

Wards of the State: A National Study of Public Guardianship



Full Report

*Pamela B. Teaster
Erica F. Wood
Naomi Karp
Susan A. Lawrence
Winsor C. Schmidt, Jr.
Marta S. Mendiondo*

*Funded by a grant from
The Retirement Research Foundation
April 2005*

Statement

The logo for the University of Kentucky, featuring the letters "UK" in a bold, blue, serif font.

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 logo for the American Bar Association, featuring the letters "ABA" in a bold, black, serif font, with the tagline "Defending Liberty Pursuing Justice" in a smaller, black, sans-serif font below it.

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.

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

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.

Wards of the State: A National Study of Public Guardianship

Pamela B. Teaster, Ph.D.¹

Erica F. Wood, J.D.²

Naomi Karp, J.D.³

Susan A. Lawrence, B.A.⁴

Winsor C. Schmidt, J.D., LL.M.⁵

Marta S. Mendiondo, Ph.D.⁶

Funded by The Retirement Research Foundation – Grant # 2003-269
Final Report Submitted
March 31, 2005

¹ Principal Investigator, Graduate Center for Gerontology/Department of Health Behavior, 306 Wethington Health Sciences Building, 900 South Limestone, University of Kentucky, Lexington, KY 40536-0200, Ph: 859.257.1450 x80196, Fax: 859.323.5747, pteaster@uky.edu

² Co-Investigator, Commission on Law and Aging, American Bar Association, 740 15th Street NW, Washington DC 20005, Ph: 202.662.8693, Fax: 202-662-8698, ericawood@staff.abanet.org

³ Co-Investigator, Commission on Law and Aging, ABA

⁴ Project Manager, University of Kentucky

⁵ Consultant, Department of Health Policy and Administration, Washington State University, P.O. Box 1495, Spokane, WA 99210-1495, Ph:509. 358.7981, Fax: 509.358.7984, schmidtw@wsu.edu

⁶ Consultant, University of Kentucky

Acknowledgements

The authors are grateful for the wonderful support they received throughout this project. The 51 state contacts that responded to our national survey generously lent their time and expertise. The many public guardianship program staff, judges, lawyers, Adult Protective Services (APS) workers, aging and disability advocates and wards who participated in our interviews and focus groups in the site visit states gave us key information and valuable perspectives essential to our findings.

In particular, we thank the key informants in the seven states we studied in-depth: Michelle Hollister in Florida; John Wank, Helen Godlewski, and Patrick Murphy in Illinois; Sue Crone in Kentucky; Kate Tewanger in Indiana; Ellen Henningsen in Wisconsin; Deanna Clingan-Fischer in Iowa, and Sherry Shamel in Missouri.

Our advisory panel assisted in the drafting of the survey questionnaire and offered prompt and careful review of draft chapters: Joy Duke, David English, Marty Ford, Sally Hurme, Judge John Kirkendall, and Karen Roberto.

We appreciate the assistance of the University of Kentucky staff, including Erin Abner, Tyler Dugar, Graham Rowles, and Monica Underwood.

We gratefully acknowledge the support of Julie Kaufman at the Retirement Research Foundation and the grant from the Foundation that made this report possible.

Pamela B. Teaster
Erica F. Wood
Naomi Karp
Susan A. Lawrence
Winsor C. Schmidt
Marta S. Mendiondo

Wards of the State: A National Study of Public Guardianship

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 (the ward or incapacitated person). The appointment of a guardian occurs when a judge decides an adult individual lacks capacity to make decisions on his or her own behalf. Guardians are often family members or willing friends, sometimes attorneys, corporate trustees, agencies, or even volunteers. However, for some at-risk low-income adults, there is no one to help. These vulnerable individuals frequently fall through societal cracks, failing to receive needed services, falling victim to third party interests, and often inappropriately placed in institutions.

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, often serving as “guardian of last resort.”

The only comprehensive study of public guardianship before the current report was the groundbreaking work, *Public Guardianship and the Elderly*, by Professor Winsor Schmidt and colleagues in 1981. The project included a statutory and case law analysis, a survey of public guardianship options, and intensive site visits in five states. In the 25 years since the Schmidt study, converging trends have escalated the need for public guardianship: the “graying” of the population (with an upward spike anticipated soon when the Boomers come of age); the aging of individuals with disabilities; the aging of 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. Thus, the current study by the University of Kentucky and the American Bar Association Commission on Law and Aging sought to advance public understanding about the operation and effect of state public guardianship programs, and to compare the state of public guardianship today with the findings of the 1981 Schmidt study.

Methodology

The project included seven steps: (1) Securing of Institutional Review Board (IRB) approval to conduct research; (2) Conducting a public guardianship literature review and legal research of state statutes and court cases involving public guardianship, with preparation of a statutory table; (3) Identifying key contacts in all 51 jurisdictions and conducting a national survey of public guardianship programs and practices (with a 100% response rate); (4) Preparing interview guides; (5) Conducting in-depth telephone interviews with public guardianship program staff in Florida, Illinois, Indiana, Iowa, Kentucky, Missouri, and Wisconsin; (6) Conducting site visits with focus groups and

personal interviews in Florida, Illinois, and Kentucky; and (7) Analyzing the information and preparing the report with recommendations.

Existing Literature

The work of Schmidt and colleagues 25 years ago has remained the single national study of public guardianship, and has been followed by only a small body of literature that belies the importance of the growing need for surrogate decision-makers of last resort. Schmidt and colleagues followed up on this seminal research with more focused examination of selected aspects of public guardianship. In addition, a limited number of evaluative or empirical studies have assessed public guardianship in single jurisdictions. Notably, researchers have performed legislatively mandated evaluations of state public guardianship programs in Virginia (Teaster & Roberto, 2003) and Utah (The Center for Social Gerontology, 2001). In addition, the National Guardianship Association has surveyed its members to gain information on key parameters of public and other guardianship programs (NGA, 2003).

Analysis of Public Guardianship Law

State Statutes. In 1981, Schmidt 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 denominating it as such. Schmidt found 26 implicit statutory schemes in 26 states and 14 explicit schemes. Today, research shows a total of 20 implicit schemes in 19 states and 23 explicit schemes in 22 states. Implicit schemes often name a state agency or employee as guardian of last resort. Clearly, over time states have shifted somewhat 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.

State public guardianship statutes are markedly variable. Statutory schemes can be classified into four models according to their placement in the governmental administrative structure (Regan & Springer, 1977), although there are many exceptions and caveats that blur clear distinctions. The current statutory study found: (1) establishment of the public guardianship function in the court system – four programs; (2) public guardianship office as independent agency in executive branch – four programs; (3) placement of public guardianship function in an agency providing direct services to wards – 34 programs; and (4) location of public guardianship at county level – 10 programs. The social service agency model presents a conflict of interest between the role of a guardian (monitoring and advocating for services) and the role of a social service agency (providing for services).

The statutory research also assessed state public guardianship provisions on several other key parameters – eligibility; scope of services; authority to petition; powers and duties; costs; court and other governmental review; language concerning limited

guardianship; and staffing ratios. Two important findings were that 12 state laws specifically allow public guardianship programs to petition for their own wards; and that six states now provide for a staff-to-ward ratio (with only one state, Florida, setting the ratio in statute and the remainder specifying that it must be set administratively).

State legislatures continue to grapple with public guardianship issues. At the time of the survey, 12 states reported proposed legislation; and in the following months five additional states had significant public guardianship bills pending.

Case Law. Case law affecting public guardianship includes court rulings in the broad arenas of adult guardianship and disability law, as well as rulings specific to public guardianship practice. From the mid-1960s until now, there have been hundreds of reported case decisions in which the public guardian is a party to the litigation or is involved in the case history. A significant number of cases specifically have focused on public guardianship appointment, powers and duties, removal, and termination. These cases, summarized in the study, have helped to raise the visibility of the programs and sharpened their contours.

A 1999 class action lawsuit filed in Nevada, *Tenberg v. Washoe County Public Administrator*, appears to be the only case of its kind, brought on behalf of wards and alleging sweeping failures on the part of the public guardian. The case was settled and thus did not yield a published court opinion, but the consent decree included constructive provisions to strengthen quality and accountability. The suit is a notable step in the use of litigation to address broad-based problems of a public guardianship program inadequately caring for wards.

Finally, the Supreme Court's landmark ruling on the Americans with Disabilities Act, *L.C. & E.W. v Olmstead*, required that states must provide services "in the most integrated setting appropriate to the needs of qualified individuals with disabilities" and has resulted in increased emphasis on placement in home and community-based settings. The *Olmstead* decision supports the allocation of additional resources to public guardianship and other surrogate decision-making mechanisms – as well as renewed efforts by public guardianship programs on appropriate placement of wards in community-based settings.

The National Survey of Public Guardianship

Administrative Structure and Location in Government. Using the categorization system used by Schmidt and colleagues, there is a 70% increase in the number of states with some form of public guardianship, increasing from 34 – 48 in number. Also of note is the shift of models in the ensuing years – clearly the predominant model is that of an entity also providing social services, or the conflict of interest model.

Twenty-seven states now have full coverage of public guardianship services, and six states have established guardian to ward ratios. Still, an alarming number of programs have extremely high ratios, which at their highest were 1:173. In comparison,

the Uniform Veterans Guardianship Act provides that no person other than a bank or trust company can be guardian of more than five veteran wards.

Functions of the Public Guardianship Program. The majority of programs (35) provide guardianship of the person, and 27 provide guardianship of property, likely reflecting the fact that most wards of public guardians are individuals with low incomes. Twenty-three programs reported serving as representative payee, the most common service provided other than guardianship. Most programs monitor the delivery of services to their wards and most educate the community about guardianship. Twenty-four programs (36 responding) petition for adjudication of legal incapacity and 25 (35 responding) petition for appointment of themselves as guardian.

Staffing. Few states could provide an estimate of the unmet need for public guardians though most indicated that they were chronically, and in some instances, dangerously understaffed. Number of wards served ranged from a low of 2 (Florida, and a program in its infancy) to 5,383 (OSG, IL), median = 216. The amount of time spent on services to one ward was calculated by only 15 programs and ranged from one hour biannually to more than five hours per week. Most states have adopted standardized policies and procedures, and many have adopted hiring requirements, which ran the gamut from a high school degree to a law or doctorate degree.

Wards. Individuals under guardianship appear to have shifted somewhat from the older adult population (e.g., persons aged 65+) to a younger population (e.g., persons ages 18-64). In many ways, reported anecdotally, younger wards reflect a more challenging client mix. Primary diagnoses of wards were typically developmental disabilities, mental illness, and mental retardation (even some substance abuse, particularly in the county model), rather than AD or other dementias as discovered in the 1981 study. Wards were fairly evenly split between men and women, again, representing a shift from the 1981 study, which found the majority of wards to be older White women. A surprising number of wards continue to be White, with the most Minority wards in any program being 33% (Los Angeles, CA).

If the population demographic of wards is changing, the number of wards who are institutionalized is still far too high, but not at 100% in any state, which was the case in 1981. The highest percentage of institutionalized wards was 97% (Los Angeles, CA-County Model), and the lowest was 36% (Kansas – Independent State Office Model). This is likely reflective of a greater combination of payment sources available to indigent persons and more living options available to wards than were available in 1981.

Strengths, Weakness, Opportunities, Threats. Overwhelmingly, when respondents provided information on strength, weaknesses, opportunities and threats, the greatest strength was that of the public guardianship staff. Most staff members worked under difficult conditions with less than adequate remuneration and with difficult clients.

Turnover of staff was reportedly surprisingly low. The predominant weakness of programs was the lack of funding. The most consistent opportunity for public guardian programs appeared to be education of the public, which usually took a back seat to providing guardianship services. Websites giving information about the programs were, as a rule, underdeveloped. Another opportunity for some programs, used exceptionally effectively in Cook County, Illinois, was the use of lawsuits to provide needed services for clients.

Not surprisingly, and, regrettably, similar to the 1981 study was the assertion, by nearly every program in every state of a critical lack of funding, which translated into circumscribed services for wards and inadequate staffing to meet ward needs. This is more significant now than in the past, as the demographic imperative portends more and more individuals needing guardianship services.

Case Studies of States with In-Depth Interviews

The study included in-depth interviews with key contacts in four states – Indiana, Iowa, Missouri and Wisconsin. The resulting case profiles show the diversity of state programs and the significant gaps remaining.

Indiana. The state’s 16-year-old public guardianship program is coordinated by the state unit on aging with regional programs through area agencies on aging and mental health associations. The program is state funded. Some of the regional programs use Medicaid funding to pay for guardianship services. The program served approximately 289 individuals in FY 2004. The local programs petition for guardianship. A rough estimate of time spent on each case is five hours. Caseloads per individual guardian ranged from 25-44 wards. Wards are visited at least monthly, but for wards in nursing homes, every 90 days. While a statewide needs assessment is underway, the unmet need is perceived as substantial, and the funding limited. The programs are at “maximum capacity” at current caseloads, and the program does not serve as guardian of last resort with unlimited intake.

Iowa. Currently public guardianship needs in Iowa are met in piecemeal fashion and in many areas not at all. State legislation creating a system of volunteer guardianship programs was enacted but not funded, and currently only one county has such a program. An additional county operates an independent staff-based program that provides guardianship, conservatorship, and representative payee services. Also, under a state law, seven counties have established substitute medical decision-making boards of last resort for individuals without the capacity to give informed consent, if there is no one else to do so. This leaves much of the state without public guardianship. Practitioners and advocates are acutely aware of the gap and are assessing unmet need and developing legislative proposals to create a statewide public guardianship program.

Missouri. Missouri law provides for an elected county public administrator to serve as guardian of last resort in each of the state’s 115 jurisdictions. There is wide variability throughout the state in: the background and experience of the public

Administrators, the method of payment, the additional functions they perform, the caseloads, the extent of support from county commissioners and judge, and whether the administrators petition for guardianship cases. This system of public administrators as public guardians is unique. On the positive side, the system covers the state. On the negative side, using elected officials to perform this critical role interferes with continuity – and works against the development of a cadre of qualified, stable, and experienced surrogate decision-makers. Moreover, funding is uneven and patently insufficient, resulting in sometimes dangerously high caseloads.

Wisconsin. There is no statewide public guardianship program and no statutory provision, but Wisconsin does have three mechanisms that are paid for or approved by the state to provide for guardianship of last resort: (1) Corporate guardians are incorporated entities that provide guardianship services, with payment by counties or from the estate of the ward. They are state-approved and located in all parts of the state. (2) Volunteer guardianship programs are operated by county agencies or non-profit entities, and were originally funded by small state grants. (3) County-paid guardians serve five or fewer wards. The Guardianship Support Center provides technical assistance on guardianship and surrogate decision-making issues statewide. Unlike other states studied, the interview did not make reference to a large unmet need for public guardianship services.

Case Studies of States with Site Visits

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

Florida. The Statewide Public Guardianship Office is located administratively in the Florida Department of Elder Affairs. The Office contracts with 16 local programs, generally non-profit entities that cover 23 of the 67 counties in the state. The programs serve as both guardian of the person and of property, as well as representative payee. Most of the local programs have a mixture of funding sources, but many had relied heavily on court filing fees. A recent change in the Florida Constitution resulted in removal of the counties' authority to direct filing fees toward public guardianship. Although a matching grant program was enacted, funds were not allocated, and the Office was assisting the local programs to identify alternative sources of funding. The Office was moving toward establishment of uniform procedures across programs.

Florida law provides for a 1:40 staff-to-ward ratio. Once programs reach this level, for any additional cases there is an unmet need in the locality with no last resort decision-maker. Moreover, many informants perceived lack of resources to support the filing of guardianship petitions as a serious barrier to securing public guardianship for individuals in need. Finally, the *guardian ad litem* system appears uneven, with little training for attorneys who take on this role.

Kentucky. In the 1990s, the Office of the Public Guardian was placed within the Department of Social Services, now the Department for Community Based Services in the Cabinet for Health and Family Services. This shift dramatically increased the number of wards, without a commensurate increase in staffing or funding. More recently, the public guardianship program came under the supervision of the service regions in the state. There are 16 service regions and six guardianship regions.

Staff to ward ratios are approximately 1:80, with many staff shouldering caseloads far higher, along with administrative duties. The mixture of rural and urban locations in the state has created additional difficulties in meeting ward needs and visiting them in a timely manner. That the coordinator for the public guardianship program also has responsibilities for APS appeared to present a marked conflict of interest, and attempts are underway to rectify this.

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

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

The Cook County Office of Public Guardian has, for the past 25 years (until very recently), been directed by a highly visible attorney who had garnered significant resources, media attention and support for the program. Cook County OPG serves approximately 650 older wards and 12,000 children. Approximately 40% of the adult OPG wards are living in the community, and 25% had been exploited prior to being served by the program. Cook County OPG petitions to become guardian and has filed a number of critical lawsuits to protect the interests of wards. OPG programs in the rest of the state (not covered in our site visit) appeared uneven.

Conclusions

Individuals Served

- Public guardianship programs serve a wide variety of individuals.
- Public guardianship programs serve a population of clients which includes more, younger individuals with more complex needs than 25 years ago.
- In most states, a majority of public guardianship wards are institutionalized.
- The *Olmstead* case provides a strong mandate for re-evaluation of extent of institutionalization of public guardianship clients.

Program Characteristics

- Public guardianship programs may be categorized into four distinct models.
- All but two states (NE, WY) and Washington, DC have some form of public guardianship.
- The clear majority of the states use a social services 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 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 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.
- Staff size and caseload in public guardianship programs show enormous variability.
- Education requirements for staff in public guardianship programs vary.
- Public guardianship programs are frequently understaffed and under-funded.
- Although some public guardianship programs use ratios to cap the number of clients, most serve as guardian of last resort without limits on intake.
- Funding for public guardianship is from a patchwork of sources, none sufficient.
- The Supreme Court *Olmstead* case provides a strong impetus for support of public guardianship.

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

- Very little data exist 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 is 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 wards under public guardianship.
- The effect of public guardianship services on wards over time merits study.

Program Characteristics

- States would benefit from an updated model public guardianship act.
- States should avoid a social services agency model.

Functions of Public Guardianship Programs

- State public guardianship programs should establish standardized forms and reporting instruments.
- 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, should identify others to petition, and should implement multidisciplinary screening committees to review potential 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 a periodic and meaningful external evaluation.

Funding and Staffing of Programs

- Public guardianship programs should be capped at specific staff-to-ward ratios.
- States should provide adequate funding for public guardianship programs.
- Research should explore state approaches to use of Medicaid to fund public guardianship.

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

- State court administrative offices should move toward the collection of uniform, consistent basic data elements on adult guardianship, including public guardianship.
- 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 wards.
- Courts should examine the role of *guardians ad litem* and court investigators, especially as it bears on the public guardianship system.
- Research should explore the functioning of the Uniform Veterans Guardianship Act, as implemented by the states.

Hallmarks of an Efficient, Effective, and Economic Program of Public Guardianship

- 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 meaningful external evaluations
- Track cost savings to state
- Support and recognize staff
- Develop and update written policies and procedures
- 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 that uses information requested in this study as a baseline

Table of Contents

CHAPTER 1: INTRODUCTION TO THE STUDY	1
Overview of Adult Guardianship.....	2
Recent Events.....	4
Public Guardianship.....	5
Overview of Research Design.....	6
References.....	7
CHAPTER 2: EXISTING LITERATURE	12
Adult Guardianship Literature.....	12
Empirical Research.....	15
Recent Developments.....	16
Public Guardianship Literature.....	16
Evaluative Research.....	19
Model Statutes, Legal Writings.....	21
References.....	23
CHAPTER 3: ANALYSIS OF PUBLIC GUARDIANSHIP LAW	31
Changes in State Statutes.....	32
Elements of Public Guardianship Statutes.....	37
Proposed Public Guardianship Legislation.....	43
Case Law.....	44
Public Guardianship Cases.....	45
References.....	56
Compilation of State Public Guardianship Statutes (TABLE 3.1).....	57ff
CHAPTER 4: THE NATIONAL SURVEY OF PUBLIC GUARDIANSHIP	58
Methods.....	58
Results.....	59
Court Model.....	62
Independent State Office Model.....	67
Division of a Social Service Agency Model.....	74
County Model.....	82
Comparison of Selected Information by Model.....	89
Summary and Comments.....	94

CHAPTER 5: CASE STUDIES OF STATES WITH AN IN-DEPTH EXAMINATION (TELEPHONE SURVEYS)	96
Missouri.....	97
Iowa.....	101
Indiana.....	103
Wisconsin.....	106
CHAPTER 6: CASE STUDIES OF STATES WITH AN IN-DEPTH EXAMINATION (TELEPHONE SURVEYS AND SITE VISITS)	110
Florida.....	111
Kentucky.....	122
Illinois.....	136
Office of the State Public Guardian (OSG).....	136
Office of the Public Guardian – Cook County (OPG).....	140
CHAPTER 7: CONCLUSION AND RECOMMENDATIONS	150
Conclusions.....	150
Recommendations.....	158
Hallmarks of an Efficient, Effective & Economic Program of Public Guardianship.....	164
References.....	166

Appendixes

- Appendix A: The National Survey of Public Guardianship (2004)
- Appendix B: National Survey by Winsor Schmidt and Colleagues (1981)
- Appendix C: In-depth Telephone Survey for States without Public Guardianship
- Appendix D: In-depth Telephone Survey for States with Public Guardianship
- Appendix E: Site Visit Questions
- Appendix F: Brief State Specific Model Information
- Appendix G: Map of State Models
- Appendix H: Criteria for Choosing Public or Private (Contracting-Out) Models in the Provision of Guardian of Last Resort Services

List of Tables

Table 3.1	Compilation of State Public Guardianship Statutes.....	57
Table 4.1	Models of Public Guardianship Programs.....	61
Table 4.2	Court Model – Administrative Features.....	62
Table 4.3	Court Model – Function of the Public Guardian.....	63
Table 4.4	Court Model – Personnel Management.....	64
Table 4.5	Court Model – Ward Demographics.....	65
Table 4.6	Court Model – Referral Sources.....	65
Table 4.7	Court Model – Extent of Guardianship.....	66
Table 4.8	Court Model – Primary Diagnosis of Wards.....	66
Table 4.9	ISO Model – Funding Source.....	67
Table 4.10	ISO Model – Administrative Features.....	68
Table 4.11	ISO Model – Function of the Public Guardian.....	69
Table 4.12	ISO Model – Personnel Management.....	70
Table 4.13	ISO Model – Ward Demographics.....	71
Table 4.14	ISO Model – Referral Sources.....	72
Table 4.15	ISO Model – Extent of Guardianship.....	72
Table 4.16	ISO Model – Primary Diagnosis of Wards.....	73
Table 4.17	ISO Model – Wards’ Residence.....	73
Table 4.18	DSSA Model – Funding Source.....	75
Table 4.19	DSSA Model – Administrative Features.....	76
Table 4.20	DSSA Model – Function of the Public Guardian.....	77
Table 4.21	DSSA Model – Personnel Management.....	78
Table 4.22	DSSA Model – Ward Demographics.....	79
Table 4.23	DSSA Model – Referral Sources.....	80
Table 4.24	DSSA Model – Extent of Guardianship.....	81
Table 4.25	DSSA Model – Primary Diagnosis of Wards.....	81
Table 4.26	DSSA Model – Wards’ Residence.....	82
Table 4.27	County Model – Funding Source.....	83
Table 4.28	County Model – Administrative Features.....	84
Table 4.29	County Model – Function of the Public Guardian.....	85
Table 4.30	County Model – Personnel Management.....	86
Table 4.31	County Model – Ward Demographics.....	87
Table 4.32	County Model – Extent of Guardianship.....	87
Table 4.33	County Model – Primary Diagnosis of Wards.....	88
Table 4.34	County Model – Wards’ Residence.....	88
Table 4.35	4 Model Comparison – Administrative Features.....	90
Table 4.36	4 Model Comparison – Function of the Public Guardian.....	91
Table 4.37	4 Model Comparison – Staffing and Ward Information.....	92
Table 4.38	4 Model Comparison – Ward Information.....	93

Chapter 1 Introduction to the Study

Public guardianship is being endorsed, but only if it is done properly. By “properly” we mean with adequate funding and staffing, including specified staff-to-ward ratios, and with the various due process safeguards that we have detailed. . . . The office should be prepared to manage guardianship of person and property, but it should not be dependent upon the collection of fees for service. The functions of the office should include the coordination of services, working as an advocate for the ward, and educating professionals and the public regarding the functions of guardianship. The office should also be concerned with private guardianship, in the sense of developing private sources and to some extent carrying out an oversight role” (Schmidt, Miller, Bell, & New, 1981, pp. 174-175).

Professor Winsor Schmidt and colleagues made the above recommendation in their landmark national study, *Public Guardianship and the Elderly*. The year was 1981. Public guardianship was a fairly new phenomenon. Until this study, there has been no additional national study of public guardianship. In nearly 25 years, however, several converging trends have escalated the need for public 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 to these trends, most states have reformed their adult guardianship laws, and many have enacted *public* guardianship programs. Meanwhile, a new industry of private non-profit and for-profit guardianship service providers has emerged alongside of public guardianship.

These developments are positioned against a backdrop of societal changes, including the development of managed care and other new forms of health care delivery, changes in long-term care including the rise of assisted living, recent massive state budgetary constraints forcing cutbacks in social programs, escalating litigation in the health and long-term care arenas, and moves to deinstitutionalize people with disabilities and identify community-based care (according to the 1999 Supreme Court decision in the *Olmstead* case, 138 F.3d 893).

Another look at public guardianship was sorely needed. This study sheds light on how the recommendations of Schmidt and colleagues have fared, how public guardianship operates, who it serves – and how it affects the lives of society’s most vulnerable, at-risk members.

The purpose of this study was to make findings and recommendations to improve care for public guardianship wards⁷, who are unable to care for themselves and who are typically poor, old, alone, “different“ – who are “unbefriended” and have no other recourse than to become wards of the state. The project brought to bear a combined 56 years of experience from the fields of public health and public administration, gerontology, and law – all focused on adult public guardianship systems.

Overview of Adult Guardianship

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 – as distinguished from the guardianship of minors – is marked by an inherent tension: it protects at-risk individuals and provides for their needs, while at the same time removing fundamental rights, potentially reducing individuals to the status of children. It can “unperson” them and make them “legally dead” (Associated Press, 1987). Guardianship is truly a double-edged sword – “half Santa and half ogre” (Regan, & Springer, 1977, p.27)

Early and localized studies of protective proceedings including guardianship found little benefit to the ward from these interventions and concluded that many petitions were filed primarily for the benefit of third parties or stemmed from well-meaning but ineffective motives to aid vulnerable groups (Alexander & Lewin, 1972; Blenkner, Bloom, Nielson, & Weber, 1974). A 1982 Dade County Florida Grand Jury investigation found a disturbing lack of monitoring (Dade County Grand Jury, 1982; Schmidt, 1984). A 1983 Pennsylvania State University study concluded that “though guardianship in and of itself does not have significant positive impacts on the alleged incompetent, neither are there many of the horror stories” that had been cited (Cohen, 1983). Despite explorations of the need for state guardianship reform in the 1970s and 1980s and early reform efforts, state guardianship remained a backwater area governed by archaic terms, inconsistent practices, drastic paternalistic interventions, little attention to rights, and meager accountability (Horstman, 1975; Mitchell, 1978-79; NCCUSL, 1982; Regan & Springer, 1977; The Center for Social Gerontology, 1986; Wood, 1986).

In 1986, the Associated Press undertook a year long investigation of adult guardianship in all 50 states and the District of Columbia that included an examination of more than 2,200 randomly selected guardianship court files, as well as multiple interviews with a range of informants. The result was a six-part national series released in September 1987, *Guardians of the Elderly: An Ailing System*, that decried a troubled system that declared elders as “Legally Dead.” The AP report alleged that “the nation’s

⁷ In this study, the authors use the term, “ward.” The use of “ward” conveys a sense of total dependence of the individual on the state, which is a fundamental characteristic of public guardianship. Thus, the authors justify its use in this study, even though it is not a term that signifies the importance of an individual’s autonomy and self-determination. The trend in statutory language is toward use of the term “incapacitated person” or other such terms.

guardianship system, a crucial last line of protection for the ailing elderly, is failing many of those it is designed to protect.” It denounced “a dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, then fails to guard against abuse, theft and neglect.”

The AP release prompted a hearing by the U.S. House Committee on Aging, as well as a 1988 National Guardianship Symposium sponsored by the ABA Commission on Legal Problems of the Elderly (currently the Commission on Law and Aging) and the Commission on Mental and Physical Disability Law, known as the “Wingspread Conference.” These events precipitated a rush to reform state guardianship laws. Each year over the next 15 years saw the passage of a substantial number of guardianship measures. All states made at least minor or moderate revisions, and some made significant changes. A growing list of states enacted comprehensive reforms or tossed aside their old guardianship law and started anew – Florida, New Mexico, North Dakota, and Ohio in 1989; Washington in 1990; New York in 1991; Rhode Island, Tennessee, and Pennsylvania in 1992; Texas and South Dakota in 1993; West Virginia in 1994; Oregon in 1995; Washington (more changes) in 1996; Virginia in 1997; Wyoming in 1998; Michigan (more changes, in seven bills termed “the magnificent seven”) and Colorado in 2000; and Kansas in 2002 (Hurme, 1995-96; Johns, 1999; Wood, 2004). These reforms featured five key trends: (1) stronger procedural protections for alleged incapacitated persons; (2) a more functional determination of incapacity; (3) use of limited guardianship and emphasis on the principle of the “least restrictive alternative”; (4) stronger court monitoring; and (5) development of *public* guardianship programs.

Guardianship practices by judges, attorneys, guardians, and other players did not automatically follow statutory reforms. While important changes were made, often gradually, implementation of the new laws was uneven, and the press has continued from time to time to highlight abuses. In May 2000, an exposé in the *Detroit Free Press* charged that too often, little evidence exists that guardians and conservators in Michigan’s probate court system are caring for anyone’s interests but their own. Some professional guardians have responsibility for more than 500 people whom they rarely visit or never meet (Wendland-Bowyer, 2000). Similar exposés appeared in the *Phoenix New Times* (Rubin, 2000) and the *Rocky Mountain News* (Kilzer, 2001), as well as the 2000 book *The Retirement Nightmare: How to Save Yourself from Your Heirs and Protectors* (Armstrong, 2000).

A host of national, state, and local efforts since the early 1990s sought to strengthen guardianship practice. A national study by the ABA Commission profiled best practices in guardianship monitoring (Hurme, 1991). Legal Counsel for the Elderly, Inc., at American Association of Retired Persons (AARP) coordinated an imaginative National Guardianship Monitoring Program featuring the use of trained volunteers to be the “eyes and ears” of the court. The National Guardianship Association was created in 1987, and produced *Standards of Practice* and a *Code of Ethics*. The *National Probate Court Standards*, published in 1994, addressed procedural protections, limited guardianships and use of less restrictive guardianship alternatives, and court procedures to monitor guardian activities (Hannaford & Hafemeister, 1994). A 1994 study by The

Center for Social Gerontology analyzed sample hearings and guardianship file data from ten states and found striking deficiencies in legal representation, medical evidence, and use of limited guardianship orders. The Uniform Guardianship and Protective Proceedings Act was revised in 1997. Finally, seven national groups convened a second national guardianship conference (“Wingspan”) in 2001, resulting in yet another set of recommendations for action.

Guardianship experts contend that although we have come a long way legislatively, there has been very little in practice and in effect on the lives of vulnerable wards and proposed wards. One source observed that changes in law are nothing but a mask of virtual reality, hiding what is actually being done in the process, and what is done to older Americans caught in it (Johns, 1997). In truth, we have very little data to refute or substantiate this. Statistics are scant. *The number of adults under guardianship in the United States remains unknown.* (A 1988 estimate by the Associated Press was about 400,000; a 1996 estimate by Schmidt put the total at approximately 1.5 million or about one for every 1750 people). This paucity of research makes it difficult to assess the results of guardianship reform efforts.

Recent Events Surrounding Guardianship

Several recent events have refocused public attention and reinforced the need to bolster the nation’s adult guardianship system with stronger laws, better practices, education and training, and, most significantly, data collection and research. In May 2002, a District of Columbia court ordered that an 87-year-old Washington, DC resident, Mollie Orshansky, be put in the care of a court-appointed attorney as guardian in D.C., despite her clear advance directives and plans for living arrangements near her family in New York. A D.C. court of appeals reversed the decision [*In Re Mollie Orshansky*, 804 A.2d 1077(D.C. App. 2002)], holding that the lower court abused its discretion. Both decisions were spotlighted by *The Washington Post*, and triggered a hearing on guardianship in February 2003 by the U.S. Senate Special Committee on Aging on guardianship, the first in a decade, entitled “Guardianships Over the Elderly: Security Provided or Freedoms Denied?” The hearing profiled cases of misuse of guardianship, and Sen. Larry Craig, Committee Chairman, stated that “ironically, the imposition of guardianship without adequate protections and oversight may actually result in the loss of liberty and property for the very persons these arrangements are intended to protect” (p. 2). In June 2003, *The Washington Post* published two front-page articles – “Under Court, Vulnerable Became Victim” (Leonnig, Sun, & Cohen, 2003) and “Rights and Funds Can Evaporate Quickly” (Cohen, Leonnig, & Witt, 2003) – detailing massive neglect and exploitation by court-appointed attorney guardians in the District of Columbia. In December 2004, a series of articles by Horner and Hancock (*Dallas Morning News*) spotlighted problems with guardianship in Texas, also detailing neglect.

As requested by the chairman of the Senate Committee, the United States Government Accounting Office (GAO) studied the accountability of guardians. In July 2004, the GAO released its report with findings of uneven implementation of guardianship oversight laws, lack of adequate data on the adult guardianship system,

growing interstate guardianship problems that complicate oversight, and lack of collaboration between the state court system handling guardianship and the federal representative payment programs in the Department of Veterans Affairs and the Social Security Administration (GAO, 2004).

Public Guardianship

An important subset of reform over the past decades has been the development of *public* guardianship programs. Guardians are often family members or willing friends, sometimes attorneys, corporate trustees, agencies, or even volunteers. For some at-risk low-income adults, however, there is no one to help. These at-risk individuals often fall through societal cracks, failing to receive needed services, falling victim to third party interests, and frequently being inappropriately placed in institutions. Since the 1960s, states and localities have developed a variety of mechanisms to address this “unbefriended” population, serving as “guardian of last resort.” In some instances, jurisdictions have enacted or supported public guardianship programs.

A *public guardian*, distinguished from private professional guardian service providers, 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, fees from the ward, or some combination of these. In 1980, 34 states had a statutory provision for public guardianship (Schmidt et al., 1981). Today, state laws generally either make explicit statutory provision for a “public guardian” or implicit reference to a process for identifying a guardian of last resort. Public guardianship programs may serve two distinct populations: (1) older incapacitated persons who have lost decisional capacity, and (2) individuals with mental retardation and/or developmental disabilities that may never have had decisional capacity. State programs may be operated from a single statewide office or have local/regional components. In addition, many local jurisdictions have developed their own public guardianship programs. They may be 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 frequently serve other functions as well, such as case management, financial planning, social services, APS, *guardian ad litem* or court investigators, public education, and advisors or assistants to private guardians.

Little data exist on the unmet need for public guardianship. A few programs have sought to estimate the number of individuals, frequently indigent, in need of a guardian and without willing relatives or friends. According to a Virginia legislative study, there are over 2,000 indigent, incapacitated persons in the state for whom no one is willing or able to act as guardian (Select Committee, 2002). Florida’s Statewide Public Guardianship Office reports that the need for public guardianship is approaching crisis proportions and estimates that 1.5 guardianships could be needed per 1,000 population (Florida Statewide Public Guardianship Office, 2000). A Massachusetts expert estimates

that 10,000 Medicaid-eligible nursing home residents needed but did not have guardians in 2000 (Ford, 2000).

Study Justification

Despite massive social and demographic changes since the 1981 Schmidt study, only a handful of state and local studies described further in Chapter 2 have examined the institution of public guardianship. Several have identified serious systemic problems, especially as to accountability and staffing. 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 guardianship (Cappiello, 2002) 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” (p. 597). Concerning public guardianship specifically, the recommendations urged that “states provide public guardianship services when other qualified fiduciaries are not available” (p. 604); that “the public guardianship function [should] include broad-based information and training” (p. 605); 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 (p. 604); and that “funding for development and improvement of public [. . .] guardianship services” should be identified and generated (p. 605).

Overview of Research Design

The overarching objective of the study was to update the 1981 study conducted by Schmidt and colleagues. All the states included in the study (i.e. Florida, Illinois, Indiana, Iowa, Kentucky, Missouri, Wisconsin) were located within the geographic focus of the Retirement Research Foundation. Thus, the study was tailored to that focus. Within that context, the investigators conducted the following: (1) updated public guardian literature search, conducted legal research of court cases involving public guardianship programs, and prepared summarizing state statutory tables; (2) identified key contacts in all 51 jurisdictions (3) developed a national survey of public guardianship and gathered data from all 51 jurisdictions (using survey format); (4) prepared interview guides and conducted in-depth telephone interviews with public guardianship program staff in all seven states; and (6) made site visits to hold focus groups and one-on-one ward interviews in Florida, Illinois, and Kentucky.

The following six chapters are the result of the study described above. They are: Literature Review (Chapter 2), State Statues and Case Law (Chapter 3), The National View of Public Guardianship (Chapter 4), States with an In-Depth Examination (Telephone Surveys) (Chapter 5), States with an In-Depth Examination (Telephone Surveys and Site Visits) (Chapter 6), and Recommendations and Conclusions (Chapter 7).

References

- Alexander, G. & Lewin, T. (1972). *The aged and the need for surrogate management*. Syracuse, NY: Syracuse University Press.
- American Bar Association Commission on Legal Problems of the Elderly and National Judicial College. (1986, June). *Statement of recommended judicial practices on guardianship Proceedings for the Elderly*, Washington, D.C.
- Armstrong, D. (2000). *The retirement nightmare: How to save yourself from your heirs and protectors*. Amherst, NY: Prometheus Books.
- Associated Press (1987, September). *Guardians of the elderly: An ailing system*.
- Axilbund, M. (1979). *Exercising judgment for the disabled: Report of an inquiry into limited guardianship, public guardianship and APS in six states*. Washington, DC: American Bar Association Commission on the Mentally Disabled.
- Bell, W., Schmidt, W., & Miller, K. (1981). Public guardianship and the elderly: Findings from a national study. *The Gerontologist* 21(22), 194-202.
- Blenkner, M., Bloom, M., Nielson, M., & Weber, R., *Final Report: Protective Services for Older People, Findings from the Benjamin Rose Institute Study* (1974).
- Bogdan, R. & Biklen, S.K. (1998). *Qualitative research for education: An introduction to theory and methods*. Boston, MA: Allyn and Bacon.
- Cappiello, P. (Ed.). (2002). Wingspan – the second national guardianship conference [Special issue.] *Stetson Law Review*, 31(3).
- The Center for Social Gerontology, *Guardianship and Alternative Legal Interventions: A Compendium for Training and Practice*, Ann Arbor MI (October 1986).
- The Center for Social Gerontology (1987). *Guidelines for guardianship service programs*. Ann Arbor, MI.
- The Center for Social Gerontology (2001). *Utah Office of Public Guardian: Program evaluation*. Ann Arbor, MI.
- Cohen, M. (1983). *An analysis of the dynamics of the adult guardianship process*. Unpublished Master's thesis. Pennsylvania State University, University Park, Pennsylvania.
- Cohen, S., Leonnig, C., & Witt, A. (2003, June 16). Rights and funds can evaporate quickly. *The Washington Post*, p. A-1.

- Commission on National Probate Court Standards (1993). *National probate court standards*. The National College of Probate Judges, The National Center for State Courts. Williamsburg, VA.
- Dade County Grand Jury. (1982). *Final report of the Grand Jury*. Miami, FL: Office of the State Attorney.
- Florida Statewide Public Guardianship Office. (2000). *Forgotten Faces of Florida*.
- Ford, J.J. (2000). The ABC's of a *rudow* guardianship. *The Best of MBA-CLE*. Massachusetts Bar Association.
- Fred, M. (2001, February). *Illinois guardianship reform project: Final report* Chicago: Equip for Equality, Inc.
- Guardianship, An agenda for reform. (1988). Recommendations of the National Guardianship Symposium and Policy and Policy of the American Bar Association. Commission on Legal Problems of the Elderly and Commission on the Mentally Disabled. Washington, D.C.: American Bar Association.
- General Accounting Office. (2004). *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*. (Publication Number GAO-04-655). Washington, D.C, US: Author.
- Hannaford, P. & Hafemeister, T. (1994). The national probate court standards: The role of the courts in guardianship and conservatorship proceedings. *The Elder Law Journal*, 2(2).
- Horstman, P. (1975). Protective services for the elderly: The limits of *parens patriae*. *Missouri Law Review*, 40, 215.
- Hurme, S. (1991). *Steps to Enhance Guardianship Monitoring*, American Bar Association Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly, Washington D.C.
- Hurme, S. (1995-96). Current trends in guardianship reform. *Maryland Journal of Contemporary Legal Issues*, 7(1) 143-189.
- In Re Mollie Orshanksy*, 804 A.2d 1077 (D.C. App. 2002).
- Johns, A. F. (1997). 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? *Stetson Law Review*, 27(1).

- Johns, A. F. (1999). Ten years after: Where is the constitutional crisis with procedural safeguards and due process in guardianship adjudication? *The Elder Law Journal* 7(1), 33.
- Kilzer, L. & Lindsay, S. (2001, April 7). Guardianship series. *The Rocky Mountain News*.
- Leonnig, C., Sun, L., & Cohen, S. (2003, June 15). Under court, vulnerable became victims. *The Washington Post*, p. A-1.
- Lisi, L, Burns, A. & Lussenden, K. (1994). *National study of guardianship systems: Findings and recommendations*. Ann Arbor, MI: The Center for Social Gerontology.
- Miller, K., Schmidt, W., Peters, R., & Loenwenstein, D. (1984). *Second Year Evaluation of the Florida Public Guardianship Pilot Program*. Florida Institute for Social Research, for Florida Office of the State Courts Administrator.
- Miller, K., Schmidt, W., Peters, R & Loenwenstein, D. (1988). A descriptive analysis of professional and volunteer programs for the delivery of guardianship services. *Probate Law Journal*, 8, 125.
- Mitchell, A. (1978). Involuntary guardianship for incompetents: A strategy for legal services advocates. *Clearinghouse Review*, 12, 451-468.
- Mitchell, A. (1979). The Objects of our wisdom and our coercion: Involuntary guardianship for incompetents. *Southern California Law Review*, 5, 1405.
- National Conference of Commissioners on Uniform State Laws (NCCUSL). (1982). *The Uniform Guardianship and Protective Proceedings Act*. Chicago: NCCUSL.
- National Conference of Commissioners on Uniform State Laws (Revised). (1997). *The Uniform Guardianship and Protective Proceedings Act*. Chicago: NCCUSL.
- National Guardianship Association. (1994). *Ethics and standards for guardians*. Elmhurst, IL: National Guardianship Association.
- National Guardianship Association. (1998). *Agency directory*. Elmhurst, IL: National Guardianship Association.
- Regan, J. (1972). Protective services for the elderly: Commitment, guardianship, and alternatives. *William and Mary Law Review*, 13, 569.
- Regan, J. & Springer, G. (1977). *Protective services for the elderly. A working paper prepared for the Special Committee on Aging, U.S. Senate*. Washington, D.C.: U.S. Government Printing Office.
- Rubin, P. (2000, June 15). Checks & imbalances: How the state's leading private

- fiduciary helped herself to the funds of the helpless. *Phoenix New Times*. Retrieved Jan. 31, 2005 from http://www.phoenixnewtimes.com/issues/2000-06-15/news/feature2_4.html
- Roberto, K.A., & Teaster, P.B. (2004). Older women who experience mistreatment: Circumstances and outcomes. *Journal of Women and Aging, 16*(1/2), 3-17.
- Schmidt, W. (1984). The Evolution of a public guardianship program. *Journal of Psychiatry and Law, 12*, 349-372.
- Schmidt, W., Miller, K., Bell, W. & New, E. (1981). *Public guardianship and the elderly*. Cambridge, MA: Ballinger Publishing Company.
- Schmidt, W.C., Teaster, P.B., Abramson, H., & Almeida, R. (1997). *Second year evaluation of the Virginia guardian of last resort and guardianship alternatives demonstration project*.
- Final report Richmond, VA: Virginia Department for the Aging. Also see *Preliminary Evaluation* (1996) and *First Year Evaluation* (Jan. 1997). Also see authors' article, 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 & Aging 131* (Fall-Winter 1999).
- Select Committee to Study the Statewide System of Providing Substitute Consent for People with Mental Disabilities (2002). *Report to the Governor and the General Assembly of Virginia*, H.D. No. 37.
- Siemon, D., Hurme, S. B., & Sabatino, C. P. (1993). Public guardianship: Where is it and what does it need? *Clearinghouse Review, 27*, 588-599.
- Steinberg, R. (1985). *Alternative Approaches to Conservatorship and Protection of Older Adults Referred to Public Guardian*, (Final Report, Institute for Policy and Program Development). Ethel Percy Andrus Gerontology Center.
- Teaster, P. B. (2002). The wards of public guardians: Voices of the unbefriended. *Family Relations, 51*, 344-350.
- Teaster, P. B. (2003). When the state takes over a life: The public guardian as public administrator. *Public Administration Review, 63*(4), 396-404.
- Teaster, P.B., & Roberto, K.A. (2002). *Virginia public guardian and conservator programs: Summary of the first year evaluation*. Report to the Virginia Department for the Aging, Richmond, VA.
- Teaster, P.B., & Roberto, K.A. (2003). *Virginia public guardian and conservator programs: A profile of programs*. Report to the Virginia Department for the

Aging, Richmond, VA.

U.S. House of Representatives Select Committee on Aging, Subcommittee on Health and Long-Term Care. (1987). *Abuses in guardianship of the elderly and infirm: A national disgrace*. (Comm. Pub. No. 100-641). Washington, DC: U.S. Government Printing Office.

U.S. House of Representatives Select Committee on Aging (1989). *Model standards to ensure quality guardianship and representative payee services*. (Comm. Pub. No. 101-729). Washington, DC: U.S. Government Printing Office.

U.S. Senate Special Committee on Aging (2003). *Guardianships over the elderly: Security provided or freedoms denied?* (Serial No. 108-3) Washington, D.C.: U.S. Government Printing Office.

Wendland-Bowyer, W. (2000, May 24-26). Who's watching the guardians? [Electronic version]. *The Detroit Free Press*.

Wood, E. F. (2004). *State guardianship legislation: Directions of reform*, An annual review. American Bar Association Commission on Legal Problems of the Elderly.

Wood, E. (1986, June). Statement of recommended judicial practices adopted by the national conference of the judiciary on guardianship proceedings for the elderly. (NCSC KF 553 .N37, 1986).

Chapter 2 Existing Literature

Professor Winsor Schmidt and his colleagues completed their landmark national study on *Public Guardianship and the Elderly* in 1981. Public guardianship was a fairly new phenomenon. The work of Schmidt and colleagues almost 25 years ago has remained the single national study of public guardianship and has been followed by only a small body of literature that belies the importance of the growing need for surrogate decision-makers of last resort.

Adult Guardianship Literature

Writings on public guardianship are set in the context of a much larger body of literature on the adult guardianship system generally, including a number of key law review articles and extensive recommendations for reform – but little empirical research. Some of the research is summarized in review articles (Schmidt, 1990; 2002).

Early Guardianship Reform

The authors of *The Mentally Disabled and the Law* trace the ancient history of guardianship through the centuries (Brakel, 1986) from the Golden Age of Greece and Roman times to early English law. Fourteenth century England brought the development of the concept of *parens patriae* in which the king and later the state serves as a benevolent parent with the responsibility of caring for those unable to care for themselves. The concept was embedded in Colonial law and later in the statutory scheme of each state.

The early stirrings of guardianship reform in the United States began in the mid-1970s. A visionary article on protective services for elderly people (Regan, 1972) found the state guardianship statutory criteria for incapacity “vague or overreaching,” attacked “the oppression latent in many of the present systems” of guardianship and recommended stronger procedural protections. Regan later solidified these views in a working paper on *Protective Services for the Elderly* prepared for the U.S. Senate Special Committee on Aging (Regan & Springer, 1977). The report observed that “protective service law is a two-headed creature, part Santa Claus and part ogre” (p. 27) – aptly capturing the inherent tension in guardianship between beneficence and autonomy, between needs and rights.

Regan’s emphasis on procedural safeguards was in contrast to that of another early writer on guardianship, Alexander, who argued bluntly that guardianship meets the needs of the guardians and others rather than the needs of vulnerable wards – and that it should simply be abolished (Alexander & Lewin, 1972). Later in the decade, other legal scholars and practitioners also produced key articles addressing the philosophical underpinnings of guardianship, the rights of proposed wards, and the strategies for reform (Horstman, 1975; Mitchell, 1978, 1979).

Another approach targeted judicial action as key to ensuring individuals' rights while providing for the needs of at-risk individuals with diminished capacity. The 1986 *Statement of Recommended Judicial Practices* resulted from a national conference of probate and general jurisdiction trial judges sponsored by the ABA Commission on Legal Problems of the Elderly and the National Judicial College. The recommendations addressed procedural due process safeguards, the determination of incapacity and methods of court oversight (Schmidt, 1987).

Throughout the 1980s, legal experts examined multiple aspects of guardianship law (Dudovitz, 1985; Frolik, 1981; Kapp, 1981; Parry, 1986). An innovative article by a health care professional helped to pioneer functional evaluation of alleged incapacitated persons (Nolan, 1984). A text edited by Apolloni and Cooke (1984) examined guardianship and alternatives from the perspective of parents and other care providers of individuals with disabilities. The Center for Social Gerontology in Ann Arbor Michigan produced a comprehensive manual, *Guardianship and Alternative Legal Interventions: A Compendium for Training and Practice*, that included curriculum materials, discussion problems, a case handling guide for legal practitioners, and an extensive annotated bibliography (The Center for Social Gerontology, 1986). This developing literature built an important base for change.

Associated Press Report and Response. The modern movement of guardianship reform began in earnest with a year-long Associated Press investigation in all 51 jurisdictions including an examination of over 2,200 court files and hundreds of interviews with wards, judges, lawyers, social workers, doctors, court clerks and academicians (Bayles & McCartney, 1987). The six-part national series, *Guardians of the Elderly: An Ailing System* decried a troubled system that declared elders as 'legally dead' and found overburdened courts, lack of monitoring, assessments based on ill-defined criteria and insufficient evidence, routine rubber-stamp appointments, and minimal awareness of alternatives. In quick response, the U.S. House Select Committee on Aging convened a hearing within days (Select Committee, *Abuses in Guardianship*, 1987) that presented a plethora of problems in both law and practice. The AP series and the House hearing triggered an interdisciplinary National Guardianship Symposium in 1988 that brought together 38 experts in law, disability, mental health, aging, judicial practices, medicine, and government. The conference resulted in 31 sweeping recommendations covering procedural issues, capacity assessment, and accountability of guardians (American Bar Association Commission on Legal Problems of the Elderly & Commission on the Mentally Disabled, 1988).

By 1988, the stage was set for an explosion of action in state legislatures throughout the nation. Each year over the next 15+ years saw the passage of a substantial number of guardianship measures (Hurme, 1995-96; Johns, 1999; Wood, *Directions of Reform*, annual update, www.abanet.org/aging). The new laws were marked by four trends – (1) enhanced procedural protections through better notice, legal representation and presence of the proposed ward at the hearing; (2) a more functional determination of incapacity; (3) use of the “least restrictive alternative” principle and encouragement of limited orders; and (4) strengthened oversight through reporting requirements, training for guardians, and sanctions. A number of legal writings traced these specific aspects of guardianship reform. For instance, Sabatino and Bassinger (2001) reviewed the changing statutory criteria for judicial capacity assessment. Gottlich (1995-96) as well as Calhoun and Bassinger (2000) discussed the right to counsel in guardianship proceedings. Meanwhile the Uniform Guardianship and Protective Proceedings Act that originated in 1969 was revised in 1982 and again in 1997, offering a model for state legislative action (National Conference of Commissioners on Uniform State Laws).

Guardianship practices by judges, attorneys, guardians, and others did not automatically follow statutory reforms, as chronicled in a number of writings. For example, one law review article found that while Maryland law had changed, “the actual process in most guardianship cases bears little resemblance to the process promised in the statute” (O’Sullivan & Hoffmann, 1995-96). Another maintained that “the changes in laws are a mask of virtual reality, hiding what is actually being done in the process” (Johns, 1997), and a third suggested that statutory changes face “powerful inertia” (Frolik, 1998). Keith and Wacker (1994), Johns (1997), and other critics describe insufficient accountability and judicial oversight. A host of press accounts detailed disturbing guardianship practices in which guardians, conservators, and courts failed to look out for the interests of wards for whom they were responsible (*Money*, 1989; *Detroit Free Press*, 2000; *Phoenix New Times*, 2000; *The Washington Post* 2003; *AARP Magazine*, 2003; *Detroit News*, 2004; *New York Times*, 2004).

Many national, state, and local efforts sought to strengthen guardianship practice. The National Guardianship Association produced a *Code of Ethics and Standards of Practice* for guardians. The National College of Probate Judges (NCPJ) produced *National Probate Court Standards* (Hannaford & Hafemeister, 1994; NCPJ 1994). The ABA Commission on Legal Problems of the Elderly and Commission on Mental and Physical Disability Law developed a comprehensive set of *Steps to Enhance Guardianship Monitoring* (Hurme, 1991); and The Center for Social Gerontology developed pilot projects and a manual on guardianship mediation. Zimny and Grossberg (1998) produced a text on the psychiatric and judicial aspects of guardianship of the elderly. State guardianship associations developed guardianship handbooks, curricula and videos. A few states took a broad-based look at how guardianship was functioning in practice (Fred, 2001; Geller, 1998; Harshbarger, 1996; Michigan Supreme Court, 1998;

Virginia Guardianship Task Force, 1993). Meanwhile, in the wake of the introduction of unsuccessful Federal legislation on guardianship, the U.S. Senate Special Committee on Aging held a *Roundtable Discussion on Guardianship* (Special Committee Print, 1992) to examine the possible Federal “hooks” for regulation and the use of incentives for improvement.

Empirical Research

Aside from the Associated Press report profiled above, only a few empirical studies of guardianship exist. Alexander and Lewin (1972) studied over 400 guardianships and concluded that as a device of surrogate management, it has been used largely by third parties to protect their own interests. A 1974 study in Cleveland, through the Benjamin Rose Institute, addressed the risks of well-meaning intervention in the lives of vulnerable older persons, finding that intervention resulted in a higher rate of institutionalization (Blenkner, Bloom, Nielson, & Weber, 1974). The contribution of elder protective referral, including guardianship, to nursing home placement was revisited and confirmed in an epidemiologically rigorous fashion 30 years later (Lachs, Williams, O’Brien, & Pillemer, 2002). In 1982, a Dade County Florida grand jury conducted a review of 200 random guardianship cases, finding that 87% of the cases were not up to date in the required annual personal status reports, and 75% were incomplete in financial reports, and 91% lacked timely physician reports (Grand Jury, Dade County, 1982). Another Florida study examined probate court records in Leon County (Peters, Schmidt, & Miller, 1985), finding that petitions were affirmed without evidence of alleged disabilities and recommending more comprehensive assessment and more rigorous financial accounting.

A Pennsylvania study of a sample of cases in three counties found neither significant positive impacts nor horror stories and made recommendations for improvement including use of alternatives to guardianship and avoidance of institutionalization (Cohen, 1983). A study of conservatorship cases in San Mateo County California looked at the cause of the petition and rates of institutionalization and mortality, and made observations about both underuse and overuse of guardianship (Friedman & Savage, 1988). A six-month ethnographic study in three Illinois counties involved courtroom observations and interviews with attorneys and program administrators (Iris, 1988), and presented findings on the use of medical and legal standards in determining the need for guardianship.

In 1994, The Center for Social Gerontology conducted a national study that examined the guardianship process intensively in ten states through observation of guardianship hearings, examination of court files, and telephone interviews with petitioners. The study found that only about one-third of respondents were represented by an attorney during the guardianship process; medical evidence was present in the court file in most cases, but medical testimony was rarely presented at the hearing; the majority of hearings lasted no more than fifteen minutes and 25% of hearings lasted less than five

minutes; some 94% of guardianship requests were granted; and only 13% of the orders placed limits on the guardian's authority (Lisi, Burns, & Lussenden, 1994).

Recent Developments

Several events during the past several years have turned public attention to the nation's adult guardianship system. In 2001, seven national groups convened a second national guardianship conference ("Wingspan") 13 years after the first national "Wingspread" conference to assess progress on reform. The conference resulted in yet another set of recommendations for action, as well as a landmark series of articles in the *Stetson Law Review* on mediation, the role of counsel, use of limited guardianship, fiduciary and lawyer liability, and guardian accountability (Stetson, 2002). In 2004, many of these same groups convened again to develop steps for implementation of selected recommendations.

Meanwhile, in 2002, a District of Columbia court of appeals overturned a lower court decision, *In re Mollie Orshansky* (804 A. 2d 1077 (D.C., 2002), that highlighted critical guardianship issues. The case and other guardianship rumblings prompted a hearing in 2003 by the U.S. Senate Committee on Aging, "Guardianships Over the Elderly: Security Provide or Freedoms Denied" – which in turn prompted a Senate request for a study on guardianship by the Government Accountability Office. The GAO study, *Guardianship: Collaboration Needed to Protect Incapacitated Elderly People*, surveyed courts in New York, Florida and California. Findings included significant variations in guardianship oversight, a marked lack of data on guardianship proceedings and wards, problematic interstate guardianship issues and lack of coordination between state courts handling guardianship and federal representative payment programs (GAO, 2004). Finally, in 2005, Quinn produced a comprehensive text for community health and social services practitioners, *Guardianships of Adults: Achieving Justice, Autonomy and Safety*, with an extensive reference list.

Public Guardianship Literature

Public guardianship is a last resort surrogate mechanism for vulnerable incapacitated individuals without family members or willing friends, attorneys, corporate trustees, or volunteers to serve as decision-maker. The literature on public guardianship is a small subset of the larger collection of guardianship writings. What little public guardianship literature exists falls into the overlapping categories of evaluative research, descriptions of state systems, policy recommendations and legal writings – with the extensive research of two authors, Schmidt and Teaster, bridging these categories and dominating the field.

Need for Public Guardianship

Little data exist on the unmet need for public guardianship. Studies in a few states have sought to estimate the number of individuals, frequently indigent, in need of a guardian and without willing relatives or friends. In 1987, Schmidt and Peters studied the

unmet need for guardians in Florida. The project surveyed the state mental health institutions, community mental health centers, offices on aging, and other agencies and found that over 11,000 individuals in Florida needed a guardian – and that these individuals typically were female, elderly, and predominantly white, with many having both medical and psychiatric conditions (Schmidt & Peters, 1987). Hightower, Heckert, and Schmidt (1990) assessed the need for public limited guardianship and other surrogate mechanisms among elderly nursing home residents in Tennessee and found that over 1,000 residents needed a surrogate decision-maker but had no one to assume the role. In addition, in some instances the facilities were serving as representative payee, representing a potential conflict of interest.

A 2000 report by Florida’s Statewide Public Guardianship Office stated that the need for public guardianship is approaching crisis proportions and estimated that 1.5 guardianships could be needed per 1,000 in the population (*Forgotten Faces*). A Massachusetts expert estimated that 10,000 Medicaid-eligible nursing home residents in the state needed but did not have guardians in 2000 (Ford, 2000). In 2002, a Virginia legislative study estimated that there were over 2,000 indigent, incapacitated persons in the state for whom no one was willing or able to act as guardian (Select Committee).

Early Study. In 1978-79, the ABA Commission on the Mentally Disabled (currently the Commission on Mental and Physical Disability Law) reported that while several states had enacted public guardianship programs, “little was known about their impact and operation in actual practice” (Foreword). Thus, the Commission undertook an initial inquiry, with profiles of public guardianship programs in Delaware and Minnesota, and concluded that “the laws of every state should sanction some form of impersonal guardianship.” It maintained that small public guardianship agencies tend to be more intimately involved with their wards yet larger programs may achieve “a more consistent and professional approach.” The report noted that existing programs had arisen “somewhat haphazardly” and that public guardianship issues required further study (Axilbund, 1979). Also in 1978, an article by Langden postulated that public guardianship is useful but steps must be taken to safeguard rights (Langden, 1978).

Landmark Report. In October 1978, Winsor Schmidt and his three colleagues at the Florida State University (FSU) Institute for Social Research began an intensive 15-month national study of public guardianship of the elderly, funded by the U.S. Administration on Aging. The intent of the study was to “assess the extent to which public guardianship assists or hinders older persons in securing access to their rights, benefits, and entitlements” (Schmidt et al., 1981, p. 3). The study reviewed existing and proposed public guardianship laws in all states, and focused intensively on five states with public guardianship programs (Maryland, Delaware, Illinois, Arizona, and California) and one state without public guardianship (Florida – which has since enacted a public guardianship statute). The review found that 34 states offered some statutory provision for public guardianship.

The full 1981 report, *Public Guardianship and the Elderly*, still stands as the seminal work on public guardianship. It presented a massive amount of information

including background, legal analysis, extensive data, and program profiles. It also included a model public guardianship statute. The findings of the study were many, and 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. It noted that “public guardianship offices seem to be understaffed and under-funded, and many of them are approaching the saturation point in numbers,” and that consequently many wards received little personal attention. It noted instances of flagrant abuse as well as instances of genuine concern and advocacy for the wards.

One critical inquiry concerned the governmental location of public guardianship programs. Professor Schmidt, using Regan and Springer’s taxonomy (1977), 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 report strongly maintained that naming social service agencies to act as public guardians represents an inherent or potential conflict of interest (Schmidt et al., 1981). The report also urged that programs that petition for adjudication of incapacity should not be allowed to serve as guardians and that strict procedures should accompany public guardianships. The report concludes with forthright recommendations quoted at the beginning of this report on the prerequisites for workable public guardianship systems.

Schmidt and colleagues followed up on this seminal research with a more focused examination of selected aspects of public guardianship. For example, a 1982 article examined possible alternatives to public guardianship – “benign neglect,” informal assistance outside of the legal framework, civil commitment to a mental institution (“poor man’s guardianship”), use of banks and trust companies to assume guardianship of property, and use of non-profit corporations to serve as guardian (a trend that has since grown markedly, with the development of many private non-profit and for-profit guardianship agencies). This and several other articles by Schmidt and colleagues were collected in *The Court of Last Resort for the Elderly and Disabled* (1995).

Research exploring alternatives to public guardianship was conducted by Wilber (1991). This study responded to the fact that one-third of persons referred to the public guardian in Los Angeles County were referred because of financial problems. Dividing 63 community-dwelling elders into trial and control groups, the trial group was offered Daily Money Management (DMM) service agencies (Wilber & Buturain, 1993), which consisted of “bill paying, budgeting, credit counseling, obtaining benefits, medical payment forms, and tax problems” (Wilber, 1991, p.151). Although DMM services forestalled persons’ evictions from homes and foreclosures, participation in the program did not affect appointment of conservatorship. A second study, conducted in 1995, used the same control group as in the previous study but embedded the DMM within a case management agency so that comprehensive services could be provided. As with the previous study, findings did not indicate a diversion effect. Despite the fact that other alternatives are available, particularly as they relate to money management, sometimes guardianship is the only viable option for persons who lack capacity; interventions prior to guardianship include those that are supportive, shared, delegated, and surrogated (Wilber & Reynolds, 1995).

Evaluative Research – State Public Guardianship Programs

Researchers have conducted evaluative studies of public guardianship in three states – Florida, Virginia, and Utah. Schmidt (1984) examined the evolution of public guardianship in Florida, comparing the initial operation of the state's two pilot projects – a staff-based program in Dade County and a volunteer-based model in St. Petersburg. A finding was that the volunteer model required significant staff time for volunteer management, at the cost of providing direct staff service to wards (Schmidt, 1984). Schmidt and colleagues further compared the two Florida pilots in 1988, examining characteristics of wards, role of family, changes in functioning levels of wards over time, use of guardianship plans, specific roles of guardianship staff, frequency of contact with wards, and cost. The study found that the programs were meeting the basic needs of the wards, that the functional assessment of the wards did not change significantly over the evaluation period, and that optimal use of guardianship plans required greater attention. It also noted limitations of the volunteer model.

In the mid-1990s, the Virginia Department for the Aging contracted for two pilot public guardianship programs, which were evaluated by Schmidt, Teaster, Abramson and Almeida. The 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 (Schmidt, Teaster, Abramson, & Almeida, 1997). The evaluation found the pilots viable. Based on the experience of the two pilot studies, the legislature created a statewide program with ten local/regional projects.

Teaster conducted additional in-depth examinations of data collected in Virginia, focusing on staff and volunteer models (Teaster, Schmidt, Abramson, & Almeida, 1999). Finally, Teaster (2003) also 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).

A legislatively mandated evaluation of these ten projects by Teaster and Roberto (2002) collected detailed information on program administration, ward characteristics, and ward needs. The study determined that the programs were performing reasonably well in serving the needs of incapacitated persons and recommended that the geographic reach be extended to cover all areas of the state. Other recommendations addressed the need for rigorous standardized procedures and forms for ward assessment, care plans and guardian time accounting, regular program review of these documents, the need for an established guardian-to-ward ratio, increased fiscal support, and more attention to meeting the needs outlined in the care plans. Importantly, the evaluation also found 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).

In 1996, The Center for Social Gerontology received support to conduct a multi-year national study of practices of guardianship service providers, including both public

and private non-family guardians. Although the study collected a significant amount of information at that time, it was not completed, and did not result in a report.

When the Utah legislature created an Office of Public Guardian in 1999, it required an independent program evaluation by 2001. The evaluation was conducted by The Center for Social Gerontology, and included on-site visits, interviews, and case file reviews. The study was conducted at an early stage in program operation and made many recommendations including the need for 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 (TCSG, 2001).

Additional Empirical Studies. A few other studies have added to the state of knowledge about the functioning of public guardianship programs, analyzing client and program characteristics. A California study examined 270 cases referred to the Los Angeles County Public Guardian over a three-month period. It found that 20% of referrals for public guardianship were appropriate; 80% of referrals were for individuals over age 60; and that the most common triggering problems were the wards' need for money management or asset protection, chronic or acute physical illness and/or mental impairments, and lack of family supports. Obstacles contributing to inappropriate referrals included: inadequate public guardian staffing, inadequate practitioner knowledge about community alternatives, and inadequate communication with prospective wards (Steinberg, 1985).

A unique study, drawing on interviews and case files from six sites in four states (Delaware, Maryland, Tennessee, and Virginia), sought to understand public guardianship from the perspective of wards. Wards were selected based on their ability to communicate and process information. Analysis showed that wards came from a variety of backgrounds, had feelings of loneliness and fear, and did not understand, or were not necessarily satisfied with, actions of the public guardianship programs (Teaster, 2000).

Another study compared client and program characteristics and outcomes of rural and urban public guardian programs, through data from client assessment instruments, care plans, and work activity logs for 14 clients in a rural program and ten clients in an urban program in Virginia. The research found that the rural program served a much less diverse population, provided similar or higher quality public guardian service, with better client planning and accountability and more direct contact hours per client, at a lower cost than the urban program. The study noted that use of volunteers without proper management, may create inefficiencies (Teaster & Roberto, 2001).

In 1998 and 2002 the National Guardianship Association (NGA) surveyed its members to gain a rough informal snapshot of practice, providing a rare glimpse of how public and private guardianship programs compare in key parameters such as services provided, budget, clients served, size and experience of staff, funding, caseload, and quality assurance measures. In 2002, information was collected from 39 for-profit

organizations, 39 not-for-profit organizations, 53 public agencies, and 48 solo practitioners (NGA, 2003). One of the most dramatic findings highlighted the difference in caseloads between private (for-profit, non-profit, and sole) and public guardianship agencies. For-profit guardianship agencies generally were able to maintain smaller caseloads (1-20 or 21-40), while public guardianship staff often strained under dangerously high caseloads (with ten reporting caseloads of 41-60, 11 reporting caseloads of 61-80, and seven reporting caseloads of 81-141+).

Model Statutes and Legal Writings

Ahead of its time, Legal Research and Services for the Elderly (LRSE) of the National Council of Senior Citizens proposed a model public guardianship statute as early as 1971. The proposed position of public guardian was to “provide free or low cost guardian and conservator services for . . . those persons who have no friends or relatives within the jurisdiction of the court able and willing to serve [and] persons whose income or wealth is inadequate to provide the requisite compensation to a private guardian or conservator” (Legal Research and Services for the Elderly, 1971). To promote a close liaison with the judge, the model statute made the public guardian an official of the Court. Regan and Springer’s paper for the U.S. Senate Special Committee on Aging in 1977 included a model statute based on the original LRSE statute. The 1981 report by Schmidt and colleagues also included a model public guardian statute that used these earlier models as a base.

By the early 1990s, the state statutory landscape had changed considerably. Legal scholars recognized the need to update the 1981 Schmidt statutory study and re-analyzed state public guardianship laws in 1993. They classified the then-existing state statutes according to Schmidt’s models, finding that seven states used an independent state agency, 12 states used a government agency providing social service, 12 states used the volunteer or contract model, 12 states used government employees not providing social services, and eight had no program. They conducted limited telephone interviews in five states (Alaska, Georgia, Idaho, Alabama, and Washington), and produced an article entitled “Public Guardianship: Where Is It and What Does It Need?” (Siemon, Hurme & Sabatino, 1993). Their brief exploratory research (conducted without any financial support) found that public guardianship offices were understaffed and under-funded and were approaching the saturation point in number of wards. Additional unpublished legal and programmatic research by law students focused on public guardianship programs in selected states (Ellis, 1995; Hirschorn, 1996).

Since the 1993 inquiry, a number of states have established statewide public guardianship programs: New Mexico consolidated guardianship services in various state agencies into a program within the attorney general’s office in 1995; Virginia established public guardianship within the department for the aging, to provide funding to local/regional projects throughout state in 1998; Utah’s (1999) program is located within the department of human services; it may contract with local providers and may recruit volunteers; Florida established its program in 1999 within the department of elderly affairs, with the option to establish local programs; and most recently, Oklahoma

established a pilot project in 2001, with statewide expansion to depend on evaluation and funding. Several other states made statutory changes in existing programs, established study commissions on public guardianship, or addressed the authority for social services agencies to be appointed as guardian. (Wood, 2003)

Research by the American Bar Association Commission on Law and Aging placed public guardianship in the context of a range of mechanisms for health care decision-making for “unbefriended” elders. The study identified four legislative solutions – (a) statutory authorization for health care consent by attending physicians, ethics committees or others (eight states); (b) external committees trained and authorized to make health care decisions (three states); (c) judicial authorization (at least five states); and (d) public guardianship. The report’s policy suggestions included the development of temporary medical treatment guardianship programs; support for public guardianship programs that are adequately funded and staffed; and further research concerning the quality of care and decision-making services in public guardianship programs (Karp & Wood, 2003).

Impetus for Current Study. Despite (1) the dramatic growth of the aging population (www.aoa.gov); (2) the growing prevalence of Alzheimer’s Disease and related dementias (with one in ten persons over age 65 and almost half of those over age 85 diagnosed with Alzheimer’s, [<http://www.alz.org/AboutAD/Statistics.htm>]); (3) the growth of the disability population (including an increasing number of persons with mental illness, mental retardation, developmental disabilities, and persons in the end stages of HIV/AIDS); and (4) the growth of public guardianship programs in response to this demographic shift, a full assessment of public guardianship has been sadly hampered by the absence of recent data and research. Aside from Schmidt’s groundbreaking but now quite outdated study (25 years ago), a mere scattering of state and local investigations, as described above, have contributed to the hazy picture of public guardianship. This study has sought to fill in the picture, advancing public understanding about the operation and effect of state public guardianship programs in the early 21st Century.

References

- Alexander, G. & Lewin, T. (1972). *The aged and the need for surrogate management*. Syracuse, NY: Syracuse University Press.
- American Bar Association Commission on Legal Problems of the Elderly and Commission on the Mentally Disabled. (1989). *Guardianship: An agenda for reform*. Washington, DC: American Bar Association.
- American Bar Association Commission on Legal Problems of the Elderly and National Judicial College. (1986). *Statement of recommended judicial practices on guardianship proceedings for the elderly*. (June). Washington, DC: American Bar Association.
- Armstrong, D. (2000). *The retirement nightmare: How to save yourself from your heirs and protectors*. Amherst, NY: Prometheus Books.
- Axilbund, M. (1979). *Exercising judgment for the disabled: Report of an inquiry into limited guardianship, public guardianship and APS in six states*. Washington, DC: American Bar Association.
- Bayles, F. & McCartney, S. (1987). Guardians of the elderly: An ailing system. *Associated Press, September*, pp. 1-26.
- Bell, W., Schmidt, W., & Miller, K. (1981). Public guardianship and the elderly: Findings from a national study. *The Gerontologist, 21*, 194-202.
- Blenkner, M., Bloom, M., Nielson, M., & Weber, R. (1974). *Final report: Protective services for older people: Findings from the Benjamin Rose Institute Study*. Cincinnati, OH: Benjamin Rose Institute.
- Brakel, S., Parry, J., & Weiner, B. (1986). *The mentally disabled and the law (3rd ed)*. Chicago: University of Chicago Press.
- Cohen, S., Leonnig, C., & Witt, A. (2003). Rights and funds can evaporate quickly. *The Washington Post, A1* (June 16).
- Commission on National Probate Court Standards. (1993). *National probate court standards*. Williamsburg, VA: The National College of Probate Judges, The National Center for State Courts.
- Dudovitz, N. S. (1985). The least restrictive alternative. *Generations: Journal of the American Society on Aging, 10(1) Fall*. 39-41.
- Ellis, R. (1995). *Public guardianship of the elderly: Case studies of the office of public*

- guardian in Delaware, Vermont and New Hampshire*. Unpublished paper for Law and Aging Seminar, Georgetown University Law Center. (Available from the ABA Commission on Law and Aging, Washington, DC.)
- Florida Statewide Public Guardianship Office (2000). *Forgotten Faces of Florida*.
- Ford, J. J. (2000). The ABC's of a Rudow guardianship. *The Best of MBA CLE, Massachusetts Bar Association*.
- Fred, M. (2001). *Illinois guardianship reform project: Final report*. Chicago: Equip for Equality, Inc.
- Frolik, L. (1981). Plenary guardianship: An analysis, a critique and a proposal for reform. *Arizona Law Review*, 23(2.) 599-660.
- Frolik, L. (1998). Guardianship reform: When the best is the enemy of the good. *Stanford Law & Policy Review*, 9(Spring). 347-358.
- Gottlich, V. (1995-1996). The role of the attorney for the defendant in adult guardianship cases: An advocate's perspective. *Maryland Journal of Contemporary Legal Issues*, 7(1) 191-221.
- Hannaford, P., & Hafemeister, T. (1994). The national probate court standards: The role of the courts in guardianship and conservatorship proceedings. *The Elder Law Journal*, 2(2) 147-166.
- Hightower, D., Heckert, A., & Schmidt, W. (1990). Elderly nursing home residents: Need for public guardianship services in Tennessee. *Journal of Elder Abuse and Neglect*, 2, 105-122.
- Hirschorn, R. (1996). *Profiles of public guardianship programs in selected states* (Arizona, Connecticut, Nebraska, New Jersey, New Mexico, Idaho). Unpublished profiles for University of Maryland School of Law, Maryland Public Interest Law Project. (Available from the ABA Commission on Law and Aging, Washington, DC.)
- Horstman, P. (1975). Protective services for the elderly: The limits of *Parens patriae*. *Missouri Law Review*, 40(2) 215-280.
- Hurme, S. (1991). *Steps to enhance guardianship monitoring*. Washington, DC: ABA Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly.
- Hurme, S. (1995-1996). Current trends in guardianship reform. *Maryland Journal of Contemporary Legal Issues*, 7(1) 143-189.

- Hurme, S. & Wood, E. (2001). *Wingspan issue brief: Public, agency and professional guardianship*. Unpublished paper for Wingspan, the Second National Guardianship Conference, Stetson University School of Law.
- Johns, A. F. (1999). Ten years after: Where is the constitutional crisis with procedural safeguards and due process in guardianship adjudication? *The Elder Law Journal*, 7(1) 33- 152.
- Johns, A. F. (1997). 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? *Stetson Law Review*, 27, 1-90.
- Kapp, M. (1981). Legal guardianship. *Geriatric Nursing*, 2, (5) 366- 369.
- Karp, N. (2004). Incapacitated and alone: Health care decision-making for unbefriended older persons. *The Journal, National College of Probate Judges*, 1(1) 10-15.
- Karp, N., & Wood, E. (2003). *Incapacitated and alone: Health care decision-making for the unbefriended elderly*. Washington, DC. American Bar Association Commission on Law and Aging.
- Karp, N., & Wood, E. (2004). Incapacitated and along: Health care and decision-making for the unbefriended elderly. *ABA Individual Rights and Responsibilities Journal*, 31(2) 20-23.
- Kilzer, L., Lindsay, S. (2001). The probate pit: Busted systems, broken lives. Stolen blind: Stricken man rages as system strips him of everything. Footing the bill: Brain-injured man pays hundreds for guardian's help shopping for shoes. *The Rocky Mountain News*, April 7- April 11. <http://rockymountainnews.com>. (Also at www.tcsg.org.)
- Lachs, Williams, O'Brien & Pillemer (2002). Adult protective service use and nursing home placement. *The Gerontologist*, 4(6) 734-741.
- Langden, W. (1978). Public guardianship. *Law & Human Behavior*, 2, 267-282.
- Legal Research and Services for the Elderly. (1971). *Handbook*. National Council of Senior Citizens.
- Leonnig, C., Sun, L., & Cohen, S. (2003). Under court, vulnerable became victims. *The Washington Post*, June 15, 2003, A1.
- Lisi, L., Burns, A., & Lussenden, K. (1994). *National study of guardianship systems: Findings and recommendations*. Ann Arbor, MI: The Center for Social Gerontology.

- Miller, K., Schmidt, W., Peters, R., & Loewenstein, D. (1984). *Second year evaluation of the Florida public guardianship pilot program*. Florida Institute for Social Research, for Florida Office of the State Courts Administrator.
- Mitchell, A. (1979). The objects of our wisdom and our coercion: Involuntary guardianship for incompetents. *Southern California Law Review*, 52, 1405-1449.
- Mitchell, A. (1978). Involuntary guardianship for incompetents: A strategy for legal services advocates. *Clearinghouse Review*, 12, 451-468.
- National Conference of Commissioners on Uniform State Laws. (1998). The uniform guardianship and protective proceedings Act, approved and recommended for enactment in all states (July 1997), with prefatory note and comments.
- National Guardianship Association. (2003). *Agency Directory*. Tucson, AZ: National Guardianship Association.
- National Guardianship Association. (2000). *Standards of practice*. www.guardianship.org.
- National Guardianship Association. (1998). *Agency Directory*. Tucson, AZ: National Guardianship Association.
- National Guardianship Association. (1991). *Code of ethics for guardians*. www.guardianship.org
- New, B. E. (1984). *Final Report of the Public Guardianship Pilot Program*. Tallahassee, FL: Office of the State Courts Administrator, Florida Supreme Court.
- Nolan, B. S. (1984). Functional evaluation of elderly in guardianship proceedings. *Law, Medicine & Health Care*, 12, 210-218.
- O'Sullivan, J. (1995-1996). The guardianship puzzle: Whatever happened to due process? *Maryland Journal of Contemporary Legal Issues*, 7(1) 11-80.
- Quinn, M. (2005). *Guardianship of adults: Achieving justice, autonomy, and safety*, Springer Publishing Company, New York.
- Regan, J. (1972). Protective services for the elderly: Commitment, guardianship and alternatives. *William and Mary Law Review*, 13, 569-622.
- Regan, J., & Springer, G. (1977). *Protective services for the elderly: A working paper*. U. S. Senate Special Committee on Aging.
- Rubin, P. (2000). Checks and Imbalances: How the state's leading private fiduciary

- helped herself to funds of the helpless. *Phoenix New Times* (June 15). phoenixnewtimes.com. (Also available at www.tcsg.org.)
- Sabatino, C. P., & Bassinger, S.L. (2000). Competency: Refining or removing our legal fictions. *Journal of mental health and aging* 6(2), 119-144).
- Sales, B.D., Powell, Matthew D., Van Duizend, Richard & Associates, "Guardianship and conservatorship." *Disabled persons and the law*. Developmental Disabilities State Legislative Project, American Bar Association Commission on the Mentally Disabled, pp. 455-662, Plenum Press, New York (1982).
- Schmidt, W. C. (2002). The wingspan of Wingspread: What is known and not known about the state of guardianship and public guardianship systems thirteen years after the Wingspread National Guardianship Symposium. *Stetson Law Review*, 31(3) 1027-1046.
- Schmidt, W. (Ed.) (1995). *Guardianship: The court of last resort for the elderly and disabled*. Durham, NC: Carolina Academic Press.
- Schmidt, W. (1984). The evolution of a public guardianship program. *Journal of Psychiatry and Law*, 12, 349-372.
- Schmidt, W. (May 1987). Recommended judicial practices in guardianship proceedings for the elderly. 61 *Florida Bar Journal*, 61, 35-40.
- Schmidt, W. (1990). Quantitative information about the quality of the guardianship system: Toward a next generation of guardianship research. *Probate Law Journal*, 10, 61-80.
- Schmidt, W. C., Miller, K., Bell, W., & New, E. (1981). *Public guardianship and the elderly*. Cambridge, MA: Ballinger Publishing Company.
- Schmidt, W.C., Miller, K.S., Bell, W. G. (1979). A national study: Public Guardianship and the elderly. Tallahassee, FLA: Florida State University Institute for Social Research.
- Schmidt, W. C., Miller, K., Peters, R., & Loewenstein, D. (1988). A descriptive analysis of professional and volunteer programs for the delivery of guardianship services. *Probate Law Journal*, 8, 125-156.
- Schmidt, W. C., Teaster, P. B., Abramson, H. & Almeida, R. (1997). Second year evaluation of the Virginia guardian of last resort and guardianship alternatives demonstration project. Richmond, VA: Virginia Department for the Aging.

- Schmidt, W. C., Teaster, P. B., Abramson, H. & Almeida, R. (1997). First year evaluation of the Virginia guardian of last resort and guardianship alternatives demonstration project. Richmond, VA: Virginia Department for the Aging.
- Schmidt, W. C., Teaster, P. B., Abramson, H. & Almeida, R. (1996). Preliminary evaluation of the Virginia guardian of last resort and guardianship alternatives demonstration project. Richmond, VA: Virginia Department for the Aging.
- Schulman, E. & Suskin, H. (1990). *Handbook for adult guardianship review boards of Maryland*. MD: Department of Human Resources, State of Maryland, Council of Adult Public Guardianship Review Boards of Maryland.
- Select Committee to Study the Statewide System of Providing Substitute Consent for People with Mental Disabilities. (2002). Report to the Governor and General Assembly of Virginia. H. D. No. 37.
- Siemon, D. (1992). *Public Guardianship*. Unpublished paper for Law and Aging Seminar, Georgetown University Law Center, (October).
- Siemon, D., Hurme, S., & Sabatino, C. (1993). Public guardianship: Where is it, and what does it need? *Clearinghouse Review* (October) 588-599.
- Steinberg, R. (1985). *Alternative approaches to conservatorship and protection of older adults referred to public guardian: Final Report for Policy and Program Development*. Ethel Percy Andrus Gerontology Center, University of Southern California.
- Teaster, P. B. (2003). When the state takes over a life: The public guardian as public administrator. *Public Administration Review*, 63(4) 396-404.
- Teaster, P. B. (2002) The wards of the public guardians: Voices of the unbefriended. *Family Relations*, 51, 344-350.
- Teaster, P. B. & Roberto, K. A. (2003). *Final Report: Virginia public guardian and conservator programs: Evaluation of program status*. Richmond, VA: Virginia Department for the Aging.
- Teaster, P. B., & Roberto, K. A. (2002). When the state takes over a life: The need for guardians of last resort. *Journal of Applied Gerontology*, 21, 176-187.
- Teaster, P. B., & Robert, K. A. (2001). *Rural and urban programs of public guardianship: Client and administrative characteristics and outcomes*. Salt Lake City, UT: For the Borchard Foundation Center on Law and Aging.

- Teaster, P. B. & Roberto, K. A. (2002). *Virginia public guardian and conservator programs: Summary of the first year evaluation*. Richmond, VA: Report to the Virginia Department for the Aging.
- Teaster, P. B., Schmidt, W. C., Abramson, H., & Almeida, R. (1999). Staff service and volunteer staff service models for public guardianship and 'alternatives' services: Who is served and with what outcomes? *Journal of Ethics, Law & Aging*, 5(2) 131-152.
- The Center for Social Gerontology. (2001). *Utah office of public guardian: Program evaluation*. Ann Arbor, MI: The Center for Social Gerontology.
- The Center for Social Gerontology. (1994). *National study of guardianship systems: Findings and recommendations*. Ann Arbor, MI: The Center for Social Gerontology.
- The Center for Social Gerontology. (1987). *Guidelines for guardianship service programs: Preliminary guidelines for development and operation of three program models – Public, corporate and volunteer*. Ann Arbor, MI: The Center for Social Gerontology.
- The Center for Social Gerontology. (1987). *Guidelines for guardianship service programs*. Ann Arbor, MI: The Center for Social Gerontology.
- The Center for Social Gerontology (1986). *Guardianship and alternative legal interventions*. Ann Arbor, MI: The Center for Social Gerontology.
- United States Government Accountability Office (GAO). (2004). *Guardianships: Collaboration needed to protect incapacitated elderly people*. Washington, DC: USGAO - Publication # 04-0655.
- United States House of Representatives, Select Committee on Aging. (1989). *Model standards to ensure quality guardianship and representative payee services*. Washington, DC. United States House of Representatives, Select Committee on Aging.
- United States House of Representatives, Select Committee on Aging. (1987). *Abuses in guardianship of the elderly and infirm: A national disgrace*. Washington, DC: Commission Pub. No. 100-641.
- United States House of Representatives, Select Committee on Aging. (1989). *Model standards to ensure quality guardianship and representative payee services*. Washington, DC: Comm. Pub. No. 101-729.
- United States Senate Special Committee on Aging. (2003). *Guardianship over the*

- elderly: Security provided, or freedom denied?* Washington, DC: Serial No. 108-3.
- Wall, T. S. (2001). Office of public guardian. *Utah Bar Journal*, 30, October 14.
- Wendland-Bowyer, W. (2000). Who's watching the guardians? The Detroit Free Press (May 24; May 25; May 26). www.freep.com. (Also available at www.tcsg.org.)
- Wilber, K. (1991). Alternatives to conservatorship: The role of daily money management services, *The Gerontologist*, 31, 150-155.
- Wilber, K.H., & Buturain, L. (1993). Developing a daily money management service model: Navigating the uncharted waters of liability and viability. *The Gerontologist*, 33, 687-691.
- Wilber, K.H., & Reynolds, S.L. (1995). Rethinking alternatives to guardianship. *The Gerontologist*, 35, 248-257.
- Wood, E. (2003). No one to decide: Public guardianship and other options of last resort. *National College of Probate Judges Life & Times*, 2(7) 22-24.
- Yeoman, B. (2004). Stolen lives. *AARP: The Magazine*, (Jan.-Feb.) 46-73.

Chapter 3 Analysis of Public Guardianship Law

State Statutes

As with the 1979-1981 study by Schmidt and colleagues, one of the first tasks of this study was to research state statutes to identify jurisdictions having provisions for public guardianship. Such provisions most frequently are included as a section of the state guardianship code, but in some states the public guardianship provisions are located in separate statutory sections. For instance, they are located under sections on services for the aging, APS, or services for individuals with disabilities.

The investigators defined *public guardianship* as “the appointment and responsibility of a public official or publicly funded organization to serve as legal guardian in the absence of willing and responsible family members or friends to serve as, or in the absence of resources to employ, a private guardian.” The Schmidt study used a similar definition. According to this definition, 40 states now have some statutory provision for a public guardian, as compared with 34 states in 1981. Eleven states have no statutory provision for public guardianship – although, in practice, they may or may not have programs. This study did not include a systematic search of all state APS statutes, which might reveal additional guardianship provisions. (Note: throughout this chapter the District of Columbia is counted as a state).

In both studies the total number referenced includes and distinguishes 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 (Schmidt, et al., 1981, p. 26).

Twenty-five 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. Today, research shows a total of 20 implicit statutory schemes in 19 states and 23 explicit schemes in 22 states. 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, over time states have shifted somewhat 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.

An understanding of public guardianship statutes requires a close look at the state guardianship codes on which they are based. While a full examination of the evolution of state guardianship statutory law is outside the scope of this project, the American Bar Association Commission on Law and Aging has tracked statutory changes annually since

1988 and continually compiles and updates the results, found in State Guardianship Statutory Tables at www.abanet.org/aging (ABA Commission & Hurme, “Legislative Updates”). This chapter includes: (1) a summary of state guardianship statutory elements in comparison to the findings of Schmidt of 25 years ago (see ABA tables referenced above), (2) a description of current elements of state public guardianship statutes in comparison with the Schmidt findings (Table 3.1, end of this chapter), (3) a description of proposed public guardianship legislation based on the project’s national survey, and (4) a brief discussion of the implications of these findings. Thus, the chapter takes two legislative “snapshots” a quarter of a century apart, and then looks to the future. The second part of this chapter examines court opinions involving public guardianship.

Changes in State Guardianship Statutes

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, which include the following elements.

Potential Petitioners

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 the states allow “any person” including the alleged incapacitated person to file, in line with the Uniform Guardianship and Protective Proceedings Act (UGPPA)(National Conference of Commissioners on Uniform State Laws, 1998), 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 conflict of interest (see below on provisions for public guardians petitioning).

Investigation

The Schmidt study included a section on state approaches toward “discovering the identity of those individuals who are in need of public guardianship services” (p. 34). At that time this problem had been 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 APS law (Stiegel, 1995) with professional reporting requirements, 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 (see Chapter 4). 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 than did in 1981.

Appointment Procedures

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 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 that could be 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, which calls for reasonable accommodations at the person's request.

Schmidt noted that some 11 of the states studied in 1981 gave an individual the opportunity to have a trial by jury. Today, approximately 28 states provide for trial by jury, generally if requested by the respondent. 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 uses a standard of "beyond a reasonable doubt," one uses a mere "preponderance of the evidence," and the remainder state no statutory standard.

A key to providing procedural due process for respondents 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 and that 17 made counsel available free of charge to indigent persons. Today, there is a growing recognition that a "right to counsel" may be an empty promise for a vulnerable indigent individual. Thus, approximately 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 a judge determines counsel is necessary. An additional question concerns the role of counsel for respondent. Whether the attorney should act in the "best interest" of the person or serve as a "zealous advocate" for the interests of the person, but not determine those interests, remains a contentious issue (O'Sullivan, 2002; Schmidt, 1993).

Statutory definitions of incapacity have undergone a significant evolution as well. In the early 1980s – and even today to a lesser extent – many states included the terms "mental illness," "mental disability," and "mental retardation," "mental condition," or "mental deficiency" in the statutory definition of incapacity. In other words, incapacity was based primarily on diagnosis of conditions – encompassing "physical disability" and

even “advanced age” in many state codes. These labels invite overly subjective and arbitrary judicial determinations, perhaps encouraging judges to defer to a clinician rather than assessing how impairments specifically might affect the person’s ability to make decisions and care for him or herself. Over time, states have sought to make the determination less reliant on medically oriented labels and more focused on how an individual functions in society, responds to information, and makes decisions (Sabatino & Bassinger, 2000). The UGPPA definition of an incapacitated person, serving as a model for a number of states, refers to a person who:

for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance (Sec. 102(5), National Conference of Commissioners).

Examination

Although definitions of incapacity have changed over time, clinical examinations continue to provide important evidence for judicial determinations. Schmidt found that 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 ten provided for other examinations. He also noted that some states required a more comprehensive capacity-specific assessment. Today, at least 32 states refer to examination by a physician and 16 specifically include a psychologist. Other examiners named by state statutes include psychiatrists, mental health professionals, social workers, nurses, and “other qualified professionals.” The UGPPA model calls for examination by “a physician, psychologist or other individual appointed by the court who is qualified to evaluate the respondent’s alleged impairment” (Sec. 306, National Conference of Commissioners). 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.

Termination

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 the death of the incapacitated person. Additional reasons cited by Schmidt included restoration to capacity or, in some cases, other changes such as exhaustion of the person’s estate or institutionalization of the ward. Today, the UGPPA model 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” (Sec. 318). The Uniform Act sets out a procedure for terminating a guardianship. Virtually all states provide a termination procedure.

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 may be particularly relevant for public guardianship, since vulnerable individuals without societal contacts – candidates for public guardianship appointment – frequently experience crises that put them in jeopardy. Schmidt indicated that only “a handful of states” had emergency procedures, and that these were set out in APS legislation and emergency guardianship procedures in “some states.” Currently, as indicated above, all states have APS legislation and programs in place, which frequently funnel cases to public guardianship programs. In addition, most states have provisions for emergency guardianships. One issue is that, typically, due process safeguards for emergency guardianships are less stringent 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. (See Barrett 1992-93, and also see *Grant v. Johnson*, 757 F. Supp. 1127, D. Or., 1991, which ruled a state emergency guardianship statute unconstitutional because it lacked sufficient due process protection).

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 – that incapacity need not be all or nothing. A limited guardian has powers only in those areas in which the person lacks capacity, allowing the ward to retain as much independence and autonomy as possible. This is in accordance with the principle of using the “least restrictive alternative.” 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. The concept, however, is difficult to put into practice (Schmidt, 1996). A 1994 study found that, nationwide, the overall use of limited guardianships (excluding one high use state) was about 5% (The Center for Social Gerontology, 1994; Hurme, 1995-96). Limited guardianship is mentioned specifically in several public guardianship provisions (see below).

Review of Guardianships

At the time of the 1981 Schmidt report, guardianship monitoring was fairly rudimentary, and 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 whatever review was provided focused primarily on property, neglecting examination of the condition of the ward. Currently, all states provide for regular – generally annual – financial accountings, and all except three states provide for regular status reports on the personal well-being of the incapacitated

person. 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 two years thereafter. Unfortunately, in practice, state courts often lack sufficient resources to fully implement a monitoring scheme (Hurme & Wood, 2001).

Veterans' Guardianship

Some states have established additional safeguards to protect respondents and wards who are veterans. About a third of the states (GAO, 2004) have adopted the Uniform Veterans Guardianship Act. The Act provides that the Department of Veterans Affairs can be a party in interest in a guardianship proceeding involving a veteran, and that no person other than a bank or trust company can be guardian of more than five veteran wards. The Act also sets out petition and bonding requirements. It requires the state court to notify the Department of Veterans Affairs upon appointment of a guardian for a veteran. Finally, it sets out accounting requirements to the court and to the Department of Veterans Affairs and provides that the guardian's report be sent to the Department, thus establishing useful coordination between these federal and state entities both working for the best interests of vulnerable, incapacitated veterans.

Elements of Public Guardianship Statutes

With the evolving nature of state guardianship statutory law as a backdrop, the current study focused particularly on key elements of public guardianship statutory provisions and sought to compare them with the 1981 provisions. Table 3.1 sets out the results in the following areas, paralleling the Schmidt study.

Eligibility

In 1981, the Schmidt study found that of the 34 states under analysis, 20 provided for public guardianship services for "incompetents" generally; 17 made specific provision 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 were temporary and could perhaps be served adequately by private resources.

Today, 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. As described above, 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. Only three of the statutory schemes (Alaska, North Carolina, and South Dakota) specifically reference minors, although several states use inclusive language such as “persons in need of guardianship services.” In Texas and other states, the protective services agency may be appointed guardian of minors as well as elderly or disabled persons. (In practice, states may serve primarily certain groups. See Chapter 4.)

However, a few statutory provisions 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. Two states – Maryland and New York – limit services to those requiring APS, and New York further limits the reach of its community guardianship program by specifying service only to those living outside of a hospital or residential facility. In at least two additional states and possibly more – Arkansas and Texas – the APS agency is authorized by statute to provide guardianship services to APS clients. (However, during this study, in Texas the guardianship function was being moved to the Department of Aging and Disability Services). In Arkansas, the APS agency serves as “legal custodian.”

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.

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,” and in Indiana, services are for indigent adults, as defined administratively. In Illinois, one scheme serves individuals with estates of \$25,000 or less; 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. On the other hand, Mississippi law specifies that appointment of the clerk as guardian is only for “a ward who has property.”

Scope

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. Interestingly, Schmidt remarks that the traditional terms “guardian” (as responsible for an individual’s care, custody and supervision) and “conservator” (as responsible for possession and control of an individual’s property) was a distinction then “being eroded.” That is not so today. The UGPPA makes a clear distinction between “guardianship” and “conservatorship,” and close to 20 states have adopted this distinction.

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, 29 state laws clearly 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 APS to provide “custodian” services of the person only and to identify a guardian of the estate if needed. In the remainder, there is no statement specifically in the public guardianship provisions granting or restricting services, but reliance on the overall guardianship code infers 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. See Chapter 4.) Schmidt observed that in many states there was only a slight mention of guardianship of the person, and the emphasis seemed to be on providing for property management. This may be less so today – at least on paper -- as guardianship codes have been revised to more clearly delineate the duties of the guardian of the person in procuring services and benefits, as well as maximizing autonomy.

Public Guardian as Petitioner

A question central to the operation of any public guardianship program is whether it can petition to serve as guardian. Such petitioning could present an apparent conflict of interest. For example: if the program relies on fees for its operation, or if its budget is dependent on the number of individuals served, it might be inclined to petition more frequently, regardless of individual needs. On the other hand, it might, as Schmidt points out, “only petition for as many guardianships as it desires, perhaps omitting some persons in need of such services.” 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 one state (Vermont) explicitly prohibits it. The remaining state statutes do not address the issue.

Who Serves as Public Guardian

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 this

project's national survey (see Chapter 4 reporting on the results and categorizing the programs).

The specific statutory provisions for each state are shown in Table 3.1. 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 (1977) 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. Below is a brief explanation of the models, which are explained in greater detail in Chapter 4.

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. Today, statutory provisions show three states (and four programs) with a court model – Delaware, Hawaii (large and small), and Mississippi.

Independent State 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 located 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 (p. 38).

Schmidt found that over one-half of the states studied placed the public guardianship function administratively so as to present a conflict of interest between the role of guardian (monitoring and advocating for services), and the role of social services agency (providing services). That is largely still true today. The percentage of states with statutes providing a potential for conflict appears to have increased. Some 25 or more of the 39 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 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 Public Guardian’s Office 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 wards. North Dakota allows any appropriate government agency to be appointed, *unless* it provides direct care and custody of the incapacitated person (unless 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 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 instance, 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.” It is notable that the model public guardianship statute developed by the Schmidt study in 1981 locates public guardianship at the county level.

Duties and Powers of 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, as shown in Table 3.1. For example, mandatory duties may include specified ward visits. Seven 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; and maintain records and statistics. Public guardianship statutes frequently set out additional powers as well as duties – for instance, the authority to contract for services, recruit and manage volunteers, and intervene in private guardianship proceedings if necessary.

Costs

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, 30 of the 38 states with statutory provision make some mention of cost. Ten 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 Elder 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 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) specifically provide 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 21 reference the ward. Seventeen reference both

the governmental agency and the ward for payment of guardianship services as well as costs and fees associated with initiation of the guardianship. A common scenario appears to be that the ward's estate pays, but if the ward is unable to pay, the county or state makes up the difference. A number of states mention recovery from the ward's estate after death, and two states (Indiana and New Jersey) allow for a lien on the estate. Statutes in six states (Idaho, New Jersey, Ohio, Oregon, Tennessee, and Utah) provide either that the court *may*, or the court *must*, at least waive filing fees or court costs for indigent wards.

Review of Public Guardianship

Public guardianship programs are subject to the same provisions for guardianship accountability and monitoring as other guardians (see above). However, in 18 states the public guardianship statute either specifically mentions that the program must report to court and abide by state requirements for guardian review, or provides for special additional oversight. Four states call for an annual report to the court, and one state (Delaware) specifies court review of public guardianship cases every six months. In Florida, the public guardianship office must report to the court, within six months of appointment, on efforts to locate a successor guardian and on potential restoration.

In addition to reporting to the court, several statutes call for annual reports on the program or individual 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.

Public Guardian as Limited Guardian

As indicated above, virtually all state guardianship codes now include language allowing or encouraging the court to limit the scope of the order to areas in which the ward lacks decisional capacity. In eight 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 (e.g., California and Illinois) the public guardianship program may petition to serve and could thus petition for a limited order.

Staffing Ratios/Criteria

In 1981, the Schmidt study endorsed public guardianship only "with adequate funding and staffing, including specified staff-to-ward ratios" (p. 174). It is significant that six 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. Finally, in Virginia the Department on Aging must adopt regulations including “an ideal range of staff to client ratios” for local/regional programs. Implementation of the ratios and effect on quality of care in these states bears study as a model for other jurisdictions.

Proposed Public Guardianship Legislation

The project’s 51-jurisdiction survey asked whether there were any proposed changes to the public guardianship statute currently pending. Twelve states indicated some pending legislative amendments. However, four of these provided no details or simply noted that minor legislative changes frequently are made. A few states noted proposals in the broader guardianship code – for example, a proposal in Kentucky concerning jury trials and evaluation professionals did not pass, and an amendment in West Virginia added authority for guardians to make certain decisions after the death of the ward. Two states addressed agency or professional guardianship. Alaska had just enacted a measure to provide for licensing of private professional guardians, and Virginia passed a provision clarifying that private not-for-profit agencies may serve as guardian. One state, Florida, had just enacted provisions establishing a matching grant program for the public guardianship office.

At the time of the survey or in the following months, five states had significant public guardianship legislation pending. A 2005 Nebraska bill would establish a public guardianship office within the judicial branch of government, responsible to the supreme court. Iowa proposed to establish an office of substitute decision-maker within the department of elder affairs. An Idaho proposal would set filing fees to be used for the establishment of a pilot guardianship project including consideration of a county office of public guardian. The 2005 Texas legislature, as part of a much larger revision of the state’s APS system, would remove the guardianship function from APS, providing that as a last resort only, the court may appoint the state Department of Aging and Disability Services as guardian, and that counties may contract with private professional guardians or guardianship agencies. A 2005 Georgia proposal would provide for counties to register and maintain a list of approved public guardians, with payment through the state agency on aging. Finally, a 2005 New Jersey proposal would provide for registration of professional guardians by the Office of Public Guardian.⁸

⁸ "Note: As of June 1, 2005, public guardianship provisions passed in Georgia, Idaho and Texas."

Appraisal

Clearly, much has changed since the Schmidt statutory review conducted by Schmidt (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 UGPPA has undergone two revisions and has been adopted in whole or piecemeal in a number of states. However, as shown by the ABA Commission on Law and Aging statutory tables, state guardianship law remains variable, causing particular problems when interstate guardianship issues arise (e.g., such as problems with court oversight or with unnecessary relitigation of capacity if the ward moves from one state to another. State statutes have made 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, which would be a helpful resource to states in enacting statutory provisions. A “then and now” statutory comparison shows that eight 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, the fact that six states now make statutory reference to staffing ratios is a great leap forward, probably attributable to the Schmidt study’s emphasis on adequate staffing. It is notable, however, that 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 remedy this with statutory language, the conflicting agency roles remain problematic.

Case Law

Evolving Guardianship and Disability Case Law

Case law affecting public guardianship includes court rulings in the broad arenas of adult guardianship and disability law, as well as rulings specific to public guardianship practice. Since the early 1980s, courts have ruled on multiple aspects of adult guardianship, interpreting the rights of the incapacitated individual and the guardian’s powers and duties. While trends are difficult to identify, a number of significant cases affected the direction of adult guardianship law as a whole and bear directly on the practice of public guardianship programs (Wood, in Quinn, 2005). For instance:

- The court in *In re Boyer*, 636 P.2d 1085 (Utah, 1981) found that a determination of incapacity must be based on the individual’s decision-making process rather than the decision made, and that the court must consider the least restrictive alternative, as well as the interest of the proposed ward in self-determination.
- A federal district court *Grant v. Johnson*, 757 F. Supp. 1127 (D. Or., 1991) ruled the Oregon emergency guardianship statute unconstitutional because it lacked sufficient

due process protections for the proposed ward. Because many wards come to public guardianship in a crisis situation, requirements for emergency guardianship are of critical importance.

- A number of cases such as *Harvey v. Meador*, 459 So. 2d 288 (Miss., 1984) held that old age alone was not a sufficient basis for a determination of incapacity.
- A host of cases, such as *Mack v. Mack*, 618 A 2d 744 (Md., 1993) grappled with the health care decision-making authority of guardians, including end-of-life decisions. A significant case was *Conservatorship of Wendland*, (No. S087265. Aug. 9, 2001), in which the California Supreme Court ruled that for conscious conservatees who have not left formal directions for health care and whose conservators propose to withhold life-sustaining treatment, “the conservator must prove, by clear and convincing evidence, either that the conservatee wished to refuse life-sustaining treatment or that to withhold such treatment would have been in his best interest.” The Florida case, *In Re Guardianship of Schiavo* – exhaustively litigated with many levels of review and garnering explosive national media attention in 2005 – highlights the importance of the role of guardians in decisions concerning life-sustaining treatment when there is no advance directive.
- The D.C. Court of Appeals overturned a probate court decision in *In re Mollie Orshansky*, 804 A. 2d 1077 (D.C. App., 2002), concluding that the lower court abused its discretion by not giving the ward’s advance planning instruments (a health care proxy to her niece and revocable trust with her sister) adequate consideration in the appointment of an attorney as guardian.

In addition, in 1999, the U.S. Supreme Court issued a landmark ruling on the Americans with Disabilities Act that directly affects public guardianship. In *L.C. & E.W. v Olmstead* 527 U.S. 581 (1999), the Court interpreted the ADA to require that states must provide services “in the most integrated setting appropriate to the needs of qualified individuals with disabilities.” As a result, the federal government has encouraged states to plan for approaches to fully integrate people with disabilities into community settings rather than institutional environments when appropriate (Fox-Grage, 2002). This includes social supports such as transportation, housing, education – and could include public guardianship if surrogate decision-making is needed to help assist individuals in their discharge from institutions or in living in the community. Thus, state “Olmstead Plans” may reference the unmet need for public guardians and support strengthening or expanding public guardianship programs (for example, see Virginia’s “Olmstead Recommendations Summary Matrix, #160, 2004). Moreover, the *Olmstead* decision offers a powerful mandate to public guardianship programs to decrease any unnecessary institutionalization of wards and to identify community living arrangements wherever possible.

Public Guardianship Cases

From the mid-1960s until now, there have been hundreds of reported case decisions involving public guardians. However, in the great majority of these cases, the public guardian is a party to the litigation or is mentioned in the case history but is tangential to the issues involved in the case. For purposes of this case review, the

decisions examined resolve issues integral to the appointment of, the role played by, or the removal of the public guardian. [Cases involving the particularities of a unique statute (e.g., California's landmark Lanterman-Petris-Short Act involving conservatorships for "gravely disabled" persons) are not included in this discussion.]

Early Cases

The Schmidt study discussed the three or four dozen significant cases that had been reported to date, primarily in the late 1970s and mainly in Arizona, California, and Illinois (Schmidt et al., 1981). Many of these early cases involved due process issues. These cases arose prior to or in the early stages of what can now be called a due process revolution in the field of guardianship as a whole. Starting in the late 1970s, states put procedural safeguards in place through dramatic changes in state guardianship statutes. The Schmidt study includes discussion of some cases involving guardianship proceedings generally (going beyond cases specifically involving *public* guardians). Such court decisions had an impact upon the actions and practices of public guardians as a sub-group of guardians acting under state law. Schmidt and colleagues grouped the pre-1981 case law into five categories:

- Public Guardian as Vindicator. These cases included affirmative lawsuits brought by public guardians on behalf of their wards in order to assert their rights (e.g., a California suit against a private attorney alleged to have coerced property from the incapacitated ward and a suit by the Illinois public guardian on behalf of state institution residents alleging grievous mistreatment over a thirty-year period).
- Grievances Against Public Guardians and Abuses of Wards. The wards in most of these cases claimed that their guardians had violated their due process rights. For example, several suits alleged that public guardians had institutionalized wards without the requisite court authorization. In other cases, public guardians sued state hospitals for providing harmful or inadequate care to involuntarily hospitalized patients.
- Administrative Problems of Establishing Guardianship Programs. These early cases highlighted the need for guardians of last resort for institutionalized and other incapacitated persons.
- Due Process. These decisions involved due process rights of the ward in guardianship cases, such as notice of the proceedings, right to be present, and legal representation of the proposed ward.

As Schmidt noted in 1981, the issue of due process safeguards in the guardianship context was an emerging one, and it was hard to assess the impact of the court cases on legislation involving public guardians at that time.

Since the Schmidt study, the focus of court cases specifically involving public guardians has shifted. While litigants have raised the due process rights of public guardianship wards in court cases as recently as 1999⁹, most decisions have focused on

⁹ *Tenberg v. Washoe County Public Administrator*, No. CV99-01170, unpublished pleadings (Nev. Dist. Ct. 2d Dist. 1999).

the requirements of state statutes – both general guardianship statutes and statutes specifically governing public guardianship. Most court decisions since 1981 address four issues: (1) the appropriateness of the appointment of a public guardian, (2) powers and duties of the public guardian, (3) the standard for removal of a public guardian, and (4) when a public guardianship terminates. Some cases do not fit neatly into one of these categories and raise other significant issues. Again, the majority of reported cases arose in a handful of states, primarily California, Illinois, Missouri, Minnesota, Arizona, and Delaware.

Appropriateness of Appointment

The case law on the appropriateness of the appointment of a public guardians falls into two categories. Many court cases raise the issue of whether the guardianship court appropriately appointed the public guardian rather than a willing (although not necessarily able) family member. A smaller number of cases address the appropriateness of appointing a public or community agency as a guardian of last resort when it is clear that no other person is appropriate, available, or willing to serve.

The first type of case generally arises when a relative or other third party appeals from the trial court's appointment of the public guardian, or when a relative seeks removal of the public guardian and appointment as successor guardian. These court decisions examine the state's guardianship statute on appointment and evaluate the trial court's application of the statute to the facts at hand. Because the standard for appellate review is whether the trial court abused its discretion in appointing the public guardian, the majority of these decisions affirm the public guardian's appointment.

Several Missouri Court of Appeals cases exemplify this trend. In *Couch v. Couch*,¹⁰ the court noted that while the Missouri guardianship law contains a hierarchy of who should be considered for appointment, relatives and "other eligible persons" hold the same rank in the hierarchy, and a public guardian is such an eligible person. In that case, the incapacitated person's son sought appointment, but where there was evidence of "adverse interests" of the children and family dissension, it was appropriate for the court to appoint the public administrator (who serves as public guardian under Missouri law). The following year, another Missouri decision, *In the Matter of Hancock*,¹¹ recognized that a nephew is entitled to preference under the statute but that the decision on whether to appoint him guardian was "in the sound discretion of the court." Where there was dissension among the nephews and the nephew in question presented inadequate methods of care for the ward, the appointment of the public administrator was appropriate. A third Missouri case, *In the Matter of Mitchell*,¹² raised the issue of whether an attorney-in-fact under a durable power of attorney should have been appointed rather than the public administrator. Where the record called into question whether the ward could understand the consequences of the power of attorney, the attorney-in-fact may have been seeking

¹⁰ 824 S.W. 2d 65 (Mo. App. 1991).

¹¹ 828 S.W.2d 707 (Mo. App. 1992).

¹² 914 S.W.2d 844 (Mo. Ct. App. 1996).

personal financial gain, and the public administrator has statutory duties and experience, the appellate court approved the trial court's appointment of the public administrator.

Similar cases show that this approach is not limited to Missouri. In a Montana case, the trial court appointed a state agency and the ward's father as co-guardians (*In the Matter of Co-Guardianship of D.A. Jr.*¹³). The state supreme court held that because the state agency had the expertise to provide assistance to the ward and the father did not possess all of the skills or resources required, the court did not abuse its discretion in creating the co-guardianship rather than appointing the father sole guardian. Similarly, a Tennessee appellate court pointed out that where a trial court determines that no family member can provide the proposed conservatee the supervision, protection, and assistance she requires, the court may consider appointing the public guardian (*In the Conservatorship of Groves*¹⁴). In a California case on the issue of whether the court should have appointed the conservatee's choice (not a relative), the appellate court found it appropriate to choose the public guardian because there was ample evidence to cast serious doubt on the proposed conservator's supervision of the conservatee's trust assets (*Conservatorship of Estate of Wilson*¹⁵).¹⁶

A pair of Delaware Chancery Court decisions shows that the trial judges in that state give less deference to family members than courts in other states. One case indicates that the public guardian is not treated as a guardian of last resort, and that a family member may face a substantial challenge in convincing the court not to appoint the public guardian. In that case, *In the Matter of Harris*,¹⁷ a daughter sought to succeed the public guardian as her mother's guardian. The judge stated, "In some instances a family member might be able to protect a disabled person's interest in a manner better than the Public Guardian," for example, where the public guardian has done a fine job but the family member "because of resources, knowledge of the disabled person's needs, and time to devote....might be able to do an even better job." The judge found that the daughter did not demonstrate that her case is "one of the few that might fall in that category." The court seems to set up a presumption that the Public Guardian is most appropriate, and that the family member has the burden of overcoming that presumption – perhaps because the posture of the case requires changing an existing appointment. Another Delaware case, *In the Matter of Bennefield*,¹⁸ doesn't go quite as far, but does state that the "wishes of the family...cannot dictate whether there should be a guardian and who that person should be" and opts for the public guardian over the daughter seeking guardianship.¹⁹

¹³ 323 Mont. 442, 100 P.3d 650 (2004).

¹⁴ 109 S.W.3d 317 (Tenn. App. 2003).

¹⁵ 2004 WL 1855594 (Cal. App. 1 Dist. Aug. 19, 2004).

¹⁶ In a Texas case involving the appointment of the APS agency (not a public guardian) as guardian, the appellate court said that the trial court did not abuse its discretion where the facts showed that the husband was incapable of caring for the wife, and the daughters declined to serve as guardian. Trimble v. Texas Department of Protective and Regulatory Service, 981 S.W.2d 211 (Tx. App. 1998).

¹⁷ 2003 WL 22843905 (Del. Ch. Nov. 14, 2003).

¹⁸ 1998 WL 1033060 (Del. Ch. Dec. 31, 1998).

¹⁹ These two cases are unreported trial court level decisions rather than appellate court opinions.

In several cases, appellate courts have held that the trial court erred in appointing a public guardian rather than a relative. In *Matter of Estate of Williams*,²⁰ the court stated that under Michigan's statutory scheme relatives are preferred and the probate court had no good cause to pass over the relative. Therefore, the daughter's designee should serve as conservator. Interestingly, the court allowed the public guardian in his "individual capacity" to serve as guardian of the person even though the state has no enabling legislation for the Office of Public Guardian. One Missouri case, *In re Estate of Romberg*,²¹ was decided in favor of the family member. The court pointed out that there is a preference for relatives under the statute, and, although not absolute, the facts of the case at hand did not fit under the exceptions to the preference. Therefore the trial court's decision to appoint the public administrator as guardian was reversed.

In the second line of cases on appointment, appellate courts recognize the significant need for guardians of last resort in states where they may be hard to come by. A 1984 Kentucky case, *Commonwealth v. Cabinet for Human Resources*,²² raised the issue of whether the district court could appoint the state agency as limited guardian and limited conservator of a mentally retarded adult where no one was available to serve. The state agency was unwilling to serve and maintained that the statute required the agency to agree to accept the role. The court found this statutory construction absurd: "If no person or entity were available and willing to be appointed, could the court 'appoint' the Cabinet for Human Resources only if it were available and willing? If it were not willing, would the court have any effective appointive power?" Clearly, the court found, the legislature intended to see that mentally retarded individuals are cared for by the state and the Cabinet can be forced to accept an appointment. Similarly in the *Co-Guardianship of D.A. Jr.* case cited above, the Montana court held that a state agency's appointment does not require state consent.

A New York decision overruled a trial court's appointment of a community guardian program as guardian for an institutionalized incapacitated woman. The trial court in *In re Jewish Association for Services for the Aged*,²³ had denied the conservator community agency's petition for a final accounting and instead appointed it as guardian, despite the New York law stating that an agency acting under the Community Guardian Program cannot provide services for a person who has entered a residential facility on a long-term basis. The trial court had recognized that its action was not permitted by statute, but because of the lack of funding for appointment of guardians under New York's Mental Hygiene Law, the court knew that it would be hard to find the elderly woman a guardian. The appellate court stated that "however well intentioned the court's motives, the statute clearly prohibits JASA from assuming this responsibility." Moreover, such an order frustrates the agency's ability to serve those who are able to remain in the community, and in bringing the appeal, the agency was placed in a position that could be deemed to create a conflict of interest with the ward. Thus state law

²⁰ 349 N.W.2d 247 (Mich. App. 1984).

²¹ 942 S.W.2d 417 (Mo. App. 1997).

²² 686 S.W.2d 465 (Ky. App. 1984).

²³ 251 A.D.2d 105, 674 N.Y.S.2d 34, (1st Dept. 1998).

frustrates the trial court's attempt to deal with the severe shortage of guardians for institutionalized incapacitated elders.

Powers and Duties of Public Guardians

A number of cases address whether public guardians have the authority to take actions or make decisions of critical importance to their wards. In most of these cases, the court's analysis focuses on whether a guardian has the requisite authority, not specifically on whether a *public* guardian has such authority. Several cases do discuss the particular qualifications or role of the public guardian in relation to the decision at hand. In some of these cases, the trial court's role in granting or withholding authorization of a guardian's actions also is a subject of the appellate court's opinion. Key issues in these cases include: the ward's placement outside the home, the public guardian's role in involuntary commitment cases, involuntary administration of neuroleptic medications, and the termination of life-sustaining treatment for wards in a persistent vegetative state.

A New Hampshire Supreme Court case exemplifies court decisions on the issue of institutional placement of a ward. In *In re Guardianship of Lanoue*,²⁴ the ward's husband appealed a probate court's order granting the public guardian authority to permanently place his wife in a residential facility. The husband claimed that there must be specific findings of harm to justify removing the ward from her home and that the guardian had to meet a weighty evidentiary standard of proving that the action was necessary to the ward's well-being. The appellate court determined there was no basis for those claims, finding that the state guardianship statute provides that the guardian "may establish the ward's place of abode" and that the probate court may uphold the guardian's decision to admit a ward into a private institution so long as the guardian restricts "the personal freedom of the ward only to the extent necessary." The facts of the case amply supported the public guardian's actions and the probate court's decision.

Two recent court decisions impact the role of the public guardian in civil commitment cases. A 1994 Florida case, *Handley v. Dennis*,²⁵ dealt with an apparent conflict between the Baker Act (Florida's involuntary placement statute) and the state's guardianship law. Under the Baker Act, the public defender has a duty to represent indigent mental patients in hearings to determine the need for continued involuntary placement at a state hospital and to advocate for transfer to a less restrictive environment if appropriate (even if it is outside the judicial circuit). All guardians, on the other hand, must obtain a court order before approving a change in the ward's residence and, in particular, to petition the court for authority to change the ward's residence from one county to another.

In the case at hand, the hospital administrator and the public defender sought to move the ward from the state hospital to a less restrictive facility outside of the circuit, and the guardian opposed the move, claiming that the public guardian must be consulted

²⁴ 802 A. 2d 1179 (N.H. 2002).

²⁵ 642 So.2d 115 (Fla. 1 Dist. App. 1994).

on such a transfer. The appellate court held that the ward's right under the Baker Act to be released to a less restrictive environment takes precedence over the duty of the guardian and the power of the circuit court in the guardianship proceeding. If the ward must be moved outside the circuit pursuant to a ruling in a Baker Act proceeding, the public guardian should file a motion to withdraw and to transfer the guardianship case to the appropriate circuit. The court noted that because public guardians do not exist in every circuit, there may not be suitable guardians willing to serve in the new circuit. However, the court emphasized that wards should be guaranteed that a successor public guardian is appointed and that "by assuming jurisdiction over citizens pursuant to [the guardianship law], the State of Florida bears a great responsibility to ensure that these persons are adequately cared for."

An Illinois case, *Williams v. Staples*,²⁶ arose in a more unusual posture. A criminal defendant was committed to state custody and a state mental health center after being found not guilty of murder by reason of insanity. After he had been committed for more than the maximum time he would have had to serve for the crime, he sought release. A lower appellate court directed the appointment of the public guardian to ascertain whether civil commitment proceedings should be commenced. The Illinois Supreme Court found the appointment unnecessary because, pursuant to state statute, the State's Attorney, not the public guardian, is the proper party to initiate civil commitment proceedings.

Another key issue addressed in some court decisions is the adequacy of procedural protections for mentally ill and/or mentally retarded wards before psychotropic or neuroleptic medications can be involuntarily administered and the authority of the public guardian to consent to such medication.²⁷ Two Minnesota decisions specifically address due process challenges to treatment with neuroleptic medications with the public guardian's consent. In the first, *In the Matter of Blilie*,²⁸ a mentally retarded and mentally ill woman contended that her right to privacy was not adequately protected because the state statutory scheme subjected her to intrusive forms of therapy without independent judicial review and with an inadequate approval system. The state statute creates a series of procedural protections (including approval of a *guardian ad litem* and a multidisciplinary treatment review panel) for mentally ill patients regarding administration of neuroleptics, but for mentally retarded patients seems only to require consent of the patient or the patient's guardian. The court held that the statutory scheme is constitutional but requires the same procedural protections for both populations, except that a public guardian may be substituted for a court-appointed *guardian ad litem* for mentally retarded patients. In explanation, the court stated that the public guardian, who has a wide range of duties with regard to the patient, has much

²⁶ 208 Ill. 2d 480 (2004).

²⁷ Numerous cases around the country have ruled on involuntary administration of psychotropic drugs, e.g. *Riese v. St. Mary's Hospital and Medical Center*, 243 Cal. Rptr. 241 (Cal. App. 1 Dist. 1988), *Rogers v. Okin*, 478 F. Supp. 1342 (D.C. Mass. 1979), but most of them do not involve the authority of guardians generally or public guardians specifically, although they may significantly impact the actions of guardians for this population. Neuroleptic medications are a sub-category of psychotropic drugs.

²⁸ 494 N.W.2d 877 (Minn. 1993).

broader knowledge of the patient's needs than would a *guardian ad litem* appointed for this limited purpose.

In a subsequent Minnesota Supreme Court decision, *In re Conservatorship of Foster*,²⁹ the issue of whether a county public conservator who has been granted power to consent to necessary medical care may consent to treatment with neuroleptic medication without additional court approval. The public conservator's authority to consent to the use of neuroleptic medication is governed by a specific statute on public guardianship for adults with mental retardation, the general guardianship statute, and state administrative rules on consent to psychotropic medication by county staff acting as public conservator. The state statute does not explicitly require prior court approval of psychotropic medication, while it does require such approval for electroshock, sterilization or experimental treatment. Given the extensive review and approval process in place under the state rules, the court held that as long as the district court found that the conservatee lacked capacity to make medical decisions and granted the public conservator the power to consent to necessary medical care and treatment, due process does not require further specific court approval.

At least two cases addressed the power of public guardians in relation to withdrawal of life-sustaining treatment. These decisions are relatively old (1987 and 1990) in the context of the host of recent cases grappling with the health care decision-making authority of guardians, but they remain good law. Both decisions permit the public guardian to take an active role in this type of health care decision-making. In *Rasmussen by Mitchell v. Fleming*,³⁰ the public fiduciary sought appointment as guardian of a nursing home patient in a chronic vegetative state in order to consent to removal of a feeding tube and to consent to "do not resuscitate" and "do not hospitalize" orders in her chart. The trial court appointed the public fiduciary as guardian without restriction. The Arizona Supreme Court held that the public guardian had implied statutory authorization (under Arizona's guardianship law) to exercise the patient's right to refuse treatment without further court involvement. An Illinois case, *In re Estate of Greenspan*,³¹ addressed more explicitly the public guardian's role in a case involving withdrawal of life-sustaining care. The court addressed a challenge to the public guardian's standing to petition for withdrawal of nutrition and hydration from the ward in a persistent vegetative state, stating first that when the public guardian's appointment complies with the public guardianship statute, the public guardian has the same powers and duties as other guardians (with certain irrelevant exceptions). Because guardians generally have standing to file such petitions, the public guardian does as well.

Standard for Removal of Public Guardian

In two cases in which relatives sought to have public guardians removed and to be appointed as successor guardians, appellate courts interpreted statutory provisions

²⁹ 547 N.W.2d 81 (Minn. 1996).

³⁰ 154 Ariz. 207, 741 P.2d 674 (1987).

³¹ 138 Ill. 2d 1, 558 N.E.2d 1194 (1990).

requiring “good cause” for removal of a guardian. In *Matter of Estate of Williams*,³² the ward’s adult child and sole heir sought to succeed the public guardian. Because she indicated her desire to assume responsibility for her father’s affairs, had not been kept well informed of his condition, was granted statutory priority under the probate code and followed proper procedures to assume responsibility upon reaching the age of majority, the appellate court found that she demonstrated good cause for removal. The trial court in *Estate of Debevec*,³³ granted a petition to remove a public guardian and substitute the ward’s sister. In determining whether the decision was against the weight of the evidence, the appellate court addressed the meaning of “other good cause” in the statute. The court held that it does not require a finding of malfeasance or dereliction of duty by the guardian, although it does require more than the relative’s desire to be appointed. Where the ward expressed a preference for the sister to act as guardian, the sister was willing, loving and caring, and she visited daily, the record as a whole supported the trial court’s decision to remove the public guardian.

*Conservatorship of Geldert*³⁴ also involved a sister’s petition for appointment as conservator to replace the public conservator appointed under Minnesota’s Mental Retardation Protection Act. The Appellate Court held that the appropriate statutory standard was the general guardianship statute’s provision for removal despite the existence of a specific statute on conservators for mentally retarded adults. This standard was whether the guardian had failed to perform the duties associated with the guardianship or to provide for the ward’s best interests (rather than the trial court’s criterion that the public guardianship was no longer necessary because an acceptable alternative was available). The court recognized that “public guardianship is viewed as the most restrictive form of guardianship and, as a matter of policy, should be imposed only when no other acceptable alternative is available” but found that once a public guardianship has been established, removal is governed by the general statute’s removal criteria.

Termination of Guardianship

Two Illinois cases address whether certain actions to resolve fee or property issues may be taken by the public guardian after the death of the ward.³⁵ The general rule is that the guardianship terminates upon the ward’s death and that the guardian’s only interest after death is as an unpaid creditor, but these holdings are not specific to public guardianship.

³² 349 N.W.2d 247 (Mich. App. 1984).

³³ 195 Ill. App. 3d 891,552 N.E.2d 1043 (Ill. App. 5 Dist. 1990).

³⁴ 621 N.W.2d 285 (Minn. App. 2001)

³⁵ *In re Estate of Ramlose*, 344 Ill. App.3d 564, 801 N.E.2d 76 (Ill. App. 1 Dist. 2003); *In re Estate of Burgeson*, 125 Ill. 2d 477, 532 N.E.2d 825 (1988).

Other Significant Cases

In several cases, wards have alleged serious, multiple misdeeds and failings on the part of their public guardians. The cases arose in very different postures and were resolved in widely divergent manners.

A Minnesota case raised the potential conflict of interest that can arise when state or county personnel play multiple roles in relation to incapacitated wards. *Crawford v. Minnesota Department of Human Services*³⁶ involved Minnesota's statute and rules on provision of services to persons with mental retardation. The mentally retarded plaintiff, who received services from a county case manager who also served as his public guardian, attempted to challenge the case manager's actions and failures through an administrative appeal process. The Commissioner of Human Services dismissed the appeal for lack of jurisdiction, claiming that the plaintiff's complaints related to the case manager's role as public guardian, not case manager, and should have been brought to the probate court. As the appellate court pointed out, "we find it impossible to determine which of the two roles the case manager was exercising" when she supported the ward's demission from a group home, neglected to get an advocate involved on the ward's behalf, and supported criminal prosecution of the ward, among other actions. Thus the ward was entitled to the administrative appeal under state law. Ironically, the court pointed out that the "dual role" played by Crawford's case manager contravened a state statutory directive to the Commissioner to adopt rules to require that the duties of guardianship and case management not be performed by the same person. Further, the court stated that the Commissioner's jurisdiction in the administrative appeal includes the question, "(D)id the case manager properly arrange for, monitor, and assure the quality of guardianship services provided to Crawford, and did she assure that laws and rules governing provision of guardianship services were followed?" In remanding the case for appropriate handling of the administrative appeal, the court clearly pointed out the obvious conflict of interest faced by the plaintiff's case manager.

*Young v. Murphy*³⁷ addressed the question of when a public guardian has immunity against tort liability. A ward's estate sued state attorneys, public guardians, and a doctor hired by the public guardian, alleging multiple constitutional violations. The federal district court had dismissed many of the plaintiff's claims based on qualified immunity. The appellate court explained that "the defense of qualified immunity shields government officials performing discretionary functions from liability...insofar as their conduct does not violate clearly established statutory or constitutional rights." In this case, the public guardians were entitled to assert the defense because their duties required that they exercise discretionary government functions. The court reviewed the constitutional claims raised and found that the complaint failed to allege a clearly established constitutional violation. Therefore, the public guardian was entitled to qualified immunity and to have the complaint dismissed.

³⁶ 468 N.W.2d 583 (Minn. App. 1991).

³⁷ 90 F.3d 1225 (7th Cir. 1996).

Finally, *Tenberg v. Washoe County Public Administrator*,³⁸ a class action lawsuit filed in Nevada, appears to be the only case of its kind, brought on behalf of a significant number of wards and alleging sweeping failures on the part of the public guardian. Plaintiffs alleged that the county public guardian failed to initially assess or reassess wards, develop written care plans, monitor wards, place them in the least restrictive environment, and maintain sufficient professional staff, in violations of the wards' state and federal substantive due process rights as well as the state guardianship statute requiring proper care and maintenance. The case was settled and thus did not yield a published court opinion. The consent decree included provisions addressing the broad allegations of the case, such as agreement to separate the duties of the county public guardian from the public administrator, to use National Guardianship Association (NGA) standards as a guide, to hire an expert consultant during the creation of the new public guardian's office, and to use a case management protocol guided by NGA standards and performed by a qualified professional staff.

Appraisal

In 1981, the Schmidt study observed that the majority of court cases reviewed as of that time involved due process complaints and that the impact of the cases on legislation and on day-to-day public guardianship practice was unknown. In the past 25 years, court rulings on adult guardianship have broadened to include important aspects of assessment, guardian authority, and use of the least restrictive alternative. A significant number of cases specifically have involved public guardianship appointment, powers and duties, and removal. It is difficult to tease out the effect of these cases from other factors bearing on public guardianship systems, but taken together they have raised the visibility of the programs and sharpened their contours.

The 1999 *Tenberg* class action suit in Nevada is a notable step in the use of litigation to address broad-based failures of a public guardianship program to adequately care for wards. It offers a model for advocates in other locales in which public guardianship practice may lag behind statutory reform, be stretched thin through insufficient funding, operate with insufficient professional staff, or lack effective accountability mechanisms.

The Supreme Court's groundbreaking 1999 *Olmstead* decision may be the key for persuading state policymakers to devote additional resources to public guardianship and other surrogate decision-making mechanisms – and for fostering renewed emphasis by public guardianship leadership and staff on appropriate placement of wards in community-based settings. The full effect of *Olmstead* on public guardianship has yet to be felt.

³⁸ No. CV99-01170, unpublished pleadings (Nev. Dist. Ct. 2d Dist. 1999).

References

- American Bar Association Commission on Law and Aging & Hurme, S. State adult guardianship legislative charts. <http://www.abanet.org/aging/guardianship.html>.
- Barrett, P. (1992-93). Temporary/emergency guardianships: the clash between due process and irreparable harm. *Bifocal*, American Bar Association Commission on Legal Problems of the Elderly, 13, 3-7.
- Fox-Grage, W., Folkemer, D., & Lewis, J. (2002). The states' response to the Olmstead decision: How are states complying? National Conference of State Legislatures. <http://www.ncsl.org/programs/health/forum/olmsreport.htm>.
- Hurme, S. (1995-96). Current trends in guardianship reform. *Maryland journal of contemporary legal issues*, 7(1), pp. 143-189.
- Hurme, S., & Wood, E. (2002). Guardian accountability then and now: Tracing tenets for an active court role. *Stetson Law Review*, 31, 867-940.
- National Conference of Commissioners on Uniform State Laws. (1998). The uniform guardianship and protective proceedings act, approved and recommended for enactment in all states (July 1997), with prefatory note and comments.
- O'Sullivan, J. (2002). Role of the attorney for the alleged incapacitated person. *Stetson Law Review*, 31, 687-734.
- Regan, J., & Springer G. (1977). *Protective services for the elderly*. A working paper prepared for the Special Committee on Aging, U.S. Senate.
- Sabatino, C. P., & Bassinger, S.L. (2000). Competency: Refining or removing our legal fictions. *Journal of mental health and aging* 6(2), 119-144).
- Schmidt, W. (1993). Accountability of lawyers in serving vulnerable, elderly clients. *Journal of Elder Abuse and Neglect*, 5(3), 39-50.
- Schmidt, W. (1996). Assessing the guardianship reform of limited guardianship: Tailoring guardianship or expanding inappropriate guardianships? *Journal of Ethics, Law, and Aging*, 2(1), 5-14.
- Schmidt, W.C., Miller, K., Bell, W., & New, E. (1981). *Public guardianship and the elderly*. Cambridge, MA: Ballinger Publishing Company.
- Stiegel, L. (1995). *Recommended guidelines for state courts handling cases involving elder abuse*. American Bar Association Commission on Legal Problems of the Elderly. Washington DC.

- The Center for Social Gerontology. (1994). *National study of guardianship systems: Findings and recommendations*. Ann Arbor, MI: The Center for Social Gerontology.
- Wood, E. (2005). History of guardianship, in Quinn, M., *Guardianships of adults: Achieving justice, autonomy and safety*. (pp. 17-48). New York: Springer Publishing Company.
- U.S. Government Accountability Office. (2004). *Guardianships: Collaboration needed to protect incapacitated elderly people*, GAO-04-655.
- Virginia *Olmstead* Task Force. (2004). First annual implementation team report to oversight advisory committee: July 15, 2004. One community: The *Olmstead* initiative. <http://www.olmsteadva.com/ImplementationTeamReport.htm>

Table 3.1 2005 Compilation of State Public Guardianship Statutes

	AL	AK	AZ	AR	CA	CO	CT
Statutory Location	Ala. Code 26-2-26 & 26-2-50	Alaska Stat. 13.26.360 through 13.26.410 410	Ariz. Rev. Stat. 14-5601 through 14-5606	Ark. Code Ann. 5-28-309	Cal. Govt. Code 27430 through 27436; Probate Code 2920 through 2922; Welf & Insts.Code 5354.5	No provision	Conn. Gen. Stat. 45a-651
Type	Implicit	Explicit	Explicit	Implicit	Explicit		Implicit
Subjects of Public Guardianship		Incapacitated persons or minors who need guardian	Persons or estates who need guardian	Maltreated adults	Persons domiciled in county who need guardian; persons gravely disabled by chronic alcoholism		Incapacitated persons 60+ who need guardian, assets not exceeding \$1500
Scope (Governs Both Property & Person)	Property only	X	X	Personal only	X		X
PG Petition					X		
Who Serve as PG - Governmental Location	General county conservator or sheriff	Office of Public Advocacy, in Dept of Administration	County board of supervisors appoint public fiduciary	APS (serves as "custodian")	County board of supervisors create office of public guardian		Commissioner of social services; may contract with public or private agency
Duties of PG Specified		1,2,3,5,6,7,8		1,8	2		
Powers of PG Specified		A, C,D,E	B,G		G		C
Costs -State Appropriations Specified							X
Costs -Borne by County or State			X		X		
Costs-Borne by Ward Review - Specified for PG		X	X		X		
PG as Limited Guardian		X			X		
Staffing Ratio/Criteria							

Table 3.1 2005 Compilation of State Public Guardianship Statutes

DE 12 Del. Code 3991 through 3997	DC No provision	FL Fla. Stat. Ann. 744.701 through 744.709	GA Ga. Code Ann. 29-5-2; 29-8-1 through 29-8-5	HI Haw. Rev. Stat. 551A-1 through 9; 551-21	ID Idaho Code 15-5-601 through 603
Explicit Disabled persons who need guardian for reasons other than minority		Explicit Incapacitated persons who need guardian, primarily of limited financial means	Implicit	Explicit Incapacitated persons who need guardian	Implicit Persons who need guardian
X		X	X	X	X
Office of Public Guardian in judiciary		Statewide Public Guardianship Office in dept of elderly affairs. Statewide office establish local offices in counties or judicial circuits	Director of county department of family and children's services as guardian of person; county administrator as ex officio county guardian.	Office of Public Guardian in Judiciary, appointed by chief justice. Clerk of court as guardian of property if estate below \$10,000.	Board of county commissioners create board of community guardian
		1,2,5,8		1,6,7	1, 8
B		A,C,D		A,F	A,G
X		X		X	
X		X		X	X
Annual budget to general assembly; annual report to chancellor & general assembly; court review cases every 6 months		Local offices file annual report with statewide office; report to court within 6 months of appt; independent audit every 2 years		Annual report to chief justice	Annual report to board of county commissioners
		1:40 ratio of professional staff to wards			

Table 3.1 2005 Compilation of State Public Guardianship Statutes

IL – 1 20 ILCS 3955/1 through 5; 30 through 36	IL – 2 755 ILCS 5/13-1 through 5	IN Ind. Code 12-10-7-1 through 9	IA Iowa Code 217.13	KS Kan. Stat. Ann. 74-9601 through 9606	KY Ky. Rev. Stat. 210.290
Explicit Disabled adults who need guardian, estate \$25,000 or less	Explicit Disabled adults who need guardian, estate exceeds \$25,000	Explicit Incapacitated, indigent adults (defined)	Implicit Persons who need guardian	Explicit Adults who need guardian; & non-adjudicated persons who elect voluntary conservator & no one to serve	Implicit Residents adjudged partially disabled or disabled who need guardian
X		X	X	X	X
X Office of State Guardian, in Guardianship and Advocacy Commission	Governor appoint suitable person as county public guardian; for counties over 1,000,000 chief circuit court judge appoint attorney as county guardian	Adult guardianship services program in division of disability, aging and rehabilitative services, Family and Social Services Admin. contracts with regional non-profits	Volunteer program coordinated by dept of human services	A public instrumentality with board appointed by governor, including chief justice; coordinates volunteer guardians	X Cabinet for families & children
1,3,8	1,3,8	4,8	2,8		
A,F,G	A,G			X	
X	X	X		X	
X Annual report to governor	X Annual report to circuit court clerk	Periodic audit of regional providers submitted to division		Annual report to governor, legislature, judiciary & public; Monthly report on expenditures to board; annual audit	X
X	X	X			

Table 3.1 2005 Compilation of State Public Guardianship Statutes

LA No provision	ME Me. Rev. Stat. Tit. 18A; 5-601 through 614	MD Md. Code Ann. 14-102; 203	MA No provision	MI No provision	MN - 1 Minn. Stat. 252A.01 through 21	MN - 2 Minn. Stat. 524.5-3-3; 524.5-502; 626.557	MS Miss. Code 93-13-21
	Explicit Mentally retarded; other incapacitated persons	Implicit Individuals requiring APS but unwilling or unable to accept services voluntarily			Explicit Mentally retarded persons who need guardian	Implicit Incapacitated adults who need guardian; maltreated vulnerable adults	Implicit Ward who has property
	X				X	X	
	X Dept of behavioral & developmental disabilities for persons with mental retardation; dept human services for others	X APS [By rule local agencies on aging for elderly & local social services for others]			X Commissioner of human services	X County contract for services, & county employee serve if no other	Chancery court appoint clerk of court
	1,8				1,3,6,7,8		
	A,G				A,G		
	X					X	
	X Annual review each case filed with court	County review board conduct review of each public guardianship case every six months			Annually review of status of every ward; quarterly reviews of service records	X	X
	X				X		

Table 3.1 2005 Compilation of State Public Guardianship Statutes

MO Mo. Ann. Stat. 473.730 & 750; 475.055	MT Mont. Code Ann. 72- 5-312(5)	NE No provision	NV Nev. Rev. Stat. 253.150 through 250	NH N.H. Rev. Stat. Ann. 547-B:1 through B:8	NJ N.J. Stat. Ann. 52:27G-20 through 31
Implicit	Implicit		Explicit State residents who need guardian; lack sufficient assets	Explicit 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	Explicit Elderly state residents 60+ who need guardian
X				X	X
County public administrator of each county; social service agencies in counties of designated size (unless provide residential services to ward).	State or federal agency authorized to provide direct services to incapacitated persons		County board of commissioners establish county public guardian program	Dept of health & human services contracts	Public guardian office in Dept of community affairs; appointed by governor
1,8			1,5,8	1	1,4,5,7,8
			A,B,C	A,G X	A,D,E X
			X	X	
			X	X Annual reports to probate court; court must review	X
					X
					Office determine maximum caseload based on funding; when maximum reached may decline appt.

Table 3.1 2005 Compilation of State Public Guardianship Statutes

NM N.M. Stat. Ann 28-16B-1 through 6	NY N.Y. Mental Hygiene Law 81.03(a); Social Services Law 473-d	NC N.C. Gen. Stat. 35A- 1213 & 35A-1270 through 1273	ND N.D. Cent. Code 30.1-28-11	OH Ohio Rev. Code ann. 5123.55 through 59	OK 30 Okla. Stat. 6-101 & 102
Explicit Income eligible incapacitated persons	Implicit Persons receiving APS & living outside hospital or residential facility	Explicit Incapacitated persons or minors for which 6 months have elapsed from discovery of person's property without guardian	Implicit	Implicit Persons with mental retardation or developmental disabilities	Explicit Persons who need guardian
				X	
X Office of guardianship in developmental disabilities planning council	X Local dept of social services; may contract with community guardian program	Clerk appoint disinterested public agent without conflict of interest	Any appropriate gov't agency, unless provides direct care & custody (unless court finds no substantial risk)	Department of mental retardation & developmental disabilities contract with public or private agency	Office of public guardianship in Dept of human services [subject to funding; not activated until pilot expanded & evaluated]
1,4,7,8	1,8	1			2,3,5,7,8
X		A			B,C,D,E X
X	X			X	
Office monitor & enforce contracts with guardianship providers	X Files & records of program open to social services inspection	X		Annual review filed with dept	
					X
Contract with providers include maximum caseload					

Table 3.1 2005 Compilation of State Public Guardianship Statutes

OR Or. Rev. Stat. 125.700 through 730	PA 20 Pa. Stat. Ann. 5511	RI No provision	SC S.C. Code 62-5-105	SD S.D. Codified Laws 29A-5-110	TN Tenn. Code Ann. 34-7-101 through 105	TX Texas Human Resources Code 48.209
Explicit Persons who need guardian	Implicit Incapacitated persons who need guardian & no less restrictive alternative		Implicit Patients of state mental health facility	Implicit Protected persons & minors	Explicit Disabled persons 60+ who need guardian	Implicit Elderly or disabled persons in state of abuse, neglect or exploitation; minors
X	X		Property only (not over \$10,000)		X	X
X County court or board of commissioners create office of public guardian	Guardianship support agencies		Director of department of mental health or designee. (Also, a "suitable institution" may serve as guardian.)	Dept of human services or dept of social services	Program administered by commission on aging; contracts with district agencies	Department of Protective and Regulatory Services
1	1,6,8				1,2	
A,B	A,G				A,D,G X	C
X					X	
X	X				X Funds under computerized accounting package approved by commission; annual audit	
					Maximum caseload certified by commission upon review of documentation by district programs	

Table 3.1 2005 Compilation of State Public Guardianship Statutes

UT Utah Code Ann.62A-14-101 through 112	VT Vt. Stat. Ann. 3091 through 3096	VA Va. Code Ann. 2.2-711 through 713; 2.2-2411	WA No provision	WV W. Va. Code 44A-1-8(g) & (h)	WI No provision	WY No provision
Explicit Incapacitated persons who need guardian	Explicit Incapacitated persons 60+ who need guardian	Explicit Incapacitated persons who need guardian, without sufficient financial resources		Implicit		
X		X				
X Office of public guardian in dept of human services	No Office of public guardian in dept of aging & disabilities	Public Guardian & Conservator Program in dept for the aging; contracts with local/ regional programs		Dept of health and human resources designate agency under its supervision; county sheriff may be appointed		
1,2,8	1,2,3,5,8	1,2,4,5,8				
A,C,D	A,G	A,B,D,G X				
X		X				
X Office monitor status of each ward; handle funds with dept's trust account system; annual dept audit; report to governor & legislature on request; independent evaluation; policy board	Annual report to court on efforts to locate private guardian	Annual report to governor & legislature; evaluation every 4 years if funding; advisory board				
	Dept may adopt rules with standards on maximum appointments accepted	Dept regulation include ideal range of staff to client ratios for local/regional programs; procedures for disqualification of programs below or exceeding ratio				

Table 3.1 2005 Compilation of State Public Guardianship Statutes

KEY for Table 3.1 Statutory Public Guardianship Chart

X= state has provision

Duties

1= same as private guardians; secure & monitor services; make personal & health decisions; manage estate

2=attempt to find private guardian

3=visit ward regularly

4=hire staff, contract with providers

5=maintain records, statistics

6=assist private guardians, petitioners, *guardians ad litem*, courts

7=provide public information on guardianship & alternatives

8=other

Powers

A=same powers as private guardians

B=delegate to staff; delegate to subordinates

C=contract with providers

D=recruit and coordinate volunteers; accept volunteer services

E=intervene in private guardianship proceedings

F=advise on maximum autonomy

G=other

Chapter 4 The National Survey of Public Guardianship

This chapter reflects the results of a national survey on public guardianship. The purpose of the survey was to gather the most recent and accurate information on public guardianship available from each state. The first of a three-tiered approach to establishing a national picture of public guardianship (the national survey) included information on administrative structure and location in government (e.g., administrative location in government, availability of services, outsourcing); functions of the program (e.g., clients served, services provided, ability to petition); staffing (e.g., number of wards served, hours required per ward, staff requirements); and wards (e.g., referral sources, types of guardianships, demographic characteristics); as well as additional background information (Appendix A).

Methods

Survey Development

In early 2004, the research team developed the *National Survey of Public Guardianship* using the original survey conducted by Schmidt and colleagues as a baseline (Appendix B). For many questions, (e.g., numbers of petitions, wards served, hours spent per ward), information gathered was based on a program's 2003 Fiscal Year (FY) data. Development of the survey included input from Marta Mendiondo, Ph.D., the University of Kentucky (UK) biostatistical consultant on the research team, as well as from Winsor Schmidt, J.D., L.L.M., consultant, Washington State University. The advisory committee also reviewed the survey and made recommendations either by e-mail communication or during telephone conferences arranged specifically for that purpose.

The survey was pilot-tested by Sue Crone, APS and State Guardianship Manager (Kentucky) and by Cherie Mollison, National Guardianship Association board member (Michigan). Based on the results of the pilot tests, revisions were again made to the survey. The survey was then sent by e-mail to a pre-established list of state contacts in April 2004. Collection and verification of survey information continued through January 2005.

Data Analysis

Data from the surveys were entered into SPSS, a data analysis software package, for analysis by Susie Lawrence, UK doctoral candidate in gerontology. A random portion of surveys were double-entered by Erin Abner, a UK student pursuing a master's degree in public health. Data were compared for errors, which were then resolved. Data were analyzed using frequencies and descriptive statistics.

Response Rate

We obtained a 100% response rate to the survey, only after numerous follow-up telephone calls and e-mail messages, including, and on more than one occasion, actually filling out the survey at a pre-arranged time with state contacts on the telephone. The

100% response rate means that we received at least one response from every state as well as Washington, DC, for a total of 71 responses. These responses include two each from Hawaii (i.e., Hawaii Large and Hawaii Small), and Illinois [e.g., Office of the State Guardian (OSG), and Cook County's Office of the Public Guardian (OPG)]. Additionally, we received responses from four counties in Nevada and 16 from Florida (Florida responses were routed to us through the Statewide Office of the Public Guardian). Although statistically, "do not know" and "no data provided" are equivalent and considered missing data, if a program responded not knowing the answer to a given question, we *did not* treat this as missing data. Information presented follows, generally, the order in which questions were asked in the survey, followed by information broken out by type of guardianship model, the rationale for which is explained below.

Results

Of the 51 jurisdictions surveyed, 36 responded that they had public guardianship programs, while 17 responded that they did not. The total response rate is greater than 51 because Hawaii and Illinois indicated having two public guardianship programs each and submitted separate surveys. Upon closer examination of the surveys and the statutes, it became evident that 48 jurisdictions do, in fact, have some form of public guardianship, while only three jurisdictions have none (District of Columbia, Nebraska, and Wyoming). Wyoming had established statutory provision for public guardianship in 1993, but it was repealed in 1998.

The earliest established public guardianship program is that of Missouri, which dates back to 1880. One program was established in 1907 (Minnesota), one in the 1930s (Hawaii Small), one in the 1940s (Los Angeles, California), and two programs were established during the 1960s (Connecticut and Kentucky). During the 1970s, ten programs were established [Arizona, Delaware, Georgia, Illinois (1976 OPG; 1979 OSG), Kansas, Maryland, New Hampshire, Nevada, and Oregon]. The 1980s saw a comparable rate of establishment of programs with nine more programs (Alaska, Arkansas, Hawaii Large, Idaho, Indiana, Maine, New Jersey, Tennessee, and Vermont). In the past fifteen years, an additional nine programs were established (1990s: Louisiana, Montana, New Mexico, Utah, Virginia, and West Virginia; 2000-2005: Florida, Oklahoma, and Rhode Island). Four states with public guardianship (Alabama, Colorado, Michigan, and South Dakota) did not provide us with the date their program was established. The balance of states either do not have statutorily established programs, although many of them do, in fact, provide public guardianship services, or did not report the year established.

Administrative Location in Government

Of significant concern to practitioners, advocates, researchers, and policymakers is the governmental/administrative location of the public guardian. The survey offered five options: a) court system, b) independent state office, c) division of a state agency, d) county agency, and e) other. Upon analyzing responses, it became clear that the original taxonomy developed by Regan and Springer (1977) was more appropriate and accurate,

and so data were reexamined and classified into the original four models: a) the court model; b) an independent state office; c) social service agency or social service provider; and d) county plan.

Due to differences among states as to placement of social service agencies (i.e., state level vs. county level) it was critical to triangulate information provided on the surveys with data from the state statute in order to accurately categorize the states as to model. Therefore, inclusion of the states within each model is based not only upon responses received from individual jurisdictions but also upon the careful consultation of the researchers and examination of state statutes, located in various sections of state codes [e.g., probate, mental health, guardianship, public guardianship, APS (APS)].

Description of the Models

Originally proposed by Regan and Springer (1977), and used by Schmidt and colleagues (1981), the models can best be described as follows:

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

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

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

The **county** model establishes a public guardian within each county. The local official may be more sensitive to the needs of the elderly [or incompetent] in a particular county. The public guardian is appointed by the county government. The state attorney general would regulate these county offices (Schmidt, Miller, Bell & New, 1981; pp. 59-60).

By far, the majority of public guardianship programs ($n = 33$) were administratively housed within existing social service agencies, followed by the county model ($n = 10$), and the independent state office and court model ($n = 4$, each) (Table 4.1). Thus, 48 states include some form of public guardianship, a departure from the 34 number reported in 1981, and only three states have no public guardianship.¹ A brief, state-specific explanation of our categorization is contained in Appendix F.

¹ In this study, Washington, DC was treated as a state.

Table 4.1 Models of Public Guardianship Programs – FY 2003

Court Model	Independent State Office	Within Social Service Agency	County Model	None
Delaware DE	Alaska AK	Arkansas AR	Alabama AL	District Columbia
Hawaii (Large) HI-L	Illinois (OSG) IL	Colorado CO	Arizona AZ	Nebraska NE
Hawaii (Small) HI-S	Kansas KS	Connecticut CT	California CA	Wyoming WY
Mississippi MS	New Mexico NM	Florida FL	Idaho ID	
		Georgia GA	Illinois (OPG) IL	
		Indiana IN	Nevada NV	
		Iowa IA	North Carolina NC	
		Kentucky KY	North Dakota ND	
		Louisiana LA	Oregon OR	
		Maine ME	Wisconsin WI	
		Maryland MD		
		Massachusetts MA		
		Michigan MI		
		Minnesota MN		
		Missouri MO		
		Montana MT		
		New Hampshire NH		
		New Jersey NJ		
		New York NY		
		Ohio OH		
		Oklahoma OK		
		Pennsylvania PA		
		Rhode Island RI		
		South Carolina SC		
		South Dakota SD		
		Tennessee TN		
		Texas TX		
		Utah UT		
		Vermont VT		
		Virginia VA		
		Washington WA		
		West Virginia WV		
		Wisconsin (Volunteer & Corporate Guardian) WI		

After much consideration, we determined that the most effective way to present the information gathered was to break the results down by model. We discuss the court model first, followed by the independent state office (ISO), the division of a social service agency (DSSA), and close our model discussion with the county model. Discussion of the models is followed by a brief examination of similarities and differences across all models.

Court Model

We received detailed responses from three of the four programs following a court model. All data were missing from Mississippi. The remaining three programs responded that state funds are their only funding source. Budgets, from state funds, for FY 2003 ranged from \$419,500 (Delaware) to \$562,000 (Hawaii Large). Programs provided, where possible, information on the amount of additional funding that would be necessary to provide adequate public guardianship services: responses ranged from \$150,000 (Delaware) to \$500,000 (Hawaii-Large). We also asked how much budgets should increase in order to comply with a ratio of one guardian to 20 wards as recommended by Schmidt, Teaster, Abramson, and Almeida, (1997). The range required to comply was \$150,000 (Delaware) to \$1,500,000 (Hawaii Large).

Administrative Features

The three reporting programs were coordinated at the state level and provided services (none contracted out) across the entire state (Table 4.2). Only Hawaii’s Small guardianship program reported proposed statutory changes. Although Hawaii (Large) reported being authorized to collect a fee, only Delaware reported being authorized to and actually collecting an administrative fee.

Table 4.2 Administrative Features – Court Model

Court Model – Administrative Features			
Feature	Yes	No	Missing
Independent/Local/Regional		3	1
Coordinated at State Level	3	-	1
Available to All in State	3	-	1
Services Contracted Out	-	3	1
Administrative Regulations	1	1	2
Proposed Changes to Statute	1	2	1
Authority to Collect Fee	1	2	1
Actually Collect Fee	1	2	1

Total Court = 4

Function of the Public Guardian

Information on the function of the public guardian included extent of decision-making, delivery of services, and whether or not the program served clients other than the wards. Two programs (Hawaii Large and Delaware) made decisions about wards’ personal and financial affairs, and advocated for, arranged delivery of, and monitored delivery of services. One program served clients other than wards (Delaware) (Table 4.3). No programs served as financial or health care power of attorney, and only one (Hawaii Small) served as representative payee, trustee (Delaware), or personal representative of decedents’ estates (Delaware). Hawaii Small and Delaware petition for adjudication of

legal incapacity. Hawaii Large and Delaware reported petitioning for themselves as guardian.

Table 4.3 Function of the Public Guardian – Court Model

Court Model – Function of the Public Guardian			
Function	Yes	No	Missing
Decision-making			
Wards Personal Affairs	2	-	2
Wards' Financial Affairs	2	-	2
Delivery of Services			
Monitor Delivery of Services	2	1	1
Arrange Delivery of Services	2	1	1
Advocate for Services	2	1	1
Direct Provider of Services	2	1	1
Serve Clients Other Than Wards	1	2	1
Other Services Provided			
Financial Power of Attorney	-	3	1
Health Care Power of Attorney	-	3	1
Representative Payee	1	2	1
Trustee	1	2	1
Personal Representative of Decedents' Estates	1	2	1
Private Guardian Services	-	3	1
Other	2	1	1
Outreach Services			
Educate Community	2	-	2
Technical Assistance to Private guardians	-	2	2
Monitor Private Guardian	1	2	2
Other	-	2	2
Petition for Adjudication of Incapacity	2	1	
Petition for Self/Agency as Guardian	2	-	2

Total Court = 4

All data missing from Mississippi

Staffing of the Public Guardianship Program

Educational requirements for public guardians, personnel management tools used, and training provided for PG staff are provided in Table 4.4. There were 1,824 wards served by three of the four jurisdictions in FY 2003. Programs reported 23 full-time equivalent staff on March 2, 2003, with three additional volunteers. Respondents did not know average hours spent per ward per year.

Table 4.4 Personnel Management – Court Model

Court Model – Personnel Management		
	Yes	No
Education		
High School	1	-
Bachelor’s Degree	1	-
Master’s Degree	-	-
Other	1	-
Volunteers Used*	1	2
PG Program Policies & Procedures – Standards of Practice	2	1
State Guardianship Statutes	2	1
Written Personnel Policies	3	-
Written Job Descriptions	3	-
Interview Forms	1	2
Internal Staff Evaluation & Review Procedures	1	2
Ongoing training and Educational Materials for Staff	2	1
Annual or More Frequent Training Sessions	1	2
Other	1	2

Total Court = 4

* Number of Programs using volunteers

All data missing from Mississippi

Ward Information

Demographic information on wards included gender, age, ethnicity, and race. Not all programs were able to provide us with this level of detail. Hawaii Large and Delaware provided information on gender (with 50% male and 50% female). Only Hawaii Large provided us with information on wards’ age: 37% were aged 65+, while the remaining 62% were between the ages of 18 and 64. No programs provided us with information on ethnicity or race of wards – three did not know, and one provided no data. Hawaii Large provided the number of low income wards for FY 2003, Hawaii Large and Delaware provided the number of wards who had died in FY 2003, Hawaii Small indicated that it did not know, and data from Mississippi were missing (Table 4.5).

Table 4.5 Ward Demographic Information – Court Model

Court Model – Ward Demographics		
Characteristic	N	%
Sex		
Male	516	50
Female	527	50
Do not know (programs reporting)	1*	-
Age		
Aged 65 or Over*	319	37
Aged 18-65*	531	62
Aged less than 18*	-	-
Do Not Know (programs reporting)	2	-
Low Income*	808	-
Died in FY 2003	70	-

* Number reported by one program, two replied that they did not know.
All data missing from Mississippi

Referral Source

Hawaii Large and Delaware’s programs provided us with the number of wards referred to them by various programs (Table 4.6). Mental health facilities accounted for the greatest number of referrals (41%), followed by APS (29%).

Table 4.6 Referral Sources – Court Model

Court Model – Referral Source		
	N Referred	% Referred
APS	269	29
Mental Health Facility	85	9
Hospital	375	41
Private Social Service Agency	-	-
Nursing Home	47	5
Other	21	2
Attorney	9	1
Other Public Social Service Agency	94	10
Family	-	-
Jail/Prison/Police	-	-
Friend, Legal Aid, LTC Ombudsman	17	1
Total	917	

Total Court = 4
All data missing from Mississippi

Extent of Guardianship

Hawaii Large and Small and Delaware provided us with information regarding the extent of guardianship provided the wards in their care (Table 4.7). None of the programs served as limited guardian of either person or property. They served as guardian of the person only for a total 1,011 wards (56%) and as guardian of the property only for 702 wards (36%). They served as guardian of the person and property for 89 wards (5%).

Table 4.7 Extent of Guardianship – Court Model

Court Model – Extent of Guardianship		
Extent	N	%
Guardian of Person Only	1011	56
Guardian of Property Only	702	39
Guardian of Person and Property	89	5
Limited Guardian of Person	-	-
Limited Guardian of Property	-	-

Total Court = 4

All data missing from Mississippi

Primary Diagnosis and Setting of Wards

Numbers for primary diagnosis were reported only by Hawaii Large. Hawaii Small and Delaware reported that they did not know this information, and Mississippi data were missing (Table 4.8). Moreover, none of the states provided residential information on the wards. Consistent with the age of the wards reported, most had a primary diagnosis of developmental disability (n = 468, 55%) followed by Alzheimer’s disease or dementia (n = 289, 34%). An additional nine percent (n = 80) were diagnosed with mental illness. Three programs (Hawaii Large and Small and Delaware) responded that they did not know the residential setting of wards, and information was missing from Mississippi.

Table 4.8 Primary Diagnosis of Wards – Court Model

Court Model – Primary Diagnosis		
Diagnosis	N	%
Mental Illness	80	9
Mental Retardation	-	-
Developmental Disability	468	55
Alzheimer’s Disease/Dementia	289	34
Other	-	-
Substance Abuse	-	-
Head Injury	9	1
Total	846	

Total Court = 4

All data missing from Mississippi

Wards Restored to Capacity

Hawaii Large and Small and Delaware provided information on the number of wards restored to either partial or full legal capacity. Only four wards had been restored to legal capacity, none to partial legal capacity, and a total of nine wards had been transferred to a private guardian.

Independent State Office Model

Four programs comprise the independent state office model (ISO): Alaska, Illinois' Office of the State Guardian (OSG), Kansas, and New Mexico. New Mexico's program, the newest of the four, was established in 1998. Programs in Illinois and Kansas were started in the 1970s, while Alaska's program started in the 1980s. Only Illinois and Kansas provided budget figures for FY 2003. Kansas' budget was \$1,100,000 and Illinois' was \$6,075,000. Only New Mexico provided us with the amount by which the budget would need to be increased to provide adequate public guardianship services or the amount the budget would need to be increased to comply with a 1:20 ratio of guardian to ward (\$500,000 to be adequate, and \$500,000 to comply), but they reported that they did not know the amount of the budget for FY 2003. All four programs within the ISO model received state funding: Kansas and New Mexico reported their budget came from state general funds, Illinois (OSG) reported that funds came from state appropriations, and Alaska did not specify. Alaska reported receiving some funding through Medicaid, and Alaska and Illinois (OSG) reported they received funding through client fees.

Table 4.9 Funding Source – ISO Model

ISO Model -Funding Source	
Source	N
Federal Funds	
State Funds	4
County Funds	
Medicaid Funds	1
Grants/Foundations	
Private Donations	
Client Fees	2
Estate Recovery	
Other	

Total ISO = 4

Administrative Features

Alaska, Illinois, and Kansas reported that the program was coordinated at the state level (Table 4.10). All indicated that the public guardianship program provided services across the entire state, and only New Mexico reported contracting out for services. Alaska, Illinois, and Kansas had administrative regulations governing their operation, and Alaska indicated proposed changes to its statute. Alaska and Illinois (OSG) were authorized to, and did collect fees for services.

Table 4.10 Administrative Features – ISO Model

ISO Model – Administrative Features		
Feature	Yes	No
Independent/Local/Regional	-	4
Coordinated at State Level	3	1
Available to All in State	4	-
Services Contracted Out	1	3
Administrative Regulations	3	1
Proposed Changes to Statute	1	3
Authority to Collect Fee	2	2
Actually Collect Fee	2	2

Total ISO = 4

Function of the Public Guardian

All four programs make decisions regarding wards’ personal affairs, but only Alaska, Illinois (OSG), and Kansas do so regarding wards’ financial affairs (Table 4.11). Data were missing from Kansas for the items regarding delivery of services and other services provided. Only Alaska’s program of public guardianship serves as financial power of attorney, health care power of attorney, and trustee; Illinois (OSG) and New Mexico do not serve in these roles. None of the programs serves as the personal representative of decedents’ estates, and only New Mexico’s program provides private guardianship services. All within this model educate the community about public guardianship and provide technical assistance to private guardians. Only New Mexico monitors private guardians, and Illinois (OSG) provides other outreach services. Illinois (OSG) and New Mexico petition for adjudication of legal incapacity, and Alaska and Illinois (OSG) petition for their program to be appointed guardian.

Table 4.11 Function of the Public Guardian – ISO Model

Independent State Office – Function of the Public Guardian			
	Yes	No	Missing
Decision-making			
Wards' Personal Affairs	4	-	-
Wards' Financial Affairs	3	1	-
Delivery of Services			
Monitor Delivery of Services	3	-	1
Arrange Delivery of Services	2	1	1
Advocate for Services	3	-	1
Direct Provider of Services	-	3	1
Serve Clients Other Than Wards	-	4	-
Other Services Provided			
Financial Power of Attorney	1	2	1
Health Care Power of Attorney	1	2	1
Representative Payee	1	2	1
Trustee	1	2	1
Personal Representative of Decedents' Estates		3	1
Private Guardian Services	1	2	1
Other	1	2	1
Outreach Services			
Educate Community	4	-	-
Technical Assistance to Private guardians	4	-	-
Monitor Private Guardian	1	3	-
Other	1	3	-
Petition for Adjudication of Incapacity	2	2	-
Petition for Self/Agency as Guardian	2	2	-

Total ISO = 4

Staffing of the Public Guardianship Program

Educational requirements for public guardians within the ISO model range from a high school diploma to a master's degree (Table 4.12). The total number of wards being served in FY 2003 was reported as 8,254, with the most served by the Illinois OSG (n = 5,367), followed by Kansas (n = 1,617), Alaska (n = 925), and New Mexico (n = 345). Across the programs, there were 102 (Alaska = 15; Illinois = 73; Kansas = 12; and New Mexico = 2) full-time equivalent staff on March 2, 2003. Kansas, which uses volunteers to serve as guardians, reported 830 volunteers. Respondents did not indicate the average number of hours spent per ward per year. Most programs use criteria of some kind (e.g., policies and procedures and standards of practice) for accountability and efficiency.

Table 4.12 Personnel Management – ISO Model

ISO – Personnel Management		
	Yes	No
Education		
High School	1	-
Bachelor’s Degree	1	-
Master’s Degree	2	-
Other	-	-
Volunteers Used*	1	-
PG Program Policies & Procedures – Standards of Practice	3	1
State Guardianship Statutes	3	1
Written Personnel Policies	2	2
Written Job Descriptions	2	2
Interview Forms	1	3
Internal Staff Evaluation & Review Procedures	2	2
Ongoing Training and Educational Materials for Staff	2	2
Annual or More Frequent Training Sessions	2	2
Other	2	2

Total ISO = 4

Ward Information

Illinois (OSG) and Kansas were able to provide us with information regarding gender of wards served, New Mexico replied that they did not know, and Alaska was missing this data. Males comprised 52% of the wards served (n = 3,647), and females, 48% (n = 3,337) (Table 4.13). Alaska, Illinois (OSG), and Kansas provided information regarding age. The age group most frequently represented (62%) were wards between the ages of 18 and 64 (n = 4,847); with 38% aged 65+ (n = 2,937). Only three wards (Alaska) were reported to be under the age of 18. Only Illinois (OSG) provided information on ethnicity and race, with 97% non-Hispanic wards (n = 5,191). Illinois (OSG) also reported that 72% (n = 3,762) of wards were White, and 26% (n = 1,356) were African-American.

Across all programs, there were 7,933 (M = 1,918, SD = 2,222)² wards who were low-income. Alaska, Illinois (OSG), and Kansas reported that 653 (M = 217, SD = 205) wards had died during FY 2003.

² M=Median; SD=Standard Deviation

Table 4.13 Ward Demographics – ISO Model

Independent State Office – Ward Demographics			
Characteristic	N	%	Missing
Sex			
Male	3647	52	1
Female	3337	48	1
Age			
Aged 65 or Over	2937	38	1
Aged 18-65	4847	62	1
Aged Less Than 18	3	-	
Ethnicity			
Hispanic	179	3	3
Non Hispanic	5191	97	3
Do Not Know	3*	-	
Race			
White	3762	72	3
African American	1356	26	3
Native American	13	-	3
Alaska Native		-	3
Asian Pacific Islander	50	1	3
Other	10	-	3
Do Not Know	3*	-	-
Low Income	7933	-	-
Died in FY 2003	653	-	1

*number of programs reporting they do not know
Total ISO = 4

Referral Source

The Illinois and Kansas programs provided specific information regarding the wards' referral source (Table 4.14). Alaska's data were missing. New Mexico indicated not knowing that information. Forty-three percent (43%) of wards were referred to the public guardianship programs by APS (n = 363); 25% were referred by an attorney (n = 210). An additional 23% (n = 190) were referred to the public guardian by a private social service agency. Another 5% (n = 46) were referred by other public social service agencies.

Table 4.14 Ward Referral Source – ISO Model

Independent State Office – Referral Source			
Referral Source	N Referred	% Referred	Missing
APS	363	43	2
Mental Health Facility	-	-	3
Hospital	-	-	3
Private Social Service Agency	190	23	2
Nursing Home	-	-	3
Other	28	3	2
Attorney	210	25	2
Other Public Social Service Agency	46	5	2
Family	4	-	2
Jail/Prison/Police	-	-	3
Friend, Legal Aid, LTC Ombudsman	-	-	3
Total	841	-	

Total ISO = 4

Extent of Guardianship

Alaska, Illinois (OSG), and Kansas provided information regarding the extent of guardianship provided to wards (Table 4.15). The public guardian provided guardianship of the person only to 68% of wards (n = 5,319), followed by guardianship of both person and property, which was provided to 20% of wards (n = 1,575). Only 5% of wards (n = 393) were provided limited guardianship of the person. The public guardianship programs acted as guardian of property only for an additional 4% of wards (n = 345), and limited guardian of property only for 2% of wards (n = 150).

Table 4.15 Extent of Guardianship – ISO Model

Independent State Office – Extent of Guardianship		
Extent	N	%
Guardian of Person Only	5319	68
Guardian of Property Only	345	4
Guardian of Person and Property	1575	20
Limited Guardian of Person	393	5
Limited Guardian of Property	150	2

Total ISO = 4

Primary Diagnosis and Setting of Wards

Alaska, Illinois (OSG), and Kansas were able to provide us with information regarding primary diagnosis (Table 4.16) and primary residential setting for the wards (Table 4.17) (New Mexico responded that they did not know this information). As in the court model, and consistent with the reported age of the wards, a majority of wards (53%) had a primary diagnosis of developmental disabilities (n = 3,774), followed by other unspecified conditions (15%; n = 1,055), mental illness (14%; n = 971), and mental retardation (13%; n = 932).

Table 4.16 Primary Diagnosis of Wards – ISO Model

Independent State Office – Primary Diagnosis		
Diagnosis	N	%
Mental Illness	971	14
Mental Retardation	932	13
Developmental Disability	3774	53
Alzheimer’s Disease/Dementia	281	4
Other	1055	15
Substance Abuse	25	
Head Injury	83	1
Total	7121	

Total ISO = 4

Over one-third of the wards (37%) resided in a nursing home (n = 3,150). An additional 26% resided in group homes (n = 2,192); a further 20% were reported as either owning or renting their primary residence (10%; n = 857) or living at some other unspecified setting (10%; n = 866). Only 9% of wards (n = 764) resided in a mental health facility, and 6% (n = 506) were in assisted living facilities. (Table 4.17).

Table 4.17 Ward’s Residence – ISO Model

Independent State Office Model Wards’ Residence		
Residence	N	%
Own/Rent	857	10
Assisted Living	506	6
Nursing Home	3150	37
Mental Health Facility	764	9
Group Home	2192	26
Acute Hospital	94	1
Jail	52	
Person Missing/Unknown	17	
Other	866	10
Do Not Know (# Responding)	1	
Total	8498	

Total ISO = 4

Wards Restored to Capacity

Alaska, Illinois (OSG), and Kansas provided information on the number of wards restored to legal capacity in FY 2003 (n = 28), the number of wards restored to partial legal capacity (n = 0), and the number of wards transferred to a private guardian in fiscal year 2003 (n = 127). New Mexico reported not knowing this information.

Public Guardianship Program as Division of an Existing Social Service Agency

A We determined that a total of 33 states' (34 programs) programs were housed within an existing social service agency (DSSA model). We received a total of 16 responses from Florida, two of which included discrete administrative and budget information and are, therefore, treated as two discrete programs [the Statewide Public Guardian Office (PGO) and the public guardianship program administered by Barry University's School of Social Work]. These two responses from Florida and a single response from 32 other states comprise the 34 programs reporting. However, when discussing ward information, missing data figures are based on a total of 48 responses as opposed to 34, because this is where we received most of the information from the additional Florida surveys.

Of the 34 programs classified in this model, we received budget information from 17 programs. Of those 17, five programs responded that they operated with no budget (dollar amount of \$0). The remaining 12 programs had FY 2003 budgets ranging from \$109,200 (Rhode Island) to \$4,500,000 (Florida Statewide PGO). Seven programs operated with a budget below one million dollars [Barry University (FL), IN, NJ, RI, TN, UT, and VA]. Five programs operated with a budget over one million dollars [Statewide OPG (FL), KY, ME, NH and, WA]. Only seven programs [Statewide PGO (FL), MD, MN, MT, NH, TN, and VA] provided us with the amount the budget would need to be increased by to provide adequate public guardianship services. Amounts ranged from \$200,000 (Montana) to nearly nine million dollars (Minnesota). Twelve programs indicated not knowing this answer, and 15 were missing this information. Only five programs indicated the amount by which the budget would need to be increased in order to comply with the guardian to ward ratio of 1:20 [Barry University (FL), KY, MN, MT, and NH]. Amounts ranged from \$132,200 [Barry University (FL)] to \$8,770,831 (Minnesota), 15 programs replied that they did not know, and 14 did not provide any data for this question.

Many programs (n = 13) reported more than one funding source (Table 4.18). This is the only model where each of the potential funding source survey options was listed by at least one of the programs. The most often reported source of funding was state funds (n = 21), followed by federal funds (n = 6), and county funds (n = 4).

Administrative Features

Eight programs within this model reported that they were independent local, or coordinated at the regional level (CO, CT, IN, MI, MT, TN, VA, and WV); 16 reported that they were coordinated at the state level [AR, Barry University (FL), CT, GA, IN,

ME, MD, MN, MT, NJ, RI, SD, UT, VT, VA and WV]; and four [Statewide PGO (FL), KY, MO, and NH] replied “other” and specified that they were either freestanding or coordinated at the regional or county level. Five programs replied that they were both independent/regional and coordinated at the state level (CT, IN, MT, VA, and WV). The remaining 12 were missing this data.

Table 4.18 Funding Sources – DSSA Model

DSSA Funding Sources	
Funding Source	N
Federal Funds	8
State Funds	21
County Funds	6
Medicaid Funds	4
Grants/Foundations	2
Private Donations	2
Client Fees	7
Estate Recovery	2
Other	2

Total DSSA = 34

Eighteen of the programs responded that they provided services throughout the state (AR, CT, GA, IN, KY, ME, MD, MN, MO, MT, NH, NJ, RI, SD, TN, UT, VT, and WV), and five replied that they did not [CO, Statewide PGO (FL) and Barry University (FL) SC, and VA]. Data were missing from 11 of the programs (IA, LA, MA, MI, NY, OH, OK, PA, TX, WA, and WI) (Table 4.19). Only eight of the programs indicated that they contracted out services [Statewide PGO (FL), IN, MI, MO, NH, RI, UT, and VA]. Twelve programs operated with a set of administrative regulations (AR, CT, GA, IN, ME, MN, MO, RI, TN, VT, WA, and WV) and six [AR, Statewide PGO (FL), GA, KY, MT, and VA] indicated that proposed changes to their statute were pending. Thirteen programs indicated that they were authorized to collect a fee (IN, KY, ME, MD, MO, NH, NJ, SC, SD, TN, UT, VA, and WV), but only eight (IN, ME, MO, NH, NJ, SC, TN, and VA) responded that they, in fact, collect fees.

Table 4.19 Administrative Features – DSSA Model

Division of Social Service Agency Administrative Features			
Feature	Yes	No	Missing
Independent/Local/Regional	8	15	11
Coordinated at State Level	16	7	11
Available to All in State	18	5	11
Services Contracted Out	8	16	10
Administrative Regulations	12	12	10
Proposed Changes to Statute	6	20	8
Authority to Collect Fee	13	10	11
Actually Collect Fee	8	14	12

Total DSSA programs = 34

Function of the Public Guardian

Nearly 60% of the programs (n = 21) reported making decisions regarding wards' personal affairs (Table 4.20). Just under 50% make decisions regarding wards' financial affairs. More than half the programs (58%) reported that they monitor delivery of services (n = 20), 21 arrange delivery of services, and 22 advocate for services. Twelve were direct providers of services to wards. Nine programs serve clients other than wards.

Among other services provided, the most frequent was representative payee [n = 14; includes CT, CO, Statewide PGO (FL), Barry University (FL), GA, IN, MO, MT, NH, NJ, SD, TN, UT, and VT]. Five programs served as financial power of attorney and/or health care power of attorney. Over half of the programs reported educating the community about public guardianship (n = 19). Eleven indicated that they provided technical assistance to private guardians, two served as monitors of private guardians, and five provided other services such as *guardian ad litem*, conservator, and APS. Fourteen programs responded that they petition for adjudication of legal incapacity [AR, CO, CT, Barry University (FL), GA, IN, ME, MN, MO, MT, RI, SD, UT, and WV], and 14 petition for their program to be appointed guardian [AR, CO, Barry University (FL), Statewide PGO (FL), GA, KY, ME, MN, MO, MT, NJ, SD, UT, and WV].

Table 4.20 Function of the Public Guardian – DSSA Model

Division of Social Service Agency – Function of the Public Guardian			
Function	Yes	No	Missing
Decision-making			
Wards’ Personal Affairs	21	1	12
Wards’ Financial Affairs	15	7	12
Delivery of Services			
Monitor Delivery of Services	20	2	12
Arrange Delivery of Services	21	1	12
Advocate for Services	22	-	12
Direct Provider of Services	12	10	12
Serve Clients Other Than Wards	9	12	13
Other Services Provided			
Financial Power of Attorney	5	14	15
Health Care Power of Attorney	5	14	15
Representative Payee	14	5	15
Trustee	2	17	15
Personal Representative of Decedents’ Estates	4	15	15
Private Guardian Services	3	16	15
Other	5	13	16
Outreach Services			
Educate Community	19	2	13
Technical Assistance to Private Guardians	11	10	13
Monitor Private Guardian	2	17	15
Other	4	13	17
Petition for Adjudication of Incapacity	14	8	12
Petition for self/agency as Guardian	14	7	13

Total DSSA = 34

Staffing of the Public Guardianship Program

The majority of programs reported that persons making decisions on behalf of wards require at least a bachelor’s degree (n = 22); four programs indicated that the guardian needed at least a master’s degree, and ten responded ‘other’ (e.g., J.D. or attorney, a Ph.D., specialized training, or meeting special state criteria) (Table 4.21). Four programs used volunteers. Most programs use a variety of management tools, including policies and procedures, state guardianship statutes, ongoing training, and written job descriptions.

Table 4.21 Personnel Management – DSSA Model

Division Social Service Agency Personnel Management Tools		
	Yes	No
Education		
High School	-	-
Bachelor’s Degree	22	-
Master’s Degree	4	-
Other	10	-
Volunteers Used*	4	-
PG Program Policies & Procedures – Standards of Practice	28	6
State Guardianship Statutes	30	4
Written Personnel Policies	24	10
Written Job Descriptions	26	8
Interview Forms	12	22
Internal Staff Evaluation & Review Procedures	24	10
Ongoing Training and Educational Materials for Staff	30	4
Annual or More Frequent Training Sessions	25	9
Other	6	28

Total DSSA = 34

* Number of programs reporting number of volunteers
14 of 48 surveys were missing these data

Ward Information

Thirty-five of 48 respondents (includes 16 from Florida) provided information on the gender of wards (Table 4.22). Fourteen of the 35 indicated that they did not know this information. From the remaining 21 surveys representing eleven programs [Statewide PGO (FL) and Barry University (FL), GA, KY, ME, MT, RI, SD, UT, VA, and WV) we received information on gender: 55% of wards were female (n = 3,679) and 45% (n = 2,952) were male. An additional 13 surveys were missing gender information entirely. The age group most frequently represented were wards aged 65+, which comprised 55% (n = 4,112) of the total. Forty-three percent of wards being served were between the ages of 18 and 64 (n = 3,106).

Table 4.22 Ward Demographic Information – DSSA Model

Division of Social Service Agency Ward Demographic Information			
Characteristic	N	%	Missing
Sex			
Male	2952	45	13
Female	3679	55	13
Age			
Aged 65 or Over	4112	57	14
Aged 18-64	3106	43	14
Aged Less Than 18			14
Ethnicity			
Hispanic	113	2	14
Non Hispanic	4902	97	14
Do Not Know	18*	-	-
Race			
White	4574	82	15
African American	932	16	15
Native American	13	-	15
Alaska Native	-	-	15
Asian Pacific Islander	6	-	15
Other	66	1	15
Do Not Know	16*	-	15
Low Income	10062	-	15
Died in FY 2003	512	-	18

Total DSSA = 34

*Number of surveys reporting that they did not know this information.

Total possible = 48

Only 16 respondents, representing seven programs [AR, Statewide PGO (FL), Barry University (FL), GA, KY, ME, and SD), provided information on ethnicity of the wards. Ninety-seven percent of the wards (n = 4,902) were non-Hispanic, with 2% reported as Hispanic (n = 113). Eighteen respondents indicated not knowing the answer to ethnicity, with the remaining 14 missing the data entirely. Sixteen respondents representing seven programs [Statewide PGO (FL), GA, KY, ME, SD, VT, and WV)], reported the race of wards as predominantly White: 82% (n = 4,574) and 16% African-American (n = 932). Seventeen respondents indicated not knowing this information, and 15 were missing these data.

The total number of wards being served in FY 2003 was reported as 14,432 with four states accounting for more than half that number (Minnesota, 3,416; Kentucky, 2,460; Florida, 1,933; and Maine, 1,018). Across 14 programs [AR, Statewide PGO (FL), Barry University (FL), KY, MD, ME, MT, NH, NJ, RI, TN, UT, VA, and VT), there were 356 full-time equivalent staff on March 2, 2003. Four programs [Statewide PGO (FL), MT, RI and TN] reported the use of volunteers whose number totaled 178.

Twelve respondents (4 of the Florida Statewide PGO respondents, GA, MT, NH, RI, TN, VA, VT, and WV) provided information on the unmet need for public guardians, with a need ranging from 30 (Osceola County, FL) to 5,000 (West Virginia). Twenty-five programs were missing this information, and another 11 did not know the unmet need (n = 48).

The total number of low-income wards was 10,062 (M = 437, SD = 825) [23 responses reflecting 13 programs: AR, Statewide PGO (FL), Barry University (FL), GA, KY, ME, MN, NH, RI, SD, UT, VA, VT, and WV). Ten respondents indicated they did not know and 15 were missing this information. Seventeen responses [reflecting 9 programs: Statewide PGO (FL), Barry University (FL), KY, ME, MN, MT, NH, SD, and TN] indicated the number of wards who died in FY 2003: Total n = 512; M = 30, SD = 52). Thirteen respondents did not know how many wards had died, and 18 were missing this information.

Referral Source

Eleven programs [AR, Statewide PGO (FL), Barry University (FL), KY, ME, MN, MT, NJ, SD, UT, and VT) provided us with referral information (surveys = 20, due to multiple submissions from Florida), 14 were missing data, and 14 indicated not knowing. More than half (56%) of the wards were referred by APS (n = 2,545) (Table 4.23). An additional 14% were referred by private social service agencies (n = 632).

Table 4.23 Referral Source – DSSA Model

Division of Social Service Agency Referral Source		
	<i>N</i>	%
APS	2545	56
Mental Health Facility	121	3
Hospital	185	4
Private Social Service Agency	632	14
Nursing Home	245	5
Attorney	27	
Other Public Social Service Agency	68	1
Family	126	3
Jail/Prison/Police	141	3
Friend, Legal Aid, LTC Ombudsman	44	1
Other	392	9
Total	4526	

Total Possible = 48

Data were missing from 14

Extent of Guardianship

Ten respondents (7 programs) could not provide us with the number of wards and the extent of guardianship provided, and an additional 13 surveys (11 programs) were missing all information on these items (Table 4.24). Twenty-five (25) responses representing 16 programs [AR, CO, Statewide PGO (FL), Barry University (FL), KY, MD, ME, MN, NH, NJ, RI, SD, TN, UT, VA, and VT] provided us with the extent of guardianship they provided. The public guardian served as guardian of the person only for 54% (n = 6,080) of wards, and served as guardian of both the person and property for 35% (n = 3,866) of wards.

Table 4.24 Extent of Guardianship – DSSA Model

Division of Service Provision Agency – Extent of Guardianship		
Extent	N	%
Guardian of Person Only	6080	54
Guardian of Property Only	282	3
Guardian of Person and Property	3866	35
Limited Guardian of Person	795	7
Limited Guardian of Property	162	1

Total possible = 48

Data were missing from 12

Primary Diagnosis and Setting of Wards

Seventeen responses representing eight programs [Statewide PGO (FL), Barry University (FL), ME, MN, SD, TN, VA, and VT) provided information on the primary diagnosis of the wards, 15 respondents (programs = 12) indicated that they did not know wards' primary diagnosis and 16 responses were missing this data (programs =14) (Table 4.25). The diagnosis attributed to the majority of the wards was mental retardation (63%; n = 3,416), followed by Alzheimer's disease/dementia (18%; n = 962).

Table 4.25 Primary Diagnosis – DSSA Model

Division of Service Provision Agency Primary Diagnosis		
Diagnosis	N	%
Mental Illness	668	12
Mental Retardation	3416	63
Developmental Disability	127	2
Alzheimer's Disease/Dementia	962	18
Other	16	-
Substance Abuse	219	4
Head Injury	12	-
Total	5420	

Total possible = 48

Data were missing from 14

Eighteen responses, reflecting nine programs [AR, Statewide PGO (FL), Barry University (FL), KY, ME, RI, SD, VA, and VT] provided the number of wards in various residential settings, 15 did not know (13 programs), and 15 (12 programs) were missing these data (Table 4.26). Nearly one-half of the wards (48%) were living in institutions: 36% (n = 1604) were in nursing homes, an additional 10% (n = 469) were in a mental health facility, and a further 2% (n = 75) were in acute hospitals. Nearly 22% (n = 906) resided in assisted living facilities, and fully 16% (n = 704) were reported as living in “other” settings (e.g., hospice and intermediate care facilities).

Table 4.26 Wards’ Residence – DSSA Model

Division of Service Provision Agency Model Wards’ Residence		
Residence	N	%
Own/Rent	347	8
Assisted Living	966	22
Nursing Home	1604	36
Mental Health Facility	469	10
Group Home	268	6
Acute Hospital	75	2
Jail	8	-
Person Missing/unknown	6	-
Other	704	16
Do not know (# responding)	14*	-
Total	4447	

*Number of programs responding that they did not know.
Total possible =48
Data were missing from 15

Wards Restored to Capacity

Fourteen programs [AR, Statewide PGO (FL), and Barry University (FL), GA, KY, MD, ME, MN, MT, RI, SD, TN, UT and VA] provided the number of wards restored to legal capacity in FY 2003 (n = 148, M = 6, SD = 23), the number of wards restored to partial legal capacity (n = 5), and the number of wards transferred to a private guardian (n = 133, M = 5, SD =15). Six programs responded that they did not know the number of wards restored to capacity or transferred to a private guardian, and 14 were missing data.

County Model of Public Guardianship

The final model we discuss in this chapter is the county model of public guardianship. Ten programs comprise this model: Alabama, Arizona, California, Idaho, Illinois (OPG), Nevada, North Carolina, North Dakota, Oregon, and Wisconsin. We received comprehensive information from eight of the programs. We received budget information from five of the programs, one of which indicated operating with a \$0 budget (ND). Alabama, Nevada, and Idaho indicated that they did not know their budget, and North Carolina and Wisconsin were missing budget information.

Of the four programs providing us with budget figures for FY 2003, budgets ranged from \$790,000 (Multnomah County, OR) to \$15,024,600 [Cook County, IL, Office of the Public Guardian (OPG)]. Only the Los Angeles County Public Guardian Office indicated the amount by which the budget would need to be increased (\$20 million) to provide adequate coverage. Three programs provided us with figures ranging from \$700,000 (Multnomah County, OR) to \$50 million (Los Angeles, CA) in order to comply with an optimal ratio of one guardian to 20 wards. Six programs reported more than one source of funding. Only Nevada and Arizona (Maricopa County) reported relying on a single source of funding. The most common source of funding was client fees (n = 6), followed by county funds (n = 5) (Table 4.27).

Table 4.27 Funding Source – County Model

County Model – Funding Source			
Source	Y	N	Missing
Federal Funds	-	8	2
State Funds	2	6	2
County Funds	5	3	2
Medicaid Funds	2	6	2
Grants/Foundations	-	8	2
Private Donations	-	8	2
Client Fees	6	2	2
Estate Recovery	3	5	2
Other	3	6	1

Total County = 10

Administrative Features

Only Illinois (OPG) and Oregon (Multnomah County) within the county model indicated coordination at the local or regional level; Alabama reported that it is coordinated at the state level. The remaining states providing this information (Los Angeles, CA, Maricopa County, AZ, and Nevada) indicated that they were coordinated at the county level. Alabama, Arizona, California, and Illinois (OPG) replied that public guardianship services were available statewide, and five states replied they were not; data were missing from Wisconsin (Table 4.28). Illinois (OPG) and Nevada reported that they contracted out for services. Arizona and Nevada reported having administrative regulations, and Nevada and North Dakota indicated that changes to their statute were pending. Seven of the programs reported that they were authorized to collect a fee [AL, AZ, CA, IL (OPG), ID, NV, and OR], and each of these also reported that they did collect fees.

Table 4.28 Administrative Features—County Model

County Model Administrative Features			
Feature	Yes	No	Missing
Independent/Local/Regional	2	4	4
Coordinated at State Level	2	4	4
Available to All in State	4	5	1
Services Contracted Out	2	7	1
Administrative Regulations	2	6	2
Proposed Changes to Statute	3	6	1
Authority to Collect Fee	7	1	2
Actually Collect Fee	7	1	2

Total County = 10

Function of the Public Guardian

Seven programs (n = 7; missing data from NC, ND, and WI) reported making decisions regarding wards’ personal affairs, while only 6 indicated making decisions regarding wards’ financial affairs (Idaho does not). Seven programs reported arranging delivery of services, monitoring delivery of services, and advocating for services (data were missing from NC, ND, and WI). Alabama and Illinois (OPG) were direct providers of services. Arizona and Nevada reported serving clients other than wards. Among other services provided, the most frequent was representative payee (n = 5) followed by personal representative of decedents’ estates (n = 3). No program served as health care power of attorney for the wards. Only Alabama served as financial power of attorney for the wards.

Five programs reported educating the community about public guardianship as an outreach activity [AZ, CA, IL (OPG), NV, and OR]; Illinois (OPG), California, Nevada, and Oregon reported providing technical assistance to private guardians, and only Illinois (OPG) reported serving as a monitor of private guardians (Table 4.29). Five programs [AZ, CA, IL (OPG), ID, and NV] reported that they petition for adjudication of legal incapacity, while six petition for the program to be appointed guardian (Oregon is the sixth).

Table 4.29 Function of the Public Guardian – County Model

County Model – Function of the Public Guardian			
Function	Yes	No	Missing
Decision-making			
Wards’ Personal Affairs	7	-	3
Wards’ Financial Affairs	6	1	3
Delivery of Services			
Monitor Delivery of Services	7	-	3
Arrange Delivery of Services	7	-	3
Advocate for Services	7	-	3
Direct Provider of Services	2	5	3
Serve Clients other than wards	2	5	3
Other Services Provided			
Financial Power of Attorney	1	6	3
Health Care Power of Attorney	-	7	3
Representative Payee	5	2	3
Trustee	2	5	3
Personal Representative of Decedents’ Estates	3	4	3
Private Guardian Services		7	3
Other	2	5	3
Outreach Services			
Educate Community	5	2	3
Technical Assistance to Private guardians	4	1	5
Monitor Private Guardian	1	5	5
Other	1	4	5
Petition for Adjudication of incapacity?	5	1	4
Petition for self/agency as guardian?	6	1	3

Total County = 10

Staffing of the Public Guardianship Program

Five programs reported that persons making decisions on behalf of wards were required to have at least a bachelor’s degree; Nevada requires that persons making decisions on behalf of wards be Registered Guardians of the National Guardianship Association. Only Illinois (OPG) reported using volunteers. Most programs use a variety of management tools, including policies and procedures, state guardianship statutes, ongoing training, and written job descriptions (Table 4.30).

Table 4.30 Personnel Management – County Model

County Model – Personnel Management		
Personnel Management Tools	Yes	No
Education		
High School	-	-
Bachelor’s Degree	5	-
Master’s Degree	-	-
Other	1	
Volunteers Used*	1	3
PG Program Policies & Procedures – Standards of Practice	4	2
State Guardianship Statutes	5	1
Written Personnel Policies	4	2
Written Job Descriptions	4	2
Interview Forms	3	3
Internal Staff Evaluation & Review Procedures	3	3
Ongoing Training and Educational Materials for Staff	3	4
Annual or More Frequent Training Sessions	3	3
Other	3	3

Total County Possible = 10; data missing from 4

Ward Information

Only Cook County OPG (IL), Los Angeles County (CA), Maricopa County (AZ) and Multnomah County (OR) provided detailed information regarding wards (Table 4.31). This information indicated that 51% (n = 2,638) of wards were male, and 49% (n = 2,567) were female. More than half the wards were between the ages of 18 and 64 (58%; n = 3,018), and 39% were aged 65 or over (n = 2,037). Relatively few wards (12%) were Hispanic (n = 655). Nearly two-thirds (64%; n = 2,930) of wards were White, and just over one quarter (27%; n = 1,217) were African-American. A total of 3,972 wards (M = 993, SD = 1576) were classified as low-income, and 323 wards (M = 107, SD = 98) died in FY 2003.

Table 4.31 Ward Demographics – County Model

County Model – Ward Demographics			
Characteristic	N	%	Missing
Sex			
Male	2638	51	5
Female	2567	49	5
Age			
Aged 65 or Over	2037	39	5
Aged 18-65	3018	58	5
Aged Less Than 18	86	1	5
Do Not Know	71	1	5
Ethnicity			
Hispanic	655	12	4
Non Hispanic	4551	88	4
Race			
White	2930	64	4
African American	1217	27	4
Native American	50	1	4
Alaska Native	1	-	4
Asian Pacific Islander	355	8	4
Other	-	-	-
Low Income	3972	-	5
Died in FY 2003	323	-	5

Total County = 10

Extent of Guardianship

California (Los Angeles County), Illinois (Cook County OPG) and Oregon (Multnomah County) provided numbers of wards and their extent of guardianship. Alabama and Idaho’s programs indicated that they did not know, and five were missing data (Table 4.32). The public guardian served as guardian of both the person and the property for 90% of the wards (n = 4,846).

Table 4.32 Extent of Guardianship – County Model

County Model - Extent of Guardianship		
Extent	N	%
Guardian of Person Only	227	4
Guardian of Property Only	131	2
Guardian of Person and Property	4846	90
Limited Guardian of Person	72	1
Limited Guardian of Property	80	1

Total County = 10

Primary Diagnosis and Setting of Wards

California (Los Angeles County), Illinois (Cook County OPG) and Oregon (Multnomah County) provided information on the primary diagnosis of the wards. Alabama and Idaho replied that they did not know, and five had missing data (Table 4.33). Over two-thirds of wards (70%; n = 3,385) were diagnosed as mentally ill; 16% (n = 760) were diagnosed with substance abuse, and 10% (n = 490) were diagnosed as having Alzheimer’s disease/dementia.

Table 4.33 Primary Diagnosis – County Model

County Model – Ward Primary Diagnosis		
Diagnosis	N	%
Mental Illness	3385	70
Mental Retardation	118	2
Developmental Disability	10	-
Alzheimer’s Disease/Dementia	490	10
Other	-	-
Substance Abuse	760	16
Head Injury	46	1
Total	4809	

Total County =10

Data were missing from 5 programs

Approximately two-thirds of wards (68%) were reported to be living in institutions: 41% (n = 2,106) were in nursing homes, 15% (n = 772) were in mental health facilities, and 12% (n = 614) were in acute hospitals (Table 4.34). A further 20% (n = 1,132) lived in board and care homes (specified in other).

Table 4.34 Wards’ Residence – County Model

County Model Primary Setting of Wards		
Residence	N	%
Own/Rent	310	6
Assisted Living	55	1
Nursing Home	2106	41
Mental Health Facility	772	15
Group Home	82	2
Acute Hospital	614	12
Jail	44	-
Person Missing/Unknown	0	-
Other	1162	23
Do Not Know (# Responding)	2	-
Total	5145	

Total County = 10

Data were missing from 5 programs

Wards Restored to Capacity

California (Los Angeles County), Illinois (Cook County OPG) and Oregon (Multnomah County) were able to provide us with the number of wards who were restored to legal capacity in FY 2003 (n = 823; M = 274, SD = 472), the number of wards restored to partial legal capacity (n = 3), and the number of wards transferred to private guardians (n = 661; M = 220, SD = 372). Alabama and Idaho responded that they did not know this information and the remaining five were missing these data. The Los Angeles County, California, program accounts for the greatest number of wards restored to capacity (n = 820; 99.6%) and wards transferred to a private guardian (n = 650; 98%).

Comparison of Selected Information by Model

In order to assist with comprehension of these data from a national perspective, we combined data by model and present the findings under the broad headings of administrative features, function of the public guardian, staffing, and ward information.

Administrative Features Compared Across Models

In most states under the court model and the independent state agency model, the public guardianship program has statewide coverage (Table 4.35). The social service providing agency model has statewide coverage in half of the states reporting, and the county model has the least statewide coverage. The social service model contracts out for services far more than any other model, and uses a far greater array of funding sources than any other model. Budgets were extremely variable across models. Though the court model, found in small states, was fairly consistent, much variation occurred in the social service and county models, with the county model, again, highly dependent on the size of the county. Table 4.35 shows that all models rely on state funds, and that with the exception of the county model, which relies on client funds for over half of its budget, the models derive at least half their funding from state monies.

Table 4.35 Administrative Features – Percentage Breakouts by Model

Administrative Features – Model Comparison								
	Court Model (n = 4)		ISO Model (n = 4)		DSSA Model (n = 34)		County Model (n = 10)	
Statewide Coverage	3	75%	4	100%	18	53%	2	20%
Contract Out Services	0		1	25%	8	24%	2	20%
Funding Sources								
Federal Funds					8	24%		
State Funds	3	75%	4	100%	21	62%	2	20%
County Funds					6	18%	5	50%
Medicaid Funds			1	25%	4	12%	2	20%
Grants/Foundations					2	6%		
Private Donations					2	6%		
Client Fees			2	50%	7	21%	6	60%
Estate Recovery					2	6%	3	30%
Other					2	6%	3	30%
Budget								
Low		\$419,500		\$1,100,000		\$109,000		\$790,000
Median		\$490,750		\$3,587,500		\$517,000		\$3,600,000
Mean		\$490,750		\$3,587,500		\$1,118,361		\$5,878,371
High		\$562,000		\$6,075,000		\$4,500,000		\$15,024,600

Function of the Public Guardian Compared Across Models

Table 4.36 compares the functions of public guardian programs by model. At least half of the models allow their programs to authorize decisions regarding wards’ personal affairs, and nearly half of all models allow their programs to make decisions about wards’ financial affairs. The social services model has the least number of programs with this capability. As for serving clients other than wards, the court and social services models appear to serve clients other than wards more frequently than programs categorized in the other models. County and social service models include serving as representative payee more often than the other models do. Nearly half of all programs petition for adjudication of legal incapacity (notable that the conflict of interest model is slightly lower in this category) and the same is true for programs that can petition for self/agency as the guardian.

Table 4.36 Function of the Public Guardian – Model Comparison

Function of the Public Guardian – Model Comparison								
	Court Model		ISO Model		DSSA Model		County Model	
Decisions Wards' Personal Affairs	2	50%	4		21	62%	7	70%
Decisions Wards' Financial affairs	2	50%	3	75%	15	44%	6	60%
Clients other than wards	1	25%	0		9	26%	2	20%
Representative Payee	1	25%	1	25%	14	41%	5	50%
Petition for adjudication of legal Incapacity	2	50%	2	50%	14	41%	5	50%
Petition for Self/Agency as Guardian	2	50%	2	50%	14	41%	6	60%

Staffing and Ward Information Compared Across Models

When comparing staffing and ward information across models, with the exception of the court model, there is considerable variation in staffing (Table 4.37). Across all models in all programs, the ward census in March was again quite diverse, with the most consistent of the models being the court model. Extremely low numbers for some models likely reflect nascent programs beginning to fill their available slots for clients.

The independent state and social services models appear to have more procedural mechanisms in place for training and evaluation than the other models, which may reflect the size of some programs in relation to others.

Table 4.37 Staffing and Ward Information – Model Comparison

Staffing and Ward Information – Model Comparison									
	Court Model		ISO Model		DSSA Model		County Model		
Staff 03-02-03									
Low	7.0		2.0		.5		8.0		
High	8.0		73.0		62.0		90.0		
Wards 03-02-03									
Low	226		345		2		150		
High	771		5383		3224		3400		
Wards Cumulative FY 03									
Low	274		925		8		3		
High	850		5367		3416		4300		
Hours Spent per ward									
Low	DK		26		18		3		
High	DK		26		100		45		
Volunteers used (# programs)	1	25%	2	50%	11	32%	1	10%	
Low	3		1		1		4		
High	3		830		109		4		
Training/Evaluation									
Internal Staff Evaluation	1	25%	3	75%	24	71%	3	30%	
Ongoing Training	2	50%	2	50%	30	88%	4	40%	
Annual Training Sessions	1	25%	2	50%	25	74%	3	30%	

Ward Information Compared Across Models

With the exception of the county model, over half of all programs had authority of guardianship of the person only over their wards. The court model clearly had more guardianships of the property only over their wards. APS was the primary referral source for guardianships for independent state offices and for the conflict of interest model. For the court model, hospitals made the most referrals, and for the county model, the primary source of referrals was mental health entities. With the exception of the social services model, the majority of wards were between the ages of 18-64. Mental illness was the primary diagnosis of wards in the county model, with developmental disabilities the most frequent in the court and independent state agency models. Mental retardation was the most frequent diagnosis of wards in the social services model. Across all models, wards

were most frequently placed in facility in the social services model, with well over half of all wards institutionalized³ in all program models reporting this information.

Table 4.38 Ward Information – Model Comparison

Ward Information – Across County Model				
	Court Model	ISO Model	DSSA Model	County Model
Extent of guardianship				
Person only	56%	68%	54%	4%
Property only	39%	4%	3%	2%
Person and property	5%	20%	35%	90%
Limited person only	-	5%	7%	1%
Limited property only	-	2%	1%	1%
Referral Source				
APS	29%	43%	56%	8%
Private Social Service	-	23%	14%	1%
Mental Health	9%	-	3%	58%
Attorney	1%	23%	-	-
Hospital	41%	-	4%	13%
Age				
65+	37%	38%	57%	39%
18-64	62%	62%	43%	58%
<18	1%	-	-	1%
Primary Diagnosis				
Mental Illness	9%	14%	12%	70%
Mental Retardation	-	13%	63%	2%
Developmental Disability	55%	53%	2%	-
AD/Dementia	34%	4%	18%	10%
Substance Abuse	-	-	4%	16%
Primary Setting				
Institutionalized	DK	63%	85%	69%
Not Institutionalized	DK	36%	15%	30%

³ Institutional settings included nursing homes, assisted living facilities, mental health facilities, acute hospitals, and jails. We did not include board and care homes (specified other), own/rent, missing, other, and group homes in this category.

Summary and Comments

The comments provided in this section are summative in nature only. An elaboration of the major points of this chapter is contained in Chapter 7. That we received a 100% response rate is laudable and reflects the same response rate as the 1981 study. However, like the 1981 study, information we received is uneven at best. Some states provided not only much of the information requested, but also a running commentary for each question. Alternately, others states provided a very brief narrative indicating that, given our definition, they did not have public guardianship in their state. Thus, our ability to compare information among models and information among states is limited. We stress that these data represent the most accurate information on public guardianship in the country and highlight significant similarities and changes since the 1981 study. We note that no state was able to provide all the information requested on the survey.

Administrative Structure and Location in Government

Using the categorization system used by Schmidt and colleagues, there is a 70% increase in the number of states with some form of public guardianship, increasing from 34 to 48 in number. Also of note is the shift of models in the ensuing years – clearly the predominant model (n=33) is that of an entity also providing social services, or the conflict of interest model.

Twenty-seven states now have full coverage of public guardianship services, and six states have established guardian to ward ratios. Still, an alarming number of programs have extremely high ratios: the highest reported ratio was 1:173 (NM). In comparison, the Uniform Veterans Guardianship Act provides that no person other than a bank or trust company can be guardian of more than five veteran wards.

Functions of the Public Guardianship Program

The majority of programs (35) provide guardianship of the person, and 27 programs provide guardianship of property, likely reflecting the fact that most wards of public guardians are individuals with low incomes. Twenty-three programs reported serving as representative payee, the most common service provided other than guardianship. Most programs monitor the delivery of services to their wards and most educate the community about guardianship. Twenty-four programs (36 responding) petition for adjudication of legal incapacity and 25 (35 responding) petition for appointment of themselves as guardian.

Staffing

Few states could provide an estimate of the unmet need for public guardians though most indicated that they were chronically, and in some instances, dangerously understaffed. Number of wards served ranged from a low of 2 (Florida, and a program in its infancy) to 5,383 (OSG, IL), median = 216. The amount of time spent on services to

one ward was calculated by only 15 programs and ranged from one hour biannually to more than five hours per week. Most states have adopted standardized policies and procedures, and many have adopted hiring requirements, which ran the gamut from a high school degree to a law or doctorate degree.

Wards

Individuals under guardianship appear to have shifted somewhat from the older adult population (e.g., persons aged 65+) to a younger population (e.g., persons aged 18-64). In many ways, reported anecdotally, younger wards reflect a more challenging client mix. Primary diagnoses of wards were typically developmental disabilities, mental illness, and mental retardation (even some substance abuse, particularly in the county model), rather than AD or other dementias as discovered in the 1981 study. Wards were fairly evenly split between men and women, again, representing a shift from the 1981 study, which found the majority of wards to be older white women. A surprising number of wards continue to be white, with the most minority wards in any program being 33% (Los Angeles, CA).

If the population demographic of wards is changing, the number of wards who are institutionalized is still far too high, but not at 100% in any state, which was the case in 1981. The highest percentage of institutionalized wards was 97% (Los Angeles, CA – County Model), and the lowest was 36% (Kansas – Independent State Office Model). This is likely reflective of a greater combination of payment sources available to indigent persons and more living options available to wards than were available in 1981.

Strengths, Weakness, Opportunities, Threats

Overwhelmingly, when respondents provided information on strengths, weaknesses, opportunities, and threats, the greatest strength was that of the public guardianship staff. Most staff members worked under difficult conditions with less than adequate remuneration and with difficult clients. Turnover of staff was surprisingly low. The predominant weakness of programs was the lack of funding. The most consistent opportunity for public guardian programs appeared to be education of the public, which usually took a back seat to providing guardianship services. Web sites giving information about the programs were, as a rule, underdeveloped. Another opportunity for some programs, used exceptionally effectively in Cook County, Illinois, was the use of lawsuits to provide needed services for clients.

Not surprising, and, regrettably similar to the 1981 study, was the assertion by nearly every program in every state of a critical lack of funding, which translated into circumscribed services for wards and inadequate staffing to meet ward needs. This is more significant now than in the past, as the demographic shifts portend more and more individuals needing guardianship services.

Chapter 5 Case Studies of States with an In-Depth Examination (Telephone Surveys of Missouri, Iowa, Indiana, and Wisconsin)

Our original concept for the study was to gather in-depth information on three states without public guardianship and four states with public guardianship. With input from our advisory board, we developed an interview guide for states without public guardianship programs (Appendix C) and states with them (Appendix D). Our knowledge of which states did and did not have public guardianship programs was informed chiefly by public guardianship statutes. However, as we conducted interviews with the key informants, we realized that, indeed, every state we studied – both states we thought had none (i.e., Missouri, Iowa, and Wisconsin) and the states we thought had public guardianship programs (i.e., Florida, Kentucky, Illinois, and Indiana) – did have some form of public guardianship. All states were chosen because, our funder, The Retirement Research Foundation, specified that research efforts be focused on them. Hence, our titles for the next two chapters were changed to reflect our findings: Chapter 5, Case Studies of States with an In-Depth Examination (Telephone Surveys), and Chapter 6, Case Studies of States with an In-Depth Examination (Telephone Surveys and Site Visits).

Information was obtained from these three states not only through the national survey, as discussed in Chapter 4, the focus of the previous chapter, but also from an in-depth telephone interview conducted with the investigatory team. The in-depth interviews were pre-arranged with the state contact person (i.e., the individual the researchers discovered, via word of mouth, position held within the state, and other documents) expected to be the most knowledgeable in the state regarding public guardianship. Interview questions were sent to the study participants well in advance of the interview, and, while the interview was conducted, it was also tape-recorded with full knowledge of the participant involved. The interviewers took running notes along with the audio taping. The audiotapes were later transcribed by a transcriptionist at the University of Kentucky, who then checked the transcription against the audiotapes for accuracy, as did members of the research team. Interviews ranged from one to two and a half hours in duration. Follow-up telephone calls or e-mails were sent for clarification as needed, and, in many instances, interview participants sent additional documentation for clarification.

Transcription of the audiotapes was provided to all the researchers, who then wrote this chapter from the information provided. Members of the advisory committee also reviewed the chapters for comprehension. Also, when requested and wherever possible, the interview participant read a draft of the interview summary for accuracy.

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

This set of case studies, as with the following chapter, provides detailed information about filling the need for guardianship when adult persons need a guardian but for whom no suitable person or entity exists. Information is presented in this chapter in the order in which the key informants in the states were interviewed.

MISSOURI

In June 2004, we interviewed Sherry Shamel, a county public administrator in Missouri and then president of the Missouri Association of Public Administrators. She was appointed to her public administrator position in 1999 by then Governor Mel Carnahan, after the death of the then current public administrator. Prior to her appointment, she had been an employee of an area agency on aging for nine years as a care coordinator for elders and persons with disabilities. Ms. Shamel regards her work with older adults as a vocation and a calling. In 2000, when her appointed term of office was up, she ran for the office. She ran in a contested race and won the election by 500+ votes. Ms. Shamel was up for re-election in the fall of 2004, as the terms of county public administrators are for four years. She once again ran in a contested election and retained her position in the fall election, winning by 1500+ votes.

Public Administrators as Public Guardians

According to Missouri law (Section 473.730), it is the responsibility of elected county public administrators to serve as the guardians and/or conservators if there is no one else to serve. Sometimes they also serve as trustee or representative payee. The only requirements for serving in this capacity are that candidates be a resident of the county, meet an age requirement (21), be a current registered voter, and have all personal and business taxes paid.

Currently in Missouri there are 92 women public administrators and 23 men who serve in this capacity. (This is after the 2004 elections and a turnover of 35 new public administrators out of 114 counties and one city). The political breakdown is 61 Democrats, 52 Republicans, and 2 unknown.

Ms. Shamel indicated that she could not provide data for the 115 counties in the state and, in fact, had difficulty gathering such information from her own county. Judges require that the administrators file a list of their clients and their assets with the courts at the beginning of each year. The public administrators must also indicate what bonds are in place. If the judge thinks the county bond is not high enough, the judge orders the county to provide a larger bond.

The Missouri Public Administrators Association recently voted to adopt the National Guardianship Association's *Code of Ethics* and *Standards of Practice* as a guideline for the public administrators' offices. The Association is actively protesting Medicaid cuts proposed by the governor and is also trying to clarify the prescribed duties of their deputies.

Challenges for Public Administrators

Lack of funding. The greatest challenge to the public administrators is to work with the county commissioners to get budget money to cover clients' needs. This is individually negotiated in each county and is affected by the history of other public administrators and demographic realities. Twenty years ago, the public administrator was a one-person (or married couple) show and typically he or she worked out of the home, not a courthouse or a government office. To fund their positions, the public administrators collected a fee from each ward for any services provided. Today this model still exists in some areas. However, the need for public administrators grew as the size of counties increased, and having guardianship as a "cottage industry" was no longer feasible. Fees that the public administrators collect are returned to the county to offset staff salaries, supplies, and other expenses required to run the office. No uniform guidelines dictate how much the public administrators can charge against the estate. Instead, the allowable fees are left to the discretion of the Missouri judges.

In 2000, a large group of the public administrators went on salary rather than deriving their fees from a percentage of the wards' estates. Many of these public administrators stopped serving in capacities other than that of guardian and conservator, as recommended by the Missouri Public Administrators Association – such as being a representative payee for individuals who are not under public guardianship. But there is no uniformity, and some continue to serve in other roles.

The fees of salaried public administrators are commensurate with those of the clerk, the assessor, the collector, and other office holders. Once a public administrator decides to be paid a salary rather than to be paid by collecting estate fees, he or she cannot reverse the decision. The Public Administrators Association urges its members to switch to the salary model.

In urban areas, caseloads are large and offices tend to be fee based rather than salary based. Should a ward have a million dollar estate, fees generated would permit the public administrators' offices to run smoothly. The average fee per ward was estimated to be \$500 per year. No Medicaid funds are used to supplement the guardian's fees for service.

Ms. Shamel explained that when she first came to the office, she had to document all of her time spent for each ward to secure funds beyond a flat salary of \$7,000 for six months. She told the judge: "I'm working 'til midnight every night. I don't have time to write down every time I take a phone call or how long I talked to them. Trying to compile all that information for a yearly bill for each ward, I just don't have time to do that." Now the judge allows her to take a flat 5% of total income and she is "not bogged down in time logs." Some judges also allow public guardians to receive 5% of total expenditures; and some judges still require individual time logs.

Ms. Shamel said the Missouri Public Administrators Association will attempt to obtain special funds to help with the running of the public administrators' offices. Other county offices, such as the assessor, collector, county clerk, recorder, and prosecuting attorney, all have special funds to give staff raises or to pay for needed office equipment. The same provision is not afforded to the public administrators.

Lack of continuity. Ms. Shamel cited the precarious nature of the elected public guardians. In one Missouri county the public administrator, who had been there for 20 years, had an opposing candidate for the position. The county was heavily Republican and had a large turnout of straight Republican tickets that year, which knocked the incumbent out of office – even though she had been there for 20 years, had a great deal of experience and was a Master Guardian certified by the National Guardianship Foundation. She later regained her office. However, Ms. Shamel explained that many people do not know what a public administrator does, and they do not give it much thought when they go in and vote. “By voting a straight ticket, they don’t realize they are interrupting the lives of the wards. Some [wards] were terrified about the prospect of a new person, someone they don’t know, someone that they may not be able to trust.” Moreover, currently the elected official’s name appears on the guardianship letters, as the County Public Administrator. If the administrator does not win the election, technically, the letters are void.

High caseloads. Ms. Shamel had 117 clients at the time of our interview. She recognized that this number was high. She explained that a legislative measure enacted in 2000 provided that there should be a full-time worker to assist the public administrator for every 50 clients but that the wording was optional rather than mandatory. Thus, it is not uncommon for one public administrator to have 80 or more wards and not have any office help or staff. One public administrator in the state makes \$40,000 per year, has no office help, and carries a caseload of 73 wards. In addition, all office supplies, mileage, office rent, and telephone bills are taken out of this salary. The county commissioners may acknowledge, “You have the hardest job in the county, and I would not want your job,” but they often do not give any support.

Petitioning problems. Wards come to the attention of the public administrator from various entities, such as the local mental health agency under contract to the state. These local mental health agencies do not petition for guardianship, citing a conflict of interest because they are providing services to keep people independent. Petitioning to put someone under guardianship would be against their mission statement.

The Division of Aging (Senior Services) used to petition for guardianships, but recently stopped doing so, citing fiscal woes. Thus, at the time of the interview, there was an unmet need for guardianships because there were no entities coming forward to pay for the petition and the hiring of an attorney. Many public administrators petition for their wards if the local judges will allow them to do so. If their petition is denied, the county must pay the court costs. Most counties do not have the resources to do so. There

are usually more services for wards and larger budgets in the urban areas, and the Division of Aging (Senior Services) appeared more supportive in petitioning in these areas.

Private guardianship services. Public guardians are permitted to take private guardianship cases as well as public cases, and may be conducting a private business on the side. This is possible because they have substantial guardianship experience, as well as contacts with judges and attorneys involved in the system. Ms. Shamel stated that she has ethical problems with this practice and discourages it whenever it comes up. In some counties, attorneys serve as guardians/conservators for individuals with funds, and the public administrators get those without any money.

Lack of other surrogate mechanisms. 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 retardation, but they are not legal guardians, although they are allowed to make placement decisions and assist with needs through their Medicaid allotments. Ms. Shamel thinks that some of these centers' powers may be changing. She noted that one consent form sent to her to sign included a fine print statement that if the regional center is unable to contact the public administrator to authorize decisions/services, the public administrator gives the regional center permission to act as guardian. However, public administrators cannot sign over their authority to make decisions for their wards. This permission can only be given by the local courts.

Summary and Comments

Missouri law provides for an elected county public administrator to serve as guardian of last resort in each of the state's 115 jurisdictions. There is wide variability throughout the state: in the background and experience of the public administrators, the method of payment, the additional functions they perform, the caseloads, the extent of support from county commissioners and judges, and whether or not the administrators petition for guardianship cases.

The state's system of public administrators as public guardians is unique. On the positive side, the system covers the state. On the negative side, using elected officials to perform this critical role interferes with continuity, and works against the development of a cadre of qualified, experienced, surrogate decision-makers. Moreover, funding is uneven and patently insufficient, resulting in sometimes dangerously high caseloads. Lack of funding also provides incentives for public administrators to take on other roles, including provision of private guardianship services, which could be detrimental to the public guardianship wards.

The Missouri Public Administrators Association recognizes these serious problems and is working to address them. The Association's recent adoption of the NGA standards and code of ethics is an important step toward resolution.

IOWA

In June 2004 we interviewed Deanna Clingan-Fischer, the Legal Services Developer at the Iowa Department for Elder Affairs. Ms. Clingan-Fischer had fourteen years' experience with that department at the time of the interview. Ms. Clingan-Fischer reported that there had been unsuccessful attempts to change guardianship law in 1995. At that time a working task force consisted of representatives from the University of Iowa, the Department of Human Services, the Iowa Department for Elder Affairs, Protection and Advocacy, the Legal Services Corporation of Iowa, and University of Iowa Hospitals.

The task force re-convened in 1999, reconfigured to make it more multidisciplinary, and sought to address public guardianship and substitute decision-making practices and law. As of 2004, the task force was again attempting to develop a public guardianship law, with a proposal to establish a statewide office with two pilot public guardianship projects for approximately \$700,000. However, as of our interview, a viable advocate to introduce the legislation had not been identified. An effort was also underway with the University of Iowa to document the unmet need for guardians, conservators, powers of attorney, and representative payees. The survey had been completed, and the Department was in the process of tabulating the results.

County Program

Blackhawk County is the only county entity that serves as guardian of last resort. This county program is located near Waterloo, Iowa, where the 60+ population is 128,013. The county board of supervisors provides funding for guardianship, conservatorship, and representative payee services. The program derives its authority from the county board of supervisors' determination of the need for a decision-maker of last resort program in the county. The program is staff based and is housed within the county courthouse.

The program's annual budget in January 2003 was \$125,000, and was used primarily for wages, benefits, and office space for two social workers and clerical support. Ninety per cent of the budget comes from the county human service budget, which is administered by a county point of coordination (i.e., individual designated in each Iowa county to administer funds mainly for people with mental illness, mental retardation, or developmental disabilities).

The Blackhawk office receives referrals from professionals working with the proposed client and sometimes has a waiting list. In addition to the public guardian program, there are two non-profit agencies in the county that act as a substitute decision-maker if an individual has resources. If the Blackhawk County office determines that an individual needing guardianship has financial resources, the person is referred to one of the two non-profit entities.

Volunteer Programs: Polk County

Legislation to allow for statewide volunteer guardianship programs was established in 1989 (*Iowa Code* Section 217.13) and is also a potential mechanism for last resort decision-making. The intent of the legislation was to develop a statewide volunteer guardianship program, but funding was never authorized. This legislation allowed clients of the Department of Human Services (DHS) who needed a guardian but who had no suitable or appropriate decision-maker to be served by volunteers trained to act in that capacity.

Polk County (60+ population of 374,601) is one of the few county programs to implement a successful volunteer guardianship program under this code section. Clients served come from DHS caseworkers and APS referrals to the Polk County attorney's office. If the proposed ward is a county client, the Polk County attorney typically files the petition, but there is no filing of any petition until a guardian can be located.

There is no coordination between the Polk and Blackhawk County programs. Some individual county representative payee programs also exist in the state to fill some gaps in substitute decision-making needs

Medical Substitute Decision-making Board.

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 (*Iowa Code Ann.* 135.28 & 135.29). These boards are able to act as medical decision-maker of last resort. The boards' ability to act is confined to "one time medical decisions." Seven counties have local boards that can hear cases.

According to Ms. Clingan-Fischer, the success of the decision-making boards is mixed. Some users have found the system easily accessible, while others have experienced frustration. The process can be frustrating because there is a lot of paperwork involved, and decisions cannot always be made in a timely manner. The medical boards have established parameters regarding decisions they are willing to make. For example, they will not make placement decisions involving long-term care facilities. Generally, the boards serve a younger adult population, including those with developmental disabilities and those with mental retardation.

Procedural and Monitoring Issues

Iowa has two processes for filing a guardianship or conservatorship petition; a voluntary petition, and an involuntary petition process. In a voluntary proceeding, the proposed ward is the petitioner and must understand and have capacity to sign the voluntary petition. In an involuntary proceeding, generally the individual requesting to be the guardian and/or conservator is the petitioner. Attempts have been made over the

years to remove the voluntary petition process from statute because of due process concerns that there are no hearings, potentially no implementation of a standard of proof, and no notice aside from the signed petition.

In the 1995 Iowa Supreme Court case, *In re Guardianship of Hedin* (528 N.W.2d 567), the court established standards that must be met in order to appoint a guardian. The standards and requirement of seeking the least restrictive alternative for substitute decision-making created in *In Re Hedin* have since been codified.

It is a general impression that guardians' reports are filed with the probate court but receive very little review, with considerable variation on how guardianships are monitored.

Summary and Comments

Public guardianship needs in Iowa are met in piecemeal fashion and in many areas not at all. State legislation creating a system of volunteer guardianship programs was enacted but not funded, and only one county has such a program. One additional county operates an independent staff based program that provides guardianship, conservatorship, and representative payee services.

Iowa law established a state substitute medical decision-making board of last resort, and provides for local boards as well. Seven counties (out of 99 total) have such local boards, authorized to make one-time medical decisions for individuals without the capacity to give informed consent, if there is no one else to do so.

This leaves much of the state without public guardianship. Practitioners and advocates are acutely aware of the gap and are assessing unmet need and developing legislative proposals to create a statewide public guardianship program.

INDIANA

In June 2004, we interviewed our state contact, Ms. Kate Tewanger, who is the Program Consultant for Adult Guardianship, Money Management, and Legal Services. At that time, she had been with the Bureau of Aging and In-Home Services for one year. Indiana's program started in 1988 with the state's efforts towards de-institutionalization of individuals with mental illness.

Administrative Structure and Location in Government

Indiana's public guardianship program was established as a mechanism to provide assistance for persons transitioning to less restrictive environments. Six non-profit partner organizations located near state developmental centers and mental hospitals were designated for this task – four area agencies on aging and two mental health associations. These six regional agencies, each serving several counties, provide statewide public guardianship services through a performance-based, contractual arrangement with the

Bureau of Aging and In-Home Services, which is under the Family and Social Service Administration. Potential guardianship clients enter the system through these entities. At the time of the interview, the Bureau of Aging and In-Home Services was seeking to achieve greater statewide consistency among the programs and to gather more and higher quality data.

The six regional programs are uniform in their requirements for quarterly and computerized reporting. The Bureau of Aging and In-Home Services interacts frequently with the programs in an advisory capacity, and staff is supported by access to the guardianship coordinator. The public guardianship staff holds monthly informational brown bag lunches, which are hosted by the Indiana State Guardianship Association (ISGA). Beginning in the summer of 2004, the Bureau of Aging and In-Home Services was conducting site visits to each of the six programs to assess operations. The programs conform to applicable state law, the Bureau's Operations Manual, and National Guardianship Association (NGA) standards.

The program is state funded. The annual budget is approximately \$486,000, and Ms. Tewanger reported that funding had remained relatively consistent over a 10-year period. The program served approximately 289 individuals in Fiscal Year 2004. Some of the regional programs use Medicaid funding to pay for guardianship services. Through the probate court, the agencies petition for Medicaid reimbursement for a guardianship allowance of \$35 which, if granted, is collected from the facility in which the ward resides. According to information from one county, costs of establishing the guardianship, using *pro bono* attorneys, are about \$1,200. No data have been collected on cost savings of the program.

Ms. Tewanger maintains that a large unmet need for public guardians still exists in the state. She noted that it is more difficult for rural programs to maximize efficiencies because of increased travel distances as well as limited service availability.

Functions of the Public Guardianship Program

The Bureau was designing an operations manual and a monitoring tool to guide the regional staff in specific decisions for the wards. The guardianship programs are supplemented by about six money management programs (e.g., bill payer and representative payee) in various locations around the state. The money management programs are staffed by volunteers. The money management programs and the adult guardianship programs are coordinated by the Program Consultant for Money Management, Guardianship Services, and Legal Services, who reported spending about one-third of her time on each responsibility. Efforts are underway to better coordinate the two programs.

A statewide needs assessment that includes gathering data on guardianship and guardianship services is in the planning phase. The programs appear to have relationships with APS, legal services, and other entities. The programs have little staff turnover, with most positions filled by seasoned workers.

Responsibility to the Wards

Catastrophic events such as change in ward functioning or family living change are common precipitating factors of guardianship. The responsibility of the public guardian terminates upon conclusion of the guardianship, and other than reporting the death of the ward, the programs have no more involvement.

The programs petition for guardianship. Outside of the establishment of the guardianship, the probate court becomes involved if wards are to be institutionalized, and to end the guardianship.

Ward services are arranged on an “as needed” basis. A rough estimate of time spent on each guardianship is five hours per case. Caseloads per individual guardian ranged from 25-44 wards. Wards living in the community are visited at least monthly, but face to face visits of wards in facilities is every 90 days. No formal policy is established regarding ward involvement in decision-making. No mandate exists to make attempts to identify other guardians to free up guardianship slots for those most in need. Annual reports on wards are filed with the court, but the state program does not specifically oversee their completion in a timely manner.

The program is neither involved in educating the public about guardianship in general nor about public guardianship specifically. Information about the program was “buried” in the state’s governmental website, <http://www.in.gov/fssa/elderly/aging/programs-services.html>. The Bureau of Aging and In-Home Services distributes Adult Guardianship Services brochures at conferences to provide additional information.

Filling the Last Resort Gap

All cases of last resort do not go to the public guardian, because the programs do not accept more wards (they were running at maximum capacity). An advocacy service bill (HB 1178) was passed in 2004 to establish a volunteer guardianship program for seniors, based on the Court Appointed Special Advocate (CASA) model. The program hoped, within the next ten years, to “get in the thousands of volunteers.” At the time of interview, the legislation had been implemented in one county (of 92 total).

Summary and Comments

This 16-year-old program is coordinated by the state unit on aging with regional programs through area agencies on aging and mental health associations. It thus falls within the classic “division of social service agency” model – making it subject to potential conflicts of interest as both service provider and surrogate decision-maker for wards.

The program appears to be moving toward greater uniformity, accountability and quality assurance through: consistent computerized reporting; monthly informational staff meetings; coordinator site visits to regional programs; use of standards; development of an operations manual, and efforts to coordinate the guardianship and money management programs.

While a statewide needs assessment is underway, the unmet need is perceived as substantial, and the funding limited. Although no formal staff to ward ratio was mentioned, the programs are at “maximum capacity” at current caseloads, and the program does not serve as guardian of last resort. The newly enacted volunteer program may offer potential, but volunteer management will require considerable resources. Efforts to locate substitute guardians, as well as greater community and professional education about the program, could offer opportunities for improvement.

WISCONSIN

We interviewed Ellen J. Henningsen, Attorney and Director of the Wisconsin Guardianship Support Center, in June 2004. The Guardianship Support Center is a grant-funded project within the Elder Law Center of the Coalition of Wisconsin Aging Groups, a non-profit organization that has been in existence since 1978. Its mission is to support elderly persons in Wisconsin. The Guardianship Support Center has been in existence since 1991. At the time of the interview, Ms. Henningsen had been on staff of the Center for three years. The purpose of the Center is to disseminate technical assistance concerning Wisconsin guardianship law, protective placement, powers of attorney, and other health care decision-making. The office includes a guardianship hotline, newsletter, publications, and outreach. Accompanying Ms. Henningsen was Helen Mark Dicks, the first voice of the Center’s guardianship hotline, who became Director of the Elder Law Center in 2002.

Availability and Coordination of Public Guardianship

Every county provides some sort of guardian of last resort should a proposed ward not have a willing or appropriate family member to serve. These mechanisms are corporate guardians and volunteer guardians, as well as some county-operated guardianship programs that pay stipends to individuals who serve in this capacity as private guardians.

Corporate guardians. Corporate guardians are essentially non-profit or fraternal corporations that must, by law, be incorporated. They provide guardianship services and are paid, sometimes by the county and sometimes by the estate of the ward. The size of the staff is highly variable. In some instances the named guardian entity also provides services for the ward, though Ms. Henningsen noted that counties try to avoid having corporate guardians provide services to their wards, since this would present an appearance of conflict of interest. The corporate guardians are “lightly regulated” by the state. Each must be approved by the Department of Health and Family Services to receive appointments by the court. Corporate guardians also serve as representative payees and

guardians of the estate. Information on Wisconsin corporate guardians is available at www.dhfs.state.wi.us.

Corporate guardians are appointed when there is no one else to serve or if family members cannot agree on which family member should be the guardian. The courts often appoint a corporate guardian in the case of family conflict. There were 72 corporate guardians listed on the website. Corporate guardians are located in every part of the state with some covering multiple counties. The corporate guardians may belong to the Wisconsin Guardianship Association, which holds an annual conference. Some corporate guardians also serve as representative payees.

Volunteer guardians. Of the 72 counties in Wisconsin, 23 have volunteer guardianship programs. These are run either by county human or social services agencies or a non-profit entity. The volunteer programs actively recruit and match volunteers (who are unpaid) with wards in need of guardianship services. Originally, the volunteer programs were funded by start-up grants provided by the state. The volunteer programs were established competitively through a Request for Proposals solicitation and were typically provided one-time funding of \$20,000. At the time of the interview, a change in state funding had ended state-level coordination of these programs, and funding for any new programs had ceased due to state financial problems. (Since then, the state has awarded several small, new grants to volunteer programs).

Volunteer guardians are monitored in the same way that any other guardian is monitored, though some programs include their own individual monitoring. Some are bonded. Some programs serve specific populations, such as wards with developmental disabilities. The volunteers tend to provide guardianship of the person rather than guardianship of the estate. Although some programs take on “difficult cases,” generally the volunteer programs handle simpler cases, with the corporate guardianship programs handling more complex cases. In some instances, the volunteer guardian programs deal with small monetary amounts.

County-paid individual guardians. Wisconsin exempts professional guardians from the corporate guardianship law if they serve five or fewer unrelated people. These guardians may be retired social workers or those with private case management businesses. In some areas, county appointed guardians outnumber the corporate guardians or the volunteers. Guardians who are county-paid receive funds per case or per hour.

Guardianship Procedural Issues

For appointment, a petitioner nominates a proposed guardian, who becomes the guardian unless there is some objection, typically by a family member, defense counsel, or a *guardian ad litem*. A *guardian ad litem* comments on the suitability of the proposed guardian, as well as making a recommendation on whether the guardianship should be imposed. Defense counsel is appointed if the proposed ward objects to the guardianship. The most common petitioners tend to be family members (represented by private attorney), although in some cases the counties (typically smaller counties) may petition.

Two common scenarios for guardianship petitions are discharge from hospital to a nursing home and persons with developmental disabilities turning 18.

In some instances, costs for the guardianship petition may be paid by Medicaid, upon an order by the judge. These dollars are not designated for guardianship services, but rather to pay costs of petitioning for the guardianship. A guardianship court can order that a ward who is receiving Medicaid pay for guardianship fees from the ward's estate. In that case, the ward's contribution to his or her care is reduced by the amount of the guardianship fees, and Medicaid then pays more to the facility than it would otherwise until the fees are paid.

APS serves in three roles in the Wisconsin guardianship process. First, APS identifies persons in need of guardianship who are being abused, exploited, or neglected. APS can petition for guardianship or refer the individual in need to someone within the Department of Health & Family Services to petition.

Second, APS has a role concerning "protective placements." If a guardian wants to place a ward in a facility with 16 beds or more, the guardian must get a court order, called a "protective placement" order. Each protective placement requires a comprehensive evaluation or APS staff either conducts or contracts for these evaluations, and are consulted in any event. The placement recommendation for elders generally is a nursing home. Although this may not be the most appropriate environment for the individual, it is sometimes recommended due to funding streams at the county level. The court can authorize the county to make placement decisions, which are often dependent on county funds and which can effectively prevent the guardian from removing the ward from a facility to a less restrictive environment.

Third, APS staff conduct "Watts Reviews" (named after the case title that created the responsibility) for those under guardianship with protective placements. A Watts Review is a yearly review of appropriateness of protective placements conducted by the county and a *guardian ad litem*. The value of the annual review varies with the competency and interest of the *guardian ad litem*. Placement decisions are often made on assumptions about prospective needs of the ward rather than the current needs, which can result in placement that is too restrictive and for which costs are actually higher. (Since the interview, a new law requires that individuals with developmental disabilities and mental illness be placed in the "most integrated setting" and permits the funding stream to follow the person.)

Guardians ad litem are involved in each Watts Review. They interview the ward to ascertain preferences. The Center is creating training for *guardians ad litem* to ensure understanding of their role in safeguarding a ward's right to live in the least restrictive environment. The county may assert that there are no less restrictive placements available or dollars to fund them. The Wisconsin Supreme Court has mandated that counties have an affirmative obligation to make a reasonable effort to find and fund the least restrictive alternative placement possible. The *guardian ad litem* must test the county assertion that no other placement option is viable.

Court monitoring of guardianships varies significantly. For example, in some counties, little attention is given to the completeness or accuracy of guardian reports. No centralized data are collected on the guardianships.

Wisconsin has several active networks promoting health care powers of attorney as a less restrictive alternative to guardianship. Involved in this system are hospitals, clinics, and the State Bar. Ms. Dicks noted that “In one part of the state in particular, the southwest corner, the percentage of the population who has power of attorneys for healthcare is over half.”

Summary and Comments

Wisconsin has no statewide public guardianship program and no statutory provision, but it does have three mechanisms to provide for guardianship of last resort – which are paid for or approved by the state. (1) Corporate guardians are incorporated entities that provide guardianship services with payment by counties or from the estate of the ward, and that are approved by the Department of Health and Family Services. They are located in all parts of the state. (2) Volunteer guardianship programs are operated by county agencies or non-profit entities, and were originally funded by small state grants. (3) County-paid guardians serve five or fewer wards. These three systems do not appear to be coordinated. The Guardianship Support Center provides technical assistance on guardianship and surrogate decision-making issues. Unlike other states we studied, the interview did not reference a large unmet need for public guardianship services.

Wisconsin requires guardians to seek special approval for institutional “protective placement,” and requires an annual review of these placements. The roles of APS staff and of *guardians ad litem* are critical in making this system work effectively. These added layers of review may complicate the role of guardians of last resort but provide needed safeguards for wards.

Chapter 6 Case Studies of States with an In-Depth Examination (Telephone Surveys and Site Visits)

This chapter contains information derived from an in-depth study of public guardianship in three states with public guardianship programs – Florida, Kentucky, and Illinois. We conducted in-depth interviews with at least one key informant in each state. In-depth interviews were pre-arranged, with interview questions sent to the study participants in advance.

The interview was tape-recorded with knowledge and consent of the participants. At least two interviewers conducted each in-depth telephone interview, which ranged from one to two and a half hours. Interviewers made notes along with the audiotapes, which were later transcribed by a reputable transcriptionist at the University of Kentucky. The transcriptionist checked the audiotapes for accuracy, as did members of the research team. Follow-up telephone calls or e-mail messages were sent for clarification as needed. In many instances, interview participants sent additional documentation for clarification.

Site visits were also conducted in these states. Florida and Illinois were the subject of intense study by Schmidt and colleagues more than 25 years ago, and they were selected again because they allowed for historical comparison. The site visit in Kentucky was conducted because the project's principal investigator resided there, which was an opportunistic and cost-saving feature. Florida, Kentucky, and Illinois represent different models of public guardianship: that is, social service agency models and dual (state program and county) models, respectively. Also, The Retirement Research Foundation specified that research efforts be focused on these states. Agencies of the state contacts were remunerated \$1,000 for participating in the in-depth study, arranging site visits, and assisting with the site visit.

Site visits were conducted in July and October 2004. Each visit was pre-arranged with the state contact well in advance of the arrival of the investigators. The state contact made the majority of arrangements prior to the visits and was requested to assemble 2-5 people to be interviewed and tape-recorded in focus groups from the following categories of professionals: attorneys, judges and court administrators, APS staff, staff from the aging and disability communities, local public guardianship staff, and two wards. Site visits were two days in duration, and at least two investigators conducted each site visit.

Transcriptions of the audiotapes of the telephone interviews and site visits were provided to the investigators, who then together wrote this chapter from the information provided. Members of the advisory committee reviewed chapter drafts. Also, the key informants read a draft of the report pertaining to that state and checked the summary for accuracy.

Because of differences in statewide approaches to guardianship, as well as geographic and demographic differences within each state, the approaches to public

guardianship varied considerably. Hence, in this chapter, we treat each state's answer to addressing the need for public guardianship individually. We present the information in this chapter by the order in which the site visits were conducted, beginning with Florida.

FLORIDA

Our state interview contact was Michelle Hollister, Executive Director of the Florida Statewide Public Guardianship Office (SPGO), located administratively in the Florida Department of Elder Affairs in Tallahassee. She had had this position for nearly a year when we interviewed her. Prior to that time, she worked for the court system in Broward County, overseeing the probate and guardianship and mental health divisions for court administration, and for a brief period of time, represented the public guardian in Broward County. Also attending the interview was Karen Campbell, the Director of the Office of the Public Guardian, Inc., which is the public guardian for the 2nd Judicial Circuit.

Administrative Structure and Location in Government

In the 1980s, public guardianship in Florida consisted of three pilot projects in three distinct parts of the state; they remained as pilots for over 15 years. As a result of legislation in 1999, there are now 16 total public guardianship programs, with two of the 16 pending approval of the SPGO office. Every public guardian must be appointed by the statewide public guardian office, and the Executive Director may both approve and rescind the appointment of the offices. The SPGO appoints the program for a 4 year term and awards contracts, which range in amount from \$15,000-\$438,000. Most programs receive state SPGO dollars. In addition to state monies, the local programs receive funding from United Way and other charitable donations.

Appointment of the office may be granted to a single individual or to a non-profit entity. By statute, more than one public program can serve a geographic area. The local offices have varying models of operation and cover 23 of the 67 counties in Florida. The public programs serve individuals 18 years of age and over needing public guardianship services.

The local programs require uniform annual reports, but at the time of the site visit other reports were not standardized. The programs also use performance measures, which are part of the newly instituted annual report. National Guardianship Association standards inform the annual report and performance measures. The SPGO holds quarterly meetings with all offices, but only the travel of the Executive Director is funded. Each program takes turns at hosting a meeting.

Alterations in funding are of great concern. Until July 1, 2004, many of the public guardianship programs received a portion of their funding from civil filing fees. However, a recent change in the Florida Constitution resulted in removal of the counties' authority to direct filing fees toward public guardianship. The public programs were trying to find a substitute funding mechanism, and the Governor, Jeb Bush,

recommended a five-million dollar matching grant program at the outset of the legislative session. The matching grant program passed (S.B. 1782). However, funding was subject to appropriation, and the appropriation was not approved. The Office was assisting the local programs to identify alternative sources of funding. The total budget for the SPGO in FY 2003 was \$2,399,569 – statewide dollars that come to the Department of Elder Affairs. Ms. Hollister reported that there are serious threats to their ability to maintain funds “everyday.” Under S.B. 1782, the SPGO will have a direct support organization, which will allow a fund raising mechanism. Thus, there will be a non-profit mechanism with the ability to take funds.

The program hopes to gain additional monies by using an administrative claiming model, based on the Illinois public guardian’s practice. Administrative claiming dollars fund Medicaid eligibility. An incapacitated person can only access Medicaid funds through a guardian. If the individual has no means of getting a guardian, then the public guardian steps in to fill the decisional void. If the state provides public guardianship services, then it incurs a cost to do so such that the incapacitated individual receives a Medicaid payment. The state can ask the federal government to share that cost and receive 50% matching funds. For over a year, the request for Medicaid claiming was pending federal approval, and, as of spring 2005, it was still pending. With this initiative, the state makes application to pay, not for guardianship service provision, but for assisting a ward to access to Medicaid funds.

Functions of the Public Guardianship Program

A policies and procedures manual provides guidelines on making wards’ decisions, but most are left to individual programs. There are very few limited guardianships, and so the local programs generally have full decision-making authority. However, some programs seek court approval even when not strictly necessary, such as when the ward would be traveling out of the county for more than two weeks. Decisions to settle real estate or abandon property must come before a judge.

Institutionalization. There are no special procedures for institutionalizing wards. Ms. Campbell reported that, in reality, very few wards were living in the community when they were referred to the public guardian, stating, “By the time the person is referred to my program, they have either been institutionalized most of their lives or they are in an institution.”

Illnesses and End of Life Decision-making. When wards have illnesses, such as Alzheimer’s disease, programs make every attempt to match resources with clients’ special needs. Because of the volume of wards with developmental disabilities, some programs are active in the mental disability advocacy community. End-of-life decisions are given special attention because the state developed a written procedure that authorizes a guardian of a person, when the wishes of a ward are not known, to make, under certain circumstances, decisions to withhold or withdraw life-prolonging procedures⁴. The

⁴ This very issue was hotly under debate in the Terri Schiavo case, which was under a world-wide lens as we were concluding the writing of this report.

procedures, grounded in Florida statute, specify what a case manager must do, including persons to notify and letters needed for approval. One local program will then, though not required in statute, submit a motion to the court seeking authority to act in the best interest of the ward. Under this procedure, the director of the local program must personally visit the ward 24 hours before making a decision to withhold or withdraw treatment.

When a ward dies, by statute, the public guardian office must close out the guardianship absolutely. The Office notifies any family, if possible. The public guardian offers the family the opportunity to make final arrangements. Public guardians gather up all personal belongings and store them at cost to the program, not to the ward. The public guardian then makes a final report to the court, but the guardians do not have to file for probate. Typically, a report is made to the court, and the remaining dollars from the ward's estate are sent to the Registry of the Court. The family of the ward is notified of the death in writing and is given the opportunity to probate the estate. After a reasonable amount of time, if the family has not made any filings, then the program seeks to abandon the personal belongings and leave them to a charitable organization.

Representative Payee. The local public guardianship offices serve as representative payee and were exploring having public guardianship programs serve as organizational representative payees. (Organizational representative payees are allowed by Social Security to have ten percent of the ward's benefit or \$28, whichever is less.) Though not a great deal of money, it is more than an individual representative payee receives, which is no compensation whatsoever. Social Security does not recognize an appointed guardian, and requires guardians to apply to become representative payees to manage Social Security funds for their wards. Thus, the programs serve as representative payee because they often deal with the ward's Social Security income. The programs only serve as representative payee for their own wards.

Petitioning. Under Florida law, an individual must be declared incapacitated before there is a petition for appointment for guardian. The public guardian programs sometimes petition for incapacity. Most other interested parties (e.g., nursing homes, hospitals) are not eager to bear the costs of petitioning. Programs are either represented in court by an attorney on contract or on staff. In one county, the program is housed in Legal Aid.

One of the public guardianship programs was attempting to avoid the conflict inherent in petitioning for its own wards by having the individual making the report on the proposed ward swear in an affidavit that he or she reasonably believes that the proposed ward is incapacitated. This information is attached to the public guardian's petition. A case manager from the public guardian's office meets with the alleged incapacitated person for the purposes of saying that there is no contradiction with the affidavit, and that this statement will appear in the petition. Thus, a judge will be presented with a petition from the public guardian's office that indicates the presence of a concerned individual in the community who swears that he or she has reason to believe the individual is incapacitated and that the public guardian has met with the person and

finds no reason to contradict what that individual has sworn to. For that particular public guardian office, the judge will shift the work of preparing the case to the county attorney, who will set up the examining committee and schedule the hearing.

Coordination with Other Entities. All programs maintain a relationship with APS, and many programs have a relationship with the area agencies on aging. The most frequent scenario for triggering a guardianship is when an individual is in the hospital, the hospital does not know his or her identity, and family cannot be identified. In this case, the hospital needs some entity to grant informed consent for treatment. Other common scenarios are that of a hospital needing to authorize transfer to a nursing home, or that of a nursing home caring for an individual who is incapacitated but who cannot receive Medicaid benefits.

Special Initiatives. The state office was in the process of receiving the results of a statewide needs assessment, conducted by the Department for Elder Affairs, to assess the unmet need for public guardianship.

Local Public Guardian Staff

Composition. Education levels of local staff range from a B.A. to a Ph.D. Several offices are run by attorneys. Many programs are staffed by case managers with social work backgrounds. They reported very little staff turnover, although some changes in staffing occurred with a program that went from being part of a state agency to a non-profit. The programs said that they have a good relationship with the state office.

Caseloads and Cases. Even though Florida has an unusually high number of older adults, most programs reported a fairly even split between older and younger wards. Caseloads may be divided by geographic location or by facilities in which the wards reside. Most wards are visited monthly, although the statutory requirement is for quarterly visitation. Wards are included as much as possible in decision-making, with at least one program focusing on the concept of self-determination to ensure ward inclusion: Case managers and wards often set goals together. Many programs use standard forms for care planning purposes, but forms are not uniform across the state. Many entities join the public guardians in care provision (e.g., developmental services, economic eligibility, Social Security, APS, hospitals, nursing homes).

Accountability. Program supervisors conduct monthly random file reviews. Programs are audited, in many cases, by their own board, as well as the state office. The programs are guided by a state policies and procedures manual. Annual reports are given to the courts. Some programs assess work done on behalf of the wards bi-yearly.

Education and Training. In addition to coordinating the local public guardianship programs, the statewide office is also responsible for the registration, as well as the education and training of professional guardians. In addition, the office is developing materials on educating the general public about guardianship and public guardianship.

Many programs attend the Florida State Guardianship Association Conference and receive continuing education from that entity as well as through the state office. All guardians, including the public guardians, are required to have 16 hours of continuing education every two years. The statewide office handles the paperwork for all professional guardianship training in the state. Staff reported that they need additional training in end of life decisions, Medicaid planning, investment managing, and property management. Staff also wanted guidelines from the state office on guardianship practices.

Special Issues. First, the filing fee change in Florida, discussed in detail above, was of great concern to the local programs, which stood to lose a substantial amount of their program income due to the change. Second, the diverse population in Florida requires many programs to be very sensitive to cultural differences. Third, guardians reported testifying in court in Baker Act proceedings (Florida civil commitment proceedings). Public guardians are also often present in guardianship hearings.

Ratios. By statute, public guardians may only serve 40 wards for every one professional. Waiting lists are common in most parts of the state with a public guardian program. The ratio can only be increased or decreased by the state office. Most program staff agreed that it was important to have the 40:1 ratio because of the complexity of cases. However, one staff person later wrote us to say that she believed a 20:1 ratio would actually provide better services to wards and cited the unpredictable nature of their guardianship cases.

Promising Practices. Barry University School of Social Work, one of the local programs, makes use of social work interns to help support public guardianship services.

Judges and Court Administrators

Composition. Most judges and court administrators interviewed had been in the judiciary for no less than 5 years and as many as 25 years. This group had interactions with both the public guardian and private and corporate guardians. There are approximately 8,000 persons under guardianship in Miami. The main public guardianship program in Dade County has 804 wards, and another 40 wards are under the care of a secondary public guardianship program.

Cases. Most proposed wards who come before the courts are living at home but are unable to manage either their finances, their health care, or both. Indigent cases were brought to the attention of the courts primarily through APS or by a facility. *Pro bono* attorneys are often appointed by the courts to serve as guardians because of the cap on wards for the public programs.

Public guardianship cases seem to consume a higher percentage of administrative time than private guardianship cases due to their emergency nature. A general master said that over 40% of cases seen were those of the public guardianship program.

Petitioning. Typically, the public guardian office petitions for its own wards, but that was not true for all jurisdictions. For example, Miami and Lee Counties use a “wheel” system for selection of attorneys to serve as petitioners. In many instances, an emergency temporary guardian is appointed, and at the same time a petition for determination of incapacity and plenary guardianship may be filed. There were very few limited guardianships granted, and when they were granted, they were typically for persons with mental illness. Restoration of capacity rarely occurs.

Accountability. A computerized system used to track wards appeared to be problematic because it was dated. Also, data gathered were insufficient. A uniform computerized system would facilitate better tracking of the wards. In some courts, such as Miami, an initial guardianship plan is required and subsequent plans are required annually. These plans help the court understand ward needs, particularly in the realm of finances. Plans are not uniform throughout the state. An exploration of filing plans via computer was underway.

Promising practices. At least one judge took an active role in public guardianship by personally going to the county commissioners to secure additional funding. Judges were also active in helping to secure other community resources for the public programs. In one circuit, the judiciary even educated county board chairmen and budget directors from the county attorney’s office. Judges were informed about guardianship and public guardianship at a judge’s conference. Several large judicial circuits have specific units for guardianship. One judge suggested that it would be useful to have a database of grants or alternative funding sources for which the courts and/or the public guardian could apply.

Strengths, Weaknesses, Opportunities, Threats. The major threat is lack of funding. Said one participant, “It is very sad for everybody including the workers at our public guardian office to be living with the day to day threat that the doors could be closed for lack of funding.” Related to the lack of funding is the lack of attention by policymakers. An opportunity is the awareness raised by increased training for all guardians. The judges and court administrators also cited the continuing and increasing need for public guardians.

Attorneys

Composition. The attorney group had a range of practice experiences – from private practice to working for the state. Some attorneys served as guardians while others represented the petitioner or worked with public guardianship in an advisory capacity. The range of experience in their current position was from 3 to 10 years. The attorneys stated that, with the addition of the new public guardian programs, the need for guardians was being somewhat alleviated.

Petitioning. The petitioning issue was regarded as a problem. Not only was the filing fee change problematic, but also, more broadly, the way cases arise in the first

place. Many cases arise because a concerned neighbor or friend comes forward. Said one attorney,

We have to go out and draft petitioners sometimes. When it [petition] comes from facilities, there is an added conflict of interest issue. The facility has a resident whom they believe to be incapacitated. There are some ethical issues that we talk about in our Bar meetings for a facility to initiate the guardianship process. There are some potential areas for abuse. Having said that, again, when you are desperate for a petitioner to get this in front of the court, you are willing to do whatever it takes.

Attorneys may file a petition for indigency and have filing fees waived. Filing such a petition is an individual attorney's decision, but many are unaware the opportunity exists. However, as of July 2004, fees cannot be waived even if there is an affidavit of indigency. A petitioner may defer the \$400 filing fee; however, in at least one circuit, if they are not paid, the deferment agreement is a judgment against the attorney. Nursing homes, assisted living facilities, and hospitals were apparently not a ready source of payment for the approximately \$400 in filing fees, though in some cases they were willing to be the petitioner.

Accountability. There is little guidance in the Florida statute or in case law regarding the responsibility of the court-appointed attorney for the alleged incapacitated person. Attorneys not immersed in guardianship presented potential failing in client advocacy. Some attorneys regard their job as defending the capacity of the individual in the same manner as a criminal defense proceeding. The attorneys said that Bar consensus, however, is that a court-appointed attorney should act in the best interest of the alleged incapacitated person. The chance of having someone who is unfamiliar with guardianship is high. Court-appointed attorneys are not paid unless a guardianship is awarded. In some counties, the court-appointed attorney for the alleged incapacitated person is selected by the county, but in others, the petitioner selects the court-appointed attorney.

Appraisal. There was a positive appraisal of the public guardians generally, and the office was commended for educating the media about public guardianship. One attorney said the public guardian program in that jurisdiction was excellent at securing grant dollars to fund the program and operated in a very efficient manner. The public guardian's office was regarded as the first source for education on guardianship. There had been some recent negative media coverage, and one of the attorneys stated that the public programs are unfortunately associated with negative comments in the press on private guardianship.

Special Issues. One issue was that of non-profit entities not totally under the jurisdiction of the state public guardian's office. Such private non-profit guardianship agencies are assigned cases of both indigent wards and paying wards. These entities were forming referral relationships with health care providers. For example, a hospital or a chain of skilled nursing faculties may form a relationship with a non-profit agency. The

facility agrees, *de facto*, to call the non-profit when it has a guardianship case, whether fee-generating or not, if the non-profit agrees to take all the wards. Because the non-profit has developed that relationship (receiving dollars, especially from fee-generating cases), there is a propensity towards not confronting the facility if there is problem with the ward later on, which compromises the ability to advocate for the ward. The attorneys did not believe that the problem had made its way into the public guardian system, but they did regard it as a potential problem.

Another problem cited was the potential risk of the non-profit programs to charge a great deal for the paying wards in order to cover the costs of the indigent wards. The paying wards may receive more zealous advocacy and oversight than the indigent wards.

Promising practices. Broward County has a fairly sophisticated court monitoring system for guardianship, thanks to a judge who was able to secure funding for the division.

In some counties, persons were simply not to be found incapacitated if there was no one to serve. To overcome this problem, sometimes a person may be willing to serve as a health care proxy, if the individual still has capacity to execute an advance directive under Florida law. For example, a facility can hire a social worker (who must take a 40 hour guardianship training) to serve in the capacity of health care proxy, and a local non-profit might serve as a representative payee.

Strengths, Weaknesses, Opportunities, Threats. First, programs are under-funded, and the unmet need for guardians is great. When the public guardian hits the maximum number of wards, there is no provision for backup. Second, because the local public guardianship programs differ across the state, there is not much uniformity. Thus, accountability suffers. Third, it would be helpful to enact provisions regulating the relationships of guardians to referral sources. Fourth, some public programs take both public and private cases, which may present a conflict of interest.

Adult Protective Services

Composition. The APS group included over 20 people from all over Florida. Most attendees were on the telephone.

Cases. APS estimated that generally between 10% and 25% of their cases involved incapacitated persons or persons needing public guardianship services. In a few instances, that number was as low as 1% of the caseload. APS caseloads ranged from 80-120 cases per worker. APS can and does petition for public guardianship. Securing a public guardianship typically closes an APS case.

In some counties, APS work well with the public guardian, while other counties have no public guardian. In some, non-profits, such as Lutheran Family Services, filled this need, and corporate, for-profit guardians did so in others. Rural counties appeared to have a difficult time securing guardianship services. In at least one district, the public

guardian had such a long waiting list that APS had not used the program in over 10 years, and at least one public guardian would not take cases unless the individual was in a skilled nursing facility or locked facility. In at least one district, the council on aging provided public guardianship services and handled petitioning.

The majority of cases referred are self-neglect cases, although exploitation is often involved as well. Most guardianships are initiated by APS for people in the community as opposed to facilities. In rare instances, guardianships are initiated to move people from one facility to another, for example, when the resident's needs are not being met by the current facility. APS determines capacity by the use of a standard assessment tool called a "Life's Capacity to Consent" form. Psychological evaluations are generally contracted out, and some districts have limited dollars set aside for that purpose. Involuntary protective services, such as placing an individual in a state mental institution, may be provided by court order.

Appraisal. The APS appraisal of the public guardianship system was not positive in that public guardianship offices frequently could not accept cases or could serve only a fraction of APS cases in which a public guardian was needed. Respondents indicated that in some areas, 90-100% of the need for public guardians was not being met. For other jurisdictions, the need was being met. In at least one area, when the need for public guardianship for adults was raised, a local commissioner said, "if we had any money, we would give it to the children."

Strengths, Weaknesses, Opportunities, Threats. The APS group reported as strengths of the program that they get the job done and provide appropriate and necessary services. The public guardianship program provided valuable resources when they were available. The weakness was the lack of funding and inadequate staffing. APS wanted a public guardian office in every county and to have the public guardians do a full review of annual reports submitted to the courts.

One opportunity identified was that of a guardian's advocate program. These individuals could be responsible for needs of the client, including medication and medical decisions. (Serving as a limited guardian for health care and financial decisions would meet that need).

Aging and Disability Advocates

Composition. Participants included representatives from area agencies on aging, the Advocacy Center for Persons with Disabilities, and the Local Long-Term Care Ombudsman.

Cases. A concern was expressed about the number of people who were without guardians and residing in nursing homes. An unmet need for public guardians was identified but not quantified. The public guardian appears to be active in case planning and in facility complaints filed by the ombudsman.

Appraisal. Advocates stressed that the public guardianship program was underfunded and not statewide. The public guardianship programs were already at their maximum. Those who worked with the local offices were complimentary. The new Statewide Office Executive Director was positively regarded. Since the program was placed in the Department of Elder Affairs, there was more concern for the guardianships of older adults, but the respondents could not comment on the younger population. One person indicated that, at one time and in one jurisdiction, the public guardian had over 60 wards to one worker and a waiting list of well over 1,000 people.

Strengths, Weaknesses, Opportunities, Threats. Strengths included that the program was more visible than it had been in the previous administration and was generally positively regarded. Maintaining a high profile in government and with the media was deemed important. Weaknesses included the lack of a statewide registry of people who need guardianship services. The public guardian offices could do more community and judicial education. The ratio of staff to wards was regarded as too high to adequately serve wards.

Threats included under-funding and staff burnout: “They’re dealing with people who have enormous amounts of needs and are relying solely on them. That’s like having 45 children.” Medicare and Medicaid should alter reimbursement procedures so that funding for public guardianship services is allowed. Licensure for all guardians was also recommended.

Wards

The two wards we interviewed (a male and a female) were both aware that they were under the protection of a public guardian. They seemed generally satisfied with the help that the public guardian had given them. One said, “It’s the best thing that ever happened to me,” and that the guardian “knows me like a book.” Both believed that their needs were attended to and their wishes were respected.

Summary and Comments

The pilot projects in Florida were in existence when Schmidt and colleagues (also located in Florida) conducted the original study. That it took an additional 18 years from the time the authors’ book was published to establish a potential statewide system of public guardianship is surprising, given that a clear foundation was established through assessment of unmet need and scholarly and legislative activity at the time. Nevertheless, the Florida programs are now established in the Department of Elder Affairs and cover approximately half the counties in the state. The model established is the social services agency model. Problems with advocacy for the ward are obviously inherent. The local programs, typically non-profit entities, have contracts with the Statewide Office and utilize a variety of methods of operation. Sixteen entities had made application at the time of our study. The state program also has oversight of Florida’s private professional guardians. At the time of this report, the state had just instituted a policy that all

guardians be certified through a licensing examination, although this requirement had not yet been implemented.

The public programs serve adults 18 years of age and older, both as guardians of the person and of the property. The programs also serve as representative payee and were exploring the possibility of serving as an organizational representative payee. Under this arrangement, if approved, the program could realize a slight fee for this service. Guardians, by statute, can authorize withdrawal of a ward's nutrition and hydration, and the local program director must personally visit the ward within 24 hours prior to the program making the decision to do so.

A change in the collection of court filing fees threatened the existence of the programs, and virtually all entities we interviewed cited it. The programs were partially funded by dollars realized by civil filing fees, but that funding stream had recently been eliminated. The programs were scrambling to recoup the loss. The governor proposed a source of funding using a matching program, and this was enacted but dollars had not been allocated. The executive director was seeking funding for the programs in variety of ways, including a Medicaid administrative claiming model, as well as options for fundraising by a non-profit entity.

The programs can petition for guardianship, although they were reported as rarely doing so. Funding the filing of petitions from outside sources was regarded as a real impediment to establishing guardianships, as was the *guardian ad litem* system. The *Guardian ad litem* (GAL) system was noted as highly uneven, with little training for attorneys who elect to serve in this capacity and, who, in many cases, exhibit a lack of understanding of the role.

Notably, and only in our site visit to the state of Florida, there was a statutory guardian to ward ratio of 40:1, which, in some programs had already been reached. The result of the cap was that public guardian services were inaccessible in that service region. Thus, when the public guardian was needed, the last resort need was not met. One focus group participant later wrote the investigators to say that the 40:1 ratio was too high to adequately serve the wards. The use of volunteer guardians to fill the service gap was being piloted, although it had been explored by the Schmidt study over 15 years earlier and its effectiveness questioned.

The programs were establishing some uniform procedures at the state level, but internal working forms were not standardized across programs. Efforts were made to have meetings of the local programs throughout the state, although funding was inadequate to provide for travel by local program staff. Staff typically had a social work background.

The programs, early in their development, were generally well regarded in the state. Focus group participants had high hopes for Ms. Hollister, who had recently assumed her position and had taken an aggressive stand on helping to secure funds,

increasing visibility of the office, and exploring relationships with other entities associated with public guardianship in the state.

KENTUCKY

Sue Crone was the branch manager for the Families and Adult Consultative Services Branch in the Division of Protection and Permanency, in the Department for Community Based Services in the Cabinet for Health and Family Services. Her office is located in Frankfort, Kentucky. Ms. Crone began working as a case worker in the guardianship program in the early 1990s and was then promoted to the position of regional supervisor for the central Kentucky area, a catchment area of 38 counties (Kentucky has 120 counties). She had been in her current position for two and one half years, and was the direct supervisor of the regional guardianship supervisors until a recent administrative change. Ms. Crone was also responsible for review, consultation, development, and support of the Cabinet's APS program. According to Ms. Crone, the adult guardianship program is viewed as "an ongoing court-ordered protective service for adults" similar to the committed children in the Child Protective Services program.

Administrative Structure and Location in Government

Originally the public guardian program was administratively housed in the Office of the State Ombudsman. Because the program interacted so much with APS, in 1990, a decision was made to move the program to the Department of Social Services, now the Department of Community Based Services. One of the reasons for the administrative move was to encourage APS staff to keep cases open longer, rather than passing them to the public guardian and to encourage either a concerned individual or a family member to become the guardian, rather than the state. In certain service regions, the APS problem remains.

At the end of the past administration (and political party shift) a change was again made to the governmental location of the public guardianship program. The previous administration decided that public guardianship was the only direct service not under the supervision of the service regions in Kentucky. (There are 16 service regions in the state, and there are 6 guardianship regions). The service regions include essentially the same counties as the area development districts (i.e., how social services and the area agencies on aging are organized). Although a guardianship staff person is not physically located in every county in the state, there is a guardianship staff person in every service region with the exception of two: the rural counties immediately surrounding Lexington and Louisville. The purpose of the alignment of the six service regions was to keep the service providers as proximal to the wards as possible and to make changes as positions were either allocated or vacated.

The recent change that placed the public guardian program under the service regions was to prevent APS from potentially referring wards inappropriately for guardianship and closing cases prematurely or without fully exploring available and less restrictive services. Resolving differences such as this between APS and guardianship

was especially trying when Ms. Crone directly supervised guardianship and provided best practice consultation and direction on adult protection. When such situations arose, Ms. Crone would resolve the situation by employing the expertise of various staff specialists also on her branch: the elder abuse specialist, the domestic violence specialist, the guardianship specialist, a child protection specialist, and two nurse consultants. Their purpose was to focus the discussion on the best interests of the individual.

Guardianship Procedure. The majority of referrals to the program come from APS. In most instances, APS investigates cases for the appropriateness of guardianship services. Cases not arising from APS come as individual referrals. For the guardianship hearing, three documents must be filed simultaneously. Under Kentucky statute, when a petition for disability is filed (initiation of a guardianship proceeding), an entity willing to serve as guardian must also apply. A GAL is appointed upon the court's receipt of a petition for disability. The function of the GAL is to represent the best interests of the respondent in the disability hearing.

Although there are county to county variations, if an individual is in a state institution, a state psychiatric facility, or an Intermediate Care Facility for the Mentally Retarded, reports of an interdisciplinary team (IDT) are to be filed with the petition for disability and application for appointment of fiduciary. The IDT includes a social worker (provided free of charge by the Cabinet), a physician, and either a psychologist or a psychiatrist. Per statute, a hearing must occur within 30 days of filing the reports.

If the alleged incapacitated person is not living in a state facility, then the court will assign a three-person team, composed of individuals with the same qualifications mentioned earlier, for assessment purposes. The reports of the three individuals are due to the court two weeks prior to the date of the court hearing. A GAL is assigned by the court in these cases also. A hearing must occur within 60 days of the filing of the petition for disability and application for appointment of fiduciary. Should an emergency situation arise, such as a needed medical procedure arise (often the case), the public guardian can file for an emergency guardianship any time during the pendency of the petition. The petition for disability, application for appointment of fiduciary, and emergency petition may be filed at the same time, and the emergency appointment is brought before a judge who is presented with an affidavit from the doctor or the social worker, depending on the nature of the emergency. The judge reviews the documents with the GAL present. The emergency appointment is intended to be in effect until the full guardianship hearing or until the emergency situation is addressed.

A six-person jury trial is held for each regular disability hearing. This is unique to Kentucky and has been the subject of legislation for the past three years. The purpose of the jury, upon being presented with evidence regarding financial issues and/or personal functioning, is to determine full, partial, or no disability. Based on the finding of the jury, the judge determines who will serve as guardian. He or she also determines the rights the individual retains and the responsibilities of the guardian. 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 at least one of the IDT members

documents that it is not in his or her best interest to appear. The proposed ward may actually take the stand in the guardianship hearing. Said Ms. Crone, "I've been to disability hearings where the respondent wanted to testify, some cases that really helped in getting a limited [guardianship] or no appointment. In other cases, it closed the case on the person needing the full disability."

In the 2004 legislative session, the public guardian program was asked to officially comment on a proposal to abolish the jury trials. The program supported only discontinuing the jury trials in which the ward had been in a persistent vegetative state or was clearly a person with a profound mental disability. The legislation to alter the jury trial arrangement did not pass. It was filed again in 2005, passed the House and went to the Senate where it passed with an amendment. It was sent back to the House but the session ended before the House approved the amendment. A similar version has been filed in the last 5 sessions.

Funding. Programs receive funding from the Social Service Block Grant (SSBG), state general funds, and Medicaid. The annual budget is for FY 2004 was \$3,164,000.00. The Cabinet receives SSBG monies because the wards count as ongoing, court-ordered, open APS cases. The general fund dollars were matched to SSBG funding.

The public guardianship programs work with the Division of Mental Health and Mental Retardation (DMRMH), with whom the programs meet monthly. The Division of Mental Retardation has Medicaid contracts to oversee the supportive community living (SCL) program (a Kentucky provision for meeting *Olmstead* for those persons with Mental Retardation or Developmental Disabilities). Because this is a Medicaid Waiver program, the public guardianship program has an agreement with the Division for children under commitment to the Cabinet who are aging out of the children's services program. If the child protection worker, in consultation with the public guardianship program, identifies an existing need for a guardian or a partial guardian for a child with mental retardation or developmental disabilities who is turning 21, the commitment to the Cabinet as a child is extended to serve until the child turns 21. At 20 years and 6 months, the public program applies for an emergency SCL waiver funding. The public guardianship programs have been fairly successful in getting the waiver allocation, and the foster homes may apply to become the residential provider with the SCL program. Thus, the home in which the individual resided as a young person could remain his or her care setting into adulthood.

Additional monies come from billing Medicaid for Targeted Case Management. The majority of wards qualify for these case management activities, and the public guardianship program can bill Medicaid. Targeted case management is allocated for the entire state social services program. At the Cabinet level, allocations are broken down for support of the different programs, such as CPS and APS.

Funding to provide for care of a ward is based solely upon the entitlements and income for which the wards are eligible. Previously, an auxiliary fund existed as an

emergency fund for support of the wards, but that funding source was discontinued as a result of a 2002 audit and statewide budgetary constraints.

Costs per ward for operation of the public guardianship program were estimated at approximately \$1,230. Cost savings were not tracked. Said Ms. Crone, “We laugh, we say adult protection is the stepchild in community-based services, and we’re the illegitimate child of the stepchild in the public guardianship program. Fortunately we have people who have been good allies and advocated for the improvements we have been able to attain.”

Functions of the Public Guardianship Program

Though she no longer directly supervises the six regional programs, Ms. Crone holds quarterly meetings with them via teleconference. Each of the regional program supervisors has a liaison within the service region, and that individual is also invited to the meeting. The liaison is usually a clinical associate directly under the service region administrator within the service region. It is the role of the liaison to help resolve conflicts with the guardianship program and the other programs within the service region, especially APS. Though there is support in some of the regions for the public guardianship programs, it is sorely lacking in others. In more than one service region, the liaison (a paid position) had never attended a meeting. The meetings are “continuous quality improvement meetings.” In turn, each of the regional guardianship offices also held quality improvement meetings four times a year.

A guardianship was usually initiated because of a third party interest. For example, bills from facilities were not paid, or facilities sought discharge of individuals whose ability to make informed decisions was in question. A common precipitating factor for guardianships was the “Ernest T. Bass” syndrome. (For younger readers, this moniker refers to a notorious character in a 1960s television program, *The Andy Griffith Show*). Individuals fitting this description come under guardianship because a judge wants someone accountable for the behavior of an individual regarded as a nuisance in the community. The office has tried for at least six years to be placed on the district judges’ training conference to have a dialogue with them regarding this problem.

Related to this matter, and also common, are “inappropriate” guardianships. These are guardianships for the sole purpose of controlling an individual’s behavior. Successor interstate guardianships also presented problems. Finally, a problem with mental health services was that although an individual might not be appropriate for involuntary mental commitment, the community psychological support services deemed him or her ineligible for services because of a need for more services than could be provided.

Data Collection. The public guardian program had developed a new data system with a company called Panoramic. The new system was put in place due to a review two years earlier by the state public accounting office. The accounting office had found numerous problems with the system in place at that time. Also, the contractor developing

the old data system left the state before all the programs for data retrieval were ever implemented.

The regional guardianship supervisors send in a monthly report to the state and an annual report to the court on each ward. The monthly report documents the number of wards that the program is currently serving and in what capacity. The new data system will provide a public guardian staff with two months notice that the annual report to the court is due.

The program is trying to adhere to *NGA Standards of Practice*, but the programs also have their own standards of practice. Because the program has become more actively involved with NGA, it is undergoing a paradigm shift from always acting in the wards' best interest to acting, whenever possible, using the substituted judgment standard. Consequently, great emphasis is placed on gaining as much information about the ward as possible during the initial assessment. Training, which was at one time twice yearly, had devolved to whenever specialized guardianship training could be held. All new staff had Academy Training, which is provided to all entering workers in the Cabinet. One component has to do with sensitivity to vulnerable adults, and another component addresses domestic violence. A course on cultural competency is also required of all Department staff. An initial guardianship training is currently being developed with the hope of this becoming mandatory for all staff in the public guardianship program and staff working on APS cases.

Caseloads. Caseloads were approximately 80 wards to one staff person. The public guardianship program must accept all cases for which the court appoints it. One problem with the high case numbers was that in the previous administration, the central office staff was decreased, and positions were allocated in the field in order to help with the provision of direct services. However, since the change in administration, there were freezes in hiring and previously allocated positions were lost. Although the office remained hopeful, Ms. Crone confessed that, "never in the two and one half years that I supervised was [I] allocated a position for the guardianship program. But the service regions were allocated positions for their region that they could utilize as they saw appropriate." Most of the positions went to workers in CPS or APS. One of the hopes of placing the program in the service regions was that the Service Region Administrators would gain an understanding of guardianship, see the need to reduce caseloads, and reallocate positions to the program. An increase in staff occurred in only one region, the only region with a supervisor and a team located solely in one service region. With the addition in that region, caseloads were approximately 50:1 – the lowest that they have ever been.

According to Ms. Crone, the judges were generally unsympathetic to the program's high caseloads, maintaining that high numbers were "their problem" and the Cabinet's problem. Also, in the disability hearing, there was a propensity for members of the IDT to recommend total disability when a partial disability was actually reasonable. One reason for this was that physicians want to be assured that a responsible party will be

making medical decisions, including making sure that the ward takes medicines as prescribed. Ms. Crone observed:

Across the board, we're seeing most of the physicians are always saying total disability,. . . they're hoping that the guardian can force the person into complying with treatment. The other problem is, there's a jury trial where there's the finding of total disability, and then the family member realizes, oh my gosh, I still can't make my daughter stay in this program. She keeps walking off, and there's nothing I can do, and I don't want to be responsible for that. So then, they go back in and request to be removed, and the Cabinet gets that appointment.

A few years ago, an unusual increase in the program's caseloads occurred due to the district courts changing to computerized tracking of the guardians' annual reports. When judges learned that there were private guardians who had never filed or had not filed annual reports in years, they appointed the public guardian in place of the private guardian. Review by the courts of the guardian's annual reports appeared to be uneven across Kentucky's 120 counties.

Staff must have face-to-face contact with wards at least once a year. Ms. Crone emphasized that some wards were seen, depending on the situation, three or four times a week, while others were seen once yearly. In some guardianship regions, gaps were filled by staff from the ombudsman program, who attended care plan meetings and communicated with the public guardian.

Illnesses and End of Life Decision-making. Under Kentucky law (§387.500), the public guardian is to do everything possible to preserve the life of an individual. Thus, conflict arose when KRS 311.621-.643, Kentucky's Living Will Directive Act, stipulated that a court-appointed guardian was authorized to make end-of-life decisions if no advance directives were made. Public guardians were held to a different standard than private guardians. The *Matthew Woods vs. Commonwealth of Kentucky* case arose from this conflict. Mr. Woods, the ward, has since died, but the case, which concerns the right of the state to terminate life support by the same entity with oversight of Medicaid dollars, was appealed to the State Supreme Court. The state is encountering fiscal shortfalls with its Medicaid match, and might have a great interest in reducing Medicaid costs.

In 2004, the Kentucky Supreme Court ruled in a 5-2 decision that, if a ward had not executed a valid advance directive, the guardian, including a public guardian, may make end-of-life decisions as long as the decision is made in good faith and in the best interest of the ward and if the physician, ethics committee, and family of the ward agree with the guardian's decision. If there is dissent, the matter may be brought to the courts with the burden of proof on those wishing to withhold or withdraw life support, who must prove, by clear and convincing evidence, that the ward is permanently unconscious, in a persistent vegetative state, or that death is imminent and that it would be in the best interest of the ward to withhold or withdraw life prolonging treatment.

If an individual is in a persistent vegetative state or has a terminal condition, nutrition and hydration may be removed or a Do Not Resuscitate order executed with verification of either of these conditions by two physicians and review of an adult health care advisory committee to assure that Cabinet protocol and statutory requirements are met. The advisory committee is composed of five Cabinet nurses, in addition to a public health physician, a private physician, and a social worker from a hospice program. Other Cabinet staff and public sector members attend less frequently. Wards' advance directives must be honored. The committee, which has been in effect for approximately five years, developed as a result of public guardianship supervisors who wanted some guidance on the *Woods* case.

Medical decisions for which the guardian must seek court permission include removal of an organ, amputation, abortion, sterilization, and electroshock therapy. Specific illnesses, such as Alzheimer's disease or HIV/AIDS, are addressed depending on the resources available in the community in which the ward resides.

At end of life, the programs try to involve family members as much as possible. The programs attempt to arrange pre-paid burial trusts. For individuals who have no funds and no one willing to pay, arrangements are made with the individual county. Staff members are not always able to attend funerals due to high caseloads.

Petitioning. The program does not petition for adjudication of legal incapacity, but it does apply for appointment of itself. The petitioner is usually the APS worker who recommends that there is a protective need for an individual. Thus, the petitioner is the APS staff and the applicant for guardianship is the supervisor of the guardianship region in which the individual lives. When the public guardianship program is the applicant, the staff member who will work with the ward attends the hearing. There are many instances, however, in which the public guardianship program is not apprised that it has been appointed. Sometimes the social worker on the IDT or a court clerk will inform the program of its appointment, but in other instances, there is no communication. In one recent instance, the program was appointed in January but did not find out about the appointment until August (when the ward's nursing home complained that it was not being paid).

Coordination with Other Entities. The public guardianship programs coordinate with APS, Mental Health, and Legal Aid. The program is requesting a staff attorney for the regional programs because the Office of Counsel represents the program as the Cabinet. The problem created is that it is extremely difficult to find attorneys who can represent the wards in legal actions such as divorces, sale of property, and child custody issues. Cross training has been held with APS and the Division of Mental Health and Mental Retardation, and the Ombudsman.

Staffing. Ms. Crone believes that her staff is highly dedicated; several staff members have been involved in the program for 20 years. However, she emphasized that she was seeing higher stress levels among all staff. She attributed increased stress to the change in clients (a younger population and a population with mental health problems,

mental retardation, and criminal behaviors) and increased efforts to keep individuals in the least restrictive or most integrated community setting possible.

Special Initiatives. A goal is for the upcoming year was community awareness, especially to access the health care and university communities. Some information about the program was on the state elder abuse website (<http://chfs.ky.gov/dcbs/dpp/ea/>), but it was not easily accessible.

Challenges. The public guardianship program was regarded both positively and negatively. When family members were empowered, they were grateful. If public guardianship impeded family members' exploiting the wards, they were angry. It was often these instances on which newspapers focus. Due to confidentiality, the public guardianship programs often could not provide the press with information to rebut an allegation, and so the program could be regarded poorly in the public eye. For example, recent press coverage concerned a woman who was living in a trailer with conditions so egregious that persons with environmental hazard suits investigated the trailer and recommended it be burned down due to the filth inside. The press and the community perceived that the program had simply disregarded the lifestyle of the woman and had heartlessly thrown her out of her only home.

Another challenge for the program was to be consistent in serving wards. An example is how the program determines if the referral is an appropriate one. Family members are often fighting among themselves about the guardianship, and rather than determining the most appropriate person, judges appoint the Cabinet and direct Cabinet staff to sort out the family problems. In some cases, the guardianship program conducts intensive mediation efforts and goes back to court to have a family member appointed.

Younger individuals with mental illness present a special challenge. When they are minors, they are served as part of a much smaller child protection caseload, but when they turn 21 they are folded into a caseload that has 80 individuals to one public guardianship worker.

Finally, sometimes there is not enough legal advice and support available to help the public guardians, and so they may work around the boundaries of practicing law, simply because there is no one available to help them. The Cabinet had recently hired a staff attorney whose position was to advise on elder abuse, mental health, and guardianship issues, in addition to other responsibilities, but several of the informants were not aware of the position.

Public Guardian Supervisors. Public guardian supervisors are administratively responsible for a team of field workers, including clinicians, social workers, and administrative assistants. Some supervisors also carry caseloads. The supervisors were concerned about clashes with APS. The mission of APS is to consider risk and prevention, as well as the individual's history, whereas the public guardian looks at issues that have surfaced for an individual recently. The Public guardianship supervisors stressed that guardians are regarded as the "catch-all" and emphasized that they cannot

control ward behavior. They pointed out that their caseloads have generally gone up, but more significantly, cases are much more complex than they used to be. Clients are younger and have many more drug and alcohol problems.

The public guardianship supervisors emphasized that they need families and the courts to understand that the public guardian can't always protect the wards. The supervisors wanted lower caseloads so that more personalized services could be provided to the wards. All expressed a sense of frustration on receiving referrals for cases in which there is little to nothing that guardianship can do. They maintained that: it "would be better not to have a guardian appointed if there is no way to facilitate services that the individual needs."

Strengths, Weaknesses, Opportunities, Threats. Reported strengths of the public guardianship program include the commitment and creativity of the staff. Some regarded the merger with the Cabinet as a strength but others cited a conflict of interest. With the change in program administration, the ability of the public guardians to advocate for their wards was constrained because they are supervised by someone who is actually allowing or disallowing services to be provided.

Reported weaknesses of the program included a lack of gap funding for social services for clients (auxiliary funds were dissolved), a general lack of understanding about what public guardianship can and cannot do, separation of guardianship from emergency guardianships that never end (possibly a way to avoid the jury trial), lack of legal resources, *guardians ad litem* who do not do their jobs, lack of staffing, and the inability of the program to turn down a case if appointed. Another weakness was that the public guardian cannot force a person to take medications, and as a result, clients cycle in and out of the mental health system.

The program is under constant threat by its lack of funding. When positions were allocated to the regions, they were rarely if ever allocated to the public guardianship program. Informants stressed that they should avoid a conflict of interest by being in the same agency as the petitioner and the service provider. They need adequate legal representation for the wards, and they wanted to continue the jury trials, even though they are expensive.

An opportunity for the programs is in the area of community education. Education should be provided to families and the courts to facilitate an understanding that guardianship will not solve many of the problems they seek to address. The supervisors stressed that judges should understand what public guardians can and cannot do, as well as how high their caseloads really are.

The Cabinet need to give equal status to the public programs such as is given to CPS and APS. Public guardians should be recognized as a necessary professional group.

Local Public Guardian Staff

Composition. The group consisted of all current guardianship staff in one regional office. Experience ranged from people who had just started to persons with 14 years experience. Degrees were in nursing and social work.

Caseloads and Cases. Most employees did not like the move to being placed under regional community-based services. They believed that they were lost under the large social services umbrella and that their supervisors did not really understand public guardianship. They agreed that they have been placed in a classic conflict of interest model of doing their work. They felt that all the services “run downhill to guardianship,” and that when APS cases became difficult, they were passed to public guardianship. Training specifically on public guardianship was non-existent. They observed that they do a lot of “flying by the seat of their pants.” There was no formal case review process, although staff talked informally. Caseloads included more criminals, younger people, children with mental retardation or developmental disabilities with older parents, persons with dementia, and generally individuals behaving in an abusive manner.

Strengths, Weaknesses, Opportunities, Threats. Strengths included the common bond of the workers in the program. Weaknesses included lack of communication across the board, inability to adequately provide supportive services for the wards, lack of continuity on practice guidelines, too many hats required for the job, not enough time to be in the field, high caseloads, and standards of practice that were not reconciled well to statutory requirements.

Privatization was regarded as a potential threat (e.g., the state could change the programs to a contracting out model). Identified needs included more staff, the presence of the physician and the psychologist during the hearing as opposed to the social worker who reviews the reports, continuation of the jury system, representation of the guardians in court, inclusion of the public guardian on IDT; and certification of guardians.

Kentucky Fiduciary Office

Composition. One person worked with the program for over 20 years and the other for about a year and a half. Fiduciary, which handles the financial side of guardianships, was implementing a new internet-based system much more sophisticated than that used earlier, which was available to field staff as well as the central office. Most decisions regarding expenses were given to field staff, though disagreements on expenditures were occasionally resolved through consultation.

Case. Clientele had changed significantly. Instead of completely indigent elderly people, 7% of clients were able to private pay for nursing home services and owned property, including cars, investments, farms, and rental property. More clients lived independently. Complex cases were far more labor intensive than in previous years. Typical clients, older women in nursing homes, now comprise only half of caseloads. Approximately half of the cases involved some type of financial exploitation.

Strengths, Weaknesses, Opportunities, Threats. In 2002, there was an audit of the fiduciary section of public guardianship. Although no fraud was found, some accounting was not done because there simply was not enough time to do proper accounting. The audit did not capture the many years that accounts had been kept properly. One comment from the audit was that the fiduciary staff did not need to be serving a social work role.

A significant weakness was the lack of staff in the fiduciary office. Most of the staff were on temporary positions. Permanent positions had been lost to budget cuts, and so even though the number of clients in the program had more than doubled in 20 years, the number of staff in the fiduciary office was actually less than 20 years ago. This remained true even after the audit confirmed the need for more staff. At the time of the audit, fiduciary had 12 full-time staff (2002). At the time of our interview, there were 6 full-time positions filled (7 allocated), but positions were filled with temporary staff.

Judges and Court Administrators

Composition. One Kentucky judge who had served on the bench for over ten years was interviewed by telephone.

Caseloads and Cases. District court in Kentucky is a court of limited jurisdiction, which includes disability hearings. Approximately 10% of judges' time is spent conducting disability hearings. Of the jury trials dockets, disability trials comprise 90%. County attorneys present evidence for the petitioner. A GAL is appointed to represent the alleged incapacitated person in every case. According to the judge, the disability hearing takes about two hours. Most guardianships are plenary in nature.

Complaints. The judge had never received a complaint about the public guardian program. The judge had issued show cause hearings for guardians who had failed to file reports, though not for the public guardian.

Strengths, Weaknesses, Opportunities, Threats. One problem was with limited guardianships, which are granted for five years. When the guardianship is over at the end of five years, and it has not been renewed or made unlimited in that time period, the guardianship must be reinitiated, including a new jury trial. Few guardianships are ever overturned. Some personal accountings were late, at times, and the judge attributed this to the high caseloads of the public guardian.

Attorneys

Composition. Attending were an Assistant Commonwealth Attorney, an Assistant County Attorney, a Trial Commissioner, a private attorney that has served as *guardian ad litem*, and a contract attorney for wards. The Commonwealth Attorney headed a multidisciplinary team that meets to discuss elder abuse, which also involves representatives from public guardianship. One attorney, on retainer with the state, represents the wards. This attorney's work often involves liquidation of real estate. This

attorney represents the respondents. The attorney makes sure that the petitioner is not trying to take advantage of the ward. This attorney had not had any formal training on assessing capacity. The two responsibilities, serving as *guardian ad litem* and working with wards' real estate, constitute 5-10% of the attorney's practice.

Cases. Criminals under guardianship may be repeat offenders who are homeless and not serious offenders. A county attorney assists the petitioner in presentation of evidence in a guardianship proceeding, regardless of petitioner. APS petitions in approximately one fourth of cases. The attorneys reported that they see three types of guardianships: elderly people with dementia, persons with mental retardation becoming 18 years of age, and individuals who have experienced a trauma such as a car accident or a stroke. Most of the trial commissioner's (TC) cases concern older adults. The volume of guardianship cases have more than doubled in the 16 years he has served in this capacity. The commissioner has a paralegal who reviews settlements, uncompensated, for approximately 70% time.

In at least one county, a trial commissioner (TC) position was created to hear mental health cases, including guardianship cases. The commissioner also reviews annual reports for settlements. The TC spends one day a week on involuntary hospitalizations and guardianships. The TC does not like the jury system in some cases, because he simply does not like to put the family through it, "I mean, if you've got a young wife who was in a car wreck, can't talk, and you have to put the person on the stand so they can go through the testimony and sit and listen to the doctor say that she is never going to get better. It's painful for the family." In about 5% of cases the public guardianship programs serve when families are so dysfunctional that no one is suitable to serve.

Often, guardianships are instituted when the hospital needs to move an individual out and needs a surrogate decision-maker for placement and other medical decisions. Some hearings are held in this jurisdiction because the family member has come to the area for treatment. Usually the court hears the case and decides it but then transfers the guardianship back to the county in which the family normally live. Limited guardianships are rare—5-10% of all guardianships. In some instances, the Cabinet finds a more suitable guardian, thus reducing the load of the public guardianship program.

Appraisal. Regard of the public programs is generally positive. The programs are understaffed, and sometimes attempt to perform legal functions, when, in fact they are unprepared and unsupported to do so.

Strengths, Weaknesses, Opportunities, Threats. The Cabinet usually does a good job with accountings, but is slow many times due to understaffing. The centralized system of the fiduciary seems to slow the accountings down. Also, Fiduciary is slow and sometimes poor when handling property. Overall, the Cabinet does a good job, but it is chronically understaffed. Individual workers are usually highly committed people who work in the best interest of the ward.

Adult Protective Services

Composition. Participants were APS Supervisory and Casework Staff from three service regions.

Cases. APS usually testifies as part of the IDT. If one worker did the investigation, another did the team evaluation. Usually, cases from APS that go to guardianship are those involving self-neglect, and, to a lesser extent, exploitation and caregiver neglect. APS cases are closed once a guardian is appointed.

Strengths, Weaknesses, Opportunities, Threats. APS generally regarded positive regarding the performance of the public guardian positively. Most APS staff believed that the change of putting the public guardians under the Service Region Administrators was not helpful, because the administrators were not well informed about the function of public guardianship.

APS staff felt that public guardianship caseloads were too high and that the workers often dealt with legal issues they were ill-equipped to handle. Fiduciary seemed to be slow in paying bills for some wards.

An opportunity for the public guardianship program was in its efforts to prevent guardianship from being needed and for judges to understand what the public guardians could really do.

APS generally believed that the high caseloads were a true threat to the program, because problems festered that might not otherwise turn into crises. They acknowledged that some politicians raised privatization issues from time to time, but they thought that model detrimental to the functioning of the public program intent.

Aging and Disability Advocates

Composition. Participants attending were representatives from the Protection and Advocacy agency and the State and Local Long Term Care Ombudsmen.

Strengths, Weaknesses, Opportunities, Threats. Reported weaknesses of the public guardianship program included no cross-training of the aging and disability network with the public guardians. There was no time to visit wards. Nursing homes reported difficulty contacting some public guardians. Public guardians did not always have time to contact family members about their wards. Caseloads were far too high. Also, the public was unaware of the public guardian program. Wards needed to be in the best placement for them, not placed for the convenience of the guardian. The Fiduciary Office needed to be more timely in paying bills.

More adherence to standards or regulation was needed, as well as more uniform practices among the guardians. One suggestion was to have a 1-800 line for the guardians so that they could be more easily contacted.

Wards

We interviewed two wards served by the public guardian: an older husband and wife couple, residents in the same room in a nursing home. The husband was wheeling his wife around the nursing home in a wheelchair when we arrived. The wife had received a guardianship prior to her husband, who had attempted to provide care for her, but with limited resources. The very pleasant female ward had little to say to us, but her husband was far more vocal. Although he was pleased with the services his guardian (whom he could recognize and recall by name) provided, he was most concerned that his voting rights had been taken away. He had written to the election commissioner concerning the matter. He showed us the letter that he had received, which indicated that, indeed, he was no longer registered to vote because he was under guardianship. He was most distressed that he could no longer vote and asked us why this would be so and what we could do to help him. He emphasized that he had been a law abiding citizen all his life and that he had earned the right to vote. He told us that he had done nothing wrong, that he just needed a little help. He said that he felt like he was a criminal in jail.

Summary and Comments

The Kentucky Office of the Public Guardian has statewide coverage. In the 1990s, it was removed from the Office of the State Ombudsman and placed within the Department of Social Services, now the Department of Community Based Services. This effort was an attempt to garner more funding for the program, and in doing so, the Office dramatically increased the number of wards served. This strategy did increase wages for employees; however, it did not realize a commensurate increase in staffing or funding.

Another structural shift occurred within the past two years under the previous governor and at the end of his administration. This change folded public guardianship, the only direct service not under the supervision of the service regions in Kentucky at the time, into the 16 service regions in the state, with 6 guardianship regions. The purpose of the alignment was to keep the service providers as proximal to the wards as possible and to make changes as positions were either allocated or vacated. Another reason was to prevent APS from potentially referring wards inappropriately for guardianship and closing cases prematurely or without fully exploring available and less restrictive services.

Staff to ward ratios are approximately 1:80, with many staff shouldering caseloads far higher, along with administrative duties. The mixture of rural and urban locations in the state created additional difficulties in meeting ward needs and visiting them in a timely manner. That Ms. Crone had responsibilities for both public guardianship and APS presented clear conflicts of interest. Attempts were underway to rectify this.

Kentucky's use of the jury system for guardianship cases is an important and unique feature of the state's system. Particularly impressive is its use of IDT which,

when done well, adds an additional layer of evidence of incapacity in support of the investigation of the *guardian ad litem*.

The interview with the ward who wanted his voting rights retained was striking. At the time we interviewed him, scholars and the popular press were debating the same issue nationally on the eve of the 2004 elections. This issue should be re-visited, both nationally, but more importantly, for this particular ward in Kentucky and others like him.

ILLINOIS

Illinois has a dual system of public guardianship: a statewide program of public guardianship and a county public guardianship program. The statewide program is part of one state agency; the county programs are limited to one of Illinois' 102 counties. Each is a separate system, and are not affiliated with one another. For individuals with estates valued at more than \$25,000, public guardianship is handled at the county level by the Office of the Public Guardian (OPG). For individuals with estates of less than \$25,000, public guardianship is provided by the Illinois Guardianship and Advocacy Commission (IGAC), which comprises seven regional Offices of the State Guardian (OSG), and two advocacy groups: the Human Rights Authority and Legal Advocacy Service. This report focused on the two largest public guardian programs, OSG and the Cook County (includes Chicago) OPG, although references are also made to county public guardians in other Illinois counties.

Office of the State (Public) Guardian (OSG)

The state contact for OSG was John Wank, the Acting Director and General Counsel of the Illinois Guardianship and Advocacy Commission. On paper, OSG is "as independent as a political entity can be in Illinois." The Commission's OSG is "beholden to the executive branch and the legislative branch. The executive branch controls . . . budget, and the legislative branch approves it." It is important to note, that the Commission is not a provider of social services, and thus the Office of State Guardian does not fall into the conflict of interest trap inherent in social service providers also providing guardianship services.

OSG has eight regional offices providing coverage for the entire state. Each office has a director, a manager, and caseworkers. Many, but not all, have an attorney. Each office handles different caseloads with a cross section of wards—not only elders, but also individuals with developmental disabilities, those with mental illness, and those with physical limitations that preclude their ability to engage in meaningful decision-making.

OSG is consistent with other state agencies with centralized programs for personnel and time-keeping. In addition to the standard oversight provided by these programs, OSG has an internal auditor who examines fiduciary operations on a regular basis. External auditors, unaffiliated with the Commission, are retained to perform biennial audits and file their reports with the State of Illinois. The audits include a

program audit that examines whether OSG is in compliance with mandates that require them to visit wards periodically and file periodic court accountings. Although some downstate courts excuse OSG from annual report filing requirements, it does file such reports in all counties.

Funding

The OSG budget for FY 2003 was approximately eight million dollars. Funding sources included assessments against the estates of the wards, and Medicaid funds (since 1998). OSG can assess fees against the estate of the wards, but because of the nature of the clientele (i.e., estates < \$25,000) assets are likely to be limited, and so the yield from this source is minimal. The monies gleaned from Medicaid are matching funds and accrue to the benefit of the taxpayer (in the amount of \$800,000 in FY 04), not directly to the Commission. The balance of the funding is derived from general revenue fund dollars. Medicaid claims are made for administrative case management activities eligible for reimbursement through the federal financial participation (FFP) program. (This Medicaid claiming program is in contrast to targeted case management, which seems to be used by Ohio – upon whose practice Illinois based their pursuit of Medicaid funding.) Through contacts with the National Guardianship Association, OSG received information that led to pursuit of Medicaid funds to offset costs of guardianship. Cost per ward for FY 2003 was \$672.00 (this only accounts for \$3.6 million of budget).

Procedures. Approximately four years ago, the Office of the State Guardian (OSG) centralized its intake process. The Office (staff of four) processes approximately 5,700 public service inquiries to the Commission per year, of which 2,600 are related to OSG services. Of these 2,600 approximately 500 materialize into guardianship cases. One to six requests per half day shift are for the OSG to serve as guardian. A temporary or emergency guardianship can take from one to five days from referral to appointment. A plenary guardianship usually occurs within 30 days of a call. There are exceptions – for example, transitioning a minor ward to adult guardianship generally takes one year, but some may take as long as two and half years.

In general, the OSG does not petition for itself as guardian – most of its cases arise from hospitals and long-term care facilities. It appears that in many cases OSG is appointed temporary guardian for a person who is in need of medical treatment for which he or she cannot consent, and the Office is appointed temporary guardian specifically to cover the medical procedure; sixty days later, it is appointed plenary guardian. Occasionally, the Attorney General of the State of Illinois will petition on behalf of the state department of human services – generally for persons who are institutionalized in a state-operated facility for persons with developmental disabilities or mental illness.

Interaction between OPG and OSG is primarily limited to either a ward of the OPG having spent down to the point that his or her estate is worth less than \$25,000, or conversely, when a ward of the OSG inherits or otherwise comes into a great deal of money. In a very limited number of cases the OSG and OPG may work in tandem: a

parent with a sizable estate would be handled by OPG, while the adult child, whose estate is negligible, would be handled by OSG.

OSG does not serve as agent under a power of attorney. The Office does serve as representative payee for wards under the program. Most wards of OSG live in supervised facilities, and those facilities may serve as representative payee. OSG does not assume a conflict of interest in these cases. Instead, it watches for abuse but does not assume that it will occur.

Events triggering a guardianship are an individual's need for medical procedures or exploitation and poverty. Although the unmet need was undetermined, staff indicated a population of approximately 100,000 adults in Illinois living in long term care facilities. OSG handles approximately 3,000 of these adults.

Staffing and Training

OSG has 48 caseworkers, 95% of whom are Registered Guardians certified by the National Guardianship Foundation (NGF). The Office also supports staff, attorneys, and managers, for a total staff of 73 full-time equivalent employees. The number of wards for Fiscal Year 2003 was 5,383, which results in a ward to guardian ratio of 77:1. In terms of staff who have actual ward contact, the ratios are 132:1 for "person only" guardianship cases, and 31:1 for estate cases.

In an attempt to address the issue of inadequate numbers of staff, OSG made a conscious decision that its staff would be extremely well-trained. In support of this, Commission staff provides periodic training sessions. Education for new staff is intense and includes a training manual, as well as an introduction to the policy and procedures manual. New staff "shadow" existing staff for about two weeks. OSG staff indicated at the site visit that this mentoring aspect was particularly effective, illustrated by the following:

I think at the time, the best way for individuals to truly learn, at that time, was to have someone in the Commission take your hand and they supported you, they would go to you and you would go to them.

OSG provides staff with at least ten hours of continuing education units each year, which can be applied to recertification as Registered Guardians with NGF. There is also some cross-training among the three branches of the Commission. Six staff attorneys and two managing attorneys cover approximately 100 of 102 counties and the entire OSG caseload (approximately 5500 persons).

OSG staff is about one-third minority, reflecting the diverse population served. The Office has staff proficient not only in Spanish, but also Polish and other Eastern European dialects. There are also a number of staff who can sign to hearing-impaired individuals. Staff persons are sensitive to religious and cultural issues surrounding end-

of-life decision-making. In addition, staff reflects cultural diversity. OSG remains involved with wards after death but only as far as burial, autopsies if necessary, and in some cases, with financial matters, “wrapping up the last vestiges of a ward’s estate.”

Volunteers

The Human Rights Authority branch of the Commission consists exclusively of volunteers, but OSG only has a handful of volunteers who have worked there consistently. OSG is beginning a pilot program that uses volunteers. The use of volunteers is intended to fill their understaffing gap. One of the key informants explained;

That’s one of those “necessity is the mother of invention alternatives.” When it becomes more and more evident that you’re just not going to get staff that you may wish for or the funding, I think it creates greater impetus to look around and think creatively and come up with things like that.

Wards

Decisions on behalf of wards include placement, health care, and withdrawal of life-sustaining treatments. Withdrawal or foregoing of life sustaining treatment is based on the Illinois Health Care Surrogate Act. Prior to this Act, a guardian was required to go to court on every single end-of-life decision. Since the passage of the Act, guardians are rarely required to seek court approval for end-of-life decisions. Ironically, the Probate Act still requires that any transaction involving realty be reviewed and approved by a judge, reflecting what some Illinois practitioners see as an anomaly in the law.

OSG staff visits wards living in unlicensed community placement situations and those who live at home on a monthly basis with some visited on a weekly basis. Wards in institutions are visited once every three months as mandated. The OSG attempts to include the ward in placement decisions by arranging a pre-placement visit to the facility to provide the ward with the opportunity to meet staff and residents. With medical decisions, there are cases where the ward is “not really capable of giving” input, and so OSG will make the decision, where possible, using substituted judgment, consistent with the decision-making standard found in the Probate Act.

If placement means relocating to another county or geographic area, any remaining family will be notified. This illustrates another ironic situation in that the OSG is the guardian of last resort, which in many cases means the ward has been “abandoned, abused or maligned in some way by family”, but the OSG will – despite suspicions – “bend over backwards to accommodate [the] interests of other persons.” Key informants said that the greatest amount of contact with family occurs upon the death of the ward, and that contact is largely regarding any residual estate.

Wards of the OSG live in many different settings. Some are in the community, some are in nursing homes, some are in assisted living facilities, and some are in other institutions. One respondent said “I think our wards live in 1,600 different places” to

which another respondent replied: “That’s quite an adjustment for us, 20 years ago, all of our wards could have been found in about 16 sites, state institution sites.”

Every ward must be visited, at a minimum, four times each year. This is checked by the external audit, and OSG is up to 99% compliant with this mandate. The OSG staff also indicated that those wards living in unlicensed community placements are visited at least once each month. This ensures that there is an ongoing record of progress, medication compliance, and assessment. One respondent observed that this is because “we don’t have the benefit of other staff and facilities to assist us to gather information, trying to assess how a particular person is doing.”

Rural/Urban Differences

Not surprisingly, the differences between rural and urban guardianship are immense. In the Chicago metropolitan area, OSG has approximately 3,000 wards. There are regions where 500 wards are spread out over 14 counties – requiring long travel time, even overnight visits, in order to meet the state mandate to make at least quarterly visits to every ward. One other important consideration is the expertise of the judiciary involved in guardianship. In the Chicago area, there may be five or six judges with whom the OSG interacts on a regular basis, while in a rural area, the judge is more likely to be a generalist who may see one or two guardianship cases in the course of an entire year. Rural and urban settings also provide very different opportunities for individuals in need of guardianship to remain in the community.

Ward Interview

The investigators interviewed one ward by telephone, a 68 year old man who had been served by both the OPG and the OSG, the latter being used when his funds declined due to his being exploited. The gentleman had been under the care of a guardian for over 15 years. He lived in a special apartment for older adults in Chicago. At the time of our interview, he was planning on going to court to discuss the possibility of having some of his rights restored, about which he seemed uncertain. He indicated that he had not always received his money from the public guardian in a timely fashion.

Office of the Public Guardian, Cook County

Patrick Murphy was interviewed over 25 years ago by Schmidt and colleagues. He had just begun in the Cook County Office of Public Guardian (OPG), which was awash in scandal from the previous administration. At that time, Mr. Murphy had a staff of three people. Mr. Murphy, a highly visible attorney both in Illinois and nationally, had, at the time of the present interview, a staff of over 300. Those he introduced to the researchers he knew by name and had personal remarks to make to most. We also interviewed Robert Harris, who later replaced Mr. Murphy (who received a judgeship), as well as a social worker with the program.

OPG in Cook County serves approximately 650 older wards and approximately 12,000 children. The office has three divisions: a Juvenile Division, a Domestic Relations Division, and a Disabled Adults Division. Approximately 100 older wards are lost to death each year. Approximately 40% of OPG wards are living in the community, and 25% of the wards were exploited prior to being served by OPG. Of those exploited, approximately 90% were being exploited by an agent under a power of attorney. Mr. Murphy reported that he had lost only one exploitation case in 25 years.

To qualify for the program, adult wards with disabilities must have an estate of over \$25,000, although no one could explain why this designation separated the OSG and the OPG. OPG in Cook County is an attorney-run program with an annual budget of approximately 16 million dollars. The office assesses hourly fees for its work, which are collected from the ward's estate.

Mr. Murphy is widely noted for his excellent staff of attorneys, whom he recruits from law schools all over the country. Approximately 80% of his staff attorneys are women. Office staff also includes employees fluent in American Sign Language, Polish, and Spanish. The Office boasted approximately 17% minority attorney hires, the highest in any office in the state. One of the hallmarks of Mr. Murphy's success is his ability to leverage funds for his office and his wards and to focus media attention on the topic of guardianship. By his own admission, Mr. Murphy regards his work as a vocation and his special contribution is advocacy.

Features of the Office include a unit that hires independent contractors and agencies to assist with ward needs. The office receives numerous referrals from elder abuse services. Meetings are held on each case. For each ward, assessments, care plans, and time logs are kept. Wards are visited monthly and are consulted in their own decision-making; contact sheets are completed each time a ward is visited. Efforts are made to place wards of various racial and ethnic groups in facilities that have a special emphasis on that particular population. Mr. Murphy deemed appropriate placement as 95% of ward success. Wards with mental illness are an increasing part of the OPG caseload and a function of the mental health system. Annual reports and yearly accountings are filed for each ward, and an annual report is also filed for the entire OPG office.

The office petitions for guardianship. Mr. Murphy did not regard this as a problem, and argued that such a system works well. He suggested that there is a "philosophy to make the system more complex," so that dollars can be maximally realized by all the entities involved. In his view, the system is best kept simple and at the least expense to the wards.

An exceptional feature of the office is the pooled trust, which allows wards' public benefits to be maximized. This payback trust allows supplementation of dollars for wards when needed. Mr. Murphy characterized the trust as a form of Medicaid planning.

By his own admission, perhaps the greatest threat to the OPG office in Cook County was the loss of Patrick Murphy himself. At the time he was interviewed (late October 2004), a successor had not been named. At the time of this writing (March 2005), Mr. Murphy's successor is Robert Harris, who had worked with him for 13 years. In his new position as judge, Mr. Murphy hoped to start the nation's first guardianship court.

Judges and Court Administrators

Composition. The probate judges in Cook County represented individuals with no fewer than 10 years on the bench and some with greater than 28 years (the Presiding Judge of the Probate Division). Cook County does not have a specific probate court but does include a probate division. According to the judges, at least two OPG attorneys were in their courts on behalf of clients. They saw the OSG less frequently in court but stated that those cases were also handled with commitment and sensitivity. The judges reported that, on any given day, 25% of their cases emanated from the public guardian, as opposed to 75% of cases dealing with private guardianship matters. The judges did not regard the public guardians' ability to petition as guardian as problematic and estimated that the public guardians' appointments originate from the overwhelming majority of their own petitions. Judges are required by statute to make a written finding to appoint a petitioner as guardian. Each judge reported personally reading guardians' annual reports. A computer system flags reports that are due to the courts. Guardianship cases are randomly assigned to the judges in the probate division.

Cases. Most guardianships arise in court due to changes in an individual's lifestyle, and a high percentage of cases arise due to the need for nursing home placement. Once a public guardian is appointed, it is not necessary to return to the court to authorize a change in nursing home placement. The Health Care Surrogate Act removed the need for many emergency hearings for a guardian. The act covers all emergency medical issues, including end-of-life decision-making, and equips statutorily identified surrogates with legal authorization to consent to or forego medical decisions for persons a doctor deems to be incapacitated. A result of the act is that guardianship petitions have been reduced.

In most cases, a *guardian ad litem* (GAL) is appointed to each case, though the requirement for a GAL can be waived if the appointment is deemed unnecessary. The judges stressed the importance of having a good GAL who does his or her job thoroughly. For example, one quality of a good GAL is his/her willingness to investigate the least restrictive alternatives possible for the alleged incapacitated person. The GAL must make a finding in writing that a less restrictive alternative is not available.

Although the judges noted their wish to have limited guardianships where possible, they estimated that the highest percentage of limited guardianships granted would not exceed 20%. Far fewer limited guardianships were contested than were plenary guardianships. Limited orders usually concerned driving and voting privileges. According to one judge, more limited guardianships are presented for an elderly person,

and the scope of the guardianship grows with the needs of the individual. This judge uses a technique by which limited guardianships are vested with full powers, although the guardian must seek specific authority to use them. The guardian is given a sliding power to use as a ward's situation worsens, subject to the judges' specifications. The judge reported using this strategy successfully for over eight years.

The judges reported that monitoring of public and private guardianship cases is the same, and they did not hold the opinion that public guardians were any better or worse than private guardians, though they did acknowledge that some problems arise when guardians are inexperienced with filing reports. The judges are educated on guardianship in general at judicial educational sessions, but there are few, if any, distinctions made regarding public and private guardians. The judges emphasized that there was one guardianship statute and that they did not believe that there should be separate laws for each.

Complaints. When there are complaints against guardians, judges act on them. The judges are not allowed to participate in efforts to help secure funds for the public guardianship programs. They maintained that lack of funds is not a defense for inadequate service provision.

Appraisal. The judges said that Patrick Murphy, OPG, "has an ability to hire great people." They regarded them as consistently well-trained attorneys. In spite of the many attorneys and staff members, the judges emphasized that the office needed more staff than its present complement. They believed that OSG also needed more staff and funding, and that the funding issue was far more difficult for OSG, because it could not use the ward's assets to offset costs for ward needs.

Adult Protective Services.

Composition. APS, known in Illinois as elder abuse specialists, work with the Illinois Department on Aging. Participants brought with them a wide range of experience, from relatively new employees to highly seasoned ones.

Cases. The elder abuse specialists provide the bulk of referrals to both OPG and OSG. They reported seeking guardianship in approximately 45% of their cases. The Illinois Department on Aging earmarked funds, out of General Revenue funds, to pay attorneys to petition in some guardianship cases. The Department could also pay for GALs. The elder abuse specialists stressed the importance of training for GALs, as they are an important link in correctly establishing the guardianship.

Guardianship cases arise from various situations, including financial exploitation, the inability of a caregiver to provide adequate care, and self-neglect. Once a public guardian is appointed to a case, the elder abuse specialist rarely follows up, usually because the level of risk to the client drops to an acceptable level. The elder abuse specialist would remain involved in situations where the family tried to sabotage the

public guardian. Elder abuse specialists conduct screening prior to a guardianship using a standardized assessment instrument that includes a risk assessment component.

Coordination with Other Entities. Elder abuse specialists have done cross-training with OSG and OPG. Both OPG and OSG appeared to have slow responses to elder abuse specialist referrals. The specialists stressed the importance of maintaining a paper trail on the need for a guardian of the at-risk individual. They emphasized that there is a gap in services for individuals who need a public guardian but who could be maintained in the community. They emphasized that nursing home placement was typically automatic for OSG wards.

Appraisal. Although the Cook County OPG received generally high endorsement for services, that was not the case for other counties in Illinois where OPG was not necessarily responsive to referrals from elder abuse specialists. At least one participant cited difficulties in working with OSG, stating that it was difficult to get OSG to take a case, although some workers were more helpful than others. This participant stressed that a consistent set of standards, regarding when cases would be accepted by OSG, would be very helpful, as case acceptance seemed to be ill-defined and somewhat capricious. There was a propensity, though less often with OPG, for high-risk cases to languish because there did not appear to be a time frame within which action needed to be taken.

Strength, Weaknesses, Opportunities, Threats. A reported strength of the public guardianship programs, specifically the OPG, was that wards are kept in the community if possible. One drawback of the public guardianship programs, specifically OSG, was that wards were not seen often enough and that little contact was made with the elder abuse specialist once OSG took a case. Still, the elder abuse specialists reported that they use the public guardianship programs as a tool in the provision of protective services.

Aging and Disability Advocates

Composition. Participants included representatives from the Department on Aging; Equip for Equality, Inc., the designated Protection and Advocacy provider in Illinois; the Illinois Protection and Advocacy Group, a non-profit guardianship agency; and a member of the Illinois Guardianship Association.

Appraisal. Participants reported unevenness in the public guardianship systems. For example, they indicated that in some counties, the local OPG does not even know wards it is serving and that OSG frequently provided this information to OPG. In some instances, county public guardian (OPG) administrators outside of Cook County appeared to understand the financial side of guardianship but were strikingly ignorant regarding the personal aspects. Due to insufficient funding and staffing, OSG was not seeing its wards frequently enough, though wards were supposed to be seen at least quarterly. Participants stressed that the guardianship system was set up as a money system and that the courts emphasize the money trail versus maintenance of the person, noting that the annual personal statement on the ward is optional for all guardians. Some participants acknowledged that some courts had not reviewed wards' records in over 20 years.

Participants indicated that OSG does not generally petition for removal when individuals may no longer need a guardian. They noted that, for removal, a ward must work though Equip for Equality. Although OSG could perform this function, it does not regularly do so due to a lack of funds.

OPG and OSG were apparently exempt under statute from having to consult the court regarding moving a ward. The ability to move wards as needed but without notification made keeping track of wards extremely difficult. Participants reported that in one instance, OSG removed wards from a poorly run facility but did not make efforts to petition for other people living there who may have also needed a guardian. One place where guardians are needed, but inadequately provided, is in nursing homes. Though nursing homes can seek a guardian, most do not unless residents are discharged to a hospital. In rare instances, a public health agency or a Long-Term Care Ombudsman may petition. The area agencies on aging sometimes pay for the drafting of guardianship petitions by legal services, naming the nursing home administrator as the petitioner. In many of these instances, OSG becomes the guardian.

OPS and OSG are also exempted from some reporting requirements, which are described by statute. Although it may free up the offices to perform other tasks, participants viewed this negatively. The two systems were regarded as divergent and lacking in uniformity, despite statutory requirements, and so ascertaining ward status and outcomes was difficult.

Participants reported that the Department on Aging had received funds for a pilot project to assist older parents caring for children with developmental disabilities. They noted that this is a growing group of people needing guardianship services and information. Participants remarked that financial problems often drew them into the system, which was also true for older people in general. Exploitation by unchecked powers of attorney was seen as increasing in frequency.

Participants did not regard the ability of the public guardian to petition as problematic. A striking comment was that “No one rocks the boat if everyone gets a piece of the action.” Few limited guardianships were awarded – according to this group, about 1% of all cases. Representative payees were used in conjunction with guardianships by OSG.

Strengths, Weaknesses, Opportunities, Threats. Reported strengths of OSG were its excellent leadership and compassionate and dedicated staff. Participants noted that both OSG and OPG maintain good relationships with the judges, who apparently respect their actions.

Performance of local OPG offices outside of Cook County was regarded as highly uneven across the state. Problems included high caseloads and warehousing of wards in facilities, both due to inadequate funding. A problem mentioned was that of some public

guardians developing relationships with nursing home administrators to encourage ward placement at a certain facility.

Participants stressed that the lack of interest by OSG to file pleadings to restore capacity was surprising, given that doing so would result in lower caseloads, and restoration of freedoms to wards. They said that the main reason for not doing so was lack of funds. Another problem with restoration is the lack of a baseline assessment at the time of appointment and the need for continuous assessment from that point onward. Participants also described a lack of reporting by the public guardianship staff, which contributed to a lack of involvement in wards' cases by physicians and attorneys. The inadequate completion of forms, even when used, was described as "rather scandalous" by one participant.

Participants in the group said that, in a misuse of power and misunderstanding of the Mental Health Code, OPG and OSG placed wards in a locked facility without going through the courts. This may be because the public guardianship programs do not interpret the regulations as applicable to them, although such actions are prohibited by statute. Participants perceived an unwillingness on the part of the public guardianship programs to go through mental health court, and stressed that the programs continue to place wards in this way because they are rarely, if ever, held accountable for these actions. OSG and other public guardians maintain that such placements were routinely authorized by probate courts applying adult guardianship statutes and case law, but the practice was rejected when challenged by Equip for Equality on a mental health cause of action. OSG believes the dispute illustrates the bifurcated nature of addressing issues related to incapacity (Probate Act) and mental illness (Mental Health and Developmental Disabilities Act). After being challenged by Equip for Equality, OSG now complies with the law.

Another problem, noted particularly with OSG, was the lack of integration of persons with disabilities into the community. Participants mentioned a propensity by OSG to warehouse wards in one large facility that did not necessarily meet the needs of the individual ward. An *Olmstead* challenge to OSG was pending at the time of the site visit. More than one participant spoke of open efforts to identify mentally ill persons for placement to a specific facility, when they were ready to be removed from a psychiatric hospital to a facility. Patients were apparently given few options in placement decisions. Part of the problem was in the relationship of the psychiatrist to the Institution for Mental Disease (a designation applied by the Illinois Department of Public Health for facilities that specialize in the treatment of persons with mental illness). Psychiatrists, when recommending placement, not only suggest the need for level of care, but also specify the facility in which the need should be met.

Participants regarded public education concerning OSG as a true opportunity for the programs. They stressed that the public was much more familiar with OPG, in particular, the actions of OPG in Cook County. The resignation of Patrick Murphy was regarded as the ultimate threat to OPG.

Attorneys

Composition. Attorneys who participated in the site visit focus group worked with both the OSG and the OPG and specialized in GAL activities, as well as estate planning.

Cases. For the county program, particularly in Cook County, the OPG acts as petitioner, whereas this is not true of OSG. Downstate, hospitals have attorneys on retainer who act as petitioner in the event a hospitalized patient needs a guardian. The Center for Prevention of Abuse (in effect APS) may also act as petitioner. The attorneys perceived that OSG's policy – statewide – is that they do not petition. Some attorneys serve in several roles, e.g., GAL, representing petitioners filing for guardianship, independent petitioner on behalf of person in need of guardianship, and representing respondents who are opposing guardianship. Attorneys indicated that although OSG is the guardian of last resort, and therefore cannot refuse any guardianship case, in fact, it often finds ways to do so.

One legal group, The Center for Disability and Elder Law, is contacted to serve as petitioning attorney when a nursing home realizes that residents who have been in the facility for “five, ten, fifteen years, and ha[ve] never had a visitor, and then for some reason, the nursing home gets nervous and realizes that they shouldn't be making . . . at least . . . end-of-life decisions for those people.” This, despite the fact that the nursing home has been making medical decisions for these residents for their entire stay. Clients may also be isolated elders, or socially isolated persons with disabilities who are being exploited by third parties, who are referred to the attorneys by clergy, police, or social workers. Other sources of clients include hospitals, nursing homes, and local elder abuse agencies.

In some cases a GAL is appointed. One attorney was insistent that in every case involving the Office of Public Guardian in Cook County a GAL is always appointed. Cases involving OSG in the Chicago area often do not involve a GAL. Participants noted that GALs are only mandated to read the prospective ward his or her rights and solicit his or her opinion about becoming a ward.

Appraisal. Participants perceived that guardianship oversight appears to be spotty at best. In one case, a guardian had been dead for two years, and the court had never requested a report on that guardian's wards. Another case had been open for ten years, but a report had never been filed. It is important to note that the attorneys did not see evidence of any difference between private and public guardianship cases – in all cases reporting is lacking. This appears to be changing due to recently implemented computerized monitoring. Annual reports to the court are more likely in cases where there is an estate, and in the Cook County program, the asset report includes a report on the status of the ward. Downstate, attorneys representing private guardians are fairly good about reporting to the court. If there are limited assets, the court may require less frequent reporting (i.e., once every two to three years rather than annually).

Attorneys were equivocal regarding the unmet need for guardians. Some pointed out that people who are mentally ill may not be well served by guardianship. Others just as adamantly indicated that the unmet need is huge. The difference (not surprisingly) appears to rest on whether or not the individual has assets. They also pointed out that to the best of their knowledge there had been no study of unmet need in Illinois.

Strengths, Weaknesses, Opportunities, Threats. Participants observed that Cook County OPG has good attorneys and can step in with services very quickly. OPG has robust internal resources and links with external networks. Cook County OPG is at the forefront nationally – it advances the quality of life of the wards, while identifying and maintaining resources. The OPG tries to keep people in the community.

Participants perceived that OSG uses a cookie cutter approach. They stressed that OSG serve wards without assets and with very limited resources and prohibitively high caseloads. Thus, OSG cannot focus on the needs of the individual wards as extensively as OPG.

Outside of Cook County, participants perceived that OPG is concerned about making money. If a client is under the guardianship of the OPG and resources are depleted, the ward may be appointed to the OSG.

Summary and Comments

Illinois has two systems of public guardianship operating in the same state. We studied both. The Office of State Guardian (OSG) is an independent state office that has statewide coverage. OSG serves indigent wards with estates of \$25,000 or less. The other system, the Office of Public Guardian (OPG), which operates at the county level, serves wards with estates of \$25,000 or more. We studied only the Cook County OPG. Inquiry of several focus groups and interviews as to the distinction regarding dollar amounts yielded no information about why the numbers had been set as they were or whether the amounts should be reconsidered.

The OSG Office maintained that the following was the ratio of wards to guardian: guardians of person and property had a 77:1 ratio, and guardians of the property had only a 31:1 ratio. OSG was not in existence when Schmidt and colleagues studied public guardianship in the late 1970s. OSG serves approximately 5500 wards. The Office can petition for itself, although it rarely does so. OSG may also serve as representative payee for its own wards, but only if it also serves as guardian of both person and property. OSG compensates for its high caseload by providing extensive staff training; including having nearly all staff tested as Registered Guardians with The National Guardianship Foundation. Cross-training with other entities was notable. Staff came from a wide variety of disciplines, predominately social work and law. Visits to wards were once every three months or less.

Cook County OPG was included in the Schmidt study 25 years ago. At that time, director Patrick Murphy had just recently arrived to an office staff of three people and a

cloud of criminal activity perpetrated by his predecessor, who was removed from office. The current investigators again interviewed Mr. Murphy, along with two other staff members. Ironically, he was preparing to leave his position after 25 years to assume a judgeship. OPG serves both younger people and older adults, with children representing the office's predominant caseload. OPG petitions for itself, and Mr. Murphy did not regard that ability as a conflict of interest, but rather, as increasing expediency and efficiency so that estates of wards are not meted out to interested parties. Mr. Murphy had increased his office staff to more than 300 people, generally attorneys, and gained both national and international attention, sometimes through aggressive and high profile litigation.

Focus group participants emphasized that the OSG serves far too many wards with far too few resources and complained that some areas will not accept wards unless they will be living in institutions. They stressed that wards were not given enough personal attention because of inadequate staffing and funding and that accountability suffered. They indicated that OSG was not responsive to their requests for assistance as they thought appropriate. They told us that at times wards were inappropriately placed by both OSG and OPG in a locked facility without court approval, even though such actions require court approval because they knew they would not be held accountable,.

Overall, participants had fewer comments about the Cook County OPG, although an individual who wrote us after we concluded our interviews raised concerns over delays in handling an end-of-life case. The main concern about the OPG was what would happen after Patrick Murphy left the office. Even Mr. Murphy expressed concern, although he had been grooming successors, one of whom, Robert Harris, did succeed him in office. Less clear but at issue was how the rest of the state was served by the county OPG programs. Based on the spotty comments from focus group participants, OPG in other counties is highly uneven and has problems similar to those of OSG – specifically, inadequate staffing and funding, not unlike the complaint of other states' informants.

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, Indiana, Iowa, Kentucky, Missouri, and Wisconsin) and site visits in Florida, Kentucky and Illinois (OSG and Cook County, OPG).

A departure from Schmidt's study is that the 2004 study has more empirical information (simply put, because more was available). 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 effort 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 conclusions and recommendations below.

CONCLUSIONS

Public guardianship programs serve a wide variety of individuals. The overwhelming majority of state statutes provide for services to incapacitated individuals who are determined to need guardians under the adult guardianship law, but who have no person or private entity qualified and willing to serve. However, four state schemes limit services to elderly people, four focus exclusively on individuals with specific mental disabilities, three specifically reference minors, and some target services only to APS 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 % (IL – OSG) to 33% (CA – 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, and a direct result of federal and state funding restrictions – namely Medicaid – often the only available living arrangement was a nursing home.

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 18-64 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 – the incidence 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 illness – 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 “clients are younger and have many more drug and alcohol problems. Public guardianship used to be regarded as a custodial program, but no longer. 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 about placement. Others described greater efforts to locate appropriate community placements.

The *Olmstead* case provides a strong mandate for re-evaluation 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 to vigorously 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. As in the earlier study, some states programs did not fit neatly into the classification system. It should be noted that the social service agency model included both state and local entities. Thus, some county level programs may in fact be located in social service agencies and are 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 services provided to wards – nor can it zealously advocate for the interests of the ward, including complaining about the services and, if necessary, filing 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 (at either the state or local level), and 10 states use a county model (Illinois uses two distinct models).

All but two states (and Washington, DC) 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, and the District of Columbia 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.

A clear majority of the states uses a social services model of public guardianship. A striking finding in our study is the increase 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 APS 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 vigorously 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 services of government are highly complex, as with public guardianship, they are best provided by a governmental entity. Under the “privatization premise” (see Schmidt & Teaster, 1997, Appendix H), 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 significant 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 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.

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 indicated 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. Moreover, 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 may be avoided.

In the national survey, some 25 responses (14 from service providing agencies, 7 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 while not petitioning means those in need may languish without attention. Still others, in light of the overwhelming need, found petitioning an appropriate role for public guardianship programs.

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 they 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, but 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 (e.g., Florida, Utah, Virginia), and so gathering sufficient data for this purpose is neither difficult nor highly expensive. Not only should each state establish its unmet need numbers (with an unduplicated count), but also, 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, in most cases, they 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 (NGA) conducts an examination that certifies both Registered and Master Guardians. 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 under-funded. Virtually all states reported that lack of funding and staffing is their greatest weakness and greatest threat. The study identified staff to ward ratios as high as 1:50, 1:80 and even 1:173. Caseloads are rising, but 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, all requiring a higher degree of staff oversight and interaction. Some of the focus group and interview respondents revealed high levels of 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 recommended staff-to-ward ratio. In selected additional jurisdictions, caps are imposed administratively. But most public guardianship programs serve a true “last resort” function, and must accept cases regardless of staffing level. This puts programs in an intractable position with clients in jeopardy. The conundrum is that public guardianship was originally contemplated as an essential part of the public safety net. Public guardianship was intended to serve as a guardian of last resort, taking all comers with nowhere else to go. 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 are frequently 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 listed guardianship in their Medicaid plan. At least one state (Illinois) uses an “administrative claiming” model to access Medicaid funds – in which the federal government provides a match for state funds used to pay for guardianship services that help incapacitated individuals to apply for Medicaid funds. At least one state (Kentucky) bills Medicaid for guardianship services under its Targeted Case Management program. 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 when appropriate rather than institutional placements. Individuals often 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 State Guardianship System: Due Process Protections and Other Reform Issues

Very little data exist on public guardianship. Many states have insufficient or uneven data on adult guardianship in general (GAO, 2004), 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 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. 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 (Hurme, 1994; Fell, 1994; Frolik 1981; 2002; Schmidt, 1996; Quinn, 2005). 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 limited guardianships, and judges are often 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. The in-depth interviews with key informants and with various groups in all site visits, revealed flaws in the use of GALs. First, little or no training for GALs exists, and thus, their function, as the eyes and ears of the court is compromised. While some GALs faithfully exercise their duties (e.g., 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 functional capabilities of wards, and provide the court with incomplete information. Payment to GALs is abysmal, and often ignores potentially time-consuming efforts. 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 and growing movement toward eliminating GALs from court proceedings, a position consistent with some commentary, and with court decisions or guidelines in Florida, Montana, Nebraska, Pennsylvania, South Carolina, Vermont,

and Washington (Dore, 2004). We propose that a GAL 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. 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 specifically provide 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 arena 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 the Public Guardian in Cook County, Illinois brought multiple high visibility lawsuits to enforce the rights of wards in many 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 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.

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 the assets of those unable to care for themselves (Schmidt et al., 1981). 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 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 among models.

Program Characteristics

States would benefit from an updated model public guardianship act. Model public guardianship acts were proposed in the 1970s and by the Schmidt study in 1981. 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 – nor can the public guardian bring legal suit against the agency on the ward’s behalf. For example, in Cook County, Illinois (county model), OPG 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 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” (Stetson, 2002). 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 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 those 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 service staff 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 and/or community guardians, seek to limit the scope of the guardianship order, and consider the most appropriate plan of care.

Public guardianship programs should track cost savings to the state and report the amount regularly to the legislature and the governor. To our knowledge, only one state (Virginia) has adequately tracked cost savings. 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. See Teaster & Roberto, 2003). 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. 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 overstated. Our argument for doing so is analogous to the one made in the preceding paragraph concerning tracking cost savings. Some states (Virginia, 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.

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 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 fisc by sound management of ward finances, prevention of crises, ensuring proper medical care, avoiding use of unnecessary emergency services, use of the least restrictive alternative setting, and identification of ward assets and federal benefits.

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 State Guardianship System: Due Process Protections and Other Reform Issues

State court administrative offices should move toward the collection of uniform, consistent basic data elements on adult guardianship, including public guardianship. The uniform collection of data on guardianship was supported in a recent study by the GAO (2004). 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.

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. Courts should establish additional monitoring

procedures for public guardianship beyond 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.

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 (Frolik, 2002).

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 cost the state unnecessary expense to address crises that could have been averted or 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 GAL 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 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 (GAO) recommended that such coordination should be strengthened. State implementation of the Act directly affects veterans who are public guardianship wards and merits examination.

Hallmarks of an Efficient, Effective, and Economic Program of Public Guardianship

We conclude our recommendations with hallmarks of an excellent program. We propose these attributes as 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 meaningful external evaluations
- 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

FINAL THOUGHTS

Simply put, we conclude as we began, our recommendations commensurate with and summarized by a statement from Winsor Schmidt’s 1981 study, as true in 2005 as it was in 1981.

“Public guardianship is being endorsed, but only if it is done properly. By ‘properly’ we mean with adequate funding and staffing, including specified staff-to-ward ratios, and with the various due process safeguards that we have detailed. . . . The office should be prepared to manage guardianship of person and property, but it should not be dependent upon the collection of fees for service. The functions of the office should include the coordination of services, working as an advocate for the ward, and educating professionals and the public regarding the functions of guardianship. The office should also be concerned with private guardianship, in the sense of developing private sources and to some extent carrying out an oversight role” (Schmidt et al., 1981).

References

- Dore, M. (2004-2005). The *Stamm* case and *guardians ad litem*. *Elder Law*, 16(4), 3, 6-7.
- Fell, N. (1994). Guardianship and the elderly: Oversight not overlooked. *University of Toledo Law Review*. Vol 25. pp. 189 – 213.
- Frolik, L. (1981). Plenary guardianship: An analysis, a critique and a proposal for reform. *Arizona Law Review*, 23(2) 599-660.
- Hurme, S. (1994). Limited guardianship: Its implementation is long overdue. *Clearinghouse Review. National clearinghouse for legal services*. Vol. 28(6). pp. 660-670.
- National Guardianship Association (2000). Standards of practice. www.guardianship.org.
- Quinn, M. J.(2005). *Guardianship of adults: Achieving justice, autonomy, and safety*. New York: Springer Publishing Company.
- Schmidt, W. C., Miller, K., Bell, W., & New, E. (1981). *Public guardianship and the elderly*. Cambridge, MA: Ballinger Publishing Company.
- Schmidt, W.C. (1996). Assessing the guardianship reform of limited guardianship: Tailoring guardianship or expanding inappropriate guardianships? *Journal of Ethics, Law, and Aging* 2(1), 5-14.
- Schmidt, W.C., & Teaster, P.B. (1997). *Criteria for choosing public or private (contracting out) models in the provision of guardian of last resort services*. Appendix report to the Virginia Department for the Aging, Richmond, VA.
- Teaster, P. B. & Roberto, K. A. (2003). *Final Report: Virginia public guardian and conservator programs: Evaluation of program status*. Richmond, VA: Virginia Department for the Aging.
- United States General Accounting Office (GAO). (2004). *Guardianships: Collaboration needed to protect incapacitate elderly people*. Washington, DC: USGAO - Publication # 04-0655.
- _____, *Stetson Law Review*. (Spring 2002). Wingspan – The second national guardianship conference. Vol 31(3).

Appendix A

(2004 National Survey of Public Guardianship)

PUBLIC GUARDIANSHIP SURVEY

APRIL 2004

The University of Kentucky and the American Bar Association Commission on Law and Aging are conducting a joint project, funded by the Retirement Research Foundation. This project is an attempt to understand public guardianship programs in the United States. This survey represents the first phase of this study. The purpose of the first phase is to gather baseline information about your state's system of public guardianship or the lack thereof.

Should you have questions about this survey, please contact Pamela B. Teaster, Ph.D., Principal Investigator, University of Kentucky at pteaster@uky.edu or by telephone, 859.257.1450 x80196. This survey may be returned by e-mail attachment, fax, or conventional mail. Please return it by **May 10, 2004** to slawr53@uky.edu

DIRECTIONS

Follow the *Instructions for Completing the Survey* provided with the e-mail message. You may wish to print the survey and complete it by hand prior to returning it via e-mail, fax, or conventional mail. If your program captures data that relate to the question but do not fit these categories, please attach a sheet that provides this information with a reference to the specific question. You may wish to include your definitions of these categories.

DEFINITIONS

Ward: A person placed by the court under the care of a guardian.

Guardian: A person lawfully invested with the power, and charged with the duty, of taking care of the person and managing the property and rights of another person who is considered incapable of administering his or her own affairs.

Public guardianship: 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.

Public guardianship program: The entity responsible for exercising public guardianship duties.

Contact Information

Please provide the following information:

Name of respondent: _____

Title: _____

Agency Affiliation/Name: _____

Name of Program: _____

Address: _____

Telephone Number: _____

Fax Number: _____

E-mail: _____

A. Administrative Structure and Location in Government

1. Does public guardianship exist in the state?

yes no

• If yes, does the state have:

Independent local or regional programs

Programs coordinated at the state level

Other (Please specify):

• If no, please explain who serves as 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.

Please continue with the survey regardless of whether the state's public guardianship program/entity is on the local, regional, or state level.

2. When was the public guardianship program established (year)? _____ Not applicable

3. Where is the program of public guardianship housed administratively?

- a. Court system
- b. Independent state office (Please specify): _____
- c. Division of a state agency (Please specify): _____
- d. County agency (Please specify): _____
- e. Other (Please specify): _____

• Please provide, to the best of your knowledge, a list of every office in the state providing public guardianship services. Also, please provide contact information for every office using the contact sheet provided. You may return the contact sheet using conventional mail, e-mail (document or internet site to access), or fax (cover sheet provided).

4. Is public guardianship available to individuals in all parts of the state?

yes no

• If no, please explain: _____

5. Are public guardianship services contracted out in your state?

yes no

• If yes, to whom does the program contract out? _____

6. Is your program of public guardianship established statutorily?

yes no

• If yes, please provide the citation: _____

7. Does the public guardianship program have administrative regulations?

yes no

- If, yes, please provide the legal citation: _____
- If yes, please provide them to us using conventional mail, e-mail (document or internet site to access), or fax (cover sheet provided).

8. To the best of your knowledge, are there any proposed changes to the public guardianship statute pending in your current legislative session?

yes no

- If yes, please specify: _____

9. What was the budget for the public guardianship program for Fiscal Year 2003? \$_____ Don't Know

10. If the public guardianship program budget is inadequate, how much money should be added to the annual public guardianship budget to make it adequate? \$_____ Don't Know

11. If a public guardianship program standard of practice is a full-time equivalent (FTE) paid professional staff to ward ratio of 1:20, how much money should be added to the annual public guardianship budget to make it comply with this standard of practice? \$_____ Don't Know

12. From where does the public guardianship program receive budgetary funds? (*Check all that apply*).

- a. Federal funds (*Please specify*): _____
- b. State funds (*Please specify*): _____
- c. County funds (*Please specify*): _____
- d. Medicaid funds
- e. Grants/Foundations
- f. Private donations
- g. Client fees
- h. Estate recovery
- i. Other (*Please specify*): _____

13. Does the program have the authority to collect a fee or charge to the ward for public guardianship services?

yes no

14. Does the program collect a fee or charge to the ward for public guardianship services?

yes no

- If yes, please explain how fees are determined. _____
- If yes, please provide a copy of the fee schedule.

B. Functions of the Public Guardianship Program

1. Does the public guardianship program: *(Check all that apply)*.

- a. Make decisions about a ward's personal affairs?
- b. Make decisions about a ward's financial (property) affairs?

2. Regarding delivery of services for the public guardianship wards (e.g., homecare, transportation, money management), does the public guardianship program serve in the following roles? *(Check all that apply)*.

- a. Monitor of delivery of services
- b. Arranger of delivery of services
- c. Advocate for services
- d. Direct provider of services

3. Does the public guardianship program serve clients other than those under guardianship?

- yes no

4. What other services does the public guardianship program provide? *(Check all that apply)*.

- a. Financial power of attorney
- b. Health care power of attorney
- c. Representative payee
- d. Trustee
- e. Personal representative of decedents' estates
- f. Private guardianship services
- g. Other *(Please specify)*: _____
- h. N/A

5. Does the public guardianship program provide any of these outreach services? *(Check all that apply)*.

- a. Educate the community about guardianship
- b. Provide technical assistance to private guardians
- c. Monitor private guardians
- d. Other *(Please specify)*: _____

6. a. Does the public guardianship program petition for adjudication of legal incapacity?

- yes no

- If yes, for Fiscal Year 2003, how many times did the public guardianship program petition? _____

b. Does the public guardianship program petition for appointment of itself as guardian?

- yes no

- If yes, for Fiscal Year 2003, how many times did the public guardianship program petition? _____

C. Staffing

1. For your state, please provide a numeric estimate of unmet need for public guardians. _____

“Unmet need” means persons alleged to meet legal criteria for incapacity but who have not yet been formally adjudicated as legally incapacitated.

In Question #2, we are using the exact date of March 2, 2004 as it is the first working day in the month and should represent a “typical day” in the life of a public guardianship program.

2. On March 2, 2004:

a. How many wards did the public guardianship program serve? _____ Don't Know

b. How many full-time equivalent (FTE) paid professional staff did the public guardianship program include? Please include all paid professional staff on payroll (include those who were sick, on vacation, or on leave). _____ Don't Know

c. How many volunteers were assisting the public guardianship program? _____ Don't Know

In Question #3, we are using Fiscal Year 2003 as it is the most recent year for which information would be available for the public guardianship program.

3. For Fiscal Year 2003:

a. What was the cumulative total of wards served by the public guardianship program? _____
 Don't Know

b. What was the cumulative total of new wards accepted by your program? _____ Don't Know

4. On average, how many hours per year does a FTE paid professional paid staff member spends working on the case of a single ward? _____ Don't Know

5. As of March 2004, what is the educational requirement for a full time equivalent professional paid staff member who makes binding decisions for wards?

- a. High school graduate
- b. Bachelor's degree
- c. Master's degree
- d. Other (Please specify): _____

6. What is the experience requirement for full time equivalent professional paid staff members who make binding decisions for wards? _____ Don't Know

7. Which of the following does the public guardianship program use in personnel management? (Please check all that apply).

- a. Public guardianship program policies and procedures, standards of practice
- b. State guardianship statutes
- c. Written personnel policies
- d. Written job descriptions
- e. Interview forms
- f. Internal staff evaluation and review procedures
- g. Ongoing training and educational materials for staff
- h. Annual or more frequent training sessions
- i. Other (Please specify): _____

D. Wards

1. For Fiscal Year 2003, provide the number of public guardianship cases that came from each of the following referral sources:

- a. Adult Protective Service _____
- b. Other public social service _____
- c. Private social service _____
- d. Jail/ Prison/ Police _____
- e. Mental health facility _____
- f. Long-term Care Ombudsman _____
- g. Attorney _____
- h. Legal Aid _____
- i. Nursing home _____
- j. Hospital _____
- k. Family _____
- l. Friend _____
- m. Other (Please specify): _____

Don't Know

2. For Fiscal Year 2003, how many people did the public guardianship program serve?

- a. Guardian of the person only _____
- b. Guardian of the property only _____
- c. Both guardian of the person and guardian of the property _____
- d. Limited guardian of the person _____
- e. Limited guardian of the property _____

Don't Know

3. For Fiscal Year 2003, how many people did the public guardianship program serve in each of the following genders?

- a. Female _____
- b. Male _____

Don't Know

4. For Fiscal Year 2003, how many people did the public guardianship program serve in each of the following age groups?

- a. Persons 65+ _____
- b. Persons 18-64 _____
- c. Persons under age 18 (children) _____

Don't Know

5. For Fiscal Year 2003, how many people did the public guardianship program serve with each of the following conditions as their primary diagnosis?

- a. Adults with mental illness _____
- b. Adults with mental retardation _____
- c. Adults with developmental disabilities _____
- d. Adults with head injuries _____
- d. Adults with Alzheimer's Disease or dementia _____
- e. Adults with substance abuse _____
- f. Adults with other conditions (*Please specify*): _____

Don't Know

6. For Fiscal Year 2003, how many wards in the public guardianship program:

- a. Were low income _____ (*Please specify your dollar definition*): _____
- b. Died _____

Don't Know

7. For Fiscal Year 2003, how many wards were:

- a. Hispanic _____
- b. Non-Hispanic _____

Don't Know

8. For Fiscal Year 2003, how many wards were:

- a. White _____
- b. Black or African American _____
- c. American Indian _____
- d. Alaskan Native _____
- e. Asian or Pacific Islander _____
- f. Other (*Please specify*): _____

Don't Know

9. For Fiscal Year 2003, how many public guardianship wards had the following as their **primary setting**:

- a. Own home/apartment/room _____
- b. Assisted living _____
- c. Nursing home _____
- d. Mental health facility _____
- e. Group home _____
- f. Acute hospital _____
- g. Jail _____
- h. Missing or whereabouts unknown _____
- i. Other (*Please specify*): _____

Don't Know

10. For Fiscal Year 2003, how many public guardianship wards were:

- a. Restored to legal capacity _____
- b. Restored to partial legal capacity _____
- c. Transferred to a private guardian _____

Don't Know

11. For each public guardianship ward, what records are maintained? (*Please check all that apply*)

- a. Ward functional assessment
 - If yes, how often is it updated? _____
- b. Guardianship care plan
 - If yes, how often is it updated? _____
- c. Time logs or time keeping records for each specific public guardianship ward (i.e., documents how staff time is spent for each ward)
- d. Values history
- e. Advance directive (e.g., power of attorney, do-not-resuscitate order)
- f. Periodic report to the courts
 - If yes, how often? _____
- g. Periodic program review of public guardianship wards' legal incapacity
 - If yes, how often? _____
- h. Periodic review of appropriateness of public guardian to serve as guardian
 - If yes, how often? _____

12. Do you document the rationale for why and how decisions are made on behalf of each public guardianship ward?

yes no

E. Additional Information

Use additional pages if necessary.

1. Please state three or more strengths of the public guardianship program.

2. Please state three or more weaknesses of the public guardianship program.

3. Please state three or more opportunities for the public guardianship program.

4. Please state three or more threats to the public guardianship program.

5. Please identify three or more best practices of the public guardianship program that might serve as a model for other states.

6. Please identify three or more problems faced by the public guardianship program that other states should try to avoid.

7. Please provide any other comments that you would like to make.

Thank you for completing this survey!

Appendix B

(1981 Schmidt National Survey of Public Guardianship)

APPENDIX B
(PUBLIC) GUARDIANSHIP SURVEY

1. How long has your system for (public) guardianship existed?
2. Is your (public) guardian system directed at the elderly? If not, what other groups?
3. What do *you* see as the major advantages of the (public) guardian?
4. What do *you* see as the major disadvantages of the (public) guardian?
5. Are there specific ways in which *you* think the (public) guardian law should be changed?
6. What kinds of problems do *you* see in the application of the (public) guardian law?
7. What objections are made by *other* people? Who?
8. To what extent does the (public) guardian:
 - a) assist in the ward's personal affairs?
 - b) assist in the ward's financial (property) affairs?
 - c) supervise delivery of services?
 - d) explore alternatives to institutionalization?
9. What effect has the implementation of the (public) guardianship law had on the total number of guardianships? (Increase or decrease?)
10. What are the educational and professional qualifications of your public guardians?
11. How large is the staff of the (public) guardian program?
12. What is the annual budget of the (public) guardian program? Where does the money come from?
13. Is there a fee or charge to the ward for (public) guardian services. How is the fee determined?
14. On the average, how much time does a (public) guardian spend with a single ward per year?
15. What is the caseload per (public) guardian worker?
16. What is the total number of (public) guardianship cases per year?
17. What are the major sources of referral to the (public) guardian?

Proportion of cases from:

- jail
- prison
- mental institutions
- public social service agencies
- private social service agencies
- courts
- family
- police
- sought by ward
- sought out by public guardian office
- other (please specify)

18. What proportion of the total number of (public) guardian wards are:

- over age 65
- minorities (which)
- Female
- Low income (please specify dollar definition)

19. Within a given year, please specify how many public guardian wards are:

- Institutionalized
- Die
- Are restored to competency with the guardianship removed

20. Does the (public) guardianship office have:

- Written personnel policies?
- Written job descriptions?
- Interview forms?
- Internal evaluation and review procedures?
- Training and educational materials for staff?
- Outreach materials?

Appendix C

(In-depth Surveys of States without Public Guardianship)

In-depth Surveys of States Without Public Guardianship Programs

(Wisconsin, Iowa, Missouri)

1. Are there any local entities that serve as guardian of last resort? If so, how does it work? Challenges?
2. How are they coordinated? To what extent are they uniform?
3. How strong is the coordination? What kind of interactions do you have, and how often?
4. Do you use NGA standards?
5. What is the oversight for any of the local programs? How does the process work?
6. Specifically, how do you piece your money together? How do you maintain funds?
7. How does your state use Medicaid funds and how does the public guardianship program use them? Is there a cap? Only for public guardianship or for private? What does the state plan say and how do you use it?
8. What are your estimated costs per ward? (Be specific for each local program).
9. Have there been any proposals to change the system? Has there been any collaborations between the programs?
10. Do you collect any data on the population served? Could you provide it to us?
11. What kind of technical assistance do you give the programs?
12. Are there other surrogate decision-making programs in the state? How do you relate to these?
13. How do rural/urban environments differ?
14. Who would be 2-4 local contacts (people or corporate entities) who serve as GOLR? Is there anyone in state government with whom we should speak?
15. Do you have any information on the unmet need in the state or by county?

(There will be probes to these questions as warranted).

Appendix D

(In-depth Surveys of States with Public Guardianship)

In-depth Surveys of States With Public Guardianship Programs

(Florida, Kentucky, Indiana, Illinois)

A. Administrative Structure and Location in Government

16. Explain how the program works.
17. If it is housed in X, how does it work? Challenges?
18. If there are local or regional programs, how are they coordinated? To what extent are they uniform?
19. How strong is the coordination? What kind of interactions do you have, and how often?
20. Do you use NGA standards?
21. What is the process of contracting out? What is the oversight? How does the process work?
22. Specifically, how do you piece your money together? How do you maintain funds?
23. How does your state use Medicaid funds and how does the public guardianship program use them? Is there a cap? Only for public guardianship or for private? What does the state plan say and how do you use it?
24. What are your estimated costs per ward?
25. Does the public guardianship program track savings from such public guardianship program actions as ward placement in less costly setting where appropriate, recovering assets, or securing access to benefits or entitlements? If yes, what were the cost savings calculated for FY 2003?

B. Functions of the Public Guardianship Program

26. How do you make end of life decisions?
27. What process do you use in making decisions?
28. How much collaboration with the staff members do you have and what kind of supervision is there for staff?
29. What kind of quality assurance program do you have?
30. Are there some decisions that public guardians must go back to the court for authority? What are the carve outs? How do you do this? What is your procedure?
31. How do you address specific illnesses of wards?
32. Describe your community education.
33. Do you provide technical assistance for private guardians?
34. How much time is spent for public guardians versus representative pay/power of attorney?
35. If you do not petition, who does generally petition? Do all cases of last resort go to public guardians?? Who else gets them? Do you have to take these cases? If you get a case, by the court, how are you notified?
36. Who represents your program in court?
37. Do you have relationships with legal services, p and a, or APS?
38. Who does the progress petition? What triggers it?
39. Has the state done a statewide needs assessment?

C. Staffing

40. Staff attrition? What is the staff experience with public guardianship?
41. What type of training does staff receive? Is there X training? What type? Who does it? How often is it done? Is training done annually, one time, available?
42. To what extent does the state serve MR/DD? How is the response different? How is the program structured differently to meet the needs of these different populations? If both, how do you address?

D. Wards

43. Tell us more about ward deaths?
44. How do you go about making the decisions to institutionalize wards? Review?
45. How does your state address cultural diversity? How does your staff deal with the wards? Does your staff have training or cultural diversity and decision-making? Special considerations or protocols?
46. Do you/what kind of efforts do you make to identify guardians who might be appropriate other than you?
47. Do you use volunteers? If so, in what capacity and how does it work?
48. Are you monitored differently from a private guardian?
49. What systems do you have in place to ensure proper reporting?
50. How is the public guardianship program regarded in the state?
51. How do you make changes to the public guardianship system?
52. Are there other surrogate decision-making programs in the state? How do you relate to these?
53. How do rural/urban environments differ?
54. How does the program involve the ward in decision-making? How does the program involve family or close friends?

Appendix E

(Site Visit, Focus Group Questions)

**Wards of the State:
A Study of Public Guardianship Programs in Seven Jurisdictions**

**University of Kentucky and
American Bar Association Commission on Law and Aging**

State Focus Group Guides

Local Public Guardianship Program Staff

1. Please tell us about your background, which public guardianship program you work for, and how long you have worked for the program.
2. What training and experience did you have before you began this job?
3. Describe the training your program provided when you began the job, and any training you have had during the course of your employment. How would you assess the training? Are there any areas of training you believe would have been helpful when first starting as the Public Guardian?
4. What other type of training you have had during the course of your employment? Are there any areas of training you believe would be helpful at this time?
5. What is your caseload? Do you serve in the public guardianship program full- or part-time?
6. What type of supervision do you receive? How frequently do you meet with a supervisor? Describe any case review process you may have.
7. Approximately what percentage of your cases involves guardianship of the person, the property or both? Do you have authority to make all types of decisions on behalf of wards? Does your program give different staff members different levels of authority for decision-making?
8. Can you give some examples of some of your cases?
9. Do any decisions require court approval? If not required by state law, does your program elect to seek court approval for certain decisions? Which ones? If you seek court approval, who handles the court appearance? Do you ever testify in court?

10. Describe your caseload in terms of the characteristics of wards. For example, are they largely younger persons with developmental or mental disabilities, or are they largely older persons with dementia, or a mixture? Can you give some examples? Describe any structures or practices your program uses to meet the needs of different populations.
11. Where do the wards live? What is the approximate ratio of wards living in institutions to wards living in community settings in your caseload. Describe the range of living arrangements of your wards (e.g. nursing homes, state mental health facilities, group homes, assisted living). Can you give some examples?
12. How often do you typically visit? How does where the ward lives influence frequency of visits? Does this vary depending on where the ward lives? What other factors influence how often you visit a particular ward?
13. Does your program use a particular set of practice guidelines? Please describe. What do the guidelines cover, e.g. frequency of visitation, decision-making principles, conflicts of interest?
14. In what ways do you involve your wards in decision-making? In what ways? Do you involve family members or close friends in decision-making and, if so, how?
15. Do you prepare plans of care for your wards? If so, what process do you use for developing these plans? Does your program have a template or other guidance for care plans?
16. Who writes the annual reports for the court? If so, what guidance does your program supply? Describe any systems your program has in place for ensuring that annual plans and reports are written and filed in a timely manner?
17. What state or local agencies do you interact with on a regular or frequent basis in your casework (e.g. APS, long-term care ombudsman, legal services program, area agency on aging)? Please describe some typical circumstances or issues triggering those contacts.
18. Please describe the “boundaries” of your relationships with your wards. For example, do you share holidays with wards? spend your own funds for necessities or gifts? use first names when speaking to one another? Does your program have guidelines for these aspects of the relationship?

19. What, if any, role do you play when a ward dies? Do you continue to be involved in the case and, if so, what do you do?
20. Please describe a current or recent case that you have found to be challenging. What made it difficult? How much time did you spend on the case on a weekly or monthly basis? Did you seek help in managing the case?
21. Do you have contact with staff in other local/regional public guardianship entities in your state? Please describe your interactions.
22. Do you have contact with the state public guardianship office? Please describe that relationship and its effect on the operation of your program.
23. What are the strengths of the public guardianship program (both the statewide system and your local program)?
24. What are the weaknesses of the public guardianship program (statewide and local)?
25. What are some opportunities for the public guardianship program (statewide and local)?
26. Are there any threats to the public guardianship program (statewide and local)?

Wards

1. Tell me about yourself.
2. How did you come under the public guardian's care?
3. How do you feel about your health and health care? What are your day to day wishes? What did you/do you like to do? What would you like to be doing that you can't do now?
4. Do you feel that your public guardian meets your needs? How so or how not?
5. How do you feel about being under the public guardian's care?
6. What experiences have you had being a ward that you have liked/disliked?
7. How well do you think that your guardian knows you?
8. What would you like your guardian to know about you that you think he or she doesn't know?
9. In making decisions for you, do you think that the guardian respects your wishes when possible?
10. What decisions do you think you could make that you aren't making now?
11. Do you think that guardianship has been good for you? How so or how not?
12. What else would you like to talk about? Is there anything that you would like to discuss about which I haven't asked you?

* Questions for the ward may be rephrased so that the ward can better understand and respond to them.

Judges and Court Administrators

1. Please tell us about your background, how long you have served as a judge and what kinds of cases come before you.
2. Could you tell us a little about your connection with the local public guardianship program?
3. What kinds of cases come before your court in which you appoint the public guardianship program to serve as surrogate decision-maker? Can you give a recent example?
4. What percent of your ongoing guardianship caseload is from the public guardianship program?
5. What events, conditions or scenarios generally trigger a petition for which the public guardianship program is appointed?
6. How does a case usually get to the public guardianship program? Who brings the petition, who represents the petitioner & who represents the ward?
7. Before the public guardianship program is assigned a case, to what extent and how do you ensure there are no less restrictive alternatives available and no private guardian available?
8. How often do you craft limited orders for the public guardianship program?
9. How frequently do public guardianship program staff come back to court for approval of decisions? For what kinds of decisions?
10. After appointment, how frequently does public guardianship program locate another guardian to serve?
11. How do you monitor the local public guardianship program? Can you comment on the submission of the annual reports? Do you monitor the public guardianship program any differently than private guardians?
12. How frequently do you receive complaints about the public guardianship program? What kinds of complaints and from whom? If you receive a complaint, what happens?
13. To what extent can public guardianship program meet local needs for appointment of guardians of last resort? For what kinds of decisions do you see the greatest needs? What happens if there is no public guardianship slot available?
14. Have judges in your state played any role in securing additional funding for the public guardianship program?

15. Have there been any judicial education sessions in your state on the public guardianship program?
16. Do you have any comments about the performance of the local public guardianship program?
17. In your opinion, how is the public guardianship program regarded in the state?
18. What are the strengths of the public guardianship program?
19. What are the weaknesses of the public guardianship program?
20. What are some opportunities for the public guardianship program?
21. Are there any threats to the public guardianship program?

Attorneys

1. Please tell us your name, where you work, and how long you have been in this position.
2. What role do you play in relation to guardianship cases?
3. Do you play a role in cases in which the local public guardianship program is appointed to serve as guardian for an incapacitated person? Please describe your involvement in public guardianship.
4. For cases in which the court appoints a public guardian to serve as guardian, who generally acts as the petitioner? Do you ever petition for guardianship or represent petitioners? In your jurisdiction, is it difficult to find someone willing to petition for guardianship when the alleged incapacitated person has no relatives or friends who are willing or able to do so?
5. In your experience, what are the most typical scenarios resulting in the appointment of the public guardian?
6. Do the courts appoint a *guardian ad litem* in these cases? What is the role of the *guardian ad litem*? Have you served in this role?
7. Have you ever represented an alleged incapacitated person opposing a guardianship petition? Has the public guardian ever been appointed in one of those cases? Do you have any on-going role or relationship with the public guardian in those cases?
8. Do you have any personal knowledge of court monitoring of the public guardianship program? Do you know whether court monitoring of the public guardian differs from monitoring of other guardians?
9. In your experience, does the public guardianship program seek to identify others who could serve as guardians for their wards? Have you ever been or represented a successor guardian in such a case? Please describe.
10. What are your overall impressions of the local public guardianship program?
11. What are your overall impressions of the statewide office of public guardianship?
12. Do you know how the public guardianship program is generally viewed by the probate and elder law bar in your area? By the legal services community? Other attorneys?
13. Do you believe that there is an unmet need for guardians of last resort in your area? Upon what do you base this impression? What generally happens when no public guardianship slot is available?

14. Does the public guardianship program in your area perform any public education or technical assistance for family members, private guardians or attorneys involved in guardianship cases? Please describe.
15. Has there been any press coverage or other public attention to public guardianship in your area or in the state? Please describe.
16. Are there any strengths of the public guardianship program that you have not already described?
17. Are there any weaknesses that you have not described?
18. What are some existing opportunities for the public guardianship program?
19. Are there any threats to the public guardianship program?

Aging and Disability Advocates

1. Please tell us a little about your background and your role.
2. Describe your connection with the local public guardianship program? How have you been involved with the program? Can you give us a few examples?
3. How frequently do you encounter individuals or clients who are wards under the public guardianship program?
4. Have you ever participated in court hearings in which the public guardianship program is proposed for appointment? If so, how frequently?
5. Do you have any comments about the performance of the local public guardianship program? Do you ever receive complaints or comments about the public guardianship program?
6. Does your program do any cross-training with the public guardianship program?
7. If your program encounters an individual who may need a guardian, how do you proceed? What if there is no individual or private agency available to serve?
8. Do you ever serve as petitioner in a guardianship action? Do you ever seek appointment of the public guardianship program?
9. Do you have any comments on the extent of local unmet need for appointment of guardians? How frequently do you encounter a long-term care resident in need of a guardian for whom there is no public guardianship slot available? What generally happens?
10. In your opinion, how is the public guardianship program regarded in the state?
11. What are the strengths of the public guardianship program?
12. What are the weaknesses of the public guardianship program?
13. What are some opportunities for the public guardianship program?
14. Are there any threats to the public guardianship program?

Specific Questions for Long-Term Care Ombudsmen:

15. Do public guardianship program staff members consult with you about nursing home or assisted living facility care of wards? Do they make complaints to the state survey agency? Do you ever monitor cases specifically for the public guardian?

16. Do public guardianship staff members attend care planning meetings? Are you aware of the frequency of program staff visits to wards in facilities?

Adult Protective Services

1. Please tell us a little about your background and experience with APS. Please describe your caseload and clients. How do you categorize your cases (e.g., self-neglect, abuse, exploitation, community vs. institutional)? How many cases do you maintain?
2. Tell us about your connection with the local public guardianship program?
3. About what percent of your cases end up in guardianship? About how many of these go to the public guardianship program?
4. How do you determine which cases/when/at what point to seek appointment of the public guardianship program? What kinds of cases generally trigger a petition to public guardianship (e.g., self-neglect, abuse, exploitation, community vs institutional)? Can you give us a few examples?
5. Do you petition for public guardianship? Do you participate in the hearing?
6. Is your case closed when the public guardian is appointed? If not, what is your continuing role?
7. Do you have any screening tools in place to identify less restrictive alternative before turning to public guardianship?
8. Does your program do any cross-training with the public guardianship program?
9. Do you have any comments about the performance of the local public guardianship program? Do you ever receive complaints or comments about the public guardianship program? Could you give an example?
10. To what extent can public guardianship program meet local needs for appointment of guardians of last resort? For what kinds of decisions do you see the greatest needs (i.e., medical decisions, money management, placement, other)? What happens if there is no public guardianship slot available?
11. How frequently do you have a client in need of a guardian for whom there is no public guardianship slot available? What generally happens? Can you give an example?
12. In your opinion, how is the public guardianship program regarded in the state?
13. What are the strengths of the public guardianship program?
14. What are the weaknesses of the public guardianship program?

15. What are some opportunities for the public guardianship program?

16. Are there any threats to the public guardianship program?

Appendix F

(Brief State-Specific Model Information)

Quick Reference -- State Mini-Profiles

State	Brief Description of Public Guardianship
Alabama	Probate judge appoints a county conservator or the sheriff serves.
Alaska	Office of Public Advocacy in Department of Administration provides public guardianship services.
Arizona	County boards of supervisors appoint public fiduciaries in all counties.
Arkansas	APS may serve as legal “custodian.”
California	County boards of supervisors create county offices of public guardian.
Colorado	County departments of social services (APS) provide public guardianship.
Connecticut	Commissioner of social services authorized to serve as conservator of last resort.
Delaware	Office of Public Guardian in the court system provides public guardianship services.
District of Columbia	None
Florida	Statewide Public Guardianship Office in Department of Elder Affairs coordinates local programs.
Georgia	County departments of family and children’s services (APS) provide public guardianship services.
Hawaii	Two Programs, Large and Small: Office of Public Guardian in court system provides public guardianship services. One serves wards with estates < \$10,000.
Idaho	In some counties, board of county commissioners has created board of community guardians to serve, through largely volunteer programs.
Illinois	Office of State Guardian in Illinois Guardianship and Advocacy Commission provides services through regional offices to individuals with estates under \$25,000. Office of Public Guardianship provides services to individuals with estates \$25,000 and over through county offices.
Indiana	Division of Disability, Aging and Rehabilitative Services in Family and Social Services Administration contracts with regional non-profit providers.
Iowa	Department of Human Services authorized to create county volunteer guardianship programs, but only one exists. An additional county has created its own public guardianship program.
Kansas	Kansas Guardianship Program is a statewide volunteer-based public guardianship program.
Kentucky	Families and Adult Consultative Services Branch in Division of Protection and Permanency, Department for Community Based Services coordinates public guardianship services through offices

	in state service regions.
Louisiana	Private not for profit organization provides guardianship for 35 older adults, 90 MRDD, older adults' services paid by Governor's office of Elder Affairs.
Maine	Department of Behavioral and Developmental Services provides guardianship for individuals with mental retardation; and Department of Human Services provides guardianship services for others.
Maryland	Maryland Department of Aging coordinates guardianship services for elderly individuals through the area agencies on aging. APS provides guardianship services for others.
Massachusetts	Executive Office of Elder Affairs administers a protective services guardianship program for elders who have been abused, neglected or exploited, through contracts with non-profit agencies.
Michigan	Michigan Department of Human Services provides funding for guardianship for APS clients. In addition, some counties have county-funded public guardianship programs.
Minnesota	Minnesota Department of Human Services has Public Guardianship Office.
Mississippi	Chancery Court may appoint clerk of court to serve.
Missouri	Elected county public administrators provide guardianship services. Though it appears a county model, we determined that many public administrators are housed in the court house and receive county monies rather than a fee for service, yet they may have both public wards and their own private wards (for whom they do extract fees). Thus we placed it in a Division of Social Service Agency, or Conflict of Interest model.
Montana	APS provides guardianship services.
Nebraska	No public guardianship services.
Nevada	County boards of commissioners have established county public guardianship programs in some counties, housed as independent agencies or in public administrator's office or district attorney's office.
New Hampshire	Office of Public Guardian is a free-standing non-profit corporation to provide public guardianship services through contract with Department of Health and Human Services.
New Jersey	Office of Public Guardian for Elderly Adults in Department of Health and Senior Services provides guardianship services for elders.
New Mexico	Office of Guardianship in Developmental Disabilities Planning Council coordinates guardianship services through contracts with guardianship service providers.
New York	New York City has three community guardian programs that serve indigent persons who reside in the community. Additionally, some funding for serving indigent persons available

	from local departments of social services.
North Carolina	Clerk appoints public agent without conflict of interest.
North Dakota	None
Ohio	Department of Mental Retardation and Developmental Disabilities contracts with guardianship providers.
Oklahoma	An Office of Public Guardian was established within the Department of Human Services, to be activated when public guardianship pilot program is funded, expanded and evaluated.
Oregon	County boards of commissioners have created county public guardianship programs in a few regions of the state.
Pennsylvania	In some regions, area agencies on aging are assigned by judges to provide guardianship services; and in some regions private guardianship support agencies exist, as authorized by statute.
Rhode Island	Pilot public guardianship program is operated by Meals on Wheels of Rhode Island, Inc. through contract with the Department of Elderly Affairs.
South Carolina	Statute allows director of Mental institution to serve as guardian of last resort.
South Dakota	Department of Social Services and Department of Human Services coordinate guardianship services. ck
Tennessee	Commission on Aging and Disability coordinates guardianship services housed at the regional area agencies on aging.
Texas	At time of survey, APS provided guardianship services but 2005 legislation transferred the function to Department of Aging and Disability Services (DADS) under certain circumstances.
Utah	The Office of Public Guardian in the Department of Human Services provides guardianship services.
Vermont	The Office of Public Guardian in the Division of Advocacy and Independent Living provides guardianship services.
Virginia	The Department for the Aging coordinates guardianship services by local and regional programs.
Washington	The state Medicaid plan includes an allowance for guardianship services by professional guardians.
West Virginia	Department of Health and Human Services personnel in district offices provide guardianship services. Conservator of last resort is the local sheriff.
Wisconsin	Some counties pay individuals or state-approved corporate guardians to serve.
Wyoming	No provision for public guardianship.

Appendix G

(Map of State Models)

Appendix H

[Criteria for choosing public or private (contracting out) models in the provisions of guardian of last resort services]

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 & Sabaino, *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 11

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. Gomley, *Privatization and Its Alternatives*, Madison: University of Wisconsin Press (1989), pp. 251-280.

¹⁶ Prager, *Contracting Out Government Services: Lessons from the Private Sector*, 54 *Pub. Admin. 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”²⁰ In guardianship, public officials employ the guardianship agency’s unique perspectives, experience, structures, and ethics to address the complex issues of public guardianship.

²⁰ Wamsley, *The Agency Perspective: Public Administrators as Agential Leaders*, in G. Walmsley, R. Backer, C. Goodsell, P. Kronenberg, J. Rohr, C. Stivers, O. White & J. Wolf (eds.), *Refounding Public Administration*, Newbury Park, CA: Sage (1990).