

# Who's Overseeing the Overseers? A Report on the State of Adult Guardianship in Indiana

---

February 2012

The Indiana Adult Guardianship State Task Force is a multidisciplinary work group of public and private key stakeholders and advocates convened to examine the public policy and service delivery issues and needs related to adult guardianship in Indiana.



**Indiana Adult Guardianship State Task Force**

---

**Contacts:**

**Indiana Adult Guardianship State Task Force  
Indiana Adult Guardianship Services Project**

404 West 92<sup>nd</sup> Street  
Indianapolis, IN 46260  
(317) 652-5804  
iagsproject@yahoo.com

**Chairman**

**Honorable Diane K. Schneider**

Lake Superior Court  
Civil Division Room One  
232 Russell Street  
Hammond, IN 46320  
(219) 933-2894  
dks922@aol.com

**After July , 2012**

Lake Superior Court  
Civil Division Room Seven  
2293 N. Main Street  
Crown Point, IN 46307  
(219) 648-6150

**Project Director**

**Rebecca M. Pryor, MSM, NCG**

(317) 652-5804  
iagsproject@yahoo.com

**Contributing Authors**

**Honorable Kevin Barton**

Johnson Superior Court 1  
(317) 346-4413  
kburton@co.johnson.in.us

**Jennifer Ihns, NCG**

Notre Dame Legal Aid Clinic  
(574) 631-7795  
jihns@nd.edu

**Dr. Michael Jenuwine, JD, Ph.D., NCG**

Notre Dame Legal Aid Clinic  
Notre Dame Law School  
(574) 631-7795  
michael.j.jenuwine.1@nd.edu

## Table of Contents

|  | Page |
|--|------|
| Acknowledgements.....  | 4    |
| Executive Summary.....   | 6    |
| Introduction.....  | 8    |
| Background.....  | 9    |
| National and State Guardianship Reforms.....                               | 13   |
| At-Risk Adult Populations.....   | 16   |
| State of Adult Guardianships in Indiana.....                               | 22   |
| Conclusions and Recommendations for Actions.....                           | 27   |
| List of References.....  | 34   |
| Appendices.....  | 36   |
| A. The State of Adult Guardianship in Indiana:.....                        | 37   |
| An Empirical Perspective. Dr. Michael Jenuwine, JD, Ph.D., NCG.<br>(2011). |      |
| B. Guardianship Reform and An Aging Population. The Honorable.....         | 59   |
| Kevin Barton. Johnson Superior Court 1. (2008).                            |      |
| C. Adult Guardianship: A National Overview. Jennifer Ihns, NCG.....        | 92   |
| Notre Dame Legal Aid Clinic. (2011)  |      |



## Acknowledgements

**The Indiana Adult Guardianship State Task Force** gratefully acknowledges and thanks the many key agency and organization stakeholders and individual advocates who have contributed their time and expertise to the work of the group and to the production of this report. The Task Force wishes to commend Franciscan Alliance St. Margaret Hospital, and especially President Thomas Gryzbek, and the many members of the Lake County Guardianship Services Task Force (NIAGS) for following their vision to develop the volunteer guardian services programs which serve as the models for the state. We would also like to thank the Arc of Indiana and the Indiana FSSA Division of Disability and Rehabilitative Services for providing the initial sponsorship and funding to convene the statewide stakeholder group in 2008. We want to express our gratitude to the many individuals who have served on the Task Force without pay or reimbursement throughout the past 3 years and commend them for their dedication to the purpose for which this effort was created. We furthermore would like to recognize and thank The Honorable Diane K. Schneider for her vast vision, limitless patience and long-term leadership as the Chairperson of the Task Force.

### Agency / Organization Members:

Alzheimer's Association-Greater Indiana  
AARP Indiana  
The Arc of Northwest Indiana  
The Arc of Indiana  
The Center for At-Risk Elders  
Families First  
Fountain Circuit Court  
Franciscan St. Margaret Health Hospital  
Franciscan St. Margaret Health – Volunteer Advocates for Seniors Program  
Guardianship Consortium of Elkhart County  
Guardianship Consortium of St. Joseph County  
Guardianship Services of Southwestern Indiana  
Indiana Adult Guardianship Services Project  
Indiana Association of Area Agencies on Aging  
Indiana Association of Homes & Services for the Aging  
Indiana Association of Residential Facilities  
Indiana Judicial Conference – Probate Judges Committee  
Indiana Legal Services – Senior Law Project  
Indiana Pro Bono Commission  
Indiana Professional Guardianship, Inc.  
Indiana State Bar Association – Elder Law Section  
Indiana State Bar Association - Probate Trust and Real Property Section  
Indiana Professional Management Group  
Indiana State Guardianship Association  
Johnson Superior Court 1  
Lake Superior Court 1  
Lawrence County Guardianship Services

### Program

Mental Health America of Indiana  
Northeast Indiana / Allen County Guardianship Council  
Northwest Indiana Adult Guardianship Services, Inc.  
Notre Dame Legal Aid Clinic  
Riley Hospital – Center for Youth and Adults with Conditions of Childhood  
Self Advocates of Indiana  
Southern Indiana Center for Independent Living, Inc.  
Wabash Center – Tippecanoe Adult Guardianship Services Program

### Individual Advocate Members:

Ken Bennett, JD, NCG  
Holly Fuller, NCG  
Amy Glaub, NCG  
Jennifer Ihns, NCG  
America McAlpin, JD, NCG  
Tim Peterson, JD, NCG  
Becky Pryor, NCG  
George Slater, JD  
Nancy Slater, JD, MD  
Commissioner Donald Stepanovich, JD  
Beth Sullivan-Summers, JD

### Public Agency Participants:

Indiana FSSA Division of Aging  
Indiana FSSA Division of Aging – Adult Guardianship Services  
Indiana FSSA Division of Aging –

Adult Protective Services  
Indiana FSSA Division of Aging – State  
Long Term Ombudsman  
Indiana FSSA Division of Disability and  
Rehabilitative Services

Indiana FSSA Division of Mental Health  
and Addiction Services  
Indiana FSSA Division of Family Resource  
Indiana State Department of Health

The Task Force would like to express its sincere thanks to the many state agencies and their representatives who participated in the working group. We greatly appreciated their willingness to provide information and data as requested and to offer valuable perspectives and thoughtful observations on the potential adult guardianship issues and needs of the clients/consumers who are served by them. The state agencies and their representatives were not considered voting members of the Task Force for the purpose of adopting public policy positions or approving the set of recommendations for actions presented in this report.

Special thanks are extended to AARP Indiana, the Alzheimer’s Association – Greater Indiana Chapter and the Indiana State Bar Association-Probate Trust and Real Property Section for hosting the Task Force meetings, to the Notre Dame Legal Aid Clinic and the Notre Dame Law School for hosting the 2011 Strategic Planning Retreat and to Franciscan St. Margaret Hospital, the Honorable Diane K. Schneider and Creative Approaches LTD for their funding support.

Special thanks are also extended to the following individuals and organizations for their generous contributions of works and publications which were drawn upon as sources for ideas, data and significant portions of the report. See the Appendices for their complete documents.

- The Honorable Kevin Barton, Johnson Superior Court 1, “Guardianship Reform and An Aging Population” (2009)
- Jennifer Ihns, NCG, Notre Dame Legal Aid Clinic, “Adult Guardianship: A National Overview” (2011)
- Michael Jenuwine, JD, Ph.D., NCG, Notre Dame Legal Aid Clinic, “The State of Adult Guardianship in Indiana: An Empirical Perspective” (2011)

Finally, we would like to recognize all the individuals served by guardians in our state and hope that the work of the Task Force and this report will contribute to their best interests, safety and quality of life.



## ***Executive Summary***

The **Indiana Adult Guardianship State Task Force** was convened in the spring of 2008. The membership represents key Indiana public / private agencies and organizations that serve or advocate for at-risk adults in need of guardianship services and by individual guardianship professionals, advocates and others with an interest in the provision of quality guardianship services. The 35 plus members of the Task Force have been supported in their work by the participation of the major Indiana state agencies with the responsibility of providing services to adults in need of guardianship services. The stated purpose of the Task Force is “to convene an interdisciplinary group of Indiana key stakeholders to examine the public policy, legal and service delivery issues, and needs related to adult guardianship and to support the development and provision of community-based adult guardianship services across the state.” The initial support for the Task Force came from the Indiana Adult Guardianship Services Project (IAGS Project) of The Arc of Indiana and funding was provided through a grant from the Indiana FSSA Division of Disability and Rehabilitative Services.

The work of the Task Force has focused on examining the level of need, availability of resources, and quality of adult guardianship services across the state and on supporting an extensive legal review of Indiana guardianships, practices, and statutes. State information was gathered through presentations and reports from service providers, a review of the guardianship statutes, and responses from a statewide needs assessment. The Task Force also reviewed the resources and methods of guardianship services oversight and funding in other states and examined the nationally recommended standards for developing quality guardianship services. It was this work of the Task Force members and state agency participants that led the group to develop recommendations for action.

The recommendations for action in this report are intended to be central ideas to improve the professionalism, efficiency and effectiveness of adult guardianship services in the state. The Task Force will move forward with more specific details and proposals on how to implement the recommendations through future strategic planning and advocacy with its members, legislators, the state and other partner organizations, agencies and advocates with an interest in adult guardianship services. The Task Force recognizes that not all of the recommendations can be achieved immediately, or simultaneously, but we believe they are goals worth pursuing. The Task Force envisions the report to create discussion and to encourage feedback on additional ways to improve guardianship services.

The content of this paper and the recommendations for action were reviewed and adopted by a majority vote of the Task Force Members on December 8, 2011.

### ***The Task Force found:***

□ The older population in Indiana – persons 65 years or older – is expected to double over the next 15 - 20 years, with seniors outnumbering children under the age of fifteen by 2035.

- Indiana ranks in the top 20 states for the number of adults with mental health and addictions disorders and has a slightly higher population percentage (12.6 %) than the national average of adult population with disabilities.
- Indiana currently has a population of approximately 7,000 incapacitated adults under court ordered guardianships. This number is similar to the number of abused and neglected children under state wardship.
- Indiana has a significant population of aging and handicapped adults in nursing homes, group homes, adult foster care and state hospitals who are in need of protection from abuse, neglect and exploitation.
- National groups, such as the American Bar Association, National College of Probate Judges, National Guardianship Association, AARP, and Alzheimer's Association are urging the adoption of uniform state guardianship statutes, standards and service systems.
- Indiana is one of only a handful of states that does not have a state supported and funded statewide public system of providing adult guardianship services for individuals who are indigent or without a suitable relative to serve as their guardian.
- Indiana has a fast growing number of for-profit guardianship businesses and approximately 35 non-profit agencies providing court ordered personal and financial guardianship services, both of which operate without state oversight or standards.
- Probate Courts have extremely limited resources to appoint guardians in cases without the means to pay for legal representation or guardian services.
- Volunteer guardian programs, similar to the respected Volunteer Guardian ad Litem/Court Appointed Special Advocate Programs for abused children, have the support of a large number of the probate courts and family law attorneys.
- The volunteer guardian programs developed as part of the IAGS Project are successfully recruiting and training community volunteers to serve as guardian advocates for indigent and alone incapacitated adults.
- Indiana has no statewide tracking system or central repository for adult guardianship cases that can be shared by the courts, state agencies and other service providers.
- Families in need of information and help to seek guardianships for their aging relatives or disabled or mentally ill adult children are without a central source for information and referral for services.

***The Task Force urges:***

- The state to establish and fund a Office of Adult Guardianship as a department of the Indiana Supreme Court – Division of State Court Administration.
- The state to establish and fund a system of community-based volunteer guardian services created to serve the need for statewide guardianship services for incapacitated adults who are indigent or without the support of suitable family members.
- The state to establish and fund a system for mandatory guardian education, certification, and registry for all attorney, professional, and nonfamily member guardians appointed by the courts.
- The state to establish and fund an adult guardianship registry to collect data and issue reports on all adult guardianship cases and guardians appointed by the courts.
- The Indiana Probate Code Study Commission undertake a comprehensive review and revision of the probate code regarding guardianship under IC 29 and IC 12.
- The state to establish and fund an information and referral resource center to provide public education on advanced directives planning and the options available to individuals and families for substitute decision-making.

## Introduction

**Indiana** is one of only a handful of states that does not have a state supported public system of providing adult guardianship services for the indigent. At least forty other states fund and administer statewide adult guardian services delivery systems through their probate courts or state offices of public guardian.<sup>1</sup> Indiana has neither system. Instead, we struggle to meet the fast growing need for adult guardianship services for the elderly, disabled and mentally ill through a patchwork of public and private services efforts. Statewide provision of adult guardianship services for those without means or the support of suitable family members is limited to fewer than thirty (30) local nonprofit guardianship programs scattered statewide, the goodwill of a little more than 10 % of practicing attorneys under the Supreme Court directed Pro Bono Commission, the limited efforts of Indiana Legal Services and four (4) minimally state funded adult guardian programs through the Indiana FSSA Division of Aging.<sup>2</sup> In all, it is estimated that the combined efforts of these initiatives address less than 30% of the real need we have for no fee or low cost adult guardianship services.<sup>3</sup>

On average, Indiana has approximately 7,000 Indiana residents with court ordered guardianships.<sup>4</sup> Courts appoint guardians to assist and protect people with cognitive disabilities who are unable to manage their own personal or financial affairs. Referred to as “incapacitated persons” in the statutes, these individuals are often vulnerable to financial exploitation, medical neglect, physical abuse, emotional abuse, and other kinds of harm.<sup>5</sup> Having a court appointed guardian can dramatically reduce the likelihood of such threats through the prudent management of finances, timely health care decision-making, appropriate determination of living arrangements, and assistance in other numerous important ways that protect both the person and their assets.

In recent years, serious concerns about the availability of adequate numbers of guardians and the quality of the work they do have been raised by many of the Indiana probate courts and the health care, mental health, legal, and social services provider communities.<sup>6</sup> To add to these concerns, a 2011 national audit conducted by the Government Accountability Office focused further critical attention on the limited capacity of the courts to prevent, uncover and address problems in monitoring and supervising guardianships under their jurisdiction.<sup>7</sup>

---

<sup>1</sup> Teaster, Pamela and Wood, Erica and Schmidt, Windsor, Jr. and Lawrence, Susan. (2007). Public Guardianship After 25 Years: In the Best Interest of Incapacitated People?.

<sup>2</sup> The Indiana FSSA Division of Aging, Adult Guardianship Services Program was established under Indiana Code 12-10-7 to serve the persons with disabilities who were moved from the Ft. Wayne Training Center when it was closed in 1992.

<sup>3</sup> This estimate is extrapolated from available local and state statistical reports and needs assessment data.

<sup>4</sup> Jenuwine, Michael, JD, Ph.D. (2011). Notre Dame Legal Aid Clinic. The State of Adult Guardianship in Indiana: An Empirical Perspective.

<sup>5</sup> See Indiana Code 29-3 at [www.in.gov](http://www.in.gov).

<sup>6</sup> Barton, The Honorable Kevin, Johnson Superior Court 1. (2008). Guardianship Reform and An Aging Population.

<sup>7</sup> United States Government Accountability Office. (2011) Incapacitated Adults: Oversight of Federal Fiduciaries and Court Appointed Guardians Needs Improvement.

In 2007, the Arc of Indiana responded to the many concerns being voiced about the need for adult guardianship services by creating the Indiana Adult Guardianship Services Project (IAGS Project) and, with the support of a \$1.25 million grant from the Indiana FSSA Division of Disability and Rehabilitative Services, moved forward to create a model system of community-based volunteer guardian programs similar to the Court Appointed Special Advocate and Volunteer Guardian ad Litem programs created to protect abused and neglect children.

As part of its purpose, the IAGS Project also convened an Indiana Adult Guardianship State Task Force to examine the state of adult guardianship services.<sup>8</sup> Formed in the spring of 2008, the Task Force membership includes public and private agency and organization stakeholders and individual advocates with an interest in adult guardianship issues and needs. The work of the Task Force includes soliciting input on the status of adult guardianship from state and local stakeholders, reviewing literature from Indiana and elsewhere in the country regarding recommended guardianship best practices, collecting data on the level of Indiana's need for guardianship services, and conducting an in depth legal research project on the policies, procedures and practices of the Indiana courts in guardianship cases.

At a March 2011 strategic planning retreat, the members of the Task Force concluded that Indiana lacks a consistent, reliable and adequately funded approach to protecting vulnerable individuals through the provision and management of adult guardianships. This report describes the major findings and conclusions of the Task Force discussed at the March retreat and offers recommendations for actions to improve the Indiana adult guardianship services system.

## ***Background***

**Indiana's** adult guardianship probate statutes can be found in Indiana Code 29-3 and Indiana Code 12-10-7.<sup>9</sup> The statutes were enacted by the Indiana General Assembly and are eligible to be reviewed and modified each year by the Indiana Probate Code Study Commission and the General Assembly during their legislative session. The most recent comprehensive review and revision of the probate code was conducted in the 1980s.

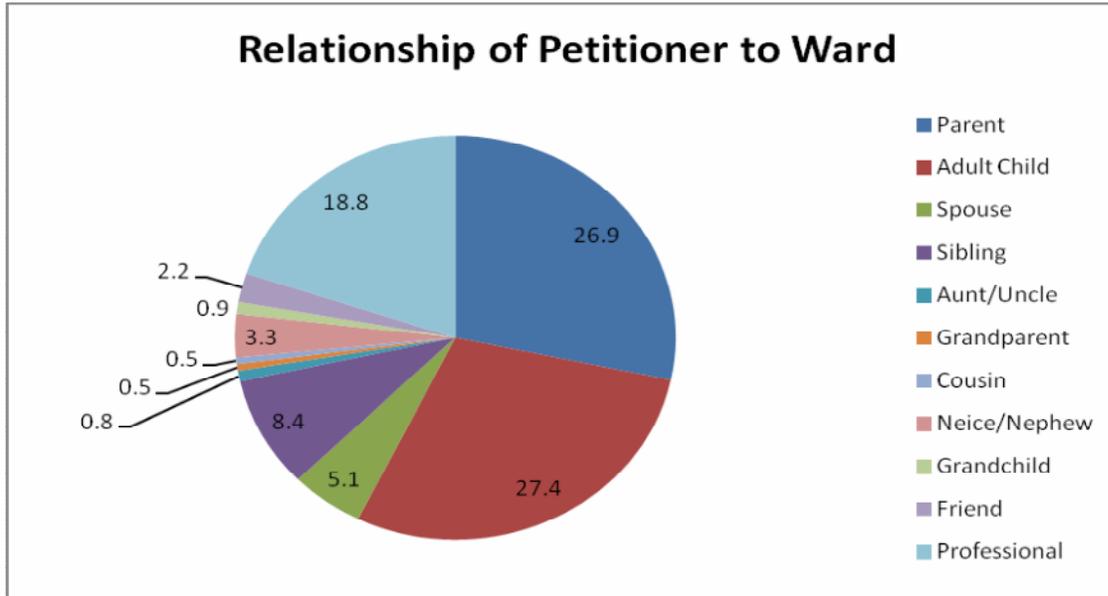
The probate statutes establish the structure for Indiana's adult guardianship legal proceedings, including the criteria and requirements for identifying suitable guardians and the responsibilities and powers that guardians are granted by the courts. Indiana has a county based system of local courts with probate jurisdiction and, for the most part, the local courts may handle and determine the outcome of guardianship cases at their own discretion. The statutes provide the framework and guidelines for guardianship decision-making; with the courts determining their own local court rules that govern much of the process and decision-making.

---

<sup>8</sup> The Indiana Adult Guardianship State Task Force is comprised of representatives of agencies and organizations in the public and private sectors, judges, attorneys, guardian programs, professional and volunteer guardians, family guardians, advocates, and other professionals and volunteers with an interest in adult guardianship.

<sup>9</sup> See Indiana Code 29-3 and Indiana Code 12-10-7 at [www.in.gov](http://www.in.gov).

In Indiana, most guardianship actions for incapacitated adults are initiated by family members. In situations where there are no appropriate or available family members, or where those family members are unsuitable because they are the source of the exploitation, abuse or neglect, there are few alternatives to provide protection to the at-risk person. Indiana law allows any “interested person,” as well as some institutions, to petition for guardianship but most often it is a family member who is appointed by the court.<sup>10</sup>



Two organizations that have long histories of active efforts regarding adult guardianship issues and needs in the state are the Indiana State Guardianship Association (ISGA) and the Indiana State Bar – Probate Trust and Real Property Section and the Elder Law Section. The Indiana State Guardianship Association was established 1996 as a nonprofit membership organization. It has as its mission to “strengthen guardianship and related services through networking, education and tracking and commenting on legislation.”<sup>11</sup> The ISGA has a modest membership of professional guardian and organization members and is the state affiliate to the National Guardianship Association (NGA).<sup>12</sup> As an NGA state affiliate, the organization urges its members to adhere to the NGA Standards of Practice and Code of Ethics for Guardians and to become National Certified Guardians.

The Indiana State Bar – Probate Trust and Real Property Section is open to any attorney who has an interest in elder law issues and is a member of the association. The Section provides a forum for attorneys interested in probate law, estate planning, estate and guardianship administration, trusts, real estate law, death taxes, elder law and other related areas of law. It produces pamphlets for the use of clients regarding joint tenancy, advance directives, estates, guardianships, trusts, duties of personal

<sup>10</sup> See Indiana Code 29-3 at [www.in.gov](http://www.in.gov).

<sup>11</sup> See [www.indianaguardian.org](http://www.indianaguardian.org)

<sup>12</sup> See [www.guardianship.org](http://www.guardianship.org)

representatives, and other related issues. Finally, it monitors and responds to legislative proposals involving probate, trust, elder law, and real property issues.

The Indiana State Bar Association - Elder Law Section is open to any attorney (or paralegal) who has an interest in probate law and is a member of the association. The Section focuses on serving the needs of older adults and persons with disabilities. Its activities include advocating the development of laws benefiting elder citizens and persons with disabilities, simplifying and expediting forms and procedures related to the practice of elder law, promoting ethical and competent practice in the field of elder law, and disseminating information for the better understanding of the public in matters relating to elder law.

The National Guardianship Association also has a presence in the state through its membership and the 50 - 60 National Certified Guardians who practice under the organization's Standards of Practice and Code of Ethics.<sup>13</sup> Indiana does not have a state certification system for professional guardians, so individuals must seek professional certification through the NGA and their affiliated organization, the Center for Guardianship Certification.<sup>14</sup> The certification process includes requirements for experience as a guardian, references, a clear criminal history, and an examination on guardianship and fiduciary responsibilities and standards.

Also active in guardianship efforts across the state is the Indiana Adult Guardianship Services Project. The IAGS Project was developed as a program of the Arc of Indiana and received state funding in the amount of \$1.25 million dollars through the Indiana FSSA Division of Disability and Rehabilitative Services from 2007-2009.<sup>15</sup> The mission of the project is to improve the quality and availability of adult guardianship services for Hoosiers who are age 18 and older and who have been determined to be incapable of handling their own personal and financial affairs. The purpose of the project is to build a framework of community-based adult guardianship services programs across the state. The core principles that guide the planning and activities of the project include commitments to:

- serve incapacitated adults through guardianship and other substitute decision-making services that are least restrictive and include specialized services for seniors and persons with disabilities or mental illness
- adhere to the National Guardianship Association Standards of Practice and Code of Ethics
- establish inclusive statewide and local networks of courts, attorneys, service providers, guardianship professionals/volunteers, and other advocates as stakeholders to develop effective guardianship services in Indiana
- utilize the services of attorneys, professional National Certified Guardians, and trained and supervised community volunteers as guardians
- advocate on behalf of incapacitated adults and the programs that provide guardianship services for them in Indiana.

---

<sup>13</sup> See [www.guardianship.org](http://www.guardianship.org)

<sup>14</sup> See [www.guardianshipcert.org](http://www.guardianshipcert.org)

<sup>15</sup> See [www.arcind.org/iags](http://www.arcind.org/iags)

The statewide activities that the IAGS Project initially undertook included:

- Supporting the continued development and implementation of two Northwest Indiana adult guardianship services models that incorporate the National Guardianship Association Standards and Ethics and use trained and supervised community volunteers as guardians.
- Convening local community-based key stakeholder groups to facilitate the strategic planning, development and implementation of volunteer-based adult guardianship services at six (6) targeted county pilot project sites.
- Conducting an academic review of national and Indiana guardianship demographics, data, statutes, funding sources, and the recommended best practices for guardianship services, standards, oversight, and certification.
- Convening a multidisciplinary Indiana Adult Guardianship State Task Force to support the development and provision of adult guardianship services across the state.
- Providing quality educational opportunities on adult guardianship issues, needs and practices.
- Increasing national awareness of the project and facilitating the participation of Indiana Judges, attorneys, guardianship professionals, and volunteers at the national level.

The IAGS Project model for the delivery of community-based guardianship services was developed along the same lines as the successful volunteer Court Appointed Special Advocate and Volunteer Guardian ad Litem programs across the state. Under the IAGS Project model, local nonprofit agencies or court adopted programs are appointed the guardian of the person and/or estate of an incapacitated person and utilize both paid staff, attorneys and trained and supervised volunteer advocates to fulfill their duties. The Volunteer Advocates for Seniors and Volunteer Advocates for Incapacitated Adults statutes at I.C. 29-3-8.5 govern the duties and operation of the volunteer guardian programs.

The Indiana Adult Guardianship State Task Force was convened by the IAGS Project in the spring of 2008. Representative of public / private agencies and organizations who serve at-risk adults who may be in need of guardianship services and individual guardianship professionals and others with an interest in the provision of quality guardianship services were asked to serve as members. The group has continued to meet regularly since 2008, albeit without the support of state funding since July 2009.

The purpose of the Task Force is “To convene an interdisciplinary group of Indiana key stakeholders to examine the public policy, legal and service delivery issues, and needs related to adult guardianship and to support the development and provision of community-based adult guardianship services across the state.”<sup>16</sup>

The work of the Task Force has encompassed receiving more than 50 reports and presentations regarding the level of need, availability and quality of guardianship services across the state, conducting an online guardianship needs assessment and supporting an extensive review of the state and national literature on guardianship best practices;

---

<sup>16</sup> See [www.arcind.org/iags](http://www.arcind.org/iags)

guardianship service delivery systems and statutes in other states; resources and methods of funding; and the recommended standards for developing quality guardianship services. The Task Force has worked to develop public policy strategies regarding needed guardianship statute improvements and advocated for the passage of volunteer advocate for seniors and incapacitated adults program legislation in 2010 (HB 1169) and the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act in 2011 (HB 1055). Subsequently, the group has also convened in strategic planning retreats on two occasions, the most recent being hosted by the Notre Dame Law School and Notre Dame Legal Aid Clinic in March 2011. It was the work of the Task Force members and state agency participants at this most recent retreat that led to the development of the following findings and recommendations for action. At the retreat the members met in focus groups addressing the issues of state structure and oversight of guardianship services; training and certification for professional and family guardians; and the sustainability of a statewide guardianship service delivery system. The findings and recommendations for action reports of each focus group were reviewed and approved by majority vote to be addressed in this report.

It is important to note that the creation of the IAGS Project and the Task Force were preceded by the development of the Volunteer Advocates for Seniors Program (2003) by the Franciscan Alliance St. Margaret Health Hospital (Sisters of St. Francis) in Hammond and the Northwest Indiana Adult Guardianship Services, Inc., (2006) nonprofit guardianship program which serves Lake and Porter counties in the Northwest Indiana region. Both of these initiatives are promoted by the IAGS Project and Task Force as the “best practice and standards” models for the development of the six pilot volunteer guardian programs across the state.<sup>17</sup>

## ***National and State Guardianship Reforms***

*“The state system of appointing guardians to manage the finances and affairs of incapacitated people has created the opportunity for widespread corruption and needs to be radically overhauled, a grand jury concluded in a report filed yesterday in State Supreme Court in Queens... The grand jury closely examined the case of a Long Island City lawyer who stole \$2.1 million over a five-year period in cases involving 17 incapacitated people... The grand jury...said that guardians...are poorly trained and inadequately supervised by court appointees. It found, for instance, that even rudimentary financial reporting requirements are often ignored and independent audits are rare.”* **New York Times, March 3, 2004**<sup>18</sup>

**Guardianship** originally grew out of the 14<sup>th</sup>-century English concept of *parens patriae*—the duty of the king, and later the state, to protect those unable to care for themselves. The court, on behalf of the state, appoints a guardian to carry out the duty of protection, and the guardian is bound by high standards of care and accountability. A critical part of the court’s protection is oversight of the guardian at the “back end” of the process. Without monitoring, the court cannot be assured of the welfare of society’s most

---

<sup>17</sup> See [www.arcind.org/iags](http://www.arcind.org/iags)

<sup>18</sup> Glaberson, William. (2004, March 3). Report calls for overhaul of system that protects the unfit. *New York Times*.

vulnerable members. Indeed, monitoring is at the very core of the court's *parens patriae* responsibility. In addition to these historical and philosophical bases for strong monitoring, there are practical considerations as well. We are at a critical time with guardianship practice. The first baby boomers are turning 65, signaling a much greater use of the guardianship system in coming years. Guardianship practices are again under censure by the press, courts struggle to secure funding allocations in a highly competitive environment, and rapid changes in information technology continue to revolutionize the way we communicate.

Retrospectively, the past ten years may be remembered as the pivotal decade in recognizing the need for federal and state guardianship reform. Numerous national organizations and government entities have called for the review and reform in federal and state guardianship laws and for the examination and additional oversight and regulation of the state guardianship service delivery systems. These decade-long calls for action have come from such well respected groups as the:

- National Academy of Elder Law Attorneys; National Guardianship Association; & National College of Probate Judges in their 2002 joint report titled "Wingspan – The Second National Guardianship Conference Recommendations" and their 2004 joint report titled "National Wingspan Implementation Session Report".
- American Bar Association - Commission on Law and Aging in their 2003 report titled "Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly" and their 2006 report titled "State-Level Adult Guardianship Data: An Exploratory Survey".
- The Retirement Research Foundation in their 2007 funded report by the American Bar Association titled "Public Guardianship After 25 Years: In the Best Interest of Incapacitated People?".
- U.S Senate Special Committee on Aging in their 2007 report on "Guardianship for the Elderly".
- National Guardianship Association in their 2007 Standards of Practice and Code of Ethics for Guardians and in their 2009 Public Policy Position Statements on Guardianship Certification and Funding.
- The Elder Justice Coalition in their 2009 Public Policy Statement in support of the passage of the Elder Justice Act (S.795).
- Conference of Chief Justices and the conference of State Court Administrators in their 2009 Resolution 14 "encouraging Collection of Data on Adult Guardianship..." and their 2010 "Joint Task Force on Elders and the Courts Report".
- Counsel on Accreditation in their 2009 adoption of Standards of Operation and Service Delivery for Accredited Nonprofit Agencies with Guardianship Programs
- AARP in their 2011 report on "Protecting Vulnerable Adults: Oversight and Screening of Court Appointed Guardians" and their 2011 report titled "Protecting Older Investors – The Challenge of Diminished Capacity".
- U.S. Government Accountability Office in their 2004 "Report on Guardianship: and their 2010 report "Incapacitated Adults: Oversight of Federal Fiduciaries and Court Appointed Guardians".
- National Guardianship Network in their 2011 report on the Third National Guardianship Summit: Standards of Excellence.

At the request of the U.S. Senate Special Committee on Aging, the Government Accountability Office (GAO) investigated the financial exploitation, neglect and abuse of seniors in the guardianship system. Their findings support many of the concerns voiced in previous reports by the above organizations. The GOA report determined that there was widespread failure of guardians to carry out their court ordered duties, that potential guardians were inadequately screened and trained and that there was insufficient oversight of guardians after appointment.

The National Guardianship Network held the “Third National Guardianship Summit: Standards of Excellence” in October 2011. The Summit was a continuation of the work the group began at the two previous Wingspread/Wingspan Conferences (1988 & 2001). The recommendations adopted by the summit participants focused on the development of nationally adopted standards for guardians and conservators and the establishment and operation of state guardianship programs.

Most recently, the National College of Probate Judges, in partnership with the National Center for State Courts, began the process of updating the *National Probate Court Standards* to include best practices for courts that have been developed since the initial standards were promulgated in 1994.

In Indiana, the organizations calling for a review and revision of the guardianship statutes have not been as vocal as their counterparts on the national level. Most state organizations develop annual public policy priorities or platforms for legislative action but, for the most part, these address their specific organizational focus on the needs of their clients or their service delivery system and not the need for overall reforms to the probate code.

The Indiana probate statutes under IC 29-3 have not been comprehensively reviewed or revised since the 1980s. The Indiana Probate Code Study Commission is charged by the General Assembly with reviewing recommendations for changes to the probate statutes. Usually, between one to five bills with probate law impact are introduced in the General Assembly each year but passage of major revisions is rare. Most often, the probate code bills that are enacted are proposed to fine tune the existing statutes.

Two recent exceptions to the rarity of major amendments to the probate code were the enactments of the Volunteer Advocates for Seniors and Volunteer Advocates for Incapacitated Adults (VAS/VASIA) legislation in 2004 (with subsequent major amendments in 2006 and 2010) and the adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) in 2011. The VAS/VASIA legislation created statutes that enable the establishment of volunteer advocate (guardian) programs, including defining the duties of the programs and advocates and granting civil immunity to the programs and advocates who fulfill their duties in good faith.<sup>19</sup> The VAS/VASIA legislation was the first volunteer advocates statutes to be passed in the country. The UAGPPJA legislation language was created as a national uniform act

---

<sup>19</sup> See Indiana Code 29-3-8.5 at [www.in.gov](http://www.in.gov).

primarily designed to improve interstate jurisdiction issues in adult guardianship and protective proceedings cases. Indiana was the 30<sup>th</sup> state to adopt the Act.<sup>20</sup>

## ***At-Risk Adult Populations***

### **National Overview**

#### ***Aging***

The older population—persons 65 years or older—numbered 39.6 million in 2009 and 40.2 million in 2010 and is expected to rise greatly.<sup>21</sup> They represented 12.9 percent of the U.S. population, over one in every eight Americans. The number of older Americans has increased by 4.3 million or 12.5 percent since 1999, compared to an increase of 12.3 percent for the under-65 population. However, the number of American aged 45-64 – who will reach 65 over the next two decades – increased by 26 percent during this period.

Since 1900, the percentage of Americans 65+ has more than tripled (from 4.1percent in 1900 to 12.9 percent in 2009) and the number has increased almost thirteen times (from 3.1 million to 39.6 million). The older population itself is increasingly older. In 2008, the 65-74 age group (20.8 million) was 9.5 times larger than in 1900. In contrast, the 75-84 group (13.1 million) was 17 times larger and the 85+ group (5.6 million) was 46 times larger.

In 2007, persons reaching age 65 had an average life expectancy of an additional 18.6 years (19.9 years for females and 17.2 years for males). The period of 1990-2007 also has seen reduced death rates for the population aged 65-84, especially for men – by 41.6percent for men aged 65-74 and by 29.5percent for men aged 75-84. Life expectancy at age 65 increased by only 2.5 years between 1900 and 1960, but has increased by 4.2 years from 1960 to 2007.

About 2.6 million persons celebrated their 65<sup>th</sup> birthday in 2009. In the same year, about 1.8 million persons 65 or older died. Census estimates showed an annual net increase of 770,699 in the number of person 65 and over.

The baby boomers (those born between 1946 and 1964) will start turning 65 in 2011, and the number of older people will increase dramatically during the 2010-2030 period. The older population in 2030 is projected to be twice as large as their counterparts in 2000, growing from 35 million to 72 million and representing nearly 20 percent of the total U.S. population.<sup>22</sup>

The growth rate of the older population is projected to slow after 2030, when the last baby boomers enter the ranks of the older population. From 2030 onward, the proportion of people age 65 and over will be relatively stable, at around 20 percent, even though the absolute number of people age 65 and over is projected to grow. The oldest-

---

<sup>20</sup> See Indiana Code IC 29-3.5 at [www.in.gov](http://www.in.gov).

<sup>21</sup> Data for this section were compiled primarily from the U.S. Census Bureau and the National Center for Health Statistics/Health Data Interactive.

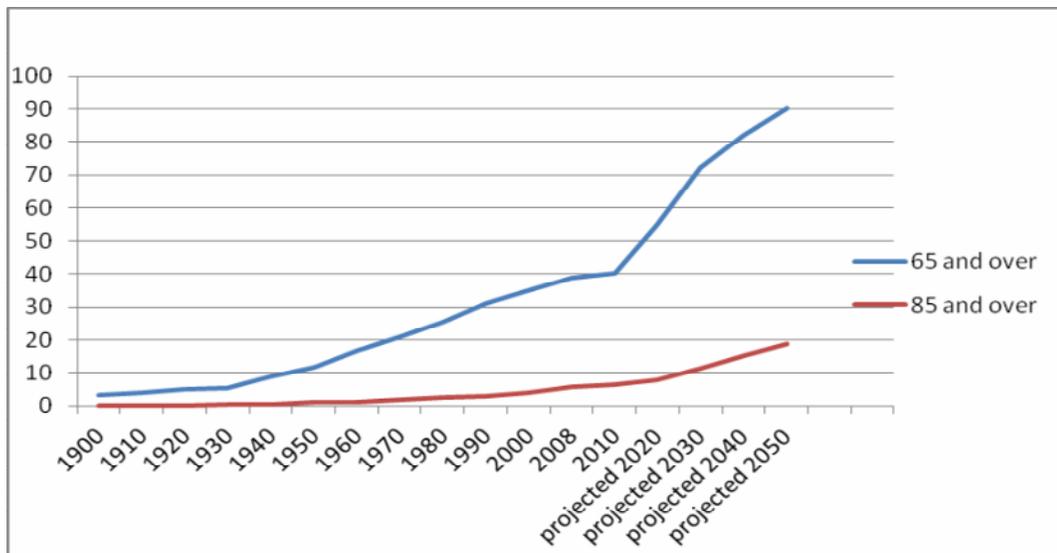
<sup>22</sup> Horiuchi S. Greater lifetime expectation. *Nature* 405:744–5. June 2000.

old population, however, is projected to grow rapidly after 2030, when the baby boomers move into this age group.<sup>23</sup>

The U.S. Census Bureau projects that the population age 85 and over could grow from 5.7 million in 2008 to 19 million by 2050. Some researchers predict that death rates at older ages will decline more rapidly than is reflected in the U.S. Census Bureau's projections, which could lead to faster growth of this population<sup>24</sup>

Some type of disability (i.e., difficulty in hearing, vision, cognition, ambulation, self-care, or independent living) was reported by 37 percent of older persons in 2009. Some of these disabilities may be relatively minor but others cause people to require assistance to meet important personal needs. In 2005, almost 37 percent of older persons reported a severe disability and 16 percent reported that they needed some type of assistance as a result. Reported disability increases with age. 56 percent of persons over 80 reported a severe disability and 29 percent of the over 80 population reported that they needed assistance.

Population age 65 and over and age 85 and over, selected years 1900-2010 and projected 2020-2050 (in millions)



### Elder Abuse

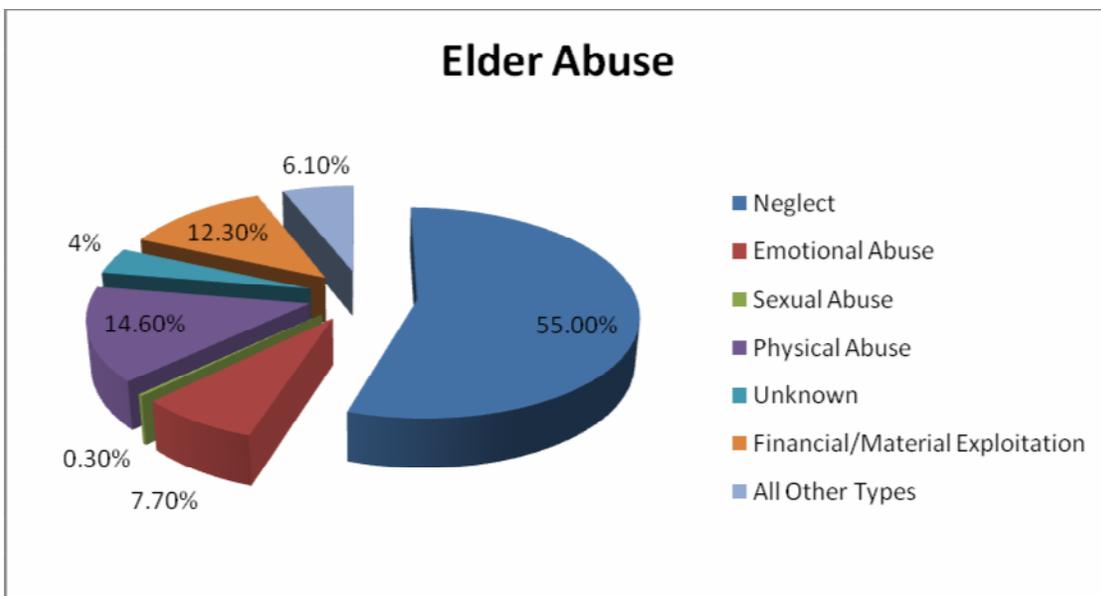
No one knows precisely how many older Americans are being abused, neglected, or exploited. While evidence accumulated to date suggests that many thousands have been harmed, there are no official national statistics. According to the best available estimates, between 1 and 2 million Americans age 65 or older have been injured, exploited, or otherwise mistreated by someone on whom they depended on for care or

<sup>23</sup> Oeppen J, Vaupel JW. Broken limits to life expectancy. *Science* 296:1029–31. 2002.

<sup>24</sup> Tuljapurkar S, Nan L, Boe C. A universal pattern of mortality decline in the G8 countries. *Nature* 405: 789–92. 2000.

protection.<sup>25</sup> Current estimates put the overall reporting of financial exploitation at only 1 in 25 cases, suggesting that there may be at least 5 million financial abuse victims each year.<sup>26</sup> It is also estimated that for every one case of elder abuse, neglect, exploitation, or self-neglect reported to authorities, about five more go unreported.<sup>27</sup>

The National Center on Elder Abuse defines seven different types of elder abuse: physical abuse; sexual abuse; emotional abuse; financial exploitation; neglect; abandonment; and self-neglect. These definitions are based on an analysis of existing State and Federal definitions of elder abuse, neglect and exploitation conducted by the Center in 1995. The largest percentage by far of the abuse that occurs to the elderly is neglect. More than half of the reported cases of elder abuse involve neglect by a caregiver, who is also most often a family member. Older persons are far less likely to report exploitation and/or abuse or take steps against the family caregiver abuser due to fear of losing the care and services on which they depend.



### ***Developmental Disabilities***

Developmental disabilities are severe, life-long disabilities attributable to mental and/or physical impairments which manifest themselves before the age of 22 years and are likely to continue indefinitely. The population of Americans with significant disabilities is growing.

<sup>25</sup> *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America, 2003*. Washington, DC: National Research Council Panel to Review Risk and Prevalence of Elder Abuse and Neglect.

<sup>26</sup> Pillemer, Karl, and David Finkelhor. 1988. "The Prevalence of Elder Abuse: A Random Sample Survey," *The Gerontologist*, 28: 51-57.

<sup>27</sup> *National Elder Abuse Incidence Study: 1998*. Washington, DC, National Center on Elder Abuse at American Public Human Services Association.

According to the Administration of Developmental Disabilities, there are approximately 4.5 million people with developmental disabilities in the United States – equivalent to about 1.5 percent of the population. The Autism Society of America reports that as many as 1.5 million Americans today are believed to have some form of Autism. The United Cerebral Palsy Research and Educational Foundation believes that between 1.5 and 2 million people have cerebral palsy in the United States and that there are an estimated 10,000 new cases each year. The National Down Syndrome Society estimates that Down Syndrome occurs in one out of every 733 live births – approximately 5,000 births per year. An estimated 2.5 million people in the United States have an intellectual disability – approximately 1 percent of the population (U.S. Equal Employment Opportunity Commission). It should be noted that there are no cures for any of these developmental disabilities.

*“Maltreatment of people with disabilities takes many forms. It can explode in a moment of violence, or it can fester through decades of neglect. It can be the work of unrepentant thugs who take pleasure in inflicting pain, or well-respected policy makers who fail to take necessary action. Violence and abuse are as tangible in the crushing of dreams and the denial of humanity as in the spilling of blood and flowing of tears.*

(Sobsey, Dick. Foreword. “Combating Violence & Abuse of People with Disabilities: A Call to Action.” By Nancy Fitzsimmons. Baltimore, Maryland: Paul H. Brookes Publishing Company. 2009. ix-xii.)

In the not-too-distant past, a great number of people with significant developmental disabilities died before they reached their 30th birthday. Today, individuals with disabilities are living well into their 60s, 70s, and even beyond. Individuals with Down Syndrome, for example, have experienced a doubling in life expectancy. In 1983, the average lifespan for an individual with Down Syndrome was just 25 years. By 1997, this had increased to 49 years.<sup>28</sup>

In addition to the increasing life expectancy of persons with developmental disabilities, those who have traditionally provided the most support for this group are aging and dying. In a 2004 study, researchers at the University of Colorado determined that over 700,000 adults with developmental disabilities in 2002 were living with caregivers who were 60 years of age or older.<sup>29</sup> These are individuals who twenty or thirty years ago would have been institutionalized. The generations of people with disabilities that families chose to raise at home are now middle-aged and their parents are aging; stretching state service-delivery systems well beyond their capacities to meet current and projected demands for residential, vocational, and family support services for individuals with developmental disabilities.<sup>30</sup>

### ***Mental Health Disorders***

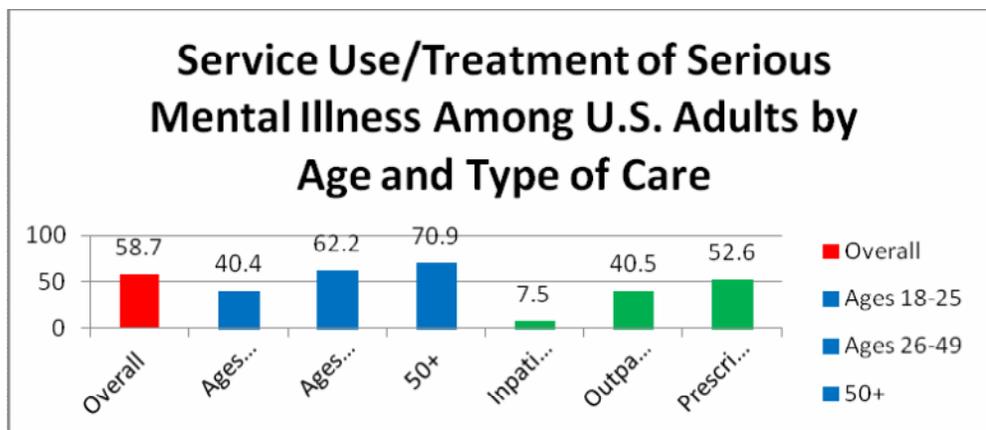
Mental disorders are common in the United States. An estimated 26.2 percent of Americans ages 18 and older or about one in four adults suffer from a diagnosable mental

<sup>28</sup> Yang, Q., Rasmussen, S.A., & Friedman, J.M. (2002). Mortality associated with Down's syndrome in the USA from 1983 to 1997: A population-based study. *Lancet* 359 (9311):1019-25.

<sup>29</sup> Rizzolo, M., Hemp, R., Braddock, D., & Pomeranz, Essley, A. (2004). *The state of the states in developmental disabilities*. Denver, CO: University of Colorado.

<sup>30</sup> Texas Department on Aging and the Texas Council for Developmental Disabilities. Aging with Developmental Disabilities: The Texas Project. Austin, TX: July 2001.

disorder in a given year. When applied to the 2004 U.S. Census residential population estimate for ages 18 and older, this figure translates to 57.7 million people. While mental disorders are common in the United States, their burden of illness is particularly concentrated in a much smaller proportion of about 6 percent, or 1 in 17 who suffer from a serious mental illness (SMI). In addition, mental disorders are the leading cause of disability in the United States for ages 15-44. According to the National Survey on Drug Use and Health, in 2008, 13.4 percent of adults in the United States received treatment for a mental health problem. This includes all adults who receive care in inpatient or outpatient settings and/or used prescription medication for mental or emotional problems.



### ***Undue Influence and Financial Exploitation***

Undue influence is a form of psychological abuse, related to the phenomena of mind-control. Defined as the substitution of one person's will for the true desires of another, undue influence generally occurs when the victim is incapacitated by cognitive impairment, physical or mental illness or some other vulnerability such as recent bereavement. Undue influence is usually accompanied by fraud or duress by the perpetrator, generally someone in a position of trust or authority, who seeks financial gain at the expense of the victim.

Elderly people with assets such as their own homes, stocks, bonds, and other material and financial assets, are most likely to become victims of undue influence due to their life circumstances. This can include ill health with physical dependency, cognitive impairments, grief and bereavement, and decreased independence in such activities as shopping, bill paying and the need for transportation. Mentally ill individuals are also at risk for victimization, as are those with developmental delays, chemical dependency, and other such conditions that result in need for assistance with various activities.

Perpetrators almost always begin with a close and trusting relationship with the victim, and most often perpetrators are family members. Family members sometimes have a financial duty to the victim as their attorney-in-fact, and use that relationship to take financial advantage of the victim. These people have no court oversight so this type of relationship often goes undetected. Authorities have found that oftentimes there is a family member who lives with the victim, sometimes an adult child who never left home, and that person is in a prime position to isolate the victim from others.

Unrelated perpetrators, such as accountants, trustees, attorneys, or guardians, may have a financial duty to the victim as well. Other times the perpetrators are housekeepers, caregivers, neighbors, nursing personnel, physicians, church members, or even clergy. Occasionally these people deliberately develop a close relationship with the victim with the goal of financial gain. Wilber and Reynolds, researchers at the University of Southern California, found that “anywhere from 33% to 53% of elder abuse victims are believed to experience financial abuse.”

### **Indiana Overview**

#### **Aging**

The 2000 Census reported 6,080,485 residents living in Indiana.<sup>31</sup> Twelve and four-tenths percent (12.4%) of the population was over sixty-five (65) years of age. Individuals 65-74 years of age accounted for six and five-tenths percent (6.5%) of the population or 395,393 individuals. Individuals 75-84 years of age accounted for four and four-tenths percent (4.4%) of the population or 265,880 individuals. Individuals over age 85 years accounted for one and five-tenths (1.5%) of the population or 91,558 individuals. The median age in Indiana in 2000 was 35.2 years. In looking at the “baby boomers,” individuals born between 1946 and 1964, the 2000 census includes data for individuals 35 to 54 years age (1946 to 1965). Individuals 35 to 54 years of age constituted twenty-nine and two-tenths (29.2%) of the population or 1,777,568 individuals.<sup>32</sup>

The Indiana Business Research Center predicts that the population over age sixty-five (65) years will increase from one-eighth of the population in 2000 to one-fifth of the population by 2040. The population over age sixty-five years by 2040 is expected to double to approximately 1.48 million people. While the population over sixty-five years is only believed to have expanded by approximately 8,000 individuals from 2000 to 2005 and will remain steady until 2010, an additional 108,000 seniors are expected from 2010 to 2015 and an additional 162,000 from 2020 to 2025. By 2030, sixty-one additional counties will join Brown County with a median population age over forty (40) years. Due to this large increase, seniors will outnumber children under the age of fifteen by 2035.<sup>33</sup>

The future increase of senior citizens in Indiana tracks the national demographics. Nationwide, the number of citizens over age 65 is expected to increase from 35.5 million in 2000 to 69.4 million in 2030. The ratio of citizens over age 65 to the population age 20 to 64 is projected to increase from 20.6% in 2005 to 35.5% in 2030. The number of citizens over age 85 years is expected to triple by 2040 to 15 million. By 2050, the population over age 85 years is expected to be 19 million.<sup>34</sup>

---

<sup>31</sup> The Indiana Census Demographic Profile of United State 2000 Census was used as the basis for the report because the 2010 Indiana Demographic Profile was unavailable. The 2010 Census Bureau Report found that the Indiana population had grown to 6,483,802 residents.

<sup>32</sup> The Indiana Census Demographic Profile of United State 2000 Census was used as the basis for the report because the 2010 Indiana Demographic Profile was unavailable.

<sup>33</sup> How Many Hoosiers?, Indiana County Population Projections, 2005 to 2040, Indiana Business Research Center, Kelley School of Business, Indiana University.

<sup>34</sup> 2004 Report by the U.S. General Accounting Office to the Special Committee on Aging (GAO-04-655).

Nationwide, 5 million people currently have Alzheimer's disease. The number is expected to triple to 16 million by 2050 according to researchers at John Hopkins University.<sup>35</sup> The increase is associated with the aging of the population. One report estimates that one-eighth (1/8th) of the population over age 65 years has Alzheimer's disease, while one-half of the population over age 85 has the disease.<sup>36</sup>

### **Developmental Disabilities**

The Indiana Council on Independent Living estimates that 12.6 percent of the Indiana population, approximately 800,000 individuals, are considered persons with disabilities. This is slightly higher than the national percentage of 12.1 percent of the total population. Individuals ages 18-34 years of age account for 6.5 percent of the total Indiana population of persons with disabilities, again, higher than the national percentage of 5.6 percent. Individuals ages 35-64 years of age account for 13.5 percent of the total Indiana population of persons with disabilities as compared to the national percentage of 12.7 percent. Individuals ages 65-74 years of age account for 27.3 percent of the total Indiana population of persons with disabilities, slightly higher than the national percentage of 26.5 percent. Individuals ages 75 years of age and older account for 50.6 percent of the total Indiana population of persons with disabilities. This is the only category where the national percentage of 51.4 is higher than the Indiana percentage.<sup>37</sup>

### **Mental Health and Addictions Disorders**

According to a 2006 report by the U.S. Department of Health and Human Services – Office of Applied Studies, Indiana ranks in the top twenty states for depression and serious psychological distress and for addictions disorders among persons ages 18 or older.<sup>38</sup> 12.73 percent of adults experienced serious psychological distress and 8.67 percent of adults experience at least one major depressive episode during a given year. 23.5 percent of adults ages 18-25 showed a dependence on or abuse of illicit drugs or alcohol in past year. A lower rate of 6.7 percent was reported for adults ages 26 and older exhibiting a dependence on or abuse of illicit drugs or alcohol in past year.

## ***State of Adult Guardianships in Indiana***

**As part** of the activities sponsored by the IAGS Project, the Arc of Indiana entered into a partnership with Dr. Michael Jenuwine, JD, Ph.D. of the Notre Dame Legal Aid Clinic to conduct an academic research and review of national and Indiana guardianship demographics, data, statutes, funding sources and the recommended best practices for guardianship services, standards, regulation and certification. Dr. Jenuwine holds a J.D. in Law and a Ph.D. in Clinical Psychology and, along with his work at the Legal Aid Clinic, is an Associate Professor of Clinical Law at the Notre Dame Law School and an Associate Professor of Psychology at the University of Notre Dame.

---

<sup>35</sup> See [www.msnbc.com](http://www.msnbc.com). World's Alzheimer's cases to quadruple by 2050.

<sup>36</sup> Karp, Naomi and Wood, Erica, AARP Public Policy Institute and ABA Commission on Law and Aging. (2007). *Guarding the Guardians: Promising Practices for Court Monitoring*.

<sup>37</sup> Houtenville, Andrew and Ruiz, Tony. 2011. *Statistics Describing the Population with Disabilities in Indiana*.

<sup>38</sup> U.S. Department of Health and Human Services, Office of Applied Studies. 2006. *2006 State Estimates of Depression and Serious Psychological Distress*.

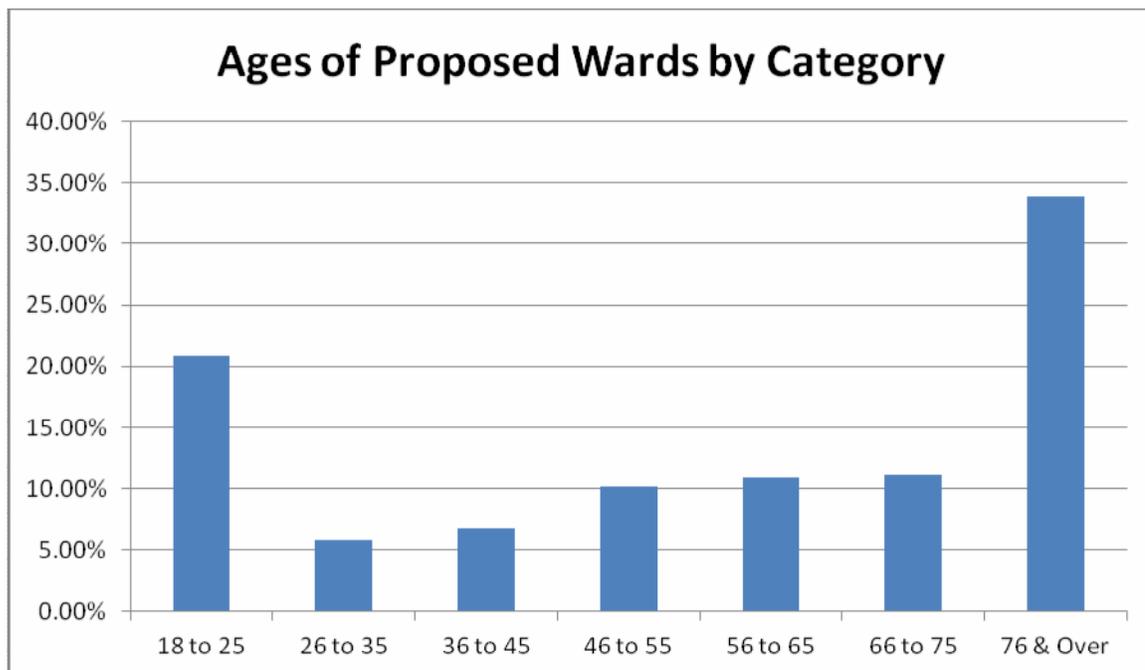
Dr. Jenuwine and several of the Notre Dame Legal Aid Clinic law student interns conducted the research project over a period of 24 months. Funding for year-one of the project was provided by a grant to the Arc of Indiana from the Indiana FSSA Division of Disability and Rehabilitative Services. The remainder of the cost for the study was underwritten by the Notre Dame Legal Aid Clinic, the University of Notre Dame School of Law and by Dr. Jenuwine himself.

Guardianships of incapacitated adults filed between January 1, 2008 and December 31, 2008 were reviewed in 14 jurisdictions across Indiana. A convenience sample of counties was selected to collect data representing a combination of urban and rural populations, as well as to represent varying geographical regions of the state. For each county, an attempt was made to determine which one or two courts handled the majority of adult guardianship cases filed. Those courts became the source of data for each county, and the court files of all new adult guardianship cases filed in 2008 were reviewed. For many jurisdictions, this included all newly-filed adult guardianship cases, while in others, a minority of adult guardianship cases that were filed outside of those two target courts was not included in the sample. Across the state, the sample represented the vast majority of adult guardianship filings for each county studied.

|                   | <b>PROPORTION OF<br/>SAMPLE</b> | <b>PROPORTION OF<br/>TOTAL IN<br/>POPULATION</b> | <b>PROPORTION OF IN<br/>POP. 65 AND OLDER</b> |
|-------------------|---------------------------------|--|---|
| <b>ALLEN</b>      | 10.8%                           | 5.50%  | 5.03%   |
| <b>DAVISS</b>     | 2.0%                            | 0.47%  | 0.50%   |
| <b>ELKHART</b>    | 5.6%                            | 3.12%  | 2.78%   |
| <b>FULTON</b>     | 0.9%                            | 0.32%  | 0.39%   |
| <b>HAMILTON</b>   | 6.3%                            | 4.23%  | 2.79%   |
| <b>JOHNSON</b>    | 4.1%                            | 2.18%  | 2.03%   |
| <b>LAKE</b>       | 14.6%                           | 7.74%  | 7.87%   |
| <b>LAWRENCE</b>   | 3.1%                            | 0.72%  | 0.93%   |
| <b>MARION</b>     | 27.4%                           | 13.80%   | 11.67%  |
| <b>MARSHALL</b>   | 2.1%                            | 0.73%  | 0.79%   |
| <b>ST. JOSEPH</b> | 9.0%                            | 4.18%  | 4.28%   |
| <b>TIPPECANOE</b> | 6.2%                            | 2.58%  | 1.93%   |
| <b>VANDEBURGH</b> | 5.7%                            | 2.74%  | 3.12%   |
| <b>WAYNE</b>      | 2.3%                            | 1.06%  | 1.40%   |
| <b>TOTAL</b>      | 100%                            | 49.37%   | 45.51%  |

A total of 1071 new adult guardianship cases filed were filed in 2008 in the fourteen counties which were individually reviewed. The combined populations of the fourteen counties represent approximately fifty percent of the total state population, and approximately forty-five percent of the population aged 65 and over. Based on available data, it is estimated that more than three thousand new adult guardianship cases were filed in 2008 in Indiana. Guardianship petitions were equally distributed for male and female protected persons. A substantial proportion of the adult guardianship cases

involved the elderly as prospective wards, with young adults representing the next largest group.



A substantial number of proposed wards aged 18 to 25 were alleged to have cognitive or intellectual impairments. The most common incapacity alleged among the elderly was dementia. In many cases, no evidence of incapacity was filed with the court beyond the allegations in the guardianship petition. Many times, the guardianship petition was silent as to the incapacitating condition alleged. Most often, a physician’s report was filed to support the prospective guardian’s assertion that the proposed ward was incapacitated. Physician’s reports were often incomplete and at times, provided information that failed to respond to the specific queries. Even when filled-out accurately and completely, the physician’s report used in most jurisdictions across Indiana falls short of the best practices outlined by the ABA and APA concerning capacity determinations.

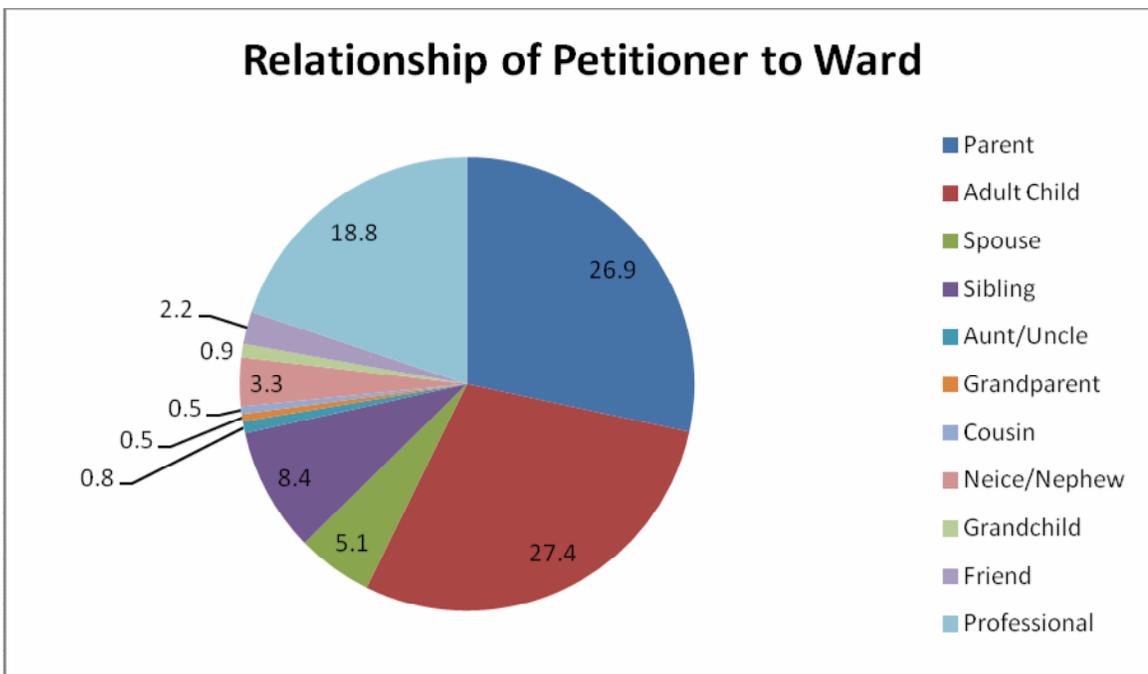
**Cognitive/Intellectual Impairment by Age Category**

|                    |       |
|--------------------|-------|
| <b>18-25</b>       | 46.4% |
| <b>26-35</b>       | 11.7% |
| <b>36-45</b>       | 8.6%  |
| <b>46-55</b>       | 13.5% |
| <b>56-65</b>       | 12.6% |
| <b>66-75</b>       | 2.2%  |
| <b>76 and over</b> | 5.0%  |

**Severe Mental Illness by Age Category**

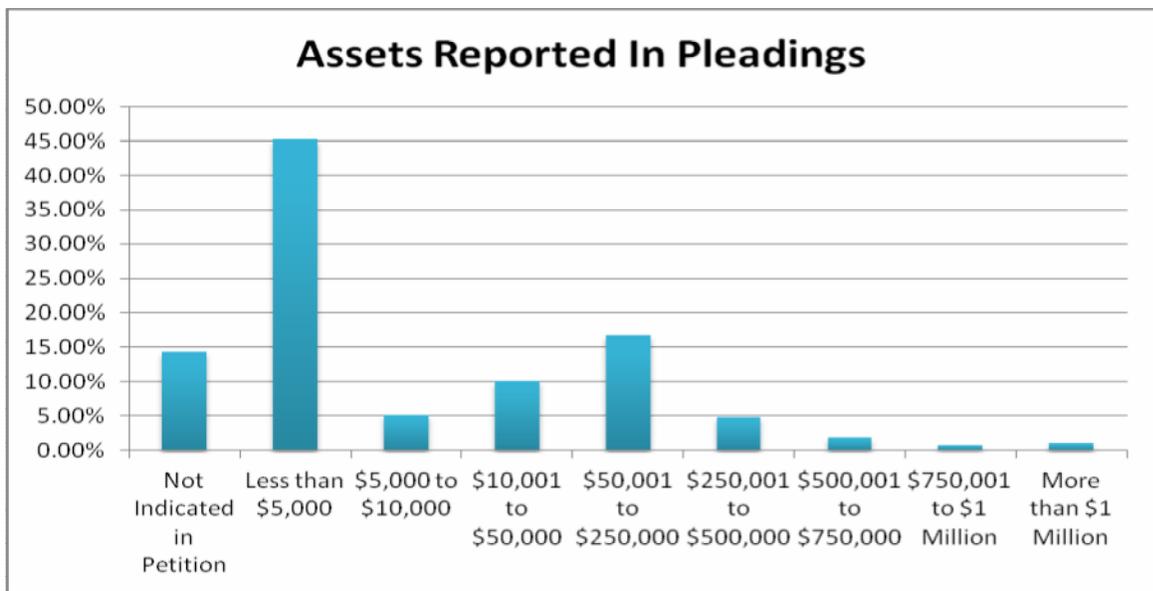
|                    |       |
|--------------------|-------|
| <b>18-25</b>       | 15.5% |
| <b>26-35</b>       | 7.8%  |
| <b>36-45</b>       | 12.6% |
| <b>46-55</b>       | 15.5% |
| <b>56-65</b>       | 21.4% |
| <b>66-75</b>       | 12.6% |
| <b>76 and over</b> | 14.6% |

While little demographic information is typically recorded in court files for the wards in adult guardianship cases, even less is known about the individuals petitioning to be appointed as guardians. There is no statutory authority limiting how many individuals can serve as guardian for a protected person. Typically, an individual person comes forward to assume that authority. Indiana law enumerates who should receive preference when a court is determining who should be appointed to serve as guardian for an incapacitated adult. Indiana statute lists a person designated in a durable power of attorney as receiving the highest priority of consideration when appointing a guardian, followed by the spouse of the incapacitated person, an adult child of the incapacitated person, and then a parent of an incapacitated person, or someone nominated in the will of a deceased parent.<sup>39</sup> In our sample, the petitioners were most often the parent of the proposed ward or the adult child of the proposed ward. Professional guardians were the next most common category of prospective guardians in the cases sampled. Of all cases in which a parent petitioned for guardianship of an alleged incapacitated person, the majority (66%) were cases where the proposed ward was between the ages of 18 and 25. Among those cases in which the prospective guardian was an adult child of the proposed ward, the majority (66%) were cases where the ward was over the age of 75.



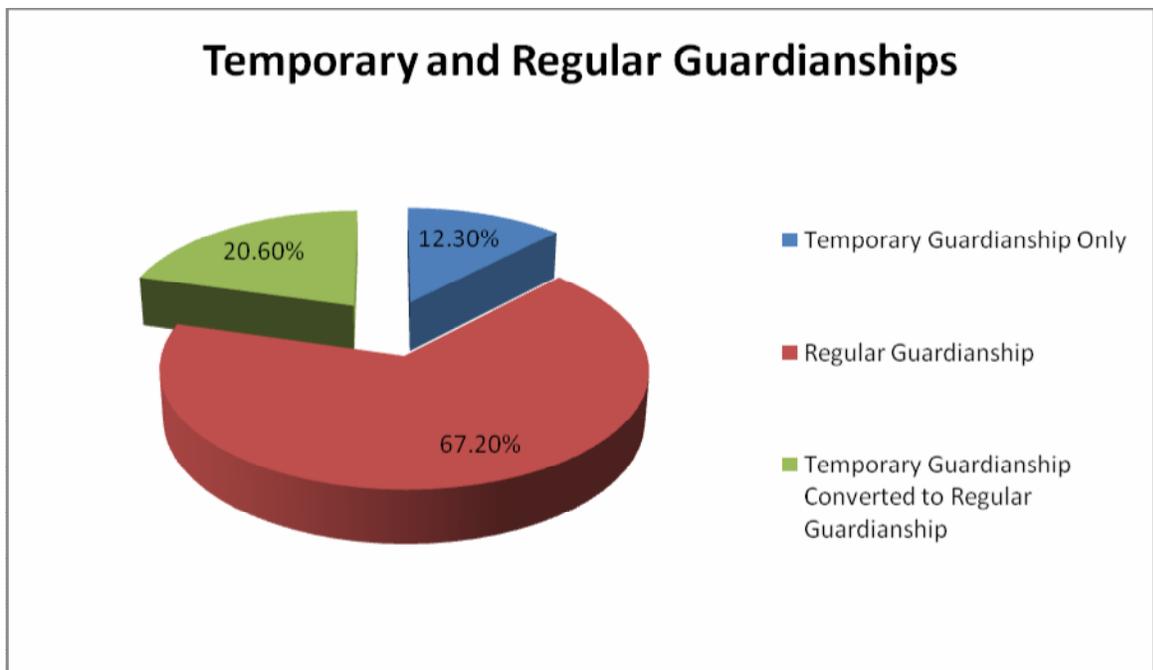
The protected persons were typically not represented by counsel in the cases sampled. Statewide, guardians *ad litem* were appointed to advocate on behalf of the prospective wards less than half of the time. Far fewer wards have legal advocates appointed (20%) when focusing on the majority of counties in which persons appointed as guardians *ad litem* contact with the parties outside of the courtroom, and conduct full investigations prior to the guardianship hearing. Taken together, appointment of legal representation by a guardian *ad litem* is not typical in Indiana, leaving proposed wards vulnerable and ill-equipped to protect their rights.

<sup>39</sup> See Indiana Code 29-3-5-4 at [www.in.gov](http://www.in.gov).



Plenary guardianship of both the person and estate is most often awarded. Persons petitioning for guardianship typically value the ward’s assets as being less than \$5,000 when reporting to the court. In nearly 15% of the cases sampled, information concerning the ward’s property was never provided to the court in the petition for guardianship.

Statewide, emergency guardianships are sought in less than one-third of all cases. Local practices vary, however, from county to county. Some jurisdictions rely on temporary guardianships much more frequently, in half of the cases filed. In contrast, other counties utilize temporary guardianships in slightly more than three out of every fifty cases. Temporary guardians later sought longer-term appointments in the majority of cases reviewed. This suggests that most adult guardianship cases allowed the parties notice and a hearing.



## ***Conclusions and Recommendations for Actions***

*“I shall pass through this world but once. Any good thing therefore that I can do, or any kindness that I can show to any human being, let me do it now. Let me not defer it or neglect it, for I shall not pass this way again.”*

*Etinne de Grellet*

**The Indiana Adult Guardianship State Task Force** has approved, by a vote of the membership,\* the following specific actionable recommendations to address Indiana’s growing significant unmet need for adult guardianship services for the indigent and alone and to improve the provision and delivery of the existing adult guardianship services across the state.

The recommendations for action contained in this report are central ideas to improve the professionalism, efficiency and effectiveness of adult guardianship services in the state. The Task Force will move forward with more specific details and proposals on how to implement the recommendations through future strategic planning and advocacy with its members, legislators, the state and other partner organizations, agencies and advocates with an interest in adult guardianship services. The Task Force recognizes that not all of the recommendations can be achieved immediately, or simultaneously, but we believe they are goals worth pursuing. The Task Force envisions the report to create discussion and to encourage feedback on additional ways to improve guardianship services.

\* The state agencies and their representatives who participated on the Task Force were not considered voting members for the purpose of adopting public policy positions or approving the set of recommendations for actions presented in this report.

### **Recommendation 1: A state supported and funded Office of Adult Guardianship should be established as a department of the Indiana Supreme Court – Division of State Court Administration.**

Rationale: There are 27 states with a state supported and funded Office of (Adult) Guardianship Services. Indiana currently has no single identified state level source of support services or funding to assist courts and counties to increase and improve the availability and quality of adult guardianship services in their communities. The creation of an Office of Adult Guardian would serve that purpose. The mission of the Office would be to assist the local courts to develop high quality community-based volunteer guardian services, to oversee and enforce standards for guardian program operations and service delivery, to collect statistics and evaluate the local guardianship services, to administer the certification program for guardians and guardianship programs, to promote the exchange of information and support educational opportunities for guardians, serve as an information resource center, to provide reports on the demographics and status of guardianship in the state, to staff a State Adult Guardianship Services Advisory Committee, and to provide information and technical support to the guardians and guardianship service providers across the state. The Office would serve as the fiscal agent for state and federal funding appropriated to support the statewide network of adult guardianship services. As part of its duties, the Office would also collect guardianship

data and analyze the operation, cost and offsetting savings benefits to the state, and other benefits from the delivery of guardianship services.

Not unlike the Office of Guardian ad Litem and CASA, the mission and activities of the Office of Adult Guardianship will fit appropriately within the mission of the Indiana Supreme Court - Division of Court Administration. The departments and programs of the Division are overseen by the Chief Justice of the Supreme Court, who also provided the initial approval to develop the model volunteer guardianship programs in Northwest Indiana.

Cost Benefit: Based on the budget appropriated for the state Office of Guardian ad Litem/CASA, the annual cost of staffing and operating an Office of Adult Guardianship would be an estimated \$300,000. The funding would cover the personnel cost of 2 staff members (director, administrative assistant), operating and travel expenses, expenses for the Adult Guardianship Services Advisory Committee and expenses for an statewide annual adult guardianship educational conference.

The intrinsic value of providing support for increased availability and improved quality adult guardianship services to the at-risk individuals who have no one to protect and serve them is incalculable. The real cost savings to the state and local courts, counties and direct service providers however is measurable. We know from other states with state offices that having standardized operations, standards of practice, uniform forms, and increased data collection and reporting supports the more timely and cost efficient provision of guardianship services. These cost efficient improvements will in turn lead to direct cost savings to the courts and to service providers, such as the hospitals, through savings in paid staff time and the ability to have timely and appropriate decision-making for incapacitated persons. The role of the Office will be to identify and analyze all of these cost savings and to report the savings regularly to the state.

**Recommendation 2: A state supported and funded system of community-based volunteer guardian services should be created to serve the need for statewide guardianship services for incapacitated adults who are indigent or without the support of suitable family members.**

Rationale: Indiana is one of only ten states that do not have a state supported and funded delivery system for adult guardianship services. (This a very similar situation to when in 1989 the state was one of only 11 states that did not have a state supported and funded delivery system for Guardian ad Litem/Court Appointed Special Advocate services to abuse and neglected children. The state established a state office and budget appropriation for a statewide delivery system for GAL/CASA services that same year.) In most states, adult guardianship services are provided by a state agency similar to our state's Adult Protective Services system. In those guardianship programs, the state is appointed the guardian and paid case manager personnel handle the case management and decision-making for the guardianship. Also in most states, the case loads are extraordinarily high and there is continual criticism of the inefficiency and high cost to the state for providing the services.

The Indiana Adult Guardianship Services Project has been working since 2007 to develop and implement community-based volunteer guardian programs in model sites across the

state. The Project had the approval of the Chief Justice of the Supreme Court to develop the model and initial funding of \$1.25 million provided by the Indiana FSSA Division of Disability and Rehabilitative Services. The funding has since not been renewed because of the state's fiscal crisis but the work of the Project has continued with the support of the Task Force and the courts where the local model programs are located. The volunteer guardian programs that are being developed are based in part on the state supported GAL/CASA model system of services across the state. They are located in courts, existing nonprofit agencies, or are themselves incorporated nonprofit agencies and utilize the services of trained and supervised volunteers. There are currently 8 volunteer guardian programs that serve approximately 200 individuals in 9 counties. These programs have 9.5 paid staff positions and the donated services of more than 150 trained volunteers. The programs are considered by the courts they serve to be a tremendous asset in that they accept guardianship cases where the incapacitated person has no means or other suitable person to serve as the guardian. The programs are also highly rated by the hospitals and nursing homes in their communities. As the guardian, the programs are able to make appropriate and timely medical decisions for their wards which, in turn, saves the facilities funds in wasted staff time and Medicaid/Medicare and insurance reimbursements. Lastly, the programs are highly rated by the volunteers who donate their time to be advocates.

The development of a statewide network of volunteer guardian programs to serve each county would assure that every court has a resource for protecting the individuals who are the most at risk by being without an advocate. It would also reduce costly court time and prevent the unnecessary expenditure of individual assets and local, state and federal funds for inappropriate institutionalization, untimely decision-making and inappropriate medical care services.

Cost Benefit: Similar to the GAL/CASA programs, the volunteer guardian programs are designed to provide cost efficient services and to save the state funds. According to the Office of GAL/CASA, the volunteers serving in its 70 county programs donated 508, 423 hours of service advocating for children and saved the state more than \$25,000,000 above the cost of state allocated funds in 2010. These savings are similar to reports from state guardian offices in states like Virginia where the savings in 2009 was \$5.6 million, Florida where they saved \$3.9 million in health care costs, and in New York where the annual cost savings in Medicaid costs averages \$2.3 million.

The initial funding for start-up and the first year operation for the IAGS Project model volunteer guardian programs was \$75,000 per program. It is estimated that, when the statewide network of guardianship programs is fully operational in all 92 counties, the annual statewide budget will be approximately \$9.2 million. If the appropriation language is similar to that of GAL/CASA, it will require an annual state appropriation of approximately \$7.0 million. This amount assumes that there will also be a matching funds requirement of 30% to the counties. The cost to the state may be offset by the possibility of receiving federal funds available through the Justice Department and HHS. Additional funds could also be raised to offset the cost to the state by an increase in court filing fees for guardianships and other probate matters or adding guardianship services to the array of services that are allowed payment under the state's Medicaid Plan.

**Recommendation 3: A state supported and funded system of mandatory guardian education, certification, and registry should be created for all attorney, professional, and nonfamily member guardians appointed by the courts.**

Rationale: Indiana currently has no system of certification or regulation in place to assure the delivery of quality adult guardianship services across the state. The only source of certification that is available to Hoosier professional guardians is at the national level through the Center for Guardianship Certification which is affiliated with the National Guardians Association. To date, there are only 50-60 individuals in the state with a National Certified Guardians designation as compared to the estimated several hundreds of attorney, professional and nonfamily member guardians who have been appointed by the courts.

Guardianship certification promotes ethical guardianship practices and insures the availability of qualified guardians who understand and embrace the best guardianship practices. Indiana currently has education and certification requirements for attorneys and other professionals who wish to serve the courts as civil mediators. Much like the requirements placed on mediators, nonfamily individuals who present themselves to courts as being suitable and qualified as guardians should be screened and trained to do the job. The current system that places the responsibility of determining a person's qualifications on the court is burdensome and often flawed. The courts do not have the courtroom or staff time to investigate as to whether persons who come before them are in reality qualified to serve as guardians. Neither do the courts have any method to monitor the work or accountability of such persons. Certified guardians who qualify to be on a Certified Guardian Registry would be required to meet initial and continuing educational requirements and would work under a set of professional standards of practice and a code of ethics that the Judges would be able to rely upon.

The State Office of Guardianship and the State Adult Guardianship Services Advisory Committee would be responsible for developing and administering the state certification program and certified guardian registry.

Cost Benefit: The cost of unqualified and unscrupulous guardians neglecting the needs of their wards and misappropriating ward's funds is a growing problem. Media reports of theft by nonfamily individuals trusted by the courts to protect at-risk individuals have increased. A recent report regarding a professional guardian in Lake County involved the disappearance of hundreds of thousands of dollars in wards' assets. Another report from LaPorte County charged that a guardian representing a nonprofit stole tens of thousands of dollars over a five year period. With the entrance of the Baby Boomers, and the wealth they bring with them, into the probate court system, it is timely, if not urgent, that the state provide for their protection at every level possible. Requiring the certification and registry of nonfamily professional guardians is one way to provide a safeguard for this future at-risk population.

The cost of applying to become a certified guardian and the cost of renewing the certification should be the responsibility of the individual applicants. Currently, the Center for Guardianship Certification charges a fee of \$200 for the application and examination and a \$150 biennial re-certification fee.

Based upon the cost for other certification programs and registries in the state, it is estimated that the cost of operating the certification program and registry will average less than \$50,000 per year. The costs for allotted staff time to administer and the expense of the State Adult Guardianship Services Advisory to provide oversight for the program and registry are incorporated into the proposed budget for the Office of Adult Guardianship.

**Recommendation 4: A state supported and funded adult guardianship registry should be created to collect data and issue reports on all adult guardianship cases and guardians appointed by the courts.**

Rationale: The Indiana Supreme Court – Division of Court Administration collects the total number of guardianship filings from each court annually but the data is a mix of the children and adult filings and does not provide identifying information regarding the incapacitated person or appointed guardian. Accessible data on the name and contact information for both the incapacitated person and the court appointed guardian would be invaluable to the courts, healthcare, mental health, and social services providers, as well as to local and state law enforcement and Adult Protective Services. These entities are often called upon to provide emergency services for individuals who may already have been determined to be incapacitated and have a guardian appointed. Currently, the courts, service providers or law enforcement agencies are without a central resource to access any information which often leads to confusion, duplication of services, and wasted staff time and resources. A centralized repository of guardianship information would also provide the state with currently unavailable demographic information about the individuals who are under its care.

The Probate Judges Committee of the Indiana Judicial Conference has identified the development of a guardianship registry as one of its recommendations to the Supreme Court Chief Justice. It has also received permission from the Board of the Judicial Conference of Indiana to form a task force to explore the creation of a Guardianship Registry. To that end, the Probate Committee has met with: The Probate Section of the Indiana State Bar Association; the Rules of Practice and Procedure Committee of the Indiana Supreme Court; a representative of the Indiana Clerk’s Association; JTAC and representatives of the varied interests serving as a member of IAGS to measure support for such a project. It has been widely received with much enthusiasm. Additional support and input would be necessary from other stakeholders serving the target population. The goal is to create an information sharing system that will allow courts, law enforcement, government agencies, hospitals, mental health facilities and other providers with a readily available source of information relating to guardianships.

The development and operation of a state guardianship registry is also one of the many recommendations being made in several national studies and investigations (ABA, U.S. Senate) of guardian monitoring and accountability.

Cost Benefit: The Indiana Judicial Conference – Probate Judges Committee is working with the JTAC who hosts the INCite secure extranet site and Mental Health Adjudication accessible site for the courts. The JTAC estimates that the initial cost of developing and installing the computer software to operate the registry program would be approximately \$50,000. An annual maintenance cost has not yet been calculated but should run \$12,000

– \$24,000. The JCTA also currently operates the Odyssey program for the courts. The Odyssey program has a public access component which may possibly be modified to handle the adult guardianship case information. The program is not yet statewide but a few courts already allow public access to the program information for free or for a fee.

Having accurate number and demographic information for guardianship wards and guardians would also be important to the state securing future funding for guardianship services from federal programs such as the Elder Justice Act and the newly introduced Guardian Accountability and Senior Protection Act. The state currently receives no federal funding for guardianship services.

**Recommendation 5: The Indiana Probate Code Study Commission should undertake a comprehensive review and revision of the probate code regarding guardianship under IC 29 and IC 12.**

Rationale: The Indiana statutes for adult guardianship have not undergone a comprehensive review and revision since the 1980s. The piecemeal process of amending the statutes over the past 30 years has left it conflicting and confusing. The current format that mixes child and adult guardianship statutes is not user friendly for the increasing number of lay and family member guardians wishing to understand how to follow the requirements. No system for monitoring, educating, or regulating guardians is incorporated in the statutes. The current statutes do not set standards of practice and ethics for guardians or provide for a guardian registry to track the appointment of guardians across the state. Numerous other recommendations for legal reforms that would promote would bring the state statutes up to date and in line with current federal laws and recommended guardianship best practices have been made by organizations such as the Uniform Law Commission, the National College of Probate Judges, and the American Bar Association and should be reviewed and considered for incorporation where appropriate.

The State of Adult Guardianships Legal Research Report uncovered several other significant case and court process concerns that should be reviewed and revised including: (1) a substantial number of proposed wards aged 18 to 25 were alleged to have cognitive or intellectual impairments but the guardianship petition often failed to include a complete physician's report as evidence of incapacity or to meet the best practices outlined by the ABA and APA concerning capacity determinations in adult guardianship cases; (2) the protected persons were typically not represented by counsel or present at the petition hearings; (3) guardians *ad litem* were appointed to advocate on behalf of the prospective wards in less than half of the filings; (4) plenary guardianships of the person and estate were most often granted by the courts, with very few limited guardianship granted by courts; (5) significant numbers of filings lacked information concerning the ward's property; and (6) over use of emergency temporary guardianships, with no subsequent noticed hearing for a plenary guardianship, is a common practice in a significant number of the courts across the state.

Cost Benefit: It is projected that no additional cost should be allocated to this recommendation since the Probate Code Study Commission is a standing committee that is already budgeted for funds and staffed in the state budget and is charged with the duty

of reviewing and approving proposed probate code statutory changes and making recommendations for changes to the legislature.

**Recommendation 6: A state supported and funded information and referral resource center should be created to provide public education on advanced directives planning and the options available to individuals and families for substitute decision-making.**

Rationale: Indiana does not have a central resource for information, education, and referral services for individuals and families needing to learn about the alternatives available for substitute decision-making such as guardianship, power of attorney, health care representative, representative payee, etc. There are currently very few private resources for this type of assistance aside from paying for attorney services. There are a limited number of publications, form templates and website listings available that provide Indiana focused information, often with conflicting views and advice. Some legal services organizations, local bar associations and law firms offer informational sessions or trainings but mostly are not open to the public and almost always there is a fee charged.

A resource center could operate a hotline for information (not legal advice) and referral, a website for accessing publications, articles and forms, and conduct public education workshops and trainings. These educational activities would support individuals and families making more timely, better informed, efficient, and cost saving plans and decisions when there is a need for a substitute decision maker.

Cost Benefit: It is projected that the cost of operating this type of information and referral center would be approximately \$150,000. This estimate is based on costs identified for similar services provided by other states. The major budget expense would be for the staff position and benefits and for the public education workshops and trainings. It is anticipated that pending federal funds in the Elder Justice Act and Senior Protections Act may be available to supplement a state budget appropriation for the center.

The services of a resource center which promotes timely and appropriate personal and estate decision-making planning and legal filings would provide a significant cost savings to the state, healthcare providers, Medicaid, Medicare, courts and most certainly protect more incapacitated individual's assets from exploitation and loss.

## *List of References*

- American Bar Association, Commission on Law and Aging. (2003). *Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly*.
- Barton, The Honorable Kevin, Johnson Superior Court 1. (2008). *Guardianship Reform and An Aging Population*.
- Bennett, H. Kennard, JD. (2011). *Indiana Guardianship Law: Warts and All*.
- Conference of Chief Justices, Conference of State Court Administrators & Center for Elders and The Courts. (2010). *Adult Guardianship Court Data and Issues Results from an Online Survey*.
- Council on Accreditation, Inc. (2010). *Adult Guardianship Service Standards for Accreditation*.
- Houtenville, Andrew and Ruiz, Tony. (2011). *Statistics Describing the Population with Disabilities in Indiana*.
- Ihns, Jennifer. (2011). *Notre Dame Legal Aid Clinic. Adult Guardianship: A National Overview*.
- Indiana Bar Foundation and Indiana Bar Association. (2009). *Indiana Laws of Aging*.
- Indiana Probate Code. Title 12. See [www.in.gov](http://www.in.gov).
- Indiana Probate Code. Title 29. See [www.in.gov](http://www.in.gov).
- Karp, Naomi, JD. (2011). *AARP Public Policy Institute. Protecting Vulnerable Adults: Oversight and Screening of Court-Appointed Guardians*.
- Karp, Naomi, JD, & Wilson, Ryan. (2011). *AARP Public Policy Institute. Protecting Older Investors – The Challenge of Diminished Capacity*.
- Jenuwine, Michael, JD, Ph.D. (2011). *Notre Dame Legal Aid Clinic. The State of Adult Guardianship in Indiana: An Empirical Perspective*.
- National Academy of Elder Law Attorneys; National Guardianship Association; & National College of Probate Judges. (2004) *National Wingspan Implementation Session*.
- National Guardianship Association. (2007). *Guardian Standards of Practice and Guardian Code of Ethics*.
- Roberto, Karen, Ph.D. & Teaster, Pamela, Ph.D. (2003) *Virginia Public Guardian and Conservator Programs: Evaluation of Program Status and Outcomes*.
- Teaster, Pamela and Wood, Erica and Schmidt, Windsor, Jr. and Lawrence, Susan.

- (2007). Public Guardianship After 25 Years: In the Best Interest of Incapacitated People?.
- Uekert, Brenda & Van Duizend, Richard. (2008) National Center for State Courts. Adult Guardianships: A “Best Guess” National Estimate and the Momentum for Reform.
- United States 110<sup>th</sup> Congress. (2008). Senate Bill S795. The Elder Justice Act.
- United States 112<sup>th</sup> Congress. (2011). Guardian Accountability and Senior Protection Act. Senate Bill S1744.
- United States Census Bureau. (2000 & 2010). United States 2000 and 2010 Census Report Demographic Profiles.
- United States Government Accountability Office. (2011) Incapacitated Adults: Oversight of Federal Fiduciaries and Court Appointed Guardians Needs Improvement.
- U.S. Department of Health and Human Services, Office of Applied Studies. (2006). 2006 State Estimates of Depression and Serious Psychological Distress.
- Wingspan – The Second National Guardianship Conference Recommendations. (2002)
- Wood, Erica. (2006). State-Level Adult Guardianship Data: An Exploratory Survey.

## *Appendices*

- A. The State of Adult Guardianship in Indiana: An Empirical Perspective. Dr. Michael Jenuwine, JD, Ph.D., NCG. (2011).
- B. Guardianship Reform and An Aging Population. The Honorable Kevin Barton. Johnson Superior Court 1. (2008).
- C. Adult Guardianship: A National Overview. Jennifer Ihns, NCG. Notre Dame Legal Aid Clinic. (2011)

**THE STATE OF  
ADULT GUARDIANSHIP IN INDIANA:  
AN EMPIRICAL PERSPECTIVE**

**OCTOBER, 2011**

**MICHAEL J. JENUWINE, PH.D., J.D.  
NOTRE DAME LAW SCHOOL**

## DESCRIPTION OF THE SAMPLE

Guardianships of incapacitated adults filed between January 1, 2008 and December 31, 2008 were reviewed in 14 jurisdictions across Indiana. A convenience sample of counties was selected to collect data representing a combination of urban and rural populations, as well as to represent varying geographical regions of the state. For each county, an attempt was made to determine which one or two courts handled the majority of adult guardianship cases filed. Those courts became the source of data for each county, and the court files of all new adult guardianship cases filed in 2008 were reviewed. For many jurisdictions, this included all newly-filed adult guardianship cases, while in others, a minority of adult guardianship cases that were filed outside of those two target courts was not included in the sample. Across the state, the sample represented the vast majority of adult guardianship filings for each county studied.

Figure 1 lists the counties included in the current study, and what percentages they represent of the sample collected, the total state population, and the state population of individuals aged 65 and over. Figure 2 shows a map of the counties sampled.

Figure 1

|              | PROPORTION OF<br>SAMPLE | PROPORTION OF<br>TOTAL IN<br>POPULATION | PROPORTION OF IN<br>POP. 65 AND OLDER |
|--------------|-------------------------|---|---------------------------------------|
| ALLEN        | 10.8%                   | 5.50%                                   | 5.03%                                 |
| DAVISS       | 2.0%                    | 0.47%                                   | 0.50%                                 |
| ELKHART      | 5.6%                    | 3.12%                                   | 2.78%                                 |
| FULTON       | 0.9%                    | 0.32%                                   | 0.39%                                 |
| HAMILTON     | 6.3%                    | 4.23%                                   | 2.79%                                 |
| JOHNSON      | 4.1%                    | 2.18%                                   | 2.03%                                 |
| LAKE         | 14.6%                   | 7.74%                                   | 7.87%                                 |
| LAWRENCE     | 3.1%                    | 0.72%                                   | 0.93%                                 |
| MARION       | 27.4%                   | 13.80%                                  | 11.67%                                |
| MARSHALL     | 2.1%                    | 0.73%                                   | 0.79%                                 |
| ST. JOSEPH   | 9.0%                    | 4.18%                                   | 4.28%                                 |
| TIPPECANOE   | 6.2%                    | 2.58%                                   | 1.93%                                 |
| VANDEBURGH   | 5.7%                    | 2.74%                                   | 3.12%                                 |
| WAYNE        | 2.3%                    | 1.06%                                   | 1.40%                                 |
| <b>TOTAL</b> | <b>100%</b>             | <b>49.37%</b>                           | <b>45.51%</b>                         |

Figure 2



Data concerning persons disabled to the extent that they require substitute decision-makers are virtually non-existent. A large proportion of individuals requiring guardianship are the elderly. Using the limited data projections available from the United States Census Bureau, Figure 3 lists the proportion of persons over the age of 65 anticipated in each of the sample counties by the year 2040.<sup>40</sup> This information is included as a crude estimate of the growing number of a subset of those individuals who may require a guardianship. These projections are of limited utility, however, as the vast majority of individuals aged 65 and over will not necessarily require a guardianship solely based on inclusion in this age grouping.

---

<sup>40</sup> Annual Estimates of the Resident Population for Counties of Indiana: April 1, 2000 to July 1, 2008 (CO-EST2008-01-18), Population Division, U.S. Census Bureau, March 19, 2009; City-County Finder, STATS Indiana, [http://www.stats.indiana.edu/uspr/a/us\\_profile\\_frame.html](http://www.stats.indiana.edu/uspr/a/us_profile_frame.html) (last visited Oct. 28, 2010) (giving county and population information for cities and towns in the United States).

Figure 3

|                         | <b>POPULATION<br/>CHANGE:<br/>ALL AGES<br/>BY 2040</b> | <b>POPULATION<br/>CHANGE:<br/>65 AND OLDER<br/>BY 2040</b> |
|-------------------------|--|--|
| <b>ALLEN</b>            | +19%   | +88%   |
| <b>DAVISS</b>           | +18%   | +25%   |
| <b>ELKHART</b>          | +29%   | +92%   |
| <b>FULTON</b>           | +5%  | +62%   |
| <b>HAMILTON</b>         | +59%   | +269%  |
| <b>JOHNSON</b>          | +25%   | +119%  |
| <b>LAKE</b>             | +7%  | +72%   |
| <b>LAWRENCE</b>         | -2%  | +50%   |
| <b>MARION</b>           | +16%   | +93%   |
| <b>MARSHALL</b>         | +18%   | +69%   |
| <b>ST. JOSEPH</b>       | +9%  | +60%   |
| <b>TIPPECANOE</b>       | +11%   | +72%   |
| <b>VANDEBURGH</b>       | +5%  | +50%   |
| <b>WAYNE</b>            | -1%  | +35%   |
| <b>14 COUNTY SAMPLE</b> | +10%   | +153%  |

**AVAILABLE DATA**

The Indiana Supreme Court Division of State Court Administration (DSCA) maintains statewide trial court statistics, and publishes these figures annually.<sup>41</sup> Within the data collected by the DSCA are annual figures of “Total Cases Filed.” These figures can be separated out by Case Type, which is based on the case caption as maintained by the trial court. Within the distinction of case type is a category titled “GU- Guardianship.” The DSCA defines the guardianship case type as “Petitions for appointment of guardians are filed under this category. A guardianship case is considered ‘closed’ when the court enters an order appointing and approving the guardianship.”<sup>42</sup> In 2008, for example, the DSCA reports that 7,088 guardianship cases were filed in Indiana statewide. This figure, however, is based on all cases filed with a GU case type in the caption, including adult guardianships and minor guardianships together. Some jurisdictions also file other types of actions under the GU case type, such as minor settlements of civil suits, and appointments of health care representatives. As a result, the number of adult guardianship cases filed each year in the state of Indiana is not captured by statistics recorded by the DSCA.

<sup>41</sup> <http://www.in.gov/judiciary/admin/courtmgmt/stats/>

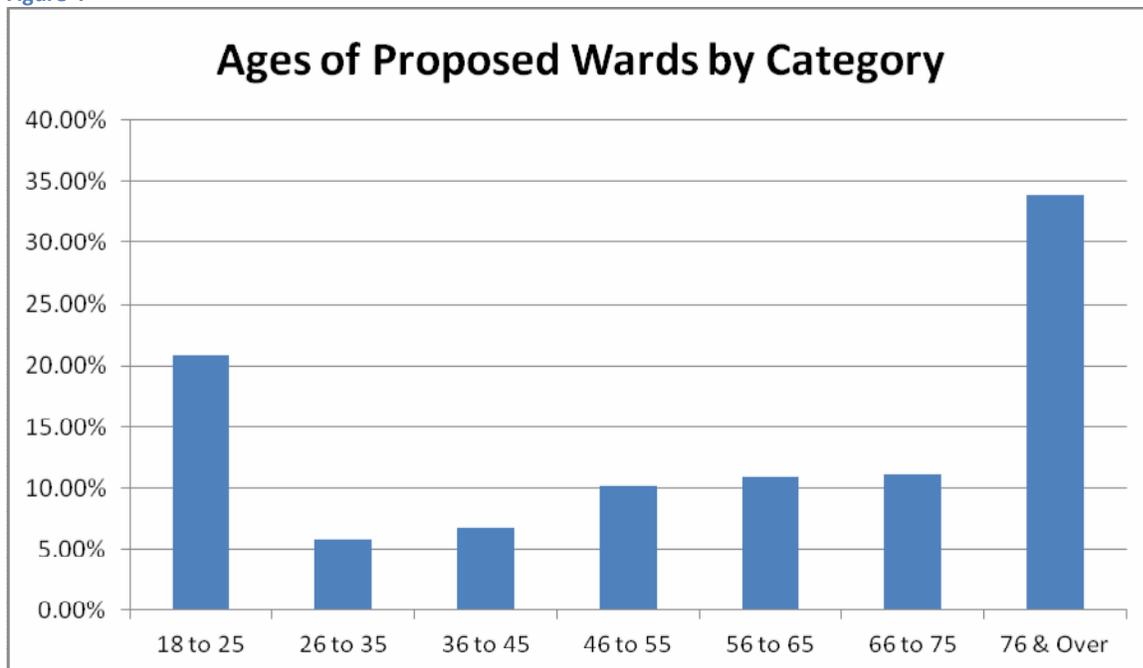
<sup>42</sup> Summary of Caseload Reports:  
[http://www.in.gov/judiciary/admin/courtmgmt/stats/2008/v1/trialcourts/case\\_report.pdf](http://www.in.gov/judiciary/admin/courtmgmt/stats/2008/v1/trialcourts/case_report.pdf)

The data collected in the current study can be extrapolated in an effort to approximate the number of adult guardianship cases filed in Indiana in 2008. Looking at a subgroup of four the fourteen counties sampled, we find the following: in Allen County, 38% of all GU cases filed were adult guardianships; in Johnson County, 37% of all GU cases filed were adult guardianships; in Marshall County, 47% of all GU cases filed were adult guardianships; and in Fulton County, 33% of all GU cases filed were adult guardianships. Averaging these proportions and applying the number to the total number of guardianships (adult and minor) filed in Indiana in 2008, we can approximate that nearly 3,000 (between 2,339 and 3,331) new adult guardianship cases were likely filed in Indiana in 2008. This figure, however, is based on crude estimates from a very limited sample (four counties), and is of limited utility. Ideally, future trial court statistics could be collected in a way that allows easy determination of exactly how many adult guardianship cases are filed in any given year.

**INFORMATION ABOUT THE PROPOSED WARDS**

Relatively little demographic information is recorded in most court files concerning the proposed wards in adult guardianship cases. In our sample, 48% of the prospective wards were women, and 52% were men. Court pleadings did not include the age of the proposed ward in 11.75% of the cases. For those where age was indicated, the mean age of proposed wards was 56.81 years, with a standard deviation of 25 and a maximum value of 102 years. Figure 4 contains a categorical listing of the ages of prospective wards sampled.

Figure 4



In terms of age categories, two primary clusters can be seen at the extremes: prospective wards aged 18 to 25 years old, and proposed wards over the age of 75. A large number of

the 18 to 25 year-old proposed wards are individuals who suffer from cognitive or intellectual impairments, suggesting that petitions for guardianship were filed when these individuals attained the age of majority. Also within that category are individuals who are diagnosed as having a serious mental illness during young adulthood, and thereby require the appointment of a substitute decision-maker through an adult guardianship. Proposed wards alleged to have a severe mental illness are most represented in the 56 to 65 year-old age category. Figure 5 shows the proportion of proposed wards in the sample described in pleadings as having cognitive or intellectual impairments, while Figure 6 shows the proportion of proposed wards alleged to have a severe mental illness, sorted by age category.

Figure 5

| <b>Cognitive/Intellectual Impairment by Age Category</b> |       |
|--|-------|
| <b>18-25</b>   | 46.4% |
| <b>26-35</b>   | 11.7% |
| <b>36-45</b>   | 8.6%  |
| <b>46-55</b>   | 13.5% |
| <b>56-65</b>   | 12.6% |
| <b>66-75</b>   | 2.2%  |
| <b>76 and over</b>                                       | 5.0%  |

Figure 6

| <b>Severe Mental Illness by Age Category</b> |       |
|--|-------|
| <b>18-25</b>                                 | 15.5% |
| <b>26-35</b>                                 | 7.8%  |
| <b>36-45</b>                                 | 12.6% |
| <b>46-55</b>                                 | 15.5% |
| <b>56-65</b>                                 | 21.4% |
| <b>66-75</b>                                 | 12.6% |
| <b>76 and over</b>                           | 14.6% |

Over one-third of all new adult guardianship cases filed in Indiana in 2008 involved prospective wards over the age of 75. This suggests that as the proportion of elderly adults increases in the future, it can be expected that the number of petitions for adult guardianship filed will also increase. Population projections in Figure 3 indicate an increase by 153% for individuals aged 65 and older in the fourteen counties sampled in the current study. If these projections are actualized, the result will be a significant increase in adult guardianship filings in Indiana, absent any changes in the current policies and procedures.

#### **INFORMATION ABOUT THE PETITIONERS**

While little demographic information is typically recorded in court files for the wards in adult guardianship cases, even less is known about the individuals petitioning to be

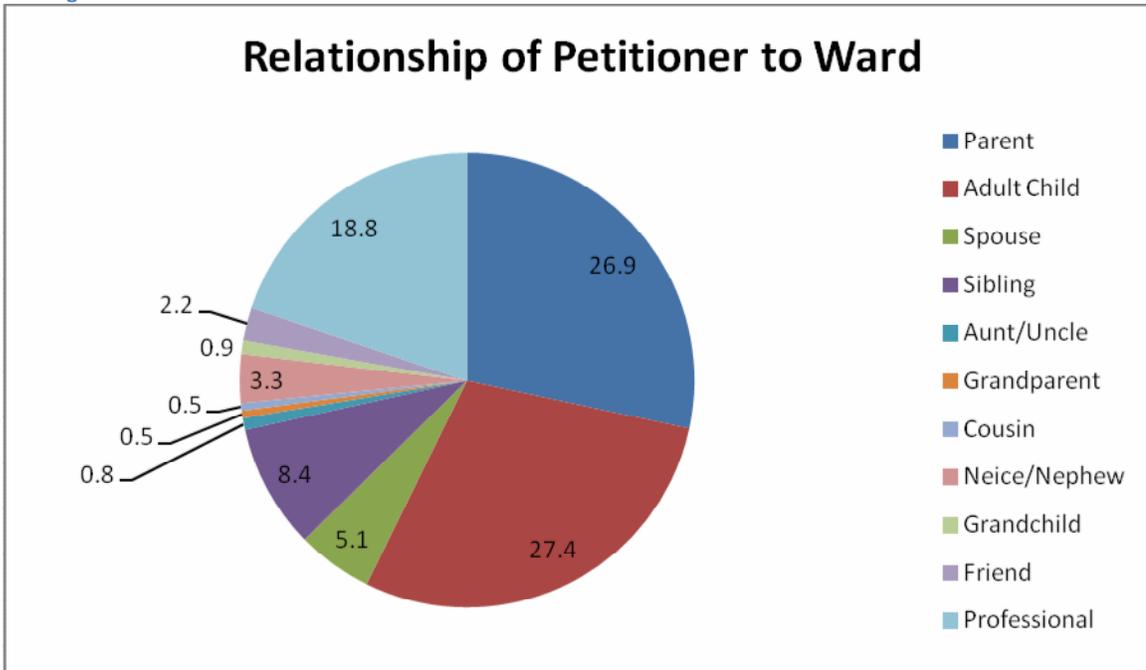
appointed as guardians. There is no statutory authority limiting how many individuals can serve as guardian for a protected person. Typically, an individual person comes forward to assume that authority. At times, often when it involves an incapacitated child who is becoming an adult, parents will collaboratively petition to serve as co-guardians. It is also not uncommon in cases where adult children seek guardianship of elderly parents for siblings to petition together to serve as co-guardians. Much like joint custody of a minor child, co-guardians can typically serve the needs of the ward as long as they are able to effectively communicate, and collaboratively make decisions concerning the best interests of the protected person. In our sample, 71% of all cases involved a single person petitioning for guardianship, while co-guardianship was requested in 29% of the cases.

There are also instances where multiple individuals are interested in becoming guardian for a proposed ward, but these prospective guardians are not able or willing to work collaboratively. In these contested cases, each individual wants to become the sole guardian. Indiana law enumerates who should receive preference when a court is determining who should be appointed to serve as guardian for an incapacitated adult. Indiana statute lists a person designated in a durable power of attorney as receiving the highest priority of consideration when appointing a guardian, followed by the spouse of the incapacitated person, an adult child of the incapacitated person, and then a parent of an incapacitated person, or someone nominated in the will of a deceased parent.<sup>43</sup> In our sample, the petitioners were most often the parent of the proposed ward or the adult child of the proposed ward. Professional guardians were the next most common category of prospective guardians in the cases sampled. Of all cases in which a parent petitioned for guardianship of an alleged incapacitated person, the majority (66%) were cases where the proposed ward was between the ages of 18 and 25. Among those cases in which the prospective guardian was an adult child of the proposed ward, the majority (66%) were cases where the ward was over the age of 75. The relationship of the prospective guardian to the proposed ward is illustrated in Figure 7.

---

<sup>43</sup> IC 29-3-5-4

Figure 7



#### REPRESENTATION AND ADVOCACY

Proposed wards in guardianship proceedings are vulnerable individuals. An alleged incapacitated person may not fully comprehend the legal proceedings, and may not appreciate the extent of the limitations they will experience if the petition for guardianship is granted. The assistance of counsel in adult guardianship cases provides an important safeguard of the rights and interests of the proposed wards. Although there are many cases where respondents can speak on their own behalf or where family and friends can be relied on to assist the proposed ward, an attorney is well-suited to advocate on behalf of these individuals. In our current study, attorneys represented the proposed ward in 2.4% of all cases, leaving alleged incapacitated respondents without legal counsel in 97.6% of the cases reviewed.<sup>44</sup>

Indiana law provides for the appointment of a guardian *ad litem* in those instances where there are questions about the alleged incapacitated person's representation. Specifically, courts are required to appoint a guardian *ad litem* "to represent the interests of the alleged incapacitated person ... if the court determines that the alleged incapacitated person ... is not represented or is not adequately represented by counsel."<sup>45</sup> While not serving as the proposed ward's attorney, a guardian *ad litem* is charged with advocating on behalf of the best interests of the alleged incapacitated person in the guardianship proceeding. Typically, a guardian *ad litem* is responsible for investigating the information alleged in the guardianship petition, and reporting to the court concerning the best interests of the

<sup>44</sup> In some counties, the attorney who prepared the guardianship petition and represented the person seeking guardianship was also listed as attorney for the proposed ward. For purposes of this study, those alleged incapacitated persons were not counted as having their own attorney.

<sup>45</sup> IC 29-3-2-3

proposed ward. In many instances, this involves multiple interviews with the proposed ward, petitioners, family members, physicians, and friends. Guardians *ad litem* conducting this type of investigation rely on collateral information, conducting extensive document reviews, background checks, and at times visiting the homes of proposed guardians and wards before making recommendations to the court.

In some jurisdictions, the role of guardian *ad litem* is served by individuals assigned to advocate on behalf of the wards in every guardianship case assigned to a specific court. For example, some jurisdictions have an attorney who is present in court at every adult guardianship hearing. These individuals serve as guardian *ad litem* by questioning parties during the court proceedings, and perhaps interviewing the ward and petitioners immediately before the hearing commences. These individuals perform their services primarily within the courthouse, and typically don't conduct full investigations or home visits prior to the guardianship hearings. It is not uncommon for these guardians *ad litem* (referred to as "in-court" guardians *ad litem* hereafter) to meet the ward for the first time at the guardianship hearing. The advantage of an in-court guardian *ad litem* is that more wards can benefit from the services of a guardian *ad litem*. The disadvantage to an in-court guardian *ad litem* is that, due to the high volume of cases and the design of the program, the services provided by the in-court guardian *ad litem* are often cursory and superficial, missing the crucial issues that will only be discovered from a more thorough investigation into the ward's circumstances by looking to sources not available within the confines of the courthouse.

Across the 14 counties we sampled, guardians *ad litem* were appointed in 47% of all adult guardianship cases. Two of the fourteen counties relied on in-court guardians *ad litem*. Eliminating the two counties that provide in-court guardians *ad litem*s, we found guardians *ad litem* were appointed 20% of the time in the remaining 12 counties.

Counties typically lack the resources to pay for guardians *ad litem* in adult guardianship cases. Further, Indiana statutes don't provide much guidance concerning the training and duties of a guardian *ad litem* in any context other than family law (i.e. dissolution, paternity, or guardianships of minors). For family law cases, there are formal training opportunities for individual who wish to serve as guardians *ad litem*, many of which are offered as continuing legal education opportunities. These trainings don't exist, however, for individuals interested in becoming guardians *ad litem* in adult guardianship cases. As a result, there are too few qualified individuals willing and capable of serving as guardians *ad litem*. Even where there are individuals who are competent to serve as guardians *ad litem* in adult guardianship cases, limited resources make it difficult for judges to hire those professionals beyond the most challenging cases before the court.

## **INCAPACITY OF WARDS**

A guardian may not be appointed for an adult until that individual has been adjudicated incapacitated.<sup>46</sup> Indiana law enumerates medical reasons an individual may be incapacitated as including insanity, mental illness, mental deficiency, developmental

---

<sup>46</sup> IC 29-3-5-2 – A guardian may not be appointed for an incapacitated person or a minor under this chapter until the incapacity or minority has been adjudicated.

disability, physical illness, infirmity, habitual drunkenness, and excessive use of drugs.<sup>47</sup> Of the guardianship petitions reviewed that specified a basis for incapacity, nearly all listed a physical or mental diagnosis as the reason for seeking guardianship.<sup>48</sup> Clinical evaluations of capacity, together with testimony of the petitioner, are typically the primary evidence supplied to courts in adult guardianship proceedings. Across Indiana, it is uncommon for in-court expert testimony to be offered as evidence in adult guardianship proceedings. Rather, written documentation of the individual's diagnosis or level of functioning is usually provided to support allegations of incapacity plead in the guardianship petition. Figure 8 lists the alleged incapacities specified in guardianship petitions.

Figure 8

| Diagnostic Category                | Prevalence |
|------------------------------------|------------|
| Dementia                           | 25.8%      |
| Cognitive/Intellectual Impairment  | 22.0%      |
| Severe Mental Illness              | 10.5%      |
| Conditions Related to a Stroke     | 5.4%       |
| Acquired Brain Injury              | 5.0%       |
| Chronic Intoxication               | 1.4%       |
| Conditions Associated with Old Age | 1.4%       |
| Other                              | 15.1%      |
| None Indicated                     | 13.4%      |

There is no specific statutory requirement for documentary evidence of incapacity. However, a Marion County Local Rule requiring “the Court’s prescribed physician’s report” has been adopted, both formally and informally, in many counties.<sup>49</sup> As a result, a Physician’s Report form is often completed by a medical practitioner, signed, and filed with the court. A sample Physician’s Report form is attached as Appendix A. Table 2 lists the proportion of the sample that included the seven types of evidence of incapacity most frequently filed in the cases sampled.

Figure 9

| Evidence of Incapacity | Prevalence |
|------------------------|------------|
| Physician’s Report     | 64.1%      |

<sup>47</sup> IC 29-3-1-7.5 -- "Incapacitated person" means an individual who: (1) cannot be located upon reasonable inquiry; (2) is unable: (A) to manage in whole or in part the individual's property; (B) to provide self-care; or (C) both; because of insanity, mental illness, mental deficiency, physical illness, infirmity, habitual drunkenness, excessive use of drugs, incarceration, confinement, detention, duress, fraud, undue influence of others on the individual, or other incapacity; or (3) has a developmental disability (as defined in IC 12-7-2-61).

<sup>48</sup> In 13.4% of petitions, no reason was given in the petition or any other court filings to indicate why the proposed ward was alleged to be incapacitated.

<sup>49</sup> Marion County Probate Rules LR49-PR00-410.2 -- In all guardianship or protective proceedings seeking to declare an adult incapacitated; the Court's prescribed physician's report form must be completed and presented to the Court at or before the hearing.

|   |       |
|---|-------|
| Correspondence from Physician or PhD Psychologist | 11.2% |
| Excerpt from Medical Record                       | 1.7%  |
| Psychological Testing                             | 1.0%  |
| Proof of Out of State Guardianship                | 0.2%  |
| In-Court Medical/Psychological Testimony          | 0.2%  |
| No Evidence of Incapacity                         | 20.3% |

Researchers in other states have suggested that capacity evaluations in adult guardianships are often suboptimal.<sup>50</sup> A joint panel of the American Bar Association (ABA) and the American Psychological Association (APA) recommended best practices in determining capacity in guardianship proceedings involving older adults.<sup>51</sup> Based on the work of the ABA and APA, capacity determinations of adults in guardianship cases should consider six primary factors: (1) medical/psychiatric condition & formal diagnosis; (2) cognitive elements; (3) everyday functional elements; (4) values & preferences of the proposed ward; (5) risk considerations & level of supervision; and (6) steps to enhance capacity. An empirical study of the comprehensiveness of clinical evaluations in adult guardianship cases in Massachusetts, Colorado, and Pennsylvania adapted the standards of the ABA and APA, to create six key quality indicators. In their tri-state review, researchers concluded that states with recent statutory reform in the area of adult guardianship typically had more comprehensive clinical evaluations in guardianship cases than in those states with minimal statutory reform.<sup>52</sup>

In our review of adult guardianship cases filed in the sample counties, Physician’s Reports were often incomplete, illegible, or improperly completed. Many times, information written on the Physician’s Report was not responsive to the question asked, and statements were typically conclusory (i.e. *Mrs. Smith needs a guardianship*) rather than descriptive of the individual’s medical status, level of functioning, or prognosis. Applying the six key quality indicators adapted from the ABA and APA best practices, only half of these factors are even queried on the Indiana Physician’s Report. Assuming a best case scenario in which the Physician’s Report has been filled-out completely and accurately, incapacity is often adjudicated without consideration of all of the relevant factors. The Physician’s Report currently in use in Indiana falls short of the recommended practices for capacity evaluations in adult guardianship cases.

<sup>50</sup> Capacity evaluations in Ohio and Washington were described as “sketchy” and “conclusory” (Bulcroft, Kielkopf, & Tripp, 1991); In West Virginia and Pennsylvania, “substandard” capacity evaluations existed in a sample of 119 adult guardianship cases studied (Dudley & Goins, 2003).

<sup>51</sup> Three publications are available from the American Bar Association Commission on Law and Aging and American Psychological Association on this topic: *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings: A Handbook for Judges*; *Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers*; and *Assessment of Older Adults With Diminished Capacity: A Handbook for Psychologists*. Washington DC: American Bar Association and American Psychological Association.

<sup>52</sup> Moyer, J., Wood, S., Edelstein, B. et al. (2007). Clinical evidence in guardianship of older adults is inadequate: Findings from a tri-state study. *The Gerontologist*, 47 (5), 604-612.

In many guardianship cases reviewed, we found written correspondence from a treating professional that was filed as evidence of incapacity. At times, the notes and letters were one to two-pages in length, and signed by family physicians or treating psychologists who were familiar with the proposed ward. In other cases, the evidence of incapacity consisted of one to two-sentences, often handwritten on note paper or a prescription pad. None of the correspondence included all six of the criteria outlined by the ABA and APA.

Filings that included excerpts of medical records as proof of incapacity typically consisted of discharge paperwork from recent hospital stays or clinic visits. These excerpts contained little more than a discharge diagnoses, and never included information detailing functional impairments, prognosis, or specific limitations of the ward that would be applicable to adjudication of incapacity.

In those cases where a report of psychological testing was filed as evidence of the proposed ward's incapacity, these test reports were usually not current and did not specifically address the issue of capacity for purposes of adult guardianship. Rather, psychological testing presented as evidence of incapacity in adult guardianship cases usually included formal psychological testing reports written in response to other referral questions, and not testing designed to assist in determining the individual's capacity for decision-making.<sup>53</sup> Taken together, the evidence of incapacity found in the files reviewed fell short of the best practices for determining capacity in guardianship proceedings.

#### **EXTENT OF GUARDIANSHIP**

A limited guardianship is the appointment of a substitute decision-maker whose powers are restricted to only those specifically enumerated by the court granting the guardianship. In contrast, a plenary guardian has all the powers available under the law. Under a limited guardianship, the guardian is given only the duties and powers that the proposed ward is incapable of exercising. A limited guardianship maximizes the autonomy of the protected person.<sup>54</sup> The Uniform Adult Guardianship and Protective Proceedings Act (UAGPPA) promotes limited guardianships.<sup>55</sup> The objective, according to UAGPPA, is to provide maximum personal freedom from authority for the ward. Over two decades ago, the ABA recommended the use of limited guardianship and other less restrictive alternatives to plenary guardianship.<sup>56</sup> National standards similarly direct probate judges to “detail the duties and powers of the guardian including limitations to the duties and powers, and the rights retained by the respondent,” specifying that “the

---

<sup>53</sup> Psychological test reports typically had referral questions suggesting they were administered in an attempt to determine eligibility for benefits such as Social Security Disability, special education services, or psychiatric treatment planning. While these may provide some evidence useful in adjudicating incapacity, a different battery of psychological instruments would comprise a psychological evaluation specifically tailored to assess capacity for decision-making in an adult guardianship case.

<sup>54</sup> Sally Balch Hurme, *Current Trends in Guardianship Reform*, 7(1) Maryland J. of Contemporary Legal Issues: Guardianship 143-189 (1995-96); Frolik, *supra* n. 1; Mary Joy Quinn, *Guardianships of Adults: Achieving Justice, Autonomy, and Safety* (Springer 2005).

<sup>55</sup> *Uniform Adult Guardianship and Protective Proceedings Act* (1997).

<sup>56</sup> American Bar Association, *Guardianship: An Agenda for Reform* (1989).

court's order should only be as intrusive of the respondent's liberties as necessary."<sup>57</sup> The National Probate Court Standards further emphasize that allowing incapacitated individuals to retain as much autonomy as possible is vital for the mental health of wards. Other scholars have echoed that limited guardianship supports an individual's mental health, while plenary guardianships may exacerbate the individual's feelings of helplessness and frustration.<sup>58</sup>

Although limited guardianships are seen as favorable when considering the benefit to the ward, an impediment to limited guardianships is the difficulty of tailoring limitations to an individual's specific incapacities.<sup>59</sup> In part, this would require detailed clinical evaluations of capacity, enumerating specific abilities and limitations of the alleged incapacitated person. No capacity evaluations in the current sample were sufficiently extensive to serve this purpose. Some argue that plenary guardianships are preferred by judges because of the legitimate pressures of the legal system.<sup>60</sup> A plenary guardianship may be seen as more efficient, saving time for judges and litigants, and costing less than a limited guardianship in which additional hearings would be necessary for the guardian to expand powers as the ward's incapacity changes.

Indiana statute allows for a guardian's powers to be limited.<sup>61</sup> A person petitioning to serve as guardian can specify limitations in the guardianship, or the protected person can petition the court to limit the guardian's authority at any time. The court is also empowered to impose limitations sua sponte. Limitations are one possible outcome upon a finding that "the welfare of an incapacitated person would be best served by limiting the scope of the guardianship."<sup>62</sup> In these instances, courts are specifically required to draft orders that "encourage development of the incapacitated person's self-improvement, self-reliance, and independence" and "contribute to the incapacitated person's living as normal a life as that person's condition and circumstances permit without psychological or physical harm to the incapacitated person." Less than 1% of the cases reviewed in our sample included limited guardianships, with plenary guardianships sought in nearly every case reviewed.

Regardless whether a guardian is given plenary or limited authority, Indiana law also distinguishes between those individuals with authority over decisions concerning the

---

<sup>57</sup> Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships, *National Probate Court Standards* (1999).

<sup>58</sup> Peggy Dervitz, Shashi Jain & Joan Kakascik, *Preference/Choice/Decision: A Model for Limited Guardianship* (Guardianship Assoc. of N.J. 2003).; Peggy Dervitz, Shashi Jain & Joan Kakascik, *Assessing Capacity for People with Developmental Disabilities: Implementing the Model for Limited Guardianship* (Guardianship Assoc. of N.J. 2004).

<sup>59</sup> Norman Fell, *Guardianship and the Elderly: Oversight Not Overlooked*, 25 U. Toledo L. Rev. 189 (1994).

<sup>60</sup> Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 Stetson L. Rev. 735 (Spring 2002).

<sup>61</sup> IC 12-3-8-8

<sup>62</sup> IC 29-3-5-3

physical person of the ward (Guardian of the Person) and those with authority over decisions concerning the ward's property and finances (Guardian of the Estate).<sup>63</sup> An individual who is appointed guardian of the person and not the estate would not have authority or responsibility for the guardianship property, defined as "the property of an incapacitated person... for which the guardian is responsible." For those instances in which the total of the protected person's property does not exceed ten thousand dollars in value, guardianship of the estate is not always necessary. As an alternative to guardianship, Indiana law permits the court to authorize financial transactions and disposition of property for individuals adjudicated incapacitated without appointing a guardian of the estate.<sup>64</sup> This would allow a court to direct an individual to make specific transfers of smaller assets and property on behalf of an incapacitated person without the necessity of filing a written, verified accounting, as required of guardians of the estate under Indiana law.<sup>65</sup> In several jurisdictions in Indiana it is not uncommon, however, for the accounting requirements to be waived. This would allow a guardian of the estate to transfer property and finances belonging to the ward without any judicial oversight, even for estates valued in excess of ten thousand dollars. In the current study, the majority of cases sampled involved individuals seeking appointment as guardian of both the person and estate (75%), with reports of guardianship assets ranging from "minimal" or "Social Security Benefits only" to estates estimated well over one million dollars, as outlined in Figure 9 and Figure 10.

---

<sup>63</sup> IC 29-3-1-6: "Guardian" means a person who is a fiduciary and is appointed by the court to be a guardian or conservator responsible as the court may direct for the person or the property of an incapacitated person...

<sup>64</sup> IC 29-3-3-2: When the entire property of an incapacitated person does not exceed the value of ten thousand dollars (\$10,000), the court may, without appointment of a guardian, giving bond, or other order of the court, authorize: (1) the deposit of the property in a depository authorized to receive fiduciary funds in the name of a suitable person designated by the court; or (2) if the property does not consist of money, the delivery of the property to a suitable person designated by the court. The person receiving the property shall hold and dispose of the property in a manner the court directs and is entitled to reasonable compensation and to reimbursement for reasonable expenses incurred in good faith on behalf of the incapacitated person and approved by the court.

<sup>65</sup> IC 29-3-9-6

Figure 10

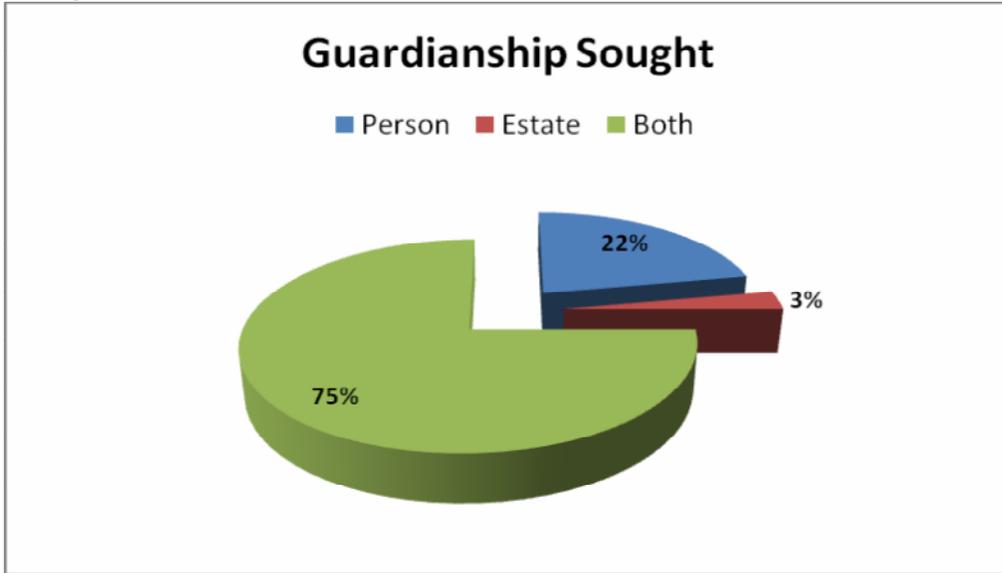
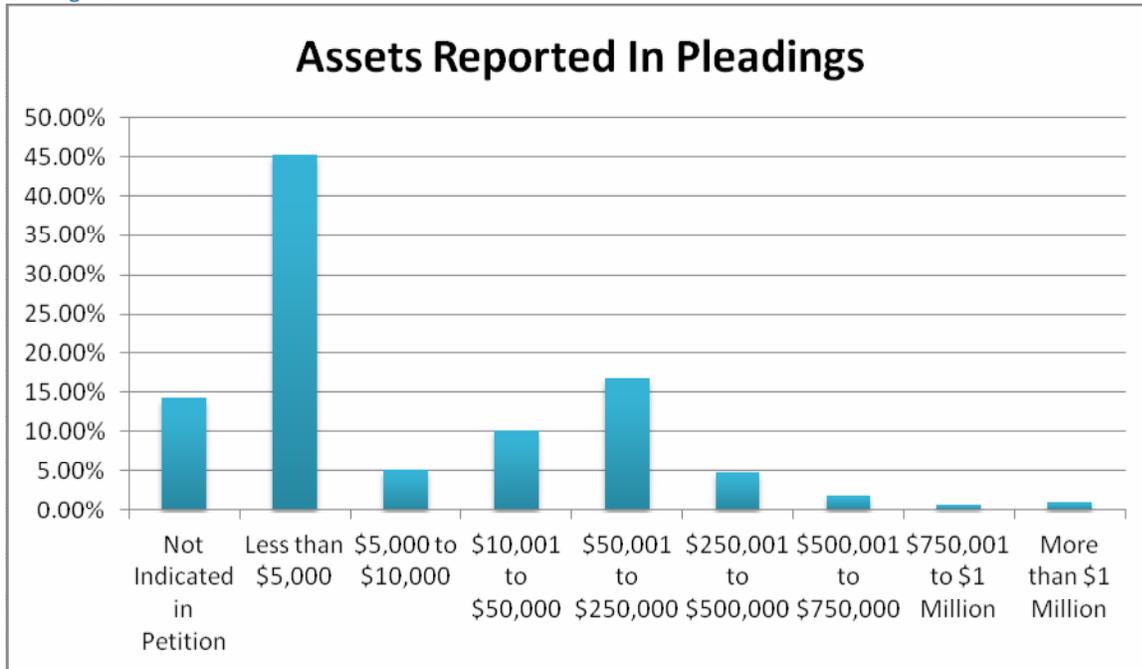


Figure 11



Although Indiana statute requires petitions for appointment of guardian to specify the approximate value and description of the property of the proposed ward, 14% of all petitions for guardianship (excluding those petitions for guardianship of the person only) in the current research made no mention of the ward’s assets or property.<sup>66</sup> In fact, a significant number of these guardianships were granted and the files lacked requisite

<sup>66</sup> IC 29-3-5-1

inventories long after the ninety-day statutory period for filing had lapsed. This suggests that in many instances, guardians are failing to inform the court of the contents and value of the ward's property subject to their control both at the time of the petition, as well as after being appointed and serving as guardian.<sup>67</sup>

### **EMERGENCY STATUS AND DURATION**

In some instances, the proposed ward may be at risk of immediate harm, or the person's property may be in danger of being wasted, misappropriated, or lost unless immediate action is taken. These urgent scenarios typically require appointment of a substitute decision-maker before a hearing on the general guardianship can be held. Indiana statute allows for the appointment of a "temporary guardian" when three criteria are met: (1) an emergency exists; (2) the welfare of the proposed ward requires immediate action; and (3) no other person has authority to act.<sup>68</sup> Temporary guardians may be appointed in an *ex parte* proceeding, and the notice provisions typically required for adult guardianships do not necessarily apply. As the title indicates, however, the duration of temporary guardianships is time-limited.

The appointment of a temporary guardian provides a useful means for making decisions in an emergency situation. At the same time, the imposition of a temporary guardianship has the potential to infringe significantly on the rights of the proposed ward with minimal due process protections.<sup>69</sup> When abused, petitions for temporary guardianship have the potential to produce significant and irreparable harm to the protected person.

In the total sample of cases reviewed, temporary guardianships were sought 29% of the time. There was variability, however, when practices in individual jurisdictions were compared. Practices in counties ranged from temporary guardianships being sought nearly 7% of the time in one jurisdiction, to 50% of the time in another county.<sup>70</sup> Figure 11 lists the proportion of cases in which temporary guardianship was initially sought, sorted by jurisdiction.

---

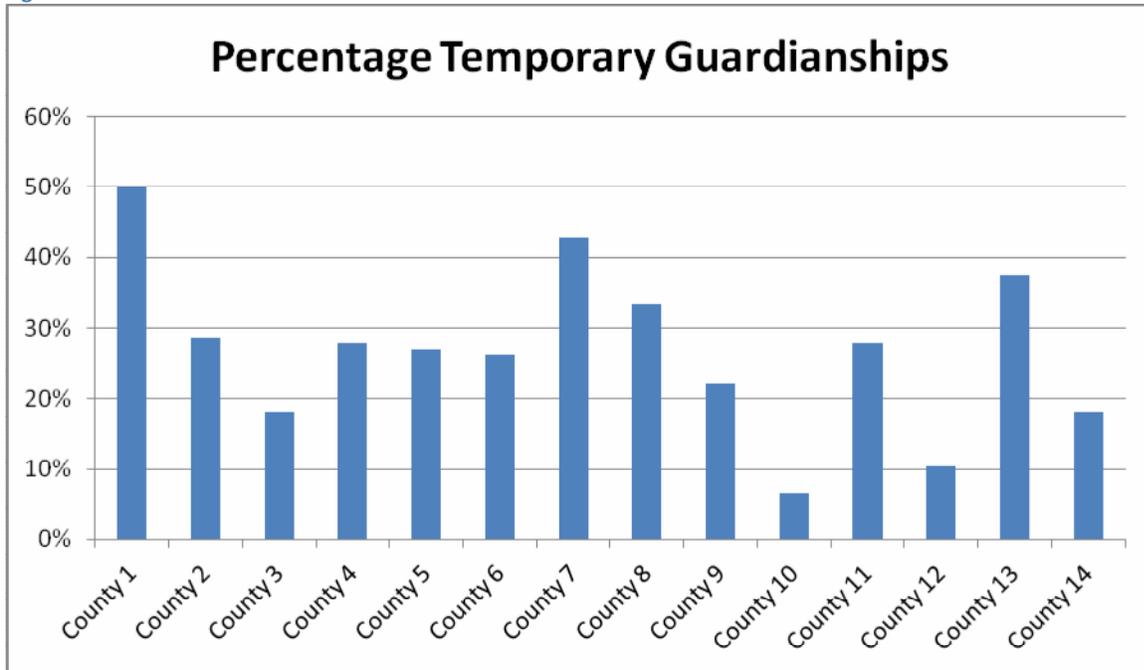
<sup>67</sup> In some cases reviewed, over two years had lapsed and the guardians never reported the value of the ward's assets to the court, neither in the petition, inventory, or bi-ennial account required under IC 29-3-9-6. While this was not a formal variable collected systematically in the current research, it was observed qualitatively in numerous instances.

<sup>68</sup> IC 29-3-3-4

<sup>69</sup> Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships, *National Probate Court Standards* (1999).

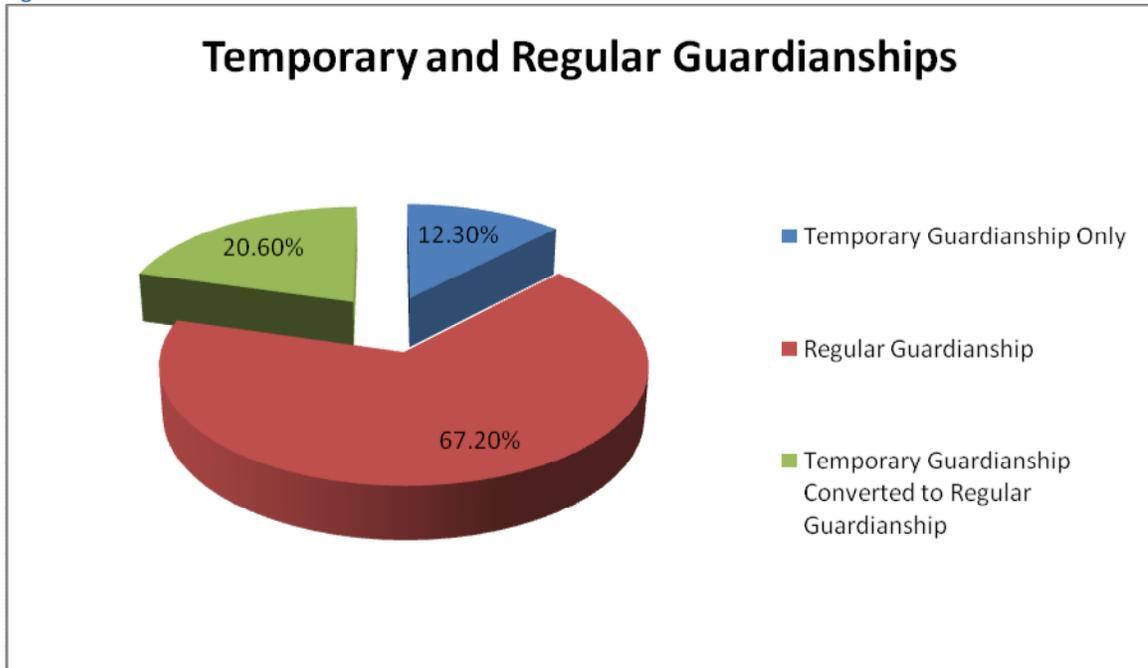
<sup>70</sup> One jurist in a county not sampled in the current study explained that he encourages attorneys to petition for temporary guardianship in nearly all adult guardianship cases. This allows an opportunity to evaluate the temporary guardian before appointing them as guardian over a longer term. When asked about the statutory requirement that "an emergency exists," he indicated that any situation where an individual is alleged to be incapacitated poses such an emergency.

Figure 12



Of the cases seeking a temporary guardianship, petitions were filed requesting to convert the temporary guardianship into a regular guardianship 62% of the time. Figure 12 lists the cases involving petitions for temporary guardianship, regular guardianship, and temporary guardianship later converted to regular guardianship. These data suggest that most non-emergency guardianships are initiated as such, and that nearly two-thirds of all temporary guardianships filed are subsequently heard as non-emergency guardianship petitions, presumably following notice provisions and allowing all interested parties to be heard in open court.

Figure 13



## CONCLUSION

A total of 1071 adult guardianship cases filed across fourteen counties in Indiana in 2008 were individually reviewed. These cases represent almost fifty percent of the total state population, and approximately forty-five percent of the population aged 65 and over. Based on available data, it is estimated that over three thousand new adult guardianship cases were filed in 2008 in Indiana. Guardianship petitions were equally distributed for male and female protected persons. A substantial proportion of adult guardianship cases involved the elderly as prospective wards, with young adults representing the next largest group.

A substantial number of proposed wards aged 18 to 25 were alleged to have cognitive or intellectual impairments. The most common incapacity alleged among the elderly was dementia. In many cases, no evidence of incapacity was filed with the court beyond the allegations in the guardianship petition. Many times, the guardianship petition was silent as to the incapacitating condition alleged. Most often, a physician's report was filed to support the prospective guardian's assertion that the proposed ward was incapacitated. Physician's reports were often incomplete and at times, provided information that failed to respond to the specific queries. Even when filled-out accurately and completely, the physician's report used in most jurisdictions across

Indiana falls short of the best practices outlined by the ABA and APA concerning capacity determinations in adult guardianship cases.

The protected persons were typically not represented by counsel in the cases sampled. Statewide, guardians *ad litem* were appointed to advocate on behalf of the prospective

wards less than half of the time. Far fewer wards have legal advocates appointed (20%) when focusing on the majority of counties in which persons appointed as guardians *ad litem* contact with the parties outside of the courtroom, and conduct full investigations prior to the guardianship hearing. Taken together, appointment of legal representation or formal advocacy by a guardian *ad litem* for the ward is not typical in Indiana, leaving proposed wards vulnerable and ill-equipped to protect their rights in the majority of adult guardianship cases.

Very few adult guardianships in Indiana are limited. Most times, plenary guardianship of both the person and estate is awarded. Persons petitioning for guardianship typically value the ward's assets as being less than \$5,000 when reporting to the court. In nearly 15% of the cases sampled, information concerning the ward's property was never provided to the court in the petition for guardianship.

Statewide, emergency guardianships are sought in less than one-third of all cases. Local practices vary, however, from county to county. Some jurisdictions rely on temporary guardianships much more frequently, in half of the cases filed. In contrast, other counties utilize temporary guardianships in slightly more than three out of every fifty cases. Temporary guardians later sought longer-term appointments in the majority of cases reviewed. This suggests that most adult guardianship cases allowed the parties notice and a hearing.

**APPENDIX A**

**STATE OF INDIANA** ) **IN THE \_\_\_\_\_ COURT**  
**COUNTY OF \_\_\_\_\_** )  
 ) **CAUSE NO. \_\_\_\_\_**  
**IN RE: THE GUARDIANSHIP OF** )  
 )  
 ) **PHYSICIAN’S REPORT**  
 )  
**\_\_\_\_\_** )  
**Protected Person** )

\_\_\_\_\_, a Physician holding an unlimited license to practice medicine in the State of Indiana, submits the following report on \_\_\_\_\_, (“Patient”), based upon examination of the Patient.

1. Set forth the dates of all examinations of the Patient within the last (1) year from the date of this report.
2. In your opinion, based upon your examination and observation of the Patient, is the Patient incapacitated? If so, describe the nature and type of incapacity.
3. In your opinion, based upon your examination and observation of the Patient, how long has the Patient been incapacitated?
4. Describe the Patient’s mental and physical condition; and, if appropriate, describe the Patient’s educational condition, adaptive behavior and social skills.
5. In your opinion, is the Patient totally or only partially incapable of making personal and financial decisions; and, if the latter, the kinds of decisions which the Patient can and cannot make. (Include the reason for this opinion.)
6. In your opinion, what is the most appropriate living arrangement for the Patient; and, if applicable, describe the most appropriate treatment or rehabilitation plan. (Include the reason for this opinion.)
7. Can the Patient appear in Court without injury to his/her health?  
 Yes  
 No

If the answer is no, explain the medical reasons for your answers.

8. Is the Patient capable of consenting to the appointment of a Guardian?  
 Yes  
 No
9. Is the nature of the Patient’s incapacity such that it prevents the Patient from making a knowing and voluntary Waiver of Notice?  
 Yes

No

10. In your opinion, is a Guardian needed to care for the Patient

Yes

No

11. If a Guardian is needed, is one needed for personal or financial need, or both?

Personal

Financial

I affirm under the penalties for perjury that the foregoing representations are true.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20 \_\_\_\_\_ .

Signed: \_\_\_\_\_

Printed Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone: \_\_\_\_\_

If the description of the Patient's mental, physical and educational condition, adaptive behavior or social skills is based on evaluations by other professional, please provide the names and addresses of all professionals who are able to provide additional evaluations. Evaluations on which the report is based should have been performed within three (3) months of the date of the filing of the Petition.

Name and addresses of the other persons who performed evaluations upon which this Report is based;

Name (s): \_\_\_\_\_

Address (s): \_\_\_\_\_

Telephone (s): \_\_\_\_\_



**GUARDIANSHIP REFORM AND  
AN AGING POPULATION**

**Written by**

**The Honorable Kevin Barton  
Johnson Superior Court 1  
2009**

## GUARDIANSHIP REFORM AND AN AGING POPULATION

*By The Honorable Kevin Barton, Johnson Superior Court I*

### **I. Demographics of Indiana Population and Portents for the Future**

The 2000 Census reported 6,080,485 residents of Indiana. Twelve and four-tenths percent (12.4%) of the population was over sixty-five (65) years of age. Individuals 65-74 years of age accounted for six and five-tenths percent (6.5%) of the population or 395,393 individuals. Individuals 75-84 years of age accounted for four and four-tenths percent (4.4%) of the population or 265,880 individuals. Individuals over age 85 years accounted for one and five-tenths (1.5%) of the population or 91,558 individuals. The median age in Indiana in 2000 was 35.2 years. In looking at the “baby boomers”, individuals born between 1946 and 1964, the 2000 census includes data for individuals 35 to 54 years age (1946 to 1965). Individuals 35 to 54 years of age constituted twenty-nine and two-tenths (29.2%) of the population or 1,777,568 individuals. Stats Indiana, United States 2000 Census.

The 2006 population estimate for Indiana is 6,313,520, which represents approximately sixty-four hundredths of a percent (0.64%) annual increase in population over the 2000 census. Stats Indiana, March 22, 2007. Population growth has slowed from the ninety-seven hundredths per cent (.97%) annual increase in population that occurred from 1990 to 2000. Stats Indiana. Population growth will continue, but with a slower rate of increase, as the state is expected to top seven million residents in 2030. How Many Hoosiers?, Indiana County Population Projections, 2005 to 2040, Indiana Business Research Center, Kelley School of Business, Indiana University. The prediction would place Indiana’s growth rate at only about five-eighths (5/8ths) of the national growth rate. See, msnbc, 8/14/08.

The Indiana Business Research Center predicts that the population over age sixty-five (65) years will increase from one-eighth of the population in 2000 to one-fifth of the population by 2040. The population over age sixty-five years by 2040 is expected to double to approximately 1.48 million people. While the population over sixty-five years is only believed to have expanded by approximately 8,000 individuals from 2000 to 2005 and will remain steady until 2010, an additional 108,000 seniors are expected from 2010 to 2015 and an additional 162,000 from 2020 to 2025. By 2030, sixty-one additional counties will join Brown County with a median population age over forty (40) years. Due to the increase in seniors, seniors will outnumber children under the age of fifteen by 2035. Currently, seniors constitute about sixty percent (60%) of the population under the age of fifteen. Working age population, ages 25 to 64 years, will decline from fifty-two percent (52%) of the statewide population in 2000 to forty-seven percent (47%) in 2040. With the exception of the nine county Indianapolis metropolitan area, working age population is expected to decline in most other areas of the state. How Many Hoosiers?, Indiana County Population Projections, 2005 to 2040, Indiana Business Research Center, Kelley School of Business, Indiana University.

While the median age of the population will be just under forty by 2040 at 39.4 years, the increase in the median age of approximately 4.2 years from 2000 to 2040 will be less than the seven year increase in the median age that occurred between 1970 and 2000. Morton J. Marcus, Perspectives on the Projections, Indiana Business Review, Summer 2003.

The future increase of senior citizens in Indiana tracks the national demographics. Nationwide, the number of citizens over age 65 is expected to increase from 35.5 million in 2000 to 69.4 million in 2030. The ratio of citizens over age 65 to the population age 20 to 64 is projected to increase from 20.6% in 2005 to 35.5% in 2030 according to the United States Census Bureau. J. Judak, Retirement Crisis: From bad to worse, MSN Money, 3/7/2008. The number of citizens over age 85 years is expected to triple by 2040 to 15 million. 2004 Report by the U.S. General Accounting Office to the Special Committee on Aging (GAO-04-655), p. 1. By 2050, the population over age 85 years is expected to be 19 million. msnbc, 8/14/08.

## **II. Statistics**

A. Number of Guardianship Cases in Indiana. 2005 case statistics show that all Indiana courts received six thousand six hundred fifty-seven (6,657) guardianships. Over the prior ten (10) years, the number of guardianships declined from a high of 7,022 in 1995 to 6,469 in 2003 before increasing in 2004 and 2005. Case Statistics, Office of State Court Administration Due to increased incapacity among seniors as opposed to the population in general, the number of guardianships should increase due to an aging population. However, the increased awareness of the availability of power of attorneys based on pre-need planning and improved information on preventive health care may diminish the increase in guardianship due to an aging population.

B. Health Issues - Nationwide, 5 million people currently have Alzheimer's disease. The number is expected to triple to 16 million by 2050 according to researchers at John Hopkins University. World's Alzheimer's cases to quadruple by 2050, MSNBC.com. The increase is associated with the aging of the population. One report estimates that one-eighth (1/8th) of the population over age 65 years has Alzheimer's disease, while one-half of the population over age 85 has the disease. N. Karp and E. Wood, Guarding the Guardians: Promising Practices for Court Monitoring, AARP Public Policy Institute and ABA Commission on Law and Aging (2007). The U.S. General Accounting Office estimates a lower percentage with 6% of the population over age 65 years having the disease and with one-quarter of the population over age 85 years having the disease. 2004 Report by the U.S. General Accounting Office to the Special Committee on Aging (GAO-04-655), p. 1, 4.

C. Poverty - As of 2002, 21% of the citizens over age 65 years in the United

States were living in poverty and an additional 10% were classified as low income. Assuming the same percentage of senior citizens living in poverty or low income, the future increase of the senior population will result in the number of low-income or poor elderly in the United States increasing from 13.6 million in 2002 to over 27 million in 2030. P. 13, *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors With Reduced Capacity*, Senator Gordon Smith and Senator Herb Kohl, United States Senate Special Committee on Aging (2007).

D. Diversity - The America of the future will be more diverse. Non-Hispanic whites will be a minority by 2042, which is eight (8) years sooner than the last estimate made in 2004. While the black population will only increase slightly as a percentage of the total population, the number of people of Hispanic origin will double from 15% of the population currently to 30% of the population in 2050 and the number of Asian origin will increase from 5% currently to 9% in 2050. The population of American will increase from 305 million currently to 400 million in 2039 and 439 million in 2050. msnbc, 8/14/08.

### **III. Number of Guardianships**

The population of individuals more likely to be susceptible to infirmity is expanding. As noted, the number of Alzheimer's cases is expected to triple in the United States. The number individuals over age 85 years will double in the United States from 4.7 million in 2003 to 9.6 million in 2030. E. Wood, *State-Level Adult Guardianship Data: An Exploratory Survey*, American Bar Association, Commission on Law and Aging, p. 9 (2006). The population over age 85 years will triple by 2040. msnbc, 8/14/08. The population over age 85 years is fifty percent (50%) likely to suffer from Alzheimer's disease as opposed to one-eighth (1/8th) of the population over age 65 years generally. P. 14, N. Karp and E. Wood, *Guarding the Guardians: Promising Practices for Court Monitoring*, AARP Public Policy Institute and ABA Commission on Law and Aging (2007). Incidents of disability among younger individuals, including mental retardation, developmental disabilities and mental illness, are also increasing. Approximately 9.2 million Americans are estimated to have developmental disabilities and mental retardation. As medical advances lengthen the life span of individuals with such disabilities, the total number of individuals with developmental disabilities and mental retardation is expected to increase. Id. 1.4 million Americans sustain a traumatic brain injury each year. Id.

However, the AARP reports that the prevalence of disability in older America is declining. AARP, *Reimaging America: How America Can Grow Older and Prosper*. The number of nursing home residents declined 4.6% from 1998 to 2004. A national nursing home population of 1.4 million in 2004 was only two-thirds of the 2.1 million that a U.S. Senate Special Committee on Aging had forecast in 1991. Id. The need for guardianship will also be affected by the "non-probate movement". Attorneys and financial professionals are more apt to assist clients in planning for disability by including

a power of attorney and an appointment of a health care representative with their legal documents.

Accordingly, while the expansion of the elderly population will make it more than likely that the number of guardianships will increase, the rate of increase may be offset by the countervailing trends of improving health and increased use of alternatives to guardianship.

#### **IV. Guardianship Reform**

The aging of the population and the possible increase in the number of guardianships comes at a time when guardianship has been criticized. Increasingly, guardianship is perceived as failing to protect incapacitated individuals, although an accurate assessment is hampered due to the lack of data. E. Wood, *State-Level Adult Guardianship Data: An Exploratory Survey*, American Bar Association, Commission on Law and Aging, p. 9 (2006). If inadequately monitored, guardianship may actually contribute to elder abuse. P. 4, *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors With Reduced Capacity*, Senator Gordon Smith and Senator Herb Kohl, United States Senate Special Committee on Aging (2007).

A stinging indictment of the guardianship system was issued by the 1987 Associated Press report, “Guardians of the Elderly: An Ailing System.” The report found a “dangerously burdened and troubled system that regularly puts elderly lives in the hands of others with little or no evidence of necessity, and then fails to guard against abuse, theft, and neglect.” Specific concerns were identified as a lack of resources to provide for adequate monitoring of guardians, lack of training of guardians, lack of awareness of alternatives to guardianship and deprivation of due process. P. 1, *National Probate Court Standards*, Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships.

While data is lacking, the 1987 Associated Press investigation provided some insight into guardianships. It estimated the total number of adult guardianships at between 300,000 and 400,000. Two-thirds of the incapacitated adults for whom a guardianship was established were female. The average age of incapacitated persons in adult guardianships was estimated at seventy-nine (79) years. A third of adult incapacitated people were moved during the guardianship, and sixty-four percent (64%) were in a nursing home at some time during the guardianship. In 44% of the cases surveyed, the incapacitated person was not represented by an attorney. In 49% of the cases, the incapacitated person had not attended a hearing. Accountings were missing in 48% of the files. 30% of the files lacked any medical evidence. A quarter of the files gave no indication that a hearing had been held. E. Wood, *State-Level Adult Guardianship Data: An Exploratory Survey*, American Bar Association, Commission on Law and Aging, p. 9 (2006). Increasingly, the media is holding courts accountable for failing to monitor the actions of guardians. N. Karp and E. Wood, *Guardianship Monitoring: A National Survey of Court Practices* p. 6 (2006).

In response to the call for reform of guardianship law, various studies have been performed and recommendations made. Common problems with administration of guardianships found in the reports include the following: inadequate assessment to determine decision-making capacity, inadequate due process protection, inadequate training of guardians, inadequate review of guardian reports, inadequate monitoring of guardianships and lack of awareness of alternatives to guardianship. Final Report, Illinois Guardianship Reform Project (2001), p.2. A review of some of the recommendations follows:

## **A. National Probate Court Standards**

In response to the criticism of guardianships and an assessment that improvement was needed from state representatives of the National College of Probate Judges, the National College of Probate Judges and the National Center for State Courts created the Commission on National Probate Court Standards. Following two years of work, the fifteen member Commission developed the National Probate Court Standards. The Commission developed a detailed list of standards for probate courts. Most of the standards developed reflect sound judicial practice and are not set forth in detail. Other standards are noteworthy due to deviation from existing law or practice. Noteworthy among the standards are the following:

Standard 2.4.3 - Technology - Courts are called upon to assess new technology and to determine if new technologies can assist in the performance of work more effectively, efficiently and economically.

Standard 2.4.4 - Collection of Caseload Information - Courts should collect caseload information on the volume, nature and disposition of cases.

Standard 2.5.1 - Mediation - Courts should encourage mediation. The standard notes the anticipated reduced cost of mediation as opposed to a trial, and the benefit to parties from a solution that they have carefully crafted on their own. Areas that are believed to be particularly susceptible to mediation are will contests, creditor claims and individual treatment or habitation plans in guardianship and civil commitment proceedings. Mediation can help craft limited guardianships and determine which family members should receive fiduciary responsibilities. However, mediation would not resolve the initial determination of incapacity.

Standard 2.5.2 - Arbitration - For the same reasons as in mediation, courts should encourage arbitration and enforce arbitration provisions in wills.

Standard 3.1.1 - Notice - Timely and reasonable notice is required that is properly tailored to the situation. Of note, the standard directs that notice be given in language other than English if appropriate. The standard provides for notice by mail or personal delivery a reasonable time prior to hearing.

Standard 3.3.2 - Screening - The court should establish a process for screening guardianship petitions. Inappropriate petitions should be diverted. Less intrusive alternatives should be encouraged where appropriate in lieu of guardianship.

Standard 3.3.3 - Early Control and Expeditious Processing - It is vital in guardianship cases that the Court manages the docket and not the parties.

Standard 3.3.4 - Court Visitor - The Court should appoint a court appointee to visit with the respondent in a guardianship proceeding. The court visitor should explain the respondent's rights, investigate the facts of the petition and explain the circumstances and consequences of the action. The court visitor should investigate further court appointments if required and file a written report with the court. The court visitor acts as the eyes and ears of the court in making an independent assessment of the necessity of the guardianship. The court visitor fulfills a role different from court appointed counsel.

Standard 3.3.5 - Appointment of Counsel - Counsel should be appointed for the respondent when requested by an unrepresented respondent, recommended by the court visitor, determined to be advisable by the court or required by law. Counsel service solely as an advocate for the respondent. If it is determined that a petition has not been brought in good faith, the fee of a court appointed counsel may be assessed against the petitioner.

Standard 3.3.6 - Emergency Appointment of a Temporary Guardian - Ex parte appointment of a temporary guardian should occur only upon the showing of an emergency, as part of a petition for permanent guardianship, the petition for permanent guardianship is set for hearing on an expedited basis and notice of temporary appointment is promptly provided to the respondent. Upon request, a respondent should be entitled to a prompt hearing to revoke the temporary guardianship. Protective orders should be considered and used in lieu of temporary guardianship when appropriate. A temporary guardianship should be carefully limited. A temporary guardianship should not extend over thirty (30) days. Courts must be sensitive to the possible due process violations that may occur in the appointment and actions of a temporary guardian.

Standard 3.3.7 - Notice - Notice to the respondent should be served by a court officer in plain clothes who is trained on how to interact with elderly and disabled individuals. The notice should be subsequently explained by the court visitor.

Standard 3.3.8 - Hearing - The standard stresses the need for a prompt hearing. The respondent should have the right to attend the hearing. The Court should consider moving the hearing to a location more convenient for the respondent if required such as a hospital conference room.

Standard 3.3.9 - Determination of Incapacity - Courts should avail themselves to experts in evaluating the respondent and determining if the respondent is incapacitated. Courts should provide forms that call for the expert to assess the functional limitations of the respondent. The factors to be assessed should include the following: "the respondent's diagnosis, the respondent's limitations and prognoses, current condition, and level of functioning, recommendations regarding the degree of personal care the respondent can manage alone or manage alone with some assistance and decisions requiring supervision of a guardian, the respondent's current incapacity and how it affects his or her ability to provide for personal needs, and whether current medication affects the respondent's demeanor or ability to participate in proceedings." By prescribing content that the report should address, the report will avoid the typical conclusory opinions rendered by medical professionals.

Standard 3.3.10 - Less Intrusive Alternatives - Prior to the appointment of a guardian, a court should always consider less intrusive alternatives. Courts should always consider limited guardianships. Guardianships should be limited to the particular needs,

functional capacities and limitations of the respondent. Courts should work with social service agencies to find alternatives to guardianships and to assist the respondent in limited guardianships. The standard notes that loss of ability to control events is scientifically shown to cause physical or emotional illness, and hence, the respondent should be afforded the maximum degree of control of decisions. Courts should be guided by the wishes of the respondent, or if not available, courts should operate under a substituted judgment standard of what the respondent would have chosen if he or she had the current capacity to choose.

Standard 3.3.12 - Orders - The Order should be as specific as possible. In limited guardianships, the Order should specifically enumerate duties and powers. The court should consider that certain actions by the Guardian may be irreversible or result in permanent injury or harm (i.e. abortion, organ donation, sterilization, civil commitment or termination of parental rights). The court may wish to limit the Guardian's ability to make such decisions without specific court approval. Prior court approval should be obtained prior to removal of the respondent from the jurisdiction of the court. The Order should direct the Guardian to involve the respondent to the greatest extent possible in decisions affecting the respondent. The Order should direct the Guardian to follow the respondent's known preferences and values, and the Guardian should assist the respondent in regaining his or her legal capacity.

Standard 3.3.13 - The court should develop and implement programs to train guardians. Training material, including model handbooks and videotapes, should be available and used to train guardians. Resource material in languages other than English should also be available as necessary. The standard recommends that an orientation program be available, self study material be in the court's library or available from the clerk and that the court supply an informational brochure to the guardian upon appointment. Guardian acknowledgment of the review of informational material or video should be required.

Standard 3.3.14 - Reports by the Guardian - The Guardian should file a guardianship plan and a report on the respondent's condition. Annual updates should be required. The Guardian should be required to provide the Court with advance notice if the respondent will be away from the Court's jurisdiction for more than thirty (30) days as well as any change in the respondent's residence. Court should develop reports that are informative and which are simple enough so that Guardians can supply the requested information without need of counsel.

Standard 3.3.15- Monitoring of the Guardian. Court's should promptly review the Guardian's reports. Procedures should be in place to determine if a Guardian has failed to file a report. The Guardian should be provided with prompt notice of any failure to file a report. If a report is not filed, or if a report causes a concern, the Court should be prepared to promptly take further steps to investigate. The Court should consider requiring the Guardian to distribute the report to interested parties with certification filed with the Court.

Standard 3.3.16 - Reevaluation of Necessity for Guardianship - The Court should have procedures in place for the periodic review of the necessity of the guardianship. A request for termination of the guardianship should be promptly addressed. The Court notes that there is a difference of opinion on the burden of proof for termination of the guardianship, whether trial de novo is required and whether evidence from past years

should be considered. The court visitor should check on the respondent periodically. The need for the guardianship and whether less intrusive options are available should always be considered.

Conservator - The National Probate Court Standards uses the term Conservator to describe a Guardian of the Estate and restates the standards for conservators as established for guardians. This report does not repeat the Probate Court Standards except as to financial functions subject to limitation in limited guardianship.

Standard 3.4.9 - Determination of Incapacity - With regard to financial affairs, the independent assessment should include recommendations “regarding the degree of financial management the respondent can manage alone or manage alone with some assistance and financial decisions requiring supervision of a conservator, the respondent’s current incapacity and how it affects his or her ability to provide for financial needs, and whether current medication affects the respondent’s demeanor or ability to participate in proceedings.”

Standard 3.5 - Interstate Guardianships - Courts need to be aware of multi-state contacts. In situations involving multiple jurisdictions, Courts should communicate and cooperate with one another. If the incapacitated person is transferred to another jurisdiction, provisions need to be made to finalize and to terminate the guardianship in the jurisdiction from which the incapacitated person is being moved and to initiate guardianship in the receiving jurisdiction. The court in the receiving jurisdiction should initiate review hearings after the arrival of the incapacitated person.

## **B. AARP Public Policy Institute and ABA Commission on Law and Aging**

A critique of the guardianship system prepared by Naomi Karp of the AARP Public Policy Institute and Erica Wood of the ABA Commission on Law and Aging focuses on the following factors:

A. Reporting Requirements - A 1991 American Bar Association study, the Uniform Guardianship and Protective Proceedings Act and the Second National Guardianship Conference (the 2001 Wingspan Conference) all recommend annual reports and accounts. While the majority of states require annual reports and account, the 1991 ABA study found compliance with the annual reporting requirements to be lax.

B. Form of Status Report - The 1991 ABA study recommended that status reports contain narrative responses so as to provide the reviewer with sufficient information to assess the incapacitated person’s circumstances, the care being provided and the need for continued guardianship.

C. Guardianship Plan - A guardianship plan emerged from a 1979 American Bar Association model guardianship statute. While only six states require guardianship plans by statute, the concept has been endorsed by every major subsequent set of guardianship recommendations.

D. Guardianship Training - Generally, courts do not provide assistance to guardians in carrying out their duties. Due to the vast array of new areas in which a guardian is expected to possess expertise, including housing, long term care, medical care, psychological assessments and accountings, the National Probate Court Standards recommend that probate courts development and implement programs for the training of

guardians. Only a few states have enacted mandatory training of guardians. A 2005 AARP survey found that Court provided instructions or manuals were the most common form of assistance provided by courts. Respondents also noted court sponsored training sessions and required videos presentations.

E. Assistance with Reports and Accounts - Courts can also make clear to guardians their reporting responsibility by specifically setting forth the reporting requirements in the initial guardianship order and by making the forms of report and account readily available to guardians.

F. Review of Need For Continuation of Guardianship - Under National Probate Court standards, probate courts should continue periodic review of the necessity for the guardianship. Currently, twenty-nine states require or permit court review of continuing need. However, a 2005 AARP survey found that court's review of continuation of guardianship tended to be episodic as opposed to periodic.

G. Verification and Investigation - A 1988 interdisciplinary guardianship symposium convened by the American Bar Association (Wingspread conference) and the 1991 ABA study urged courts to use volunteers, review boards and investigators to verify the contents of reports and the status of the incapacitated person. The 2005 AARP survey reports that over a third of the respondents are unaware of any court appointed person to verify information.

H. Technology - Generally, courts have been slow to implement new technologies into guardianship practice. The 2005 AARP report found that only a small percentage of the individuals responding to the AARP survey report that information to guardians is available electronically, accounts could be provided electronically or that deadlines and status of cases could be monitored electronically.

N. Karp and E. Wood, Guardianship Monitoring: A National Survey of Court Practices (2006).

### **C. United States Senate Special Committee on Aging**

A report entitled Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors With Reduced Capacity was issue in December of 2007 by Senator Gordon Smith and Senator Herb Kohl of the United States Senate Special Committee on Aging. The report sets forth the following observations concerning state guardianship law as applied in the United States.

A. Due Process Violations. Too often guardianships are established on the basis of an emergency appointment of a guardian and with disregard to the due process rights of the alleged incapacitated person.

B. Capacity and Guardianship - Guardianship proceedings frequently fail to adequately assess residual functional capacity of the incapacitated person and to reserve to the incapacitated person self determination on those matters that the incapacitated person may still exercise. Typically, this results from a failure to have an adequate objective assessment performed of the incapacitated person.

C. Lack or shortage of public guardians - While noting the existence of public guardians in most states, the report concluded that public guardians were inadequately meeting the needs of an expanding number of incapacitated

individuals. As a result of the shortage of public guardians, incapacitated individuals were subject to neglect, abuse and exploitation.

D. Inadequate supervision - As a result of episodic reports of inadequate court supervision of guardians, the report notes a concern as to adequate court supervision of guardians. However, due to the lack of data on guardianship, it is unknown if the episodic reports of inadequate court supervision are typical or atypical of general court supervision of guardians.

E. Failure to use technology - Premised upon the belief that technology would improve court supervision of guardians by facilitating the filing of reports and accounting and permitting greater efficiency in review of reports and accountings, the report notes the lack of utilization of technology in state courts to facilitate guardian's reports and accounts.

F. Federal and State Cooperation - The report noted that federal programs operated by the Social Security Administration and the Department of Veteran Affairs and guardianship administered under state law operate independently of each other. Accordingly, fiduciary misconduct in a state administered guardianship may not become known to the appropriate federal agency, and vice versa.

G. Improvement in Guardianship Practice - The federal report noted the recommendations made by two symposia convened by the ABA's Commission on Legal Problems of the Elderly and the Commission on the Mentally Disabled. The first symposium held in 1988 is commonly known by the conference site name as the Wingspread Conference. The second symposium held in 2001 is known as the Wingspan Conference. This report will address the conference results separately. The federal report in general noted the recommendations made by the Wingspan and Wingspread Conferences for education and training of those involved in the guardianship process, the need for additional research and funding for reform.

H. Reform of State Laws Based Upon Amendment to Uniform Act - The federal report noted the 1997 amendment of the Uniform Guardianship and Protective Proceedings Act by the National Conference of Commissioners on Uniform State Laws. The 1997 amendments address an emphasis on limited guardianship, consultation between the guardians and incapacitated person if feasible, use of less restrictive alternatives to guardianship if the incapacitated person retains functional capacity, development of more specific steps before establishment of guardianship, use of a court appointed visitor to investigate the averments of the petition, to make arrangements for representation by counsel and to determine need for professional assessment of functional capacity, and on monitoring guardian's performance.

I. Professional Guardians - The report notes an increase in professional guardians and a need for criteria for certification of professional guardians.

J. Mediation - The report refers to a reform initiative by the Center for Social Gerontology for greater use of mediation. The Center's recommendation to increase the use of mediation is based upon the following bases: 1). Most guardianship disputes are family based, and 2). Use of adversarial based

procedure in guardianship exacerbates family disputes. According to the Center's studies, mediation helps to resolve three-fourths of the disputes in guardianships.

K. Jurisdictional Issues - Based upon increased multi-state contacts by an aging population, jurisdictional issues in guardianship proceedings are becoming more prevalent. In 2007, the National Conference of Commissioners on Uniform State Laws approved the final draft of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act to address the jurisdictional issues when multi-state contacts arise. The report further notes the potential for multi-national contacts in dealing with the alleged incapacitated person. The report recommended that the United States approve the 1999 Hague Convention on the International Protection of Adults.

L. Lack of Data - The report noted the virtual absence of national data on guardianships. Increased data collection was determined to be essential for understanding how guardianships are functioning and the development of new models for guardianship.

Recommendations While noting substantial progress in guardianship reform in the last twenty years, the federal report contained recommendations for state improvement of guardianships. The recommendations bear setting forth in full:

“However, much work remains to ensure that the growing numbers of incapacitated seniors are care for appropriately by competent, trustworthy surrogate decision makes - whether these be family members, friends or other agents chosen (by) the elderly to act on their behalf, or guardians appointed by the courts. Although guardianship is an important tool for protecting the safety and property of incapacitated seniors, it is imperative that it be the option of last resort - used only when other measures do not adequately meet a senior's needs - because it strips the elderly of fundamental rights, drains the resources of potential wards and public programs that serve as guardians for the indigent, and is time-consuming and expensive for the courts. When appropriate, priority should be given to use of less restrictive and less costly alternatives to guardianship. And when guardianship is imposed, court orders should be tailored to the specific level of capacity retained by the ward, thereby protecting right of self-determination. Courts also should recognize that incapacity is not always permanent; therefore, orders should contain provisions for re-evaluating wards and more easily suspending the guardianship if it no longer is necessary. Finally, courts should closely monitor and hold accountable guardians for the care they provide and quickly remove incompetent and/or malfeasant guardians. To adequately and efficiently monitor guardianships, a concerted effort must be made to electronically collect and review case data.

It will take collaboration by local and state courts, agencies and governments, along with leadership from the federal government, to achieve these objectives. At the local and state levels:

1. Courts should strive to minimize the use of full guardianship.
2. Courts should use mediation, when possible and appropriate, to help divert

guardianship cases to alternative surrogate decisions making measures and to resolve disagreements between family members of incapacitated seniors that otherwise lead to the appointment of independent parties or public entities as guardians.

3. All states should require use of a functional definition of capacity in guardianship proceedings.
4. All states should adopt the NCCUSL Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.
5. The Conference of State Supreme Court Justices should take a more active role in addressing guardianship issues; for example, by encouraging states to invest in systematic collection of guardianship case data by the courts, as well as providing additional leadership in improving this system; and
6. To avoid unnecessary guardianship, states should encourage their residents to plan ahead, anticipating possible incapacity in old age by, for example, choosing agents to exercise power of attorney on their behalf.

Strengthening and correcting deficiencies in the guardianship system also calls for federal leadership. To accomplish this:

1. Congress should pass federal elder abuse prevention legislation, which should help deter mistreatment of incapacitated elderly by their guardians.
2. Congress should mandate collection of data on guardianship cases by the states.
3. The Administration on Aging should conduct a survey of a representative sample of counties, to generate nationwide estimates of basic characteristics and outcomes of guardianship cases and encourage collection of data by states.
4. The Administration on Aging also should encourage development of local data systems on guardianship cases by supporting research to identify and publicize successful systems already in place and by hosting conferences to disseminate information on how to develop such systems.
5. The Social Security Administration should implement GAO's recommendations regarding coordination with the courts on guardianship cases and determine what changes are needed to the Privacy Act, other federal laws and regulations that would allow the agency to share information, such as a ward's location with the courts, and GAO should inventory the recipients and objectives of all federal funding directed at elder abuse, to assist Congress in ensuring federal funding is directed to where it would have the greatest impact on court diversion and oversight of guardianship for the elderly."

Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors With Reduced Capacity, Senator Gordon Smith and Senator Herb Kohl, United States Senate Special Committee on Aging (2007).

## **D. Wingspan Conference**

The Second National Guardianship Conference, which is commonly known as the Wingspan Conference, was held in 2001. The conference issued its report which set forth sixty-eight recommendations. The recommendations are summarized as follows:

### **I. Overview**

#### **A. Changes in Statute or Regulation**

1. Procedures need to be in place for resolving inter-state jurisdictional disputes in guardianship proceedings.
2. A person's capacity be determined by functional and multi-disciplinary assessment. The terms "incapacitated" or "incompetent" are rejected in favor of "diminished capacity."
3. Payment for a person's capacity assessment be covered by Medicare and Medicaid.

#### **B. Changes in Practice Precepts or Guidelines**

4. A uniform data collection system be developed and funded.
5. Improved dialogue between legal and medical professions regarding capacity and guardianship issues generally.
6. State and local jurisdictions have an interdisciplinary entity on guardianship matters.

#### **C. Recommendation for Education, Research and Funding**

7. Develop and disseminate information on funding guardianship initiatives.
8. Funding for multi-disciplinary assessment should be developed.
9. Improved training and assistance to guardians should be implemented.
10. Mandatory education for judges hearing guardianship cases, with special emphasis on general jurisdiction judges.
11. Use of the internet and technology to educate those involved in guardianships
12. Multi-disciplinary tools be developed and used in educating those involved in guardianships
13. Conduct research on the affect of guardianship on individuals with diminished capacity
14. Conduct studies if specialized statutes should be developed for individuals with developmental disabilities.
15. Leadership in guardianship reform should be provided by the National Guardianship Network.
16. Research on guardianship issues be funded by the National Institute on Aging.

### **II. Diversion and Mediation**

#### **A. Changes in Statute and Regulation**

17. States adopt statutes requiring that agents operating under durable power of attorney maintain fiduciary standards.
18. Statutes give deference in appointment of a guardian to an individual

named in a durable power of attorney, advanced directive or other writing.

19. Medical consent statutes be adopted by the states.

20. Statutes require that guardianship petitions contain a review of alternatives to guardianship and an explanation as to why no alternatives are appropriate.

#### B. Changes in Practice Precepts or Guidelines

21. Practice precepts or ethical rules require that attorneys meet with the principal as opposed to the prospective agent in drafting powers of attorney.

22. Standards and training for mediation in guardianship related matters be developed.

23. A multi-disciplinary diversion program be developed to avoid guardianship.

#### C. Recommendations for Education and Advocacy

24. Measures should be implemented to improve awareness of the risks and benefits of guardianship, alternatives to guardianship and use of mediation.

#### D. Recommendations for Further Study

25. Information for funding medication be developed and disseminated.

26. Research be conducted on abuse of powers of attorney and trusts and on statutory options to permit review of the actions of an agent or trustee.

### III. Due Process

#### A. Changes in Statute and Regulation

27. Respondents have the mandatory right to appear and be heard, which may be waived.

28. Counsel be appointed for the respondent. Counsel shall act as an attorney as opposed to a guardian ad litem.

29. Emphasis on the role of counsel as zealous advocate.

30. The pre-hearing process include a visit by a court investigator or visitor to identify the respondent's wants, needs and values.

31. Guardianship proceedings be conducted by courts with plenary powers as opposed to non-judges.

32. The term "guardian ad litem" be replaced by "investigator" or "visitor" so as to avoid misstating the individual's role and function.

33. The respondent should have the following rights:

A. Right to a closed hearing in determining capacity;

B. Right to medical functional evaluations by a medical professional other than the respondent's treating physicians;

C. Right to have the privilege of the respondent's treating Physician recognized;

D. Right to have medical records sealed at the end of the proceeding.

34. Emergency appointment of guardians be subject to the following limitations:

A. Actual notice to respondent prior to hearing;

- B. Mandatory appointment of counsel;
  - C. Establishment of the emergency;
  - D. Prompt conduct of the hearing on permanent guardianship; and
  - E. Limitation of the emergency powers to only those necessary.
35. Emergency or temporary guardianship be limited to the emergency, and terminated after the emergency has passed.
  36. Special procedures should exist for single transactions.
  37. Specific court authority is required before a guardian can consent to civil commitment, electric shock treatment or dissolution of marriage.
  38. Statutes be enacted and forms developed to encourage entry of limited guardianship orders.
  39. Proof of the necessity of plenary guardianship over limited guardianship be required.

B. Changes in Practice Precepts or Guidelines

40. Adequate funding be provided for court investigation at the beginning of a guardianship proceeding as well as monitoring during the pendency of the guardianship.
41. A hearing be held promptly after service upon a respondent.
42. The guardian use a substituted judgment standard in terms of the decisions made for an individual with diminished capacity.
43. The guardian selected be in the best interest of the person with diminished capacity.

IV. Agency Guardianship and Guardianship Standards

A. Changes in Statute or Regulation

44. Public guardianship services be provided by statute when other qualified fiduciaries are not available.
45. Minimum standards of practice for guardians be adopted based upon the National Guardianship Association Standards of Practice.
46. Professional guardians should be licensed. Professional guardians should possess the necessary skills and held to professional standards and ethics.

B. Changes in Practice Precepts or Guidelines

47. Services, including housing, medical care and social services, should not be provided by the guardian unless authorized by the court and with appropriate monitoring.

C. Recommendations for Education and Advocacy

48. Education and training be included in the public guardianship function.

D. Recommendation for Further Study

49. Information on public and private guardianship services and funding be developed and disseminated by the National Guardianship Network.
50. Successful professional guardianship agencies be studied to identify features that could be used in other programs.

V. Monitoring and Accountability

A. Changes in Statute or Regulations

51. Annual reports of the person and accounts of the estate be required,

and that the report and account be audited frequently.

52. The Court require the following:

A. A functional assessment of the respondent;

B. A limited guardianship should be used based upon the functional assessment;

C. An annual plan should be developed based upon the functional assessment;

D. The annual report should address how the plan is being fulfilled or how it should be modified;

E. The annual report should include reports required by other agencies, including the Social Security Administration and Department of Veteran Affairs.

B. Changes in Practice Precepts or Guidelines

53. States develop data systems to insure that plans and reports are filed, and that the privacy of such information is preserved.

54. Primary responsibility for monitoring is with the Courts.

55. Monitoring is performed in all cases regardless of the guardian.

56. Guardianship be handled by judges qualified to hear guardianship matters by training or experience.

C. Recommendations for Education and Advocacy

57. The National Guardianship Network develop awareness of the importance of guardianship monitoring and the need to fund monitoring.

D. Recommendations for Further Study

58. Research be conducted on whether courts should delegate or contract monitoring to other public or private agencies, and if delegated, the extent of the retained oversight responsibility.

VI. Lawyers As Fiduciaries or Counsel to Fiduciaries

A. Changes in Statute or Regulation

59. ABA Ethics 2000 be adopted by the American Bar Association and the states. ABA Ethics 2000 provides greater flexibility to the attorney representing a person with diminished capacity to take protective action.

60. Bonding be required of all guardians, including attorneys. Attorneys should also maintain professional liability insurance.

61. Instances of neglect, abuse or exploitation known to an attorney should be subject to disclosure to the extent necessary to protect the person with diminished capacity.

B. Changes in Practice Precepts or Guidelines

62. An attorney representing a petitioner should not be appointed the respondent's counsel, guardian ad litem or guardian except in exigent or extraordinary circumstances or in instances of informed consent based on retained functional capacity.

63. The attorney for a person with diminished capacity not represent the petitioner.

64. An attorney serving as both attorney and fiduciary insure that fees are

differentiated, reasonable and subject to court approval.

65. Attorneys serving as guardians follow the National Guardianship Association standards in the absence of other mandatory standards of conduct.

66. When an attorney represents a fiduciary, the attorney should insure the fiduciary understands his or her responsibilities and standards of conduct, based upon the National Guardianship Association standards in the absence of any other standards.

67. Attorneys be aware of responsibilities in performing estate planning functions.

C. Recommendations for Further Study.

68. Further study be performed as to the duties of an attorney for the fiduciary to the person with diminished capacity in instances of fiduciary actions that result in a reduction of the value of the estate.

Wingspan - The Second National Guardianship Conference Recommendations, Vol. XXXI, Stetson Law Review, No. 3, Spring, 2002.

**E. Illinois Guardianship Reform Project**

Following focus group meetings and public hearings, a seventeen member task force and senior review board proposed several recommendations for the reform of Illinois Guardianship law. The Report noted that “Illinois has many skilled and dedicated guardians as well as vigilant and resourceful judges. Unfortunately, often due to a lack of funding and other resources, the guardianship systems in many states, including Illinois, do not always accomplish the difficult tasks set for them. The design of the Guardianship Reform Project was meant to take advantage of a wide range of expertise in Illinois and from that to build a consensus for recommending improvements in the guardianship system.” Final Report, Illinois Guardianship Reform Project (2001), p. 9. The recommendations include:

A. Assessment - The task force noted a need to obtain better assessments of a respondent’s decision making ability for purpose of determination of incapacity and to limit the guardianship only to the extent necessary based on the respondent’s needs. The report recommended expansion of the role of the guardian ad litem to provide more detailed information on the advisability of guardianship. In addition, the report suggested improved reporting forms for medical opinion and guardian ad litem reports so as to provide more detailed information to the court. Final Report, Illinois Guardianship Reform Project (2001), p. 3. The report noted a need to codify a clear and convincing standard of proof for determination of incapacity. Limited guardianship should be encouraged. The report encourage modifying the term used to identify an individual under guardianship, “disabled” in Illinois, to the less judgmental term of “person in need of a guardian”. The term “guardian ad litem” should be changed to court investigator to avoid misconstruing the person’s responsibilities based upon the role of a guardian ad litem in civil litigation. *Id.* at 25-26.

B. Monitoring - The task force noted a need for improved monitoring so as to insure that individuals continue to receive services, abuse and neglect are not occurring and the guardianship order continues to be appropriate. The report included a recommendation for a demonstration project to assess the merits of a statewide monitoring system, require a guardian to prepare and to submit a guardianship plan, develop and use a standardized guardian report form and establishment of a statewide guardianship registry. *Id.* at p.3. The report recommended that guardians be required to develop and to submit a guardianship plan within sixty (60) days of appointment and that the plan be incorporated into future monitoring. Guardians should be required to file annual reports or more frequently if required by court order or by change in the respondent's condition. The court monitor should be able to recommend termination or modification of a guardianship. *Id.* at 36-37.

C. Training and Support - The task force encouraged that new guardians be required to take a training and orientation course, a manual be developed for distribution to guardians and the Office of Public Guardian be provided with additional funding to expand information on guardian responsibilities and available community resources. *Id.* at 43.

D. Public and Private Guardianship Service Programs - The task force recommended that additional funding be provided to the Office of Public Guardian to expand caseworkers providing public guardianship services, develop a program modeled on the Cook County Public Guardian program to expose elder abuse and to establish a certification program for professional guardians. *Id.* at 51. The report noted that the Illinois Office of Public Guardian had a caseload of 138 individuals in need of services to each public guardian. The caseload precluded monthly visits recommended by the National Guardianship Association. *Id.*

E. Public Education and Professional Training - The task force suggested continuing education programs for guardians. In addition, improved dissemination of information concerning guardianship and alternatives to guardianship would be conducted through the Office of Public Guardian and other appropriate agencies. *Id.* at 5.

A cautionary note is that the Report found that despite an acknowledgment of a need for report and enactment of reforms, the Report noted that "those (statutory) revisions have failed to produce the desired outcomes in terms of number, scope and monitoring of guardianships." *Id.* at p.10. The report noted that the key "to changing the guardianship system lies in developing public awareness and consciousness about cultural attitudes toward aging and disability, and about how these attitudes affect the increasingly significant role of guardianship in American society. Because technological advances enables individuals with disabilities to live independently in ways not considered possible 30 years ago, it is necessary to keep everyone apprised of these possibilities that have important implications for the guardianship system." *Id.* at 2.

## **F. Assessment of Indiana Guardianship Law**

Guardianship reforms have largely not been enacted in Indiana. The last substantial revision of statutory guardianship law occurred in the late 1980s. Substantial

deviation exists between existing guardianship law and practice and measures called for under guardianship reform initiatives as identified in the foregoing report. Without being exhaustive, factors include the following:

#### A. Multi-State Jurisdiction

No procedure exists for resolution of interstate jurisdictional disputes in guardianship cases. With final approval being provided to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act in 2007, a model act is now available for reference for the General Assembly to consider.

#### B. Functional Assessment

Indiana law does not require a functional assessment, or for that matter any determination of incapacity by a trained medical professional. While submission of a Physician's Report with the Petition for Guardianship by the respondent's attending physician has developed as a matter of local practice in order to provide expert opinion to the trial judge, the Physician's Report is submitted in violation of physician-patient privilege. There is no provision for consideration of the report over objection at a contested hearing under Rules of Evidence. While the practice is to submit expert opinion from the respondent's attending physician(s), guardianship can be established solely on the basis of testimony from fact witnesses and without expert opinion.

Due to this situation, multiple issues arise. First, there is the issue of determination of incapacity in the absence of any expert opinion. Second, there is the issue of determination of incapacity while respecting physician-patient privilege as well as federal HIPPA regulations. Third, with the emphasis on reserving to the incapacitated person the ability of self determination based upon residual functional capacity, a full functional assessment would be required. Full functional assessments are not being performed. Fourth, the Physician's Report form that is used only requests medical determination of incapacity without encouraging the physician to assess residual functional capacity of the respondent.

One method of addressing these issues is to require that the respondent be examined by a court appointed examiner or examining committee. For example, Florida requires the appointment of a three member examining committee. One of the members must be a psychiatrist or other physician. The two remaining members be appointed from several disciplines but with sufficient training, experience or education so as to render an expert opinion. One of the members must have knowledge of the specific incapacity alleged in the guardianship petition. The respondent's family physician cannot be appointed to the committee. A physical examination, mental health examination and functional assessment are required. Florida Statute 744.331.

Indiana Code 29-3-5-3 currently makes provisions for a limited guardianship. However, in the absence of requiring functional assessments of the respondent

and developing forms to be used in the functional assessment that are then tied to the court's orders on limited guardianship and limitation of authority in the Letters of Guardianship, expanded use of limited guardianships will probably not occur. While limited guardianships are encouraged under recent reform initiatives, the Final Report of the Illinois Guardianship Report Project noted that limited guardianships were only rarely ordered inasmuch as attorneys and judges perceived limited guardianships as being time consuming and difficult to administer and physicians had difficulty in assessing or communicating partial incapacity. P. 19, Final Report: Illinois Guardianship Reform Project (2001). The American Bar Association, Commission on Law and Aging, American Psychological Association and National College of Probate Judges developed a document entitled Judicial Determination of Capacity of Older Adults in Guardianship Proceedings. The Handbook was distributed electronically to Indiana trial court judges on February 19, 2007. The forms contained in the Handbook may provide a basis for the standardized forms to be used in functional assessments. However, assuming that limited guardianships are favored, judges, attorneys and medical evaluators will need to be informed on the emphasis on limited guardianships as well as the use of the forms to provide the necessary information to the court. Otherwise, judges and attorneys will be apt to disregard the steps necessary to obtain the information necessary to create a limited guardianship as an unnecessary encumbrance. A factor to be taken into account in the requirement of any court ordered evaluation is the additional cost that will be incurred for the evaluation and what entity should bear the cost.

### C. Guardianship Training

No provision exists for guardianship training by statute. By local rule, some counties have developed a form entitled Instructions to Guardian that a newly appointed guardian is to read and to sign. While counsel provides assistance at the establishment of a guardianship, the guardian oftentimes functions with only limited guidance after a guardianship is established. Based upon such limited instruction, it should come as no surprise that a guardian may not fully understand his or her role as a fiduciary, the responsibilities and duties as guardian, any applicable limitation on authority and acts that constitute breach of fiduciary duty. Standard 3.3.13 of the National Probate Court Standards requires that probate courts develop and implement programs for the orientation and training of guardians. Standard 3.3.13, National Probate Court Standards, Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships of the National College of Probate Judges and National Center for States Courts. The 1986 Statement of Recommended Judicial Practices endorsed by the American Bar Association likewise recognizes the duty of courts to provide adequate training of guardians. A need for improved guardianship training exists. Resource materials need to be developed to adequately provide training to guardians. In addition to print materials, technology can assist in training guardians through web sites and material on the internet. Courts need to implement and to maintain a program to provide information and training to

guardians. Guardian certification that the Guardian has read the material and completed training should be provided to the Court.

When the assets of the guardianship are minimal, guardians are reluctant to expend additional funds for legal assistance after establishment of a guardianship. Based upon inadequate training of guardians, guardians have little conception of the reporting and accounting requirements for a guardianship. Typically, guardians attempt to comply with the accounting requirement by submission of accounting in “shoe box”, check register or bank statement format. A need exists for courts to assist guardians in the preparation and submission of reports and accounts. Standard forms of account and report need to be developed. Technology can assist guardians in the submission of accounts and reports.

#### D. Education of Judges

Based upon Indiana’s general trial court system, few judges are able to devote their exclusive attention to probate or to guardianship matters. Accordingly, guardianship cases are heard by judges who are often responsible for multiple types of cases and who may not devote substantial time to guardianship cases. A judge’s expertise may then be limited due to his or her limited exposure to guardianship issues. Education and training in guardianship issues for trial judges is therefore important.

#### E. Technology

Technology is identified as an important tool in the management and monitoring of guardianship cases by courts. Access to information can be readily provided to guardians by the internet. Submission of accounts by the guardian electronically is increasingly common in other jurisdictions. Electronic submission of reports and accountings will enable courts to provide improved monitoring of guardianships. The Supreme Court’s work in developing a case management system should provide future assistance in improved monitoring of guardianships.

#### F. Emergency Ex Parte Appointment of a Temporary Guardian

Indiana Code 29-3-3-4 provides for emergency ex parte appointment of a temporary guardian in instances where “it is alleged and found by the court that immediate and irreparable injury to the person or injury, loss, or damage to the property of the alleged incapacitated person or minor may result” before opportunity for hearing. *Id.* As noted, the Wingspan Conference recommended that actual notice be provided to the respondent, that counsel be appointed, the emergency be established, and a hearing on permanent guardianship be conducted as soon as possible and that emergency powers be limited.

Standard 3.3.6 of the National Probate Court Standards contains the following recommendation:

“Emergency Appointment of a Temporary Guardian

(a) Ex parte appointment of a temporary guardian by the probate court should occur only:

(1) upon the showing of an emergency; (2) in connection with the filing of a petition for a permanent guardianship; (3) where the petition is set for hearing on the proposed permanent guardianship on an expedited basis; and (4) when notice of the temporary appointment is promptly provided to the respondent.

(b) The respondent should be entitled to an expeditious hearing upon a motion by the respondent seeking to revoke the temporary guardianship.

(c) Where appropriate, the court should consider issuing a protective order (or orders) in lieu of appointing a temporary guardian.

(d). The powers of a temporary guardian should be carefully limited and delineated in the order of appointment.” Standard 3.3.6, National Probate Court Standards, Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships of the National College of Probate Judges and National Center for States Courts.

In recognizing the potential damage of violating due process rights and causing harm to the respondent, the National Probate Court Standards stress the duty of the court to be vigilant. Prompt notice to the respondent with notice of opportunity to request a prompt hearing are considered essential in preventing the extension of an inappropriate guardianship. Under the National Probate Court Standards, temporary guardianship should extend for in excess of thirty (30) days only under the most extraordinary circumstances. *Id.*

Indiana Code 29-33-4 permits a temporary guardianship to extend for sixty (60) days. As with ex parte custody issues, Trial Rule 65 standards provide a basis for minimal notice prior to ex parte action under Indiana Code 29-3-3-4.

#### G. Plan

Development of a plan with periodic review and revision was suggested by the Wingspan Conference. There is no provision for a plan under Indiana law. For purposes of reference, Florida Statute 744.363 sets forth the following requirements for an initial plan to be developed by the examination committee:

“(a) The provision of medical, mental, or personal care services for the welfare of the ward;

(b) The provision of social and personal services for the welfare of the ward;

(c) The place and kind of residential setting best suited for the needs of the ward;

(d) The application of health and accident insurance and any other private or governmental benefits to which the ward may be entitled to meet any part of the costs of medical, mental health, or related services provided to the ward; and

(e) Any physical and mental examinations necessary to determine the ward’s medical and mental health treatment needs.” *Id.*

The guardian is required to consult with the ward in the development of the plan, to honor the ward’s wishes insofar as the rights retained by the ward under the plan and “(t)o the maximum extent reasonable” be made in accordance with the

wishes of the ward. The plan should not restrict the ward's liberty more than is necessary. Id.

#### H. Monitoring

Reports and accountings are due biennially under Indiana Code 29-3-9-6. Most states require an annual accounting with several states requiring that the first account be filed within one to six months after appointment of the guardian. P. 19, Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors With Reduced Capacity, Senator Gordon Smith and Senator Herb Kohl, United States Senate Special Committee on Aging (2007). The required information is limited. Indiana Code 29-3-9-6(c) only requires that the incapacitated person's residence be identified and a description of the conditions and circumstances of the incapacitated person. Frequently, guardians, and even attorneys, are unaware of the need to file biennial status reports. Inasmuch as a detailed plan is not required, updates to the plan are not required. Court monitoring of guardians is viewed as essential. National Probate Court Standards direct that "(t)he probate court should have written policies and procedures to ensure the prompt review of reports and requests filed by guardians." Standard 3.3.15, National Probate Court Standards, Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships of the National College of Probate Judges and National Center for States Courts. The potential for exploitation of the incapacitated person by a guardian stems from inadequate court monitoring of guardians. P. 4, Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors With Reduced Capacity, Senator Gordon Smith and Senator Herb Kohl, United States Senate Special Committee on Aging (2007). The federal report cited newspaper investigations of guardianship monitoring in Washington D.C., Dallas and Los Angeles, which revealed inadequate oversight of guardians. Id. at p. 14. In June of 2003, the Washington Post concluded that "chaotic record-keeping, lax oversight and low expectations" existed in the D.C. Superior Court. The Washington Post found that the court "fostered a culture that rarely held guardians accountable for neglect, abuse, or exploitation of their wards." Id.

Standard 3.3.14 of the National Probate Court Standards provides that "(a) guardian should be required to file with the probate court a guardianship plan and a report on the respondent's condition, with annual updates provided by the guardian thereafter. A guardian should also provide the court with advance notice of any intended absence of the respondent from the court's jurisdiction in excess of thirty calendar days, or any major anticipated change in the respondent's physical presence (e.g., a change in residence, place of abode)." Standard 3.3.14, National Probate Court Standards, Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships of the National College of Probate Judges and National Center for States Courts.

Judge Steve King of the Tarrant County Probate Court One and a Past President of the National College of Probate Judges, presents the following recommendations for reports by guardians and review of the reports:

#### Reports by Guardians

1. Mandate uniform forms to ensure consistent reporting and review practices and make forms generally available (trainings, Web site, clerk's office).
2. Require regular (preferably annual) reports on the condition and well-being of the ward and verified accountings as to all assets, receipts, and expenditures.
3. Require care plans for the ward and management plans for ward's estate.
4. Require a final report, both for the ward and the estate, before discharge of the guardian.

#### Review of Reports

1. Adopt a "redemptive" rather than "punitive" approach to erring guardians.
  2. Develop uniform reporting and accounting documents, as well as audit procedures, and train court staff, guardians, and attorneys on implementation and use.
  3. Establish monthly allowances to minimize need for applications and orders for expenditures.
  4. Observe appropriate bonding practices or require restricted access to fiduciary accounts and review bond adequacy annually.
  5. Require court approval of reports and accounts.
  6. Develop and implement computer technology to store, retrieve, and sort case information, including the capacity to identify and manage cases with overdue reports/accounts and to trigger notification to guardians and other interested parties.
  7. Develop and implement a monitoring program using trained volunteers (retirees, law students, social-work students, and nursing students) as visitors, acting under supervision of court staff.
  8. Develop protocols for the use of e-filing in guardianships to allow guardians to electronically file reports and accounts."
- S. King, Guardianship Monitoring: A Demographic Imperative, Future Trends in State Courts, National Center for State Courts (2007).

As an assessment, Court monitoring of guardians is limited to review of the biennial accounts and reports filed with the Court. The long biennial period, the limited amount of required information, the lack of information available to assist guardians and the limited ability of courts to independently audit accounts and to investigate reports creates a situation where courts are inadequately equipped to adequately supervise guardianships.

#### I. Court Appointed Investigator

Guardianship reform initiatives prefer the use of Court Appointed Investigator or "Visitor" as a more accurate description of the role of individuals who serve as

the “eyes and ears of the court” instead of the prior term “Guardian Ad Litem”. The use of an independent Court Investigator is a key aspect of court oversight of guardianships. The Court Investigator is charged with meeting with the respondent after the filing of the Petition, providing a preliminary assessment of the respondent to the court, insuring proper service upon the respondent, making sure that the respondent understands the affect of the appointment of a guardian, ensuring that provision is made for representation by counsel, if desired or required, providing monitoring of the guardian’s performance and assessing compliance with the plan for the incapacitated person. Unless a Guardian Ad Litem is not required to be appointed under Indiana Code 29-3-2-3(b), Indiana Code 29-3-2-3(a) requires the appointment of a guardian ad litem. Indiana Code 29-3-9-11 requires the county office of family and children to investigate and make report to the court of the conditions and circumstances of the minor or incapacitated person as well as the fitness and conduct of the guardian when ordered to do so by the court. However, in practice the appointment of a Guardian Ad Litem is the exception rather than the norm, and the appointment of the county office of family and children to perform an investigation is rare.

If adequately funded, existing statutory provisions allow for the oversight of the establishment of guardianship and monitoring of the guardian that are deemed essential by guardianship reform initiatives. However, the significant increase in the use of Guardians Ad Litem and the county office of family and children would be a change from past practice and would require development of policies and procedures for the increased oversight.

In practice, the appointment of a Court Visitor or Guardian Ad Litem is not regularly done. The notice by certified mail upon the respondent that is required by Indiana Code 29-3-6-1 is unlikely to give the respondent any meaningful knowledge of the guardianship proceeding. Medical professionals are often apt to opine that it is inadvisable for a respondent to attend a court proceeding, particularly if the respondent suffers from the onset of Alzheimer’s disease and is subject to agitation upon change of environment. Unless the Court is proactive in insuring that the respondent is properly served, receives sufficient information regarding the guardianship proceeding, gains insight to the respondent’s situation with additional information and is vigilant in requiring that the respondent have an opportunity to appear for hearing if capable, the guardianship proceeding may comply only minimally with due process. The role of the Court Visitor is crucial in giving the Court an independent assessment in what often is an uncontested hearing.

#### J. Service

The National Probate Court Standards stated that “(t)he notice (to the respondent) should be written and personally delivered, if possible, by a court officer dressed in plain clothes who is trained and instructed how to communicate and interact with respondents.”

Standard 3.3.7. Indiana only provides for service by certified mail under Indiana Code 29-3-6-1.

#### K. Counsel

Under National Probate Court Standards, counsel should be appointed for the respondent when: “(1) requested by an unrepresented respondent; (2) recommended by a court visitor; (3) the court, in the exercise of its discretion that the respondent is in need of representation; or (4) otherwise required by law.” Standard 3.4.5. Currently, appointment of counsel for a respondent is left to the Court’s discretion, presumably at the request of the respondent under Indiana Code 34-10-1-2.

#### L. Order

The Court’s Order is the key to the future administration of the guardianship. National Probate Court Standard 3.3.12 directs that the Order be carefully crafted. Consideration should be given to reserving to the respondent powers that may be exercised by the respondent under limited guardianship and deleting from the guardian’s power authority as to decisions that can be irreversible without further court authorization. The Court has the opportunity to direction preparation of a plan for administration of the guardianship and to provide for reports and accounts in accordance with the plan. The Court can establish the framework for administration of the guardianship by requiring that the guardian consult with the respondent, insofar as possible, in making decisions and that the Guardian operate in accordance with the respondent’s prior expressed wishes. Currently, Court Orders normally only set forth the requisite finding of incapacity with appointment of the named Guardian without restriction as to the Guardian’s duties and responsibilities.

#### M. Modification or Termination

Reevaluation of the necessity of a guardianship is stressed under National Probate Court Standards. Courts are directed to establish procedures whereby modification or termination of guardianship are brought back before the Court. Standard 3.3.16; Standard 3.4.17. Indiana Code 29-3-12-1 provides for termination of guardianship upon determination that the individual is no longer an incapacitated person. There is no method for regularly placing before the Court the issue of whether the guardianship should be modified or terminated. The Guardian normally will not be seeking to terminate the guardianship. The minimal reporting requirements do not place sufficient information before the Court for the Court to make assessments. Just as no medical determination is required for the establishment of guardianship, no medical examination or report is required for continuation of guardianship. Inasmuch as functional assessments and plans are not being used, the Court is unaware of changes in the respondent’s abilities. The burden is placed upon the respondent to establish that he or she is no longer an incapacitated person as opposed to being placed upon the guardian to justify the continuation of the guardianship.

#### N. Public Guardians

Perhaps the most glaring omission under Indiana practice is any provision for the appointment of a public guardian. Interestingly, the federal report broadly stated that “(e)very state has some form of public guardianship program . . . .” P. 7, *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors With Reduced Capacity*, Senator Gordon Smith and Senator Herb Kohl, United States Senate Special Committee on Aging (2007). Currently, the guardianship system is dependent upon an individual being willing to serve as guardian. An emerging question is what happens when no one is available or willing to serve in that role. Such individuals are bereft of family and friends to serve in the capacity as guardian and finances are insufficient to afford professional assistance.

Recently, Indiana enacted an adult Volunteer Advocate for Seniors Program to address the needs of such individuals. The program grew out of the effort of Judge Diane Schneider of the Lake Superior Court to address the need to provide assistance to hospitalized individuals with no suitable person available to assist them in medical decision making, to assist individuals to regain their independence following periods of hospitalization or to assist individuals with appropriate assisted living or institutional care for those individuals unable to regain their independence. The program provides a short term volunteer advocate to assist individuals. If capable, authority is granted under a power of attorney or appointment of a health care representative, and if incapacitated, the volunteer is appointed as a temporary guardian. The concept of the program is based upon the children’s CASA program with whom the program shares a common primogenitor, Becky Pryor. In recognition that the need for appointment may be long term, the Northwest Indiana Adult Guardianship Services Project is being developed to assist incapacitated individuals with appointment of a permanent guardian. The programs are designed to assist both indigent individuals and non-indigent individuals who do not have a suitable individual available to assist them. Services are provided based upon a person’s economic circumstances without cost or at a cost determined upon the person’s economic resources.

The glaring omission when no suitable individual is available to serve as guardian is addressed in other states, including Illinois and California, by a publicly funded office of the Guardian Ad Litem. However, the effectiveness of public offices of the Guardian Ad Litem are dependent upon the level of funding. Rising caseloads in an era of budget tightening have left many individuals unserved or inadequately served. See, R. Fields, *Guardians For Profit; For Most Vulnerable, A Promise Abandoned*; *L.A.’s Public Guardian, Stripped of County Funding For Over A Decade, Turns Away Many in Need*, Los Angeles Times, November 16, 2005.

Within the public guardianship, various models exist for development of a state sponsored public guardianship program. *Public Guardianship After 25 Years: In*

the Best Interest of Incapacitated People?, National Study of Public Guardianship, Phase II Report, The Retirement Research Foundation (2007). Due to the reluctance of state legislatures in other states to adequately fund an Office of Public Guardian at a level sufficient to provide adequate assistance to incapacitated persons, strong consideration should be given to the development of a volunteer public guardian program based upon the pioneering work performed by Judge Diane Schneider and Becky Pryor in developing the Lake County Adult CASA program and the Northwest Indiana Guardianship Project.

The following steps have been identified in the development of an adult guardianship program.

1. Fund the program. Funding consists of staff time to manage the program as well as the normal expenses for an office. Charities and social service agencies may assist in the cost of the program due to tight public budgets.
  2. Hire a paid program coordinator. Duties include recruiting, screening, training, scheduling and supervising volunteers, developing and overseeing program funds, tracking results and reporting and solving problems with the program. Duties may only require a part time coordinator.
  3. Provide space for the program.
  4. Recruit and screen a sufficient number of qualified volunteers. The typical volunteer is 65 years or older, female and retired. Continued recruitment of volunteers is essential. An American Bar Association study found that most volunteer programs ended due to an inability to obtain sufficient volunteers rather than a lack of funding for other needs. Volunteers may have different talents that can be used. Volunteers do need to be carefully screened.
  5. Clearly define the duties and responsibilities of volunteers.
  6. Form partnerships with state and local organizations.
  7. Recognize volunteers.
  8. Provide regular and comprehensive training for volunteers. Training should include an overview of guardianship law and process, introduction to the court, discussion of ethics, confidentiality requirements and liability, explanation of common forms of disability, explanation of program guidelines and explanation of elder abuse and neglect.
  9. Track results of the program.
    10. Integrate the volunteer program with the overall monitoring conducted by the court. For example, problems detected by volunteers may be followed up by investigators with greater training.
- E. Klem, Volunteer Guardianship Monitoring Programs: Increase Your Court's Capacity to Monitor Guardianship Cases Without Increasing Court Staff and Budget, Vol 5, No. 1, The Journal, National College of Probate Judges, p. 5-8.

#### O. Professional Guardians

The size of the future expansion of the aging population as well as the wealth of the population will undoubtedly lead to the expansion of the use of professional guardians. State involvement in the licensing and oversight of professional guardians will be required. Minimum fiduciary standards as well as professional ethical guidelines will need to be adopted.

#### P. Mediation

Mediation was perceived by several studies to be important in preserving family relationships from harm due to ill will generated from the adversarial process. Rules for Alternative Dispute Resolution are already in place. However, mediation has not traditionally been used in guardianships. Court may need to emphasize mediation in guardianship to change “legal culture.”

#### Q. Alternatives to Guardianship

Studies emphasize alternatives to guardianship, including the power of attorney and appointment of a health care representative, in order to reduce costs otherwise incurred in guardianship. The power of attorney and the appointment of a health care representative should be considered by attorneys when counseling their older clients. However, other factors make the use of a power of attorney inapplicable in many circumstances. The power of attorney is premised upon the delegation of power and control from the principal to the agent. The principal may be unwilling to make a present delegation of control. It may be difficult to define the “trigger” event to make a future delegation effective and to communicate to third parties that the “trigger” event has occurred. The principal may not have an individual available in whom sufficient trust is placed to serve as agent. From a practical standpoint, individuals abhor the loss of independence inherent in the delegation of power to a third party. The cost savings may not overcome resistance to delegation. The power of attorney is not an option in the case of individuals who do not possess capacity to execute the document.

The recommendation that Courts emphasis consideration of alternatives to guardianship is at odds with the need for greater supervision by Courts of guardianship. While advance planning simplifies the process for appointing an individual to provide care for an incapacitated person in time of need, the power of attorney and healthcare representative are not subject to any oversight.

Due to the significant difference between existing Indiana law of guardianship and the proposed reforms in guardianship law advocated by experts in the field, the issue of whether Indiana Guardianship law should be reformed must be assessed. Undoubtedly, reform will come at a price of increased cost for guardianship proceedings. As in other areas, the Indiana General Assembly will have to perform a cost benefit analysis in determining whether to implement reform.

## **V. Elder Abuse**

Related to the oversight of the elderly and incapacitated individuals is the area of elder abuse. In a youth oriented culture, the issue of elder abuse has largely been ignored. Elder abuse: Silent shame, *Wisconsin State Journal*, June 26, 2008. In 2006, federal funding to fight elder abuse was approximately one-sixth (1/6th) of the amount spent to fight child abuse. *Id.* Elder abuse is expected to merit greater attention in the future due to the growing senior population. *Id.*

As defined by the National Center on Elder Abuse, elder abuse refers to “any knowing, intentional, or negligent act by a caregiver or any other person that causes harm or a serious risk of harm to a vulnerable adult.” M. Twomey, M. Quinn & E. Dakin, *Courts Responding to Domestic Violence*, 6 *J. Center for Fam. Child & Cts.* 73, 74 (2005). Although statistics are scant, the National Research Council estimated in 2003 that between one and two million Americans over the age of 65 years had been injured, exploited or mistreated. E. Wood, *State-Level Adult Guardianship Data: An Exploratory Survey* p. 11 (2006). The House of Representative’s Select Committee on Aging estimated that five percent (5%) of the nation’s elderly population, or 1.5 million, was subject to moderate to severe abuse. M. Twomey, M. Quinn & E. Dakin, *Courts Responding to Domestic Violence*, 6 *J. Center for Fam. Child & Cts.* 73, 74 (2005) A 2004 survey of adult protective services revealed a 19.7 percent increase in the reports of elder and protected adult abuse and neglect and a 15.6 percent increase in “substantiated cases” from 2000. E. Wood, *State-Level Adult Guardianship Data: An Exploratory Survey* p. 11 (2006). The National Elder Abuse Incidence Study found that only sixteen percent (16%) of the cases of abuse were referred to help. M. Twomey, M. Quinn & E. Dakin, *Courts Responding to Domestic Violence*, 6 *J. Center for Fam. Child & Cts.* 73, 74 (2005).

The National Elder Abuse Incidence Study found that two-thirds of the victims were women and that the elderly over age eighty were two to three times more likely to be victims than younger seniors. The study further found that ninety percent (90%) of elder abuse was perpetrated by a family member with women being more likely to engage in neglect whereas men are more likely to engage in verbal or physical abuse. The incident of elder abuse is associated with perpetrator characteristics that include drug and/or alcohol abuse, impairments, including mental illness and developmental disabilities, financial dependency on the elder and a bad past relationship with the elder. While the better understood domestic violence paradigm has been applied to elder abuse, the elderly present unique features of increased physical vulnerability, mental changes, increased dependence and personality changes due to the onset of dementia. M. Twomey, M. Quinn & E. Dakin, *Courts Responding to Domestic Violence*, 6 *J. Center for Fam. Child & Cts.* 73, 74 (2005).

The American Psychological Association reports that only one in six cases of elder abuse is reported. Although reports of elder abuse in nursing homes are the most shocking, only four percent (4%) of older adults live in nursing homes. The vast majority of older adults in nursing homes do not experience abuse or neglect. Most elder abuse

occurs in the home and is perpetrated by family, household members or care givers. Often the abuse is subtle, and the distinction between interpersonal stress and abuse may be difficult to discern. There is no single pattern of abuse in the home. The abuse may be a continuation of long standing patterns of physical or emotional abuse in a dysfunctional family. More often the abuse results from changes in living situations and relationships brought about due to the older person's growing frailty and dependence. Elder abuse takes many forms and includes physical abuse, emotional or psychological abuse, caregiver neglect, sexual abuse and financial exploitation. Elder Abuse and Neglect: In Search of Solutions, American Psychological Association.

The American Psychological Association report notes that several factors can contribute to elder abuse. Factors include increased stress in the family due to the older person's presence, a prior history of violent interactions in the family, stress or social isolation resulting from the care of an older person and lack of knowledge of proper care. Elder abuse may simply be a continuation of a prior pattern of domestic violence or it may be a reversal of roles due to the enfeeblement of the prior perpetrator. Personal problems experienced by the caregiver may create stress and give rise to elder abuse. A caregiver may be adequately qualified to provide care for an ill parent but may persist in trying to provide care due to concern that placement of the parent in a nursing home or alternative facility will violate the parent's trust. Financial dependence by the caregiver on the elderly person or vice versa may give rise to financial exploitation or abusive behavior. Pre-existing emotional and psychological problems by a caregiver, including prior alcohol or drug abuse, may lead to greater stress and abuse. Societal attitudes make discovery of abuse more difficult. Matters within a person's home are considered private matters. The elderly are perceived as marginalized by society. As such, society is more indifferent to their plight. Id.

Indiana has established the Adult Protective Services Unit to assist in investigating elder abuse. Nonetheless, Adult Protective Services remains constrained in the options available by the circumstances in seeking alternative arrangements for an adult that has been in an abusive situation. The lack of public guardian services may limit the options available to the Adult Protective Services Unit and to the Courts.

Against this background, future trends suggest that less care will be provided to the elderly within the family. The "Baby Boom" generation is more apt to be remote from a family support network. According to the U.S. Census Bureau, the "Baby Boom" generation will more likely live alone and be less likely to have family caregivers than in the past. 2004 Report by the U.S. General Accounting Office to the Special Committee on Aging (GAO-04-655), p. 5. The shift will place increasing demands on the public sector to monitor the care of the elderly. Elder abuse: Silent shame, Wisconsin State Journal, June 26, 2008. In order to deal with the elder abuse issue in the future, more funds will need to be spent on social workers, police training, specialized prosecutors, specialized investigators to uncover elder abuse, more funds for institutional care and increased regulation of providers. Id. Baby boomers are apt to be vocal in demanding that public funds be spent on the elderly than in the past. Id.



# **Adult Guardianship: A National Overview**

**Prepared by**

**Jennifer Ihns, NCG  
University of Notre Dame Legal Aid Clinic  
Fall 2011**

## Adult Guardianship: A National Overview

*“The statewide system of appointing guardians to manage the finances and affairs of incapacitated people has created the opportunity for widespread corruption and needs to be radically overhauled, a grand jury concluded in a report filed yesterday in State Supreme Court in Queens... The grand jury closely examined the case of a Long Island City lawyer who stole \$2.1 million over a five-year period in cases involving 17 incapacitated people... The grand jury...said that guardians...are poorly trained and inadequately supervised by court appointees. It found, for instance, that even rudimentary financial reporting requirements are often ignored and independent audits are rare.”*

**New York Times, March 3, 2004**<sup>71</sup>

## The Older Population

The older population—persons 65 years or older—numbered 39.6 million in 2009 and 40.2 million in 2010 and is expected to rise greatly. They represented 12.9 percent of the U.S. population, over one in every eight Americans. The number of older Americans has increased by 4.3 million or 12.5 percent since 1999, compared to an increase of 12.3 percent for the under-65 population. However, the number of American aged 45-64 – who will reach 65 over the next two decades – increased by 26percent during this period.

Since 1900, the percentage of Americans 65+ has more than tripled (from 4.1percent in 1900 to 12.9percent in 2009), and the number has increased almost thirteen times (from 3.1 million to 39.6 million). The older population itself is increasingly older. In 2008, the 65-74 age group (20.8 million) was 9.5 times larger than in 1900. In contrast, the 75-84 group (13.1 million) was 17 times larger and the 85+ group (5.6 million) was 46 times larger.

In 2007, persons reaching age 65 had an average life expectancy of an additional 18.6 year (19.9 years for females and 17.2 years for males). A child born in 2007 could expect to live 77.9 years, about 30 years longer than a child born in 1900. Much of this increase occurred because of reduced death rates for children and young adults. However, the period of 1990-2007 also has seen reduced death rates for the population aged 65-84, especially for men – by 41.6percent for men aged 65-74 and by 29.5percent for men aged 75-84. Life expectancy at age 65 increased by only 2.5 years between 1900 and 1960, but has increased by 4.2 years from 1960 to 2007.

About 2.6 million persons celebrated their 65<sup>th</sup> birthday in 2009. In the same year, about 1.8 million persons 65 or older died. Census estimates showed an annual net increase of 770, 699 in the number of person 65 and over.

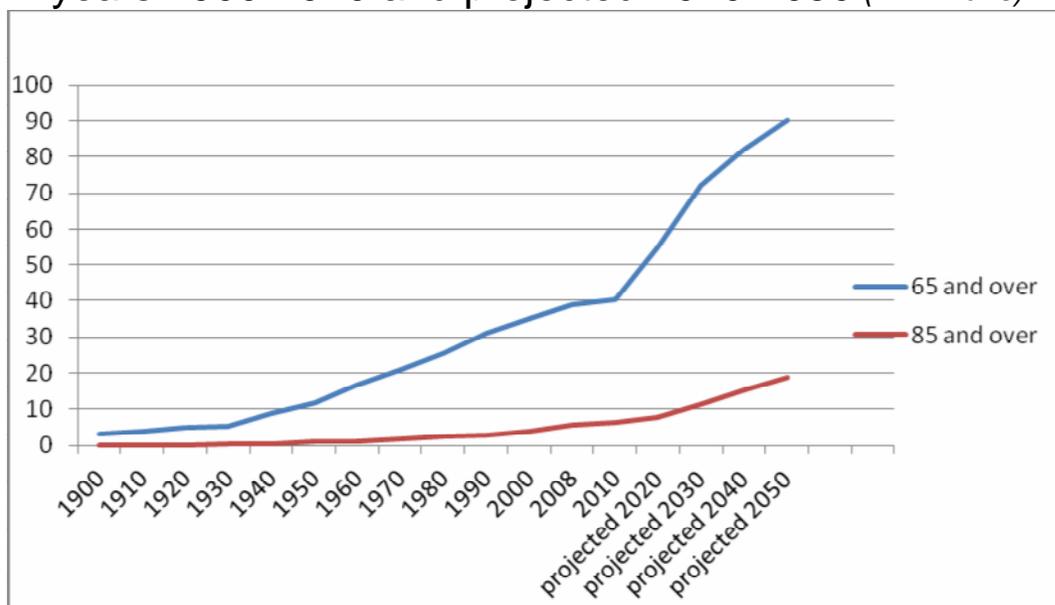
***(Data for this section were compiled primarily from the U.S. Census Bureau***

---

<sup>71</sup> Glaberson, William. (2004, March 3). Report calls for overhaul of system that protects the unfit. *New York Times*.

and the National Center for Health Statistics/Health Data Interactive).

### Population age 65 and over and age 85 and over, selected years 1900-2010 and projected 2020-2050 (in millions)



The baby boomers (those born between 1946 and 1964) will start turning 65 in 2011, and the number of older people will increase dramatically during the 2010-2030 period. The older population in 2030 is projected to be twice as large as their counterparts in 2000, growing from 35 million to 72 million and representing nearly 20 percent of the total U.S. population.<sup>72</sup>

The growth rate of the older population is projected to slow after 2030, when the last baby boomers enter the ranks of the older population. From 2030 onward, the proportion age 65 and over will be relatively stable, at around 20 percent, even though the absolute number of people age 65 and over is projected to grow. The oldest-old population, however, is projected to grow rapidly after 2030, when the baby boomers move into this age group.<sup>73</sup>

The U.S. Census Bureau projects that the population age 85 and over could grow from 5.7 million in 2008 to 19 million by 2050. Some researchers predict that death rates at older ages will decline more rapidly than is reflected in the U.S. Census Bureau's projections, which could lead to faster growth of this population<sup>74</sup>

<sup>72</sup> Horiuchi S. Greater lifetime expectation. *Nature* 405:744-5. June 2000.

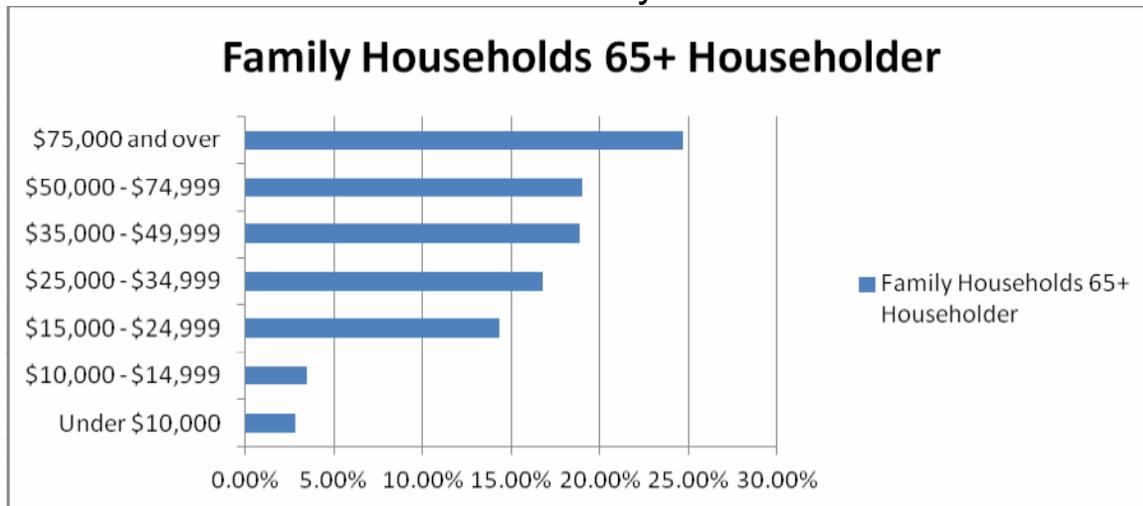
<sup>73</sup> Oeppen J, Vaupel JW. Broken limits to life expectancy. *Science* 296:1029-31. 2002.

<sup>74</sup> Tuljapurkar S, Nan L, Boe C. A universal pattern of mortality decline in the G8 countries. *Nature* 405: 789-92. 2000.

## Income

The median income of older persons in 2009 was \$28,877 for males and \$15,282 for females. Median money income of all households headed by older people rose 5.8 percent from 2008 to 2009. Households containing families headed by persons 65+ reported a median income in 2009 of \$43,702. About 6.3 percent of family households with an elderly householder had incomes less than \$15,000 and 62.6 percent had incomes of \$35,000 or more.

### Percent Distribution by Income: 2009



The major source of income as reported by older persons in 2008 were Social Security (reported by 87 percent of older persons), income from assets (reported by 54 percent), private pensions (reported by 28 percent), government employee pensions (reported by 14 percent), and earnings (reported by 25 percent). In 2008, Social Security benefits accounted for 37 percent of the aggregate income of the older population.

Since 1974, the proportion of older people living in poverty and in the low income group has generally declined so that, by 2007, 10 percent of the older population lived in poverty and 26 percent of the older population was in the low income group. In 2007, people in the middle income group made up the largest share of older people by income category (33 percent). The proportion with a high income has increased over time. The proportion of the older population having a high income rose from 18 percent in 1974 to 31 percent in 2007.

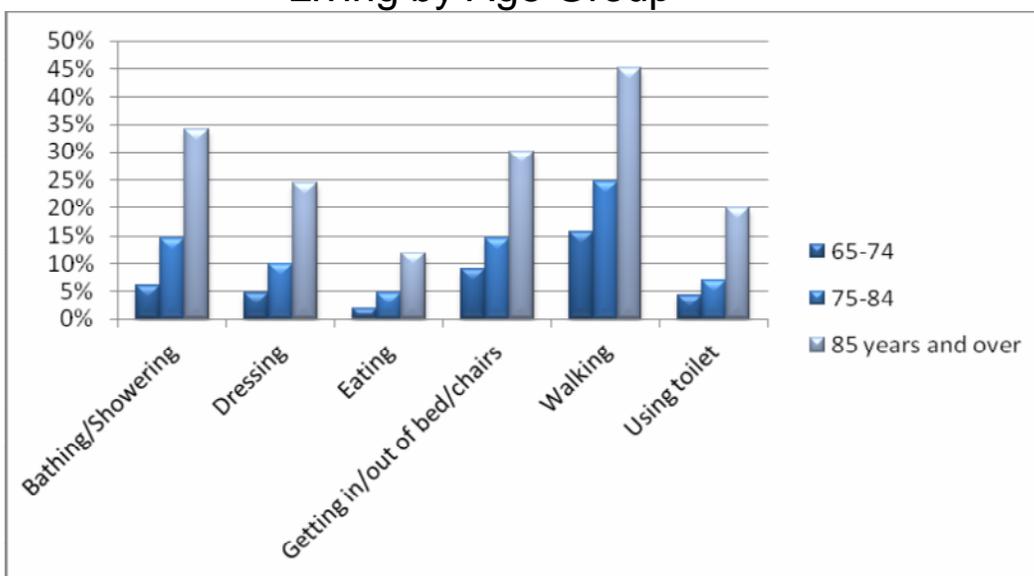
***(Based on data from Current Population Survey, Annual Social and Economic Supplement, "Income, Poverty, and Health Insurance Coverage in the United States: 2009" P60-238, issued September, 2010 by the U.S. Census Bureau, related Census detailed tables on the Census Bureau web site, and from Fast Facts and Figures About Social Security, 2010, Social Security Administration)***

## Disability and Activity Limitations

Some type of disability (i.e., difficulty in hearing, vision, cognition, ambulation, self-care, or independent living) was reported by 37 percent of older persons in 2009. Some of these disabilities may be relatively minor but others cause people to require assistance to meet important personal needs. In 2005, almost 37 percent of older persons reported a severe disability and 16 percent reported that they needed some type of assistance as a result. Reported disability increases with age. 56 percent of persons over 80 reported a severe disability and 29 percent of the over 80 population reported that they needed assistance. There is a strong relationship between disability status and reported health status. Among the 65+ persons who reported no disability, only 10 percent reported their health as fair or poor. Presence of a severe disability is also associated with lower income levels and educational attainment.

In a study with focused on the ability to perform specific activities of daily living (ADLs), over 25 percent of community-resident Medicare beneficiaries over age 65 in 2007 had difficulty in performing one or more ADLs and an additional 14.6% reported difficulties with instrumental activities of daily livings (IADLs). By contrast, 83 percent of institutionalized Medicare beneficiaries had difficulties with one or more ADLs and 67 percent of them had difficulty with three or more ADLs. [ADLs include bathing, dressing, eating, and getting around the house. IADLs include preparing meals, shopping, managing money, using the telephone, doing housework, and taking medications.] Limitations in activities because of chronic conditions increase with age.

### Percent of Persons with Limitations in Activities of Daily Living by Age Group

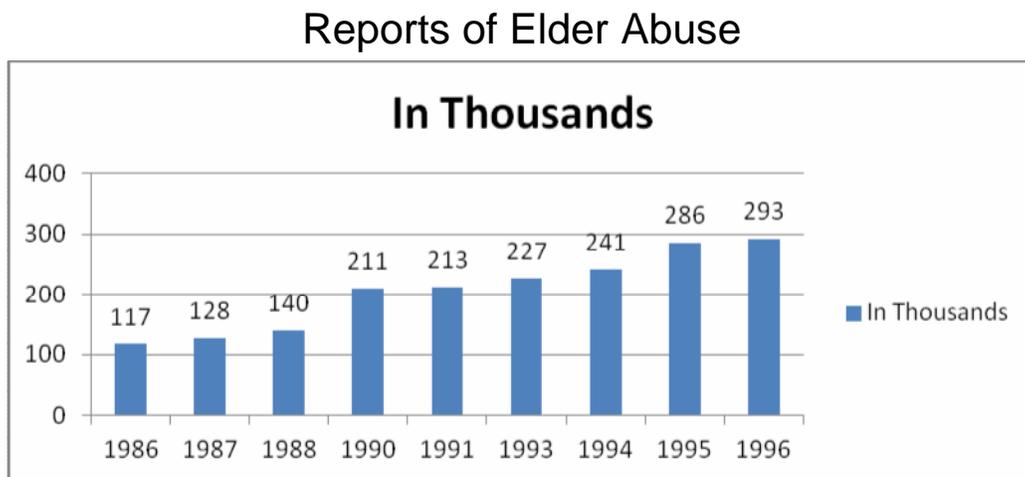


**(Sources: *Americans with Disabilities: 2005, December 2008, P70-117 and other Internet releases of data from the U.S. Census Bureau, the Centers for Medicare and Medicaid, and the National Center of Health Statistics, including the NCHS Health Data Interactive data warehouse*)**

## Elder Abuse

No one knows precisely how many older Americans are being abused, neglected, or exploited. While evidence accumulated to date suggests that many thousands have been harmed, there are no official national statistics. There are several reasons:

- Definitions of elder abuse vary. It is difficult to pinpoint exactly what actions or inactions constitute abuse, and the problem remains greatly hidden.
- State statistics vary widely as there is no uniform reporting system.
- Comprehensive national data are not collected.



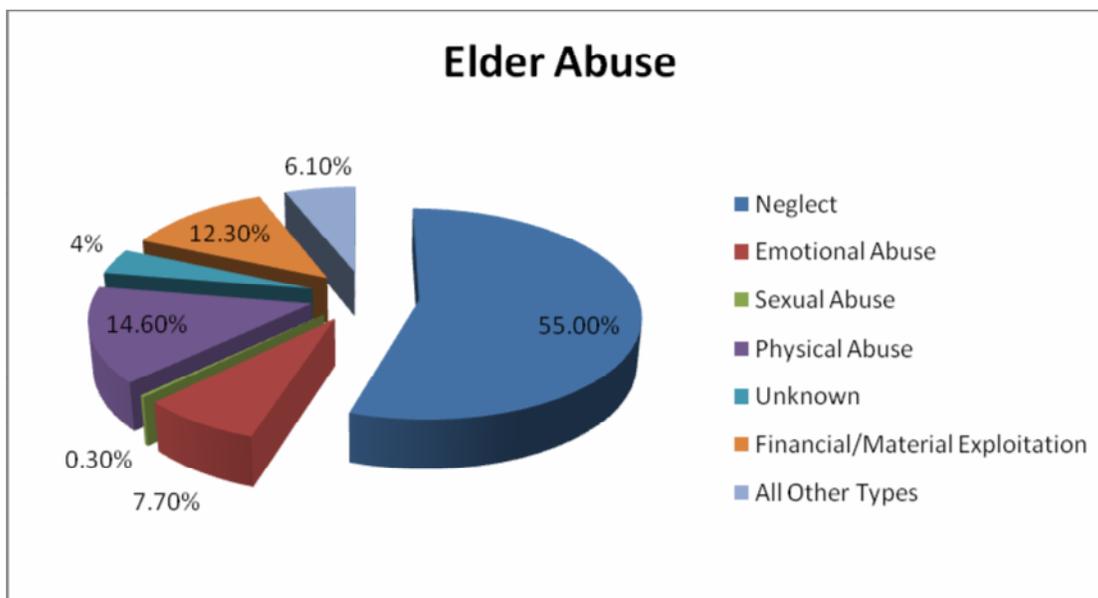
According to the best available estimates, between 1 and 2 million Americans age 65 or older have been injured, exploited, or otherwise mistreated by someone on whom they depended on for care or protection.<sup>75</sup> Current estimates put the overall reporting of financial exploitation at only 1 in 25 cases, suggesting that there may be at least 5 million financial abuse victims each year.<sup>76</sup> It is also estimated that for every one case of elder abuse, neglect, exploitation, or self-neglect reported to authorities, about five more go unreported.<sup>77</sup>

<sup>75</sup> *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America, 2003*. Washington, DC: National Research Council Panel to Review Risk and Prevalence of Elder Abuse and Neglect.

<sup>76</sup> Pillemer, Karl, and David Finkelhor. 1988. "The Prevalence of Elder Abuse: A Random Sample Survey," *The Gerontologist*, 28: 51-57.

<sup>77</sup> *National Elder Abuse Incidence Study: 1998*. Washington, DC, National Center on Elder Abuse at American Public Human Services Association.

The National Center on Elder Abuse defines seven different types of elder abuse: physical abuse; sexual abuse; emotional abuse; financial exploitation; neglect; abandonment; and self-neglect. These definitions are based on an analysis of existing State and Federal definitions of elder abuse, neglect and exploitation conducted by the Center in 1995.



## Individuals with Developmental Disabilities and Mental Health Issues

Historically, people with developmental disabilities and those suffering from mental health issues have not been recognized as distinct populations and there has been limited data on the status and needs experienced by these people. Information on trends in disability is critical for monitoring the health and well-being of these populations. It is believed that up to 90% of individuals with developmental disabilities may be the victims of abuse, neglect, or exploitation at some point in their lives. Since many of these individuals are non-verbal and often have significant physical impairments, this population is particularly vulnerable to these types of crimes.<sup>78</sup>

*“Maltreatment of people with disabilities takes many forms. It can explode in a moment of violence, or it can fester through decades of neglect. It can be the work of unrepentant thugs who take pleasure in inflicting pain, or well-respected policy makers who fail to take necessary action. Violence and abuse are as tangible in the crushing of dreams and the denial of humanity as in the spilling of blood and flowing of tears.* (Sobsey, Dick. Foreword. “Combating Violence & Abuse of People with Disabilities: A Call to Action.” By Nancy Fitzsimmons. Baltimore, Maryland: Paul H. Brookes Publishing Company. 2009. ix-xii.)

<sup>78</sup> “All About Developmental Disabilities” website

There are many explanations why people with developmental disabilities may be at increased risk of abuse (including sexual) and exploitation.

- Dependence: Many people with developmental disabilities are acutely dependent on their caregivers for such needs as bathing, dressing, using the toilet, etc., but frequently they have little choice as to who assists them with day-to-day personal care. They are less likely to report exploitation and/or abuse or take steps against the abuser due to fear of losing services they depend on. They are less likely to understand what is happening to them, in terms of the exploitative nature of the relationship, and they are less likely to question caregivers and those in positions of authority.
- Need for Acceptance: While the need to be liked or accepted can lead to sexual exploitation for everyone, it can be particularly difficult for those who are less physically or socially capable. Being lonely or isolated and having low self-esteem can increase this vulnerability.
- Lack of communication: Difficulty communicating can increase a person's vulnerability to exploitation as the exploiter may know that there is less likelihood of "getting caught" as the situation may not be reported.
- Power and Authority: In any care-giving relationship, there is always an element of power. Persons with developmental disabilities may not only be physically but also psychologically dependent on caregivers. The tendency to comply with instructions of "those in charge" may lead to learned compliance with authority figures.
- Pattern of Victimization: There are risk factors that exist inherent in care giving settings, particularly in situations where consumers did not choose housemates or caregivers and cannot always change these if they are unhappy or uncomfortable, thus allowing situation of victimization to continue.
- Difficulties in Personal Relationships: Persons with developmental disabilities typically need education and encouragement to develop satisfactory personal relationships. If appropriate social relationships do not exist, inappropriate relationships may be allowed to develop or continue.

*"I wasn't able to say, "knock it off" to my family who was doing my personal care. I thought it was normal to be tossed around in my chair. To have a comb dragged through my hair so it comes out. To be left on a toilet for an hour. It took me about five years of hiring people, when I realized that I didn't have to accept those things. (Saxton, 2001)*

Developmental disabilities are severe, life-long disabilities attributable to mental and/or physical impairments which manifest themselves before the age of 22 years and are likely to continue indefinitely. They result in substantial limitations in three or more of the following areas:

- self-care
- comprehension and language
- skills (receptive and expressive language)

- learning
- mobility
- self-direction
- capacity for independent living
- economic self-sufficiency
- ability to function independently without coordinated services (continuous need for individually planned and coordinated services).

The population of Americans with significant disabilities is growing. According to the Administration of Developmental Disabilities, there are approximately 4.5 million people with developmental disabilities in the United States – equivalent to about 1.5 percent of the population. The Autism Society of America reports that as many as 1.5 million Americans today are believed to have some form of Autism. 1 in 150 children is diagnosed with autism, with 67 children diagnosed per day. That is equivalent to a new diagnosis almost every 20 minutes. The United Cerebral Palsy Research and Educational Foundation believes that between 1.5 and 2 million people have cerebral palsy in the United States and that there are an estimated 10,000 new cases each year. About 3 in 10 children with cerebral palsy have severe learning disabilities; 1 in 3 children cannot walk; and 1 in 4 cannot feed or dress themselves. The National Down Syndrome Society estimates that Down Syndrome occurs in one out of every 733 live births – approximately 5,000 births per year. An estimated 2.5 million people in the United States have an intellectual disability – approximately 1 percent of the population (U.S. Equal Employment Opportunity Commission). It should be noted that there are no cures for any of these developmental disabilities.

In the not-too-distant past, a great number of people with significant developmental disabilities died before they reached their 30th birthday. Today, individuals with disabilities are living well into their 60s, 70s, and even beyond. Individuals with Down syndrome, for example, have experienced a doubling in life expectancy. In 1983, the average lifespan for an individual with Down syndrome was just 25 years. By 1997, this had increased to 49 years.<sup>79</sup>

In addition to the increasing life expectancy of persons with developmental disabilities, those who have traditionally provided the most support for this group are aging and dying. In a 2004 study, researchers at the University of Colorado determined that over 700,000 adults with developmental disabilities in 2002 were living with caregivers who were 60 years of age or older.<sup>80</sup> These are individuals who twenty or thirty years ago would have been institutionalized. The generations of people with disabilities that families chose to raise at home are now middle-aged and their parents are aging; stretching state service-delivery systems well beyond their capacities to meet current and projected demands for

---

<sup>79</sup> Yang, Q., Rasmussen, S.A., & Friedman, J.M. (2002). Mortality associated with Down's syndrome in the USA from 1983 to 1997: A population-based study. *Lancet* 359 (9311):1019-25.

<sup>80</sup> Rizzolo, M., Hemp, R., Braddock, D., & Pomeranz, A. (2004). *The state of the states in developmental disabilities*. Denver, CO: University of Colorado.

residential, vocational, and family support services for individuals with developmental disabilities.<sup>81</sup>

The unemployment rate for individuals with disabilities is 5 to 7 times greater than for the non-disabled depending on the disability type and severity. Only 25% work year round and full time.<sup>82</sup> Three times as many people with disabilities live in poverty.<sup>83</sup> Government expenditures to support working age people with disabilities and their dependents under programs such as Supplemental Security Income (SSI) have risen at twice the rate of other spending.<sup>84</sup>

Mental disorders are common in the United States. An estimated 26.2 percent of Americans ages 18 and older or about one in four adults suffer from a diagnosable mental disorder in a given year. When applied to the 2004 U.S. Census residential population estimate for ages 18 and older, this figure translates to 57.7 million people. While mental disorders are common in the United States, their burden of illness is particularly concentrated in a much smaller proportion of about 6 percent, or 1 in 17 who suffer from a serious mental illness (SMI). In addition, mental disorders are the leading cause of disability in the United States for ages 15-44. The National Survey on Drug Use and Health (NSDUH) defines SMI as:

- A mental, behavioral, or emotional disorder (excluding developmental and substance use disorders)
- Diagnosable currently or within the past year
- Of sufficient duration to meet diagnostic criteria specified within the current edition of the *Diagnostic and Statistical Manual of Mental Disorders*
- Resulting in serious functional impairment, which substantially interferes with or limits one or more major life activities

According to the National Survey on Drug Use and Health, in 2008, 13.4 percent of adults in the United States received treatment for a mental health problem. This includes all adults who receive care in inpatient or outpatient settings and/or used prescription medication for mental or emotional problems.

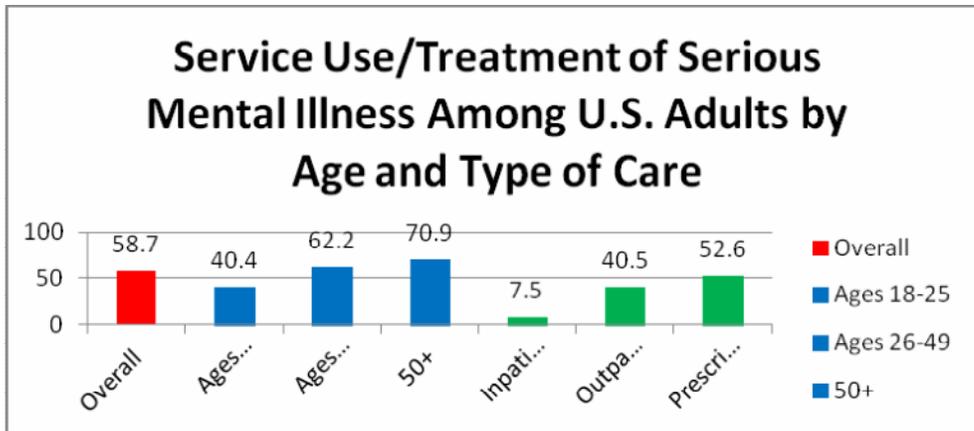
---

<sup>81</sup> Texas Department on Aging and the Texas Council for Developmental Disabilities. Aging with Developmental Disabilities: The Texas Project. Austin, TX: July 2001.

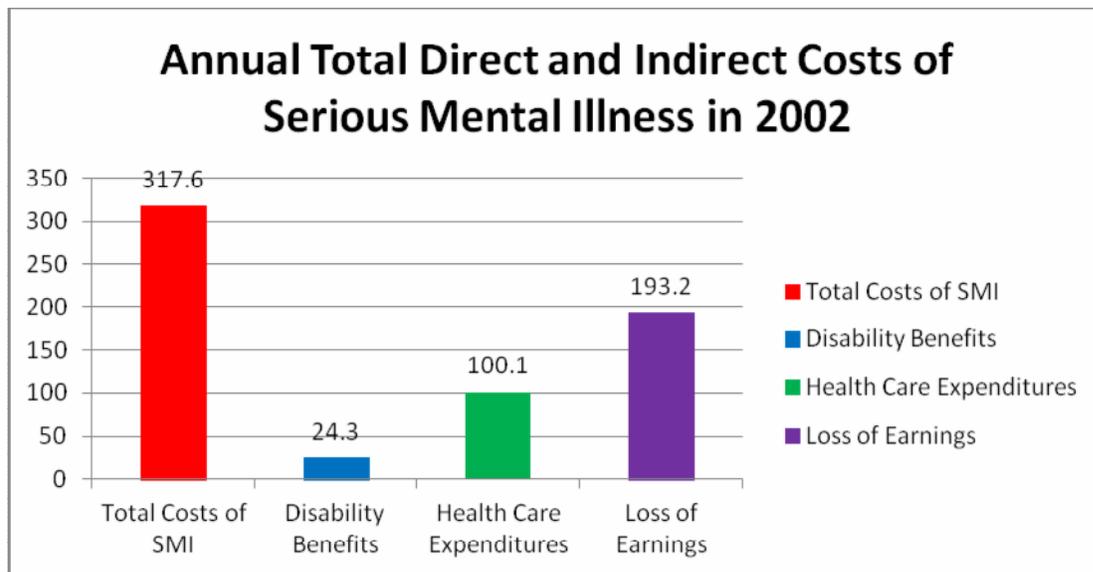
<sup>82</sup> Janicki, M.P., Dalton, A.J., Henderson, C.M., & Davidson, P.W. 1999. Mortality and morbidity among older adults with intellectual disability: Health services considerations. *Disability and Rehabilitation*, 21, 284-294.

<sup>83</sup> Census 2000 Disability Data

<sup>84</sup> Social Security website



The costs associated with mental illness stem from both the direct expenditures for mental health services and treatment (direct costs) and from expenditures and losses related to the disability caused by these disorders (indirect costs). Indirect costs include public expenditures for disability support and lost earning among people with serious mental illness. The National Institute of Mental Health (NIMH) conservatively estimates the total costs associated with serious mental illness, those disorders that are severely debilitating and affect about 6 percent of the adult population, to be in excess of \$300 billion per year. This estimate is based on 2002 data from the Substance Abuse and Mental Health Services Administration (SAMHSA), the Social Security Administration, and findings from NIMH-funded National Comorbidity Survey.



## Undue Influence and Financial Exploitation

Undue influence is a form of psychological abuse, related to the phenomena of mind-control. Defined as the substitution of one person's will for the true desires of another, undue influence generally occurs when the victim is

incapacitated by cognitive impairment, physical or mental illness or some other vulnerability such as recent bereavement. Undue influence is usually accompanied by fraud or duress by the perpetrator, generally someone in a position of trust or authority, who seeks financial gain at the expense of the victim.

Elderly people with assets such as their own homes, stocks, bonds, and other material and financial assets, are most likely to become victims of undue influence due to their life circumstances. This can include ill health with physical dependency, cognitive impairments, grief and bereavement, and decreased independence in such activities as shopping, bill paying and the need for transportation. Mentally ill individuals are also at risk for victimization, as are those with developmental delays, chemical dependency, and other such conditions that result in need for assistance with various activities. Perpetrators almost always begin with a close and trusting relationship with the victim, and most often perpetrators are family members. Family members sometimes have a financial duty to the victim as their attorney-in-fact, and use that relationship to take financial advantage of the victim. These people have no court oversight so this type of relationship often goes undetected. Authorities have found that oftentimes there is a family member who lives with the victim, sometimes an adult child who never left home, and that person is in a prime position to isolate the victim from others.

Unrelated perpetrators, such as accountants, trustees, attorneys or guardians, may have a financial duty to the victim as well. Other times the perpetrators are housekeepers, caregivers, neighbors, nursing personnel, physicians, church members, or even clergy. Occasionally these people deliberately develop a close relationship with the victim with the goal of financial gain. Wilber and Reynolds, researchers at the University of Southern California, found that “anywhere from 33% to 53% of elder abuse victims are believed to experience financial abuse.”

## **A Need for Guardianship Reform**

Parallel with and triggered by all of the national developments in guardianship was an explosion of action in state legislatures. In 1988, some 28 states introduced a total of over 100 guardianship bills, 23 of which passed. Each year over the next decade saw the passage of a substantial number of guardianship measures. All states made at least moderate or minor revisions, and many made significant changes. A growing list of states enacted comprehensive reforms or tossed aside their old guardianship law and started anew.

These laws were marked by four trends. First, states sought enhanced procedural due process safeguards. These included meaningful notice, representation by counsel, presence of the alleged incapacitated person at the hearing if possible, a number of hearing rights, and the “clear and convincing

evidence” standard of proof. Second, states moved toward a more functional determination of incapacity, relying less on medical labels and more on evidence concerning how the person can function in society. Third, states emphasized the principle of “the less restrictive alternative,” including provision to ensure that needs could not be met by other options before resorting to guardianship; and provisions for the use of limited guardianship orders. Fourth, states strengthened the accountability of guardians, and court oversight.

In 2010, at least 21 states passed a total of 29 adult guardianship bills – as compared with 16 states and 25 bills passed in 2009. Seven states enacted the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA), bringing the total number of states with enactments to 20. The Virgin Islands passed an adaptation of the Uniform Guardianship and Protective Proceedings Act (UAGPPA). Other states made changes in the guardianship adjudication process, the capacity determination, the authority of guardians, accountability and court oversight, and the public guardianship system. Key features of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act include:

- Determination of initial jurisdiction. The Act provides procedures to resolve issues concerning initial guardianship jurisdiction by designating one state as the proper forum in which to file.
- Transfer. The Act sets out a two-state procedure for transferring a guardianship to another state, helping to reduce expenses and save time while protecting persons and their property from potential abuse.
- Recognition and enforcement of a guardianship or a protective proceeding order.
- Communication and cooperation. The Act permits communication between courts and parties of other states in order to respond to requests for assistance from courts in other states.
- Emergency situation and other special cases. A court in the state where the individual is physically present can appoint a guardian in the case of an emergency. Also, if the individual has real or tangible property located in a certain state, the court in that jurisdiction can appoint a conservator for that property.

Despite these reform measures, judicial monitoring practices appear to vary and, in many areas, remain lax. Continuing news accounts throughout the 1990s and beyond indicate that serious problems persist.<sup>85</sup> Press stories include a two-part *Washington Post* series in 2003, “Misplaced Trust: Guardians in the District,” which alleged that “the [District of Columbia] court’s probate division...has repeatedly allowed its charges to be forgotten and victimized.” The *Post*’s review of more than 10 years of case dockets and hundreds of court files, as well as dozens of interviews, found hundreds of cases where court-appointed

---

<sup>85</sup> Wendland-Bowyer, Wendy. (2000, May 24). Who’s watching the guardians? *Detroit Free Press*.

protectors violated court requirements, noting specifically that since 1995, one of five guardians had gone years without reporting to the court.<sup>86</sup>

In November 2005, the *Los Angeles Times* published an extensive four-part series, entitled “Guardians for Profit,” detailing the findings from a review of more than 2,400 cases, including every case handled by professional guardians in Southern California between 1997 and 2003. The *LA Times* found many cases in which guardians (called “conservators” in California) ignored the needs of their wards, plundered estates, and charged hefty fees. The series observed that court oversight is “erratic and superficial,” and that judges “rarely take action against conservators.”

Whether such accounts reflect isolated examples of abuse in an otherwise well-functioning process or come closer to the norm is unknown. Indeed, policymakers, advocates, and the legal and judicial system are working in the dark in assessing adult guardianship. There are very few data resources. The 2004 GAO report noted that most courts “do not maintain information needed for effective monitoring and oversight of guardianships.”

### **Data Collection**

In recent years, there have been a few attempts to collect data on adult guardianship, including the following:

The Associated Press provided the country’s first guardianship statistics—numbers that remain today among the very few such national-level counts. It concluded that there were approximately 300,000 to 400,000 adults under guardianship in the country—and that 67 percent were female, the average age of wards was 79, 33 percent of wards were moved during the guardianship, and 64 percent were in a nursing home sometime during the guardianship. It also included figures on guardianship proceedings. In 44 percent of the cases, the proposed ward was not represented by an attorney, and in 49 percent of the cases the proposed ward did not attend the hearing. Accountings were missing in 48 percent of the files. Three out of 10 files included no medical evidence. “Advanced age” was given as the reason for appointment of a guardian in 8 percent of the cases. One out of four files contained no indication that hearings had been held. Some 13 percent of the files were empty except for the opening of the guardianship (Bayles & McCartney, 1987).

The National Probate Court Standards Project compiled statistical information about the number of guardianship cases filed in 41 jurisdictions in 1988, 1990, 1991, 1992, 1998, and part of 1999. The project found that the number of guardianship cases filed widely among the states, both in terms of absolute numbers and relative to the state’s population. The total number of filings was 86,622 for 22 states and the District of Columbia (DC) in 1990; 114,

---

<sup>86</sup> Leonnig, Carol D., Lena H., & Cohen, Sarah. (2003, June 15). Under court, vulnerable became victims. *The Washington Post*, A-01

882 for 31 states and DC in 1991; 133,005 for 33 states and DC in 1992; and 247, 416 for 40 states and DC in 1998. Taking into account only those states reporting filings for all three years “the number of filings increased twenty-five percent between 1990 and 1992” (Hannaford & Hafemeister, 1994).

A national study by The Center for Social Gerontology in 1994 examined the guardianship process intensively in ten states. The project gathered and analyzed data from 566 guardianship hearing and 726 guardianship files, conducted telephone interviews with 228 petitioners, and identified 20 previous research studies focused largely in individual states. The study made 14 findings and eight recommendations about the guardianship process (Lisi, Burns, & Lussenden, 1994).

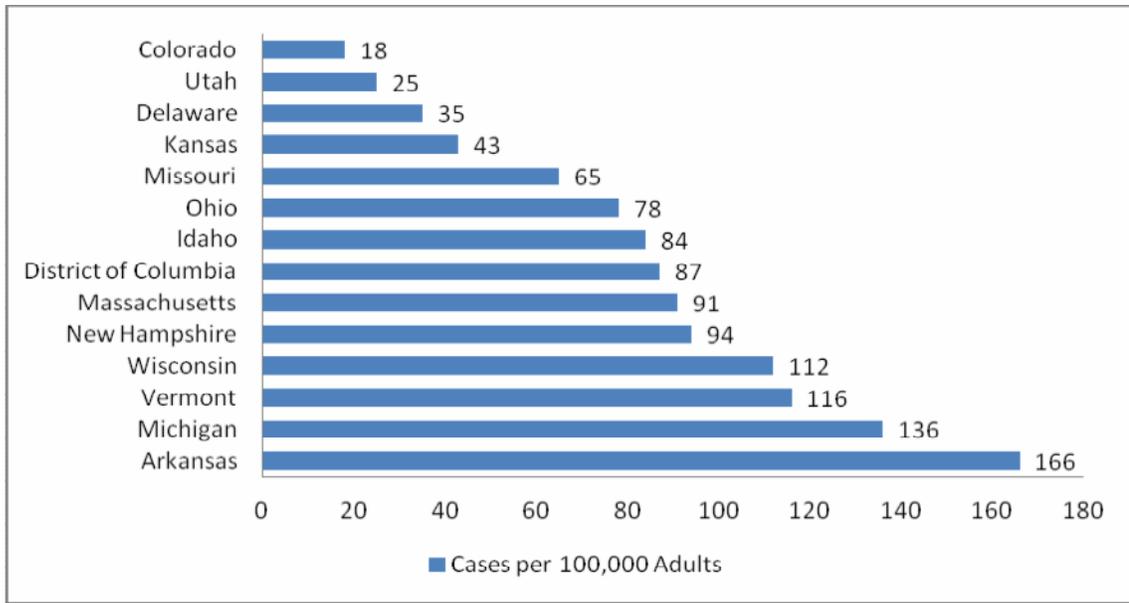
Research on guardianships continues to be hampered by the lack of quality data.<sup>87</sup> The number of adults under guardianship in the United States can only be estimated. Recent attempts at collecting state data on guardianship have demonstrated the absence of meaningful data. Where information does exist, it has been collected through random means. For example, while a study of guardianships release by AARP’s Public Policy Institute, in collaboration with the ABA Commission on Law and Aging, claims to be a “national survey of court practices,” the “survey” was administered in the form of an internet-based questionnaire and includes responses from only 26 probate judges.

State court caseload data on adult guardianships is collected through the National Center for State Courts’ Court Statistics Project (CSP). Currently, few states are able to report complete statewide adult-guardianship caseload data, because these cases are counted in a generic probate case type or otherwise blended into civil caseload statistics. A number of states cannot distinguish adult guardianships from adult conservatorships as distinct case types. Other states include both juvenile and adult guardianships in a single “guardianship” case type. A case may begin as a simple conservatorship but evolve into a guardianship, and vice versa, further complicating the counting issues. Thus a complete picture of how many adult guardianship and adult conservatorship cases are filed, closed, and pending nationally is not available.

Despite the lack of comprehensive national data, 14 states report adult guardianship filings annually. The chart shows the number of incoming adult guardianship cases and the number of cases per 100,000 adults. The median number of incoming adult guardianship cases per 100,000 adults is 87.

---

<sup>87</sup> R. Schauffler and B. Uekert. 2008. “The Need for Improved Adult Guardianship Data,” *Caseload Highlights*, 15 (2).



### Guardian Reporting Requirements

The primary way that courts are informed about the individual's status after a guardianship has been established is through period guardian reports. The 1991 ABA monitoring study recommended that "(t)he guardian should be required to report to the court...on the ward's personal status and finances no less than once a year."<sup>88</sup> Requiring periodic personal status reports is now generally accepted in courts across the country.<sup>89</sup> The most frequent requirement is for annual reporting. The Uniform Guardianship and Protective Proceedings Act require annual reports and accounts.<sup>90</sup> The Wingspan 2001 recommendations urge "mandatory annual reports of the person and annual financial accountings."<sup>91</sup>

As of the end of 2004, all but two states<sup>92</sup> statutorily required personal status reports, although the required frequency of filed varied. The majority of state statutes require personal status reports to be filed at least annually, although some leave the frequency to the discretion of the court.<sup>93</sup>

<sup>88</sup> Hurme, Sally Blach. (1991). *Steps to enhance guardianship monitoring*. Washington, DC: American Bar Association Commission on the Mentally Disabled and Commission on Legal Problems of the Elderly.

<sup>89</sup> Hurme, p. 898

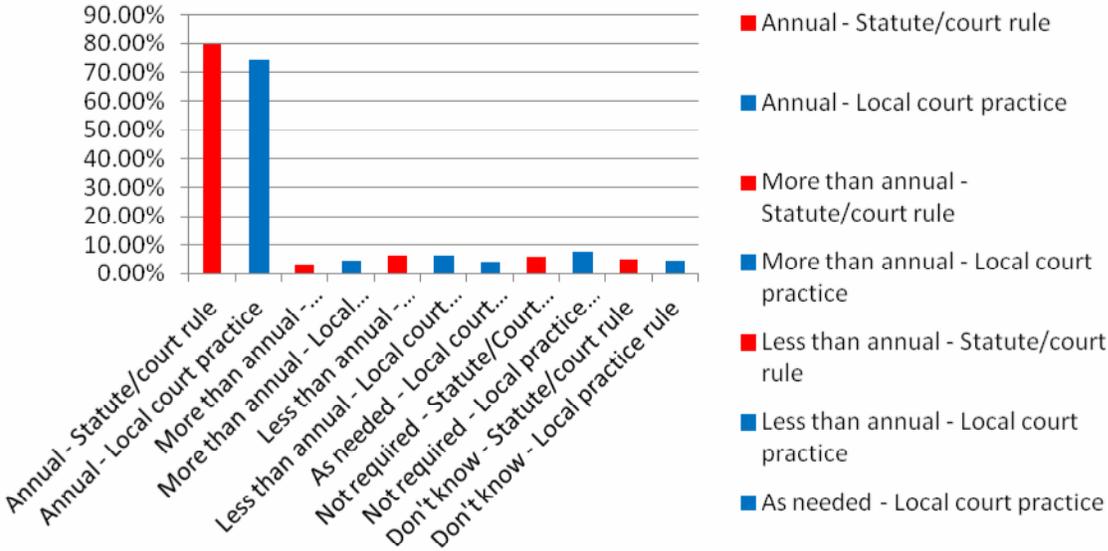
<sup>90</sup> National Conference of Commissioners on Uniform State Laws. (1997). *Uniform Guardianship and Protective Proceedings Act*

<sup>91</sup> Wingspan Recommendations, #51

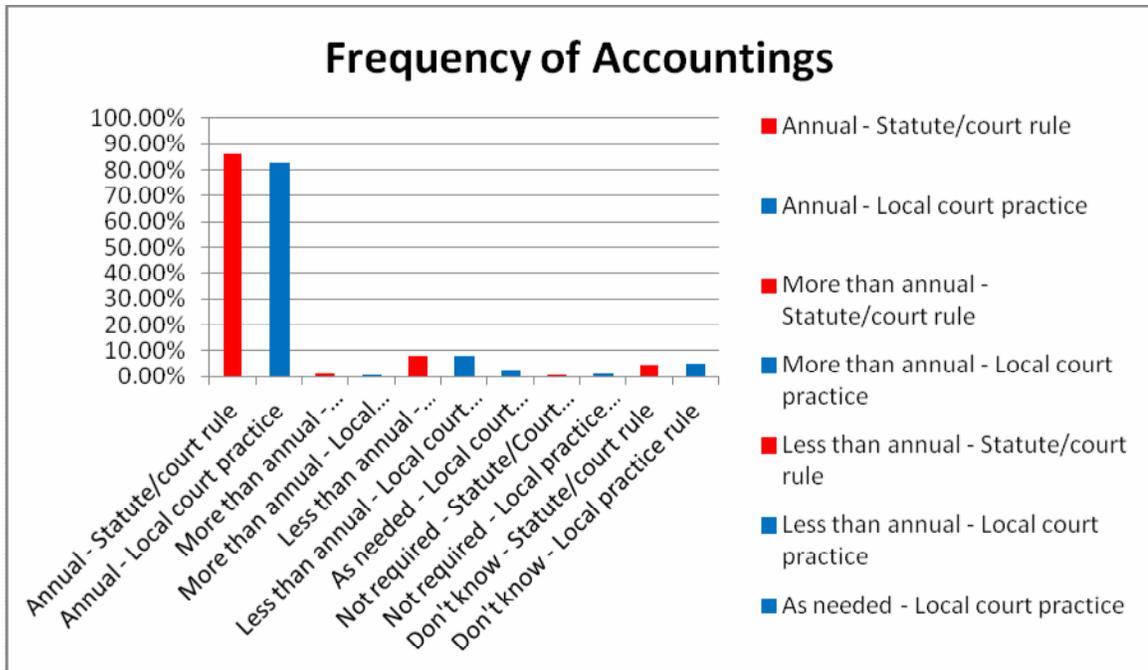
<sup>92</sup> Delaware and Massachusetts

<sup>93</sup> ABA Commission on Law and Aging

## Frequency of Personal Status Reports



Due to the probate roots of guardianship, probate courts are historically familiar with requiring and auditing accounts from executors and guardians of the estate. Since the 1988 Wingspread conference recommendations, experts and professional groups have repeatedly recommended that courts require guardians of the estate to file reports on their ward’s finances at least annually. These recommendations can be found in the 1991 ABA monitoring study, the Uniform Adult Guardianship and Protective Proceedings Act, the *National Probate Court Standards*, and the 2001 Wingspan conference recommendations. All states statutorily require periodic accountings, with annual being the most common time interval, although a number of states defer the frequency of filing to the probate courts’ discretion.



### Guardianship Plans

A guardianship plan is a forward-looking document submitted by a guardian to the court describing the proposed care of the individual and reporting on past care. Guardianship plans provide a baseline inventory that enables the court to measure the guardian’s future performance. The concept of a guardianship plan, introduced in 1979 in an ABA model guardianship statute,<sup>94</sup> has been echoed in every major set of guardianship recommendations. In contrast to accountings and personal status reports, only a few states mandate care plans by statute—with the filing of the petition, following appointment of a guardian, or with the annual report.<sup>95</sup>

### Court Assistance to Guardians

Serving as a guardian is “one of society’s most serious and demanding roles.”<sup>96</sup> The guardian must step into the shoes of another and make critical decisions about care and property, sometimes even about life and death. To do an effective job, guardians require assistance and direction from the court in the form of training, clear specification of reporting responsibilities, and provision of reporting forms, along with samples showing how they should be filed out. The 1991 ABA study concluded that “despite the difficulty of the guardian’s tasks, in many instances the guardian does not receive much assistance in taking on these new responsibilities.”

<sup>94</sup> American Bar Association, Commission on the Mentally Disabled. (1979). *Guardianship & conservatorship*, Model Statute, §17(2)

<sup>95</sup> States requiring care plans include Oklahoma, Washington, Colorado, Maryland, New Hampshire, and Maine.

<sup>96</sup> ABA Commission on the Mentally Disabled & ABA Commission on Legal Problems of the Elderly. (1989)

Since guardians must be knowledgeable about a vast array of topics, ranging from housing and long-term care to medical and psychological treatment to accounting, policy recommendations since the 1980s have endorsed court-sponsored training and ongoing assistance to guardians. Few state statutes mandate guardianship training and assistance, and such support generally is left to the initiative of the court. Florida and New York are exceptions; each has mandatory training (that can be waived under certain circumstances) with specified course content, including instruction in the guardian's duties and responsibilities.<sup>97</sup> Arizona and Washington have training requirements as part of a certification program for private professional guardians. The most commonly available resource for guardians is court-provided written instructions or manuals. In addition to training, courts can assist guardians by providing clear direction on reporting and accounting responsibilities. The most common source of reporting and accounting forms is the court clerk or court's website. Samples or models of appropriately prepared personal status reports and accountings may be the most helpful to guardians.

### **Enforcing Reporting Requirements**

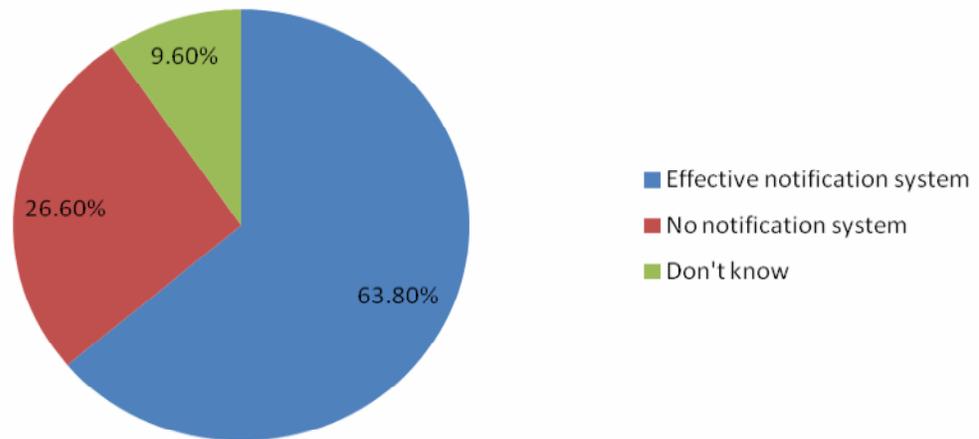
The 1988 Wingspread Conference participants recommended that courts "vigorously enforce timely filing of all required reports." Theoretically, state statutes inform guardians of reporting requirements and frequency. Moreover, reporting deadlines may be set out in the initial court order. However, notification to guardians when the due date is approaching or has passed enhances the consistency of timely filing. The 1991 ABA monitoring study noted that "experience and our survey indicate that unless courts take steps to enforce reporting requirements, few reports are filed." The study observed: "in many courts it is common practice to notify guardians if reports and accounts are not filed on time."<sup>98</sup>

---

<sup>97</sup> Hurme, pp. 877-878

<sup>98</sup> Hurme, pp. 31-32

## Notification of Reports Due or Past Due



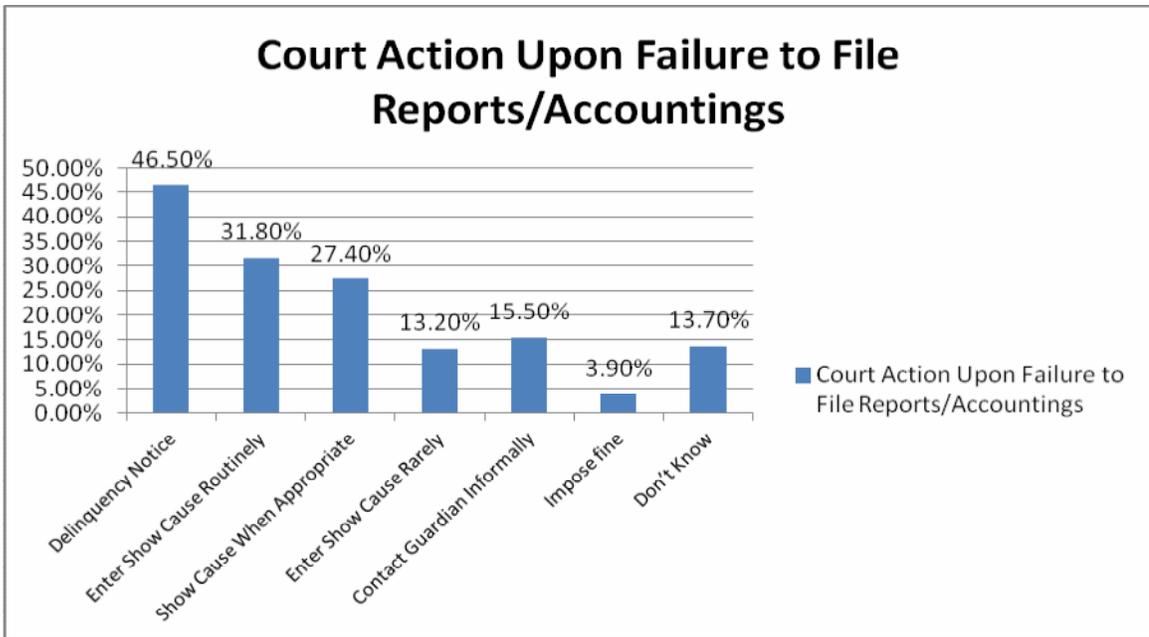
What happens if guardians fail to respond to an initial notice? The *National Probate Court Standards* commentary indicates that “the court should be prepared to investigate those situations where a guardian fails to submit any report required by the original order.”<sup>99</sup> Guardianship statutes give judges an arsenal of sanctions to impose.<sup>100</sup> The 1991 ABA study showed that courts are more likely to take action if an accounting is not filed than if a personal status report is not filed, but indicated that, overall, sanctions are not used “frequently.”<sup>101</sup>

---

<sup>99</sup> Commission on National Probate Court Standards, pp. 75-76.

<sup>100</sup> ABA Commission on Law and Aging

<sup>101</sup> Hurme, pp. 33-34.



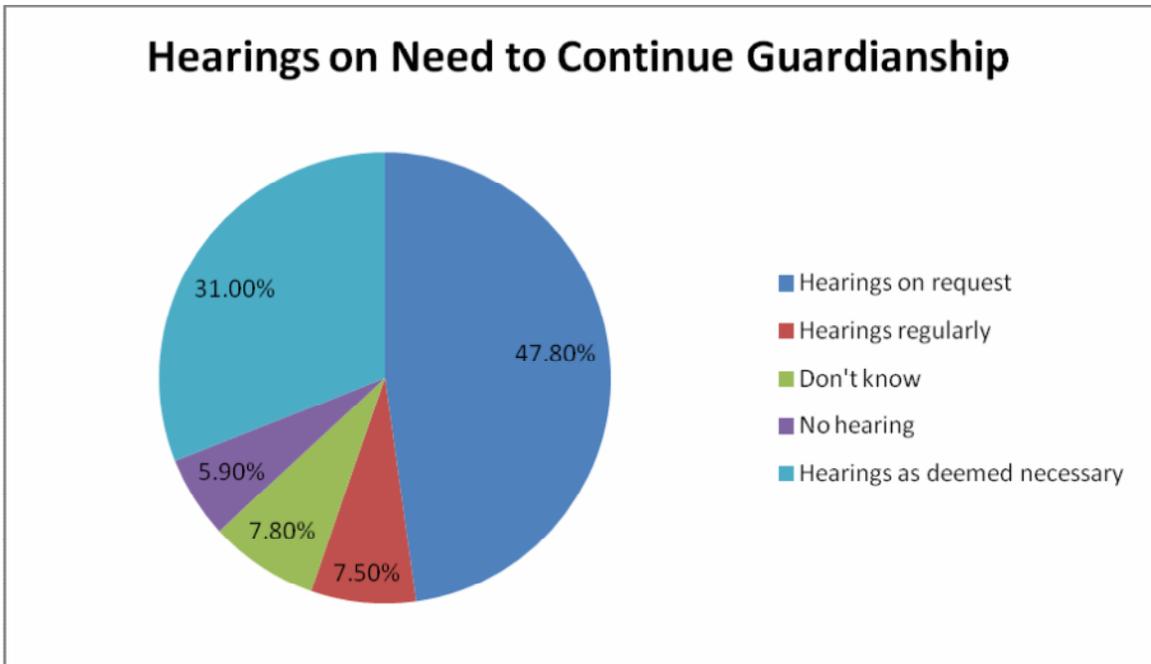
### Procedures for Review

Without consistent court review and response, guardian reports serve little purpose other than having a possible sentinel effect. Clearly someone with expertise must examine the reports and accountings for completeness and accuracy and flag any problems needing attention. The courts must also set criteria to assist the reviewer in knowing what to look for in the documents and aid the guardian in understanding what information the court expects.

Since the condition and circumstances of the incapacitated person may change over time, there is a need to determine periodically whether guardianship is still necessary. According to the *National Probate Court Standards*, “the probate court should adopt procedures for the periodic review of the necessity for continuing a guardianship. A request by the respondent for a review of the necessity for continuing a guardianship should be addressed promptly.”<sup>102</sup> Currently, 29 state statutes include provisions requiring or permitting court review of continuing need.<sup>103</sup>

<sup>102</sup> NPCS, Standard 3.3.16.

<sup>103</sup> ABA Commission on Law and Aging



### Funding for Monitoring

Good monitoring requires sufficient resources—to fund staff, technology, training, and materials. The 1991 ABA study found that 52 percent of the guardianship experts surveyed named inadequate state appropriations as a barrier to monitoring, and 41 percent named inadequate local appropriations. The study indicated that most jurisdictions rely on multiple funding sources and recommend that “(s)tate and local funding agencies should provide the courts with sufficient funds or revenues so the court will be able to monitor guardianship cases adequately.”<sup>104</sup> Thirteen years later, the July 2004 GAO study showed that funding remains a problem: “(m)ost courts surveyed said they did not have sufficient funds for guardianship oversight.”<sup>105</sup>

### Court-Community Interaction

The 1991 ABA monitoring study urged that courts be “aware of and encourage the efforts of other community groups and agencies that monitor wards’ well-being.” If courts and community agencies are both engaged in monitoring the status of at-risk individuals, they can strengthen their effectiveness by working together. Such community entities might include adult protective services, long-term care ombudsman programs, state and area agencies on aging, guardianship associations, and bar association grievance committees.

Moreover, broader guardianship reform recommendations over the years have encouraged court-community linkages. The 1988 Wingspread conference urged states to create

<sup>104</sup> Hurme, p. 59.

<sup>105</sup> GAO, p. 16.

“multidisciplinary guardianship and alternatives committees” to plan for reform (including monitoring) and enhance education of all stakeholders. The 2001 Wingspan conference charged state and local jurisdictions to create “an interdisciplinary entity focused on guardianship implementation, evaluation, data collection, pilot projects and funding.”<sup>106</sup>

### **Data Systems and Court Technology**

The 2004 GAO report highlighted a grave lack of hard data on adult guardianship. It found that only one-third or fewer of the responding courts surveyed tracked the number of active guardianships for incapacitated adults and concluded that the dearth of statistical data limits oversight and efforts to improve the guardianship system. The GAO findings reflect continuing concern with lack of guardianship data over the course of many years. In 1994 experts from the National Center for State Courts noted that “a pervasive problem for organizations examining the use of guardianship for the elderly has been the lack of accurate or reliable information concerning the number of persons actually under the protection of a guardian in the United States.”<sup>107</sup>

One additional data element concerns whether the case involved elder abuse. This is important because there is currently wide consensus that there is no clear picture of the incidence and prevalence of elder abuse in the United States, and that such a picture “is imperative to enable society to...mount an effective response.”<sup>108</sup> Court data on guardianship cases involving elder abuse (either as a reason for the guardianship or in which case the guardian is the perpetrator) could contribute significantly to the knowledge base.

Since the 1991 ABA study on monitoring, court technology has undergone a sea of change. Today, the National Center for State Courts estimates that, collectively, courts spend in excess of \$500 million annually on information technology.<sup>109</sup> Guardianship files include sensitive private information on health conditions, mental disabilities, finances, and such identifying information as addresses and Social Security numbers. Good monitoring requires that full information be maintained. A critical question is to what extent this information is and should be available to the public, particularly if the files can be accessed on the Internet. Privacy and the potential for exploitation argue that the files should be sealed and available only for limited purposes, yet public access to guardianship monitoring can help to ensure full accountability.

In light of technological innovations enabling courts to “broadcast” information in court records on the Internet, numerous state courts and legislatures have examined the issue of how to balance public access, personal privacy, and public safety. For example, a 2005 California court rule requires individual guardianship case records to be accessible electronically at the

---

<sup>106</sup> Wingspan Recommendations, Rec. #6.

<sup>107</sup> Hannaford, Paula, & Hafemeister, Thomas. (1994). The National Probate Court Standards: The role of the courts in guardianship and conservatorship proceedings. *The Elder Law Journal*, 2.

<sup>108</sup> Bonnie, Richard J., & Wallace, Robert B. (Eds.). (2003). *Elder mistreatment: Abuse, neglect, and exploitation in an aging America*. Washington, DC: The National Academies Press.

<sup>109</sup> National Center for State Courts

courthouse itself but not remotely. The Supreme Court of Florida's Committee on Privacy and Court Records recommended in 2005 that psycho-social evaluations, psychological evaluations, and guardian ad litem reports be placed under seal by the clerk of the court.

## **Conclusion**

Guardianship originally grew out of the 14<sup>th</sup>-century English concept of *parens patriae*—the duty of the king, and later the state, to protect those unable to care for themselves. The court, on behalf of the state, appoints a guardian to carry out the duty of protection, and the guardian is bound by high standards of care and accountability. A critical part of the court's protection is oversight of the guardian at the "back end" of the process. Without monitoring, the court cannot be assured of the welfare of society's most vulnerable members. Indeed, monitoring is at the very core of the court's *parens patriae* responsibility. In addition to these historical and philosophical bases for strong monitoring, there are practical considerations as well. We are at a critical time with guardianship practice. The first baby boomers are turning 65, signaling much greater use of the guardianship system in coming years. Guardianship practices are again under censure by the press, courts struggle to secure funding allocations in a highly competitive environment, and rapid changes in information technology continue to revolutionize the way we communicate.