

**LIABILITY OF GUARDIANS:
EMERGING NATIONAL TRENDS
REGARDING INDIVIDUAL AND
SYSTEM ACCOUNTABILITY AND
PERFORMANCE**

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**Related experience (disclosure)
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- Certified Professional Guardian Board, Washington Courts, Olympia, WA, 10/16/03-9/30/12 [Application Committee, Education Committee, Ethics Committee (Chair 2010), Regulation Committee] (appointed and re-appointed for three terms by Chief Justice, Washington Supreme Court).
- Guardianship Advisory Board, Guardianship Certificate Program, University of Washington Educational Outreach, October 2007-present.
- "Subject Matter Expert" for WINGS (Working Interdisciplinary Networks of Guardianship Stakeholders) in Washington state (May 1, 2015-March 31, 2016), and Chair of the Washington WINGS Standards and Best Practice Committee, Washington Administrative Office of the Courts, September 25, 2015-present.
- Member, Rethinking Guardianship: Building a Case for Less Restrictive Alternatives initiative, A Statewide Interdisciplinary Workgroup convened by the NC Division of Aging and Adult Services and The Jordon Institute for Families, UNC Chapel Hill School of Social Work, November 2015-present.

Introduction and Scope:

1. The Need for Guardianship Services
2. The Establishment of Guardianships
3. Petitioning and Other Costs
4. The Entities Responsible for Guardianship Costs
5. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services
6. The Efficacy of Statutes Governing Guardianship Services
7. Methods for the Timely and Effective Delivery of Guardianship Responsibilities and Services

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Introduction

Wall Street Journal, October 30, 2015:

- "Abuse Plagues System of Legal Guardians for Adults"
- "Allegations of financial exploitation are rife, despite wave of overhaul efforts"
- (Florida, Minnesota, Washington cases)

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Introduction

[Schmidt, 7(2) *MAELA Journal*, Fall 2011, pp. 173-4]

Newspaper headlines and media scrutiny of guardians and the guardianship system persist.

- From the 1987 Associated Press national examination of 2,200 randomly selected guardianship court files ("Guardians of the Elderly: An Ailing System"),
- through the June 2003 *Washington Post* documentation of exploitation and neglect by attorney-guardians ("Misplaced Trust"),
- the January 2005 *Dallas Morning News* highlighting of Texas guardianship problems ("Holes in the Safety Net"),
- the November 2005 *Los Angeles Times* investigation of poor quality professional guardian performance in California ("Justice Sleeps While Seniors Suffer"),
- and the December 2006 *Seattle Times* perusal of cozy guardianship case ties ("Secrecy Hides Cozy Ties in Guardianship Cases"),
- to the April-October 2010 *Omaha World-Herald* revelation of shoddy guardian oversight of incapacitated persons' health and property ("Guardian Faces Theft Counts"),
- guardians and the guardianship system have been challenged to perform their duties better in order to merit greater public and legal confidence.

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Background

The GAO (2010) criticized such guardian behaviors as

- (a) irregularities in guardians' annual accountings,
- (b) failure to file any interim financial reports for three years,
- (c) failure to pay a ward's taxes,
- (d) failure to visit a ward for eight months and nine months delinquency in filing a personal care plan and ward asset inventory,
- (e) failure to file an annual accounting for ten years, and
- (f) "persistent and repeated" guardianship reporting violations.

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Introduction

- *Parens patriae* ("parent of the country") refers to the authority and responsibility of the state as sovereign to serve as general guardian or "super guardian" for people with legal disabilities who are unable to take care of themselves and have no one else to take care of them;
- For example, children, and persons with disabling intellectual disabilities or mental illness.

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1. The Need for Guardianship Services

- (a) Review the number of guardians appointed by the courts and
- (b) identify the unmet need for guardian services.

A. Number of Guardians Appointed by the Courts

- Number of guardianship cases in the state by county
- New annual filings and average annual filings

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1. The Need for Guardianship Services

B. Unmet Need for Guardian Services: Quantity

- ▶ A projected total population-based unmet need for plenary public, private, corporate, and family guardian and limited guardian services

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1. The Need for Guardianship Services

B. Unmet Need for Guardian Services: Quantity (continued)

- ▶ For example, a projected total population-based unmet need for plenary public guardian services in North Dakota is 305 individuals. [Schmidt, *N. Dakota L. Rev.* 77 (2013)]
- ▶ The unmet need for plenary public guardian services in North Dakota based on survey responses is 149 individuals (25 people with developmental disabilities on the Catholic Charities waiting list; 7 adults in Assisted Living Facilities; 44 adults in Basic Care Facilities; 64 adults in Nursing Facilities; 9 adults in the State Hospital).
- ▶ The difference of 156 individuals may be accounted for by such factors as:
 - (a) the 79% to 69% response rate for the Long Term Care Association survey;
 - (b) limited community hospital unmet need information (e.g., estimated 15-20 individuals per year in one Fargo area hospital);
 - (c) the transient and homeless populations; and
 - (d) some of the 149 individuals may be accounted for by the 232 (296 minus 64) adults in Nursing Facilities who do not have a guardian but need a guardian and reportedly employ a have willing and responsible family members or friends or resources to employ a guardian.
- ▶ The unmet need for plenary public guardian services in North Dakota is 305 individuals.

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1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

1. Guardianship Staff-to-Client Ratio

- ▶ The Council on Accreditation (COA) has developed and is applying adult guardianship accreditation standards.
- ▶ One of the COA Adult Guardianship Service Standards (7) prescribes that guardianship caseload sizes "support regular contact with individuals and the achievement of desired outcomes."
- ▶ The accompanying COA Research Note states: "Studies of public guardianship programs have found that lower staff-to-client ratios are associated with improved outcomes and recommend a **1:20 ratio** to eliminate situations in which there is little to no service being provided."
- ▶ "The Council on Accreditation (COA) partners with human service organizations worldwide to improve service delivery outcomes by developing, applying, and promoting accreditation standards. . . . In 2005, COA accredited or was in the process of accrediting more than 1,500 private and public organizations that serve more than 7 million individuals and families in the United States, Canada, Bermuda, Puerto Rico, England and the Philippines." <http://www.coastandards.org/about.php>

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1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

1. Guardianship Staff-to-Client Ratio (continued)

- See Wash. Rev. Code section 2.72.030(6) (Washington's office of public guardianship is prohibited from authorizing payment for guardianship services "for any entity that is serving **more than twenty incapacitated persons per certified professional guardian.**")
- Adopted in 31 states (including North Carolina), the Uniform Veterans' Guardianship Act provides that **no person may be a guardian for more than five wards at one time.**
- The Virginia Department for the Aging "contracted with the local [Virginia] programs for a **maximum staff to ward ratio of 1:20** and the programs were able to maintain [an average of] this ratio, serving between 10 and 35 wards per evaluation year."

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1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

1. Guardianship Staff-to-Client Ratio (continued)

- A class action law suit in 1999 against a County Public Administrator providing public guardianship services in Nevada alleged that the Guardian **fails to engage sufficient numbers of professional personnel** to be able to adequately assess and periodically reassess the needs of each of its individualized wards, to adequately formulate and periodically revise an individualized case plan for each of its wards, to insure the implementation of such case plans and to insure minimal professional interactions with each ward on an ongoing basis.
- Tenberg v. Washoe County Public Administrator and Washoe County, No. CV99-01770 (Family Court, Second Judicial District Court, Nevada, filed March 15, 1999). The *Tenberg* case was settled.

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1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

1. Guardianship Staff-to-Client Ratio (continued)

- For example, one of North Dakota's principal corporate guardianship programs reports a guardianship staff-to-client ratio of 1:36-39 (1:40 as of 7/1/09).
- One of the several public administrators serving as guardian reports a part-time guardian caseload ranging from 22 to 29 with "wards" housed 210 miles apart.
- There is an unmet need for guardian services in North Dakota to reduce the staff to client ratio to 1:20.

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1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

Tenberg v. Washoe Co. Public Administrator (Nevada) and Washoe Co. (continued)

- › Guardian fails to independently assess compliance of institutional settings with relevant regulatory and statutory requirements such as State licensing standards
- › Guardian fails to adequately assess the individual needs of each temporary or proposed ward
- › Guardian fails to record such assessments. Such failure deprives other case managers or staff members to plan or implement a case plan based on such assessment and deprives a person or entity assessing the adequacy of such assessment of the ability to do so
- › Guardian fails to periodically update the comprehensive assessment of each of its wards or to record same
- › Guardian fails to adequately develop an individualized case plan for each of its wards or proposed wards, making provisions for such person's specific needs identified in a comprehensive assessment, or to record such case plans
- › Guardian fails to periodically review and revise its ward's individualized case plans

1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

Tenberg v. Washoe Co. Public Administrator (Nevada) and Washoe Co. (continued)

- › Guardian fails and is unable to insure that the ward is placed in the least restrictive housing environment taking into consideration the minimally adequate setting for habilitation
- › Guardian fails to provide or arrange for sufficient training/education to forestall a deterioration of the conditions which precipitated the guardianship or which may be reasonable in light of the ward's liberty interest in safety and freedom from unreasonable restraints
- › Guardian fails to educate and train each of its wards
- › Guardian fails to assure itself that it is providing each of its wards with adequate food, shelter and clothing
- › Guardian's office fails to personally visit each of its wards at a minimum once a month
- › Thus, guardian fails to appropriately manage the ward's estate

1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

Tenberg v. Washoe Co. Public Administrator (Nevada) and Washoe Co. (continued)

- › Guardian fails to leverage or acquire available community resources for its wards (inchoate estate)
- › Guardian fails to ensure provision of mental health services for its wards
- › Guardian has insufficient operational guidelines
- › Guardian has no assessment mechanism which enables it to learn, periodically, its need for additional resources
- › County fails to assure that the guardian accomplishes these things

1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

Tenberg v. Washoe Co. Public Administrator (Nevada) and Washoe Co. (continued)

- Agreement to "creation of an independent public guardian's office which is guided in principle by the guidelines and standards promulgated by the National Guardianship Association"
- The "Public Guardian's Office will employ case management protocol guided by the precepts suggested by the National Guardianship Association and performed by staff professionally trained to perform case management protocol which includes, at a minimum: standardized individual client assessments with documentation of needs; individual care plans which are tied to those assessments and which state specific measurable objectives which are regularly updated and revised; and documentation of activities taken to effectuate the individual assessments."
- "[A]n independent audit for content and outcomes by a qualified expert . . . bi-annually in the first two fiscal years . . . and annually thereafter."
- "[A] mechanism for self-assessment concerning the Public Guardian's capacity to manage cases."

Sources of Data for Accountability and Performance

Client Assessment Form (client functioning)

- Living situation
- Activities
- Functional status (daily skills)
- Nutrition status
- Medical status
- Intellectual functioning and behavior
- Services and social support

Schmidt, Miller, Peters & Loewenstein, "A Descriptive Analysis of Professional and Volunteer Programs for the Delivery of Guardianship Services," 8 *Probate Law Journal* 125-156 (1988) (Florida), in W. Schmidt (ed.), *Guardianship: Court of Last Resort for the Elderly and Disabled*, Durham, NC: Carolina Academic Press (1995), 260 pp.; <http://www.casipress.com/books/177>

Teaster, Schmidt, Abramson & Almeida, "Staff Service and Volunteer Staff Service Models for Public Guardianship and 'Alternatives' Services: Who Is Served and With What Outcomes?," 5 (2) *Journal of Ethics, Law, and Aging* 131-151 (Fall/Winter 1999) (Virginia).

Sources of Data for Accountability and Performance

Client Assessment Form (client functioning) (recommended tools for "Multidisciplinary Evaluation):

STEPHEN ANDERER, DEVELOPMENT OF AN INSTRUMENT TO EVALUATE THE CAPACITY OF ELDERLY PERSONS TO MAKE PERSONAL CARE AND FINANCIAL DECISIONS (1997) [regarding the Decisionmaking Instrument for Guardianship (DIG), which Moye (2002) characterizes as "nicely and appropriately grounded in problem solving theory" and devised through "surveys of legal and social service professionals"]

David Loewenstein, et al., A new scale for the assessment of functional status in Alzheimer's disease and related disorders, 44(4) *Journal of Gerontology* P114-P121 (1989) [Moye (2002) suggests that the Direct Functional Assessment of Functional Status (DAFS) herein may be best at capturing information relevant to guardianship decisions]

Jennifer Moye, *Guardianship and Conservatorship*, in Thomas Grisso, EVALUATING COMPETENCIES: FORENSIC ASSESSMENTS AND INSTRUMENTS (2nd ed. 2002)

GARY MELTON, JOHN PETRILA, NORMAN POYTHRESS & CHRISTOPHER SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS (3rd ed. 2007) (chapter on Civil Competencies, including Guardianship, and Sample Report on Competency to Handle Finances)

Sources of Data for Accountability and Performance

Guardianship Plan*

1. A statement of the specific needs of the person under guardianship (in each functioning area).
2. A statement of the optimal (least restrictive) conditions to meet those needs, and to achieve at least the standard of living enjoyed by the person under guardianship prior to incapacity and guardian appointment.
3. A statement of the available services that will be obtained to meet those needs, both within six months, and longer term.
4. A statement of the rationale for provision of any non-optimal service.
5. A notation of the guardian or staff responsible for obtaining or providing the service.
6. A statement of the minimum conditions, for each need in each functioning area, under which the guardian might be relieved (legal capacity restored).

*Required as minimum constitutional requirement for adequate guardianship care? *CF, e.g., Wyatt v. Stickney, 325 F.Supp. 781 (M.D. Ala., 1971), 344 F.Supp. 373 (M.D. Ala. 1972), aff'd sub nom., Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).*

Sources of Data for Accountability and Performance

Guardian Activity Report (similar to attorney's timekeeping log, or a work chronology record)

- > Name of worker
- > Date
- > Time the activity began
- > The activity (accomplishment, outcome)
- > The code for the activity (from the functioning areas of the client assessment form, plus general indirect services, and general activities in support of the program)
- > Duration of the activity
- > Name of the client for whom the activity was performed

1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

2. Guardian Visitation-of- "Ward" Standard

- > National Guardianship Association (NGA) Standard 13(IV) prescribes that the guardian of the person **"shall visit the person no less than monthly."**
- > NGA Standard 23(I) states that "The guardian shall limit each caseload to a size that allows the guardian to accurately and adequately support and protect the person, that allows a **minimum of one visit per month with each person,** and that allows regular contact with all service providers."

National Guardianship Association Standards of Practice (4th Ed. 2013)

1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

2. Guardian Visitation-of- "Ward" Standard (continued)

- A recent court of appeals decision in Washington state concludes that a guardian's "duty generally was to provide, to the extent reasonably possible, all the care [the "ward"] needed. We view the specific acts, such as **infrequent visits**, which the [Department of Social and Health Services] Board characterized as duties, to be evidence of [the guardian's] failure to meet her general duty." *Raven v. DSHS*, 273 P. 3d 1017, 1028 (Wash. Ct. App. 2012).
- The guardian in *DSHS v. Raven* was charged with violation of the Abuse of Vulnerable Persons Act for behavior that included a log of guardian visits "evidenced **only six in 2004, two in 2005** (both when Ida [the "ward"] was hospitalized [with severe skin ulcers]), and **five in 2006**" (p. 1023).

1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

2. Guardian Visitation-of- "Ward" Standard (continued)

- On appeal, the Washington Supreme Court reversed the court of appeals and held, inter alia, that substantial evidence did not support the conclusion that the guardian's conduct meets the statutory definition of neglect.
- However, the court found that the actions of the Department of Social and Health Services against the guardian were "substantially justified" and rejected the guardian's request for attorney fees. *Raven v. Dept. of Social and Health Svcs.*, 306 P.3d 920, 177 Wash. 2d 804 (2013).

1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

3. Licensing, Certification, or Registration of Professional Guardians

- On the subject of guardian standards, the Second National Guardianship Conference ("Wingspan") recommends, "Professional guardians — those who receive fees for serving two or more unrelated wards — should be licensed, certified, or registered."
- As a follow-up to such recommendations, the National Academy of Elder Law Attorneys (NAELA), the National Guardianship Association, and the National College of Probate Judges convened a Wingspan Implementation Session to identify implementation action steps, including the following steps relating to guardian certification: "[t]he supreme court of each state should promulgate rules[,] and/or the state legislature of each state should enact a statutory framework[,] to require education and certification of guardians as well as continuing education within the appointment process to ensure that all (i.e.— professional and family) guardians meet core competencies."
- The Wingspan national guardianship conference recommends that states should "adopt minimum standards of practice for guardians, using the National Guardianship Association Standards of Practice as a model."

1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

3. Licensing, Certification, or Registration of Professional Guardians (continued)

- There are at least 15 states with some provision for guardian licensing, certification or registration: Alaska, Arizona, California, Florida, Georgia, Illinois, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Texas, Utah, and Washington. [Schmidt, 7(2) *NAELA Journal*, Fall 2011, pp. 173-4]
- North Carolina reportedly offers voluntary certification through the North Carolina Guardianship Association. [GAO, pp. 24, 50, 53 (2010)]
- For example, the Certified Professional Guardian Board in the state of Washington has formal legal responsibility for certification applications, standards of practice, training, recommendation and denial of certification, continuing education, grievances and disciplinary sanctions, and investigation of certified professional guardians. Washington publicly reports disciplinary actions for guardians and guardian agencies.
- Arizona requires certification and licensing of all fiduciaries, except family members, who meet eligibility requirements. As part of the fiduciary certification program, the Arizona Supreme Court established the Fiduciary Compliance Audit Authority. The five most common fiduciary audit findings are (1) late required court case filings; (2) inaccurate required court case filings; (3) undocumented fiduciary actions and decision making; (4) business and fiduciary certification number is not used on court documents; and (5) incompetent fiduciary management of client caseload.

1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

3. Licensing, Certification, or Registration of Professional Guardians (continued)

- The private Center for Guardianship Certification (CGC) offers certification of individual professional guardians.
- GAO reported that CGC did not require Social Security numbers or other identifying information, did not verify educational or professional credentials, and did not conduct background or credit checks for fictitious certification applicants. U.S. Government Accountability Office, *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, GAO-10-1046 (2010), at p. 25.
- The fictitious applicants passed the National Certified Guardian Examination and "were listed on the organization's website as nationally certified guardians." *Id.* at p. 26.

1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

3. Licensing, Certification, or Registration of Professional Guardians (continued)

- For example, some guardianship stakeholders express some concerns about oversight and monitoring of guardians and guardian annual reports, and lack of such requirements as criminal background checks and credit checks.

Recommendation:

- As recommended by the Wingspan Implementation Session of the National Academy of Elder Law Attorneys, the National Guardianship Association, and the National College of Probate Judges, states "should enact a statutory framework to require education and certification of guardians as well as continuing education within the appointment process to ensure that all (i.e., professional and family) guardians meet core competencies."
- As recommended by the Wingspan national guardianship conference, states should "adopt minimum standards of practice for guardians, using the National Guardianship Association Standards of Practice as a model."

1. The Need for Guardianship Services

C. Unmet Need for Guardian Services: Guardianship Standards

3. Licensing, Certification, or Registration of Professional Guardians (continued)

What are the implications of requiring certification, standards of practice, and background checks for guardians?

- Increased quality; reduced violations of standards of practice
- Increased access to higher quality guardian services; reduced competition from lower quality guardian services
- Increased cost of service; reduced cost from such things as (1) late required court case filings; (2) inaccurate required court case filings; (3) undocumented fiduciary actions and decision making; and (4) incompetent fiduciary management of client caseload.
- Improved fiduciary service; improved outcomes for persons with incapacities
- Increased professionalization of fee-based guardianship
- Reduced guardian liability
- Efficient deterrence and prevention of unqualified guardians by background checks

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2. The Establishment of Guardianships

- (a) *Review the services available for assistance with the establishment of guardianships and*
- (b) *the process for the establishment of guardianships and*
- (c) *recommend proposed changes.*

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2. The Establishment of Guardianships

- For example, some guardianship stakeholders express some concerns with the judicial process for the establishment of guardianships. [Schmidt, *N. Dakota L. Rev.* 77 (2013)]
- Concerns included but were not necessarily limited to the following:
 - a) mandatory reporting of vulnerable adult abuse and neglect;
 - b) perception of less follow through or investigation in some cases (that is, disagreement about the timing and urgency for intervention);
 - c) guardianship filing fees not waivable for indigents;
 - d) limited legal assistance from state's attorneys or Attorney General attorneys for petitioners in indigent cases;
 - e) no right to counsel or public defender for the proposed "ward" if the proposed "ward" cannot afford counsel;
 - f) some proposed "wards" reportedly not present at hearings in some courts; and
 - g) appointment of "emergency" guardians without notice and a hearing for up to ninety days.

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2. The Establishment of Guardianships

The following recommendations are based on the concerns expressed by some guardianship stakeholders with the judicial process for the establishment of guardianships.

A. Mandatory Reporting of Vulnerable Adult Abuse and Neglect

Recommendation:

B. Right to Counsel: Legal Counsel for Indigents

Recommendation: Adopt model recommendations regarding the right to counsel and the duties of counsel representing the proposed "ward" at the hearing. [See section VI.B.4. for statutory language.]

Over 25 states require the appointment of counsel in guardianship proceedings, generally making counsel available without charge to indigent respondents. [Teaster, et al. (2010), at p. 20.]

C. Emergency Guardian

Recommendation: Adopt section 311 of the Uniform Guardianship and Protective Proceedings Act related to emergency guardian. [See section VI.E.2. for statutory language.]

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3. Petitioning and Other Costs

Identify petitioning and other costs associated with providing guardianship services and financial assistance available.

For example, the North Dakota Aging Services Division reports that the average cost of petitioning was \$1,474 in the previous biennium compared to the initial estimate of \$2,500, and depending on the ability to obtain pro bono services. Also, provisions in 2011 HB 1199 provided 16 guardians "a modest annual payment of \$500" to offset some guardian costs; 32 guardians in year two of the biennium. The Developmental Services Division reports \$2,052,416 for 414 "wards" during the 2011-2013 biennium, including \$51,720 in petitioning costs. The daily rate is \$6.52 per "ward" in the first year (**\$2,380 per client annually**), and \$6.71 per "ward" in the second year (**\$2,449 per client annually**).

There are several published studies of costs associated with providing public guardianship services.

- a) The annual public guardian cost per client in Florida in 1983 was **\$2,857.00**.
- b) The annual public guardian cost per client in Virginia in 1997 was **\$2,662.00**.
- c) The average annual public guardian cost per client in Virginia in 2002 was **\$2,955.00**.
- d) The average annual cost per public guardian client in Florida in 2007-2008 was **\$2,648.00**.
- e) The average annual cost per public guardian client in Washington in 2008-2011 was **\$3,163.00**.
- f) The annual operating cost per guardianship client in New York City in 2010 was **\$8,648.60**.

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3. Petitioning and Other Costs

Identify petitioning and other costs associated with providing guardianship services and financial assistance available.

An area of study related to costs is the extent to which guardianship is cost effective, as well as the extent to which not having sufficient guardianship services probably costs significantly more than having sufficient guardianship services.

- Disabled and vulnerable populations like those served by guardians experience disproportionately high health care costs.
- Medicaid enrollees with disabilities are 17% of the Medicaid population nationally and account for 46% of federal Medicaid costs, and for long health care duration.
- The elderly population is 9% of the Medicaid population nationally, but accounts for 27% of program costs.
- Twenty percent of Medicaid expenditures nationally are for nursing facility care, and 8% are for home health care.
- One percent of the population accounted for 20.2% of total health care expenditures in 2008 and 20% of the population in the top 1% retained this ranking in 2009; the top 1% accounted for 21.8% of the total expenditures in 2009 with an annual mean expenditure of \$90,061.
- The median intensive care unit (ICU) length of stay for incapacitated patients without a surrogate is twice as long as other ICU patients.

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3. Petitioning and Other Costs

Identify petitioning and other costs associated with providing guardianship services and financial assistance available.

- Without sufficient appropriate guardianship services, significant health care costs are incurred through inappropriate institutionalization, insufficient deinstitutionalization, excessive emergency care, and lack of timely health care.
- Guardianship studies from Florida, New York, and Virginia report annual savings by guardianship programs ranging from \$3.2 million to \$13 million.
- ⓐ Half of the legally incapacitated public mental hospital patients without guardians in a Florida study could have been immediately discharged if a public guardian was available.
- ⓑ The Greater New York Hospital Association lost \$13 million in nine months awaiting appointment of guardians for 400 un-discharged patients.
- ⓒ Virginia saved \$5.6 million in health care costs in one year with appropriate public guardian services for 35 patients.
- ⓓ Florida saved \$3.9 million in health care costs in one year with appropriate public guardian services.
- ⓔ Washington State concluded that the decrease in average costs of residential settings exceeded the cost of providing a guardian within 30 months in 2008-2011; clients with a public guardian had a decrease of an average 29 hours in personal care hours needed each month, compared with an increase in care hours for similar clients; 21% of clients with a public guardian had a reported improvement in self-sufficiency in the previous three months.
- ⓕ The Vera Institute of Justice Guardianship Project in New York City saved a reported net Medicaid cost-savings of \$2,500,026 for 111 guardianship clients in 2010.

3. Petitioning and Other Costs

Identify petitioning and other costs associated with providing guardianship services and financial assistance available.

- An area of study related to costs is the extent to which guardianship is cost effective, as well as the extent to which not having sufficient guardianship services probably costs significantly more than having sufficient guardianship services.
- For example, Catholic Charities North Dakota reports residential placement moves from a more restrictive and expensive setting to a less restrictive setting for 22 guardianship clients in 2011, including seven clients moving from the North Dakota State Hospital, two clients moving from the Developmental Center, two clients moving from a nursing home to an Individualized Supported Living Arrangement (ISLA), and one client moving from a hospital to a nursing home.

5. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services

Review the duties and responsibilities of these entities and the cooperation/collaboration and interaction between and among the entities associated with guardianship services and recommend proposed changes.

5. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services

- ▶ For example, based on interviews of one to three hours with at least 32 guardianship stakeholders in North Dakota, as well as several dozen county social service directors, the interaction between the courts, counties, state agencies, and guardianship organizations regarding guardianship and public administrator services seems generally good. There is apparently some tension with the counties regarding funding of public administrators appointed by presiding district judges.
- ▶ The most recent national study of public guardianship found that the original taxonomy for state public guardianship programs remains appropriate: (1) a court model, (2) an independent state office, (3) a division of a social service agency, and (4) a county model.

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5. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services

Court model. The court model establishes the public guardianship office as an arm of the court that has jurisdiction over guardianship and conservatorship. . . . In 2007, statutory provisions revealed 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.

"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." Teaster, et al. (2010), at p. 152.

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5. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services

Independent [state office] model. The independent state office model [i]s one in which the public guardianship office is established in an executive branch of the government that does not provide direct services for IPs [incapacitated persons] or potential IPs. . . . 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.

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5. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services

- **Social service agency.** The placement of the public guardianship function in an agency providing direct services to IPs presents a clear conflict of interest. . . .
- 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 service, 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.
- . . . [S]ome 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 specify 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 on efforts to find others to serve within six months of appointment. 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 legally IPs. . . . 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.

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5. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services

- **County model.** Approximately 13 of the statutory schemes place 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.
- Under North Carolina General Statutes 35A-1213(d), the clerk of superior court may appoint a "disinterested public agent" to serve as guardian. The "disinterested public agent" means the director or assistant director of a county department of social services. N.C.G.S. 35A-1202(4). "[T]he fact that a disinterested public agent provides financial assistance, services, or treatment to a ward does not disqualify that person from being appointed as guardian."

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5. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services

The Second National Guardianship Conference (2002) recommends that,

States provide public guardianship services when other qualified fiduciaries are not available.
 Comment: This function may be provided through independent state agencies, contracts with private agencies, or by other means.

The Third National Guardianship Summit (Oct. 2011) recommends: "To ensure the right of access to guardianship services, states should provide public funding for: Guardianship services for those unable to pay. Third National Guardianship Summit: Standards of Excellence, Recommendation #3.3 (2011)

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6. The Efficacy of Statutes Governing Guardianship Services

- a) Review the statutes governing guardianship services,
- a) evaluate the effectiveness of the statutes,
- a) and recommend proposed changes.

Review the statutes governing guardianship services, evaluate the effectiveness of the statutes compared to other states and compared to national models, and make recommendations about proposed changes, including, where appropriate or desired, alternative recommendations from which to select.

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6. The Efficacy of Statutes Governing Guardianship Services

A. Type of Public Guardianship Program and Public Guardian Subjects

1. Type of Public Guardianship Program: Implicit or Explicit

- › 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, whereas explicit schemes generally provide for an office and the ability to hire staff and contract for services. Over time states shifted markedly toward enactment of explicit public guardianship schemes—which are more likely to have budgetary appropriations and which may have greater oversight than is required for private guardians or for guardians under an implicit scheme.

Recommendation:

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6. The Efficacy of Statutes Governing Guardianship Services

2. Public Guardian Subjects

Regarding salient differences in guardianship needs/issues for the elderly and people with disabilities, compare, for example:

- › North Dakota has general fund appropriations to the Department of Human Services (Developmental Disabilities Division, and Aging Services Division) to contract with an entity to create and coordinate a unified system for the provision of guardianship services (a) to vulnerable adults who are ineligible for developmental disabilities case management services, and (b) to individuals diagnosed with a mental illness, traumatic brain injury, or elderly individuals age 60 years and over.

This kind of segregation based on specific clinical conditions risks (a) *Olmstead* liability concerns and (b) vulnerable individuals with dual or multiple diagnoses and eligibilities falling through the cracks of single clinical, categorical, or siloed public guardian services.

Olmstead v. L.C., 527 U.S. 581, 598 (1999) (“Unjustified isolation . . . is properly regarded as discrimination based on disability.”)

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6. The Efficacy of Statutes Governing Guardianship Services

2. Public Guardian Subjects

Recommendation: States should provide for public guardian services for all eligible people with legal incapacity similarly, and not particular public guardian services for particular diagnoses or categories. The Model Public Guardianship Act recommends the following statutory language:

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.

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

- Judicial process highlights for the establishment of guardianships and guardianship stakeholder concerns.
- The significant relevant elements in guardianship and public guardianship statutes from the most recent national study of public guardianship follow.

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

1. Potential Petitioners

A central question to the effectiveness of public guardianship is whether public and private guardianship agencies may petition for appointment of themselves as guardian, a potential conflict of interest.

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 served, the program might petition more frequently, regardless of individual needs. On the other hand, the program might . . . "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.

There is a formal ethics advisory opinion observing that: "The practice of nominating oneself as guardian automatically raises the appearance of self-dealing." Vermont prohibits the office of public guardianship from petitioning for guardianship: "Neither the office of public guardian or its designees may petition for guardianship." This is similar to the statutory language recommended by the 2010 Model Public Guardianship Act: "The office of public guardian may not initiate a petition of appointment of the office as guardian or conservator."

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

1. Potential Petitioners (continued)

- **NGA Standard 16(III)(E). A guardian who is not a family guardian may act as petitioner only when no other entity is available to act, provided all alternatives have been exhausted.**
- The Council on Accreditation, *Adult Guardianship Service Standards* state: "The organization only petitions the court for its own appointment as guardian when no other entity is available." (AG 6.03) *Adult Guardianship Conflict of Interest*, COUNCIL ON ACCREDITATION (2013), available at <http://coanet.org/standard/ag/6/>
- The Second National Guardianship Conference recommends, "[a] lawyer petitioning for guardianship of his or her client *not* . . . seek to be appointed guardian except in exigent or extraordinary circumstances, or in cases where the client made an informed nomination while having decisional capacity." See *Wingspan—The Second Nat'l Guardianship Conference, Recommendations*, 31 STETSON L. REV. 595, 608 (2002).

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

1. Potential Petitioners

Recommendation: States should adopt a prohibition against the public guardian petitioning for appointment of itself: "The office of public guardian may not initiate a petition of appointment of the office as guardian or conservator."

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

2. Investigation of Vulnerable Adults in Need

In 1981, only a handful of states addressed the problem of "discovering the identity of those individuals who are in need of public guardianship services," usually by means of professional reporting laws or an investigatory body.

Today, the landscape has changed completely. Every state has enacted and administers an APS [adult protective services] law 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, in many cases, APS programs are a primary referral source for public guardianship programs. Because of these developments in APS, as well as the aging of the population, many more cases are likely to come to the attention of public guardians . . .

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

2. Investigation of Vulnerable Adults in Need

- Twelve percent of community-dwelling elders without severe cognitive incapacity reported at least one form of elder abuse victimization (physical (4.6%), sexual (0.6%), or emotional (4.6%) mistreatment or neglect (5.1%) in a recent year, not including financial exploitation by family (5.2%) and lifetime financial exploitation by a stranger (6.5%).
- A national study of adult protective services found 253,421 reports of abuse of adults age 60+, 832 reports for every 100,000 people. Yet 84% of abuse incidents are not reported.
- While adult protective services are beyond the scope of this guardianship services study, mandatory reporting of vulnerable adult abuse and neglect is important for investigation and identification of vulnerable adults in need of guardianship services.

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

2. Investigation of Vulnerable Adults in Need

What are some pros and cons of mandatory reporting?

- Cons: increased cost; increased false positives; increased inequity of creating a demand for unavailable services
- Pros: reduce unreported abuse and neglect; increase investigations, prosecutions, and convictions; increase specific and general deterrence; increase services to victims; reduce costs from victimization

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

3. Notice and Hearing

Recommendation: States should adopt a version of UGAPPA (Uniform Guardianship and Protected Proceedings Act) notice provisions regarding rights at the hearing and the nature, purpose, and consequences of appointment of a guardian: "The notice must inform the ward or proposed ward of the ward or proposed ward's rights at the hearing and include a description of the nature, purpose, and consequences of an appointment of a guardian."

*The Third National Guardianship recommends, "Where possible, the term person under guardianship should replace terms such as incapacitated person, ward, or disabled person." Third National Guardianship Summit: Standards of Excellence, Recommendation #1.7 (2011). See also La Forge, "Preferred Language Practice in Professional Rehabilitation Journals," 57 (1) *The Journal of Rehabilitation* 49-51 (1991); Texas Council for Developmental Disabilities, *People First Language - Describing People with Disabilities*.

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

4. Right to Counsel; Legal Counsel for Indigents

Some guardianship stakeholders express concerns with no right to counsel or public defender for the proposed "ward" if the proposed "ward" cannot afford counsel. Procedural due process safeguards in guardianship are meaningless without counsel to exercise the safeguards: "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."

Counsel for all proposed "wards" would probably facilitate negotiation, settlement, and achievement of more cost effective, least restrictive alternative, resolution for the proposed "ward".

Recommendation: States should adopt model recommendations regarding the right to counsel and the duties of counsel representing the proposed "ward" at the hearing.

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

5. Right to Jury Trial

➤ Since 1981, the number of states that provide a right to a jury trial in guardianship proceedings has gone from 11 to 27 states [N.C.G.S. 35A-1110].

➤ Recommendations for the right to a jury trial in guardianship proceedings range from Regan and Springer to the U.S. Senate Special Committee on Aging in 1977 to the Model Public Guardianship Act in 2010: "The AIP [alleged incapacitated person] shall have the right to trial by jury."⁸

⁸*Cf., e.g.,* Arnold A. v. Sanchez, 166 Misc. 2d 493, 634 N.Y.S.2d 343 (Sup. 1995) (state constitutional right to trial by jury in involuntary civil commitment).

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

5. Right to Jury Trial

How do you see the 'right to trial by jury' affecting the current guardianship process?

The right to a jury trial would probably facilitate negotiation, settlement, and achievement of more cost effective, least restrictive alternative, resolution for the proposed "ward".

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

6. Cross Examination; Standard of Proof; Appeal/Review

Cross Examination. Since 1981, the number of states that provide a right to cross-examination in guardianship proceedings has gone from only nine states to 35 states.

Standard of Proof. Thirty-six states require "clear and convincing evidence" as the standard of proof in guardianship proceedings. New Hampshire requires "beyond a reasonable doubt." North Carolina [N.C.G.S. 35A-1112(d)] and Washington use "clear, cogent, and convincing evidence." The Model Public Guardianship Act recommends "clear, unequivocal, and convincing evidence" as the standard of proof.

Appeal/Review. Since 1981, the number of states that provide a right to appeal in guardianship proceedings has gone from only three states to at least 29 [N.C.G.S. 35A-1115].

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6. The Efficacy of Statutes Governing Guardianship Services

B. Procedural Due Process Safeguards in Guardianship

6. Cross Examination; Standard of Proof; Appeal/Review

What is the impact of changing the standard of proof in guardianship proceedings from "clear and convincing evidence" to "clear, unequivocal, and convincing" evidence?

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. [cf., e.g., *Addington v. Texas*, 441 U.S. 418 (1979)]. . . . The clear, unequivocal, and convincing evidence standard is utilized in such analogous proceedings as deportation, denaturalization, and involuntary civil commitment. [references omitted] Public guardianship is easily conceptualized as the denaturalization or deportation of an individual's legal autonomy as a citizen.

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6. The Efficacy of Statutes Governing Guardianship Services

C. Assessment of Alleged Incapacitated Person, Civil Liberties, Selection of Guardian

1. Medical Examination; Psychological Examination; Other Examination

The determination of capacity of older adults in guardianship proceedings has received book-length treatment in a collaboration of the American Bar Association Commission on Law and Aging, the American Psychological Association, and the National College of Probate Judges. Clinical examinations are important evidence for judicial determinations of legal incapacity. At least 40 states provide for examination of the proposed "ward" by a physician, and 31 states specifically include a psychologist. [N.C.G.S. 35A-1111 multidisciplinary evaluation]

Unfortunately, the available research finds significant problems with clinical evidence in guardianship proceedings for older adults. Much clinical evidence is incomplete. The mean length of written clinical reports for guardianship of older adults ranges between 83 words in Massachusetts (with two-thirds of the written evidence illegible) and 781 words in Colorado (one to three pages) compared to 24 pages for the mean length of child custody evaluations. Several North Dakota stakeholders report difficulties with insufficient physician specialists for clinical evaluations in guardianship proceedings.*

*Jennifer Moye, Stacey Wood, Barry Edelstein, Jorge Armesto, Emily Bower, Julie Harrison & Erica Wood, *Clinical Evidence in Guardianship of Older Adults is Inadequate: Findings from a Tri-State Study*, 47 GERONTOLOGIST 604, 608, 610 (2007).

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6. The Efficacy of Statutes Governing Guardianship Services

C. Assessment of Alleged Incapacitated Person, Civil Liberties, Selection of Guardian

1. Medical Examination; Psychological Examination; Other Examination

Recommendation: States should consider adopting the Model Public Guardianship Act provision regarding evaluation in guardianship.

The AIP [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 AIP 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.

(from Regan & Springer to the U.S. Senate Special Comm. on Aging)

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6. The Efficacy of Statutes Governing Guardianship Services

C. Assessment of Alleged Incapacitated Person, Civil Liberties, Selection of Guardian

2. Civil Liberties Preserved

Compared with only 10 states in 1981, at least 27 states [N.C.G.S. 35A-1215(b) **limited guardianship**] have a statutory provision aimed at preserving civil rights under guardianship. Such provisions 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."

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6. The Efficacy of Statutes Governing Guardianship Services

C. Assessment of Alleged Incapacitated Person, Civil Liberties, Selection of Guardian

3. Who Serves as Guardian—General Probate Priority; Input by Alleged Incapacitated Person

For the question of who may be guardian, most states, use a priority hierarchy of the incapacitated person's nominee, spouse, adult child, parent, relative, or friend ("the usual probate priority scheme"). Compare N.C.G.S. 35A-1213.

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6. The Efficacy of Statutes Governing Guardianship Services

C. Assessment of Alleged Incapacitated Person, Civil Liberties, Selection of Guardian

3. Who Serves as Guardian—General Probate Priority; Input by Alleged Incapacitated Person

Some guardianship stakeholders express some concerns about oversight and monitoring of guardians and guardian annual reports, and lack of such requirements as criminal background checks and credit checks. Twenty-seven states have specific guardian background requirements like a credit check, or disqualify felons from serving as guardians. The U.S. Government Accountability Office reported

hundreds of allegations of physical abuse, neglect, and financial exploitation of "wards" by guardians in 45 states and the District of Columbia, between 1990 and 2010. In 20 selected closed cases from 15 states and the District of Columbia, GAO found that guardians stole or improperly obtained \$5.4 million from 158 incapacitated victims, many of them seniors. GAO's in-depth examination of these 20 closed cases identified three common themes: 1) state courts failed to adequately screen the criminal and financial backgrounds of potential guardians; 2) state courts failed to adequately monitor guardians after appointment, allowing the continued abuse of vulnerable seniors and their assets; and 3) state courts failed to communicate ongoing abuse by guardians to appropriate federal agencies like the Social Security Administration (SSA), the Department of Veterans Affairs (VA), and the Office of Personnel Management (OPM), which manages federal employee retirement programs. Guardians serve as federal representative payees on one percent of SSA cases, 13 percent of VA cases, and 34 percent of OPM cases.

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6. The Efficacy of Statutes Governing Guardianship Services

C. Assessment of Alleged Incapacitated Person, Civil Liberties, Selection of Guardian

3. Who Serves as Guardian—General Probate Priority; Input by Alleged Incapacitated Person

Recommendation: States should require information about the qualifications of the proposed guardian to include the results of fingerprint, criminal history, and credit background checks before appointment of a guardian.

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6. The Efficacy of Statutes Governing Guardianship Services

D. Powers and Duties of Public Guardians

1. Specified Agency as Public Guardian

At least 44 states specify a particular agency to serve as public guardian.

Recommendation. States should specify one public guardian agency to serve as public guardian.

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6. The Efficacy of Statutes Governing Guardianship Services

D. Powers and Duties of Public Guardians

2. Conflict of Interest Raised/Remedied

In reviewing the extent to which public guardianship assists or hinders vulnerable adults in securing access to rights, benefits, and entitlements, a core conclusion of the U.S. Administration on Aging-funded first national public guardianship study was that success is dependent on the clear consideration that "The public guardian must be independent of any service providing agency (no conflict of interest)."

Recommendation. States should make the office of public guardian independent from all service providers.

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6. The Efficacy of Statutes Governing Guardianship Services

D. Powers and Duties of Public Guardians

3. General Probate Powers for Public Guardians

While most state statutes provide that the public guardian has the same duties and general probate powers as any other guardian, many state statutes list additional duties and powers for the public guardian.

For example, mandatory duties may include specifications about visits to the (incapacitated person) 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.

Recommendation. A state's guardians and guardian organizations should comply with the "ward" visitation standards.

National Guardianship Association (NGA) Standard 13(IV) prescribes that the guardian of the person "shall visit the person no less than monthly."

NGA Standard 23(1) states that "The guardian shall limit each caseload to a size that allows the guardian to accurately and adequately support and protect the person, that allows a minimum of one visit per month with each person, and that allows regular contact with all service providers."

Recommendation. States should list additional duties and powers for the public guardian modeled after those in the Model Public Guardianship Act.

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6. The Efficacy of Statutes Governing Guardianship Services

E. Additional Guardianship Provisions

The 2010 national public guardianship study of additional guardianship elements (e.g., provision for termination; restoration; incapacitated person petition; annual report; emergency guardian; temporary guardians; limited guardian) shows that most states address all of these elements. Stakeholders highlight several concerns.

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6. The Efficacy of Statutes Governing Guardianship Services

E. Additional Guardianship Provisions

1. Annual Report

Some guardianship stakeholders express some concerns about oversight and monitoring of guardians and guardian annual reports. There is an extensive literature and numerous national recommendations about changing from passive court monitoring to active court monitoring. Annual reports are the sole means of accountability for guardianships. Without the timely filing and active review of annual reports for accuracy and comprehensiveness, there is little guardianship accountability.

Recommendation. States should establish a system for active monitoring of guardianship annual reports, including filing and review of annual reports and plans.

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6. The Efficacy of Statutes Governing Guardianship Services

E. Additional Guardianship Provisions

2. Emergency Guardian

Several guardianship stakeholders express significant concerns with temporary guardian statutes. Compared with the emergency guardianship statutes in other states, some states lack the following statutory provisions for temporary (emergency) guardianship: (a) required petition details; (b) notice required; (c) specific language about the right to a hearing pre and post order; (d) right to counsel at the hearing; (e) presence of the proposed "ward" at the hearing; (f) limited duration (North Dakota allows up to 90 days; several states allow no more than 10 days); (g) specific language about the standard of proof.

An important 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. At least one federal district court ruled a state emergency guardianship statute unconstitutional because it lacked sufficient due process protection. See *Grant v. Johnson*, 757 F. Supp. 1127 (D. Or. 1991).

Recommendation. States should adopt section 311 of the Uniform Guardianship and Protective Proceedings Act related to emergency guardian.

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7. Methods for the Timely and Effective Delivery of Guardianship Responsibilities and Services

➤ *Determine the appropriate duties and responsibilities for entities involved in guardianship services, financial responsibilities, and appropriate roles in providing guardianship services.*

➤ *Provide estimated costs for guardianship services.*

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7. Methods for the Timely and Effective Delivery of Guardianship Responsibilities and Services

Estimated Costs

- For example, the Office of Public Guardianship in the state of Washington's Administrative Office of the Courts contracts with certified professional guardians to provide public guardianship services for a daily rate of \$10.68 per "ward" (not to exceed \$325 per month, \$525 per month in the first three months of a case; \$3,900 per year) with a required staff to "ward" ratio of no more than 1:20.
- The certified professional guardians providing public guardianship services also comply with the minimum monthly "ward" visit standard.

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7. Methods for the Timely and Effective Delivery of Guardianship Responsibilities and Services

Estimated Costs (continued)

- The Washington State Institute for Public Policy evaluated the costs and benefits of the public guardianship program in Washington over a 30-month period.
- The study found that while the average public guardianship cost per client over the 30-month period was \$7,907, the average decrease in residential costs per client from moves to less restrictive environments was \$8,131 (an average savings per client of \$7.47 per month, \$0.25 per day).

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7. Methods for the Timely and Effective Delivery of Guardianship Responsibilities and Services

D. Estimated Costs (continued)

- These conservative savings from decreased average residential costs do not include the savings reported by the Washington State Institute for Public Policy from decreased personal care hours for public guardianship clients (an average of 29 hours per client per month) compared with an increase in care hours for similar clients without a public guardian.
- The Washington study also reported that 21% of public guardianship clients showed improvement in self-sufficiency (e.g., decreasing dependence on personal caregiver or nurse) during the 30-month period.

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Outcomes

Systematic outcomes studies of guardianship and other adult protective services are generally lacking (Wilber, 1997).

- The first such study, a quasi-experimental design conducted by Blenkner and colleagues through the service, research and advocacy leading Benjamin Rose Institute in Cleveland, discovered that the experimental group receiving enriched protective services including guardianship had a higher rate of institutionalization and mortality than the control group, as well as failing to have deterioration or mortality forestalled (Blenkner et al, 1971; Bloom et al, 1974).
- The Blenkner study design and conclusions were questioned (Dunkle et al, 1983), and a reanalysis by other researchers suggested that the mortality findings came from initial group differences not controlled by the random sampling, but the reanalysis confirmed the institutionalization tendency (Berger and Piliavin, 1976).

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Outcomes

- The results of the 'landmark' Blenkner study were not 'revisited in an epidemiologically rigorous fashion' until 30 years later by Lachs and colleagues (Lachs et al, 2002: 734).
- The research question for the Lachs study was 'whether APS [adult protective services] use for abuse and self-neglect is an independent predictor of NHP [nursing home placement] after adjusting for other factors known to predict institutionalization (eg, medical illness, functional disability, and poor social support)' (2002: 735).
- The research discovered that "the relative contribution of elder protective referral [including 'pursuit of guardianship'] to NHP is enormous ['4- to 5-fold risk conferred by elder mistreatment and self-neglect, respectively'] and far exceeds the variance explained by other variables such as dementia, functional disability, and poor social networks" (Lachs et al, 2002: 736-38).

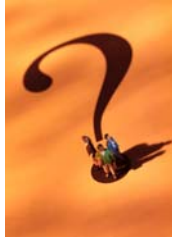
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Outcomes

- The clinicians and APS clients acknowledged that dramatic quality of life improvements often resulted from nursing home placement but thought it 'remarkable that controlled studies of differential outcomes of APS have not yet been conducted' (Lachs et al, 2002: 738).
- The literature review showed 'no systematic attempt to evaluate program outcomes or to examine unintended consequences of APS intervention.'
- Given the findings of the present study, APS should be subjected to rigorous evaluation research' (Lachs et al, 2002: 738).
- While the need for adult protective services may seem as self-evident as child protective services, 'the positive benefits of APS intervention must be scientifically documented, to justify the possible risk of negative outcomes such as institutionalization' (Lachs et al, 2002: 738).

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Questions?



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National Guardianship Trends

3rd National Guardianship Summit: Standards of Excellence

- ▶ [AARP, Public Policy Institute](#)
- ▶ [The American Bar Association Commission on Law and Aging](#)
- ▶ [The American Bar Association Section of Real Property, Trust and Estate Law](#)
- ▶ [The Alzheimer's Association](#)
- ▶ [The American College of Trust and Estate Counsel](#)
- ▶ [The Center for Guardianship Certification](#)
- ▶ [The National Academy of Elder Law Attorneys](#)
- ▶ [The National Center for State Courts](#)
- ▶ [The National College of Probate Judges](#)
- ▶ [The National Guardianship Association](#)

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National Guardianship Trends

3rd National Guardianship Summit: Standards of Excellence

- ▶ [ABA Comm. on Mental and Physical Disability Law](#)
- ▶ [The Arc](#)
- ▶ [The Center for Social Gerontology](#)
- ▶ [The Nat'l Adult Protective Services Association](#)
- ▶ [The Nat'l Assn. of State Long-Term Care Ombudsman Programs](#)
- ▶ [The Nat'l Assn. of State Mental Health Program Directors, Older Persons Division](#)
- ▶ [The National Committee for the Prevention of Elder Abuse](#)
- ▶ [The National Disability Rights Network](#)
- ▶ [Bazelon Center for Mental Health Law](#)

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National Guardianship Trends

3rd National Guardianship Summit: Standards of Excellence

- › Standards of Decision-Making/Person Centered Planning
- › Guardian's Relationship to Court
- › Paying for Guardianships
- › Financial Decision-Making
- › Medical Decision-Making
- › Residential Decision-Making
- › State Interdisciplinary Guardianship and Alternatives Committees

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About the author

› Winsor Schmidt is the Metrolina Medical Foundation Distinguished Professor of Public Policy on Health, University of North Carolina at Charlotte. He is an Adjunct Professor of Law at Stetson University College of Law. Professor Schmidt is principal author of *Public Guardianship and the Elderly* (Ballinger Publishing Co., 1981), *Guardianship: Court of Last Resort for the Elderly and Disabled* (Carolina Academic Press, 1995), and co-author of *Public Guardianship: In the Best Interests of Incapacitated People?* (Praeger Publishers, 2010). He received the A.B. in Government from Harvard University, the J.D. in Public Law from American University, and the LL.M. in Mental Health Law from the University of Virginia.

› Professor Schmidt's teaching experience includes courses on health law and policy, mental health law, aging policy and law, women's health law and policy, children's health law and policy, social science in law, administrative law, and international health law and bioethics. Recent service experience includes the National Committee for the Prevention of Elder Abuse Board of Directors, and the state of Washington's Certified Professional Guardian Board.

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Guardianship Definition

N.C.G.S. 35A-1101(7) "Incompetent adult" means an adult or emancipated minor who lacks sufficient capacity to manage the adult's own affairs or to make or communicate important decisions concerning the adult's person, family, or property whether the lack of capacity is due to mental illness, mental retardation, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition.

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