

Wards of the State: A National Study of Public Guardianship



Executive Summary

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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.

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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

