, or an A.A. degree plus two years of experience and completion of training, or a bachelor’s degree and completion of department training. The office contained deputies, supervising deputies, and senior deputies. Deputies have a caseload and manage the affairs of the client, or professional/technical work. Less senior deputies work with senior deputies in order to understand the nuances of the job. The average LPS conservatorship caseload was between 55-70 incapacitated persons per staff member. The probate conservatorship ratio was 55:1. One interviewee indicated that “somebody does a good job of weeding out a lot of cases we shouldn’t be getting.” Although the public guardian’s overall numbers were down as compared to past years, public guardian staff thought their clients were more severely mentally ill and were quite often criminals. Also in the mix were persons with alcohol or drug problems. A problem noted for persons in the criminal justice system was that court appearances were problematic—the public guardian did not have caged cars and did not transport. On the probate side of the house, the SBPG quite often had incapacitated persons who are abused either physically or fiscally by their family members. The family members, in turn, became abusive to the public guardians. Often, the incapacitated persons still wanted contact with the family members, but the family members continue to abuse them. Also in probate are clients with developmental disabilities who are put under probate conservatorships because their caregiving mothers are reportedly abusing them. Probate conservatorships are increasingly involving special needs trusts and successor trusteeships.

Staff members thought the office needed more clerical staff—at one time there was a clerk per deputy. Now there was one for every two deputies. There are not enough placement options in the county. Most incapacitated persons live in board and care facilities, but public guardian staff felt that a level of care with higher supervision was needed for many clients. Public guardian staff considered state reimbursement for clients far too low and fewer facilities were in business. No clients of the SBPG were living in their own homes. We were told that if clients are not in facilities, the SBPG does not take them.

Collection of Fees for Services. Like the LAPG, the program has the authority to collect a fee or charge to the ward for services. The court approves a fee schedule with the amount predicated on the size of the incapacitated person’s estate.

Structure and Function

Conflict of Interest—Ability to Petition. Similar to the LAPG, the SBPG petitions for legal incapacity and petitions for appointment of itself as guardian. Unlike the LAPG, we were provided no data on how often that occurred or the exact figures regarding incapacitated persons served. We were unable to discern the exact size of the staff beyond the estimate of Ms. Adams. Staff members came from a variety of backgrounds and educational levels. Several persons had been with the office for over 20 years. There was an investigator for the public guardian on staff who determined, based on the referral coming into the office, whether or not an individual met criteria for a probate conservatorship. This individual also determined assets and if there were any alternatives to the service of the public guardian or conservatorship. Persons with mental health problems were referred to DBH to assess for LPS conservatorship.

Regarding the possible conflict of interest of location in a service-providing agency, public guardian staff indicated that the law lays out how they perform their role and who is appropriate for conservatorship. They thought that if they were not under DAAS, another service providing agency would provide placement, such as the DBH, which would also create conflicts of interest.

Incapacitated Persons

Beyond the estimation of Ms. Adams that the office served around 500 wards, we were not provided any further data. The LPS conservatorships, which tended to concern more male incapacitated persons, were a greater part of the SBPG caseload than were probate conservatorships, which tended to concern more female incapacitated persons.

We were unable to interview incapacitated persons at this site as we customarily did at the others. The county attorney advised the SBPG that the job of the public guardian is to advocate and protect individual incapacitated persons. The county attorney was wary of individuals studying conservatorship and desiring to interview incapacitated persons in particular. An example was the *Los Angeles Times* article that was, according to him, distorted and did not give the full picture of the problem. His concern was that with our study distortion would happen again. Even after we spoke to him personally, his answer remained the same, and so we did not interview any incapacitated persons.

Adequacy of Criteria and Procedures

Although the information we received did not indicate what records were kept for each incapacitated person, we learned that for each public guardianship client:

1. Care plans of a nursing home and those of the DBH were relied upon by the public guardian.
2. There is an internal audit of cases every three months, and there is an internal audit of all cases received every six months. It was explained to us that there were two types of ongoing audits. The first is an internal audit of cases that the program has had for over a year. The second is an initial audit of those cases they have had for three to six months. The auditor comptroller also audits the office. The auditor comptroller audits the fiscal side of the program and the program is occasionally audited by the grand jury. The Social Security office has also audited the office.
3. The relationship with the courts was regarded as nonadversarial. The public defender contracts with a private attorney to represent the alleged incapacitated persons, and there is a tacit agreement between county counsel, the public guardian, and the private attorney's office, that the case goes to a jury if the potential conservatee is objecting.

Decision Making. When the office receives a potential probate conservatorship, it asks for medical consent in the petition. This was a recent change in procedure done to streamline the amount of time and resources spent going to court. The LPS conservatorships require that the program go to court for any invasive procedure. All deputies have the same authority to make decisions; a new deputy (during her first year) has all decisions authorized by a more senior deputy.

Internal Issues for the Program

Relationships with APS. The program apparently has a rocky relationship with APS. Adult Protective Services perceived that the SBPG is not responsive when APS refers a case to them. The SBPG program was slow to respond to requests. The public guardian program thought that there were conservators available for people in their own homes and that often a private conservator was found for many of the individuals APS referred.

Relationships with DBH. The DBH and the public guardian had issues in need of resolution. The DBH thought that the public guardian should manage the day-to-day assessments of the clients. The public guardian office thought that the DBH did not make appropriate placement decisions for the clients. The SBPG had its

own policy stipulating placement of conservatees only in licensed facilities, thus eliminating room and board placements and community-care licensing. San Bernadino County public guardian clients were placed only in a licensed board and care facility reviewed and approved by the SBPG. The DBH is acutely aware of a shortage of beds and feels that room and board beds are already licensed and appropriate for some SBPG clients.

Outside Assessments of the Office

Outside commentators thought that the office needed more funding and more staff members. The office, due to the shortfall, did not visit clients as much as needed and was not as responsive as needed to other partners in the care collective in the county. If the office had more funding for more staff, it could assume more guardianships. Despite the difficult conditions created by underfunding, the longevity of deputies in the office was regarded as a plus.

Notable Features of the Office

- (A) The SBPG will accept clients living in their own home, though we were told by outside commentators that it was not currently doing so.
- (B) The SBPG office was in transition and did not provide any records information about the size of the office or the wards it served.

Concluding Assessment

Strengths

- 1. Dedicated and experienced staff.
- 2. Warmth of the staff for the persons served.

Weaknesses

- 1. Caseloads are too high.
- 2. Increase in inconvenience due to moving the office.
- 3. At the time of the site visit there was a new administrator, who was relatively unfamiliar with the functions of the public guardian.
- 4. Tenuous relationship with the DBH.

Opportunities

- 1. Strengthening the relationship with APS.
- 2. Strengthening the relationship with DBH.
- 3. Change in administration of the office from under the aegis of the coroner to the Department of Aging and Adult Services.

Threats

- 1. Apparent underfunding of the office.
- 2. Complexity of the LPS conservatorships.
- 3. Loss of the MOU with DBH.
- 4. Administrative changes made too quickly and without staff buy-in.

Assessment of Then and Now

When researchers studied the LAPG in late 1979, the office was staffed by an individual with a social work background whose assistant had a business administration background. Today, the office is overseen by an individual with an M.B.A. Caseloads were 110 to 165 per staff in the 1970s and were apparently cut in half by 2006. It appears that the office was skeptical about maintaining incapacitated persons in their homes at the time of the first study, and that skepticism appears institutionalized in 2006, as no incapacitated persons were maintained in their home. Unlike the 1970s, the majority of the wards were male, since LPS conservatorships dominate SBPG caseloads.

In the late 1970s, the unmet need for guardianship was reportedly substantial. However, we did not encounter the same sentiment during our 2006 visit. The office had taken steps, largely through the program's public guardian investigator, to stem the tide of appointments. Criteria for acceptance were apparently put in place in the interim. The office did not appear under as great a crush of work as at the time of the initial site visit.

We note that a conflict of interest, that the public guardian office was placed administratively under the coroner, existed in the 1970s, and while that arrangement was altered, the conflict of interest remained with office placement under the Department of Aging and Adult Services. While a conflict exists theoretically, we did not learn of its causing a severe problem practically, unless it was manifested with the Department of Behavioral Health. Because the SBPG had as its customer the DBH, it appeared to have little leverage when its staff believed decisions for clients were made improperly or inappropriately.

We raise concerns regarding the following features of the SBPG:

1. The office can petition for its own wards, which creates the potential for self-aggrandizement.
2. We raise a concern with the relationship of the SBPG with the DBH. We think the MOU may not permit the SBPG to advocate fully for clients due to the service arrangement established. We raise concerns over the office's arrangement with the DBH because a conflict of interest exists that may stymie the advocacy function of the public guardian when the DBH is involved.
3. While staff-to-client ratios were reportedly cut in half in the ensuing years, they are still far too high.
4. There is a danger that LPS conservatorships, due to their complexity, receive far more attention than the more stable probate conservatorships.
5. We are surprised that the office did not produce answers to our relatively simple questions on clients and staff in the office. We were unable to determine if the office maintained computerized records. Not to maintain them and have them easily accessible in 2006 seems anachronistic.
6. We were aware of two levels of internal audits of the program and those performed by the county, but we were not aware that meaningful audits by persons knowledgeable in the area of public guardianship were conducted.
7. The agency should accumulate information on its cost savings to the county.
8. Our greatest concern for this office is its administrative change from its location under the coroner to under the Department of Aging and Adult Services.

Wyoming Guardianship Corporation

A site visit to study the Wyoming Guardianship Corporation (WGC) occurred in Cheyenne, Wyoming, in June 2006.

After the repeal of the state's public guardianship statute in 1998, the WGC, a private nonprofit entity with over 80 volunteer guardians, assumed the cases. The corporation executive director is named individually as guardian in some cases, and the corporation is named in other cases. The Developmental Disabilities Division and the Wyoming State Hospital funds the corporation. The corporation also receives federal funding as a Social Security representative payee and Veterans Affairs fiduciary, as well as fees for private

guardianship services. In addition, the corporation runs the Mental Health Ombudsman Program and the Wyoming Guardianship Corporation Pooled Trust.

A board of directors governs the WGC. The WGC provides staff and volunteers to serve as guardians for incapacitated persons “when no other appropriate person is willing or able to serve.” The declared purposes of the WGC include: “To recruit, screen, train, monitor, and support ‘volunteer guardians’; “To match volunteer guardians with individuals who are at risk and for whom no other appropriate person is able or willing to serve”; “To provide technical assistance for guardianship issues”; and “To increase public awareness of guardianship issues by providing public education and in-service training.”

The director is a national registered guardian with the Center for Guardianship Certification.

Statutory Authorization

Wyoming law providing for public guardianship was repealed in 1998. The general guardianship law is at Wyo. Stat. §§ 3-1-101 through 3-6-119.

Public Guardianship Survey

A “Public Guardianship Survey” of systematic information about administrative structure and location in government, functions of the public guardianship program, staffing, wards, and additional information for Wyoming was not completed by the WGC. The executive director of the WGC declined consent to participate in this research study.

Unique Features

Mental Health Ombudsman Program. The WGC manages the Mental Health Ombudsman (MHB) Program. The MHB is “an individual who investigates and attempts to resolve reported complaints, while advocating to assure the highest quality of life for individuals with mental illness and their families.” The program’s mission “is to improve the quality of life for people in need of mental health services throughout Wyoming and their families.” Services include investigation, information and coaching, referral, and identification and advocacy “for systemic issues such as gaps in services.” The MHB program has a disclaimer that the program “functions with independence, and is not subjected to undue influence by any party in the completion of its duties.”

Wyoming Guardianship Corporation Pooled Trust. The WGC established the Wyoming Guardianship Corporation Pooled Trust to develop a supplemental needs trust “to protect a person’s Supplemental Security Income (SSI) and Medicaid from being impacted should they receive funds that would make them ineligible for these or other public benefits.” The trust includes funds “that constitute an asset of, or are contributed on behalf of, a person with a disability,” such as an inheritance, personal injury or insurance settlements, or house sale proceeds. “Funds in the trust are allocated for the benefit of the beneficiary by WGC trustee.” As a legally authorized pooled trust, beneficiary funds are pooled together for investment purposes. “However, each person in the trust has a subaccount and interest earned from the investments is allocated to that account monthly based on the amount of funds held for that individual’s benefit.” There is a pro rata fee for investment and management. An account manager develops a plan to access trust funds with input from the beneficiary or their representative before submission to WGC for approval. While the WGC board attempts to utilize all funds for the beneficiary’s benefit during the beneficiary’s lifetime, upon the death of the beneficiary, the balance of the trust remains with WGC for charitable purpose use.

Application of 1981 Criteria

Application of the 1979 criteria to the WGC public guardianship approach suggests: WGC does not have adequate staffing and funding, including adequate (1:20) staff-to-ward ratios; the system of guardianship laws is reportedly “broken” and “it is scary what is happening to the rights of people”; and WGC appears to prob-

lematically petition for appointment of itself as guardian. Other strengths, weaknesses, opportunities, and threats are specifically reported below.

Concluding Assessment

Strengths

1. A good working relationship and interaction throughout the state. Accessible; committed to doing the work.
2. A good job at helping find alternatives to guardianship, like the representative payee program.
3. Some financial stability because of contract funding rather than grant funding.

Weaknesses

1. “They’re not part of a larger comprehensive or coherent system and, therefore, much of what everyone does is ad hoc more or less, and it makes it much more time consuming and much more chance whether things get done the way they need to get done.”
2. The finances and the accounting component are done by the director’s husband.
3. High caseloads.
4. “I was up working with the legislative committee and last week everybody just kept saying . . . now what you really have to do is start working on the guardianship laws and . . . I have not looked at them, but the comments last week from legislators was we have put enough band-aids on our system that that system is broken.” “And it is scary what is happening to the rights of people.”
5. “Founder’s syndrome”: where the founding director “thinks she needs to do it all herself.”

Opportunities

1. An attorney as part of the program to do guardianships for people who can’t afford to get the guardianships done.
2. More specific guardianship training; training and alternatives conferences for families.
3. A lot of children with developmental disabilities are aging out of Board of Cooperative Educational Services (BOCES) and need more transition planning.
4. “And, of course, the state of Wyoming currently has a great deal of money with which they don’t know what to do.”
5. One interviewee said, “I really think that we need to have other guardianship corporations in states . . . because I, I really think that competition helps improve the product.”
6. “They could be looking and assessing people for when their [competence] can be restored.” “I think there should be a time length in there. I think our systems have evolved that we don’t always see people with disabilities as being incompetent forever.”
7. Whether people who are involuntarily committed “have a need for a guardian in the initial process . . . I suppose that would be a good idea.”

Threats

1. The large number of wards and the severity of their issues.
2. One interviewee thought that one of the biggest threats to the program is litigation against the program.

Assessment of Then and Now

In 1981, Wyoming guardians were private with the exception of the superintendent of the Wyoming State Training School or state hospital. The superintendent was by statute conservator of student residents of the institutions, except where such individuals had private guardians.

While anachronistic then, Wyoming seems to have progressed only to the point of its public service providers contracting with WGC to fulfill a similar, seemingly perfunctory public guardianship role. This public guardianship role may more clearly benefit the third party interests of public service providers than the best interests of incapacitated persons.

In the context of this research, the Wyoming public guardianship program's reluctance to participate in the study, compared with the other study participants, suggests the possible need for further inquiry into Wyoming public guardianship through such means as legislative, journalistic, professional (*e.g.*, the Center for Guardianship Certification), and advocacy oversight, as well as additional research.

Chapter 5: Models of Public Guardianship Programs

Commentary on the Models of Public Guardianship

Informed by increased scholarship in the Phase II study and building upon our Phase I work, the map and table of models of public guardianship are revised and updated (*i.e.*, Table 4.1 in the Phase I report). The identification of public guardianship continued on a “follow the money” approach. Thus, if a program received public funding, the state had some form of public guardianship. *While some form of public guardianship exists in 49 states and the District of Columbia, that fact by no means implies that those states have statewide coverage of public guardianship.*

Court Model. Washington, D.C., has a guardianship of last resort function that is financed by the courts. Designated court funds provide for a panel of attorneys to serve. This information was not provided to us in the initial study. Since the Phase I study, the state of Washington added statewide coverage of public guardianship in 2007 and placed it administratively in the courts. Thus, the court model now includes five states and six programs.

Independent State Office. The classification of states having the independent state office remains the same as in our Phase I study: four states, although one of the states (Illinois) also has a program that is classified as a division of a social service agency (*i.e.*, Office of the State Guardian).

Division of Social Services Agency. During the site visit, it was learned that Wyoming did, in fact, have public guardianship, even though its public guardianship law was repealed in 1998. The sole entity providing public guardianship services is the Wyoming Guardianship Corporation.

We revised the classification of Missouri from the social services agency model to the county model. While according to Missouri law, in certain counties of a designated size, social service agencies in the county may serve, primarily it is the responsibility of elected county public administrators to act as public guardians or conservators if there is no one else to serve. Therefore, there are now 32 states with this model, still the category within which the overwhelming number of states falls. The state of Wisconsin has programs that fall under this model, as well as the county model below.

County Model. Due to the addition of Missouri, the number of states with public guardianship classified as having this model is 11, with Illinois also having a form of public guardianship in this model (the Office of the Public Guardian). The state of Wisconsin has a program with this model as well.

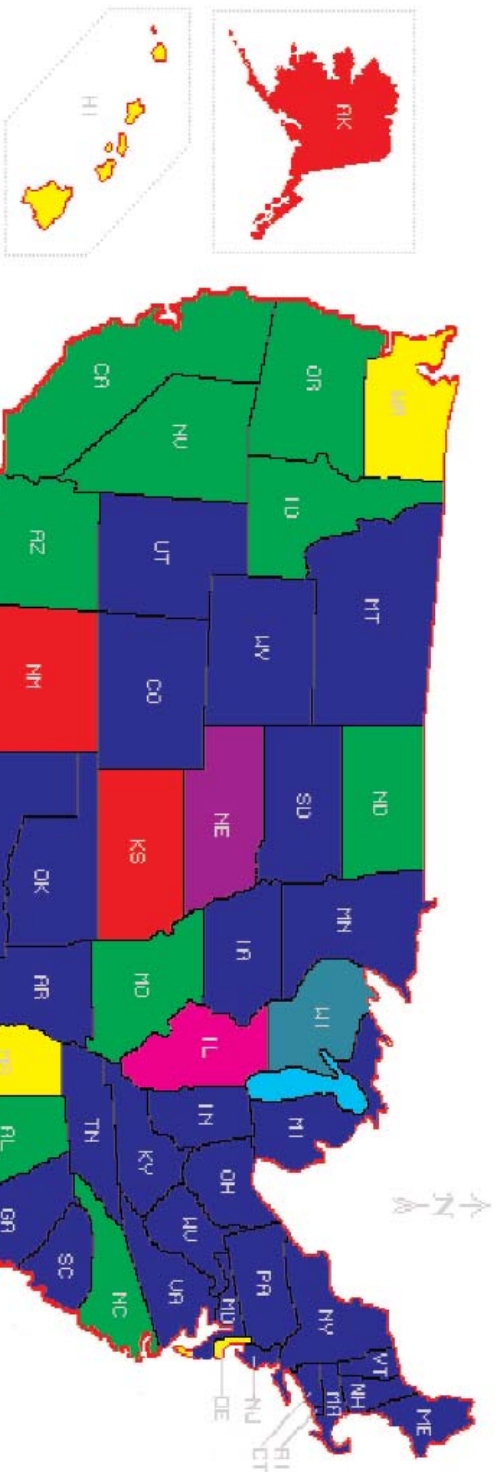
No Public Guardianship. The state of Nebraska is the only state without public guardianship. (The state had a public guardianship bill before the legislature in 2006, but this bill did not pass.)

Public Guardianship Models – 2007*

Court Model States	Independent State Office	Within Social Service Agency	County Model	No Public Guardianship
Delaware	Alaska	Arkansas	Alabama	Nebraska
Hawaii (Large)	Illinois (OSG)	Colorado	Arizona	(1 State)
Hawaii (Small)	Kansas	Connecticut	California	
Mississippi	New Mexico	Florida	Idaho	
Washington	(4 States)	Georgia	Illinois (OPG)	
District of Columbia		Indiana	Nevada	
(5 States, 6 programs)		Iowa	North Carolina	
		Kentucky	North Dakota	
		Louisiana	Oregon	
		Maine	Wisconsin	
		Maryland	Missouri	
		Massachusetts	(11 States)	
		Michigan		
		Minnesota		
		Montana		
		New Hampshire		
		New Jersey		
		New York		
		Ohio		
		Oklahoma		
		Pennsylvania		
		Rhode Island		
		South Carolina		
		South Dakota		
		Tennessee		
		Texas		
		Utah		
		Vermont		
		Virginia		
		West Virginia		
		Wisconsin (Volunteer & Corporate Guardian)		
		Wyoming		
		(32 states)		

* As in the Phase I public guardianship study, the identification of public guardianship continued on a "follow the money" approach. Thus, if the public guardianship function received public funding, the study lists the state as having some form of public guardianship—which exists in 49 states and the District of Columbia. However, that fact by no means implies that those states have statewide coverage of public guardianship, or necessarily have an explicit program. The four basic models are derived from the 1981 study by Schmidt, Miller, Bell & New (*Public Guardianship and the Elderly*, 1981), based on earlier models. While the models provide a useful classification, there are many variations, and few states fit the exact organizations described in the models.

Models of Public Guardianship



Within Social Service Agency

Court Model (Yellow)

County Model

Independent State Office/County Model

Independent State Office

No Public Guardianship

Within Social Service Agency/County Model

Chapter 6: Conclusions and Recommendations

The conclusions and recommendations in this chapter arise from: (1) the findings in Phase I of the study, including the 2004 national survey, as well as the in-depth interviews of key informants in seven states (*i.e.*, Florida, Illinois, Iowa, Indiana, Kentucky, Missouri, and Wisconsin) and site visits in Florida, Kentucky, and Illinois; and (2) Phase II, including the additional seven site visits in five states (Los Angeles, Calif., Delaware, Maryland, Maricopa County, Ariz., Pima County, Ariz., San Bernardino, Calif., and Wyoming).

The Phase II conclusions and recommendations below restate, confirm, modify, and build upon those in the Phase I report. To synthesize the Phase I and Phase II conclusions and recommendations, those in Phase I are used as a base and modified as appropriate with the new information gathered during Phase II. Therefore, much of the wording is the same, but there are significant updates, refinements, and additions, including key research recommendations.

The conclusions and recommendations follow the key areas set out in the 1981 study conclusions, thus enabling a direct comparison over time. A departure from the 1981 study is that the 2007 study includes more empirical information because more is available. Nonetheless, some conclusions reached are less empirically based than others and should be regarded as preliminary findings toward future and more in-depth scrutiny.

A key task of the study is to identify states with public guardianship statutes and programs of any kind. Fifty jurisdictions are discovered (49 states plus the District of Columbia) with either implicit or explicit forms of public guardianship or guardianship of last resort. Like the 1981 study, some explicit statutes have little in the way of programs, while some implicit programs are highly evolved.

Also consistent with Schmidt's study, there is considerable variation in public guardianship programs, both intrastate and interstate. Collapsing the states into the organizing models (*i.e.*, court, independent state office, social service providing agency, and county) is challenging, because the variations in practice and law do not always fall neatly into categories. Although the social service agency model was the predominant model in 1981, it has jumped considerably in number from 19 to 32 states in 2007. As Schmidt did in his earlier work, the heterogeneity of public guardianship programs emphasized as the conclusions and recommendations below are delineated.

Conclusions

Overarching Observations

1. Public guardianship programs serve a wide variety of individuals. The overwhelming majority of the 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 to adult protective services clients. (*See* Chapter 5.)

Responses to the survey conducted in 2004 reveal that there is a relatively even distribution of male and female clients. Minority populations constitute 30% (Illinois—Office of State Guardian) to 33% (California—Los Angeles) in some programs and a surprisingly slight proportion of the total population of incapacitated persons in others, such as in Kentucky (likely a factor of state demographics). As expected, most individuals under public guardianship are indigent. The majority are placed in an institution of some kind, usually a nursing home or state hospital. Although more options for habilitation exist than 25 years earlier, if incapacitated persons were poor, often the only available living arrangement is a nursing home, the result of federal and state funding restrictions, especially those under Medicaid.

2. Public guardianship programs serve younger individuals and individuals with more complex needs than 25 years ago. The 2004 survey found that individuals age 65 or over constitute between 37% and 57% of a state's public guardianship clients, while those age 18-64 comprise between 43% and 62% of the total.

Younger clients include a range and increasing number of individuals with mental illness, mental retardation, developmental disability, head injuries, and substance abuse, reflective of the general population. Some clients, both younger and older, have involvement in the criminal justice system.

In addition, many older clients have a dual diagnosis of dementia and severe mental illness. Many individuals with mental retardation or developmental disabilities are aging. For example, interview respondents in Kentucky report, “The typical clients, older women in nursing homes, are now only half of the caseload,” and “clients are younger and have many more drug and alcohol problems. Public guardianship used to be regarded as a custodial program, but no longer.” These complex cases involving people with challenging behavioral problems are much more labor intensive than the previous population set.

A public guardian in Arizona stated similar concerns. Incapacitated persons have become far more dangerous than in past years, as some are aggressive, carry weapons, and are frequently using illicit drugs, such as crack cocaine and methamphetamines. In addition, persons preying on incapacitated people are more dangerous than 20 years ago. People more openly exploit older adults and may be criminals themselves, sometimes taking advantage of elders for money or drugs.

3. Among states with data on institutionalization, the majority of individuals under public guardianship are institutionalized. In the survey, 15 programs (14 states) report a proportion of clients institutionalized ranging from 37% to 97%. Eleven of 15 programs providing this information indicate that between 60% and 97% of their clients live in institutional settings. Twelve jurisdictions indicate that between 60% and 100% live in institutional settings. Interviewees in some states note that very few individuals are in the community by the time they are referred to the public guardianship office, that nursing home placement often is automatic after appointment, and that incapacitated persons generally have little say about their placement decision. Other states and programs describe greater efforts than in the past to locate appropriate community placements.

The U.S. Supreme Court’s 1999 *Olmstead*⁸¹ case provides a strong mandate for evaluation of the high proportion of public guardianship clients who are institutionalized. *Olmstead* serves as a charge to public guardianship programs to assess their institutionalized clients for possible transfer to community settings and to vigorously promote home- and community-based placements when possible, a challenging tenet when both public guardianship staffing and community-based care resources are at a premium. Nonetheless, “unjustified isolation . . . is properly regarded as discrimination based on disability.”⁸²

Program Characteristics

4. Public guardianship programs may be 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. Borrowing from Regan and Springer, the 1981 Schmidt study used these same four models but recognized that many exceptions and variations existed and that, in some states, public guardianship did not fit neatly into this taxonomy.

The 2004 national survey conducted in Phase I of the current project used a variation on the classification, and in reviewing the state responses, found that the original Regan and Springer taxonomy was most appropriate. Note that the social service agency model includes both state and local entities. Thus, some county-level programs may, in fact, be located in social service agencies and are, therefore, described in the social service agency model rather than the county level model.

At first blush, the social service agency model might seem the most logical placement for public guardianship in that staff are knowledgeable about services and have networks in place to secure services. However, this model presents a serious conflict of interest in that the guardian cannot objectively evaluate and monitor the services provided. Nor can the guardian zealously advocate for the interests of incapacitated persons, including lodging complaints about the services provided. The filing of an administrative action or a lawsuit may be stymied or prevented entirely.

81. *Olmstead v. L.C.*, 527 U.S. 581, 119 S.Ct. 2176 (1999).

82. *Id.* at 2185.

The 2007 study found that five states and six programs use the court model, four states use the independent state office model, an overwhelming 32 states place public guardianship in a division of a social service agency (either state or local), and 11 states use a county model. (Illinois and Wisconsin use two different models.)

5. All states except one have some form of public guardianship. In 1981, the Schmidt study found that 34 states had provisions for public guardianship. The 2007 study finds that all states except Nebraska have some form of public guardianship. In most cases there is statutory authority for these programs (*see* Appendix A), but some states have developed programs or expend funds for public guardianship without explicit public guardianship statutes.

In the Phase I conclusions, Wyoming and Washington, D.C., had no public guardianship. During our Phase II site visit, it was learned that after the repeal of Wyoming's public guardianship statute in 1998 cases were assumed by the Wyoming Guardianship Corporation, a private nonprofit entity with over 80 volunteer guardians. The corporation is supported by public funds from the Developmental Disabilities Division and the Wyoming State Hospital. In the District of Columbia, court funds provide for the appointment of attorneys when there is no one else to serve.

However, it is critical to note that while a state may nominally designate an official to serve or provide some limited dollars for guardianship of last resort, *there are vast areas of many states unserved or under-served, and the unmet need is compelling* (*see* #13 below).

6. A clear majority of the states use a social services model of public guardianship. A striking finding in our study is the rise in the number of states (32) falling under the social services agency model. This compares with 19 states in the earlier study.

At first blush, the social service agency model might seem the most logical placement for public guardianship because staff members are knowledgeable about services and have networks in place to secure services. However, this model presents a serious conflict of interest as described in #4 *supra*.

Interview and focus group respondents were repeatedly asked if they regarded such a placement as a problem, and most did. Emphasized earlier, advocacy needs of the incapacitated person may be severely compromised when the program serves as both guardian and service provider. The ability to zealously advocate for the incapacitated person's needs and objectively assess services is gravely diminished, and the ability to sue the agency if necessary is effectively nonexistent. As a result, the person's physical and mental outcomes may be adversely affected.

7. Some governmental entities providing public guardianship services do not perceive that they are doing so. The question of "What is public guardianship?" goes to the heart of the study, and the answer was far more difficult to discern than anticipated. The study definition of public guardianship is broad and is based on *governmental agency and governmental funding*. It includes some administrative arrangements that are not explicitly labeled as "public guardianship" in state law, for example, a social service agency is designated to serve if no private guardian is available, or APS is appointed in certain situations. The definition also includes some instances in which state or local governments pay for private entities to serve as guardian of last resort. For example, a state may fund private non-profit organizations, attorneys, or private individuals to serve. A number of states with such implicit or *de facto* systems maintain that they do not have public guardianship. This perception may undermine the visibility and accountability of these fiduciary functions that occur under public or governmental aegis.

8. A number of states contract out for guardianship services. Schmidt's study did not examine this phenomenon, but today 11 states contract out for public guardianship services. Arguably, the "contracting out" approach allows states to experiment with various models of public guardianship service provision tailored to the needs of a particular region. However, this practice is not without peril and presents a service efficiency and effectiveness conundrum. Public administration literature indicates that contracting out for services is appropriate when the services of government are discrete (*e.g.*, repairing potholes), yet, when the services of

government are highly complex, as with public guardianship, services are best provided by a governmental entity. Under the “privatization premise” (see Appendix E),⁸³ contracting of this nature may pose a substantial threat to the provision of public guardianship services due to attenuated and unclear lines of authority, *i.e.*, accountability.

Guardianship of Person and Property: Functions of the Public Guardianship Program

9. 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 guardian of the person services only. The vast majority of state statutes provide for public guardianship programs to serve as both guardian of the person and property, but two specify powers over property only and one is limited to personal matters only (see Phase I Report, Chapter 4 and Appendix A). Although the statutory emphasis in the earlier Schmidt study was on management of money, which reduces the importance of guardianship of the person, statutes today provide more broadly for a range of guardianship services.

In practice, programs more frequently function as guardian of the person than as guardian of the property. In the 2004 national survey, 33 programs reported serving as guardian of the person, and 27 reported serving as guardian of the property. The number of individuals receiving guardian of the person services was significantly higher. In the social services model, which includes a majority of the states, the total reported number of incapacitated persons receiving guardian of the person services was 6,080; the number receiving guardian of property services was only 282; and the number receiving both guardian of the person and guardian of the property services was 3,866.

10. Public guardianship programs vary in the extent of community education and outreach performed. In 2004, 30 out of 34 respondents indicated that they educate the community about public guardianship. Many indicated that they balance this function with providing guardianship services to incapacitated persons. Nineteen programs provided technical assistance to private guardians, and four monitored private guardians. Not all programs are conducting this important function. If client caseloads are far too high and are projected to increase further, education is a possible mechanism for reducing caseloads with suitable individuals recruited to serve as guardians. Raising public awareness of the function (or existence) of public guardianship could be an effective tool in raising funding levels. It bears mentioning, however, that the capricious “woodwork effect” may occur along with public awareness (*i.e.*, more general information about the programs may increase the number of clients the programs are asked to serve).

11. Petitioning is a problematic role for public guardianship programs. The 1981 Schmidt study acknowledged that public guardianship programs that petition for their own appointment are subject to clear conflicts of interest. On the one hand, they may have an incentive to “self aggrandize” by petitioning in cases where there may be another alternative. On the other hand, programs may decline to petition when they have an overload of cases, or when the case presents difficult behavior problems that would require a great amount of staff time. They may have an incentive to “cherry pick” the more stable cases. 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 in which preventable emergencies could have been avoided.

In the 2004 national survey, some 25 responses (14 from service-providing agencies, seven from county programs, two from court programs, and two from independent public guardianship programs) indicated that the public guardianship program petitions the court to serve as guardian for incapacitated persons. Some interview and focus group participants regarded this as a conflict and reported that the public guardianship program sought ways to get around it.

83. Winsor C. Schmidt, Jr., & Pamela B. Teaster, *Criteria for Choosing Public or Private (Contracting Out) Models in the Provision of Guardian of Last Resort Services*, App. H, in *Evaluation of the Virginia Guardian of Last Resort and Guardianship Alternatives Demonstration Project*, for the Virginia Department for the Aging (1997).

Some saw petitioning as a barrier to guardianship because of the filing fees and court fees that must be paid by the petitioner. Others pointed out that the public guardianship program is stuck between a rock and a hard place: petitioning is a conflict, yet not petitioning means those in need may languish without attention. Still others found petitioning an appropriate role for public guardianship programs in light of the overwhelming need and noted the necessity for appropriate checks. Said an Arizona respondent,

There are, more times than not, the petitioner and the individual nominating themselves to be the guardian. I don't see the conflict in that relationship. I believe the due process, the appointment of an attorney for the ward or protected person, as well as a probate court with general knowledge of the circumstance coming from the court investigator and other sources, I believe the process is such that the conflict, if there is a conflict, is eliminated in the sense of concern.

12. Court costs and filing fees are a significant barrier to use of public guardianship services. People interviewed in several states indicate that court costs and filing fees often present an insurmountable obstacle to filing petitions for court appointment of the public guardian. In some areas, filing fees are waived if the respondent is indigent, but other areas have no such indigency waivers for payment of fees that can well run up to several hundred dollars. Nursing homes, assisted living facilities, and hospitals all may have an interest in the filing of a petition, but frequently they do not step forward to provide payment. One state where nursing homes and hospitals are the most frequent petitioners for public guardianship is Delaware.

Funding and Staffing of Programs

13. States have significant unmet needs for public guardianship and other surrogate decision-making services, but they frequently cannot quantify the unmet need. A striking majority of survey respondents could not estimate the unmet need for public guardianship in the state. Only 16 of 53 jurisdictions were able to provide this critically important information. In Washington, a bar association task force made a projection of unmet need (4,500 Washington residents), as cited in the background report for the state's 2007 legislation.⁸⁴ Many interview and focus group respondents commented that the need was vast, but few estimates exist. Some respondents specifically cited a high and growing unmet need among people with mental illness, as well as institutionalized adults.

The unmet need for public guardianship represents the moral imperative for seeking additional program funding and is the seminal reason that public guardianship exists. A number of states have conducted unmet need surveys (*i.e.*, Florida, Virginia, and Utah). Not only should each state establish its unmet need numbers (with an unduplicated count), but also, such an estimate should be calculated on a periodic, rather than one-time basis. For example, Virginia conducted an updated unmet needs study in 2006-2007.⁸⁵

14. Staff size and caseloads in public guardianship programs show enormous variability. In the 2004 survey, staff size varied from one individual in a single program to 90 individuals in one county alone. Caseloads also varied widely, with a low of two in Florida (a program in its infancy) to a high of 173 per staff person (New Mexico). The average ratio of staff to incapacitated individuals was 1:36. The total number of incapacitated persons per program ranged from two (the new program in Florida) to a high of 5,383 (Illinois Office of State Guardian). The median number that any program served was 216. Though most numbers are still significantly too high, in most cases these numbers represent a decrease from those in Schmidt's study, with

84. Elder Law Section of the Washington State Bar, *Report of the Public Guardianship Task Force to the WSBA Elder Law Section Executive Committee* (Aug. 2005).

85. Karen A. Roberto, J.O. Duke, N. Brossioe & Pamela B. Teaster, *The Need for Public Guardians in the Commonwealth of Virginia. Report to the Virginia Department for the Aging* (2007). See also David Hightower, Alex Heckert & Winsor C. Schmidt, *Elderly Nursing Home Residents' Need for Public Guardianship Services in Tennessee*, 2 (3/4) J. Elder Abuse & Neglect 105-122 (1990); Winsor Schmidt & Roger Peters, *Legal Incompetents' Need for Guardians in Florida*, 15 Bull. Am. Acad. Psych. & L. 69-83 (1987).

ratios cut in half in some instances. Reported time spent with individual clients ranged from one hour bi-annually to over 20 hours per week.

15. Educational requirements for staff in public guardianship programs vary. In the 2004 survey, 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. Many persons from diverse fields are public guardians, but most tend to be from social work backgrounds or are attorneys. Certification of guardians, including public guardians, is now required or available in some states (*i.e.*, Alaska, Arizona, California, Florida, Nevada, Oregon, Texas, and Washington) In addition, the Center for Guardianship Certification (CGC), conducts an examination that certifies both “registered guardians” and “master guardians.” The CGC has developed a *Code of Ethics and Standards of Practice*, portions of which many programs now use.⁸⁶

16. Public guardianship programs are frequently understaffed and underfunded. Virtually all states reported that lack of funding and staffing is both their greatest weakness and their greatest threat. The study identified ratios as high as 1:50, 1:80, and even 1:173. Caseloads are increasing, yet program budgets are not rising commensurately, and in some cases staff positions are frozen. Frequently, cases are more complex than 25 years ago, reflecting more individuals with challenging behavioral problems, substance abuse, and severe mental illness—problems requiring a higher degree of staff oversight and interaction.

Some of the focus group and interview respondents revealed high frustration with an overload of vulnerable individuals in dire need and with little ability of the program to respond adequately. Some reported “staff burnout,” “judges not sympathetic to the high caseload problem,” “more labor intensive cases,” “not enough time to do proper accounting,” “not enough time to see wards often enough,” “triaging cases,” moratoriums on case acceptance, “too few restoration petitions,” and “prohibitively high caseloads preventing a focus on individual needs.” Eleven states estimated the additional funding that would be needed to support adequate staff, ranging from \$150,000 to \$20 million.⁸⁷

17. 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 (*i.e.*, Florida, New Jersey, New Mexico, Tennessee, Vermont, Virginia, and Washington) provide for a ratio of staff to incapacitated persons served. These laws either require a specific statutory ratio or require that administrative procedures or contracts set out a ratio. However, most public guardianship programs serve as a true “last resort” and must accept cases regardless of their staffing level because of judicial appointment. This puts programs in an intractable position and puts clients in jeopardy. The conundrum is that public guardianship originally was intended as a guardian of last resort, taking all comers with nowhere else to go, an essential part of the public safety net. Without sufficient funding to support this, programs are stretched to the breaking point and fail to provide any real benefit to the individuals they are obligated to serve.

18. Funding for public guardianship is from a patchwork of sources, none sufficient. In the prior study, state statutes typically were silent on funding for public guardianship. Today, although almost half of state statutes reference authorization for state or county monies, actual appropriations frequently are insufficient or

86. See <http://www.guardianship.org/>.

The minimum education requirements for Center for Guardianship Certification (CGC) certification as a “registered guardian” include high school graduation or GED (General Equivalency Diploma) equivalent. Application Process for Registered Guardian Certification, <http://www.nationalguardianshipcertification.org/>. See also Schmidt *et al.*, *supra* n. 28.

87. While there is little research on cost per case, estimates are about \$2,600 to \$3,000 per case. A 2003 estimate in Virginia was \$2,955 per case annually. Teaster & Roberto, *supra* n. 42.

See also Winsor C. Schmidt, Jr., Miller, Peters & Loewenstein, *A Descriptive Analysis of Professional and Volunteer Programs for the Delivery of Guardianship Services*, 8 Probate L. J. 125-156 (1988) (\$2,857.08 per client); Teaster *et al.*, *supra* n. 41.

not forthcoming. Funding for public guardianship is often by a patchwork of sources. Most states that reported their funding sources named multiple channels, with state general funds the leading source, followed by fees collected from clients with assets.

Perhaps the most striking finding regarding funding from the 2004 survey was that the social service model, unlike the other models, pulled from all resources (*i.e.*, state funds, client fees, county funds, federal funds, Medicaid funds, estate recovery, grants/foundations, and private donations). 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 list 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. Washington uses Medicaid dollars to supplement funding for guardians, including certified guardianship providers approved under the 2007 legislation.

19. Data on costs per case are sparse, but estimates were in the range of \$1,850 per year. The Los Angeles Public Guardianship Program estimated the cost per case for a “probate conservatorship” at approximately \$1,897 per year and for an “LPS conservatorship” about \$1,433 per year. The Maricopa County Office of the Public Fiduciary estimated a yearly cost of \$1,850, as did the Kentucky public guardianship program in the Phase I study. Additional data would facilitate planning and funding of the programs. (*See* #16 and accompanying references *supra*.)

20. The Supreme Court *Olmstead*⁸⁸ case provides a strong impetus to support public guardianship. The landmark 1999 U.S. Supreme Court *Olmstead* case requires states to fully integrate people with disabilities into community settings when appropriate, rather than use institutional placements. Often individuals require surrogate decision makers to prevent institutionalization or to facilitate discharge and establish community supports. People with disabilities may languish unnecessarily in mental hospitals, in intermediate care facilities for people with developmental disabilities, or in nursing homes because they lack the assistance of a guardian. Thus, *Olmstead* serves as an impetus for states to address the unmet need by establishing and more fully funding public guardianship programs. For example, Virginia’s 2007 strategic plan for *Olmstead* implementation includes “surrogate decision making” as one of seven “critical success factors” in advancing community integration of people with disabilities.⁸⁹

Public Guardianship As Part of a State Guardianship System: Due Process Protections and Other Reform Issues

21. Very little data exists on public guardianship. Many states have insufficient or uneven data on adult guardianship in general,⁹⁰ and specifically on public guardianship, including: client characteristics, referral sources, costs, actions taken, and time spent by staff. For a majority of questions on the 2004 national survey, a significant number of states were unable to respond. In some cases, data are kept locally and not compiled regularly or consistently. While some state programs are developing computerized databases, public guardianship information systems in many jurisdictions remain rudimentary. One site in Arizona used a standardized computer data system, but staff found it difficult to extract meaningful information. Moreover, no state maintains outcome data on changes in clients over the course of the guardianship. Without uniform, consistent data

88. *Olmstead v. L.C.*, 527 U.S. 581, 119 S.Ct. 2176 (1999).

89. Community Integration Implementation Team & Community Integration Advisory Commission, *Virginia’s Comprehensive Cross-Governmental Strategic Plan to Assure Continued Community Integration of Virginians with Disabilities: 2007 Update and Progress Report* (draft), at <http://www.olmsteadva.com/downloads/052507StrategicPlan.doc>.

90. U.S. Government Accountability Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, GAO-04-655 (GAO July 2004). *See also* Erica Wood, *State-Level Adult Guardianship Data: An Exploratory Survey* (ABA Comm. L. & Aging, for the Natl. Ctr. Elder Abuse (August 2006); and Karp & Wood, *supra* n. 29.

collection, policymakers and practitioners are working in the dark, without evidence-based practice as exists in other fields such as medicine.

22. Courts rarely appoint the public guardian as a limited guardian. In the 2004 national survey, there were 11 times more plenary than limited guardianships of property and four times more plenary than limited guardianships of the person. In focus groups and interviews, estimates of the proportion of limited appointments ranged from 1% to 20%, 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.⁹¹

Limited guardianship maximizes the autonomy and independence of the individual and responds to the principle of the least restrictive alternative. The vast majority of state guardianship laws urge the court to use limited orders, and some jurisdictions state a preference for limited rather than plenary orders.⁹² Moreover, statutes in nine states clearly specify that the public guardianship program may serve as limited guardian. However, petitioners often do not request it, and judges often are reluctant to craft tailored orders that reflect the specific capacities of the alleged incapacitated person.

23. The guardian *ad litem* system, as currently implemented, can be an impediment to effective public guardianship services. From the in-depth interviews with key informants and with various groups in all site visits, flaws were revealed in the use of guardians *ad litem* (GALs). First, little training for GALs exists, and thus, their function as the eyes and ears of the court is compromised. While some guardians *ad litem* faithfully exercise their duties (visiting the alleged incapacitated person, explaining the guardianship process, even providing follow-up assistance to the individual), others never visit the person, do not investigate the appropriateness of guardianship, make ageist assumptions concerning functional capabilities, and provide the court with incomplete information. In some states, such as Delaware, respondents admitted that the role was ambiguously defined in statute, such that it was difficult for attorneys to determine whether they worked in the best interest of the client or as a client advocate. Efforts were underway to better define the role.

Payment to the GALs is abysmal and frequently ignores potentially time-consuming efforts. Thus, GALs are often inexperienced, and qualified persons serving in this capacity are regularly deterred from doing so. Reportedly and often, GALs ultimately were appointed as guardian, which appears a conflict of interest in roles.

There is an important movement toward “increasing the reliability of outcomes in cases involving guardians *ad litem*.”⁹³ A guardian *ad litem* system, adequately staffed and funded, should be established similar to the public defender system, so that the GAL function is uniform in the state and similar across states.

24. Oversight and accountability of public guardianship is uneven. Monitoring of public guardianship can be assessed at two levels: internal programmatic auditing procedures and court oversight. State public guardianship programs with responsibility for local or regional offices show great variability in their monitoring practices. In several states, strong internal monitoring is a work in progress, with both computerized systems and procedural manuals underway. State programs generally receive at least basic information on clients from local entities, and in some cases, conduct random file reviews. However, uniform internal reporting

91. Sally Hurme, *Limited Guardianship: Its Implementation Is Long Overdue*, 28(6) Clearinghouse Rev. 660 (1994); Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 Univ. Toledo L. Rev. 189 (1994); Lawrence Frolik, *Plenary Guardianship: An Analysis, A Critique and a Proposal for Reform*, 23(2) Arizona L. Rev. 599 (1981); Frolik, *supra* n. 63; Schmidt, *supra* n. 63; Quinn, *supra* 27.

92. AARP Public Policy Institute, *Chart of Selected State Statutory Provisions Addressing Limited Guardianships/Conservatorships for Adults* (forthcoming 2007).

93. Margaret Dore, *The Stamm Case and Guardians ad Litem*, 16(4) Elder Law, 3, 6-7 (2004-2005). Dore cites sources concerning the elimination of GALs from court proceedings in the child custody context, a position consistent with some commentary, and with court decisions or guidelines in Florida, Montana, Nebraska, Pennsylvania, South Carolina, Vermont, and Washington.

forms generally are lacking. In many states there is no state level public guardianship coordinating entity, thus leaving localities that perform public guardianship functions adrift.

Most public guardianship programs are subject to the same provisions for judicial oversight as private guardians and must submit regular accountings and personal status reports on incapacitated individuals served.⁹⁴ Public guardianship statutes in 18 states provide specifically for court review or for special additional court 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. Most judges did not report additional oversight measures for public guardianship cases in view of the large caseloads and chronic understaffing.

Court Cases Involving Public Guardianship

25. Litigation is an important but little used strategy for strengthening public guardianship programs. The 1981 study found that litigation in the public guardianship area was “a recent phenomenon” and that its impact on programs was “not clear.” The Schmidt study predicted a rapid expansion of persons needing this service. More recently, lawsuits were used effectively, but surprisingly sparingly, to improve public guardianship program functioning and to improve conditions for public guardianship clients. A significant number of cases have clarified public guardianship appointment, powers and duties, and removal (*see* public guardianship case law summary in Phase I report, at 48-59). A 1999 class action suit in Washoe County, Nevada, was unique in directly challenging widespread failures in serving incapacitated persons by a public guardianship program. The office of public guardian in Cook County, Illinois, brought multiple high-visibility lawsuits in order to enforce the rights of incapacitated persons in various arenas. 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 clients. The *Olmstead* case may open the door to more litigation challenges on both fronts.

Recommendations

As with the conclusions, the study recommendations are presented in the organizing framework drawn from the 1981 study. These 31 recommendations gleaned from findings in both Phase I and Phase II of the study offer a blueprint for practitioners, policymakers, and researchers in the years to come as the aging and disability populations swell and the need for effective public guardianship systems escalates. These recommendations are followed by a summary list of “Hallmarks of an Efficient, Effective, and Economical Program of Public Guardianship.”

Individuals Served

1. States should provide adequate funding for home- and community-based care for individuals under public guardianship. Public guardianship clients need basic services, as well as surrogate decision making. Public guardians can advocate for client needs, but without funding for community services such as transportation, in-home care, home-delivered and congregate meals, attendant care, care management, as well as supportive housing, public guardianship is an empty shell. The *Olmstead* case offers a powerful mandate for funding such services to integrate individuals with disabilities into the community.

Program Characteristics

2. States should consider the program characteristics in the Model Public Guardianship Act in this study, adopt or adapt the Model Act legislatively, and implement it rigorously. Model public guardianship acts were

94. For an overview of the status of guardianship monitoring, *see* Karp & Wood, *supra* n. 29.

proposed in the 1970s and by the Schmidt study in 1981. Since that time, guardianship law has undergone a paradigm shift, and public guardianship populations have changed. Many state legislatures are grappling with public guardianship provisions. The study's updated model act with commentary (Chapter 7) offers critical guidance on effective administrative structure and location, staffing, powers and duties, data collection, and evaluation.

3. States should avoid a social services agency model. Thirty-two states in 2007 have a social services agency model of public guardianship with its inherent conflict of interest. At stake is the inability of the public guardian program effectively and freely to advocate for its clients. If the public guardian program is housed in an entity also providing social services, then the public guardian cannot advocate for or objectively assess services, or bring law suits against the agency on behalf of incapacitated persons. For example, in Cook County, Illinois, (county model) the Office of Public Guardian effectively uses its ability to sue to increase the quantity and quality of service to incapacitated persons.

Guardianship of Person and Property: Functions of Public Guardianship Programs

4. State public guardianship programs should establish standardized forms and reporting instruments. To achieve consistency and accountability, state public guardianship programs should design and should require local entities to use uniform forms (*e.g.*, intake, initial client assessment and periodic re-assessment, care plans, reports on the personal status of incapacitated persons, staff time and activity logs, and values histories) and should provide for electronic submission of this information for periodic compilation at the state level. These standardized forms have long been used in mental health treatment plans, social services, and educational plans.

5. Individuals should not be accepted into public guardianship programs on the basis of funding. In order to survive, some programs have developed a priority system for accepting clients. The priority systems, investigating cases from certain entities (*e.g.*, APS, hospitals) on a "fast track" over others, in actual practice sometimes served as mechanisms to select cases with funds, rather than to screen out cases not appropriate for the office. This approach is problematic. Selection of cases on the basis of funding, or any proxy for such a scheme, presents a clear conflict of interest and compromises the "last resort" function.

6. Public guardianship programs should limit their functions to best serve individuals with the greatest needs. Currently, public guardianship programs serve a broad array of functions for their guardianship clients, and many also serve clients other than those for whom they are appointed as guardian.

Public guardianship programs should not provide direct services to their clients because this puts the programs in a conflicted position in seeking to monitor those very services and to determine whether those services are, in fact, best suited to meet the individual's needs. The Second National Guardianship Conference (Wingspan) recommendations urged that "Guardians 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."⁹⁵

In addition, providing guardianship, representative payee, or other surrogate decision-making services to individuals other than public guardianship clients dilutes the focus of the program on the most vulnerable individuals who have no resources and no other resort. *When programs are inadequately staffed and funded, as*

95. *Wingspan*, *supra* n. 22, at recommendation 47.

96. Separate funding and staffing of representative payee services is endorsed.

Cf. Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse, A Report of the National Research Council of the National Academies (Nat'l. Acad. Press 2007), <http://nationalacademies.org/more-news/20070730.html>.

Note that in the 2007 Washington legislation, the public guardianship office must report to the legislature by December 2009 on "how services other than guardianship services, and in particular services that might reduce the need for guardianship services, might be provided . . . [including] but not limited to, services provided under powers of attorney given by the individuals in need of the services" (S.B. 5320).

indicated by nearly every program surveyed, programs should only perform public guardianship and public guardianship services alone.⁹⁶ (Note that a study of this issue is listed below as part of the “future research” agenda.)

7. Public guardianship programs should adopt minimum standards of practice. Some, but not all, public guardianship programs have written policies and procedures. Programs need written standards on the guardian’s relationship with the incapacitated individual, decision making, use of the least restrictive alternative, confidentiality, medical treatment, financial accountability, property management, and more. Written policies, as well as training on the policies, will provide consistency over time and across local offices. A clearinghouse of state policies and procedures manuals will encourage replication and raise the bar for public guardianship performance.

8. Public guardianship programs should not petition for their own appointment. Because of the inherent conflicts involved, public guardianship programs should not serve as both petitioner and guardian for the same individuals.⁹⁷ Petitioning is an important potential role for the attorney general’s office. Indeed, under the concept of *parens patriae*, on which guardianship historically is based, the state has a duty to care for those unable to care for themselves, and this could include bringing a petition for the court to appoint a guardian. Additionally, bar association *pro bono* programs may include this critical function. (Some legal services programs petition for guardianship, but many view their primary role as advocating for the alleged incapacitated person, and see petitioning as incompatible.)

9. Public guardianship programs should develop and monitor a written guardianship plan setting forth short-term and long-term goals for meeting the needs of each incapacitated person. This recommendation is taken from the National Guardianship Association *Standards of Practice* (Standard #13). In addition, a number of state laws have requirements for submission of guardianship plans to the court.⁹⁸ Such a plan should address medical, psychiatric, social vocation, education, training, residential and recreational needs, as well as financial plans within the scope of the order.⁹⁹

10. Public guardianship programs should routinely and periodically perform client reassessment and develop an updated guardianship plan. Because the capacity and needs of incapacitated persons can change rapidly, programs should have an internal protocol for regular functional re-evaluation of client capacity, addressing whether a guardianship continues to be necessary, whether the scope of the order should be limited, and whether the program’s plan for services should be changed. An analogy is easily drawn with Minimum Data Set assessments required by the Centers for Medicare and Medicaid Services for nursing home residents. For nursing home residents, CMS requires reassessment on a quarterly basis or more frequently if there is a significant change in the resident. Considering that the majority of public guardianship clients are long-term care facility residents and that conditions of individuals under public guardianship are becoming increasingly complex, assessments and plans should be performed on a bi-annual basis, such as in Maryland.

97. For an ethics opinion on the inherent conflict of interest when a professional guardian petitions for him/herself as guardian, see Washington Courts, Opinion 2005-001, “Professional Guardian Petitioning for Appointment” (March 13, 2006), http://www.courts.wa.gov/committee/?fa=committee.display&item_id=644&committee_id=127.

98. Hurme & Wood, *supra* n. 61; and Karp & Wood, *supra* n. 29. See also Winsor C. Schmidt, Jr., Miller, Peters & Loewenstein, *A Descriptive Analysis of Professional and Volunteer Programs for the Delivery of Guardianship Services*, 8 Probate L. J. 125-156 (1988); Teaster *et al.*, *supra* n. 41.

99. Such a plan is similar to requirement for Social Security Administration representative payees. See Social Security Administration, *Guidebook for Representative Payees*, SSA Pub. No. 05-10076 (SSA Feb. 2006), at www.ssa.gov/pubs/10076.html.

100. Washington public guardianship law, S.B. 5320. See § 4(4) at <http://www.leg.wa.gov/pub/billinfo/2007-08/Pdf/Bills/Session%20Law%202007/5320-S.SL.pdf>.

11. Public guardianship programs should ensure that decision-making staff personally visit clients at least twice a month. The National Guardianship Association *Standards of Practice* require that the guardian visit monthly (Standard #13(V)). Some state laws (such as Florida and Alaska) require quarterly visits and Washington requires monthly visits,¹⁰⁰ but most laws are silent on the frequency of visits. Because needs and circumstances can change rapidly, because incapacitated persons are by nature dependent and vulnerable, and because guardians are charged with the high duty of “living the decisional life of another,” this study recommends bimonthly visits. Also, this will promote the regular participation of guardians in nursing home and assisted living care planning meetings for clients, as well as in other key facility events.

12. Public guardianship programs should establish and maintain relationships with key public and private entities to ensure effective guardianship services. The study’s site visits identified numerous instances in which clients fell through cracks because of a lack of communication or a misperception between the public guardianship program and community entities such as APS, mental health agencies, area agencies on aging, disability advocacy agencies, and others. It is critical that the public guardianship program maintain regular and open lines of communication with community agencies and groups that might affect the lives of incapacitated persons.

A number of state laws provide that the public guardianship program must “establish and maintain relationships with governmental, public and private agencies, institutions, and organizations to assure the most effective guardianship or conservatorship program” for each client.¹⁰¹ The 2001 Second National Guardianship Wingspan Conference recommended that “state and local jurisdictions [should] have an interdisciplinary entity focused on guardianship implementation, evaluation, data collection, pilot projects, and funding.”¹⁰² Public guardianship programs should be key players in such interdisciplinary working groups.

13. Public guardianship programs at the local and state level would benefit by regular opportunities to meet and exchange information. In some states, such as California, there are conferences for the county public guardian programs, while others have no such opportunities. Although the National Guardianship Association holds a yearly conference, there is no specific focus on the unique needs of public guardianship programs. A yearly or bi-yearly forum or confederation on the local, state, or regional level, and focused just on the issues of public guardianship would be an excellent avenue for an exchange of promising practices, relevant research, and networking. Effective but less expensive means of meeting might be through teleconferencing, interactive Web meetings, and listserves.

14. Public guardianship programs should maintain and regularly analyze key data about clients and cases. Regular internal and external program evaluation requires consistent collection and aggregation of key data elements, including at least the annual number of guardianship and conservatorship cases for which the office was appointed as guardian or conservator, the total number of open cases, the number of cases terminated and their disposition, the age and condition of clients, and the number institutionalized. Other data elements such as the number of limited guardianships, size of the estates, paid professional staff time spent on each client, referral sources, and more would shed additional light on the operation of the program. The state court administrative office, state public guardianship program, or similar entities should ensure the uniformity of local program data collection, perhaps through use of the same computerized database (*see* below).

15. Public guardianship programs should track cost savings to the state and report that amount regularly to the legislature and the governor. To our knowledge, only one state (Virginia) has adequately tracked cost savings, although one additional state (Washington) now includes such a mandate by statute.¹⁰³ While the moral imperative for public guardianship is the unmet need for guardians, the fiscal imperative is the cost savings.

101. *See, e.g.*, Alaska Stat. §13.26.380.

102. *Wingspan*, *supra* n. 22, at recommendation 6.

103. S.B. 5320 (Wash. 2007), §4(13).

The presentation of cost savings figures in the Commonwealth of Virginia provided justification for the establishment of the programs in 1998. The external evaluation (*see* below) conducted in 2001 and 2002, where data were collected in a more sophisticated and systematic manner, revealed even greater savings from more programs (over \$5,625,000, largely from discharge of individuals from psychiatric hospitals to less restrictive environments).¹⁰⁴ At that time, the public guardianship programs were in peril and in a fiscal struggle for their very existence. The provision of their proven cost savings not only saved the programs from extinction, but also in ensuing years increased their funding and total number of programs statewide.

Each state should begin collecting this information, using the Virginia model as a reference. It can be a crucial argument for, and defense of, public guardianship for any legislative entity.

16. Public guardianship programs should undergo regular periodic external evaluation and financial audit. Some states (*i.e.*, Virginia, Utah, and Washington) and some localities (*i.e.*, Washoe County, Nevada) have built periodic evaluation into their statutes and settlement agreements, respectively. Several states have undergone one-time audits by outside entities when practices have come into question. Information from more than one site visit revealed that such audits, in addition to being fact-finding, may be politically motivated. Thus, the auditing entity may slant the manner in which the audit is conducted to encourage the removal of an official or the closure of a program. Regular audits over time can be a defense against a one-time, and potentially troubling, audit (such as that in process in Los Angeles during the site visit).

Public guardianship involves a highly complex function of government. Audits conducted by individuals or entities not highly knowledgeable of the system and its requirements may produce more harm than good. Thus, periodic external evaluations are recommended that encourage input from guardianship stakeholders and evaluators alike. The several states mentioned above can be used as a reference for conducting an evaluation. Periodic evaluation (also recommended in 1981) is made far more feasible by use of computerized data collection systems that are now available.

Funding and Staffing of Programs

17. Public guardianship programs should be staffed at specific staff-to-client ratios. The recommended ratio is 1:20. The 1981 report strongly endorsed use of staff-to-client ratios, indicating that a 1:30 ratio best enables adequate individualized client attention. Since 1981, seven states have provided for ratios by statute (*see* commentary to Model Act, Chapter 7), either mandating a specific ratio by statute or requiring an administratively specified ratio.

The recommendation for a staff-to-client ratio is as important today as it was 25 years ago. At some “tipping point,” chronic understaffing means that protective intervention by a public guardianship program simply is not justified as in the best interests of the vulnerable individual. Based on the site visits and observations of Phase I and Phase II, a guardian-to-client ratio of no more than 1:20 is recommended. States could begin with pilot programs to demonstrate the client outcomes achieved through such a specified ratio, and the costs saved in terms of timely interventions that prevent crises, as well as increased use of community settings.

In computing a staffing ratio, staff should be defined as “paid professional staff exercising decision-making authority for incapacitated persons.” Such staff members clearly stand in a fiduciary relationship to the individual, a surrogate relationship with a high duty of trust, confidence, and substituted judgment. Such a staff person is truly “living the decisional life of another,” one of society’s most demanding and important professional roles, akin to a parent-child relationship. This role is unique, differing starkly from that of a case manager, who coordinates services and advises on options, but is not a surrogate. The public guardian has legal authority over an individual whose basic rights are severely compromised, and who, therefore, deserves the highest level of knowledge and attention of the state. If, according to the landmark 1988 Associated Press report, guardianship “unpersons” an individual, it is up to the state to ensure the needed level of attention and care.

104. Teaster & Roberto, *supra* n. 42. *See also* Teaster *et al.*, *supra* n. 41.

18. States should provide adequate funding for public guardianship programs. Each state should establish and periodically revise a minimum cost per incapacitated person. State funding should enable public guardianship programs to operate with specified staff-to-client ratios. Funding for public guardianship can result in significant cost savings for the taxpayer by sound management of client finances, prevention of crises, ensuring proper medical care and avoiding use of unnecessary emergency services, use of the least restrictive alternative setting, and identification of client assets and federal benefits (*see* above on tracking cost savings to state).

19. The public guardian (or director of the public guardianship office) has a duty to secure adequate funding for the office. The head of a public guardianship office will face multiple and daunting challenges: a swelling population in need of surrogate services, pressure from the court and community agencies to accept cases, the need for enhancing judicial understanding about incapacitated persons, the responsibility of directing a professional staff with a range of skills, the demands of disability and aging advocates, and the politics of long-term care. However, one of the foremost duties must be aggressively to seek adequate funding for the office. To have a grasp of funding sources, the director must have a good knowledge of Medicaid, knowledge of the local and state budget process, and contacts with state legislators and local elected officials and city/county managers. The public guardian must advocate for the appropriate level of funding for the program so that the individuals served by it do not suffer or die due to inattention to them from overwhelmed programs. Some programs studied have used litigation, a strike, and a moratorium to convince funding bodies that the programs have a limit beyond which it is not safe to operate.

Public Guardianship As Part of a State Guardianship System: Due Process Protections and Other Reform Issues

20. State court administrative offices should move toward the collection of uniform, consistent basic data elements on adult guardianship, including public guardianship. The GAO supported uniform collection of data on guardianship in a recent study.¹⁰⁵ An excellent place to implement uniform data collection is public guardianship, a case where data are inconsistently maintained. Much information is not captured and yet is necessary for program operation, and more importantly for the provision of excellent services for incapacitated persons.

Establishment of a uniform standard of minimum information for data collection is recommended using the information requested for this national public guardianship survey as a baseline and guide. Even in an age where not keeping computerized records is inexcusable, some states are in fact not doing so. Computer records are necessary for all public programs, and data should be entered, checked, and aggregated regularly. Data on guardianship will facilitate much needed accountability and will bolster arguments for necessary increases in staffing and funding as well.

21. Courts should exercise increased oversight of public guardianship programs. Public guardianship is a basic public trust. Yet many public guardianship programs are underfunded and understaffed, laboring under high caseloads that may not permit the individual attention required. Courts should establish additional monitoring procedures for public guardianship beyond the regular statutorily mandated review of accountings and reports required of all guardians. For example, courts could require an annual program report (as currently required by at least four states), conduct regular file reviews (such as in Delaware, where court review of public guardianship cases is statutorily required every six months), or meet periodically with program directors.

22. Courts should increase the use of limited orders in public guardianship. With the high volume of cases, courts should use public guardianship programs to implement forward-looking approaches, including

105. U.S. Government Accountability Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People* (GAO 2004).

106. Lawrence Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, *supra* n. 63.

the regular use of limited orders to maximize the autonomy of the individual and implement the least restrictive alternative principle. 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.¹⁰⁶

23. Courts should waive costs and filing fees for indigent public guardianship clients. Indigent individuals needing services from the public guardianship program have no other recourse and should have access to a court hearing and appointment. Court fees set up an obstacle that is not consistent with the function of serving a societal last resort function. Use of fees also causes a bottleneck of at-risk individuals with no decision-maker, which ultimately could cost the state unnecessary expense to address crises that could have been more economically averted or addressed by the public guardianship program. The Washington provision that “the courts shall waive court costs and filing fees in any proceeding in which an incapacitated person is receiving public guardianship services” could serve as a model for other states.

Recommendations for Public Guardianship Research

24. The effect of public guardianship services on incapacitated individuals over time merits study. Although some guardianships are still instituted primarily for third party interests, the purpose of guardianship is to provide for needs of the incapacitated person, improve or maintain the person’s functioning, and protect the assets of those unable to care for themselves.¹⁰⁷ If functioning of the incapacitated person is not improved, held constant, or at least safely protected from undue restraint, there is little substantive due process purpose to institute guardianship.

Research on guardianship is in its infancy, and the best research has to offer is that, at least in one reputable study in one state, public guardianship produces a significant cost savings.¹⁰⁸ The moral imperative, surrogate decision making for an incapacitated and vulnerable individual, is more elusive to capture. Attempts to do so have barely scratched the surface. What is truly needed to improve public guardianship is to secure the benefit of this governmental service to incapacitated individuals. What is needed is accurate social and medical information at baseline, followed by a longitudinal study. Outcome studies and comparisons should be made within states and between models.

25. Research should analyze the role of public guardianship for individuals with mental illness. Schmidt noted that the basis for a provision prohibiting the office from committing an incapacitated person to a mental facility was Maryland law. Today, a significant number of states bar guardians from such involuntary commitment, except by following the specific provisions of the commitment laws.¹⁰⁹ Mental commitment laws derive from the state’s police power, and generally provide that a person is subject to involuntary commitment if the person is severely mentally ill, and as a result, is a danger to self or others. States set out strict procedural protections in the commitment process. This may leave guardians with mentally ill incapacitated persons in a quandary: the individual is declining, behaviorally difficult and at risk, and appears in clear need of mental health treatment, but has not yet reached the required level of severity and of dangerousness. The guardian then is left to “stand by and wait” until the individual declines sufficiently for treatment.

The Arizona guardianship law allows the court to authorize a guardian to give consent for an incapacitated person to receive inpatient mental health care and treatment, on clear and convincing evidence that “the ward is incapacitated as a result of a mental disorder [as defined by state commitment law] and is currently in need of inpatient mental health care and treatment.”¹¹⁰ The statute provides for access to counsel for the individual, right to petition for discharge, time limits, and requires that the placement is the least restrictive alternative. Such statutes bear further scrutiny in balancing the liberty rights of the incapacitated individual with the need for treatment.

107. *Schmidt, et al., supra* n. 4.

108. Teaster & Roberto, *supra* n. 42.

109. *See, e.g.*, Fla. Stat. Ann. §744.704(7).

110. Ariz. Rev. Stat. §14-5312.01.

26. Research should analyze the operation, costs, and benefits of review boards or committees for public guardianship programs. At least two states have developed entities for the independent expert review of public guardianship cases. Under Maryland law, local review boards comprised of community experts hold face-to-face hearings attended by the incapacitated person (if possible), his or her attorney, and the public guardian to discuss the person's condition, services, treatment, and necessity for continuation or modification of the guardianship.¹¹¹ Virginia law provides for multi-disciplinary panels to review cases handled by the public guardianship program. Review boards may serve as an important check on the office, as well as an aid for judicial review, especially in complex and ethically challenging cases. Such review boards hold potential and merit further examination.

27. Research should examine the costs and benefits of allowing public guardianship programs, once adequately staffed and funded, to provide additional surrogate services less restrictive than guardianship. A public guardianship issue frequently under debate is whether the office should focus its generally limited resources solely on those individuals under the most dire need, those adjudicated incapacitated by the court but without anyone to serve as guardian, or should serve in a broader surrogate role for individuals who are not under guardianship. Should the office serve as an agent under health care or durable financial powers of attorney? Should it serve as representative payee for government benefits for clients other than guardianship clients? For example, the Iowa statute creates an office of substitute decision-maker that serves as guardian, conservator, representative payee, agent under a power of attorney, and personal representative for a decedent's estate.¹¹² The Washington law provides for a study on "how services other than guardianship services, and in particular services that might reduce the need for guardianship services, might be provided" through the public guardianship program.¹¹³

28. 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. Medicaid is a complex federal-state program with wide variations in state plans and policies within the bounds of federal guidance. The extent and creative use of various Medicaid provisions for guardianship merits further examination and would be a useful resource for public guardianship programs.

29. Courts should examine the role of guardians *ad litem* and court investigators, especially as they bear on the public guardianship system. The role of a guardian *ad litem* or court investigator in examining less restrictive alternatives, the suitability of the proposed guardian, and available resources for the respondent or incapacitated person, is critical and bears directly on the cases coming into the public guardianship programs. There is wide variability in interpretation and performance of the GAL role, which merits critical evaluation.

Postlude

Recognize guardianship for what it really is: the most intrusive, non-interest serving, impersonal legal device known and available to us and as such, one which minimizes personal autonomy and respect for the individual, has a high potential for doing harm and raises at best a questionable benefit/burden ratio. As such, it is a device to be studiously avoided.

Elias Cohen (1978)

111. Hurme & Wood, *supra* n. 61, at 912 & 913; Vicki Gottlich & Erica Wood, *Statewide Review of Guardianships: The California and Maryland Approaches*, 23 Clearinghouse Rev. 426 (1989).

112. Iowa Code §§ 231E.1 through 231E.13, Iowa Substitute Decision-Maker Act.

113. S.B. 5320 (Wash. 2007), §4(9).

In an expansive and thorough study of public guardianship after 25 years, there are significant improvements in the law, yet chasms in the law's implementation remain. Funding levels are egregiously and unconscionably low for a population of incapacitated persons that, by the acknowledgment of all commentators, is growing increasingly complex and includes persons with greater incidence and combinations of physical and mental health problems. Even if funding and staffing levels remain static, as have those of many programs, they are actually operating in a deficit mode. Ratios, while generally lower than those found 25 years ago, are still far too high, and only one state (Virginia) has public guardians practicing with a 1:20 public guardian-to-client ratio. Even this ratio is at risk, because the specified number is not written into statute but left for inclusion in regulation, approval of which is still pending nearly 10 years after the programs were statutorily authorized. Professors Schmidt and Teaster revised the 1981 established ratio of 1:30 ten years before the 2007 study because of increasing case complexity.

The majority of the states were unable to produce any meaningful data. While this was a disturbing finding in the 1981 study, it is inexcusable in 2007. Some states admitted that they had data systems, but that they were unable to readily retrieve a range of data queries. If even the most rudimentary information is inaccessible, then policymakers and practitioners are working in the dark. At a minimum, states should enhance their data systems to produce answers to the relatively simple questions asked in the national survey for the 2005 report, questions largely taken from the survey sent to states in 1979.

Three basic elements of information on incapacitated persons were suggested in the early 1980s: assessments, care plans, and time logs. Still this basic file information is often lacking due to inadequate staffing and funding of the office. Such tools are long-established in the arenas of medicine, social work, and education. The tasks of public guardianship are analogous to those required in these disciplines.

Attorney intervention or noncooperation in the research process was present in three cases. In 1981, no attorneys questioned the validity of the study and all sites cooperated with the researchers in the conduct of the site visits and analysis of findings. In 2007, the landscape changed, as attorneys were brought into the research at three different sites. First, the Alameda County Office of the Public Guardian (one of the original research sites and a site that had, for the Phase II study, written a letter of support and willingness to participate) declined to participate when administration was contacted to finalize plans for the visit. Discussed earlier in this report, an e-mail message was sent indicating that county counsel advised the office to decline participation. The researchers were told that county counsel had sent a message to this effect, but no message was found in electronic communications of either the principal investigator or the project director.

A second case of attorney intervention concerned interviews of incapacitated persons under public guardianship in San Bernardino County. A standard methodology of the original study and both phases of this study, permission to interview incapacitated persons under public guardianship at this site, was denied.

A third case of noncooperation occurred with the Wyoming Guardianship Corporation when the "Public Guardianship Survey" was not completed and the executive director declined consent to participate.

Finally, indicated in previous scholarship, research revealed that guardianship is sometimes instituted for third-party interests rather than the best interests of incapacitated persons. Public guardianship clients are still living in environments too restrictive for many, due to funding inadequacies, residual ageism, and other societal biases. The banner of least restrictive intervention should be held high: limited guardianships should be sought, guardianships should be avoided or terminated when possible, and individuals with diminished capacity should be consulted and their wishes maximized.

Guardianship is not social work, although it involves important elements of social work. Conversely, guardianship, a product of the courts, is not completely law. Guardianship is an amalgam of many disciplines: law, medicine, social work, and psychology. Most importantly, guardianship deals directly with human beings, society's most vulnerable human beings. Yet those under the care of the state often are still not afforded basic considerations. Living the decisional life for these unbefriended people is perhaps the most important and complex state function performed. Guardianship remains shrouded in mystery for most of the public, yet the public guardian performs a highly important state function for the most at-risk population, individuals who deserve no less than excellence from public servants. Public guardians must have sufficient tools to perform the essential function of living the decisional life of another person. Public guardianship does greater harm when executed poorly than no public guardianship at all.

Chapter 7: Model Public Guardianship Act

Introductory Overview

Intent and Derivation of Model Statute

The Model Public Guardianship Act is intended to translate the findings and recommendations of this study into policy and law. Key themes of the study reflected in the Model Act are independence of the public guardianship function, avoidance of conflict of interest, use of the least restrictive form of intervention, emphasis on self-determination and autonomy of incapacitated persons to the greatest extent possible, quality assurance, and public accountability.

The Model Act incorporates not only the findings and recommendations of the study (including the 2005 Phase I report),¹¹⁴ but also stands as a distillation and compilation of existing state statutes and a series of earlier model public guardianship statutes. Some 44 states currently have statutory provisions on public guardianship or guardianship of last resort, and 27 of these states have explicit provisions establishing an office or program of public guardianship. Existing state language served as a rich resource for the Model Act.

In addition, the Model Act uses the Model Public Guardianship Statute from the 1981 public guardianship study by Schmidt *et al.*,¹¹⁵ as a base. This statute, in turn, relied upon Regan and Springer's Model Public Guardianship Act from the 1977 report to the U.S. Senate Special Committee on Aging on Protective Services for the Elderly,¹¹⁶ and an earlier statute prepared by Legal Research and Services for the Elderly in 1971.¹¹⁷ Other model guardianship statutes that offer useful background and frameworks include the Uniform Guardianship and Protective Proceedings Act¹¹⁸ and the Model Guardianship and Conservatorship Statute published by the American Bar Association Developmental Disabilities Project of the Commission on the Mentally Disabled in 1982,¹¹⁹ as well as principles derived from the *National Probate Court Standards*,¹²⁰ the National Guardianship Conference (Wingspread),¹²¹ and the Second National Guardianship Conference (Wingspan).¹²²

In 1981, the introductory comments to the model statute by Schmidt *et al.*, maintained that:

The public guardian, and the public guardian process, do not exist in isolation. It would be difficult, misleading, and unrealistic to draft a statute addressing only the office of the public guardian. The public guardian is an end point in the process of guardianship, which itself seems to exist in a continuum of protective services and civil commitment. In fact, the success of a public guardian seems to be quite dependent upon the quality of the state's guardianship statute.¹²³

This language is confirmed and endorsed. It stands as true today as in 1981. Ultimately, the key to good public guardianship, along with sufficient funding and governmental support, is good guardianship. The nature of the state's guardianship and conservatorship law and practice is directly determinative of the quality of the public guardianship program. Public guardianship programs are shaped by the overall contours of

114. Teaster, *et al.*, *supra* n. 5.

115. Schmidt, *et al.*, *supra* n. 4.

116. Regan & Springer, *supra* n. 9.

117. Legal Research and Services for the Elderly, National Council of Senior Citizens, *Legislative Approaches to the Problems of the Elderly: A Handbook of Model State Statutes* (Leg. Research & Services for Elderly, Natl. Council Senior Citizens 1971).

118. National Conference of Commissioners on Uniform State Laws, *supra* n. 11.

119. Bruce Sales, D. Matthew Powell, Richard Van Diuzend & ABA Commn. on Mentally Disabled, *Disabled Persons and the Law: State Legislative Issues* (Plenum Press 1982).

120. Commission on National Probate Court Standards, *National Probate Court Standards* (Natl. Ctr. St. Cts. 1993, 1999).

121. ABA, *supra* n. 14.

122. *Wingspan*, *supra* n. 22.

123. Schmidt *et al.*, *supra* n. 4, at 179.

state guardianship codes that determine the procedures for appointment, the definition of incapacity, the powers and duties of guardians, and the mechanisms for judicial oversight. This was abundantly evident in the study site visits and interviews.

In the intervening 26 years since the study by Schmidt *et al.*, state guardianship law has undergone a sea change. When Schmidt *et al.*, wrote the 1981 model statute, most state laws lacked effective procedural protections, included no recognition of limited guardianship or use of the least restrictive alternative, and based the determination of capacity largely on the respondent's medical condition, or on generalized labels that served as a poor or discriminatory proxy (such as mental disability or advanced age). As of 2007, over half the states have made complete or very substantial revisions to their guardianship codes, and almost all of the remaining states have made significant changes, as well.¹²⁴ These changes have focused on strengthening procedural protections, such as right to counsel, presence of the respondent at the hearing, and meaningful notice; a more functional and cognitive definition of incapacity; encouragement of limited orders tailored to the needs and abilities of the individual; and enhanced monitoring. A major need for reform is implementation in practice of the statutes currently in place.

Thus, in 1981 Schmidt *et al.*, as well as Regan and Springer in 1977, were compelled to include basic guardianship procedural protections in the model public guardianship statute because few such protections existed. Today, there may well be a sufficient statutory basis, not always translated into practice, on which to build. Therefore, the current Model Act offers two options in this regard.

- *Alternative A*, for states with strong protections already built into their law, concentrates on the important programmatic aspects of a public guardianship office, as described throughout this study.
- *Alternative B* retains the procedural protections and definitions set out in the 1981 model.

Comments on Statutory Sections

Sections 1 & 2. Declaration of Policy and Legislative Intent. This section sets out the basic *parens patriae* concept that the state has a responsibility toward incapacitated persons, and should furnish guardianship services if there is no one else to provide, nor funds to purchase, such services. The first paragraph is based on Schmidt *et al.*, as derived from the Regan and Springer model. The intent is to provide for partial or limited guardianship, and to serve all incapacitated persons in need, rather than taking a categorical approach toward eligibility. The Model Act consciously avoids financing mechanisms that are dependent upon fee generation because of the resulting inducements to serve wealthier clients at the expense of persons with low incomes and to seek guardianship for wealthy individuals in inappropriate circumstances. At the same time, the Model implicitly provides for services to moderate-income persons who cannot afford private guardianship.

The second paragraph is based largely on Schmidt as derived from the ABA Developmental Disabilities Project model. The intent is to honor the individual's volition as much as possible, that the purpose of public guardianship is restoration or development of capacity, that public guardianship is not a life sentence or a facilitator of others' interests, and that these objectives should be achieved by the least drastic means. The section also includes language from recent Washington state legislation.

Section 3. Definitions.

- *Alternative A* incorporates by reference definitions from the state's general guardianship code.
- *Alternative B* incorporates state definitions, but also retains the definitions in the 1981 model act.

Section 4. Establishment of Office. Regan and Springer's Model Public Guardian Act in 1977 offered four alternatives for location of the public guardian: (1) within the court; (2) within the state executive branch as an independent entity; (3) within the state's Office on Aging, Department of Social Services, or Department

124. Erica F. Wood in Quinn, *supra* n. 27. See also ABA Commission & Sally Hurme, *supra* n. 15.

of Health and Mental Hygiene; or (4) within each county. Schmidt *et al.*, selected the county level, and the current Model Act endorses this approach. While location at the county level is not necessarily without problems, as evidenced by our site visits, it appears most in accord with our study recommendations. Schmidt explains the choice in 1981:

The least attractive location is one of the state's social service agencies, because of the serious conflict of interest. . . . The courts are a tempting location, but the judges, who recognized a need for public guardianship, themselves voiced discomfort with the potential conflict of interest and responsibility for administrative activity. An independent state office under the governor is also tempting. . . . However, the intent of the office of public guardian is to deliver individual, personalized guardianship services. This would be geographically precluded in all but the very smallest states, which could utilize a public guardian at least as effectively at our location choice, the county level.¹²⁵

The Act prohibits the contracting out of the public guardianship function. According to public administration sources,¹²⁶ contracting out for services may be appropriate for discrete services, such as repairing potholes, but generally not for highly complex services involving substantial judgment, as with public guardianship, where clear lines of governmental authority are necessary. Additionally, the Act specifies that the paid professional staff must be public employees, thus maintaining this direct line of authority.

The remaining parts of this section are intended to ensure the independence of the public guardian from service-providing agencies, the avoidance of any conflict of interest, and the limitation of the scope of the office to a serviceable and manageable number of clients. It is vital that the office of public guardianship not be part of any county social service-providing agency. The office must be able to represent an incapacitated person as independently as a private guardian.

In addition, the primary reason for problems in any public guardian office is that the office and professional staff members have responsibility for too many wards. Understaffing hinders access to rights, benefits and entitlements, and the provision of guardianship services. The best public guardian offices require and appreciate an explicit statutory staffing limitation to forestall the inevitable pressure to accept more cases, stretching staff too thinly. As Schmidt maintained, these considerations are so important that without them, incapacitated persons could be better off with no public guardianship.

Seven states now provide for a staffing ratio. The Florida statute provides for a 1:40 ratio of professional staff to wards. New Jersey law indicates that the public guardianship office must determine the maximum caseload it can maintain, based upon funding, and when such a maximum is reached, the office may decline additional appointments. In New Mexico, the contract of the state public guardianship office with guardianship services providers must include a maximum caseload. In Tennessee, the Commission on Aging must certify a maximum caseload based upon a review of documentation by the district public guardianship programs. In Vermont, the Department of Aging and Disabilities may adopt rules including standards on maximum caseload. In Virginia the Department on Aging must adopt regulations including "an ideal range of staff to client ratios" for local/regional programs. In the recent Washington legislation, no public guardianship service provider may serve more than 20 incapacitated persons per certified professional guardian. Implementation of the ratios and their effect on quality of care in these states bears study as a model for other jurisdictions.

The 1981 statute provided for a 1:30 ratio of paid professional staff to clients. The current statute reduces the ratio to 1:20, based on published research and on interviews and site visit observations across jurisdictions. The requirement for notification of the court upon reaching the ratio is derived from Virginia and New Jersey law.

125. Schmidt *et al.*, *supra* n. 4, at 183.

126. Winsor C. Schmidt, Jr., & Pamela B. Teaster, *Criteria for Choosing Public or Private (Contracting Out) Models in the Provision of Guardianship of Last Resort Services*, in *Evaluation of the Virginia Guardian of Last Resort and Guardianship Alternatives Demonstration Project*, Appendix (1997).

Sections 5 & 6. Appointment of Public Guardian. This section is derived from the 1981 Schmidt *et al.*, model. A difficult issue is whether, upon court appointment as guardian or conservator, the fiduciary responsibility falls on the office as an entity or on the individual who serves as the head of the office. Appointment of the entity allows for needed continuity, and may encourage broader court oversight of the office as a whole, while appointment of the director as an individual (“the public guardian”) puts a strong onus of personal accountability on the holder of this position. The 1981 act named an individual as public guardian, but included language seeking to provide for continuity of services. The current Model Act places the locus of authority in the office, implemented by the public guardian as director and the professional staff.

The 1981 model act indicates that consultation with advocates might assist the county in selection of the public guardian. While consultation with appropriate aging and disability advocacy agencies and others might benefit the county [board of supervisors; council] in identification of an individual to serve and might be a useful practice, it is not included in the statute, as it might inappropriately be interpreted as giving a veto power to the advocacy groups, hampering the independence of the office.

The Model Act requires the director of the office, the “public guardian,” to be a licensed attorney. Lawyers are agents of the court, bound to carry out fiduciary duties, and trained in the meaning of fiduciary standards. Lawyers are licensed by the bar, must conform to the requirements of legal ethics, and any deviations are heard by the bar’s disciplinary committee. The Act also acknowledges the importance of a background in human development, sociology and psychology, and business, a provision deriving from a combination of state public guardianship laws.

The office files a general bond, in lieu of the bond required of an individual guardian or conservator, in an amount fixed by the [board of supervisors; council]. The bond also functions in lieu of liability insurance that may be required or recommended for private guardianship agencies.¹²⁷

Section 7. Powers and Duties. The Act provides for appointment of the office of public guardian by the court pursuant to the guardianship and conservatorship law of the state. Any provisions relating to the office of public guardian or the incapacitated person not included in the Act, such as notice requirements, should be considered by reference to the state’s guardianship and conservatorship law. (However, *Alternative B* specifies additional hearing protections as set out in the 1981 model.)

The office of public guardian has the same powers and duties as a private guardian. The Act allows the public guardian as director of the office to delegate decision-making functions to paid professional staff, with the proviso that such staff have a college degree and a degree in law, social work, or psychology. In addition, a growing number of states are establishing guardian certification programs, and it behooves a public guardianship office to require certification of decision-making staff by such a state program if one exists.

Duties

The initial source for language concerning powers and duties is Schmidt, but the current Act separates duties from powers, and makes significant additions to both, derived from a scan of multiple state statutes. Highlights of the duties include:

- **Use of substituted judgment**—Reflecting the intent of the act to promote the autonomy and self-determination of the incapacitated individual, this section directs the office to use the “substituted judgment” standard of surrogate decision making, in which the guardian “steps into the shoes” of the individual, using his or her values and preferences as a guide.

127. The Wingspread National Guardianship Conference recommended that “guardianship agencies should limit the impact of liability through insurance, as it becomes available,” and that “states should be encouraged to facilitate the development of insurance coverage for guardianship agencies.” ABA Commission on the Mentally Disabled (currently the Commission on Mental and Physical Disability Law) and the Commission on Legal Problems of the Elderly (currently the Commission on Law and Aging), *Guardianship: An Agenda for Reform*, recommendation VI-F (ABA 1988). On January 8, 2007, the Washington Courts Certified Professional Guardian Board voted to adopt a regulation requiring insurance effective January 31, 2008.

128. Hurme & Wood, *supra* n. 61.

- **Individualized plan and reports**—A growing number of state guardianship statutes,¹²⁸ as well as public guardianship statutes specifically, such as Indiana and Utah, require the guardian to file with the court an individualized, forward-looking plan that the court can later compare with the report to hold the guardian accountable. Personal and financial plans foster good care and management, and thus the act requires the office to file such plans, based on assessments of individual needs and abilities. The requirements for a values history survey, annual functional assessment, and decisional accounting reports are from the Virginia public guardianship law.¹²⁹ While it may be difficult for the office to complete a values history for an “unbefriended” individual with no family or other contacts and little indication of past preferences, the office should attempt to investigate and fill in the values history to the extent possible.
- **Required visitation**—The bimonthly visitation duty is based on the project’s interviews and site visits, which underscored the need for continuous, consistent contact with the public guardianship program’s clients. The requirement for visiting prospective facilities is from Vermont law.
- **Prohibition of direct services**—Public guardianship programs should not provide direct services to their clients, since this would put them in a conflicted position in seeking to monitor those very services and to determine whether those services are in fact best suited to meet the individual’s needs. Public guardianship statutes in Illinois, Iowa, and other states include this prohibition, which is also emphasized in both the Wingspread and Wingspan national guardianship recommendations.
- **Standards of practice**—A number of public guardianship programs have adopted or adapted the National Guardianship Association *Standards of Practice* and *Code of Ethics*, or have fashioned their own set of standards, policies, and procedures. It is critical for an office of public guardian to go through such a process and clearly to articulate practices it will follow (as recommended in Phase I of this study).
- **Independent audit**—Independent financial monitoring, in addition to court oversight through review and possible investigation of accounts, is critical to public guardianship accountability. Florida requires an independent audit at least every two years.

An additional duty considered, but not included in the Model Act, is the establishment and operation of a public guardian review board. The concept of a review board is taken from Maryland law, where local review boards have functioned for over 20 years. In Maryland, review boards comprised of community experts hold face-to-face hearings attended by the incapacitated person (if possible), his or her attorney, and the public guardian to discuss the person’s condition, services, treatment, and necessity for continuation or modification of the guardianship.¹³⁰ In addition, Virginia law provides for multi-disciplinary panels to review cases handled by the public guardianship program. Review boards or screening committees could serve as an important check on the office, as well as an aid for judicial review, and could represent an important resource for the office, especially as to complex and ethically challenging cases. A review board or panel is an innovative practice with promise that merits further evaluation. (*See Recommendation 27.*)

Powers

The Model Act next lists powers, beginning with a prohibition against the office petitioning for its own appointment as guardian or conservator, as this would subject it to a clear conflict of interest. For example, if the office budget is dependent on the number of individuals served, it may have incentive to petition more frequently, regardless of individual needs, or it might petition too readily for individuals easiest or least costly and time-consuming to serve at the expense of others.

129. The values history requirement in Virginia law stemmed from the New Mexico values history model. *See Pam Lambert, Joan McIver Gibson & Paul Nathanson, The Values History: An Innovation in Surrogate Medical Decision-Making*, 18(3) *J. L. Med. & Ethics* 202 (1990).

130. Hurme & Wood, *supra* n. 97, at 912 & 913; Gottlich & Wood, *supra* n. 97, at 426-432.

However, if the office does not petition, there may be a backlog of cases in which at-risk individuals in need are simply not served, or in which preventable emergencies could have been avoided. Advocates have voiced concern about legal services programs petitioning for guardianship, especially legal services for elders under the Older Americans Act, since their primary role generally is representation of the alleged incapacitated person. Under the *parens patriae* concept, the attorney general could fill the role of petitioning for those in need of public guardianship, on behalf of the state. Another approach for petitioning might be the development of a *pro bono* initiative by the bar association.

The Act relies on the 1981 model statute in providing for the responsibility of intervention by the office in private guardianship proceedings involving a respondent or incapacitated person for non-fulfillment of guardian duties, disproportionate waste by costs, or the individual's best interests. Such intervention should function as a necessary monitor and check on the growing private professional guardianship market, as well as family guardianships.

Schmidt noted that the basis for the provision prohibiting the office from committing an incapacitated person to a mental facility was Maryland law. Today, a significant number of states bar guardians from such involuntary commitment, except by following the specific provisions of the commitment laws.¹³¹

The Act also articulates other powers, especially including:

- **Representative payment**—Many public guardianship clients also will require a Social Security representative payee, a VA fiduciary, or payee for other public benefits, and it is efficient for the public guardianship office to apply for and serve in these capacities for its guardianship clients. Whether it also should serve in such roles for individuals who do not need a guardian is a question for debate and further research, but our study recommends against this expansion until programs can be fully staffed and funded.
- **Arrangements after death**—Generally, guardianship terminates on the death of the incapacitated person, yet public guardianship programs may be left with deceased “unbefriended” clients with no one to make arrangements for disposition of the body. Hence, this Act and a number of existing state laws provide this power.

Section 8. Persons Eligible for Services. As stated above, the intent of this act, based on the 1981 Schmidt model, is to serve all incapacitated adults in need rather than taking a categorical approach toward eligibility.

Section 9. Appointment and Review Procedure. As stated above, *Alternative A* does not include this section, as it is aimed at states that recently have enacted strong procedural protections in their adult guardianship code and are now focused on creating or upgrading a public guardianship program.

Alternative B generally retains the provisions in the 1981 Model Act; and accordingly accompanying text by Schmidt *et al.*, is quoted below:

The model statute departs, as recommended by all of the recent model guardianship statutes, from the traditional indefinite term for guardianship and places the burden on the petitioner to secure successive appointments at one year intervals or less after the initial appointment for six months or less. The criteria for appointment is stated, including a precondition that necessary, beneficial services are available. Such a precondition is the quid pro quo for the stigma, deprivation of liberty and autonomy, and exacerbation of disability that otherwise accompanies guardianship.

The suggested standard of proof is “clear, unequivocal, and convincing” evidence. Such a standard is intended to inform the fact finder that the proof must be greater than for other civil cases. While it might be argued that an individual suffering from [incapacity] is not [him or herself] at liberty or free from stigma, we are quite comfortable with our assessment that it is much better at this time for [such] a person to be free of public guardianship than for a person to be inappropriately adjudicated a ward of the public guardian. The provision of functional, rather than causal or categorical, criteria should facilitate the use

131. See, e.g., Fla. Stat. Ann. §744.704(7).

of the standard. The clear, unequivocal, and convincing evidence standard is utilized in such analogous proceedings as deportation, denaturalization, and involuntary civil commitment. Public guardianship is easily conceptualized as the denaturalization or deportation of an individual's legal autonomy as a citizen.

The provisions for accounting and review of the appointment are adopted from Regan and Springer. They incorporate by reference appropriate sections of the state's guardianship and conservatorship law.

The hearing subsection is a synthesis from Regan and Springer and the Suggested Statute on Guardianship (ABA Developmental Disabilities Law Project). The provision requiring the presence of the alleged incapacitated person is taken from the California probate code. The subsections relating to counsel, trial by jury, and evaluation are from Regan and Springer. The public guardianship process is designed to be adversarial. The significance of effective, adversarial counsel for both the process and the alleged incapacitated person cannot therefore be overemphasized. Any failure of guardianship processes can be attributed in large measure to inappropriately paternalistic and condescendingly informal proceedings facilitated by counsel, whose real client is too seldom the alleged incapacitated person.

The second evaluation paragraph, relating to the rights of silence and of observers, is an adaptation from the Suggested Statute on Guardianship. The provisions for the right to present evidence and the duties of counsel are from Regan and Springer. The provisions for expert testimony under the rules of evidence subsection and for psychotropic medication are from the Suggested Statute on Guardianship. The Developmental Disabilities Legislative Project is the source for the first rules of evidence paragraph and for the appeal provision.¹³²

Section 10. Allocation of Costs. This section is derived directly from the 1981 Schmidt model, as based on Regan and Springer's earlier Model Public Guardian Act. Schmidt notes that:

The financial ability test is intended to afford some flexibility in income or asset eligibility, inclusive of some moderate income persons who cannot afford private guardianship, but with encouragement of court zealousness in concern with asset depletion rather than short-run overprotection of public funds.

Explicit provision for a reimbursement claim upon the estate at death is not made, so as to avoid any express incentive to perpetuate the guardianship to death or to preserve assets for any other than the ward's benefit. It seems clear that the intended purpose of such a provision—to discourage courts from requiring immediate costs payment or reimbursement—is adequately provided elsewhere.¹³³

In addition, the Act allows for court waiver of any court costs and filing fees for public guardianship cases, as in the 1981 model and a number of state laws, such as Florida.¹³⁴

Section 11. Right to Services. The source for the right to services is the 1981 Schmidt model, as taken from the ABA Developmental Disabilities Law Project. This concept has not been tested, and has not been enacted in any state public guardianship law. Schmidt explains that "the subsection codifies the constitutional right justified either as a quid pro quo for the loss of autonomy and freedom, as a fulfillment of the state purposes in public guardianship (restoration or development of capacity), or as the less restrictive alternative to indefinite or unnecessarily long guardianship."¹³⁵

Today, the subsection on right to services also is rooted in the *Olmstead* decision of the Supreme Court, providing under the Americans with Disabilities Act that "states are required to place persons with mental disabilities in community settings rather than in institutions when the state's treatment professionals have determined that community placement is appropriate, the transfer from institutional care to a less restrictive setting

132. Schmidt *et al.*, *supra* n. 4, at 186-187.

133. *Id.*, at 185.

134. Fla. Stat. Ann. §744.705(2).

135. Schmidt *et al.*, *supra* n. 4, at 188.

is not opposed by the affected individual, and the placement can be reasonably accommodated, taking into account the resources available to the state and the needs of others with mental disabilities.”¹³⁶

Section 12. Duties of State Court Administrative Office. As indicated above, this Model Act endorses the approach of the 1981 model in locating the office of public guardian at the county level, where it can best “deliver individual, personalized guardianship services.” However, extensive interviews and site visits conducted throughout this study found states with local offices (whether county offices or local programs funded through state offices) to be uneven in quality and often lacking in consistency of practices and data collection. Local offices may benefit from state level functions in:

- Providing training for local office staff;
- Establishing uniform formats for data collection;
- Developing forms and instruments as a resource for local offices;
- Promoting the exchange of information and promising practices among the local offices; and
- Evaluating the local offices.

These functions, along with adequate appropriations, could be carried out by the state court administrative office, bringing consistency to the offices and providing for a clear state-level snapshot over time, without stifling local flexibility or creativity.

The provision for an evaluation is taken from Virginia law,¹³⁷ Utah law,¹³⁸ and recent Washington legislation.¹³⁹ The evaluation includes an analysis of costs and “off-setting savings to the state.” The Virginia evaluation included such an analysis in practice,¹⁴⁰ which was critical to securing additional support for the program. The 2007 Washington legislation provides for tracking cost savings. (The Washington evaluation also includes an examination of whether surrogate decision-making services for individuals who are not under guardianship, such as serving as agent under powers of attorney and serving as representative payees, should be provided by the office, as authorized, for instance, in the Iowa statute.¹⁴¹)

Section 13 & 14. Statewide Public Guardianship Advisory Committee; Authorization of Appropriations; Effective Date. The Phase I study recommendations named development of an advisory council as a hallmark of a good system. Statewide advisory committees are included in a number of existing state laws,¹⁴² and have functioned to institutionalize the regular and healthy exchange of perspectives on public guardianship by the aging, disability, mental health, legal, judicial, and policymaking bodies at the state level. This section is an amalgam of state provisions, and elevates the importance of the members by making them gubernatorial appointments.

^{136.} *Olmstead v. L.C.*, 527 U.S. 581 (1999).

^{137.} Va. Code Ann. §2.2-712(B)(9).

^{138.} Utah Code Ann. §62A-14-112.

^{139.} S.B. 5320 (Wash. 2007), §4(13).

^{140.} Teaster & Roberto, *supra* n. 42.

^{141.} Iowa Code §§ 231E.1 through 231E.13, Iowa Substitute Decision-Maker Act.

^{142.} *See, e.g.*, Utah Code Ann. §62A-14-106; Va. Code Ann. §2.2-2411 & 2412. Note that the recent Washington legislation originally included an advisory committee but this section was vetoed by the governor (S.B. 5320).

Model Public Guardianship Act

Section 1. Title

This Act shall be known as the Public Guardianship Act.

Section 2. Declaration of Policy and Legislative Intent

The legislature of the state of _____ recognizes that some persons in the state, because of incapacity, are unable to meet varying essential requirements for their health or personal care or to manage varying essential aspects of their financial resources. The legislature finds that private guardianship is inadequate where there are no willing and responsible family members or friends to serve as guardian, and where the incapacitated person does not have adequate income or wealth for the compensation of a private guardian and payment of court costs and fees associated with the appointment proceeding. The legislature intends through this Act to establish the office of public guardian to furnish guardianship services at reduced or no cost for individuals who need them and for whom adequate services otherwise may be unavailable.

The legislature intends to treat liberty and autonomy as paramount values for all state residents and to authorize public guardianship only to the minimum extent necessary to provide for health or safety, or to manage financial affairs, when the legal conditions for appointment of a guardian are met. The legislature intends to establish public guardianship that permits incapacitated persons to participate as fully as possible in all decisions that affect them; that assists such persons to regain or develop their capacities to the maximum extent possible; and that accomplishes such objectives through the use of the least restrictive alternative. This Act shall be liberally construed to accomplish these purposes.

Section 3. [Alternative A] Definitions

- (a) The definitions found in [state guardianship and conservatorship law] shall apply to this Act.
- (b) “Court” means [the local or county court or branch having jurisdiction in matters relating to adult guardianships].
- (c) “Office” means the office of public guardian.
- (d) “Paid professional staff” means an individual employed by the office of public guardian who exercises decision-making authority for incapacitated persons for whom the office is serving as guardian.
- (e) “Public guardian” means the director of the office of public guardian.
- (f) “Values history survey” means a form documenting an individual’s values about health care.

Section 3. [Alternative B] Definitions

As used in this Act:

- (a) “Court” means [the local or county court or branch having jurisdiction in matters relating to adult guardianships].
- (b) “Lack of capacity to make informed decisions about care, treatment, or management services” means the inability, by reason of mental condition, to achieve a rudimentary understanding, after conscientious efforts at explanation, of the purpose, nature, or possible significant benefits of care, treatment, or management services to be provided under public guardianship; provided that a person shall be deemed incapable of understanding such purpose if, due to impaired mental ability to perceive reality, the person cannot realize that his or her recent behavior has caused or has created a clear and substantial risk of serious physical injury, illness, or disease or of gross financial mismanagement or manifest financial vulnerability to oneself; and provided further that a person shall be deemed to lack the capacity to make informed decisions about care, treatment, or manage-

ment services if the reason for refusing the same is expressly based on either the belief that he or she is unworthy of assistance or the desire to harm or punish oneself.

- (c) “Office” means the office of public guardian.
- (d) “Paid professional staff” means an individual employed by the office of public guardian who exercises decision-making authority for incapacitated persons for whom the office is serving as guardian.
- (e) “Psychotropic medication” means any drug or compound affecting the mind, behavior, intellectual functions, perception, moods, and emotion and includes antipsychotic, antidepressant, antimanic, and antianxiety drugs.
- (f) “Public guardian” means the director of the office of public guardian.
- (g) “Severe mental disorder” means a severe impairment of emotional processes, ability to exercise conscious control of one’s actions, or ability to perceive reality or to reason or understand, which impairment is manifested by instances of grossly disturbed behavior or faulty perceptions.
- (h) “Unable. . . to manage one’s financial resources” means unable to take those actions necessary to obtain, administer, or dispose of real or personal property, intangible property, business property, benefits, or income so that, in the absence of public guardianship, gross financial mismanagement or manifest financial vulnerability is likely to occur in the near future. For purposes of this Act, any such inability must be evidenced by recent behaviors causing such harm or creating a clear and substantial risk thereof, and at least one incidence of such behavior must have occurred within twenty days of the filing of the petition for public guardianship, except that such inability shall not be evidenced solely by isolated incidents of negligence or improvidence. The requirement of the preceding sentence shall not apply in the cause of a petition for renewal of guardianship.
- (i) “Unable to meet essential requirements for one’s physical health or safety” means unable, through one’s own efforts and through acceptance of assistance from family, friends, and other available private and public sources, to meet one’s needs for medical care, nutrition, clothing, shelter, hygiene, or safety so that, in the absence of public guardianship, serious physical injury, illness, or disease is likely to occur in the near future. For purposes of this Act, any such inability must be evidenced by recent behaviors causing such harm or creating a clear and substantial risk thereof, and at least one incidence of such behavior must have occurred within twenty days of the filing of the petition for public guardianship. The requirement of the preceding sentence shall not apply in the case of a petition for renewal of public guardianship.
- (j) “Values history survey” means a form documenting an individual’s values about health care.

Section 4. Establishment of Office

- (a) Establishment of office. Each county within the state shall establish an independent office of public guardian. The office may not be established by contract. Paid professional staff shall be county public employees.
- (b) Conflict of Interest. The office of public guardian shall be independent from all service providers and shall not directly provide housing, medical, legal, or other direct, non-surrogate decisionmaking services to a client.
- (c) Authority. The office of public guardian is authorized to take any actions on behalf of an incapacitated person that a private guardian may take, except as otherwise provided in this Act.
- (d) Effectiveness; Staffing Ratio. No office of public guardian shall assume responsibility for any incapacitated persons beyond a ratio of twenty incapacitated persons per one paid professional staff. When this ratio has been reached, the office of public guardian may not accept further appointments. The office shall adopt procedures to ensure that appropriate notice is given to the court.

Section 5. Appointment of Public Guardian

- (a) Appointment. The county [board of supervisors; council] shall appoint a public guardian to administer the office of public guardianship. The public guardian shall be appointed for a term of five years. The public guardian shall be a licensed attorney, shall be hired based on a broad knowledge of law, human development, sociology, and psychology, and shall have business acuity.
- (b) Part-time Appointments. If the needs of the local jurisdiction do not require that a person hold only the position of public guardian, the county [board of supervisors; council] may appoint an individual as public guardian on a part-time basis with appropriate compensation, provided that no other part-time position occupied by such individual may present any conflict of interest.
- (c) Compensation. The county [board of supervisors; council] shall fix the compensation for the position of public guardian.
- (d) Succession in office. When a person is appointed as public guardian, he or she succeeds immediately to all rights, duties, responsibilities, powers, and authorities of the preceding public guardian.
- (e) Continuation of Staff Activities. When the position of public guardian is vacant, staff employed by the office shall continue to act as if the position were filled.
- (f) Time Limit to Fill Vacancy. When the position of public guardian becomes vacant, the county [board of supervisors; council] shall appoint a successor in office within forty-five days.

Section 6. Bond Required

- (a) General Bond. The office of public guardian shall file with the clerk of the court in which the office is to serve a general bond in the amount fixed by the county [board of supervisors; council], payable to the state or to people of the county in which the court is seated and issued by a surety company approved by the [chief judge; presiding judge] of the court. The bond shall be conditioned upon the faithful performance by the office of public guardian of duties as conservator or guardian.
- (b) Nature of Bond. The general bond and oath of the public guardian is in lieu of the bond and oath required of a private conservator or guardian.

Section 7. [Alternative A] Powers and Duties

- (a) Appointment by Court. The office of public guardian may serve as guardian and/or conservator, after appointment by a court pursuant to the provisions of the [guardianship and conservatorship law of the state].

Section 7. [Alternative B] Powers and Duties

- (a) Appointment by Court. The office of public guardian may serve as guardian and/or conservator, after appointment by a court pursuant to the provisions of the [guardianship and conservatorship law of the state], provided that the alleged incapacitated person has had the opportunity for the hearing prescribed in Section 9 of this Act.
- (b) Same Powers and Duties. The office of public guardian shall have the same powers and duties as a private guardian or conservator, except as otherwise limited by law or court order.
- (c) Delegation of Powers and Duties. The public guardian may delegate to members of the paid professional staff powers and duties in making decisions as guardian or conservator and such other powers and duties as are created by this Act, although the office of public guardian retains ultimate responsibility for the proper performance of these delegated functions. All paid professional staff with decision-making authority at least shall have graduated from an accredited four-year college or university; have a degree in law, social work, or psychology; [and be certified by the state guardian certification entity].

- (d) Other Duties. The office of public guardian shall:
- (1) Use the substituted judgment principle of decision making that substitutes as the guiding force in any surrogate decision the values of the incapacitated person, to the extent known.
 - (2) Establish criteria and procedures for the conduct of and filing with the court for each incapacitated person of: a values history survey, annual functional assessment, decisional accounting reports, and such other information as may be required by law.
 - (3) Prepare for each incapacitated person within 60 days of appointment and file with the court an individualized guardianship or conservatorship plan designed from a functional assessment.
 - (4) Personally visit each incapacitated person at least twice a month; and maintain a written record of each visit, to be filed with the court as part of the guardian's report to court.
 - (5) Visit any facility in which an incapacitated person is to be placed if outside his or her home.
 - (6) Have a continuing duty to seek a proper and suitable person who is willing and able to serve as successor guardian or conservator for an incapacitated person served by the office.
 - (7) Develop and adopt written standards of practice for providing public guardianship and conservatorship services.
 - (8) Establish record-keeping and accounting procedures to ensure (i) the maintenance of confidential, accurate, and up-to-date records of all cases in which the office provides guardianship or conservatorship services; and (ii) the collection of statistical data for program evaluation, including annually the number of guardianship and conservatorship cases open, the number handled by the office and their disposition, the age and condition of clients, and the number institutionalized.
 - (9) Establish and provide public information about procedures for the filing, investigation, and resolution of complaints concerning the office.
 - (10) Prepare a yearly budget for implementation of the Act.
 - (11) Contract for an annual independent audit of the office by a certified public accountant.
 - (12) Prepare an annual report for submission to the county [board of supervisors; council] and the state court administrative office.
- (e) Other Powers: The office of public guardian may:
- (1) Not initiate a petition of appointment of the office as guardian or conservator.
 - (2) On motion of the office, or at the request of the court, intervene at any time in any guardianship or conservatorship proceeding involving an alleged incapacitated person or an incapacitated person by appropriate motion to the court, if the office or the court deems such intervention to be justified because an appointed guardian or conservator is not fulfilling his or her duties, the estate is subject to disproportionate waste, or the best interests of the individual require such intervention.
 - (3) Employ staff necessary for the proper performance of the office, to the extent authorized in the budget for the office;
 - (4) Formulate and adopt policies and procedures necessary to promote the efficient conduct of the work and general administration of the office, its professional staff, and other employees.
 - (5) Serve as representative payee for public benefits only for persons for whom the office serves as guardian or conservator.
 - (6) Act as a resource to persons already serving as private guardian or conservator for education, information, and support.
 - (7) Make funeral, cremation, or burial arrangements after the death of an incapacitated person served by the office if the next of kin of the incapacitated person does not wish to make the arrangements or if the office has made a good faith effort to locate the next of kin to determine if the next of kin wishes to make the arrangements.
 - (8) Not commit an incapacitated person to a mental health facility without an involuntary commitment proceeding as provided by law.

Section 8. Persons Eligible for Services

- (a) Eligible persons. Any incapacitated person residing in the state who cannot afford to compensate a private guardian or conservator and who does not have a willing and responsible family member or friend to serve as guardian or conservator is eligible for the services of the office of public guardian where the individual resides or is located.

Section 9. [Alternative A] Appointment and Review Procedure

[Alternative A does not include this section.]

Section 9. [Alternative B] Appointment and Review Procedure

- (a) Appointment. The initial appointment by a court of the public guardian as guardian or conservator shall be for no longer than six months, after the court determines by clear, unequivocal, and convincing evidence that the individual is incapacitated; cannot afford to compensate a private guardian; does not have appropriate, willing, and responsible family members or friends to serve as guardian; and lacks the capacity to make informed decisions about proposed care, treatment, or management services and that necessary services are available to protect the person from serious injury, illness, or disease, or from gross financial mismanagement or manifest financial vulnerability. Successive appointments for a term no longer than one year may be made by the court after the same determinations.
- (b) Accounting and Review of Appointment. No later than thirty days prior to the expiration of his or her term as guardian or conservator, the public guardian shall file with the court an inventory and account in accord with the provisions of (section _____ of the guardianship and conservatorship law of the state), which shall be subject to examination pursuant to the provisions of (section _____ of the guardianship or conservatorship law of the state). At the same time, the public guardian shall file a statement setting forth facts that indicate at least: (1) the present personal status of the incapacitated person; (2) the public guardian's plan for regaining, developing, and preserving the person's well-being and capacity to make informed decisions about care and treatment services; and (3) the need for the continuance or discontinuance of the guardianship or conservatorship or for any alteration of the powers of the public guardian.
- (c) Hearing. The court shall hold a hearing to determine the findings set forth in subsection (a), above, concerning the appointment, or renewal of the appointment of the public guardian, unless the court dismisses the petition for lack of substantial grounds.
- (d) Presence of Alleged Incapacitated Person. The alleged incapacitated person shall be present at the hearing unless he or she is medically incapable of being present to the extent that attendance is likely to cause serious and immediate physiological damage. Such waiver for medical incapability shall be determined on the basis of factual information supplied to the court by counsel, including at least the affidavit or certificate of a duly licensed medical practitioner.
- (e) Counsel. The alleged incapacitated person has the right to counsel whether or not the person is present at the hearing, unless the person knowingly, intelligently, and voluntarily waives the right to counsel. If the alleged incapacitated person cannot afford counsel or lacks the capacity to waive counsel, the court shall appoint counsel who shall always be present at any hearing involving the person. If the person cannot afford counsel, the state shall pay reasonable attorney's fees as customarily charged by attorneys in this state for comparable services.
- (f) Trial by Jury. The alleged incapacitated person shall have the right to trial by jury.
- (g) Evaluation. The alleged incapacitated person has the right to secure an independent medical and/or psychological examination relevant to the issues involved in the hearing at the expense of the state if the person is unable to afford such examination and to present a report of this independent evaluation or the evaluator's personal testimony as evidence at the hearing. At any evaluation, the

alleged incapacitated person has the right to remain silent, the right to refuse to answer questions when the answers may tend to incriminate the person, the right to have counsel or any other mental health professional present, and the right to retain the privileged and confidential nature of the evaluation for all proceedings other than proceedings pursuant to this Act.

- (h) Right to Present Evidence. The alleged incapacitated person may present evidence and confront and cross-examine witnesses.
- (i) Duties of Counsel. The duties of counsel representing an alleged incapacitated person at the hearing shall include at least: a personal interview with the person; counseling the person with respect to his or her rights; and arranging for an independent medical and/or psychological examination as provided in subsection (g) above.
- (j) Rules of Evidence. Except where specified otherwise, the rules of evidence and rules of procedure, including those on discovery, that are applicable in civil matters shall govern all proceedings under this Act. Any psychiatrist or psychologist giving testimony or reports containing descriptions and opinions shall be required to provide a detailed explanation as to how such descriptions and opinions were reached and a specification of all behaviors and other factual information on which such descriptions and opinions are based. Such witnesses shall not be permitted to give opinion testimony stating the applicable diagnostic category unless the alleged incapacitated person raises the issue through cross-examination or in the presentation of evidence.
- (k) Psychotropic Medication. The alleged incapacitated person shall be entitled upon request to have the court and the jury, if any, informed regarding the influence of any psychotropic medication being taken by the person and its effect on his or her actions, demeanor, and participation at the hearing.
- (l) Appeal. The alleged incapacitated person shall have the right to appeal adverse orders and judgments as prescribed in [the Rules of Civil Procedure], and the right to appellate counsel, who shall be compensated as provided in subsection (e) above.

Section 10. Allocation of Costs

- (a) Determination of Costs. If the office is appointed guardian or conservator for an incapacitated person, the administrative costs of the public guardianship services and the costs incurred in the appointment procedure shall not be charged against the income or the estate of the incapacitated person, unless the court determines at any time that the person is financially able to pay all or part of such costs.
- (b) Financial Ability. The ability of the incapacitated person to pay for administrative costs of the office or costs incurred in the appointment procedure shall be measured according to the person's financial ability to engage and compensate a private guardian. The ability is dependent on the nature, extent, and liquidity of assets; the disposable net income of the person; the nature of the guardianship or conservatorship; the type, duration, and the complexity of the services required; and any other foreseeable expenses.
- (c) Investigation of Financial Ability. The office shall investigate the financial status of a person for whom a court is considering the appointment of the office. In connection with such investigation, the office may require the alleged incapacitated person to execute and deliver written requests or authorizations to provide the office with access to records of public or private sources, otherwise confidential, needed to evaluate eligibility. The office may obtain information from any public record office of the state or of any subdivision or agency thereof upon request, without payment of any fees ordinarily required by law.
- (d) In any proceeding for appointment of the office, or in any proceeding involving an individual for whom the office has been appointed conservator or guardian, the court may waive any court costs or filing fees.

Section 11. Right to Services

- (a) Right to Services. Each incapacitated person served by the office has the right to prompt and adequate personal and medical care, treatment, and rehabilitative services to meet needs for protection from physical injury, illness, or disease, and for restoration of the abilities to care for oneself and to make one's own informed decisions about care and treatment services.
- (b) Petition for Order to Provide Services. If the office is unable to secure such services out of funds available from the incapacitated person's estate and income and other private and governmental benefits to which he or she is entitled, the office or the incapacitated person may petition the court for an order requiring the [state and/or county] to provide necessary funds for services that would implement the individual's right to services. Such petition shall provide complete details concerning funds and other benefits at the public guardian's disposal and justification for the necessity and appropriateness of the services for which finances are unavailable. Upon receipt of the petition, the court shall schedule the matter for a hearing within twenty days and cause the petition and notice of the hearing to be served upon the public guardian, the incapacitated person, the person's attorney, and [appropriate state and/or local officials]. In preparation for the hearing, the [appropriate state and/or local officials] shall have access to relevant care and treatment records of the individual. At the hearing, the burden of proof by a preponderance of the evidence shall be upon the petitioning party.
- (c) Order. At the conclusion of the hearing, the court shall enter an order dismissing the petition or requiring the [state and/or county] to provide the necessary funds for any services to which the individual has a right under subsection (a).

Section 12. Duties of State Court Administrative Office

- (a) The state court administrative office shall provide training and support for the local offices of public guardian; encourage consistency in data collection, forms, and reporting instruments; and facilitate the exchange of information and promising practices.
- (b) The state court administrative office shall contract with an appropriate research or public policy entity with expertise in gerontology, disabilities, and public administration for an evaluation of the local offices of public guardian.
 - (1) The evaluation shall include an analysis of costs and off-setting savings to the state, and other benefits from the delivery of public guardianship services.
 - (2) An initial report is due two years following the effective date of this Act and thereafter reports with recommendations are due to the governor and the legislature four years following the effective date of the Act.

Section 13. Statewide Public Guardianship Advisory Committee

- (a) The governor shall establish a public guardianship advisory committee consisting of the following members:
 - (1) Two persons designated by the supreme court;
 - (2) Two senators and two members of the House of Representatives from the state legislature;
 - (3) One person from the state agency on aging, and one person from the area agency on aging;
 - (4) One person from the state protection and advocacy system, and one person from the state developmental disabilities council;
 - (5) One person from the state long-term care ombudsman;
 - (6) One person from the state guardianship association; and
 - (7) One person from the state bar association.
- (b) Members of the committee shall each serve a three-year term, subject to renewal for no more than one additional three-year term; except that the first appointments to the committee shall be for

terms of varying duration, as specified by the governor. A vacancy occurring other than by expiration of term shall be filled for the unexpired term.

- (c) Members shall receive no compensation for their services, but may be reimbursed for travel and other expenses incurred in the discharge of their duties.
- (d) The purpose of the committee shall be to report to and advise the governor and the legislature on the means for effectuating the purposes of this Act.
- (e) The meetings of the advisory committee shall be open to the public, with agendas published in advance, and minutes available to the public. The public notice of all meetings shall indicate that accommodations for disability will be available on request.

Section 14. Authorization of Appropriations

To carry out the purposes of this Act, there is authorized to be appropriated \$ _____ for the fiscal year ending _____, \$ _____ for the fiscal year ending _____, and \$ _____ for the fiscal year ending _____.

Section 15. Effective Date

This Act takes effect _____.

Appendix A: State Public Guardianship Profiles

Alabama (reviewed 6/07)

- Statute** Alabama law provides that a general conservator of the county may be appointed as guardian if there is no other suitable and qualified person to serve. If there is no general conservator in a county, the sheriff must be appointed. Ala. Code §26-2-50.
- Program** In Alabama the sheriff of each county serves as a guardian of last resort. Funding is from the estate, if funds are available, and from the sheriff's operating budget. The number of wards served is unknown, as is the extent of unmet need. Cases may be referred from adult protective services or other sources. There is no other public entity that can serve as guardian, and sheriffs sometimes may not be equipped or have sufficient resources to do so, in light of their other duties. It is difficult to find individuals willing and able to serve.

Alaska (reviewed 3/07)

- Statute** In Alaska the Office of Public Advocacy, within the Department of Administration, serves as public guardian or conservator. The office must visit each ward or protected person once every quarter, and must report to court every six months on efforts to find a private guardian or conservator. In addition, the office must provide public information on guardianship, assist guardians and court-appointed visitors, and maintain a current listing of public and private services to assist incapacitated individuals. The office may intervene in a private guardianship or conservatorship proceeding to protect the best interests of a respondent or ward. The office may charge fees from the estates of clients and may make a claim against the estate upon the death of the incapacitated person. The legislature may make appropriations to the Department of Administration to carry out the purposes of the office. Alaska Stat. §§13.26-360 through 410.
- Program** The Office of Public Advocacy, which serves as public guardian, is located within the Department of Administration. The office receives funding from state appropriation, Medicaid funds, and client fees. Fees are based on a sliding scale, as provided in the program's regulations—which indicate that the program may not collect a fee that would result in financial hardship for the client. The office serves as both guardian and conservator, and may serve as agent under health care or financial powers of attorney, trustee, and representative payee for federal benefits for guardianship clients only.

The office has over 800 wards and 15 paid professional staff. Each professional staff has over 60 clients. The office does not use volunteers. Most case referrals are from APS, nursing homes, hospitals, and families. Wards are about half elders and half younger adults with mental illness, mental retardation, or developmental disabilities. The great majority are on public benefits. About half the wards are Alaskan Natives. Most live in assisted living, nursing homes, or their own home.

The office reports that its greatest strength is dedicated staff and its greatest weakness is not enough staff. The office created a position called public guardian associate, assigned to a public guardian professional, to do routine repetitive tasks, but did not have enough personnel to fill the need.

Arizona (phase II site visit state; reviewed 6/07)

- Statute** Each county board of supervisors must establish an office of public fiduciary, and that county must cover the costs of conducting the public fiduciary program. In addition to serving as

guardian or conservator for individuals for whom there is no person or corporation qualified and willing to serve, the public fiduciary may serve as a representative payee for benefits under federal law. With the approval of the court, the public fiduciary may establish or continue an estate or investment plan of the ward. The public fiduciary may charge the estate of a ward, protected person, or decedent reasonable expenses and compensation. Ariz. Rev. Stat. §§14-5601 through 5606.

Program Arizona has 15 public fiduciary programs, one in each of the counties. The programs are mandated under state law and funded by the counties. The largest program is the Maricopa County Public Fiduciary in Phoenix, followed by the Pima County Public Fiduciary in Tucson. The system of county programs was established in 1975. In addition to county funds, the programs also may collect fees from the estates of wards. The programs serve as guardian, conservator, personal representative of decedents' estates, and representative payee for federal benefits. The programs may petition for appointment of wards, but frequently lack the resources to serve the unmet need. Many staff are experienced and dedicated, but there are insufficient resources for the number of staff needed.

Public fiduciaries—as well as other professional guardians—must be certified under state law. Arizona was the first state to establish a guardianship certification program. The certification program operates under the aegis of the Supreme Court. It regularly audits professional guardians.

Arkansas (reviewed 2/07)

Statute Under Arkansas law no employee of any public agency that provides direct services to an incapacitated person may be appointed guardian of the person or estate of the incapacitated person. Ark. Code Ann. §28-65-203(h). However, the court may appoint the Department of Human Services as guardian of the person for maltreated adults receiving court-ordered adult protective services from the department. The department must honor advance directives, and must find a person to be guardian of the estate if needed. The department may consent to medical care and evaluations, and obtain medical records. The department may not consent to withholding life-sustaining treatment or experimental medical procedures. Ark. Code Ann. §§5-28-307 & 309.

Note: In mid-2007, an Arkansas public guardianship bill, S.B. 820, created an Office of Public Guardian for Adults, within the Division of Aging and Adult Services. The director of the division must appoint a division employee to serve as public guardian for adults. In recognition of the potential conflict of placement of the office in a service-providing agency, the new law provides that the public guardian “shall be functionally separate from and share no duties with any Department of Health and Human Services employee whose job it is to prepare and offer services, treatment plans, or both, to any person.”

The public guardian must have a degree in law, social work, or a related field, have a satisfactory criminal background check, complete 20 hours of training approved by the division, and “demonstrate competency and ability to carry out the values of the ward.”

The public guardian may petition for appointment as guardian if there is no suitable private guardian to serve; and may intervene in established guardianship cases to be named as successor if the private guardian is unwilling or unable to perform. The office—through staff or volunteers—must have quarterly personal contact with each ward. The law sets out requirements for the maintenance of financial, case control, and statistical records.

The new act does not take effect until and unless the director of the division determines that adequate appropriations or other funding are available to implement the program, and appoints a public guardian to serve.

Program The adult protective services program of the Division of Aging and Adult Services, in the Department of Health and Human Services, serves as guardian of the person only. The program is funded by state appropriations and also uses Medicaid funds. The program does not collect fees from wards. It does petition for appointment as guardian of its own wards.

The program serves over 180 wards and has a staff of 20 professionals. The program serves adult protective services clients only. About half the wards are on Medicaid. Many live in nursing homes.

The program named as its greatest strength that it is a component of the state infrastructure, can provide for care services, and limit or prevent exploitation. It found the greatest weaknesses to be lack of funding, lack of placement options for wards, and lack of public accountability.

California (phase II site visit state)

Statute Each county board of supervisors may create an office of public guardian for persons domiciled in the county who need a conservator (a guardian of the person or property for adults). The board may not designate a person or agency whose functions present real conflict with the functions of conservatorship. The board may designate the public administrator. The public guardian must give bond from time to time. The county may pay expenses of the public guardianship program, and may establish a revolving fund to do so. The public guardian has the authority to terminate immediately the occupancy of anyone living in the home of an intended ward or conservatee, and the statute sets out procedures for such terminations. The board may designate a public representative payee. Cal. Govt. Code Ann. §§27430 through 27436.

The public guardian may apply for appointment, and must apply for appointment if there is an imminent threat to a person’s health or safety or estate, or if the court so orders. If there is no one else qualified and willing to act, and if it is in the best interest of the person, the court must appoint the public guardian. If a person is under the jurisdiction of the state Department of Mental Health (“gravely disabled” under the Cal. Welf. & Inst. Code), an application of the public guardian may not be granted without the written consent of the department. The public guardian must begin investigations within two business days of receiving a referral. The public guardian must (beginning January 2008) meet established continuing education requirements. Cal. Prob. Code Ann. §§2920 through 2923. The public guardian may not be appointed as a guardian *ad litem* unless the court finds no other qualified person is willing to serve. Cal. Prob. Code Ann. §1003.5.

The public guardian must serve as conservator of a mentally ill person found to be “gravely disabled,” if the court recommends the conservatorship and no other person or entity is willing and able to serve. Cal. Welf. & Inst. Code Ann. §5354.5.

New guardianship provisions enacted in 2006 strengthen court oversight, expand the role of the court investigators, and establish a guardian licensure program for private professional guardians. The new provisions also clarify the role of the public guardians, requiring public guardians to apply for appointment if there is an imminent threat to an individual’s health or safety or the estate. If there is no one else qualified and willing to act, the court must appoint the public guardian. The public guardians must begin investigations within two business days of receiving a referral. The public guardian must meet continuing educational requirements. A.B. 1363 (2006).

Program The state’s “probate public guardianship system” is lodged at the county level. The counties differ as to local placement of the program. In some counties it is an independent county agency, while in others it is placed under the county Department of Mental Health, Department of Social Services, Aging, district attorney, or elsewhere. Typically, the function is housed in one office, but some counties divide functions between two offices. In some instances the pub-

lic guardian is combined with the public administrator, while in others it may be combined with the office on aging, social services, or mental health. Public guardianship is funded by the counties, Medicaid, and client fees.

County public guardianship programs serve as conservator (guardian of the person or property) for adults. They may also conduct investigations of cases before a petition is filed. At least some of the county programs educate the community about guardianship and provide technical assistance to private guardians. The programs may petition for appointment, but often lack the resources to sufficiently serve the unmet need. At least some counties have experienced longstanding underfunding, high caseloads, and demand for services exceeding program capacity. Most county public guardians are members of the statewide California Public Administrators/Public Guardian/Public Conservator Association and participate in regional meetings and training sessions.

In addition, the state has a separate public guardianship system under the county departments of behavioral health for individuals with mental illness who are determined to be “gravely disabled.” These cases are called LPS conservatorships, after the Lanterman-Petris-Short authorizing legislation. Under an LPS conservatorship, a client is involuntarily hospitalized for three days based upon a request for evaluation by a mental health professional or police officer. If the client is determined to be a danger to self or others, the client may be hospitalized for an additional 14 days, and if a physician determines the client remains gravely disabled, the physician may complete a declaration requesting the appointment of a temporary conservator and a general conservator, and the case may be sent to the public guardian. The LPS conservatorships are for one year only and subject to reevaluation. The LPS program is funded by State Mental Health Realignment Funds, conservatorship fees, and targeted case management funds through the Medi-Cal program.

In 2005, the *Los Angeles Times* published a series of articles called *Guardians for Profit* that examined the work of private professional and public guardians in Los Angeles County. The articles found that the Los Angeles County Public Guardianship Program was swamped with cases and short of staff. Until earlier that year, when the Los Angeles Board of Supervisors allotted funds to public guardianship staff, the county had not devoted funds to public guardianship since 1990, causing the program to reject a large portion of cases in need. The series spurred legislative action in 2006, including provisions for public guardianship.

Colorado (reviewed 1/07)

Statute There is no specific statutory provision for public guardianship. The Colorado general guardianship statute is at Colo. Rev. Stat. §§15-14-301 through 318, and is based on the Uniform Guardianship and Protective Proceedings Act.

Program In 2006, 48 of the 64 Colorado county departments of social services provided guardianship. The program has no statutory basis. No funds are designated specifically for guardianship services, but guardianship is covered under federal Title XX block grant funds provided to counties for adult protective services. The county departments of social services act as guardian of the person only. They may also serve as representative payee for federal benefits. The departments may petition for appointment as guardian. The county departments throughout the state serve over 400 individuals on an annual basis. Approximately three-fourths of these cases are ongoing.

The program named as a strength that it is able to provide guardianship services to a significant number of persons, but a weakness was that some individuals are unable to have guardianship needs met in the county where they live. There are not enough guardians and there is inadequate funding for guardianship services. Moreover, counties must restrict the number of cases they can accept due to limited resources, and may opt not to provide guardianship services at all.

Connecticut (reviewed 6/07)

- Statute** If no suitable person can be found to serve as conservator (guardian of the person or property) for individuals age 60 or older and with assets not exceeding \$1,500, the commissioner of Social Services shall be appointed. In a proceeding to appoint the commissioner, the court must appoint an attorney to represent the alleged incapacitated person. Conn. Gen. Stat. §45a-651.
- Program** The Department of Social Services applies to the probate court to serve as guardian (called “conservator”) when there is no one else to serve. The DSS Commissioner may be appointed as conservator of the estate for frail elderly persons aged 60 or older, who are incapable of managing their own affairs. The DSS Conservator of Person Program is administered by regional DSS staff to supervise the personal affairs of incapacitated individuals with a critical need to have someone to act on their behalf. The program is funded through state general funds.

Delaware (phase II site visit state; reviewed 6/07)

- Statute** The Delaware Code establishes an Office of the Public Guardian within the court system. The chancellor must appoint the public guardian and may require the public guardian to post bond. The General Assembly sets the salary of the public guardian, to be paid from the state’s general fund. The office serves as guardian of the person and/or of property for incapacitated adults. Administrative costs in appointment may be charged to the general fund, unless the estate can pay. Court costs and filing fees may be waived.
- Beginning six months from the date of a court order, the court must review each public guardianship case every six months thereafter to determine whether the guardianship should be continued. The public guardian must prepare an annual fiscal budget, and must make an annual report to the Chancellor and the General Assembly. Del. Code Ann. §§6-3991 through 3997.
- Program** Delaware has had a statewide Office of the Public Guardian since 1974. The office is located within the court system. The budget for the statewide program is over \$400,000, appropriated by the state legislature. The office also collects fees from the estates of incapacitated individuals. The office serves as guardian, conservator, representative payee, trustee, and personal representative of decedents’ estates. The office petitions for appointment as guardian when necessary.
- The office of public guardian serves over 225 incapacitated individuals and has seven professional full-time staff. Cases come from nursing homes, hospitals, the Court of Chancery, and adult protective services.
- The office employs professional, experienced staff, but maintained that weaknesses include underfunding, understaffing, and lack of policies and procedures as standards of practice.

District of Columbia (reviewed 2/07)

- Statute** There is no specific statutory provision for public guardianship or guardianship of last resort. General guardianship statute is D.C. Code Ann. §§21-2001 through 21-2077.
- Program** The District of Columbia has no public guardianship program. Court funds provide for the appointment of attorneys when there is no one else to serve.

Florida (phase I site visit state; reviewed 5/07)

Statute Florida law establishes a Statewide Public Guardianship Office within the Department of Elder Affairs. The statewide office in turn establishes local programs in counties or judicial circuits. The local public guardian programs must maintain a staff or contract with qualified individuals to carry out guardianship functions, including an attorney with probate experience and an individual with a master’s degree in social work, gerontology, or psychology, or a registered nurse or nurse practitioner. Upon appointment by the statewide office, the executive director of the statewide office must notify the chief judge of the circuit court and the chief justice.

The local public guardian programs must primarily serve incapacitated persons of limited financial means. The programs must seek others who are qualified and willing to serve. They may not commit a ward to a mental health treatment facility. The programs must maintain case records and statistics, file an annual report, and submit a report on efforts to locate others to serve. Each ward must be seen by a professional staff member at least quarterly. The ratio for professional staff to wards is one professional to 40 wards.

All costs of administration, including filing fees, are paid from the budget of the statewide office, and none are paid from the assets or income of the wards. Funds are appropriated by the legislature for the Statewide Public Guardianship Office, but this does not preclude use of funds raised through the efforts of the office. Florida law also creates a “direct support organization” whose sole purpose is to support the statewide office. In addition, the legislature established the Joining Forces for Public Guardianship matching grant program to assist counties in establishing and funding a community-supported public guardianship program, although this program was not funded. Fla. Stat. Ann. §§744.701 through 744.709.

Program In the 1980s public guardianship in Florida consisted of three pilot projects in three parts of the state. The legislature in 1999 created a Statewide Public Guardianship Office, located in the Department of Elder Affairs, and authorized the creation of local public guardianship programs. There are now 17 local public guardianship programs. Each local program must be appointed by the statewide office. The local programs have varying models of operation, but do not yet cover all of the 67 counties of Florida. The statewide office holds quarterly meetings with local program staff, although funding for transportation is problematic. The programs serve adults 18 years of age and older, and serve as guardian of both the person and property. They also serve as Social Security representative payee.

The public guardianship program throughout the state serves over 2,486 wards (as of 2006), and has a total of close to 70 full-time equivalent paid professional staff. The majority of cases come from nursing homes, hospitals, and adult protective services. The majority of wards are elders with dementia, but the program also serves a substantial number of younger adults with mental illness, mental retardation, developmental disabilities, and substance abuse. The vast majority of wards are low income. Most live in nursing homes, assisted living, group homes, or their own home. Because state law provides for a statutory guardian-to-ward ratio of 1:40, public guardian services are not accessible for some in need in areas where this cap has been reached. The programs can and do petition for guardianship (but not for a determination of incapacity). The identification and funding of outside sources to petition is a challenge for the system.

An additional challenge has been securing adequate funding for public guardianship. Prior to July 2004, counties had the option of enacting a local ordinance allowing for an add-on filing fee to civil court cases, but this provision was repealed, making permanent public guardianship funding a growing concern. The Department of Elder Affairs in 2004 estimated an unmet need for public guardianship services of between 5,000 and 10,000 persons statewide, and concluded that the average cost of public guardianship is \$2,363 per individual.

In 2005, the legislature recognized this issue, directed the department to explore options for funding, and enacted a waiver of filing fees for public guardianship programs.

The Statewide Public Guardianship Office also has oversight of Florida's professional guardians. The state instituted a guardian certification program, and today all professional guardians must take an examination administered by the statewide office. In collaboration with the National Guardianship Association, the office implemented a mandatory professional guardian competency examination, and in 2005, registered approximately 300 professional guardians.

The direct support organization established by statute was created in 2005 as the Foundation for Indigent Guardianship. The foundation has established the Florida Public Guardianship Pooled Special Need Trust.

Georgia (reviewed 1/07)

Statute In 2005 the Georgia General Assembly enacted a public guardianship initiative. It provides that any qualified individual may be registered as a public guardian in the probate court of the county in which he or she is domiciled upon approval by the probate court. A qualified private entity also may be registered. Each probate court must maintain a list of registered public guardians in the county. The Division of Aging Services of the Department of Human Resources must maintain a master list of registered public guardians throughout the state.

A qualified individual public guardian must be at least 18 years old, and must submit to a criminal background check and an investigation of credit history. The individual must complete at least 20 hours of training approved by the Division of Aging Services, and also must complete at least 20 additional hours of training every two years. The individual must demonstrate competency, education, and experience in guardianship, social work, or case management, as well as fiduciary integrity, and ability to act in accordance with values of the ward. The individual must agree to serve as guardian when appointed, without the ability to decline, except that an individual public guardian may serve no more than five wards at one time—but the probate court may override this in light of particular circumstances.

A qualified entity must maintain an appropriate level of liability insurance for employees or agents who will have direct contact with a ward, maintain a record for each employee and agent who has direct contact with wards, and ensure they meet the requirements for individual public guardian. The entity must submit to an investigation of its financial records. It must agree to serve as guardian when appointed, without the ability to decline, except that an entity serving as public guardian may serve no more than 30 wards at one time—but the probate court may override this in light of particular circumstances.

A public guardian must give bond in the amount of no less than \$10,000 per ward, maintain proper financial, case control, and statistical records, and must file an annual report with the probate court on operations for the year, as well as a report within six months of appointment on efforts to locate another person or entity to serve and on the ward's potential to be restored to capacity.

Public guardians receive compensation for their services from the estate of the ward. However, if the ward has insufficient resources or income, the public guardian, at the discretion of the probate judge, may make a request for payment from the Division of Aging Services. The General Assembly is authorized to appropriate state funds to provide compensation for public guardians, through the Division of Aging Services. Ga. Code Ann. §§29-10-1 through 29-10-11.

Prior to enactment of the public guardianship statute in 2005, the law provided for county administrators to serve as county guardians or conservators when appointed by the court, and this system remains in the code. County guardians must give bond with good security, and the court has authority to require additional bond. Ga. Code Ann. §§29-8-1 through 29-8-5.

Program In 2005 the Georgia Legislature enacted a public guardianship initiative providing that any qualified individual or entity may be registered as a public guardian, setting out the qualifications, and designating the Division of Aging of the Department of Human Resources to coordinate the initiative, provide or approve training, and maintain a list of registered public guardians.

To implement this legislation the Georgia Department of Human Resources, Division of Aging Services, worked with probate courts and the Georgia Council of Probate Court Judges and established an implementation team to develop a registry for public guardians and the required training. The approach is for individuals, professionals, and faith-based and other community organizations to become public guardians for vulnerable adults who have no one else willing or able to serve as their guardians. The Division of Aging Services hired a coordinator to recruit public guardians, to host community information sessions, to develop and conduct the required training, and to maintain the database.

The effort to recruit individuals and entities to serve as public guardians has been substantial, and is a continuous task. Outreach materials have been produced for this purpose, including a brochure and poster for distribution state-wide. Procedures, forms, and training materials have been developed, including an extensive training manual and comprehensive training agenda.

To date two training sessions have been held in the state and the undertaking has produced one registered public guardian and three individuals pending with their respective probate courts. Several more training dates are planned around the state, and it is anticipated that the number of public guardians will increase as knowledge of the initiative is disseminated.

Hawaii (reviewed 6/07)

Statute Hawaii law establishes an Office of the Public Guardian in the judiciary. The chief justice appoints a public guardian. The public guardian serves as guardian, limited guardian, testamentary guardian, or temporary guardian of the person for incapacitated persons. The public guardian may file a petition for the public guardian's own appointment, and petitions also may be filed by others.

The public guardian must assist the court in proceedings for appointment of a guardian of the person and in the supervision of guardians. The public guardian must assist those seeking appointment as a guardian, and provide advice and guidance to those appointed as guardian of the person; and must develop public education programs on guardianship and alternatives.

The court may not appoint the public guardian if another suitable guardian is available and willing to serve, unless it would be in the best interest of the ward. In appointment of the public guardian, the court may waive court costs and filing fees. The public guardian may receive fees for services from the estate of the ward unless it would unnecessarily diminish the estate so as to endanger the ward's independence. No fee is allowed when the ward's primary source of support is from public benefits. Any fees collected must be deposited in the state general funds. Funding for the Office of the Public Guardian is included in the budget of the judiciary. The public guardian must submit an annual report to the chief justice. Haw. Rev. Stat. §§551A-1 through 9.

In addition, the court may appoint the clerk of the circuit court as guardian of the property of a protected person whose estate is a "small estate" of less than \$10,000. If the estate increases to \$16,250, a guardian of the property will be appointed or at the court's discretion the clerk may continue to serve. Haw. Rev. Stat. §551-21.

Program Hawaii has an Office of Public Guardian located in the judiciary. The office has a budget of over \$560,000, and is funded with state appropriations from the general fund. The office has authority to petition for appointment but it does not provide this service.

The office serves over 770 wards and has 10 full-time equivalent professional staff serving as guardians statewide, one accountant, and one clerk-typist. The office uses three volunteers. Most case referrals are from hospitals, adult protective services, and other public social services. The office serves as guardian of the person only—but a different judiciary program provides conservatorship services. The office serves about 35% to 40% older persons with dementia and about 60% to 65% younger adults with developmental disabilities, including mental retardation and mental illness. The vast majority of wards are low income, receiving SSI and on Medicaid. Most of the wards live in adult residential care homes, intermediate care facilities, and nursing homes.

The office named as its greatest strength its experienced and dedicated staff, who are respected by peers and collaborating agencies, as well as by wards' families. Its greatest weaknesses were understaffing, lack of formalized rules and regulations, and difficulty obtaining legal representation in difficult cases, especially concerning real property.

In addition to the office, the court may appoint the clerk of the circuit court as guardian of the property of a small estate of less than \$10,000.

In 2004 the legislature passed a revision of the Hawaii guardianship code, based on the Uniform Guardianship and Protective Proceedings Act, and this may result in greater use of limited guardianship.

Idaho (reviewed 5/07)

Statute Local boards of county commissioners may create and budget for a board of community guardian—or several counties may jointly create and budget for such a board. A board of community guardian consists of not fewer than seven nor more than 11 members of community groups involving persons needing guardians or conservators. Members are appointed by the county commissioners. A board of community guardian may petition the court for appointment if there is no other qualified person to serve. The board also may recommend to the court that a visitor be appointed to investigate; and may review and monitor the services provided by public and private agencies to incapacitated persons.

The board of community guardian may be compensated from the estate of the ward, but if the person has no funds, the court may waive payment of fees. A lien may be created against any real property owned by the incapacitated person for all fees incurred. Each board must report annually to the board of county commissioners, including a fiscal report, the number of volunteer guardians obtained by the board, and recommendations for improving guardianship services. Idaho Code §§15-5-601 through 603.

Program In 1982 Idaho law specified that the county boards of commissioners could create a board of community guardian, which could provide for guardian services, generally through volunteers. Some counties have established such boards (Ada, Canyon, Kootenai, Bonneville, Twin Falls, and Payette), but others have not. Funding is very limited, almost nonexistent. There is no paid staff in any county except for a recent position in Ada County. Guardians can collect fees from the estates of wards, but most wards have insufficient assets or income. The board of community guardian petitions for appointment—such as appointment of a volunteer guardian. The boards generally make annual reports to the boards of county commissioners.

The boards of community guardian are uneven throughout the state and fall far short of addressing the great unmet need for guardianship services. In 2005, Idaho's Legislature passed a resolution authorizing the legislative council to appoint a committee to undertake and complete a study of the guardianship and conservatorship system in Idaho. The legislation authorizes the collection of filing fees to establish a Guardianship Pilot Project Fund. The Supreme Court is charged with administering the fund to develop pilot projects in several counties designed to improve reporting and monitoring systems for guardian and conservator oversight. The study also included consideration of public guardianship needs.

Illinois (phase I site visit state; reviewed 2/07)

Statute Illinois law provides for two schemes for public guardianship—the Office of State Guardian, for incapacitated individuals with estates under \$25,000, and a system of county guardians for those with estates of \$25,000 and over.

Office of State Guardian. The Office of State Guardian is lodged within the Illinois Guardianship and Advocacy Commission, and has seven regional offices throughout the state. The office serves as plenary or limited guardian of the person or estate, temporary guardian, testamentary guardian, or successor guardian for individuals with estates under \$25,000. The office may file a petition for its own appointment. The office must not be appointed if another suitable person is available and willing to serve.

The Office of State Guardian must not provide direct residential services to its wards. The office must visit and consult with its wards at least four times a year. The office may offer guidance and advice to those who request assistance to encourage maximum self-reliance and independence of vulnerable individuals and to avoid the need for a guardianship. The office receives state appropriations through the Guardianship and Advocacy Commission. Ill. Comp. Stat. §§20-3955/30 through 33.

County Offices of Public Guardian. The governor, with advice and consent of the Senate, must appoint in each county a suitable person to serve as public guardian of the county, to hold office for four years. For counties with a population over one million (currently only Cook County), the chief judge of the circuit court must appoint a licensed attorney as the public guardian for the county, to hold office at the pleasure of the chief judge. County public guardians serve individuals with estates of \$25,000 and over. If the county public guardian is appointed and the estate is thereafter reduced to less than \$25,000, the court may discharge the public guardian and transfer the case to the Office of State Guardian—or the court may transfer the case for good cause shown. Each county public guardian must enter into a bond of at least \$5,000 as security, and the court may require additional bond.

County public guardians must monitor the ward and his/her care and progress continually—including monthly contact with the ward and the receipt of periodic reports from care providers. The public guardian must visit a facility proposed for placement of a ward, before placement is made.

County public guardians must prepare an inventory of the ward’s assets, and may make no substantial distribution of the ward’s estate without a court order. The public guardian may liquidate assets of the estate to pay for care only after notice to all potential heirs at law, unless notice is waived by the court. The ward’s residence may be sold only if the court finds that the ward is not likely to return home.

The public guardian, at intervals directed by the court, must submit an affidavit setting forth the services the guardian has provided to the ward, and the court will set reasonable fees to be paid from the estate. The public guardian may petition the court for payment of fees quarterly. However, in counties with a population over one million, the public guardian is paid an annual salary set by the county board. Expenses of the operation of the office are paid by the county treasury, and all fees collected are paid into the county treasury.

The county public guardians must file an annual report with the clerk of the circuit court showing the number of cases handled, the disposition of each, and the total amount of fees collected. Ill. Comp. Stat. §§755-5/13-1 through 5/13-5.

Program Illinois has two schemes for public guardianship—the Office of State Guardian, for incapacitated individuals with estates under \$25,000, and a system of county guardians for those with estates of \$25,000 and over.

Office of State Guardian. The Office of State Guardian, lodged within the Illinois Guardianship and Advocacy Commission, serves approximately 5,500 incapacitated individ-

uals through regional offices. The commission is not a provider of social services, and thus there is no inherent conflict of interest. Each of the regional offices has a manager and caseworkers with administration and overall supervision handled from offices in Chicago and Springfield. Many regional offices have an attorney. Each office handles different caseloads with a cross section of wards—elders, as well as younger adults with developmental disabilities or mental illness. The OSG budget is over \$8,000,000 statewide. Funding sources include assessments against estates of wards (but these are limited), Medicaid funds, and state general fund dollars.

The Office of State Guardian may petition for its own appointment, but often does not, due to extreme limitations of staffing and resources. One to six contacts with the office per half-day shift are requests for the OSG to serve as guardian. A temporary or emergency guardianship can take from one to five days from referral to appointment; and a permanent guardianship may take 30 days.

The OSG has 48 caseworkers, of whom 95% are registered guardians certified by the National Guardianship Foundation. The office also has support staff, attorneys, and managers, for a total of 73 full-time equivalent employees. There is an approximate staff-to-ward ratio of 1:77. In terms of staff with actual ward contact, the ratios are 1:132 for guardianship of the person, and 1:31 for guardianship of the property. To address the lack of sufficient staff, OSG has focused heavily on staff training and certification.

Decisions on behalf of wards include placement, health care, and provision or withdrawal of life-sustaining treatment, as well as financial decisions. Any transactions involving sale of real property must be reviewed and approved by court. The OSG staff visit wards living in unlicensed community placements and at home on a monthly basis, and some on a weekly basis. Wards in institutions are visited once every three months. The OSG may serve as representative payee for its wards.

Interviews in Phase I of the national public guardianship study emphasized that OSG attempts to serve too many wards with too few resources, and noted that some areas do not accept wards that are not in institutions. Wards may not always receive sufficient personal attention—and OSG may not always be responsive to requests in a timely fashion—because of inadequate staffing and funding.

Interaction between OSG and the county public guardianship system is primarily in instances in which a ward of the county system has spent an estate down to less than \$25,000, or conversely when a ward of the county system inherits or otherwise receives additional funds putting the estate at or over the \$25,000 line.

County Public Guardians. County public guardians are appointed by the governor for a term of four years, for individuals with estates at or above \$25,000. The system is funded by fees collected from the estates of wards. The system appears to be uneven throughout the state, and marked by underfunding and understaffing.

By law, the Public Guardian of Cook County is an attorney appointed by the circuit court judge; costs of the office are paid by the county. Patrick Murphy served as Cook County Public Guardian for over 25 years and garnered a strong staff of over 300, including a large number of attorneys. He leveraged significant funds both from the county and from litigation, and gained considerable visibility. The office serves approximately 650 adult wards and 12,000 children. Approximately 40% of the adult wards live in the community. Approximately 25% were exploited prior to becoming wards of the office. The office petitions for appointment. Patrick Murphy left the office to become a judge in 2005, and was succeeded by Robert Harris.

Indiana (phase I interview state; reviewed 1/07)

Statute An adult guardianship services program provides services within the limits of available funding for indigent incapacitated adults. The program is located within the Division of Disability,

Aging and Rehabilitative Services of the Family and Social Services Administration. An indigent adult is an individual with no appropriate person to serve as guardian, the inability to obtain privately provided guardianship services, and an annual gross income of not more than 125% of the federal poverty level.

The division contracts with a nonprofit corporation for the provision of guardianship and related services in each region. The provider must have an individualized service plan for each person. The plan must provide for the least restrictive service including: guardianship of the person or estate, limited guardianship, appointment of a health care power of attorney, identification of a health care representative, and designation of a representative payee. Each provider is subject to periodic audit by an independent certified public accountant.

Each contract for guardianship services must specify: (1) the establishment of a guardianship committee under the provider's board of directors; (2) a 25% match of funding by the provider, with the division paying the remainder; (3) the establishment of procedures to avoid a conflict of interest for the provider in providing services to incapacitated individuals; (4) the identification and evaluation of adults in need of guardianship; (5) the adoption of individualized service plans; (6) periodic reassessment of each incapacitated individual; (7) provision of legal services necessary for the guardianship; (8) training and supervision of paid and volunteer staff; and (9) the establishment of other procedures and programs as required by the division. Ind. Code §§12-10-7-1 through 9.

Program The state's 15-year-old public guardianship program was established in 1992, is 100% state funded, and is coordinated by the Indiana Family and Social Services Administration, Division of Aging, with regional programs through Indiana's area agencies on aging and mental health associations. The program served approximately 253 individuals in FY 2006. The local programs petition the probate court to establish guardianship. An estimated time per case is five hours per month and is usually required to maintain the client files. Caseloads per individual guardian ranged from 25 wards to 46 wards.

Wards are visited at least monthly, but wards in nursing facilities are seen every 90 days.

A statewide needs assessment on aging and in-home services was completed in fiscal year 2005 and indicated that there may be a substantial unmet need, but the funding is stable. The existing programs are viewed as being at maximum capacity, with a waiting list for services.

Iowa (phase I interview state; reviewed 1/07)

Statute Legislation in 2005 created a new state Office of Substitute Decision-maker and authorizes local offices. It provides that the Department of Elder Affairs is to create and administer a statewide network of substitute decision-makers if no other decision-maker is available. It covers both personal representative services for estates after an adult's death and guardianship and other less restrictive means of decision making.

The state office is to act as decision-maker if no local office is available. The state office is also to establish a referral system, develop and maintain a listing of public and private services to aid wards, provide information to the public, develop an education and training program, and ensure that the appropriate least restrictive decision-making service is used—including representative payment, power of attorney, and limited guardianship or conservatorship. The department is to adopt rules, including providing for an ideal staff to client ratio, standards and performance measures, and a fee schedule for collection from the estates of wards with sufficient assets and income to pay.

The local offices are to provide substitute decision making and personal representative services, identify client needs and local resources, and determine the most appropriate and least restrictive form of decision making required in individual cases.

Implementation of the new law was subject to the availability of funding. Iowa Code §231E.

Code sections existing prior to the new law authorized a statewide system of volunteer guardianship programs. Clients of the Department of Human Services who need guardians and/or conservators, but have no suitable or appropriate decision-maker, may be served by volunteers trained to act in that capacity. Iowa Code §217.13.

In addition, Iowa law provides for a state substitute medical decision-making board and local substitute medical decision-making boards. The state board includes medical professionals and lay persons appointed by the director and the state board of health. Local boards in each county also include medical professionals and lay persons. The local boards may act as substitute decision-maker for patients incapable of making their own medical care decisions if no one else is available to act—and the state board may act if no local board is available. The local boards may act when there is sufficient time to review the patient’s condition and a reasonably prudent person would consider a decision to be medically necessary. The local board may petition for guardianship, but may continue to act in the patient’s best interests until a guardian is appointed. The board members are not liable for decisions made in the discharge of their duties. Iowa Code §§135.28 & 29.

Also notable is a 1995 decision by the Iowa Supreme Court, *In re Guardianship of Hedin* (528 N.W. 2d 567), in which the court established standards that must be met for the appointment of a guardian. The standards and requirement of seeking the least restrictive alternative for substitute decision making created in *In Re Hedin* were codified as part of the Iowa guardianship law.

Program Iowa has had separate piecemeal guardianship mechanisms, none even beginning to meet the need statewide. Each continues in place, but the legislation in 2005 created a new statewide program.

First, some counties serve as guardian of last resort. The county board of supervisors provides funding for guardianship, conservatorship, and representative payee services. The program derives its authority from the county board. It is staff-based and housed within the county. In other instances, non-profit organizations have developed programs in which persons in need of a decision-maker are served through that program.

Second, legislation to allow for statewide volunteer guardianship programs was enacted in 1989, for clients of the Department of Human Services needing guardianship services—but funding was never appropriated. Polk County is one of the few counties to implement a successful volunteer program. Clients come from DHS caseworkers and adult protective services referrals. The Polk County attorney typically files the petition.

Third, a unique provision in state law enacted in 1989 established a state medical substitute decision-making board operated by the Department of Public Health, and allowed for the creation of local boards as well. These boards are able to act as medical decision-maker of last resort. The boards’ ability is confined to one-time medical decisions—and does not include placement decisions. At one time, seven of the state’s 99 counties had local boards that could hear cases—and in areas where there is no board, the state board can act. Generally the boards serve a younger adult population, including those with developmental disabilities and mental retardation.

Legislation in 2005 created a new state Office of Substitute Decision-maker and authorizes local offices. It provides that the Department of Elder Affairs is to create and administer a statewide network of substitute decision-makers if no other decision-maker is available. It covers guardianship, other less restrictive means of surrogate decision making, (such as use of advance directives and powers of attorney, as well as representative payment for public benefits), and also personal representative services for estates after an adult’s death. The state office is to act as decision-maker if no local office is available.

Implementation of the new law was subject to the availability of funding, which was not appropriated in 2005 or in 2006. The department was the recipient of an Administration on

Aging (U.S. Health and Human Services) grant to assist in laying the groundwork for the office, including development of forms and training materials.

Kansas (reviewed 2/07)

Statute Kansas law establishes a statewide volunteer guardianship program. The Kansas Guardianship Program is a public instrumentality with a board appointed by the governor. The program recruits and monitors volunteers to serve as guardians or conservators for incapacitated adults.

The program's board consists of seven members, including the chief justice and six residents of the state, at least one of whom serves as a volunteer in the program. Members serve four-year terms. The board must employ staff; accept and receive gifts, grants, or donations; and report annually on actions to the governor, the legislature, the judiciary, and the public.

Funding is from state appropriations. The executive director provides a monthly report on expenditures to the board. The board is responsible for an annual audit of all financial records by an independent certified public accountant. Kan. Stat. Ann. §§74-9601 through 9606.

Program The Kansas Guardianship Program was initiated in 1979 under Kansas Advocacy and Protection Services, Inc. The 1995 Kansas Legislature established the program as a separate instrumentality governed by a seven member board of directors including the chief justice (or designee). It is the only statewide volunteer-based guardianship program in the nation.

The program works collaboratively with the Kansas Department of Social and Rehabilitative Services (SRS). The SRS identifies individuals in need of guardianship. Adult protective services and the state hospital make referrals. Guardianship is considered only after all less restrictive alternatives have been exhausted. The program screens volunteers, and matches the abilities and interests of the volunteer with the needs of the potential ward or conservatee. SRS legal services petitions the court for appointment of the volunteer. The program does not petition.

After a volunteer is appointed, the program contracts with the volunteer for services, requires a monthly report of activities, provides a small monthly stipend to offset expenses, and gives ongoing training and support.

The program serves over 1,400 wards and conservatees. It has a paid staff of 12 full-time equivalent professionals and 830 volunteers. It serves elders with dementia, as well as younger adults with mental illness, developmental disabilities including mental retardation, dual diagnoses of mental illness and developmental disabilities, and head injuries. All are low income, and most live in their own homes, nursing homes, or group homes.

The program has a budget of over \$1.2 million, appropriated from the state's general fund. The program does not collect fees from clients.

Kentucky (phase I site visit state; reviewed 5/07)

Statute The Cabinet for Health and Family Services may be appointed as guardian, limited guardian, conservator, or limited conservator for incapacitated individuals when no other suitable person or entity is available and willing to act. The cabinet applies to the district court for appointment. The cabinet receives fees for its fiduciary services from the estates of clients who are able to pay, as provided by law. The fees are placed in the state general fund. Funding for the program comes from the general fund. Ky. Rev. Stat. §210.290.

Program The public guardianship program is administered by the guardianship branch in the Division of Protection and Permanency and the Division of Service Regions, in the Department for Community Based Services, in the Cabinet for Health and Family Services. All adult protection responsibilities are under a separate adult safety branch. In 2006 the cabinet realigned the service regions from the original sixteen to nine regions and a guardianship field office is

located in each of the nine regions. Although there is support and understanding of the public guardianship program in some regions, it is still lacking in others. Supervision of all direct protective services, including the public guardianship program, is through the service regions and, thus, the conflict of interest remains.

The majority of case referrals come through adult protective services. Usually adult protective services petitions for a capacity determination, and the public guardianship program petitions for its appointment, with the supervisor of the guardianship region in which the individual lives as applicant on behalf of the cabinet. However, sometimes the public guardianship program is not notified that it has been appointed. In Kentucky a six-person jury trial is held for each guardianship case. This is unique to Kentucky and its possible abolishment or revision has been the subject of legislation for at least the past eight years. The jury is to make a determination of capacity. Based on the finding of the jury, the judge determines who will serve as guardian, as well as the scope of the order. The focus of the trial is on the functional limitations of the proposed ward within the last six months. Respondents are expected to be present unless it is determined to be not in their best interest to appear.

The program is funded from the Social Services Block Grant (Title XX), state general fund appropriations, and Medicaid. The projected annual budget for FY 2006-07 is \$4.03 million. The cabinet receives Block Grant monies because the wards count as ongoing, court-ordered, open adult protective services cases.

The public guardianship program works with the Division of Mental Retardation to address concerns, including aging-out children who may need guardianship as adults, wards in community programs with problem behaviors that may result in institutionalization, and safety of wards served in both community and institutional settings. The program continues to be successful in obtaining Medicaid waiver funding for the majority of aging-out children, thereby allowing many to remain in the same care setting into adulthood.

Current caseload average is 63 wards to one staff, with the highest caseload at 107 wards and lowest at 47 wards per staff. For calendar year 2006 the program served 2,652 wards with 96% of all wards served Medicaid eligible. The program is comprised of a total of 72 cabinet employees and nine contract fiduciary staff, 43 of whom are caseworkers. The public guardianship program must accept all cases for which the court makes an appointment. Recent hiring freezes have resulted in loss of staff positions. In addition, when the courts changed to computerized tracking of guardians' annual reports, it became evident that some private guardians had not filed reports, and the judge appointed the public guardianship program instead, further increasing its caseload. Staff must have face-to-face contact with wards at least once a year, but they see some wards much more frequently, depending on the circumstances. Wards generally live in nursing homes, assisted living, mental health facilities, and their own homes. Since the original National Public Guardianship Phase I study, there has been a decrease in wards living in long-term institutions for individuals with mental retardation and psychiatric issues, as funds have become available to support community placements.

Strengths of the program are the commitment and creativity of the staff. Weaknesses are lack of funding for services for wards, underfunding and understaffing of the public guardianship program, high caseloads, conflicts of interest within the service regions, clients cycling in and out of mental health systems, overuse of emergency guardianships, a general lack of understanding of public guardianship functions, and more.

Louisiana (reviewed 1/07)

- | | |
|---------|---|
| Statute | There is no statutory provision for public guardianship or guardianship of last resort in Louisiana law. The general guardianship law (termed "interdiction") is at La. Civ. Pro. Code Ann. art. 389 through 426; art. 4541 through 4569. |
| Program | A private not-for-profit organization, Louisiana Guardianship Services, Inc., provides |

guardianship (or “curator” services) for approximately 35 older adults and 90 younger adults with developmental disabilities, including mental retardation. Staff curators are trained and certified by the National Guardianship Foundation. The agency contracts with the Louisiana governor’s Office of Elderly Affairs to serve as curator for elderly adult protective services clients in need. It also contracts with the Department of Health and Hospitals to act as curator for individuals with developmental disabilities. The agency and individuals served were severely affected by Hurricane Katrina in 2005.

Maine (reviewed 1/07)

Statute The Department of Health and Human Services acts as the public guardian or conservator for incapacitated adults in need of a guardian or conservator. The authority is exercised by the commissioner of health and human services and by any persons delegated by the commissioner, including social workers or others qualified by education or experience. The DHHS Office of Elder Services acts as public guardian and conservator for incapacitated adults except those with mental retardation and/or autism. The DHHS Office of Cognitive and Physical Disability Services acts as public guardian and conservator for incapacitated adults with mental retardation and/or autism.

No public guardian may be appointed if the court determines that a suitable private guardian or conservator is available and willing to act. The public guardian or conservator is not required to file bonds in individual guardianships, but must give a surety bond for the joint benefit of all wards or protected persons under the program’s responsibility.

Any person may nominate the public guardian to serve. Prior to appointment, the department must accept or reject the nomination within 30 days of notification. If the nomination is accepted, the department must file a detailed plan, including the proposed living arrangement and how the financial, medical, remedial, and social needs will be met, as well as provision for continuing contact with relatives and friends. In the case of a public conservatorship, the plan must describe the management of the ward’s or protected person’s estate. Appointment of a public guardian or conservator does not change the person’s right to services available to all individuals who are incapacitated.

At a minimum, the public guardian or conservator must review each case annually and file this review with the court. Each review must include an examination and evaluation of the plan for the ward or protected person and recommendations for a modification if necessary.

When a minor with mental retardation living in a state-operated institution approaches age 18, or prior to the release of an individual with mental retardation from a state-operated institution, the head of the institution must initiate an examination to determine need for guardianship. If such need exists, and no guardianship proceeding is pending, or the facility head determines that nomination of the public guardian is advisable, such person must nominate the public guardian.

The public guardian or conservator receives compensation as allowed by the probate court, allocated to an account from which may be drawn expenses for filing fees, bond premiums, court costs, and other expenses. In some cases the Department of Health and Human Services must pay for the costs of a guardian *ad litem* or other special costs. Me. Rev. Stat. Ann. 18A; §§5-601 through 614.

Program The budget for the program administered by the Office of Elder Services is approximately \$6 million, which includes monies for adult protective services. Funding is primarily from state funds and client fees. Client fees depend upon availability of funds and court approval. This program has 71 paid staff (including all staff persons, not just professionals with decision-making responsibility).

Both programs petition for appointment if necessary. These programs serve over 1,500 individuals. Cases generally are referred from private social services agencies, as well as fam-

ilies, physicians, and others. Nearly half the clients are elders with dementia. The balance of the caseload includes younger adults with mental illness, mental retardation, and substance abuse. Most of the clients are low income (with less than \$10,000 in assets). Clients live in nursing homes, assisted living, group homes, or their own homes.

The program named as strengths the commitment of its social work staff, the coordination of services with adult protective services, statewide consistency, existence of an after-hours response system, a statewide database, and probate code provisions clearly setting out program roles and expectations. Weaknesses include the lack of client social history available to caseworkers, and the need for greater expertise and staffing in financial and estate management. Currently, the program is seeing more young adults with chronic mental illness coming under public guardianship.

Maryland (phase II site visit state; reviewed 8/07)

Statute Maryland has two statutory schemes for public guardianship—one for elders and another for younger incapacitated adults. Both provide for guardianship of the person only. For adults less than 65 years old, the director of the local Department of Social Services may serve as guardian; and for adults 65 years old or older, the secretary of aging or the director of the area agency on aging may serve—and these officials may delegate responsibilities of guardianship to staff whose names and positions have been registered with the court. Md. Code Ann. §13-707(a)(10); §14-203(b); §14-307(b). The legislative intent is that the provisions for appointment of public officials as guardian of the person be used sparingly and with utmost caution and only if an alternative does not exist. Md. Code Ann. §14-102(b);

Maryland law also establishes a system of public guardianship review boards. There must be at least one review board in each county, but two or more counties may agree to establish a single multi-county review board. Each review board consists of 11 members appointed by the county commissioner. In Baltimore County, the mayor, with advice of the city council, appoints the review board members. In any county with a county executive—as opposed to a county commissioner—the review board members are appointed by the county executive with advice of the county council. The review board members include a professional of a relevant local department, two physicians, including one psychiatrist from a local health department, a representative of a local commission on aging, a representative of a local nonprofit social service organization, a lawyer, two lay individuals, a public health nurse, a professional in the field of disabilities, and a person with a physical disability. Members serve for a term of three years.

Each public guardianship case must be reviewed by the board at least every six months. Once a year, the review is an in-person review, alternating with a file review. The review is based on a report submitted by the public guardianship agency concerning the placement and health status of the ward, the guardian's plan for preserving and maintaining the future well-being of the ward, the need for continuation or cessation of the guardianship, any plans for altering the powers of the guardian, and the most recent dates of visits by the guardian. The review board must recommend to the court that the guardianship be continued, modified, or terminated. The individual under guardianship must attend each in-person review board hearing and be represented by a lawyer he or she chooses or who is appointed by the court. Md. Code Ann. §§14-401 through 404.

Program Maryland has two separate public guardianship schemes—one for elders age 65 and over, through the Department of Aging and the area agencies on aging; and one for younger adults in need of guardianship services through local departments of social services (LDSS). When a local department becomes the guardian of an adult under age 65, it continues to serve in the role of guardian regardless of the age of the ward. These two public programs provide guardianship of the person only. Private attorneys generally serve as guardians of the property.

Funding is from state appropriations from general funds, and additional county funds in some jurisdictions. Some local guardianship programs may collect fees.

The guardianship program for older persons has about 36 paid full-time equivalent professional staff, and about 720 wards, most residing in nursing homes or assisted living facilities. The LDSS guardianship program for adults age 18-64 has close to 500 wards.

Each case is reviewed by a local public guardianship review board every six months—an in-person hearing once a year and a file review in between. The incapacitated individual must attend the annual hearing and be represented by an attorney. Attorneys, thus, remain on the case for representation before the review board. Currently, the contract for these attorney services is with the Maryland Legal Aid Bureau.

Both programs named as strengths their professional and knowledgeable staff and the use of a state contracted physicians and psychiatrists for consultations. Noted weaknesses included a critical lack of sufficient funding and staffing, lack of financial resources to conduct educational sessions and trainings, and lack of a flex fund for direct social services when none are available for wards.

Massachusetts (reviewed 2/07)

Statute Massachusetts has no statutory provision for public guardianship or guardianship of last resort. The general adult guardianship statute is at Mass. Gen. Laws Ann. §§201-1 through 51.

Program In Massachusetts, the Executive Office of Elder Affairs administers a protective services guardianship program through contracts with non-profit agencies for elders who have been abused, neglected, or exploited. The Executive Office of Elder Affairs contracts with five non-profit agencies for a total of 150 guardianship slots. The agencies accept appointments as guardian or conservator, subject to Elder Affairs' approval, and seek to keep the elder safe and secure, in the least restrictive and appropriate placement, through the provision of case management, legal, and other supportive services. The petition is submitted by the appropriate Elder Protective Services Agency, which requests a slot from Elder Affairs. If approved, and if there is a slot available, the case is assigned to a guardianship agency. The guardianship agency then reviews the case, accepts court appointment as guardian or conservator, and ensures the provision of necessary care and services.

However, advocates have recognized a need for an explicit public guardianship program and have sought legislation for a number of years. A proposed 2006 bill would have created a Public Guardianship Commission.

Michigan (reviewed 5/07)

Statute Michigan has no statutory provision for public guardianship or guardianship of last resort. The general guardianship law is at Mich. Comp. Laws Ann. §§700.1101 through 5108; 5301 through 5520. (In addition, Mich. Comp. Laws Ann. §600.880b sets aside certain fees collected by the probate registrar for adult guardianship—including independent evaluations, legal counsel, and periodic review. Provision of guardianship services is not listed.)

Program While there are no statutory provisions regarding guardianship of last resort, Michigan has in most every county a public administrator who can act as a guardian. They are appointed by the attorney general's office (political appointments) for such last resort appointments. These public administrators are attorneys, and may take the higher paying clients to offset the non-paying ones. In some large counties like Wayne, there are multiple appointees.

The Department of Human Services provides funding for guardianship for adult protective services clients. Approximately \$600,000 per year is set aside to fund guardians of last resort for vulnerable people discovered by APS. Of that amount, \$55,000 is used to provide

legal counsel to individuals who want to contest the appointment of a guardian. A guardian can charge \$60 per month to provide services with the DHS funds. This funding is insufficient and has not been increased for many years.

Michigan has allowed up to \$60 per month to be set aside for guardianship when calculating Medicaid eligibility for care in a nursing facility. As of July 1, 2007, that amount is being decreased to \$45. There is concern by guardians and judges that this could increase the problem of finding guardians for low-income individuals.

Of the state's 83 counties, fewer than one-third have some form of public guardianship. Some counties have funded programs with county funds through a special senior millage or through county general fund dollars. There is a definite and growing need for a statewide program of guardianship of last resort.

Minnesota (reviewed 7/07)

Statute Minnesota has two statutory schemes for public guardianship.

Individuals with Mental Retardation. The Commissioner of Human Services may be nominated to act as guardian for individuals with mental retardation. The commissioner must accept or reject the nomination within 20 working days of the receipt of a comprehensive evaluation. The commissioner's acceptance must be affirmed at a judicial hearing. The commissioner must accept the nomination if the evaluation concludes that the person has mental retardation, is in need of supervision and protection by a guardian, and there is no qualified person willing to serve. Public guardianship may be imposed only when there is no acceptable, less restrictive form of guardianship available. The commissioner must provide technical assistance to parents, near relatives, and interested persons seeking to become private guardians or conservators.

If the commissioner accepts a nomination, a local agency designated by the county board of commissioners, human services boards, local social services agencies, or a multi-county local social services agency, petitions on behalf of the commissioner in the court in the county of residence of the individual, seeking to serve as public guardian. The commissioner or the parent or relative of the individual also may petition. No action may proceed to hearing unless a comprehensive evaluation has been filed with the court, unless the person refuses to participate, and the court finds by clear and convincing evidence that the individual has mental retardation and needs a guardian. Upon the filing of the petition, the court must appoint an attorney for the proposed ward, unless counsel is provided by others. The proposed ward may waive the right to be present at the hearing only if the proposed ward has met with counsel and specifically waived the right to appear.

In addition to general powers and duties of a guardian, the court may grant to the public guardian the power to permit or withhold permission to marry, to begin legal action or defend against legal action, and to consent to adoption. If the commissioner determines that a conservator should be appointed, the commissioner may petition the court for the appointment of a private conservator. The commissioner must maintain close contact with the ward, visiting at least twice a year; must protect and exercise the legal rights of the ward; and should encourage maximum independent functioning in a manner least restrictive of freedom and consistent with protection.

The commissioner, acting through a local agency, also must seek out those individuals with mental retardation who are in need of guardianship and advise them as to the availability of services and assistance. The commissioner must require an annual review of every case, and must review the legal status of each ward in light of the progress indicated in the annual review. If the guardianship is no longer necessary or can be modified, the commissioner or local agency must petition for restoration or for a modification. Minn. Stat. §§252A.01 through 21.

Incapacitated Adults; Maltreated Vulnerable Adults. Minnesota guardianship law is based on the Uniform Guardianship and Protective Proceedings Act. If, under these provisions, a suitable relative or other person is not available to petition for guardianship or conservatorship, a county employee must petition with representation by the county attorney. The county must contract with, or arrange for, a suitable person or organization to provide ongoing guardianship services. If no suitable person can be found, a county employee may serve as guardian or conservator. The county must not retaliate against the employee for any action on behalf of the ward or protected person. Minn. Stat. §656.557 Subd. 10(c). When a county employee serves as guardian or conservator, the court must order compensation if the employee performs services not compensated by the county. The court may order reimbursement to the county from the client's estate for compensation paid by the county, but only if the county shows that after a diligent search it was unable to arrange for an independent guardian or conservator. Minn. Stat. §524.5-502(e).

Program Minnesota has two public guardianship programs.

Individuals with Mental Retardation. For individuals with mental retardation, the Commissioner of Human Services, at the Department of Human Services, may serve as public guardian through a local human services or social services agency. The department of a local agency may petition if necessary, but does so infrequently. When a petition is filed, there must be a comprehensive evaluation, and the individual is represented by an attorney at the hearing. The commissioner reviews every case annually for possible recommendations for modification of the order or restoration. The program is funded with state appropriations, although it is categorized as an unfunded mandate with the exception of a portion of the salary of the public guardianship administrator.

The department or local agency may petition for appointment of a private conservator—or may serve as conservator if the estate is under \$20,000.

The program serves over 3,400 individuals with mental retardation, and has one paid full-time equivalent professional staff—but also uses the staff of local agencies.

The program named as strengths its advocacy, checks and balances built into the system, and its connections with local government agencies. Stated weaknesses included extreme underfunding and understaffing, as well as conflicts of interest with program service providers and funders.

Incapacitated Individuals. For incapacitated individuals identified through adult protective services, the county must contract with, or arrange for, a suitable person or organization to provide ongoing guardianship services. If the county has made a diligent search and no suitable person has been found, a county employee may serve as guardian or conservator. This puts the employee in a clear conflict of interest position. State law specifies that the county must not retaliate against the employee for any action taken on behalf of the ward or protected person.

Mississippi (reviewed 2/07)

Statute If an individual with property needs a guardian but there is no person or entity who qualifies, it is the duty of the Chancery Court or the chancellor to appoint the clerk of the court to be guardian. The clerk must give a special cumulative bond as guardian. The clerk is allowed compensation from the estate of the ward, up to 10% of the estate, when finally settled. Miss. Code Ann. §93-13-21. The court may not appoint the Department of Human Services as guardian. Miss. Code Ann. §43-47-13(4).

Program Although Mississippi law provides that the court may appoint the clerk as guardian if there is no qualified person available and willing to serve, in reality court appointments of the clerk are very infrequent. The law provides that the court may not appoint the Department of Human

Services. The Department of Mental Health has been appointed on a few occasions. Otherwise, despite the vast and growing need, there is no public guardianship in the state.

Missouri (phase I interview state; reviewed 1/07)

Statute Missouri law provides that the county public administrators are to serve as public guardians. Mo. Rev. Stat. §§473.730 & 750. In certain counties of a designated size, social service agencies in the county may serve, unless they provide residential services to wards, and only if the agency employs a licensed professional with sufficient expertise to meet the needs of the ward. Mo. Rev. Stat. § 475.055(1)(3).

Program According to Missouri law, it is the responsibility of elected county public administrators to act as public guardians or conservators if there is no one else to serve. They may also serve as trustee or representative payee. The only requirements for serving in this capacity are that candidates must be a resident of the county, be at least 21 years old, be a current registered voter, and have all their taxes paid.

Currently there are 115 public administrators in the state. There is wide variability throughout the state in the background and experience of the public administrators, the method of payment, the additional functions they perform, their caseloads, the extent of support from county commissioners and judges, and their petitioning practices. The Missouri Public Administrators Association has voted to adopt the National Guardianship Association's *Code of Ethics* and *Standards of Practice* as a guideline.

At the beginning of the year, judges require that the administrators file a list of clients and their assets with the court, and indicate what bonds are in place. If the judge thinks the county bond is not adequate, the judge orders the county to provide a larger bond.

A challenge for the public administrators is to work with the county commissioners to get sufficient funding to cover required needs. Historically, public administrators collected fees from wards to fund their positions, and this model still exists in some areas. No uniform guidelines dictate how much the public administrators can charge against the estate, and it is left to the discretion of the judges. In 2000, most of the 115 public administrators went on salary rather than depending on fees, but there is no uniformity. The average fee per ward is about \$500 per year, but fees are larger in urban areas. Some judges allow five percent of total expenditures, some allow five percent of total income, and some still require individual time logs from the public administrators. Some judges may assign large estates to attorneys rather than the public administrators. No Medicaid funds are used to supplement the fees.

Another problem is the precarious nature of the elected public guardians. Often the public does not realize when they vote for public administrator that they are also voting for public guardian, and how a change may disrupt the lives of the wards.

Many of the public administrators have very high caseloads. Legislation in 2000 provided that there should be a full-time worker to assist the public administrator for every 50 clients, but the wording was optional rather than mandatory, and sufficient funding to support this staffing level has not been forthcoming. It is not uncommon for one public administrator to have 80 or more wards without any office help or staff. (At the same time, public administrators are permitted to take private guardianship cases, as well as public cases, and some may be conducting a private business on the side.)

Lack of petitioners is also a difficulty. There are no public entities that pay for the petition and the hiring of an attorney. Some public administrators petition for their wards if the local judge will allow it, but most counties do not have the resources to do so. In some urban areas, the division of aging may petition.

Finally, no other surrogate decision-making programs exist in the state. The Department of Mental Health has regional centers that assist people with mental illness and mental retar-

dation, but they are not legal guardians, although they are allowed to make placement decisions and assist with needs through their Medicaid allotments.

The system of using public administrators as public guardians is unique. On the positive side, it provides state-wide coverage. 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, experienced surrogate decision-makers. Moreover, funding is uneven and patently insufficient, resulting in sometimes dangerously high caseloads. Very little data exists on the cases and clients of the public administrators.

Montana

Statute If the court determines there is no qualified person willing to serve as guardian, the court may appoint an agency of the state or federal government (or a designee of the agency) that is authorized or required by statute to provide services to the persons with the incapacitated person's condition. When an agency is appointed, the court also may appoint a limited guardian to represent a special interest of the incapacitated person, with this interest as the sole responsibility of the limited guardian—and the interest is then removed from the responsibility of the agency. Mont. Code Ann. §72-5-312(5).

Program In Montana, APS provides guardianship services. There is no separate line-item funding for public guardianship. The program is funded through the state APS budget, as well as private donations. The program does not collect fees from the estates of wards. The program also may serve as representative payee or agent under power of attorney. The program can petition for appointment.

The program serves over 360 wards, and has eight paid full-time equivalent professional staff, and 10 volunteers. All of the cases come from adult protective services. The residential setting for most of the wards is assisted living facilities.

The program named as its greatest strengths the caring and commitment of its staff, and its ability to serve as a safety net for its clients. The greatest weaknesses were lack of funding, lack of volunteers, and lack of consistent training.

Nebraska (reviewed 3/07)

Statute There is no statutory provision for public guardianship or guardianship of last resort in Nebraska. The general guardianship law is at Neb. Rev. Stat. §§30-2601 through 2661. A bill to create an office of public guardianship was introduced in the 2007 legislative session, but did not pass.

Program Nebraska does not provide public guardianship services. However, there are training sessions on guardianship offered in some counties.

Nevada (reviewed 6/07; 2007 legislative changes added)

Statute Legislation in 2007 (S.B. 157) made a number of changes in Nevada's public guardianship law. The board of county commissioners of any county must establish an office of public guardian. The board must appoint a public guardian for a four-year term. The board may: (1) appoint a public guardian for a four-year term; (2) designate a county office to serve; (3) contract with a private professional guardian (unless the county population is 100,000 or more); or (4) contract with the board of county commissioners of a neighboring county in the same judicial district to use its public guardian. The county public guardians must appoint one or more deputies to perform the functions of the office.

The public guardian serves individuals with no relative or friend able and willing to serve. Any person may petition the district court for appointment of the public guardian. The public guardian must acknowledge having received a copy of the petition and all accompanying documents prior to the filing of the petition.

The public guardian must file a bond; keep financial and case records; appoint a deputy to serve in the public guardian's absence; and may hire staff and retain an attorney. The public guardian serves at the pleasure of the board of county commissioners. The public guardian may retain an attorney or obtain assistance from the district attorney's office with the approval of the board.

Costs of serving as guardian and costs incurred in the appointment process are chargeable against the ward's estate with court approval. Payment for the services of the public guardian is allowed as a claim against the estate, Nev. Rev. Stat. §§253.150 through 250. A county may advance funds for public guardianship expenses, to be repaid from the estate assets to the extent available, and may establish a revolving fund.

Program County boards of commissioners have established county public guardianship programs in some counties, housed as independent agencies or in the offices of the public administrators or district attorneys. One of the largest programs is the Washoe County Public Guardian, in which staff are certified by the National Guardianship Foundation. The program prepares an individual guardianship plan for each client, conducts monthly visits on all locally placed individuals, and case managers make quarterly assessments. The office seeks a determination from the court on the ability of the estate to pay any or all of the costs.

The 2007 legislation may spur additional public guardianship activity.

New Hampshire (reviewed 6/07)

Statute New Hampshire law establishes a public guardianship and protection program of the person, estate, or both. The program serves when a guardian is required and there is no relative, friend, or other interested person available, willing, and able to serve. The program must serve in three instances: (1) when nominated as guardian by the commissioner in the mental health services system; (2) when nominated by the administrator of services for individuals who are developmentally disabled; and (3) when nominated as guardian by the director of the adult protective services program. The commissioner of the mental health services system must take steps to safeguard clients in the system who, by reason of mental illness, cannot manage their affairs and are at risk of substantial harm. This includes nomination of a guardian when no less restrictive alternative is available. Similarly, the administrator of services for developmentally disabled persons must take steps to safeguard clients who are 18 years old or over who cannot manage their affairs and are at risk of substantial harm. This includes the nomination of a guardian when no less restrictive alternative is available. In all three of these cases, payment is from the estate of the ward except in cases of indigence. The law provides for state appropriations for the program. In addition, the program may serve others in need if funds are available, but state appropriations are not provided.

The Department of Health and Human Services must contract with one or more organizations approved by the state Supreme Court for the organization to serve as the public guardian and protection program. The contract must fix the cost per guardianship. The contract may also provide for related surrogate services by the organization, such as conservatorship and serving as agent under a power of attorney or as representative payee. The services may not include direct delivery of social services.

The public guardianship and protection program must file annual reports with the probate court for each individual for whom it is appointed. The court must review the report for compliance with state and federal law, and ensure that the ward is receiving appropriate care and services, and that the highest ethical standards are maintained. The public guardianship

and protection program may be appointed as co-guardian. N.H. Rev. Stat. Ann. §§547-B:1 through B:8.

Program The Office of Public Guardian was established as a state agency in 1979. Under legislation enacted in 1983, the office became a free-standing, non-profit corporation approved by the Supreme Court to provide public guardianship services. The New Hampshire Department of Health and Human Services contracts with the office to serve. The department also contracts with the Tri-County Community Action Program/Granite State Guardianship Services.

The budget for the program is approximately \$1.8 million for services to individuals with mental illness, developmental disabilities, or open adult protective services cases. On occasion, there is a waiting list of additional people in need. The program has 12 full-time equivalent paid professional staff with caseloads of approximately 65 wards each. Estate managers on staff handle the public benefits and other income. In addition, persons with mental illness or developmental disabilities almost all have case managers through the mental health or DD service systems.

Funding is from: (1) state appropriations, approximately \$835,000 in general funds through the Department of Health and Human Services and \$33,500 through the Department of Corrections; (2) Medicaid case management funds; (3) Medicaid and Social Security funds; and (4) client fees.

The program serves as guardian, conservator, agent under power of attorney, representative payee, trustee, and occasionally accepts guardian *ad litem* appointments. It also provides private guardianship services. The program does not generally petition for appointment, but on occasion a probate judge has asked the program to serve in this role.

The program serves about 950 individuals, 650 of whom have mental illness, developmental disabilities, acquired brain injury or dementia, and come through the program's contract with the Department of Health and Human Services. Some of these clients live in the state psychiatric hospital, some in the state psychiatric nursing home, and the remainder receive community-based services. Those wards not on the DHHS contract include individuals in nursing homes, private fee-for-services guardianships covering all the disability groups, and approximately 20 wards who are in the secure psychiatric unit in the state prison. The remainder live independently with community support.

The program named as its greatest strengths: (1) a broad funding base derived from a mix of public and private cases; (2) its well-qualified and experienced staff; (3) its excellent reputation among stakeholders; (4) its strong connections with the National Guardianship Association and other national associations (noting that the first executive director of the office of public guardian co-authored the NGA Code of Ethics); and (5) its close working relationship with the Department of Health and Human Services, especially as to identifying new funding sources. Its weaknesses included higher than ideal caseloads, due to the insufficient level of state funding.

New Jersey (reviewed 5/07)

Statute New Jersey law establishes an Office of the Public Guardian for Elderly Adults in the Department of Health and Senior Services—but specifies that the office is independent of any supervision or control by the department. The office serves incapacitated adults age 60 or older. The chief executive officer of the office is the public guardian, appointed by the governor. The public guardian must administer the office, hire qualified staff including a general counsel and other attorneys as needed, and keep proper financial and statistical records. The public guardian may serve as guardian or conservator, and may intervene in guardianship or conservatorship proceedings if the appointed fiduciary is not fulfilling his/her duties. The public guardian must consider the religious and ethical beliefs of the incapacitated person when making decisions on the person's behalf. Additionally whenever possible the public guardian

works with wards to carry out decisions that are self determined by them.

Any elderly state resident without a willing and responsible family member or friend to serve is eligible for public guardian services. After family or friends the law requires the court to give first consideration to the office of the public guardian. The court may waive court costs and filing fees. The costs of services and of appointment are charged against the income and estate of the individual. The reasonable value of the guardianship services may be a lien on the estate.

When the court appoints the public guardian, the court must make findings of fact on clear, unequivocal, and convincing evidence, and must establish whether and to what extent the authority is partial, and set the term of appointment. The grant of authority must be the least restrictive alternative and the public guardian must use means that least interfere with the capacity of wards to act on their own behalf.

The public guardian has the authority to determine the maximum caseload that the office can maintain, based on the funds available, and when the maximum is reached, may decline appointment.

When the office is not available to serve as guardian, attorneys, professional guardians, or other appropriate persons as determined by the court may serve as guardian. New Jersey law establishes a registration system for professional guardians, to be administered by the office. A person may not serve as professional guardian of five or more wards unless registered as a professional guardian. The office must charge fees, conduct background checks, and approve a vendor for training for professional guardians. The office must maintain a statewide registry of professional guardians. The public guardian may suspend or revoke a guardian's registration with reasonable cause. N.J. Stat. Ann. §§52:27 G-32, *et seq.*

New Jersey law also provides for the optional appointment of a "public guardian of incompetent veterans" by the Supreme Court for each county. N.J. Stat. Ann. §§3B: 13-21 through 23.

Significant guardianship legislation in 2005 made major reforms in procedural protections, powers, and duties of a guardian and accountability.

Program

The Office of the Public Guardian was created by state law in 1986 and is located in the New Jersey Department of Health and Senior Services, in its Division of Aging and Community Services. It serves incapacitated adults age 60 and over. It employs attorneys, investigators, care managers, accountants, and support staff. The office does not initiate cases. Hospitals, long-term care facilities, adult protective services, and county welfare agencies or other public and private agencies often petition to have the office appointed.

The office develops an individualized care plan for each client based on the person's physical, mental, social and financial ability, and needs. The office has three parts—legal, trust, and care management services. Legal consists of attorneys, paralegals, and investigators. They appear in court for various matters, secure and sell property, maintain property, investigate exploitation, secure important papers, and carry out other activities related to the legal status of the ward's person and property, including protective orders. Trust services capture all assets and liabilities and pay bills, establish eligibility for public assistance programs and Medicaid, and work closely with legal and care management. Care managers meet with each new client and assess the person's current level of functioning and future needs. The care manager interviews the client, caretakers, family and friends, and other professionals—and reviews medical and social service files to understand the client's situation. The care manager in consultation with the public guardian establishes an individual care plan, also taking into account the person's financial assets and liabilities. The office seeks to place clients in the least restrictive environment possible.

The public guardian often acquires cases that have very difficult and challenging family and friends who have not always acted in the wards best interest, but are still involved with

the ward. These cases, especially when the ward is still in the community, are extremely time consuming, require patience, and at times court action to assure the ward's health and safety.

The budget for the office is approximately \$517,000. The office receives state appropriations, and uses Medicaid funds, client fees, and estate recovery. The fee schedule is governed by statute. The office has over 700 wards and has over 50 full- and part-time professional paid staff. Staff who make binding decisions for wards are attorneys.

In addition to serving as guardian or conservator, the office serves as agent under powers of attorney and representative payees for its guardianship clients. The office also is responsible for administering the state's registration program for private professional guardians.

New Mexico (reviewed 2/07)

Statute New Mexico law establishes the Office of Guardianship in the Developmental Disabilities Planning Council. The director of the planning council must hire the director of the guardianship office.

The office provides probate guardianship services (including temporary guardianship) to income-eligible incapacitated persons. It also provides for the recruitment and training of persons to serve as mental health treatment guardians—guardians who have authority to make decisions about treatment for consumers of mental health services, including decisions about psychotropic medications, aversive stimuli, convulsive treatment, experimental treatment, and psychiatric services (N.M. Stat. Ann. §43-1-15). The office provides training and information to interested persons on guardianship and alternatives. It contracts for attorneys to petition the district court for guardianship of alleged incapacitated persons.

The office contracts for guardianship services, and must monitor and enforce all contracts. It has access to case records, court filings and reports, and financial and other records maintained by contractors. The office may arrange visits with wards served by contract guardians. A contract must include a requirement that contractors and their staff meet nationally recognized standards for guardianship services, adoption and compliance with a code of ethics for guardians, a maximum caseload for guardians, a fee schedule for services, assurance that the wards' civil rights will be met, and provision for access by the office to contract records, and staff to monitor the services. The office must establish, by rule, a system for the filing, investigation, and resolution of complaints about contractor services. N.M. Stat. Ann. §§28-16B-1 through 6.

Program The New Mexico Office of Guardianship originally was established in 1997/98 in the attorney general's office. Later legislation moved the office to the Developmental Disabilities Planning Council. The office contracts with providers of guardianship services—including the Arc (an organization that advocates for the rights of individuals with intellectual and developmental disabilities) of New Mexico for the developmental disability population, and Desert State Life Management for all other populations. Recently the office has contracted with several additional smaller contractors as well. The office also contracts for attorney services for the developmental disability population.

The office is funded with appropriations from the state general fund. It does not collect fees for guardianship services. The office serves as guardian of the person only.

New York (reviewed 2/07)

Statute A local department of social services may serve as guardian, and may contract with a not-for-profit corporation to serve as a community guardian for individuals who are eligible for, and who are receiving adult protective services, who are without friends, relatives, or responsible agencies to serve, and who are living outside a hospital or residential facility. If a community guardian client enters a hospital or residential facility on a long-term basis, the program must

petition the court for removal as guardian. The community guardian program may receive fees from the estate of clients. No officer or employee of the community guardian program may have a substantial interest in any provider of services to clients. The community guardian program must obtain annual assessments from two qualified psychiatrists, or one qualified psychiatrist and one psychologist independent of the program, for each client to determine whether continuation of the guardianship is necessary. Persons hired by the program to provide services must have expertise or experience in mental health, protective services, social services, or home care. N.Y. Mental Hyg. Law §81.03(a); N.Y. Soc. Serv. Law §473-d.

Program While New York law provides for the creation of not-for-profit community guardian programs to serve indigent adult protective services clients who reside in the community, these programs only exist in New York City. The city has three community guardian programs, funded through the New York City Human Resources Administration, Adult Protective Services. The remainder of the state provides no public guardianship. Courts and professionals have recognized the need for many years, and have initiated discussions and planning meetings in several areas. In addition, the Vera Institute, working with the New York State Office of Court Administration, has created a guardianship project that acts as a court-appointed guardian for incapacitated individuals in Brooklyn.

North Carolina (reviewed 1/07)

Statute The law provides for the clerk of the superior court in every county to appoint a county public guardian for a term of eight years. The public guardian must have a bond with three or more sureties. The public guardian must apply for and obtain letters of guardian in the following cases: (1) when a period of six months has elapsed from the discovery of any property belonging to any minor or incapacitated person without a guardian; or (2) when any person entitled to letters of guardianship requests in writing, to the clerk, to issue letters to the public guardian. N.C. Gen. Stat. §35A-1270 through 1273.

The law also provides that the clerk of superior court may appoint as guardian “a disinterested public agent.” A “disinterested public agent” guardian is defined as the director or assistant director of a local human services agency, or an adult officer, agent, or employee of a state human services agency. N.C. Gen. Stat. §35A-1213. No “disinterested public agent” may be appointed guardian until all diligent efforts have been made to find an appropriate individual or corporation to serve in this capacity. N.C. Gen. Stat. §35A-1214. Disinterested public agent guardians may not have a conflict of interest, and must have a bond whether they serve as guardians of the person, estate, or as general guardians. The premiums for bond coverage are paid by the state. N.C. Gen. Stat. §35A-1239

Program The statute provides that the clerk of the superior court may appoint a county public guardian. In practice, the public guardian is usually an attorney, who may be appointed to serve as guardian of the person, estate, or as general guardian.

North Carolina law also provides that the clerk of superior court may appoint a “disinterested public agent” to serve as guardian of last resort when no individual or corporation is available to serve. In practice, local departments of social services, mental health, public health, and county departments on aging are often appointed to serve as “disinterested public agent” guardians. A “disinterested public agent” may be appointed to serve as guardian of the person, estate, or as general guardian.

North Dakota (reviewed 2/07)

Statute In North Dakota, if no one else can be found to serve as guardian, an employee of an agency, institution, or nonprofit group home providing care and custody may be appointed if the

employee does not provide direct care to the individual and the court finds that the appointment poses no substantial risk of conflict of interest. N.D. Cent. Code §30.1-28-11(1). In addition, in 2005, the legislature provided that the Department of Human Services could create and coordinate a system of volunteer guardians for vulnerable adults ineligible for developmental disabilities case management. S.B. 2028 (2005).

Program Legislation in 2005 allowed the Department of Human Services to create and coordinate a “unified system for the provision of guardianship services to vulnerable adults who are ineligible for developmental disabilities case management services.” The legislation provided that the system must include guardian standards, staff competency requirements, and guidelines and training for guardians; and that the department must require that a contracting entity develop and maintain a system of volunteer guardians for the state. While advocates had sought \$752,000 for this system, the appropriation was \$40,000, to be used for direct guardianship services specifically for individuals with mental illness.

Ohio (reviewed 2/07)

Statute An agency providing protective services under contract with the Department of Mental Retardation and Developmental Disabilities may be nominated as guardian of a mentally retarded or developmentally disabled person. The agency may charge the client fees for services. There must be a comprehensive evaluation of the individual before the agency is appointed as guardian. The agency must review the physical, mental, and social condition of each mentally retarded or developmentally disabled person for whom it is acting as guardian, and must file these reports with the department annually. Ohio Code Ann. §§ 5123.55 through 59.

Program The Ohio Department of MRDD contracts with a nonprofit agency, Advocacy & Protective Services, Inc., to provide guardianship services for adults with mental retardation and developmental disabilities. In addition, courts often use attorneys or sometimes volunteer as guardian when there is no one else, willing, qualified, and available. The state has a number of volunteer guardianship programs including Lutheran Social Services of Northwestern Ohio and the Central Ohio Area Agency on Aging.

Oklahoma (reviewed 1/07)

Statute Oklahoma law creates an Office of Public Guardian within the Department of Human Services. However, the legislation also creates a public guardianship pilot program, and specifies that until the pilot is expanded statewide and rules are promulgated by the Commission for Human Services, and subject to the availability of funds, the office is to function as a source of information and assistance on guardianship and alternatives for the public.

The pilot program is operated by the Department of Human Services in consultation with an evaluating board, subject to the availability of funds. The evaluating board must submit a preliminary report to the legislature within six months of its establishment. The report must include information regarding the feasibility of statewide expansion, staffing, funding sources, eligibility standards, fee schedules, special needs wards, and professional guardians. The legislation sets out the required appointees for the board.

After the expansion of the pilot program to a statewide program, the Office of Public Guardian is to serve as public guardian for eligible wards. The law does not define “eligible wards.” The office also must establish and maintain relationships with relevant government, public, and private agencies; have at least phone contact with each ward every two weeks; visit each ward at least three times a quarter, with one visit unannounced; maintain case records; provide information and referrals; foster increased independence of the ward; and develop and maintain a listing of relevant services and programs.

The office may contract for services and may accept volunteer services; may intervene in a guardianship proceeding; and may employ staff. The office must seek suitable private guardians for its wards and report to the court every six months on efforts to do so. The office may serve as full guardian, limited guardian, special guardian, or conservator if there is no one else willing and qualified to serve. Okla. Stat. Ann. §§30-6-101 & 102.

Also, in a criminal proceeding, if a person is found to be incompetent because of mental retardation, and is found by the court to be dangerous, the court must suspend the criminal proceeding and place the person in the custody of the office of public guardian. The office must place any such person in a facility or residential setting; and must report to the court every six months as to that person's status. Okla. Stat. Ann. §22-1175.6b.

Program The Oklahoma Public Guardian law has not been funded. Currently, the Office of Public Guardian serves only criminal defendants who are found, by the district court in which the criminal charges are pending, to be: (1) not competent to stand trial due to mental retardation; and (2) dangerous.

The court may place the defendant in the custody of the public guardian, who has complete discretion on placement to meet the safety needs of the ward and the public. A ward stays in the custody of the public guardian until the court finds the ward to be: (1) competent to stand trial; or (2) no longer dangerous. Currently the public guardian has 26 wards.

Oregon (reviewed 5/07)

Statute A county court or board of county commissioners may create an office of public guardian and conservator and expend county funds for this purpose. The office may serve as guardian or conservator upon the petition of any person or upon its own petition. The office may employ private attorneys if the fees can be defrayed out of the funds of the estate. It must file a bond for the joint benefit of the guardianship and conservatorship estates, but is not required to file bonds for individual estates. The office has a claim against the ward's or protected person's estate for reasonable expenses for guardianship or conservatorship services and for services of the attorney of the office. If the office is compensated by the county for services, any reimbursement of expenses from estates are to be paid to the county. The court may not charge for filing fees for a petition asking for appointment of the office. Or. Rev. Stat. §§125.700 through 730.

Program While state law provides for an office of public guardian at the county level, such programs exist in only a few regions. For example, in Multnomah County (Portland), the Department of County Human Services provides guardianship services through the area agency on aging, which is also the Medicaid agency. Jackson County (Medford) contracts with legal services. Funding is from the county budgets, as well as Medicaid administrative match monies. In addition, the Multnomah County program charges a fee for services. The Multnomah County program has about 150 clients, the majority of whom are adults with mental retardation, developmental disabilities, or mental illness. A bill pending in 2007 would direct the Department of Human Services to make grants to counties to administer a public guardianship program, with a match from the county.

Pennsylvania (reviewed 2/07)

Statute Pennsylvania law provides for establishment of guardian support agencies to supply guardianship services; assistance in decision making; assistance in securing and maintaining benefits and services; and recruiting and training individuals to serve as representative payee, agents under powers of attorney, and trustees. In addition to powers and duties of guardians generally, the agency has power to invest funds of incapacitated persons for whom it is serving as

guardian of estate, pooling funds but maintaining individual accounts; expend funds to administer guardianships for which it has been appointed; and administer the estate of an incapacitated person who dies during the guardianship when no one else is willing and qualified to serve.

Guardianship support agencies may assist courts on request with reviewing petitions for appointment of a guardian, recommending alternatives to guardianship, investigating petitions, explaining petitions to respondents, or reviewing reports and monitoring guardianship arrangements. Moreover, the agencies may assist guardians in filing reports and fulfilling their duties; may assist in the filing of petitions, providing information on alternatives to potential petitioners, and locating individuals skilled in providing functional evaluations. The agencies must charge for services based on the recipient's ability to pay, and the agencies must make an effort to minimize costs through the use of volunteers. 20 Pa. Consol. Stat. Ann. §§5551 through 5555.

Program There is no uniform, statewide provision of guardianship services. It varies by county. Some counties have private guardianship support agencies; and in others the judge may assign the area agency on aging to accept cases. In still other counties, there is no guardian of last resort. In 2005-06, the Department of Aging allocated \$600,000 to support a guardianship program for older Pennsylvanians.

Rhode Island (reviewed 1/07)

Statute There is no statutory provision for public guardianship. The probate court may appoint Good Samaritan guardians if the estate of a proposed ward is insufficient to pay for the services of a guardian. A Good Samaritan guardian may not seek fees or compensation for services. Filing fees are waived and surety is not required. The court may waive court fees. (R.I. Gen. Laws §§ 33-15-4.1 through 4.5.)

Program Meals-on-Wheels, Inc., coordinates a guardianship of last resort program for frail elders who are cognitively impaired, 60 years of age or older, have assets below \$15,000, and are in need of a guardian of the person when there are no other options. Meals-on-Wheels serves through a contract with the Department of Elderly Affairs, and uses volunteers to provide guardianship services. The department provides oversight of the agency in the recruitment, training, assignment, and support of the volunteers. The program serves 85-90 individuals, almost all of whom live in nursing homes.

South Carolina

Statute If a patient of a state mental health facility has no conservator, the director of the Department of Mental Health may act as conservator. S.C. Code Ann. §62-5-105.

Program South Carolina has no system of public guardianship. The probate court attempts to identify a guardian when there is no one willing and qualified to serve.

South Dakota (reviewed 2/07)

Statute Any public agency may be appointed as a guardian, a conservator, or both, if it can provide an active and suitable program of guardianship or conservatorship for a protected person; and if it is not providing substantial services or financial assistance to the protected person. The departments of human services or social services may be appointed as guardian, conservator, or both to individuals under its care or to whom it is providing services or financial assistance, if there is no one else qualified and willing to serve. S.D. Codified Laws §29A-5-110.

Program The Department of Human Services acts as guardian of last resort when there are no appropriate family members or others willing and able to serve as guardian for a person with a developmental disability who is 18 years of age or older and who is receiving services or financial assistance from the department. The DHS contracts with people who are located in or near each protected person's community. Applicants are subject to a criminal background check and are required to attend DHS training. The Department of Social Services acts as guardian for adult protective services clients, serving approximately 60 such individuals, most of whom are in nursing homes. Funding is through Social Services Block Grant, Older Americans Act, and state monies.

Tennessee (reviewed 2/07)

Statute A statewide program administered by the Commission on Aging provides guardianship for the elderly. The law provides for the operation of district public guardians within each developmental district. The commission must provide a coordinator and must contract with grantee agencies in each of the nine development districts, which must hire staff to serve as district public guardians.

The district public guardians serve as conservator for "disabled persons" who are 60 years of age or older and have no one else to serve, and also may serve as agent under power of attorney. The district public guardians may employ staff and may accept the services of volunteers. The Commission on Aging, in consultation with the Departments of Human Services and Health, may develop a statewide program to recruit, train, supervise, and evaluate volunteers.

If an individual qualifies for SSI, there is no charge for court costs or for any fees to the estate or to the district public guardianship program. If not, costs and compensation of the public guardian will be as with other guardianships. Any monies the district public guardians receive for their clients must be audited annually by the state. The district public guardians must continue to seek others willing to serve. The district public guardians must post bond in individual cases, but the Commission on Aging must purchase a statewide bond covering all district public guardians.

The district public guardians must submit certification to the court when the maximum caseload has been reached and the court then may not assign additional cases. Costs for the public guardianship program are met through an annual appropriation to the Commission on Aging. Tenn. Code Ann. §§34-7-101 through 105.

Program The Tennessee Public Guardianship for the Elderly Program is coordinated by the Commission on Aging and Disability, and housed in the nine area agencies on aging and disability, providing services in the 95 counties of the state. The program serves persons 60 years of age and older, who are unable to manage their affairs and have no one to act on their behalf. The Commission's policies and procedures set out guidelines for the nine district programs, and these programs are monitored annually by the quality assurance unit of the state program coordinator on the commission staff. The programs do not petition to serve as guardian. The programs may collect fees on a sliding scale basis, when client resources are sufficient. Currently the statewide program serves over 400 individuals.

Texas (reviewed 6/07)

Statute According to statutory changes in 2005, the Department of Family and Protective Services, which houses adult protective services, must refer to the Department of Aging and Disability Services an elderly or disabled person who has been subject to abuse, neglect, or exploitation and is an alleged incapacitated person. Tex. Hum. Res. Code Ann. §48.209. If the Department of Aging and Disability Services (DADS) determines that guardianship is appropriate for the individual, it must file an application to be appointed as guardian of the person, the estate, or

both. Tex. Hum. Res. Code Ann. §161.101. The department may contract with a political subdivision of the state, a guardianship program, private agency, or another state agency to provide guardianship services; and the department must establish a monitoring system to ensure the quality of guardianship services provided through contract. The department is not required to post a bond. Tex. Hum. Res. Code Ann. §§161.101 through 107. A guardianship program is a local, county, or regional program to provide guardianship services. Tex. Hum. Res. Code Ann. §111.001(6).

In addition, the 2005 law provided for a certification system and a guardianship certification board. An individual employed by, or contracting with, a guardianship program, and an employee of DADS providing guardianship services must be certified and must undergo a criminal history check. Annually a statement must be submitted to the county clerk by each guardianship program operating in a county. This statement must include the names and contact information of each person employed by, or contracting with, the program, and the department must submit contact information on each employee providing guardianship services. The county clerk must submit this information to the certification board. Tex. Prob. Code Ann. §697A.

Program In 2004, in response to significant problems in the Texas adult protective services system, and charges that it had failed to provide needed protection to at-risk adults, the governor issued an executive order directing the Health and Human Services Commission to oversee systemic APS reform. The commission issued a report documenting needed improvements, including the transfer of the state guardianship program to DADS. Consequently, in June of 2005, the governor signed S.B. 6, which included substantial changes in the state's guardianship role in addition to major APS revisions.

Currently, four state agencies are involved in adult guardianship in Texas. The Department of Family and Protective Services (DFPS) is charged with investigating referrals of abuse, neglect, and exploitation. When an alleged incapacitated person is discovered to have been a victim of abuse, neglect, or exploitation, the department makes a referral to DADS for an assessment of whether a guardianship or less restrictive alternative service is needed. The DFPS is also charged with alerting DADS to make an assessment of alleged incapacitated minors who are aging-out of DFPS conservatorship. Under these two situations, DADS is authorized to apply to be appointed as temporary or permanent guardian. Otherwise, a court may appoint DADS only as temporary guardian of last resort after notice to DADS. A court may not appoint DADS as permanent guardian unless DADS files an application to be appointed or DADS otherwise agrees. The DADS may contract with local guardianship programs for guardianship services for individuals who would otherwise be its wards. Texas law still does not name a guardian of last resort.

(It is notable that under Tex. Prob. Code §683 the probate court may initiate a guardianship if it has probable cause to believe an individual is an incapacitated person and has no guardian. This may occur if DADS or APS has a case where there is a need for guardianship but no active abuse, neglect, or exploitation. The court may appoint a third party professional guardian in such a situation.)

The Health and Human Services Commission (HHSC) is the executive branch's lead health and human service agency with authority over both DADS and DFPS. It houses the 15-member volunteer guardianship advisory board whose mission is to advise HHSC on the adoption of a statewide guardianship system. Eleven of the board members are appointed by the presiding judge of the statutory probate courts. The HHSC also provides grants, totaling \$400,000 per year, to local guardianship programs.

Local guardianship programs run by non-profit organizations in the state's 254 counties continue to provide the bulk of the public guardianships in Texas annually. They receive limited funding from the state, and may contract with the counties to provide the service. They must provide public information about how many wards they serve, how much state funding

they receive, and how much other public funding they receive. Two counties have created guardianship administrations, and other metropolitan counties may contract with local non-profit organizations. In the rural counties, judges identify whoever they can to serve as guardian.

In addition, the 2005 law provided for a certification system and a guardianship certification board. All private professional guardians, paid guardians with local guardianship programs, and paid guardians of DADS must be certified and must submit to a criminal history check.

Utah (reviewed 6/07)

Statute The Office of Public Guardian within the Department of Human Services must develop and operate a statewide program to educate the public about the role and function of guardians and conservators. It may also serve as guardian, conservator, or both when no other person or entity is willing and able to do so, and the office petitioned for, or agreed in advance to, the appointment. All funds and property held by the office must be audited annually. The office must make reasonable and continuous efforts to find another person or entity to serve. It must submit recommendations for changes in state law and funding and must report upon request to the governor and the legislature.

The office may petition to be appointed as guardian, conservator, or both; develop a volunteer program; and solicit and receive donations to provide guardian and conservator services. The law creates a nine-member board of guardian services to establish policy for the office, and provides for the governance of the board.

Before the office files a petition for appointment, it must conduct a face to face assessment to determine the need for guardianship and also evaluate the financial resources of the proposed ward. The OPG must determine whether there is anyone else to serve as guardian and establish the least restrictive form of guardianship needed to meet the prospective ward's needs. The OPG must also determine if conservatorship is needed. The office must prepare an individualized guardianship or conservatorship plan for each ward within 60 days of appointment. The OPG may contract with providers of guardianship and conservatorship services, and must monitor those services.

The ward's estate must pay for the cost of guardian or conservator services, including court costs and attorney fees. If the ward is indigent, the office must serve without charge, and seek to secure *pro bono* legal services for the ward. Court costs and attorney fees may not be assessed to the office. Utah Code Ann. §§62A-14-101 through 112.

Program Established in 1999, the Office of Public Guardian is housed within the Department of Human Services. The office provides public guardianship and conservatorship services to incapacitated adults. Guardianship services are for incapacitated persons who have no one else to serve, and priority is given to those who are in life-threatening situations, or who are experiencing—or are at risk of—abuse, neglect, self-neglect, or exploitation. The office also provides a range of additional services including information and referral, assessment for guardianship, petitioning for guardianship, alternatives to guardianship, and advocating for the rights of incapacitated persons.

The office receives state appropriations. It contracts a portion of guardianship services to Guardianship Associates of Utah. It serves about 200 individuals and has approximately seven full-time equivalent paid staff. The office accepts and trains volunteers for administrative work, fundraising, and as visitors for clients. Results of a recent study suggest an unmet need for guardianship of at least 1,100 persons.

Vermont (reviewed 5/07)

Statute Vermont has two different statutes that establish public guardianship: one that establishes public guardianship for individuals with developmental disabilities and one that establishes public guardianship for individuals age 60 and older. The courts involved, the procedures, and the scope of guardianship are somewhat different for the two types of public guardianship. As the result of recent government reorganization, both types of guardianship are the responsibility of the Commissioner of the Department of Disabilities, Aging, and Independent Living.

(1) Public guardianship for individuals with developmental disabilities. Public guardianship is available for individuals with developmental disabilities who have a diagnosis of mental retardation, autism, or pervasive developmental disorder, and who also have substantial deficits in adaptive behavior. 18 Vt. Stat. Ann. §9320(1). A public guardian may exercise guardianship in the following areas: general supervision, contracts, legal/judicial, and medical. (There is no authority to exercise financial guardianship). 18 Vt. Stat. Ann. §9310. A public guardian may be appointed for a person with developmental disabilities who is unable to exercise some of all of these powers and who is not receiving the active assistance of a responsible adult who can assist the person in these areas. The court is encouraged to limit guardianship to the area or areas where it is actually needed.

In carrying out the powers of public guardianship the commissioner must be guided by the wishes and preferences of the individual, and must exercise authority through the least restrictive approach consistent with need for supervision and protection. The commissioner must maintain close contact with the individual and encourage the person's involvement in decision making. The commissioner must assist individuals under guardianship to secure services. The statute specifically authorizes the commissioner to delegate the powers of guardianship to staff within the department (*see* below for description of the office of public guardian). Any decision to withhold or abate medical treatment for an irreversible or terminal condition must be reviewed by the department's ethics committee. The commissioner has no authority to consent to sterilization, psychotropic medications, electroconvulsive therapy, or other listed procedures; and a person under public guardianship may not be placed in the state psychiatric hospital (Vermont has no institutions for individuals with developmental disabilities) except through a commitment process. The commissioner must prepare an annual review of the social adjustment and progress of each person under guardianship and must annually review the legal status of each person to determine if a modification or termination of guardianship services is warranted. 18 Vt. Stat. Ann. §§9310 through 9316.

(2) Public guardianship for individuals age 60 or older. Guardianship is authorized for individuals age 60 or older who are mentally disabled and for whom the court is unable to appoint a guardian from the private sector. The commissioner may adopt rules including standards relating to the maximum number of appointments that may be accepted by the office. The office of public guardianship may not petition for guardianship. It may fulfill the bonding requirement by purchasing an aggregate bond.

If an individual under guardianship is going to be placed outside his or her home, the public guardian must visit the proposed residence in advance. The public guardian must monitor the care and progress of each person under guardianship, including at least quarterly personal contact. The public guardian must keep a written record of each visit, and must file the record with the court as part of its annual report. It must maintain contact with all individuals and agencies providing care or services to the individual.

The office must make a reasonable effort to locate a suitable guardian from the private sector, must file a report with the court describing these efforts, and must file a motion for termination or modification upon location of such a guardian. The office must maintain annual statistics concerning the public guardianship program.

The office may provide assistance to private guardians. It must develop education programs on guardianship and alternatives; encourage individuals in the private sector to serve; and must prepare a booklet on the duties of a guardian. 14 Vt. Stat. Ann. §§3091 through 3096.

Note: There is a gap in Vermont law. There is no public guardianship for individuals age 18-59 with mental disabilities, other than developmental disability.

Program Both types of public guardianship are provided in a unified program in the office of public guardian, which is located in the Department of Disabilities, Aging, and Independent Living. At present, the office consists of 25 public guardians who operate out of 12 offices throughout the state, a two-staff representative payee program, an administrative assistant, and program director. Four public guardians have supervisory responsibility as senior public guardians. One public guardian specializes in developing alternatives to guardianship when petitions are pending or are on the horizon. Some public guardianship staff have special expertise in working with aging people and others have special experience in working with individuals with developmental disabilities. Public guardians are assigned based on geography and availability. Although authorized to do so, the office does not refuse cases at this time based upon caseload size. Typical caseloads are 30 and do not ever exceed 35.

The OPG staff provide supervision of offenders with developmental disabilities committed to the supervision of the commissioner after having been found not competent to stand trial (“Act 248”)

The OPG is responsible for obtaining court-ordered evaluations in both private and public guardianship petitions for individuals with developmental disabilities.

The OPG provides extensive assistance and advice to private guardians and provides information to the public about guardianship and training on guardianship. In addition, the office has been active in developing and publicizing alternatives to guardianship, such as a simplified form for appointing a health care agent.

As of June 30, 2006, the OPG caseload was as follows: public guardianship (DD) 568; guardianship pending (DD) 11; public guardianship (+60) 54; guardianship pending (+60) 10; Act 248 (offenders with DD) or 22; Act 248 pending 1; case management 20; representative payee 307.

Virginia (reviewed 2/07)

Statute Virginia law establishes a statewide public guardian and conservator program within the Department for the Aging to facilitate the creation of local or regional programs. The department must contract with local or regional public or private entities to provide guardian and conservator services. The department must adopt regulations including:

- (a) Training and experience requirements for professionals and volunteers of the local or regional programs;
- (b) An ideal range of staff to client ratios and procedures for when the ratio falls outside the range; and
- (c) Procedures disqualifying any program operating outside the range of ratios.

The department must establish guidelines to ensure the separation of local or regional programs from any other guardianship or conservatorship programs operated by the same entities. It must establish record-keeping and accounting procedures for the local and regional programs. The department must establish criteria for the programs to file with the department wards’ values history surveys, annual decisional accounting and assessment reports, and the care plan for the incapacitated person, as well criteria for the programs to use in setting priorities for services.

The department must maintain statistical data on the programs and report annually to the legislature on the status of the program, including identifying trends concerning need for guardians, conservators, and other surrogate decision-makers. The department must contract

with a research entity for a program evaluation every four years, provided the legislature appropriates funds. It must recommend appropriate legislative or executive actions.

The local or regional guardian and conservator programs must:

- (1) Furnish bond;
- (2) Have in place a multi-disciplinary panel to screen cases to ensure appropriate appointments and to review cases regularly;
- (3) Accept only appointments that generate no fee or a minimal fee;
- (4) Have a direct service staff-to-client ratio as specified in the department's regulations; and
- (5) Develop a plan to provide advance notice to the court when the program falls below or exceeds the ideal ratio of staff to clients.

The local or regional programs must continually seek a proper and willing person to serve. The programs may not admit an incapacitated person to a psychiatric hospital or mental health facility, but may authorize mental health treatment. The programs may accept private funds for providing education, supplemental services for incapacitated persons, and support services for private guardians and conservators.

The law establishes a public guardian and conservator advisory board to report to and advise the commissioner of the Department for the Aging, and sets out the membership of the board and the member terms. Va. Code Ann. §§2.2-711 through 713 & 2.2-2411.

Program The Virginia public guardian and conservator program is located in the Department for the Aging, and is coordinated by a designated department staff person. It serves both older individuals and younger adults with mental retardation, developmental disabilities, or mental illness. The program receives funding through state appropriations, and issues a request for proposals to local/regional nonprofit or governmental agencies throughout the state. Currently there are 15 local/regional programs in operation, but these programs do not cover the entire state. In 2006, the program received additional funding through the Department of Mental Health, Mental Retardation, and Substance Abuse Services to serve additional clients with mental retardation and developmental disabilities.

Each local/regional program has a multidisciplinary panel to screen cases and assist in case review. The law provides for a program evaluation every four years, if funds have been appropriated for that purpose. Two such reviews have been conducted by the Virginia Tech Center for Gerontology, which evaluated the local program activities and characteristics of clients, and found that the public guardianship program saved significant state dollars.

The program has a statutory board of 15 members who meet quarterly to advise the department. The board prepared a draft regulation, which is currently being promulgated, and is developing program guidelines. The program uses a 1:20 ratio to limit caseloads and ensure quality services. The department's guardianship coordinator provides training and monitors the local/regional programs.

Washington (reviewed 1/07; updated 5/07)

Statute Until 2007, Washington law did not provide for public guardianship or guardianship of last resort. However, the law did provide for the establishment by rule of maximum guardianship fees from Medicaid funds for clients of the Department of Social and Health Services who are required by federal Medicaid law to contribute a portion of their income to the cost of residential or supportive services. Wash. Rev. Code §11.92.180 & §43.20B.460. The administrative rule provides that the superior court may allow guardianship fees and administrative costs from Medicaid where the order establishes or continues a guardianship for a department client and requires future review or accounting, and sets out the maximum fees and costs. Wash. Admin. Code §§388-79-010 through 388-79-050.

In 2007, the Washington Legislature created an Office of Public Guardianship (S.B. 5320). The office is located within the administrative office of the courts. The Supreme Court

must appoint a public guardianship administrator to direct the office. The office must contract with public or private entities or individuals to provide public guardianship services. Eligible incapacitated individuals include adults with incomes not over 200% of the federal poverty level or who are receiving Medicaid long-term care services. The new law provides that the office may not petition for appointment as guardian. The law specifies a ratio of 1:20 certified professional guardians to incapacitated persons, and requires public guardianship providers to visit each incapacitated person no less than monthly. The legislation originally provided for a public guardianship advisory committee, but this section was vetoed by the governor.

Program Until implementation of the new law, Washington had no public guardianship system, but the law and administrative rules provided—and continue to provide—for maximum fees from Medicaid funds for the establishment and continuation of a guardianship in which the incapacitated person is a client of the Department of Social and Health Services. Under the new law, these fees are used to pay professional guardians who will be monitored by the office of public guardianship. Washington has a Supreme Court rule on guardian certification (Supreme Court Gen. r. 23), and all public guardianship providers under the new law must be certified. Initial implementation of the law is to be on a pilot basis in at least two areas of the state.

West Virginia (reviewed 1/07)

Statute Under West Virginia law, a guardian may include any political subdivision or other public agency or public official. A public agency that is not a provider of health care services to the protected person may be appointed as a guardian or conservator or both if it is capable of providing an active and suitable program of guardianship or conservatorship and is not otherwise providing substantial services or financial assistance to the protected person. A nonprofit corporation may be appointed to serve as guardian or conservator if licensed to do so by the secretary of the Department of Health and Human Resources.

The secretary of the department must designate a division or agency under his or her jurisdiction that may be appointed to serve as guardian if there is no other individual, nonprofit corporation, or other public agency equally or better qualified and willing to serve. The sheriff of the county may be appointed as conservator if there is no one equally or better qualified and willing to serve. When the department originally was appointed a conservator, the sheriff may not refuse to accept conservatorship appointment and the department may petition for release. When the sheriff originally was appointed as guardian, the department may not refuse to accept the guardianship appointment and the sheriff may petition for release. W. Va. Code §44A-1-4(12); §44A-1-8.

Program Under West Virginia law, the Department of Health and Human Resources may be appointed (as last resort) as guardian, and the local sheriff may be appointed as conservator if there is no one else qualified and willing to serve. Social services personnel in the department's district offices provide the decision-making services. Support is from general state funds, but there is no specific budget for guardianship services. The department provides guardianship services for over 700 clients, including incapacitated persons age 65 and older and adults age 18 to 64. Guardianship cases are reviewed by department personnel every six months and a report is submitted to the court annually. The department has a system of ethics consultation to assist staff in making complex life and death decisions. Department program coordinators maintain that staffing is insufficient to fully advocate for incapacitated persons and that additional community support resources are required. They also perceive a possible conflict of interest when the department is appointed as guardian for individuals also served by state operated facilities.

Wisconsin (reviewed 1/07)

Statute A nonprofit corporation approved by the Department of Health and Family Services to be a “corporate guardian” is qualified to act as guardian of person or property, or both, if the court finds the corporation a suitable agency to serve. Wis. Stat. §54.15 (7). In addition, individuals may serve as paid guardians of the person if they have five or fewer unrelated wards or have the permission of the court to have more. There is no limit on the number of unrelated wards for whom an individual may serve as guardian of the estate. Wisc. Stat. §54.15 (9).

Program Wisconsin has no statewide public guardianship program, but it does have three mechanisms to provide for guardianship of last resort, paid for or approved by the state. First, corporate guardians are incorporated entities that provide guardianship services with payment by counties or from the estate of the individual, and that are approved as corporate guardians by the Department of Health and Family Services and as guardians in specific cases by the court. They are located in all parts of the state. Second, volunteer guardianship programs are operated by county agencies or nonprofit entities, and originally were funded by small state grants. Third, county-paid or ward-paid guardians of the person serve five or fewer wards, or more if the court so authorizes. There is no limit on the number of wards for a paid guardian of the estate. The Guardianship Support Center, a grant-funded project within the Elder Law Center of the Coalition of Wisconsin Aging Groups, provides technical assistance on guardianship and surrogate decision-making issues.

Wisconsin law requires guardians to seek special approval for institutional “protective placement,” and requires an annual review of these placements. The roles of adult protective services staff and of guardians *ad litem* (who must be attorneys) are critical in making this system work. These added layers of review may complicate the role of guardians of last resort, but provide safeguards for individuals.

Wyoming (phase II site visit state)

Statute Wyoming law providing for public guardianship was repealed in 1998. The general guardianship law is at Wyo. Stat. Ann. §§ 3-1-101 through 3-6-119.

Program After the repeal of the state’s public guardianship statute in 1998, the cases were assumed by the Wyoming Guardianship Corporation, a private nonprofit entity with over 80 volunteer guardians. In some cases the director is named individually as guardian and, in other cases, the corporation is named. The corporation is funded by the Developmental Disabilities Division and the Wyoming State Hospital. The corporation also receives federal funding as a Social Security representative payee and Veterans’ Administration fiduciary; and receives fees for private guardianship services. In addition, the corporation runs the mental health ombudsman program and the Wyoming Guardianship Corporation Pooled Trust.

A board of directors governs the Wyoming Guardianship Corporation. The corporation provides staff and volunteers to serve as guardians for incapacitated persons “when no other appropriate person is willing or able to serve.” The director is certified by the National Guardianship Foundation.

Appendix B: State Public Guardianship Statutory Charts

Table 1: Statutory Authority and Type of Program	162
Table 2: Procedural Due Process Safeguards in Guardianship	168
Table 3: Assessment; Civil Liberties; Selection of Guardian	176
Table 4: Powers and Duties of Guardians; Costs.....	181
Table 5: Additional Guardianship Provisions	185

Table 1: Statutory Authority and Type of Program

State	Adult Guardianship Statute	Public Guardianship or Last Resort Provisions	Type of Public Guardianship —Implicit; Explicit	Public Guardian Subjects	Public Guardian Scope — Governs Property & Person
AL	Ala. Code § 26A	Ala. Code §§ 26-2-26 & 26-2-50	I	Incapacitated persons	Property only
AK	Ak. Stat. §§ 13.26.050 through 13.26.320	Ak. Stat. §§ 13.26.360 through 13.26.410	E	Incapacitated persons or minors who need guardian	X
AZ	Ariz. Rev. Stat. §§ 5101 through 5433	Ariz. Rev. Stat. §§ 14-5601 through 14-5606	E	Persons or estates who need guardian	X
AR	Ark. Code Ann. §§ 28-65-101 through 28-65-603	Ark. Code Ann. §§ 5-28-307 & 309	I	Maltreated adults receiving court-ordered adult protective services	Person only
CA	Cal. Probate Code Ann. §§ 1400 through 2955	Cal. Govt. Code Ann. §§ 27430 through 27436; Cal. Prob. Code §§ 2920 through 2944; Welf. & Inst. Code Ann. § 5354.5	E	Persons domiciled in county who need guardians; persons gravely disabled	X
CO	Colo. Rev. Stat. §§ 15-14-101 through 15-14-433	Colo. Rev. Stat. § 15-14-110	I		X
CT	Conn. Gen. Stat. §§ 45a-644 through 45a-663	Conn. Gen. Stat. § 45a-651	I	Incapacitated persons 60+ who need guardians, assets not over \$1,500	X
DE	Del. Code Ann. §§ 12-3901 through 12-3997	Del. Code Ann. §§ 12-3991 through 3997	E	Disabled adults who need guardian	X
DC	D.C. Code Ann. §§ 21-2001 through 21-2077	No provision			
FL	Fla. Stat. Ann. §§ 744.101 through 744.715	Fla. Stat. Ann. §§ 744.701 through 744.709	E	Incapacitated persons who need guardian, primarily of limited financial means	X
GA	Ga. Code Ann. §§ 29-1-1 through 29-10-11	Ga. Code Ann. §§ 29-10-1 through 29-10-11	E	Adults in need of guardian	X

State	Adult Guardianship Statute	Public Guardianship or Last Resort Provisions	Type of Public Guardianship —Implicit; Explicit	Public Guardian Subjects	Public Guardian Scope — Governs Property & Person
HI	Haw. Rev. Stat. §§ 560:5-101 through 560:5-432	Haw. Rev. Stat. §§ 551A-1 through 551A-9; 551-21	E	Incapacitated persons who need guardian	X
ID	Idaho Code §§ 15-5-101 through 15-5-603	Idaho Code §§ 15-5-601 through 15-5-603	I	Persons who need guardian	X
IL	755 Ill. Comp. Stat. §§ 5/11a-1 through 5/11a-23	20 Ill. Comp. Stat. §§ 3955/1 through 3955/5 & 3955-30 through 3955-36; 755 ILLS §§ 5/13-1 through 5/13-5	E	(a) Disabled adults who need guardian, estate \$25,000 or less; (b) disabled adults who need guardian, estate exceeds \$25,000	X
IN	Ind. Code §§ 29-3-1-1 through 29-3-13-3	Ind. Code §§ 12-10-7-1 through 12-10-7-9	E	Incapacitated indigent adults	X
IA	Iowa Code §§ 633.551 through 633.628	Iowa Code §§ 231E.1 through 231E.13; 217.13; 135.28 & 135.29	E	Adults who need guardian & non-adjudicated persons who elect voluntary conservator & no one to serve	X
KS	Kan. Stat. Ann. §§ 59-3051 through 59-3096	Kan. Stat. Ann. §§ 74-9601 through 74-9606	E	Adults who need guardian; & non-adjudicated persons who elect voluntary conservator & no one to serve	X
KY	Ky. Rev. Stat. Ann. §§ 387.500 through 387.990	Ky. Rev. Stat. Ann. § 210.290	I	Residents adjudged partially disabled or disabled who need guardian	X

State	Adult Guardianship Statute	Public Guardianship or Last Resort Provisions	Type of Public Guardianship —Implicit; Explicit	Public Guardian Subjects	Public Guardian Scope — Governs Property & Person
LA	<i>La. Civ. Pro.</i> Code Ann. art. 389 through 426; art. 4541 through 4569	No statutory provision			
ME	<i>Me. Rev. Stat. Ann.</i> 18-A 5-101 through 18-A 5-614	<i>Me. Rev. Stat. Ann.</i> 18-A 5-601 through 18-A 5-614	E	Mentally retarded; other incapacitated persons	X
MD	Md. Est. & Trusts Code Ann. §§ 13-101 through 13-107 & 13-201 through 13-908	Md. Fam. Law Code Ann. §§ 14-102, 14-203, 14-307, 14-401 through 14-404; Est. & Trusts § 13-707	E	Individuals requiring adult protective services but unwilling or unable to accept services voluntarily	Person only
MA	<i>Mass. Gen. Laws Ann.</i> Chp. 201	No statutory provision			
MI	Mich. Comp. Laws Ann. §§ 700.5301 through 700.5433	No statutory provision			
MN	Minn. Stat. Ann. §§ 524.5-101 through 524.5-502	Minn. Stat. Ann. §§ 252A.01 through 252A.21 & 524.5-3-3; 524.5-502; 626.557	E; I	Mentally retarded persons who need guardian; incapacitated adults who need guardian; maltreated vulnerable adults	X
MS	Miss. Code Ann. §§ 93-13-1 through 93-13-281	Miss. Code. Ann. §§ 93-13-21 & 93-13-129	I	Ward who has property	X
MO	Mo. Rev. Stat. §§ 475.010 through 475.480	Mo. Rev. Stat. §§ 473.730 & 750; 475.055	I		X
MT	Mont. Code Ann. §§ 72-5-101 through 72-5-439	Mont. Code Ann. §§ 72-5-312(5) & 72-5-415	I		X
NE	Neb. Rev. Stat. §§ 30-2601 through 30-2661	No statutory provision			
NV	Nev. Rev. Stat. §§ 13-159.013 through 13-159.325	Nev. Rev. Stat. §§ 20-253.150 through 20-253.250	E	State residents who need guardian; lack sufficient assets	X

State	Adult Guardianship Statute	Public Guardianship or Last Resort Provisions	Type of Public Guardianship —Implicit; Explicit	Public Guardian Subjects	Public Guardian Scope — Governs Property & Person
NH	N.H. Rev. Stat. Ann. §§ 464-A:1 through 464-A:47	N.H. Rev. Stat. Ann. §§ 547-B:1 through 547-B:8	E	Persons who need guardian nominated by commissioner in mental health services system or administrator of services for developmentally disabled; others in need if funds available	X
NJ	N.J. Stat. Ann. §§ 3B:12-1 through 3B:12-78	N.J. Stat. Ann. §§ 52:27G-20 through 52:27G-32	E	Elderly state residents 60+ who need guardians	X
NM	N.M. Stat. Ann. §§ 45-5-101 through 45-5-432	N. M. Stat. Ann. §§ 28-16B-1 through 28-16B-6	E	Income eligible incapacitated persons	
NY	N.Y. Mental Hyg. Law §§ 81.01 through 81.43	N.Y. Mental Hyg. Law §§ 81.03(a) & 81.19; Social Services Law 473d	I	Persons receiving adult protective services & living outside hospital or residential facility	X
NC	N.C. Gen. Stat. §§ 35A-1101 through 35A-1361	N.C. Gen. Stat. §§ 35A-1213 & 35A-1270 through 1273	E	Incapacitated persons for which six months have elapsed from discovery of person's property without guardian	
ND	N.D. Cent. Code §§ 30.1-28-01 through 30.1-28-15	N.D. Cent. Code § 30.1-28-11	I		
OH	Ohio Rev. Code Ann. §§ 21111.01 through 21111.51	Ohio Rev. Code Ann. §§ 21111.10 & 5123.55 through 5123.59	I	Persons with mental retardation or developmental disabilities	X

State	Adult Guardianship Statute	Public Guardianship or Last Resort Provisions	Type of Public Guardianship —Implicit; Explicit	Public Guardian Subjects	Public Guardian Scope — Governs Property & Person
OK	30 Okla. Stat. §§ 1-101 through 6-102	30 Okla. Stat. §§ 6-101 & 102; 22 Okla. Stat. § 1175.6b	E	Persons who need guardian; persons who are mentally retarded and dangerous in criminal proceeding	
OR	Or. Rev. Stat. Ann. §§ 125.005 through 125.730	Or. Rev. Stat. Ann. §§ 125.700 through 125.730	E	Persons who need guardian	X
PA	20 Pa. Stat. Ann. §§ 5501 through 5555	20 Pa. Stat. Ann. § 5511	I	Incapacitated persons who need guardian & no less restrictive alternative	X
RI	R. I. Gen. Laws §§ 33-15-1 through 33-15-47	No statutory provision			
SC	S.C. Code §§ 62-5-101 through 62-5-624	S.C. Code § 62-5-105	I	Patients of state mental health facility	Property only (not over \$10,000)
SD	S. D. Codified Laws §§ 29A-5-101 through 29A-5-509	S.D. Codified Laws §§ 29A-5-110	I	Protected persons	
TN	Tenn. Code Ann. §§ 34-1-101 through 34-7-105	Tenn. Code Ann. §§ 34-7-101 through 34-7-105	E	Disabled persons 60+ who need guardian	X
TX	Tex. Prob. Code Ann. §§ 601 through 905	Tex. Hum. Res. Code §§ 48.209; & 161.101 through 161.113	E	Elderly or disabled persons in state of abuse, neglect, or exploitation	X
UT	Utah Code Ann. §§ 75-5-101 through 75-5-433	Utah Code Ann. §§ 62A-14-101 through 62A-14 112	E	Incapacitated persons who need guardian	X
VT	Vt. Stat. Ann. §§ 14-2602 through 14-3096	Vt. Stat. Ann. §§ 14-3091 through 14-3096	E	Mentally disabled persons 60+ who need guardian	

State	Adult Guardianship Statute	Public Guardianship or Last Resort Provisions	Type of Public Guardianship —Implicit; Explicit	Public Guardian Subjects	Public Guardian Scope — Governs Property & Person
VA	Va. Code Ann. §§ 37.2-1000 through 37.2-1029	Va. Code Ann. §§ 2.2-711 through 2.2713 & 2.2-2411	E	Incapacitated persons who need guardian, without sufficient financial resources	X
WA	Wash. Rev. Code Ann. §§ 11.88.005 through 11.92.190	Wash Rev. Code Ann. [New chapter in Title 2]	E	Adults who need guardianship services & for whom services otherwise unavailable, income not over 200% of poverty level or receiving Medicaid long-term care	X
WV	W. Va. Code §§ 44A-1-1 through 44A-5-9	W. Va. Code §§ 44A-1-8(g) & (h)	I		
WI	Wisc. Stat. §§ 54.01 through 54.988	Wisc. Stat. § 54.15(7)	I		
WY	Wyo. Stat. §§ 3-1-101 through 3-3-1106	No provision			

Table 2: Procedural Due Process Safeguards in Guardianship

State	Potential Petitioners in Guardianship Proceedings	Notice & Hearing	Right to Counsel	Free Counsel to Indigents	Right to Jury Trial	Cross-Exam	Standard of Proof	Appeal/ Review
AL	Incapacitated person or any person	Yes	Court shall appoint attorney who may act as guardian <i>ad litem</i>		Yes	Yes		Yes
AK	Any person		Entitled to attorney	Court shall appoint Office of Public Advocacy if no funds	Yes	Yes	Clear & convincing	
AZ	Alleged incapacitated person or any person		Court shall appoint		Yes	Yes	Clear & convincing	
AR	Any person		Right to counsel			Yes	Clear & convincing	Yes
CA	Proposed ward, relatives, domestic partners, any other interested person		Right to counsel	Yes	Yes		Clear & convincing	Yes
CO	Individual or person interested in individual's welfare		Right to request court appointed counsel	If court directs		Yes	Clear & convincing	
CT	Any person		Court shall appoint	Yes	Yes		Clear & convincing	
DE	Any person (by rule)		Entitled to representation					
DC	Incapacitated person or any person		Court shall appoint			Yes	Clear & convincing	Yes
FL	An adult person		Court shall appoint			Yes	Clear & convincing	Yes
GA	Any interested person, including proposed ward		Right to counsel; court shall appoint unless retained				Clear & convincing	Yes

State	Potential Petitioners in Guardianship Proceedings	Notice & Hearing	Right to Counsel	Free Counsel to Indigents	Right to Jury Trial	Cross-Exam	Standard of Proof	Appeal/ Review
HI	Individual or person interested in the individual's welfare		Court shall appoint if requested, recommended by visitor (kokua kanawai), or court determines need			Yes	Clear & convincing	
ID	Incapacitated person or any person interested in welfare		Court shall appoint		Yes, for removal of guardian	Yes	If court satisfied	
IL	A reputable person or the alleged disabled person		Entitled to representation; court may appoint; shall appoint if respondent requests or position adverse to guardian <i>ad litem</i>		Yes	Yes	Clear & convincing	Yes
IN	Any person		Court may appoint		Yes	Yes		
IA	Any person		Court shall appoint	Yes	Yes, if demanded	Yes	Clear & convincing	
KS	Any person		Court shall appoint		Yes	Yes	Clear & convincing	Yes
KY	Any interested person or individual needing guardianship		Court shall appoint	Yes	Yes, mandatory	Yes	Clear & convincing	Yes
LA	Any person		Court shall appoint			Yes	Clear & convincing	Yes

State	Potential Petitioners in Guardianship Proceedings	Notice & Hearing	Right to Counsel	Free Counsel to Indigents	Right to Jury Trial	Cross-Exam	Standard of Proof	Appeal/ Review
ME	The incapacitated person or any person interested in welfare		Court shall appoint one or more of: attorney, guardian <i>ad litem</i> or visitor. Must appoint attorney if respondent objects to petition.			Yes		
MD	Interested person; alleged disabled person (by rule)		Court shall appoint	Yes	Ward's option in guardianship; no jury trial in protective proceedings.	Yes	Clear & convincing	Yes
MA	Parent, relatives, nonprofit corporation, mental health agency, human services, welfare department; alleged incompetent							
MI	An individual on own behalf or any person		Court shall appoint if person contests petition or proposed guardian or seeks limited order, or if guardian <i>ad litem</i> recommends	Yes	Yes	Yes	Clear & convincing	
MN	Individual or person interested in welfare		Court shall appoint unless individual waives in meeting with court visitor			Yes	Clear & convincing	Yes

State	Potential Petitioners in Guardianship Proceedings	Notice & Hearing	Right to Counsel	Free Counsel to Indigents	Right to Jury Trial	Cross-Exam	Standard of Proof	Appeal/ Review
MS	Interested party		Court may appoint guardian <i>ad litem</i>					Yes
MO	Any person		Court shall appoint		Yes	Yes	Clear & convincing	Yes
MT	Incapacitated person or any person interested in person's welfare		May have counsel of own choice or appointed counsel; or court may order public defender to assign counsel	Court may order public defender to assign counsel	Yes	Yes	If court satisfied	
NE	Alleged incapacitated person or any person		Court may appoint	Yes		Yes	Clear & convincing	Yes
NV	Proposed ward, governmental agency, nonprofit corporation, or any interested person		Court shall appoint if proposed ward requests	Court shall appoint legal aid attorney or private attorney			Clear & convincing	Yes
NH	Any relative, public official or interested person, or any individual in own behalf		Absolute and unconditional right to counsel	Yes			Beyond reasonable doubt	Yes
NJ			Attorney appointed by court for temporary guardianship		Yes, if demanded by alleged incapacitated person			
NM	Any interested person		Court shall appoint if not represented		Upon request by petitioner or alleged incapacitated person	Rules of evidence apply	Clear & convincing	Yes

State	Potential Petitioners in Guardianship Proceedings	Notice & Hearing	Right to Counsel	Free Counsel to Indigents	Right to Jury Trial	Cross-Exam	Standard of Proof	Appeal/ Review
NY	Alleged incapacitated, presumptive distributee, executor or administrator, trustee, person or facility with whom resides, any other person concerned with welfare		If requested, wishes to contest, not consent to move, need major medical decision, temporary appointment requested, evaluator conflict, if helpful	Yes, mental hygiene lawyers	Yes, if demanded	Yes	Clear & convincing	Yes
NC	Any individual, corporation, or disinterested public agent		Court shall appoint unless retains own counsel	Yes	Yes, upon request	Yes	Clear, cogent & convincing evidence	Yes
ND	Any interested person		Court shall appoint attorney to act as guardian <i>ad litem</i>			Yes	Clear & convincing	
OH	Court or any interested party		Right to be represented; right to have counsel appointed at court expense if indigent	Yes			Clear & convincing	
OK	Any person interested in welfare or partially incapacitated person		Court may appoint attorney, may be public defender; if respondent present & requests attorney or if court determines in best interest, court shall appoint	Yes		Yes	Clear & convincing	Yes

State	Potential Petitioners in Guardianship Proceedings	Notice & Hearing	Right to Counsel	Free Counsel to Indigents	Right to Jury Trial	Cross-Exam	Standard of Proof	Appeal/ Review
OR	Any person interested in welfare		Right to be represented	Notice refers to free or low-cost legal services for eligible individuals		Yes	Clear & convincing	
PA	Any person interested in welfare		Right to have counsel appointed if court deems appropriate	Yes	Yes, if requested	Yes	Clear & convincing	Yes
RI	Any person		Court shall appoint if respondent wishes to contest, limit powers, objects to person nominated	Yes		Yes	Clear & convincing	Yes
SC	Incapacitated person or any person interested in welfare		Court shall appoint unless person has own counsel			Yes	If court satisfied that appointment is necessary	
SD	Relative, responsible entity, any interested person		Court shall appoint if requested, contested, needed		Entitled to demand jury trial	Yes	Clear & convincing	
TN	Any person with knowledge of circumstances		Court shall appoint attorney <i>ad litem</i> if recommended by guardian <i>ad litem</i> or if necessary to protect rights or interests				Clear & convincing	Yes
TX	Any person; court, if probable cause		Court shall appoint attorney <i>ad litem</i>	Yes	Entitled on request in contested proceeding		Clear & convincing	Yes

State	Potential Petitioners in Guardianship Proceedings	Notice & Hearing	Right to Counsel	Free Counsel to Indigents	Right to Jury Trial	Cross-Exam	Standard of Proof	Appeal/ Review
UT	Incapacitated person or any person interested in welfare		Court shall appoint attorney unless person has counsel of own	If ward indigent, public guardianship office makes efforts to secure <i>pro bono</i> services	Yes	Yes		
VT	Any person interested in welfare		Court shall appoint counsel	Court maintains list of <i>pro bono</i> counsel, used before appointing legal services		Yes	Clear & convincing	Yes
VA	Any person		Court may appoint counsel on request of respondent or guardian <i>ad litem</i> , or if court determines needed	Yes	Entitled on request	Yes	Clear & convincing	
WA	Any person or entity		Right to be represented; court shall appoint when cannot afford	Yes	Yes		Clear, cogent & convincing	Yes
WV	Individual alleged to need guardian, person responsible for care or custody, any other person		Court shall appoint counsel			Yes	Clear & convincing	Yes

State	Potential Petitioners in Guardianship Proceedings	Notice & Hearing	Right to Counsel	Free Counsel to Indigents	Right to Jury Trial	Cross-Exam	Standard of Proof	Appeal/ Review
WI	Any person		Right to counsel if proposed ward requests, ward opposes petition, or court determines required		Right to jury trial if demanded		Clear & convincing	Yes
WY	Any person		Right to counsel if ordered by court		May demand jury trial		Preponderance of evidence	

Table 3: Assessment; Civil Liberties; Selection of Guardian

State	Medical Examination	Psychological Exam	Other Exam	Civil Liberties Preserved	Who Serves As Guardian—General Probate Priority	Input by Incapacitated Person
AL	Physician or other qualified person		Court representative interviews respondent		Yes	Yes, nomination in durable power of attorney
AK			Expert with expertise in alleged incapacity; court visitor	Yes	Yes; competent person, public guardian, private association, or nonprofit	Yes, nomination
AZ	Physician or registered nurse	Psychologist			Yes	Yes, nomination
AR			Professional with appropriate expertise	Yes	Suitable person who is resident of state, corporation	
CA	Physician	Psychologist	Religious healing practitioner. Court investigator	Yes	Yes, with court's discretion	Yes, nomination; & express statements reported to court investigator
CO	Physician	Psychologist	Other qualified individual appointed by court		Yes, person nominated, agent, probate priority	Yes, nomination
CT	One or more physicians	Psychologist	Social work, other		Request of respondent; any qualified person, authorized public official, or corporation in best interest	Yes, request or nomination
DE						
DC	Medical	Psychological	Social, other	Yes	In accordance with respondent's stated wishes; general probate priority (beginning with spouse or domestic partner)	Yes, in accordance with incapacitated person's stated wishes
FL	Psychiatric or other physician	Psychologist	Registered nurse, nurse practitioner, social worker, gerontologist, other	Yes	Any person qualified; preference for relative; persons with relevant experience	Yes, consider wishes
GA	Physician	Psychologist	Licensed clinical social worker	Yes	Individual; DHR; no conflict of interest; no long-term care facility serving ward	Yes, nomination
HI	Physician	Psychologist	Other qualified individual		Yes	Yes, nomination

State	Medical Examination	Psychological Exam	Other Exam	Civil Liberties Preserved	Who Serves As Guardian—General Probate Priority	Input by Incapacitated Person
ID	Physician	Psychologist	Other qualified person—mental health professional, psychiatrist, licensed social worker, or counselor		Person preferred by incapacitated person, general probate priority	Yes, person preferred by incapacitated person
IL	Physician		One or more independent experts	Yes	Person capable of providing active & suitable program of guardianship	Yes, may designate
IN					Consider request by respondent, relationship & best interest; probate priority	Yes, nomination
IA					Qualified and suitable person	
KS	Physician	Psychologist	Psychiatrist; other professional		Nominee of proposed ward; nominee of spouse, adult child, family member; nominee of petitioner	Yes, nomination
KY	Physician	Psychologist	Social worker	Yes	Any person or entity capable of conducting active guardianship program	Yes, preference or designation in power of attorney
LA	Physician (for temporary & preliminary interdiction)	Psychologist (for temporary & preliminary interdiction)	Examiner with training & experience in type of infirmity alleged	Yes	Person best able to fulfill duties; probate priority	Yes, person designated by defendant in writing
ME	Physician	Psychologist			Probate priority; includes domestic partner	Yes, nomination
MD	Physician	Psychologist		Yes	Probate priority	Yes, nomination
MA	Physician	Psychologist	Certified psychiatric nurse, clinical specialist, expert in mental illness	Rights of freedom of religion & religious practices	Court may not appoint person or entity with conflict of interest	
MI	Physician		Mental health professional		Person named by ward; probate priority	Yes, named by ward
MN			County social service agency may create screening committee to determine if less restrictive alternative	Yes	Agent appointed under health care advance directive; probate priority	Yes, agent named under advance directive

State	Medical Examination	Psychological Exam	Other Exam	Civil Liberties Preserved	Who Serves As Guardian—General Probate Priority	Input by Incapacitated Person
MS	Physician	Psychologist (for conservatorship petition)				
MO	Physician	Psychologist	Other appropriate professional	Yes	Person nominated by ward; probate priority	Yes, nomination
MT	Physician		Visitor trained in law, nursing, social work, medical care, mental health care, pastoral care, education, or rehabilitation	Yes	Person nominated by ward; probate priority	Yes, nomination
NE	Physician		Court visitor trained in law, nursing, social work, mental health, mental retardation, gerontology or developmental disabilities	Yes	Person nominated by ward; probate priority	Yes, nomination
NV	Physician		Any other qualified person		Person nominated by ward; probate priority	Yes, nomination
NH				Yes	Any competent person who agrees	Yes, nomination
NJ	Physician	Psychologist			Spouse or domestic partner, heirs, friends	Yes, as designated in power of attorney, health care proxy or advance directive
NM		Psychologist	Qualified health care professional; also visitor may be a psychologist, social worker, developmental incapacity professional, physical and occupational therapist, educator, rehabilitation worker	Yes	Person nominated; probate priority	Yes, nomination

State	Medical Examination	Psychological Exam	Other Exam	Civil Liberties Preserved	Who Serves As Guardian—General Probate Priority	Input by Incapacitated Person
NY	Physician	Psychologist	Court evaluator, including mental hygiene legal services, not-for-profit corporation, attorney, physician, psychologist, accountant, social worker, or nurse		Person nominated, any suitable individual, corporation, social services official, public agency	Yes, nomination
NC	Medical	Psychological	Social worker; professional in education, vocational rehabilitation, occupational therapy, vocational therapy, psychiatry, speech-and-hearing, communications disorders	Yes	An adult individual, corporation, or disinterested public agent	
ND	Physician	Psychologist	Visitor in nursing or social work	Yes	Any competent person, person nominated by ward; probate priority	Yes, nomination
OH	Physician		Other qualified persons	Yes	Person nominated by ward; others	Yes, nomination
OK	Physician	Psychologist	Social worker; other expert	Court must make specific determinations on right to vote, other rights, for limited guardianship	Individual nominated; probate priority	Yes, nomination
OR	Physician	Psychologist	Visitor with training or experience to evaluate functional capacity & needs, communicate with respondent	Yes	Most suitable person, desire of respondent, relationship by blood or marriage	Yes, desire of respondent considered
PA			Individuals qualified by training & experience in evaluating incapacities	Yes	Any qualified individual or corporation	If appropriate, court give preference to nominee

State	Medical Examination	Psychological Exam	Other Exam	Civil Liberties Preserved	Who Serves As Guardian—General Probate Priority	Input by Incapacitated Person
RI	Physician			Yes	Relatives & friends, financial institutions, nonprofit corporations	Court consider wishes of incapacitated person
SC	Physician		Visitor trained in law, nursing or social work, or court appointee		Any competent person or suitable institution; person nominated by incapacitated person; probate priority	Yes, nomination
SD	Physician	Psychologist	Psychiatrist		Person who will act in best interests; lists factors to consider	Yes, nomination
TN	Physician	Psychologist		Yes	Person designated by alleged disabled person; probate priority	Yes, designation
TX	Physician	Psychologist; psychological & intellectual testing records	Court visitor	Yes	Best interests of individual; probate priority	Yes, court consider preference of incapacitated person
UT	Physician		Court visitor trained in law, nursing or social work, or appointee of court		Any competent person or suitable institution, person nominated by individual; probate priority	Yes, nomination
VT			Qualified mental health professional	Yes	Competent individuals; court consider ward preference, location, relationship, guardian ability, financial conflicts of interest	Yes, court consider preference of ward
VA	Physician	Psychologist	Professionals skilled in assessment & treatment of alleged conditions			
WA	Physician	Psychologist	Advanced registered nurse practitioner	Yes	Any suitable person. For professional guardian any individual or guardianship service that meets certification requirements.	Yes, nomination
WV	Physician	Psychologist			Any adult capable of providing active & suitable program of guardianship; nonprofit corporations. Consider location, familial relationship; ability.	Yes, nomination
WI	Physician	Psychologist		Yes	Court consider opinions of proposed ward & family, conflicts of interest, other factors	Yes, nomination
WY					Any qualified person; no conflict of interest; probate priority	Yes, nomination

Table 4: Powers and Duties; Costs

State	Specified Agency As Public Guardian	Conflict Raised /Remedied	General Probate Powers for Public Guardian	Specific Powers for Public Guardian	Public Guardian Funding Specified	Costs Borne by State or County	Costs Borne by Estate
AL	General county conservator or sheriff						
AK	Office of public advocacy in dept. of administration	Yes	Yes	Yes	Yes	Yes	Yes
AZ	County board of supervisors appoint public fiduciary		Yes	Yes	Yes	Yes	Yes
AR	Department of human services	Yes		Yes			
CA	County board of supervisors creates office of public guardian		Yes	Yes	Yes	Yes	Yes
CO	Public administrator or state or county agency	Yes	Yes				
CT	Commissioner of social services; may contract with public or private agency		Yes	Yes	Yes		
DE	Office of public guardian in judiciary	NA	Yes	Yes	Yes	Yes	Yes
DC		NA	Yes				
FL	Statewide public guardianship office in dept. of elderly affairs. Statewide office establish local offices in counties or judicial circuits	Yes	Yes	Yes	Yes	Yes	
GA	Qualified individuals or private nonprofit entities registered as public guardian and approved by probate court. Division of aging of dept. of human resources maintains list. If none, dept. of human resources. County administrators as ex officio county guardians	Yes	Yes	Yes	Yes	Yes	Yes
HI	Office of public guardian in judiciary, appointed by chief justice. Clerk of court as guardian of property if below \$10,000.	NA	Yes	Yes	Yes	Yes	Yes
ID	Board of county commissioners creates board of community guardian	Yes	Yes	Yes	Yes	Yes	Yes

State	Specified Agency As Public Guardian	Conflict Raised /Remedied	General Probate Powers for Public Guardian	Specific Powers for Public Guardian	Public Guardian Funding Specified	Costs Borne by State or County	Costs Borne by Estate
IL	(a) Office of state guardian, in guardianship and advocacy commission; (b) governor appoints suitable person as county public guardian; for counties over one million chief circuit court judge appoints attorney as county guardian	Yes	Yes	Yes	Yes	Yes	Yes
IN	Adult guardianship services program in family & social services administration; contracts with regional nonprofits	Yes	Yes	Yes	Yes	Yes	
IA	State office of substitute decision-maker in dept. of elder affairs; local offices of substitute decision-maker	Yes	Yes	Yes	Yes	Implementation subject to availability of funding	Yes
KS	A public instrumentality with board appointed by governor, including chief justice; coordinates volunteer guardians		Yes		Yes	Yes	
KY	Cabinet for health & family services	Yes	Yes		Yes		Yes
LA							
ME	Dept. of behavioral & developmental disabilities, for persons with mental retardation; dept. of human services, for incapacitated persons		Yes	Yes	Yes	Yes	Yes
MD	Secretary of aging or director of area agency on aging for adults 65 or older; director of local dept. of social services for other adults		Yes				
MA		Yes					
MI		Yes					
MN	Commissioner of human services; county contracts for services, & county employee serves	Yes	Yes	Yes	Yes	Yes	Yes
MS	Chancery court appoint clerk of court		Yes		Yes		Yes
MO	County public administrator of each county; social service agencies in counties of designated size	Yes	Yes	Yes			

State	Specified Agency As Public Guardian	Conflict Raised /Remedied	General Probate Powers for Public Guardian	Specific Powers for Public Guardian	Public Guardian Funding Specified	Costs Borne by State or County	Costs Borne by Estate
MT	State or federal agency authorized to provide direct services to incapacitated persons (for guardian); public administrator (for conservator)	Yes	Yes				
NE							
NV	County board of commissioners establish county public guardian program		Yes	Yes	Yes	Yes	Yes
NH	Department of health & human services contracts	Yes	Yes	Yes	Yes	Yes	Yes
NJ	Public guardian office in dept. of community affairs; appointed by governor	Yes	Yes	Yes	Yes	Yes	Yes
NM	Office of guardianship in developmental disabilities planning council	Yes	Yes	Yes	Yes	Yes	
NY	Local dept. of social services; may contract with community guardian program	Yes	Yes	Yes	Yes	Yes	Yes
NC	Clerk appoints individual as county public guardian; also, clerk appoints disinterested public agent without conflict of interest to serve as last resort	Yes	Yes	Yes	Yes		Yes
ND	Any appropriate government agency unless provides direct care & custody (unless court finds no substantial risk)	Yes					
OH	Dept. of mental retardation & developmental disabilities contract with public or private agency		Yes		Yes	Yes	
OK	Office of public guardianship in dept. of human services (subject to funding)		Yes	Yes	Full implementation dependent upon state funding		
OR	County court or board of commissioners create office of public guardian	Yes	Yes	Yes	Yes	Yes	Yes
PA	Guardianship support agencies	Yes	Yes	Yes	Yes	Yes	Yes
RI		Yes					
SC	Director of dept. of mental health or designee. (Also, a "suitable institution" may serve as guardian.)						

State	Specified Agency As Public Guardian	Conflict Raised /Remedied	General Probate Powers for Public Guardian	Specific Powers for Public Guardian	Public Guardian Funding Specified	Costs Borne by State or County	Costs Borne by Estate
SD	Dept. of human services or dept. of social services; also any public agency if provides active & suitable guardianship program						
TN	Program administered by commission on aging; contracts with district agencies		Yes	Yes	Yes	Yes	Yes
TX	Dept. of aging and disability services; may contract with guardianship program or other entity		Yes	Yes			
UT	Office of public guardian in dept. of human services		Yes	Yes	Yes	Yes	Yes
VT	Office of public guardian in dept. of aging & disabilities		Yes	Yes			
VA	Public guardian and conservator program in dept. for the aging; contracts with local/regional programs		Yes	Yes	Yes	Yes	
WA	Office of public guardianship in administrative office of courts; contracts with private providers		Yes	Yes	Yes	Yes	
WV	Department of health & human resources designates agency under its supervision; county sheriff may be appointed	Yes	Yes				
WI	Nonprofit corporation approved by the dept. of health and family services						
WY		Yes					

Table 5: Additional Guardianship Provisions

State	Provision for Termination	Restoration	Incapacitated Person Petition	Annual Report	Other Reporting Period	Emergency Guardian	Temporary Guardian	Limited Guardian
AL	Yes	Yes	Yes		Report as ordered by court; accounting at least every 3 years	Yes	Yes	Yes
AK	Yes	Yes	Yes	Yes		Yes	Yes	Yes
AZ	Yes	Yes	Yes	Yes		Yes	Yes	Yes
AR	Yes	Yes	Yes	Yes		Yes	Yes	Yes
CA	Yes	Yes	Yes	Yes	Within 6 months of appointment	Yes	Yes	Yes, for developmentally disabled
CO	Yes	Yes	Yes	Yes	Within 60 days of appointment	Yes	Yes	Yes
CT	Yes	Yes		Yes		Yes	Yes	Yes
DE	Yes	Yes	Yes		Accounting as court requires, not more than biennially; frequency of status report not stated	Yes	Yes	Yes
DC	Yes	Yes	Yes		Accounting at least yearly or on court order; report at least semi-annually or on court order	Yes	Yes	Yes
FL	Yes	Yes	Yes	Yes		Yes	Yes	Yes
GA	Yes	Yes	Yes	Yes		Yes	Yes	Yes
HI	Yes	Yes	Yes	Yes		Yes	Yes	Yes
ID				Yes		Yes	Yes	Yes
IL	Yes	Yes	Yes		Report at intervals as indicated by court;	Yes	Yes	Yes
IN	Yes	Yes	Yes		Report as ordered by court; accounting biennially	Yes	Yes	Yes
IA	Yes	Yes	Yes	Yes			Yes	Yes

State	Provision for Termination	Restoration	Incapacitated Person Petition	Annual Report	Other Reporting Period	Emergency Guardian	Temporary Guardian	Limited Guardian
KS	Yes	Yes	Yes	Yes		Yes	Yes	Yes
KY	Yes	Yes	Yes	Yes	Accounting biennially	Yes	Yes	Yes
LA	Yes	Yes	Yes	Yes		Yes	Yes	Yes
ME	Yes	Yes	Yes		As required by court	Yes	Yes	Yes
MD	Yes	Yes	Yes	Yes	County review board conduct review of each public guardianship case every six months	Yes	Yes	Yes
MA	Yes	Yes	Yes			Yes	Yes	Not in statute but by case law.
MI	Yes	Yes	Yes	Yes		Yes	Yes	Yes
MN	Yes	Yes	Yes	Yes		Yes	Yes	Yes
MS	Yes	Yes		Yes				
MO	Yes	Yes	Yes	Yes		Yes	Yes	Yes
MT	Yes	Yes	Yes	Yes		Yes	Yes	Yes
NE	Yes	Yes	Yes					Yes
NV	Yes	Yes	Yes	Yes		Yes	Yes	Yes
NH	Yes	Yes	Yes	Yes	Status report annually unless court finds not necessary	Yes	Yes	Yes
NJ	Yes	Yes	Yes		At time intervals as ordered by the court	Yes	Yes	Yes
NM	Yes	Yes	Yes	Yes		Yes	Yes	Yes
NY	Yes	Yes	Yes	Yes		Yes	Yes	Yes
NC	Yes	Yes	Yes	Yes	Initial report within six months	Yes	Yes	Yes
ND	Yes	Yes	Yes	Yes		Yes	Yes	Yes
OH	Yes	Yes	Yes		Every two years for status report	Yes	Yes	Yes

State	Provision for Termination	Restoration	Incapacitated Person Petition	Annual Report	Other Reporting Period	Emergency Guardian	Temporary Guardian	Limited Guardian
OK	Yes	Yes	Yes	Yes	Every six months for persons who are mentally retarded & dangerous in criminal proceeding	Yes	Yes	Yes
OR	Yes	Yes		Yes		Yes	Yes	Yes
PA	Yes	Yes		Yes	Personal status report at least annually & accounting whenever directed by court	Yes	Yes	Yes
RI	Yes	Yes	Yes	Yes		Yes	Yes	Yes
SC	Yes	Yes	Yes	Yes		Yes	Yes	Yes
SD	Yes	Yes	Yes	Yes		Yes	Yes	Yes
TN	Yes	Yes	Yes	Yes		Yes	Yes	Yes
TX	Yes	Yes	Yes	Yes		Yes	Yes	Yes
UT	Yes	Yes	Yes		As ordered	Yes	Yes	Yes
VT	Yes	Yes		Yes		Yes	Yes	Yes
VA	Yes	Yes	Yes	Yes			Yes	Yes
WA	Yes	Yes	Yes	Yes		Guardian <i>ad litem</i> may move for temporary relief from abuse, neglect, or exploitation, or to address other emergency		Yes
WV	Yes	Yes	Yes	Yes	Semi-annually in first year and annually thereafter	Yes	Yes	Yes
WI	Yes	Yes	Yes	Yes		Yes	Yes	Yes
WY	Yes	Yes	Yes	Yes, accounting	Personal status report every six months	Yes	Yes	Yes

Appendix C: Criteria for Contracting Out

APPENDIX B

Criteria for Choosing Public or Private (Contracting-Out) Models in the Provision of Guardian of Last Resort Services

by

Winsor C. Schmidt and Pamela B. Teaster

Five models for providing guardian of last resort services are cited in the research literature: (1) a court model; (2) an independent state office; (3) a division of a social service agency; (4) a county agency; and, (5) private sector via volunteers or by contract ("The county or state government contracts with a nonprofit or a volunteer board to provide guardianship services.")¹ The first four models use government employees as guardian of last resort. The fifth model uses private employees (frequently with public money) as guardian of last resort. The question of whether the guardian of last resort (no willing and responsible family members or friends to serve as guardian, and no financial resources to pay a guardian) should be a public employee or a (publicly paid) private employee is an important one.

Recent assessments of service delivery options have identified characteristics associated with the particular approach. For example, the contracting (nonprofit) option involves a competitive environment, monitoring and evaluation, and loss of some control and accountability.² The volunteer option involves: uncertain supply of volunteers; unique management and personnel problems; and loss of some government control and equity.³

When contemplating a public versus a private model, it is appropriate not to fall prey to a "privatization premise" that assumes private entities consistently provide more effective services than public ones.⁴ Evidence exists that productivity increases in the public sector often exceed those in the private sector.⁵ In general, more precise services or goods (i.e., maintenance, automobile repair, garbage collection) are appropriate candidates for outsourcing.⁶ However, services such as public guardianship, which involve significant discretion and judgment, create problems with monitoring and compliance costs, as well as quality assurance and accountability.

There are significant distinctions between public services and private services.

Sovereignty and Constitutional Rights

Government possesses the rights and immunities of the sovereign; private sector organizations do not possess such rights and immunities. A sovereign may disavow debts but

¹ W. Schmidt, K. Miller, B. New & W. Bell, *Public Guardianship and the Elderly*, Cambridge, MA: Dallinger Publishing Co (1981); Siemco, Hurme & Sabauuo, *Public Guardianship: Where Is It and What Does It Need?*, 27 *Clearinghouse Rev.* 588, 589 n 7 (Oct. 1993).

² J. Herz, *Urban Service Delivery Options: Privatization Versus Intergovernmental Alternatives*, p. 10 (unpublished paper presented at the 56th Annual National Conference of the American Society of Public Administration, July 22-26, 1995).

³ *Id.* at ii

⁴ C. Goodsell, *The Case for Bureaucracy: A Public Administration Polemic*, NJ: Chatham House Publishers (3rd ed 1994).

⁵ *Id.* at 53

⁶ J. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It*, NY: Basic Books (1989).

cannot go bankrupt. "In any serious analysis of a proposal to assign the performance of a function to the public or the private sector, the first question should be: Does the performance of this function necessarily involve the powers properly reserved to the sovereign? Or, is the function largely private in character requiring none of the . . . powers of the sovereign?"⁷ (E.g., The American Bar Association is opposed to privatizing prisons and corrections on constitutional and statutory grounds. "The Fifth and Fourteenth Amendments, which prohibit the government from denying federal constitutional rights and which guarantees due process of law, apply to the acts of the state and federal governments, and not to the acts of private parties or entities."⁸) Guardianship of last resort is the exercise of judicial authority delegated by a sovereign public court. The guardian of last resort should have the strength of sovereign authority in voicing the substituted judgment of the incapacitated person, not the weaker voice of a contracted private person.

In addition to the literature on privatization of prisons that addresses the obligations of the state to persons under its care, there lies a more subtle issue relating to public guardianship and the constitutional right to the least restrictive alternative guaranteed by the Fourteenth Amendment.⁹ "A central question that has arisen in State Action litigation is when does government regulation transform private action into State Action?"¹⁰ Court decisions such as *Flagg Bros. Inc. v. Brooks*, *Rendell-Baker v. Kohn*, and *Blum v. Yaretsky* make it clear that "The greater the discretion left to private service producers in the delivery of publicly-funded service, the lesser the probability that they will be subject to constitutional restraints."¹¹ Incapacitated persons have such constitutionally guaranteed rights as habilitation or treatment in the least restrictive alternative. Contracting-out to nonprofit agencies will diminish such rights.

Accountability

"In a constitutional democracy, a major societal value is the idea that public officials should be held accountable for their actions to elected officials and through their officials to the public. When a public function is assigned to a private party, usually through a contract, there is an inevitable weakening in the lines of political accountability. While a government agency is directly accountable to elected officials, a private entity under contract has only an indirect and tenuous relationship to elected officials. What occurs . . . is the emergence of 'third-party government.'"¹² This puts elected officials in the position of being responsible for programs they do not really control. Accountability of the guardian of last resort is enhanced when the guardian is a public employee and diminished when the guardian is a contracted private employee.

Government support of nonprofit service agencies has increased in the last twenty years with over fifty percent of federal social service expenditures devoted to nonprofit organizations.¹³ However, caution should be exercised when contemplating the intersection of public and nonprofit organizations. Based on a systematic study of government funding of nonprofit organizations in Massachusetts, Connecticut, New Hampshire, and Rhode Island, the authors concluded that

⁷ Moe, *Exploring the Limits of Privatization*, 47 *Public Administration Review* 453 (Nov./Dec. 1987).

⁸ Robbins, *Privatization of Corrections: Defining the Issues*, 33 *Federal Bar News and Journal* 196 (May/June 1986). See *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948); *Civil Rights Cases*, 109 U.S. 3, 11 (1883).

⁹ Dudovitz, *The Least Restrictive Alternative*, *Generations* 39 (Fall 1985).

¹⁰ Sullivan, *Privatization of Public Services: A Growing Threat to Constitutional Rights*, 47 *Pub. Admin. Rev.* 461 (1987).

¹¹ *Id.* at 466.

¹² Moe, *supra* note 7, at 457.

¹³ Lipsky & Smith, *Nonprofit Organizations, Government, and the Welfare State*, in F. Lane (ed.), *Current Issues in Public Administration*, NY: St. Martin's Press (5th ed. 1994), pp. 414-436.

government contracts and government's concern for equity "bring administrative and accountability demands that may conflict with an agency's mission."¹⁴ Also, "When pressed, few officials could supply any hard evidence that private contracting was cheaper than government service delivery."¹⁵

Government authorities must resist demands for privatization through outsourcing until they accept the need for contract management and actually devote resources to it. Contracts that demand complex monitoring but are likely to be inadequately or inefficiently monitored, even if on sound economic and organizational grounds, must be viewed skeptically. In such instances, government production would be less costly as the apparent savings from outsourcing are overwhelmed by monitoring and other contracting costs.¹⁶

Third-Party Government

"Third-party government is not only dangerous to the political order, . . . it is corrosive of management supervision and personnel."¹⁷ (E.g., tangled decision making between NASA and Morton Thiokol Company during the Challenger disaster; contracted out managed health and mental health care experiences with Medicaid and Medicare). Guardianship of last resort requires direct management supervision and personnel, not indirect third-party management and personnel.

The Spectre of Corruption

"Possibly the most potent of the factors limiting the spread of privatization . . . is the spectre of corruption. . . . A high percentage of instances of corruption that have occurred over the two centuries of American administrative history has involved contracts with private providers to perform a public service."¹⁸ Guardianship of the last resort has demonstrated vulnerability to corruption in Chicago, Los Angeles, and isolated probate courts around the country. Incapacitated persons without willing and responsible family members or friends to serve as guardian, and without resources to pay a private guardian, deserve the substituted judgment of less corruptible and more publicly accountable public employees.

Institutional Knowledge

Public agencies are the repository of institutional knowledge on how to function with other agencies, as well as on how to address issues unique to the agency itself. Over time, agencies imbued with meaning become institutions¹⁹ and direct the sway of policy development. "The agency thus must act as an agent for those citizens not present and indeed serve as the agent-trustee

¹⁴ *Id.* at 418.

¹⁵ Van Horn, *The Myths and Realities of Privatization*, in W. Gonnley, *Privatization and Its Alternatives*, Madison, University of Wisconsin Press (1989), pp. 261-280.

¹⁶ Prager, *Contracting Out Government Services: Lessons from the Private Sector*, 54 *Pub. Admn. Rev.* 176, 182.

¹⁷ *Id.* *supra* note 7, at 458.

¹⁸ *Id.* at 458.

¹⁹ P. Selznick, *Leadership in Administration*, NY: Harper and Row (1957).

for all citizens . . . perhaps even those of future generations."²⁹ In guardianship, public officials employ the guardianship agency's unique perspectives, experience, structures, and ethics to address the complex issues of public guardianship.

²⁹ Wamsley, *The Agency Perspective: Public Administrators as Agential Leaders*, in G. Wamsley, R. Backer, C. Goodsell, P. Eronenberg, J. Rohr, C. Stivers, O. White & J. Wolf (eds.), *Refounding Public Administration*, Newbury Park, CA: Sage (1990).

Appendix D: Hallmarks of an Excellent Public Guardianship Program from 2005 Phase I National Public Guardianship Report

Hallmarks of an Efficient, Effective, and Economic Program of Public Guardianship

We conclude our recommendations with hallmarks of an excellent program. We believe that these attributes are benchmarks against which any reputable program should be measured.

Public guardianship programs should incorporate key “hallmarks” of an effective system:

- Establish, statutorily, a staffing ratio.
- Establish a screening committee (*i.e.*, for funneling appropriate cases to the public guardian).
- Develop uniform computerized forms (*e.g.*, intake, initial assessment, care plan, decisional accounting, staff time logs, changes in ward condition, values history).
- Ensure consistency and uniformity of local or regional components of a state program.
- Conduct regular external evaluation.
- Track cost savings to state.
- Support and recognize staff.
- Develop and update written policies and procedures; use NGA as a guide.
- Establish strong community links.
- Avoid petitioning for own wards.
- Create an advisory council.
- Visit wards regularly—once a month, at a minimum.
- Draw on multiple funding sources, including Medicaid.
- Explore use of a pooled trust to maximize client benefits.
- Maximize the use of media and lawsuits.
- Inform policymakers and the general public about guardianship services and alternatives.
- Implement a reputable, computerized database of information that uses information requested in this study as a baseline.

Appendix E: Conclusions and Recommendations

From 2005 Phase I National Study on Public Guardianship

Chapter 7: Conclusions and Recommendations

Major conclusions in this chapter follow the key areas in which the Schmidt study made findings in order to facilitate a direct comparison over time. The conclusions arise from the national survey, as well as the in-depth interviews of key informants in seven states (*i.e.*, Florida, Illinois, Iowa, Indiana, Kentucky, Missouri, and Wisconsin) and site visits in Florida, Kentucky, and Illinois (Office of State Guardian and Cook County Office of Public Guardian).

A departure from Schmidt's study is that this study has more empirical information (simply put, because more was available), but still, some conclusions reached are less empirically-based than others and should be regarded as preliminary findings that bear necessary future and more in-depth research.

An early task was to identify states with public guardianship statutes and programs of any kind. We discovered 48 states with some form of public guardianship, either implicit or explicit. Like the 1981 study, some explicit statutes had no programs, while some implicit programs were highly evolved.

Consistent with Schmidt's study, there was considerable variation in public guardianship programs, both intrastate and interstate. Collapsing the states into the organizing models (*i.e.*, court, independent state office, social service providing agency, and county) consumed a significant portion of the study time and proved the basis for any meaningful sort of analytical comparison, as evidenced by Chapter 4. Although the social service agency model was the predominant model in 1981, it has jumped in number from 19 to 33 states. We stress, as Schmidt did in his earlier work, the heterogeneity of public guardianship as we delineate the conclusions and recommendations below.

Conclusions

Public guardianship programs serve a wide variety of individuals. The overwhelming majority of the 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 to adult protective services clients. (*See* Chapter 3.)

Responses to our survey revealed that there is a relatively even distribution of male and female wards. Minority populations constituted 30 % (Illinois—Office of State Guardian) to 33% (California—Los Angeles) in some programs and a surprisingly slight proportion of the total ward population in others. As expected, most public guardianship wards were indigent. The majority of wards were placed in an institution of some kind, usually a nursing home or state hospital. Although more options for habilitation exist than 25 years earlier, we learned that, anecdotally, if wards were poor, often the only available living arrangement was a nursing home, as a result of federal and state funding restrictions, namely Medicaid.

Public guardianship programs serve younger individuals with more complex needs than 25 years ago. Our 2004 survey found that individuals age 65 or over constituted between 37% and 57% of public guardianship wards, while those age 18 to 64 comprised between 43% and 62% of total wards. Younger clients include a range of individuals with mental illness, mental retardation, developmental disability, head injuries, and substance abuse—all of which are rising in the general population. Some may have involvement in the criminal justice system. In addition, many older clients may have a dual diagnosis of dementia and severe mental ill-

ness—and many individuals with mental retardation or developmental disabilities are aging. For instance, interview respondents in Kentucky reported, “the typical clients, older women in nursing homes, are now only half of the caseload” and that “clients are younger and have many more drug and alcohol problems. Public guardianship used to be regarded as a custodial program, but no longer.” These complex cases involving people with challenging behavioral problems are much more labor intensive than the previous population set.

Among states with data on institutionalization, a majority of public guardianship wards are institutionalized. In the national survey, 15 programs (14 states) reported the proportion of wards institutionalized—ranging from 37% to 97%. Eleven of 15 programs providing this information indicated that between 60% and 97% of their wards lived in institutional settings. Twelve jurisdictions indicated that between 60% and 100% of their wards lived in institutional settings. Interviewees in some states noted that very few wards are in the community by the time they are referred to the public guardianship office, that nursing home placement often is automatic, and that wards generally have little say in placement. Others described greater efforts to locate appropriate community placements.

The *Olmstead* case provides a strong mandate for reevaluation of the high proportion of public guardianship clients who are institutionalized. The U.S. Supreme Court’s 1999 *Olmstead* case serves as a charge to public guardianship programs to assess their institutionalized wards for possible transfer to community settings, and vigorously to promote home- and community-based placements when possible—a tough tenet when both public guardianship staffing and community-based care resources are at a premium.

Program Characteristics

Public guardianship programs may be 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. 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. The national survey for the current project used a variation on the classification, and in reviewing the responses, found that the original taxonomy was most appropriate. It should be noted that the social service agency model includes both state and local entities. Thus, some county level programs may in fact be located in social service agencies, and are thus described in the social service agency model.

At first blush, the social service agency model might seem the most logical placement for public guardianship in that staff is knowledgeable about services and has the networks in place to secure services. However, this model presents a grave conflict of interest in that the guardian cannot objectively evaluate the services provided to wards—nor can it as zealously advocate for the interests of the ward, including complaining about the services and, if necessary, the filing of an administrative action or a lawsuit.

The current study found that three states use the court model, three states use the independent state office model, an overwhelming 33 states place public guardianship in a division of a social service agency (either state or local), and 10 states use a county model. (Illinois uses two distinct models.)

All except two states (and Washington, D.C.) have some form of public guardianship. In 1981, the Schmidt study found that 34 states had provisions for public guardianship. The current study defines “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.” Using this definition, the study found that all states except Nebraska and Wyoming have some form of public guardianship. In most cases there is statutory authority for these programs (Table 3.1), but some states have developed programs or expend funds for public guardianship without a legislative base.

The clear majority of the states uses a social services model of public guardianship. A striking finding in our study is the rise in the number of states (33) falling under the social services agency model. This compares with 19 states in the earlier study. We repeatedly asked if interview and focus group respondents regarded such a placement as a problem, and most did. Emphasized earlier, advocacy needs of the ward may be severely compromised when the program is both the guardian and the service provider. The ability to advocate for ward needs and objectively assess services is gravely diminished, and the ability to sue the agency, if necessary, is effectively nonexistent. As a result, the ward's physical and mental outcomes may be adversely affected.

Some governmental entities providing public guardianship services do not perceive that they are doing so. The question of "What is public guardianship" goes to the heart of the study, and the answer turned out to be far more difficult to discern than anticipated. The study definition is broad and is based on governmental agency and governmental funding. It includes some administrative arrangements that are not explicitly labeled as "public guardianship" in state law—for example, a social service agency is designated to serve if no private guardian is available, or adult protective services is appointed in certain situations. It also includes some instances in which state or local governments pay for private entities to serve as guardian of last resort—for example, a state may fund private non-profit organizations, attorneys, or private individuals to serve. A number of states with such implicit or de facto systems maintained that they do not have public guardianship. This perception may undermine the visibility and accountability of these fiduciary functions that appear under public or governmental aegis.

A number of states contract out for guardianship services. Schmidt's study did not examine this phenomenon, but today, 11 states contract out for services. Arguably, the contracting out approach allows states to experiment with various models of public guardianship service provision that may be best tailored to needs of a particular region. However, this practice is not without peril, and presents a conundrum. Substantial public administration literature indicates that contracting out for services is appropriate when the services of government are discrete (*e.g.*, repairing potholes). Yet, when the services of government are highly complex, as with public guardianship, services are best provided by a governmental entity. Under the "privatization premise,"¹⁴³ contracting of this nature may pose a substantial threat to the provision of public guardianship services due to attenuated and unclear lines of authority.

Guardianship of Person and Property: Functions of the Public Guardianship Program

Many public guardianship programs serve as both guardian of the person and property, but some serve more limited roles. A high number of clients are receiving guardian of the person services only. The vast majority of state statutes provide for public guardianship programs to serve as both guardian of the person and property, but two specify powers over property only and one is limited to personal matters only. (*See* Chapter 3.) While in the earlier study, the statutory emphasis was on management of money, which reduces the importance on guardianship of the person, statutes today provide more broadly for a range of guardianship services.

In practice, programs more frequently function as guardian of the person than as guardian of the property. The national survey shows that two court model, four independent model, 21 social service model, and eight county model programs (33 total) reported serving as guardian of the person; whereas two court model, three independent model, 15 social services model, and seven county model programs (27 total) reported serving as guardian of the property. The number of wards receiving guardian of the person services is significantly higher. In the social services model—which includes a majority of the states—the total number of wards receiving guardian of the person services was 6,080; the number receiving guardian of property services was only 282; and the number receiving both guardian of the person and guardian of the property services was 3,866.

¹⁴³. *Supra* n. 83.

Public guardianship programs vary in the extent of community education and outreach performed. Thirty out of 34 respondents indicated that they educate the community about public guardianship. Many indicate that they balance this function with providing guardianship services to wards. Nineteen programs provide technical assistance to private guardians, and four programs monitor private guardians. We learned that not all programs are conducting this important function. If client caseloads are far too high and projected to increase, then education becomes an excellent mechanism for reducing caseloads, as suitable individuals may be recruited to take on the task of serving as guardian and free up a slot from one of the public programs. Also, raising public awareness of the function (or existence) of public guardianship may be an effective tool in raising funding levels. It bears mentioning, however, that the “woodwork effect” may occur along with public awareness (*i.e.*, more general information about the programs may increase the number of clients the programs serve).

Petitioning is a problematic role for public guardianship programs. The 1981 Schmidt study acknowledged that public guardianship programs that petition for their own appointment are subject to clear conflicts of interest. On the one hand, they may have an incentive to “self aggrandize” by petitioning in cases where there may be another alternative. On the other hand, they may decline to petition when they have an overload of cases, or when the case presents difficult behavior problems that would require a great amount of staff time—that is, they may have an incentive to “cherry pick” the more stable cases that are easier to manage. However, 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 in which preventable emergencies could have been avoided.

In the national survey, some 25 responses (14 from service providing agencies, seven from county programs, two from court programs, and two from independent public guardianship programs) indicated that the public guardianship program petitions the court to serve as guardian for incapacitated persons. Some interview and focus group participants regarded this as a conflict and reported that the public guardianship program sought ways to get around it. Some saw petitioning as a barrier because of the filing fees and court fees that must be paid by the petitioner. Others pointed out that the public guardianship program is stuck between a rock and a hard place—petitioning is a conflict, yet not petitioning means those in need may languish without attention. Still others found petitioning an appropriate role for public guardianship programs in light of the overwhelming need.

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. In some areas, filing fees may be waived if the respondent is indigent, but other areas have no such indigency waiver for payment of fees that can run up to several hundred dollars. Nursing homes, assisted living facilities, and hospitals all may have an interest in the filing of a petition, but frequently do not step forward to provide payment.

Funding and Staffing of Programs

States have significant unmet needs for public guardianship and other surrogate decision-making services. A striking majority of survey respondents could not estimate the unmet need for public guardianship in the state. Only 16 of 53 jurisdictions were able to provide us with this critically important information. Interview and focus group respondents commented that the need was vast, and that few estimates exist. Some specifically cited unmet need among people with mental illness, as well as institutionalized adults. The unmet need for public guardianship is the moral imperative for seeking additional funding and the seminal reason that public guardianship exists. A number of states have conducted unmet need surveys (Florida, Virginia, and Utah), 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, such surveys should be conducted on a periodic, rather than 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 90 individuals in one county alone. Caseloads also varied widely, with a low of two (this being a program in its infancy) to a high of 173 per staff person (New Mexico). The average number of staff to wards was 1:36. The total number of wards per program ranged from 2 (again the nascent program in Florida) to a high of 5,383 (Illinois, OSG). The median number that any program served was 216 wards. Though most numbers are still too high, they, in most cases, represent a decrease in numbers from Schmidt's study, with ratios being cut in half in some instances. Reported time spent with individual wards ranged from one hour bi-annually to over 20 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 (2 programs), while others required an advanced or terminal degree, such as a J.D. or Ph.D. Many persons from diverse fields are public guardians, but most tend to be from social work backgrounds or are attorneys. Certification of guardians, including public guardians, is beginning to be required in some states. In addition, the National Guardianship Association conducts an examination that certifies both "registered" and "master" guardians. The NGA has developed a *Code of Ethics* and *Standards of Practice*, portions of which many programs now use.

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 ratios as high as 1:50, 1:80, and even 1:173. Caseloads are rising, yet program budgets are not rising commensurately, and in some cases staff positions are frozen. At the same time, cases frequently are more complex than 25 years ago, with more individuals with challenging behavioral problems, substance abuse, and severe mental illness, requiring a higher degree of staff oversight and interaction. Some of the focus group and interview respondents revealed high frustration with an overload of vulnerable individuals in dire need and little ability of the program to respond adequately. Some reported "staff burnout," "judges not sympathetic to the high caseload problem," "more labor intensive cases," "not enough time to do proper accounting," "not enough time to see wards often enough," "too few restoration petitions," and "prohibitively high caseloads preventing a focus on individual needs." Eleven states estimated the additional funding that would be needed 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 six states provide for a 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 their staffing level. This puts programs in an intractable position and puts clients in jeopardy. The conundrum is that public guardianship originally was intended as a guardian of last resort, taking all comers with nowhere else to go, an essential part of the public safety net. Yet, without sufficient funding to support this, programs may be stretched to the breaking point and fail to provide any real benefit to the individuals they are obligated to serve.

Funding for public guardianship is from a patchwork of sources, none sufficient. In the prior study, state statutes typically were silent on funding for public guardianship. Today, although almost half of state statutes reference authorization for state or county monies, actual appropriations frequently are insufficient or not forthcoming. Funding for public guardianship is by patchwork. Most states that reported their funding sources named multiple channels, with state general funds being the leading source, followed by fees collected from clients with assets. Perhaps the most striking finding regarding funding was that the social service model, unlike the other models, pulled from all resources (*i.e.*, state funds, client fees, county funds, federal funds, Medicaid funds, estate recovery, grants/foundations, and private donations). 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 list 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 indi-

viduals to apply for Medicaid funds. At least one state (Kentucky) bills Medicaid for guardianship services under its targeted case management program. Washington state uses Medicaid dollars to supplement funding for private guardians (Appendix F).

The Supreme Court *Olmstead* case provides a strong impetus to support public guardianship. The landmark 1999 U.S. Supreme Court *Olmstead* case requires states to fully integrate people with disabilities into community settings, rather than institutional placements, when appropriate. Often individuals require surrogate decision-makers to facilitate discharge and establish community supports. People with mental disabilities may languish unnecessarily in mental hospitals, ICF-MR beds, or nursing homes because they lack the assistance of a guardian. Thus, *Olmstead* serves as a charge to states to address the unmet need by establishing and more fully funding public guardianship programs.

***Public Guardianship As Part of a State Guardianship System:
Due Process Protections and Other Reform Issues***

Very little data exists on public guardianship. Many states have insufficient or uneven data on adult guardianship in general,¹⁴⁴ and specifically on public guardianship, including: ward characteristics, referral sources, costs, actions taken, and time spent by staff. For a majority of questions on the 2004 national survey, a significant number of states were unable to respond. In some cases, data is kept locally and not compiled regularly or consistently. While some state programs are developing computerized databases, public guardianship information systems in many jurisdictions remain rudimentary. The study found no state that maintains outcome data on changes in wards over the course of the guardianship. Without uniform, consistent data collection, policymakers and practitioners are working in the dark.

Courts rarely appoint the public guardian as a limited guardian. In the national survey, there were 11 times more plenary than limited guardianships of property and four times more plenary than limited guardianships of the person. In focus groups and interviews, estimates of the proportion of limited appointments ranged from 1% to 20%, 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.¹⁴⁵ Limited guardianship maximizes the autonomy and independence of the individual and responds to the principle of the least restrictive alternative. The vast majority of state guardianship laws urge the court to use limited orders and some jurisdictions state a preference for limited rather than plenary orders. Moreover, statutes in eight states clearly specify that the public guardianship program may serve as limited guardian. However, petitioners often do not request and judges often are reluctant to craft tailored orders that reflect the specific capacities of the individual.

The guardian *ad litem* system, as currently implemented, is an impediment to effective public guardianship services. Through in-depth interviews with key informants and with various groups in all site visits, flaws were revealed in the use of guardians *ad litem* (GALs). First, little to no training for GALs exists, and thus, their function, as the eyes and ears of the court is compromised. While some guardians *ad litem* faithfully exercise their duties (visiting the ward, explaining the guardianship process to the ward, even providing follow-up assistance to the ward), others never visit the ward, do not investigate the appropriateness of guardianship, make ageist assumptions concerning the functional capabilities of wards, and provide the court with incomplete information. Payment to the GALs is abysmal, and often ignores potentially time-consuming efforts. Thus, often GALs are inexperienced and qualified persons serving in this capacity are often deterred from doing so. Reportedly and often, GALs were appointed as the guardian of the ward, which we regard as a conflict of interest in roles.

There is an important growing movement toward eliminating GALs from court proceedings, a position consistent with some commentary, and with court decisions or guidelines in Florida, Montana, Nebraska,

144. GAO, *supra* n. 26.

145. Hurme, *supra* n. 91; Fell, *supra* n. 91; Frolik, *supra* n. 91; Schmidt, *supra* n. 77; Quinn, *supra* n. 27.

Pennsylvania, South Carolina, Vermont, and Washington.¹⁴⁶ We propose that a guardian *ad litem* system, adequately staffed and funded, be established 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 is uneven. Monitoring of public guardianship can be 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. In several states, stronger internal monitoring was a work in progress, with both computerized systems and procedural manuals underway. State programs generally receive at least basic information on wards from local entities, and in some cases conduct random file reviews. However, uniform internal reporting forms generally are lacking. And 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 18 states provide specifically for court review or for special additional court 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.

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 area was “a recent phenomenon” and that its impact on programs was “not clear.” The study predicted a rapid expansion. More recently, lawsuits have been used effectively, but surprisingly sparingly, to improve public guardianship programs and to improve conditions for public guardianship wards. A significant number of cases have clarified public guardianship appointment, powers and duties, and removal. A 1999 class action suit in Washoe County, Nevada, was unique in directly challenging widespread failures in serving wards by a public guardianship program. The Office of Public Guardian in Cook County, Illinois, brought multiple high visibility lawsuits to enforce the rights of wards in multiple arenas. In general, however, litigation has been 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.

Recommendations

As with the previous section that discussed findings and observations from the study, we present our recommendations in the organizing framework drawn from the 1981 study. These 19 recommendations offer a blueprint for policymakers and practitioners in the years to come as the aging and disability population swells and the need for effective public guardianship systems escalates. The 19 recommendations are followed by a summary list of “Hallmarks of an Efficient, Effective, and Economical Program of Public Guardianship.”

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 decision making. Public guardians can advocate for the needs of wards, but without funding for community services such as transportation, in-home care, home-delivered and congregate meals, attendant care, care management, as well as supportive housing, public guardianship will be an empty shell. The *Olmstead* case offers a powerful mandate for funding such services to integrate individuals with disabilities into the community.

¹⁴⁶ Dore, *Supra* n. 93.

The effect of public guardianship services on wards over time merits study. Although some guardianships are still instituted primarily for third party interests (see, particularly, Kentucky-specific information in Chapter 6), the purpose of guardianship is to provide for ward needs, improve or maintain ward functioning, and protect assets of those unable to care for themselves.¹⁴⁷ If ward functioning is not improved, held constant, or at least safely protected from undue restraint, there is little substantive due process purpose to institute guardianship. Research on guardianship is in its infancy, and the best research has to offer is that, at least in one reputable study in one state, public guardianship produces a significant cost savings. The moral imperative, surrogate decision-making for the ward, is more elusive to capture and attempts to do so have barely scratched the surface. What is truly needed to improve guardianship services is to capture the benefit of this state service to the wards. This is, beyond any other suggestion for research, the most critical and more important. What is needed is accurate social and medical information at baseline, followed by a longitudinal study of wards. Comparisons should be made within states and between models.

Program Characteristics

States would benefit from an updated model public guardianship act. Model public guardianship acts have been proposed in the 1970s and by the Schmidt study in 1981. Since that time, guardianship law has undergone a paradigm shift, and public guardianship populations have changed. Many state legislatures are grappling with public guardianship provisions. 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, 33 states had a social services agency model of public guardianship with its inherent conflict of interest. At stake is the inability of the public guardian program to effectively and freely advocate for the ward. If the public guardian program is housed in an entity also providing social services, then the public guardian cannot advocate for or objectively assess services—or bring legal suit against the agency on the ward’s behalf. For example, in Cook County, Illinois (county model), the Office of Public Guardian has effectively used the ability to sue to increase the size and improve the functioning of the public office.

Guardianship of Person and Property: Functions of Public Guardianship Programs

State public guardianship programs should establish standardized forms and reporting instruments. To achieve consistency and accountability, state public guardianship programs should design and should require local entities to use uniform forms (*e.g.*, intake, initial client assessment and periodic re-assessment, care plans, ward reports, staff time and activity logs, and values histories) and should provide that a regular summary of this information be submitted electronically, for periodic compilation at the state level. These standardized forms have long been used in mental health treatment plans, social services, and educational plans.

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 clients other than their wards. Public guardianship programs should not provide direct services to their wards, since this would put them in a conflicted position in seeking to monitor those very services and to determine whether those services are in fact best suited to meet the individual’s needs. The Second National Guardianship Conference (Wingspan) recommendations urged that “guardians 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.”¹⁴⁸ In addition, providing guardianship, representative payee, or other surrogate decision-making services to individuals other than public guardianship wards dilutes the focus of the program on the most vulnerable individuals who have no resources and no other resort. When

147. Schmidt *et al.*, *supra* n. 4.

148. Wingspan, *supra* n. 22.

programs are inadequately staffed and funded, indicated by nearly every program we surveyed, programs should only perform public guardianship and public guardianship services alone.

Public guardianship programs should adopt minimum standards of practice. Some, but not all, public guardianship programs have written policies and procedures. Programs need written standards on the guardian's relationship with the ward, decision making, use of the least restrictive alternative, confidentiality, medical treatment, financial accountability, property management and more. Written policies—as well as training on the policies—will provide consistency over time and across local offices. A clearinghouse of state policies and procedures manuals will encourage replication and raise the bar for public guardianship performance.

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. Programs should collaborate with other stakeholders in the community to identify petitioners—attorneys, adult protective services that are not directly providing services, or others. Moreover, whether programs petition or not, they should establish screening panels that meet regularly to identify less restrictive alternatives, identify community petitioners 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. We acknowledge that the moral imperative for public guardianship is the unmet need for guardians. At the same time, we stress that the fiscal imperative for public guardianship is the cost savings. The presentation of cost savings figures in the Commonwealth of Virginia provided justification for the establishment of the programs in 1998. The external evaluation (*see below*) conducted in 2001 and 2002—where data were collected in a more sophisticated and systematic manner—revealed even greater savings (over \$5,625,000, largely from discharge of wards from psychiatric hospitals to less restrictive environments).¹⁴⁹ At that time, the public guardianship programs were in peril and in a fiscal struggle for their very existence. The provision of their proven cost savings not only saved the programs from extinction, but also, in ensuing years (2004) increased their funding and total number of programs. We recommend that each state begin collecting this information, using the Virginia model as a reference. Collection of this information is a crucial argument for, and defense of, public guardianship for any legislative entity.

Public guardianship programs should undergo a periodic external evaluation. The importance of a periodic external evaluation cannot be stated enough. Our argument for doing so is analogous to the one made in the preceding paragraph concerning tracking cost savings. Some states (Virginia and Utah) and some localities (Washoe County, Nevada) have built periodic evaluation into their statutes and settlement agreements, respectively. Several states have undergone audits by outside entities when practices have come into question. Information from more than one site visit revealed that such audits, in addition to being fact-finding, may be politically motivated. Also, public guardianship involves a highly complex function of government. Audits conducted by individuals not highly knowledgeable of the system and its requirements may produce more harm than good. Thus, we recommend periodic external evaluations that encourage input from guardianship actors and evaluators alike. The several states mentioned above can be used as a reference for conducting an evaluation. Periodic evaluation (also recommended in 1981) is made far more feasible by use of computerized data collection systems now available.

149. Teaster & Roberto, *supra* n. 42.

Funding and Staffing of Programs

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 1:20 ratio would best enable adequate individualized ward attention. This recommendation is as important today as it was 25 years ago. At some “tipping point,” chronic understaffing means that protective intervention by a public guardianship program simply may not be justified as in the best interests of the vulnerable individual. Practitioners and policymakers should determine appropriate and workable ratios. States could begin with pilot programs to demonstrate the ward outcomes achieved with specified ratios—and perhaps costs saved in terms of timely interventions that prevent crises, as well as increased use of community settings.

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. Funding for public guardianship can result in significant cost savings for the public by sound management of ward finances, prevention of crises, ensuring proper medical care and avoiding use of unnecessary emergency services, use of the least restrictive alternative setting, and identification of ward assets and federal benefits (*see above*).

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. Medicaid is a complex federal-state program—with wide variations in state plans and policies within the bounds of federal guidance. The extent and creative use of various Medicaid provisions for guardianship merits further examination and would be a useful resource for public guardianship programs.

Public Guardianship As Part of a 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. Support for the uniform collection of data on guardianship was supported in a recent study by the GAO.¹⁵⁰ We echo the sentiments of our colleagues in federal service and suggest that an excellent place to start with uniform data collection is public guardianship, which keeps some, albeit in some instances, inconsistent and suspect data, on its wards. Much information is not captured and yet is necessary for program operation and, more importantly, the provision of excellent services to wards (who deserve no less). We recommend establishment of a uniform standard of minimum information for data collection, using this national public guardianship survey as a baseline and guide. We discovered that, even in an age where not keeping computerized records is inexcusable, states were, in fact not doing so. Computer records, necessary for all public programs, should be configured so that information extraction is easily accomplished. Data on guardianship will facilitate much needed accountability and will bolster arguments for necessary increases in staffing and funding, as well.

Courts should exercise increased oversight of public guardianship programs. Public guardianship is a basic public trust. Yet many public guardianship programs are underfunded and understaffed, laboring under high caseloads that may not permit the individual attention required by wards. Thus, courts should establish additional monitoring procedures for public guardianship beyond the regular statutorily mandated review of accountings and reports required of all guardians. For example, courts could require an annual program report, conduct regular random file reviews, and meet periodically with program directors.

¹⁵⁰. GAO, *supra* n. 26.

Courts should increase the use of limited orders in public guardianship. With the high volume of cases, courts should use public guardianship programs to implement forward-looking approaches, including the regular use of limited orders to maximize the autonomy of the ward and implement the least restrictive alternative principle. 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.¹⁵¹

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 set up an obstacle that is not consistent with the function of providing a societal last resort. Use of fees also causes a bottleneck of at-risk individuals with no decision-maker, which ultimately could cost the state unnecessary expense to address crises that could have been addressed by the public guardianship program.

Courts should examine the role of guardians *ad litem* and court investigators, especially as it bears on the public guardianship system. The role of a guardian *ad litem* or court investigator in investigating less restrictive alternatives, the suitability of the proposed guardian, and available resources for the respondent or ward is critical and bears directly on the cases coming into the public guardianship programs. 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 Veteran's Guardianship Act, as implemented by the states. About a third of the 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 U.S. Government Accountability Office recommended that such coordination should be strengthened. State implementation of the Act directly affects veterans who are public guardianship wards, and merits examination.

151. Frolik, *supra* n. 91