

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

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TABLE OF CONTENTS

I.	INTRODUCTION AND BACKGROUND	195
A.	Adult Guardianship.....	196
1.	Overview of Reform.....	196
2.	Empirical Research	198
3.	Recent Developments.....	199
B.	Public Guardianship.....	201
1.	Definition and Overview	201
2.	Empirical Research	201
II.	ANALYSIS OF PUBLIC GUARDIANSHIP STATUTES.....	204
A.	Explicit versus Implicit Provisions	206
B.	Eligibility—Client Served	207
C.	Scope of Service.....	208
D.	Public Guardian as Petitioner.....	208
E.	Administrative Location.....	209

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1.	Court Model	210
2.	Independent Agency Model	210
3.	Social Service Agency Model.....	210
4.	County Model.....	211
F.	Duties and Powers of Public Guardian.....	212
G.	Costs of Program.....	213
H.	Court Oversight and Program Review.....	213
I.	Staffing Ratios	214
III.	KEY RESULTS OF 2005 NATIONAL STUDY	215
A.	Governmental and Administrative Location	216
B.	Administrative Features and Funding	217
C.	Functions of Public Guardianship Programs	218
D.	Staffing of Public Guardianship Programs.....	219
E.	Ward Information	220
F.	Strengths, Weaknesses, Opportunities, and Threats	221
IV.	SELECTED STATE PUBLIC GUARDIANSHIP PROFILES.....	222
A.	Methods for In-Depth Interviews and Site Visits	222
B.	Case Studies of States with In-Depth Interviews	223
1.	Indiana.....	223
2.	Iowa.....	223
3.	Missouri	224
4.	Wisconsin.....	224
C.	Case Studies of States with Site Visits.....	225
1.	Florida.....	225
2.	Kentucky.....	226
3.	Illinois	226
V.	CONCLUSIONS AND RECOMMENDATIONS.....	227
A.	Conclusions	228
1.	Individuals Served	228
2.	Program Characteristics	229
3.	Program Functions.....	230
4.	Program Funding and Staffing	231
5.	Public Guardianship as Part of State Guardianship System: Due Process Protections and Other Reform Issues	233
6.	Court Cases Involving Public Guardianship.....	235
B.	Recommendations.....	235
1.	Individuals Served	235
2.	Program Characteristics	236
3.	Program Functions.....	236
4.	Program Funding and Staffing.....	237

2007]	<i>A National Study of Public Guardianship</i>	195
	5. Public Guardianship as Part of State Guardianship System: Due Process Protections and Other Reform Issues	238
	C. Hallmarks of an Efficient and Effective Public Guardianship Program	239
	D. Final Thoughts.....	240

I. INTRODUCTION AND BACKGROUND

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

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

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

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

A. Adult Guardianship

1. Overview of Reform

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

11. *Id.*

12. *Id.*

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

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

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

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

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

2. Empirical Research

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

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

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

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

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

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

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

3. Recent Developments

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

20. *Id.* at 175–183.

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

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

23. *Id.* at 44, 55–56, 61–63.

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

25. *Id.*

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

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

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

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

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

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

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

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

B. Public Guardianship

1. Definition and Overview

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

2. Empirical Research

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

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

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

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

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

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

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

41. *Id.* at 71.

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

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

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

45. *Id.*

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

47. *Id.* at 168-170.

48. *Id.* at 173

49. *Id.* at 172.

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

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

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

50. *Id.* at 172–173.

51. *Id.* at 181, 183.

52. *Id.* at 183.

53. *Id.*

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

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

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

57. *Id.*

58. *Id.*

59. *Id.*

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

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

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

II. ANALYSIS OF PUBLIC GUARDIANSHIP STATUTES

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

(Fall/Winter 1999).

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

62. *Id.* at iv.

63. *Id.* at 71.

64. *Id.*

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

66. *Id.*

67. *Id.* at 5, 6.

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

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

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

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

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

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

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

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

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

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

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

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

A. Explicit versus Implicit Provisions

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

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

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

75. *Id.*

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

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

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

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

80. *Id.* at 2.

81. *Id.* at 39.

82. *Id.* at 2.

B. Eligibility—Clients Served

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

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

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

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

84. *Id.* at 33.

85. *Id.*

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

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

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

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

90. *Id.* at § 473-d(2)(c).

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

C. Scope of Service

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

D. Public Guardian as Petitioner

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

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

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

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

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

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

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

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

98. S.C. Code Ann. § 62-5-105.

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

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

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

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

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

E. Administrative Location

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

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

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

103. *Id.*

104. *Id.*

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

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

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

1. Court Model

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

2. Independent Agency Model

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

3. Social Service Agency Model

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

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

108. *Id.*

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

110. Haw. Rev. Stat. § 551A-1 (2006).

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

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

113. Alaska Stat. § 44.21.400 (2006).

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

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

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

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

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

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

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

4. County Model

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

118. *Id.*

119. *Id.*

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

121. *Id.*

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

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

124. *Id.*

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

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

F. Duties and Powers of Public Guardian

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

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

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

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

127. Ga. Code Ann. § 29-10-4 (2006).

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

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

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

131. *Id.* at 42.

132. *Id.* at 41.

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

G. Costs of Program

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

H. Court Oversight and Program Review

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

133. *Id.*

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

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

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 41–42.

141. *Id.*

142. *Id.*

143. *Id.*

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

I. Staffing Ratios

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

144. *Id.*

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

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

147. *Infra* n. 148.

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

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

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

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

152. Fla. Stat. § 744.708(7) (2007).

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

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

III. KEY RESULTS OF 2005 NATIONAL STUDY

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

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

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

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

156. *Id.* at 58.

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

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

A. Governmental and Administrative Location¹⁵⁹

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

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

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

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

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

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

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

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

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

B. Administrative Features and Funding

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

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

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

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

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

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

166. *Id.* at 62, 67.

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

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

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

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

C. Functions of Public Guardianship Programs

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

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.*

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

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

D. Staffing of Public Guardianship Programs¹⁷⁸

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

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

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

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

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

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

E. Ward Information¹⁷⁹

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

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

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

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

F. Strengths, Weaknesses, Opportunities, and Threats

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

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

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

IV. SELECTED STATE PUBLIC GUARDIANSHIP PROFILES¹⁸⁰

A. Methods for In-Depth Interviews and Site Visits

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

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

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

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

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

B. Case Studies of States with In-Depth Interviews

1. Indiana

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

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

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

2. Iowa

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

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

3. Missouri

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

4. Wisconsin

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

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

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

C. Case Studies of States with Site Visits

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

1. Florida

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

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

2. Kentucky

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

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

3. Illinois

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

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

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

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

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

V. CONCLUSIONS AND RECOMMENDATIONS

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

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

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

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

A. Conclusions

1. *Individuals Served*

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

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

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

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

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

2. Program Characteristics

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

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

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

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

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

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

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

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

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

3. Program Functions

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

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

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

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

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

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

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

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

4. Program Funding and Staffing

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

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

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

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

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

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

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

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

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

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

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

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

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

190. 527 U.S. at 607.

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

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

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

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

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

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

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

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

6. Court Cases Involving Public Guardianship

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

B. Recommendations

1. Individuals Served

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

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

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

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

2. Program Characteristics

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

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

3. Program Functions

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

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

195. *Id.* at 179–203.

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

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

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

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

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

4. Program Funding and Staffing

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

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

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

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

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

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

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

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

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

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

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

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

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

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

C. Hallmarks of an Efficient and Effective Public Guardianship Program

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

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

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

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

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

D. Final Thoughts

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

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

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

2007]

A National Study of Public Guardianship

241

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

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