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FORUM ON PROTECTING OLDER AMERICANS UNDER GUARDIANSHIP: WHO IS WATCHING THE GUARDIAN?

FORUM

BEFORE THE

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

ONE HUNDRED EIGHTH CONGRESS

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FORUM ON PROTECTING OLDER AMERICANS UNDER GUARDIANSHIP: WHO IS WATCHING THE GUARDIAN?

THURSDAY, JULY 22, 2004

U.S. SENATE,
SPECIAL COMMITTEE ON AGING,
Washington, DC.

The committee met, pursuant to notice, at 2:04 p.m., in room SD–628, Dirksen Senate Office Building, Hon. Larry E. Craig presiding.

Present: Senator Craig.

OPENING STATEMENT OF SENATOR LARRY E. CRAIG, CHAIRMAN

The CHAIRMAN. Well, ladies and gentlemen, why do we not get started here? Good afternoon and welcome to the Senate Special Committee on Aging Forum on Guardianship Issues. The room will probably fill up with a few more folks. We are in the last day before the recess by all indications of our leadership at this moment, and that, in part, will impact attendance.

But please view this as a full room, because the record we build here today and your participation in building that record is going to be extremely important, because what we have brought together are a group of expert panelists, and I must tell you that I am pleased that among our distinguished experts are some familiar faces to the Aging Committee: Barbara, Barbara Bovbjerg, from the Government Accounting Office, who has agreed to moderate the forum this afternoon is here along with others, and she will introduce our panelists, and Barbara, we thank you for doing so.

Today's forum will focus on the monitoring and accountability of court-appointed guardians responsible for the care and financial management of this country's most vulnerable elderly. Hundreds of thousands of older Americans live under guardianship in the United States. Those numbers will dramatically increase as our aging population continues to grow at a prolific and unprecedented rate.

In February 2003, the Aging Committee held a hearing exploring the misuse of guardianships imposed over the elderly. Over the course of the hearing, I heard several horror stories of elderly Americans put into abusive guardianship situations. At that time, I called the Government Accounting Office to conduct a study on how Federal funds are managed by court-appointed guardians.

The GAO has since compiled significant information on guardianship programs nationwide with special focus on three key States. They found that while all States have laws requiring courts to oversee guardianships, the implementation of those laws are varied and sporadic. In fact, most courts surveyed by the GAO did not even track the number of active guardianships or the number of elderly under guardianships.

Another finding is the lack of collaboration between State courts and Federal agencies. While both are responsible for assisting some of the same older adults, they communicate little. There is no system in place for Federal agencies and courts to notify each other in situations where financial exploitation is detected. The failure to coordinate between agencies can leave this Nation's most vulnerable senior citizens without any protection at a time when they need it most.

In light of these concerns, it is my desire that the panel today examine three key issues: first, a review of State laws that provide for oversight in guardianship; second, identification of State courts that have exemplary training and monitoring practices, and third, how State courts and Federal representative payee programs serving the same individuals can better coordinate their oversight efforts.

I will now turn the proceedings over to Barbara. Barbara is the acting director of education, workforce and income security issues at the U.S. Government Accounting Office and is the author of a recent reporting examining the collaboration needed to protect incapacitated elderly people. Her background and expertise are impressive, as is that of each of our panelists.

Once again, I want to thank all of you for being with us this afternoon as we face the important issue of the most vulnerable amongst us, and I look forward to today's discussion and the record that you are about to build.

So, Barbara, I will turn this forum over to you and to the panelists who have gathered with you. Thank you very much.

STATEMENT OF BARBARA BOVBJERG, DIRECTOR, EDUCATION, WORKFORCE, AND INCOME SECURITY ISSUES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Ms. BOVBJERG. Thank you very much, Mr. Chairman.

I did have remarks that I wanted to make at the beginning, and then I thought I would introduce each of our panelists; I thought what I would do today as facilitator I know that they too have remarks that they would like to make. I will have a few general questions for them, and, because this is a forum and a little different from a hearing; we will invite the audience. I will invite the audience to ask questions after we have been through a couple of general ones.

I am really pleased to be here to discuss guardianships for the elderly, and I really appreciate the Senate Committee on Aging's request for this kind of work and support of our report by holding this forum. As people age, they become incapable of caring for themselves in some cases, and although family members can often provide assistance, sometimes, a State court will need to appoint a guardian to act on the incapacitated person's behalf.

There have been instances, however, in which guardians have taken advantage of the elderly people they were supposed to protect. Such cases of abuse and neglect are the very things that prompted questions about the oversight of these programs. Indeed, that is why GAO did this work. Chairman Craig and the Senate Special Committee on Aging asked us to study guardianships for the elderly, and the results of our work are being released in a report today.

It covers the three areas that Senator Craig mentioned as our focus today: what State courts do to ensure that guardians fulfill their responsibilities; what exemplary guardianship programs look like; and how State courts and Federal agencies work together to protect incapacitated elderly people.

To do this work, we reviewed guardianship statutes nationwide and conducted surveys of courts in the three States with the largest populations of elderly: California, New York and Florida. We also visited courts in eight States, and we interviewed Federal officials responsible for representative payee programs.

First, let me talk about State courts and guardians. All 50 States and the District of Columbia have laws requiring courts to oversee guardianships, and at a minimum, most State laws require guardians to submit a periodic report to the court, usually at least once annually, although not always, regarding the well being of the incapacitated person. Many State statutes also authorize measures that courts can use to enforce guardianship responsibilities. However, court procedures for implementing guardianship laws appear to vary considerably. For example, most California and Florida courts responding to our survey require guardians to submit time and expense records to support petitions for compensation, but both States also have courts that do not require these reports.

We also found that States are generally reluctant to recognize guardianships originating in other States. Few have adopted procedures for accepting transfer of guardianship from another State or recognizing some or all of the powers of a guardian appointed in another State. This complicates life for an elderly person needing to move from one State to another or when their guardian needs to transact business on their behalf in another State, for example, a property transfer.

In addition, data on guardianships are scarce. Most courts we surveyed did not even track the number of active guardianships, let alone maintain data on abuse by guardians. Although this basic information is needed for effective oversight, no more than a third of the responding courts did this sort of tracking, and only a few could provide the number of guardianships for elderly people, the subpopulation of the larger group of guardianships.

Let me now turn briefly to what we call the exemplary programs. We sought particular courts that people in the guardianship community considered especially effective. Each of the four courts so identified distinguished themselves by going well beyond minimum State requirements for guardianship training and oversight. For example, the court we visited in Florida provides comprehensive reference materials for guardians to supplement their training.

On the oversight side, the court in New Hampshire recruits volunteers, primarily retired senior citizens, to visit incapacitated peo-

ple, their guardians and care providers at least annually and to submit a report of their findings to court officials. Exemplary courts in Florida and California also have permanent staff that investigate allegations of fraud, abuse and exploitation. The policies and practices associated with these courts may serve as models for those seeking to assure that guardianship programs serve the elderly well.

Finally, I would like to turn to the role of the Federal Government in guardianship. Federal agencies administering benefit programs appoint representative payees to manage the benefits of incapacitated individuals. The Federal Government does not regulate or provide any direct support for guardianships, but State courts may decide that the appointment of a guardian is not necessary if they know that a representative payee has already been assigned.

In our interviews of Federal and court officials, we found that although courts and Federal agencies are responsible for protecting many of the same incapacitated elderly people, they generally work together only sporadically, on a case-by-case basis. Courts and Federal agencies do not notify other courts or agencies when they identify someone who is incapacitated, nor do they notify them if they discover that a guardian or a representative payee is abusing a person. This lack of coordination may leave incapacitated people without the protection of responsible guardians and representative payees or, worse, with an identified abuser, in fact, in charge of their benefit payments.

To conclude, the number of elderly Americans is expected to grow dramatically in the future. The need for guardianship arrangements seems surely to rise in response, and ensuring that such arrangements are safe and effective will become increasingly important. Emulating exemplary programs such as the four we examined would surely help, but we believe more can also be done to better coordinate across States, Federal agencies and courts. That is why we recommend establishing an interagency study group, including representatives from State courts and all the Federal programs with representative payees to consider how better to share information among these entities.

We also concluded that guardianship arrangements would benefit from the collection and analysis of consistent national data on numbers and types of arrangements and the incidence of problems. Thus, we have recommended that the Department of Health and Human Services work with national guardianship organizations and States to develop cost-effective approaches to compiling such information. With these measures, guardianship programs could better serve incapacitated individuals and would be better prepared for the growth in demand that we anticipate in the future.

This concludes my remarks. I am really looking forward to hearing what our other panelists have to say. They are people whom I know have contributed in various ways to the debate in guardianship, and I would like to take the opportunity to introduce them now. I want to say that the panelists sitting around me all have considerable expertise in a number of fields. Their expertise is not limited to guardianship, but when I talk about their qualifications, I am going to limit myself to that piece, so I want you to know that

they are even more accomplished than what you will hear about today.

We will start with Frank Johns, sitting to my left. Frank Johns is an attorney. He is a partner in the firm of Booth, Harrington and Johns in North Carolina, and he concentrates on elder law. He is a fellow and past president of the National Academy of Elder Law Attorneys and a charter board member and president-elect of the National Guardianship Association, an association that we consulted in the course of our work.

Nancy Coleman is here as the director of the American Bar Association Commission on Law and Aging. She was appointed to the National Legislative Council of the AARP in 2002. Notably to our topic today, in 1995–96, she also served as chair of the Federal Advisory Committee for the Social Security Administration to Review the Representative Payee Program. I am looking forward to some of her reactions to some of the things we have said about that program. She has also served on the board of directors of several national aging organizations.

Deborah Armstrong has come to join us from New Mexico. She is an attorney, and she is also currently the deputy secretary of the New Mexico Aging and Long-Term Care Department, formerly the State Agency on Aging, and prior to becoming deputy secretary was director of the Elder Rights and Health Advocacy division.

I am looking forward to hearing all of your comments. I hope Mr. Aldridge will be joining us shortly; perhaps we could start with you, Mr. Johns.

[The prepared statement of Barbara Bovberg follows:]

Oral Remarks of Barbara D. Bovbjerg
Director, Education, Workforce, and Income Security Issues
U.S. Government Accountability Office

July 22, 2004

I'm pleased to be here today to discuss guardianships for the elderly. As people age, some become incapable of caring for themselves. Although family members often can provide assistance, sometimes a state court will need to appoint a guardian to act on the incapacitated person's behalf. There have been instances, however, when some guardians have taken advantage of the elderly people they were supposed to protect. Such cases of abuse and neglect have prompted questions about the oversight of these programs.

Indeed, Chairman Craig and the Senate Special Committee on Aging asked GAO to study guardianships for the elderly. The results of our work appear in the report being released today.[1] The report covers 3 areas: first, what state courts do to ensure that guardians fulfill their responsibilities; second, what exemplary guardianship programs look like; and third, how state courts and federal agencies work together to protect incapacitated elderly people. To do this work, we reviewed guardianship statutes nationwide and conducted surveys of courts in the 3 states with the largest elderly populations: California, New York and Florida. We also visited courts in 8 states and we interviewed federal officials responsible for representative payee programs.

First, state courts and guardians. All 50 states and the District of Columbia have laws requiring courts to oversee guardianships. At a minimum, most states' laws require guardians to submit a periodic report to the court, usually at least once annually, regarding the well being of the incapacitated person. Many states' statutes also authorize measures that courts can use to enforce guardianship responsibilities. However, court procedures for implementing guardianship laws appear to vary considerably. For example, most California and Florida courts responding to our survey require guardians to submit time and expense records to support petitions for compensation, but both states also have courts that do not require these reports.

We also found that states are generally reluctant to recognize guardianships originating in other states. Few have adopted procedures for accepting transfer of guardianship from another state or recognizing some or all of the powers of a guardian appointed in another state. This complicates life for an elderly person needing to move from one state to another or when their guardian needs to transact business on their behalf in another state.

In addition, data on guardianship are scarce. Most courts we surveyed did not track the number of active guardianships, let alone maintain data on abuse by guardians. Although this basic information is needed for effective oversight, no more than one-third of the

[1] U.S. General Accounting Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, GAO-04-655 (Washington, D.C.: July 2004).

responding courts tracked the number of active guardianships and only a few could provide the number of these for elderly individuals.

Let me now turn briefly to what we call the "exemplary" programs. We sought particular courts that those in the guardianship community considered especially effective. Each of the four courts so identified distinguished themselves by going well beyond minimum state requirements for guardianship training and oversight. For example, the court we visited in Florida provides comprehensive reference materials for guardians to supplement training. With regard to active oversight, the court in New Hampshire recruits volunteers, primarily retired senior citizens, to visit incapacitated people, their guardians, and care providers at least annually, and submit a report of their findings to court officials. Exemplary courts in Florida and California also have permanent staff to investigate allocations of fraud, abuse, or exploitation. The policies and practices associated with these courts may serve as models for those seeking to assure that guardianship programs serve the elderly well.

Finally, I'd like to turn to the role of the federal government in guardianship. Federal agencies administering benefit programs appoint representative payees to manage the benefits of incapacitated individuals. The federal government does not regulate or provide any direct support for guardianships, but state courts may decide that the appointment of a guardian is not necessary if a rep payee has already been assigned. In our interviews of federal and court officials, we found that although courts and federal agencies are responsible for protecting many of the same incapacitated elderly people, they generally work together only on a case-by-case basis. Courts and federal agencies don't notify other courts or agencies when they identify someone who is incapacitated, nor do they notify them if they discover that a guardian or a rep payee is abusing the person. This lack of coordination may leave incapacitated people without the protection of responsible guardians and rep payees or, worse, with an identified abuser in charge of their benefit payments.

In conclusion, the number of elderly Americans is expected to grow dramatically in the future. The need for guardianship arrangements seems likely to rise in response, and ensuring that such arrangements are safe and effective will become increasingly important. Emulating exemplary programs such as the four we examined would surely help, but we believe more can also be done to better coordinate across states, federal agencies, and courts. That is why we recommend establishing an interagency study group including representatives from state courts and all federal programs with rep payees to consider how better to share information among these entities. We also concluded that guardianship arrangements would benefit from the collection and analysis of consistent national data on numbers and types of arrangements and incidence of problems. Thus we have recommended that the Department of Health and Human Services work with national guardianship organizations to develop cost-effective approaches to compiling such information. With these measures, guardianship programs could better serve incapacitated individuals, and will be better prepared for the growth in demand expected in the future.

STATEMENT OF FRANK JOHNS, ATTORNEY AT LAW, BOOTH, HARRINGTON & JOHNS, NATIONAL ACADEMY OF ELDER ATTORNEYS, GREENSBORO, NC

Mr. JOHNS. Thank you. To participate in a forum such as this is an honor in and of itself.

While Barbara described our credentials, there are as many other experts with whom we always collaborate who make it possible to share the kind of depth and anecdotal information about guardianship that is brought forward in a forum like this one. I also want to thank Chairman Craig, who, in his wisdom and foresight did something more than I thought would be done after the hearings that were conducted in February 2003.

In academic writings that I have published over the years, one thing I have mentioned is that between 1960 and the middle 1990's, there were no less than 30 major studies done with recommendations that carried very little weight. There were numerous hearings that had been held that ended with nothing going further than the transcript of the hearings themselves.

With some degree of tenacity and a conviction that supports his interest in this area, Senator Craig, on behalf of this Committee, sought out and received the involvement of the GAO, and for a year now, a study has been ongoing, the likes of which is, quite frankly, somewhat of a landmark in this field. The potential of this study is that it will target ways by which coalitions of funding sources and agency authority will join with groups like the National Guardianship Network to truly deliver some of the required needs that we see coming in the future.

On that premise, then, my remarks both oral and in writing that are shared with you are requested to be made part of the transcript, and I further request authorization to extend those remarks where appropriate when given the opportunity after the hearing is over.

In terms of a target, I was not sure exactly what would be produced in the study at the time I did my writing, although I did have the benefit of being interviewed by representatives of the GAO who shared with me how they went about the process of their investigation, what States they targeted and where they focused their inquiry. With that benefit, I primarily focused my writing on what is written in the GAO study.

Basically, it is what we do not know that is going to hurt the people we serve. What we do not know is developed in two primary areas: what we do not know about those who are guardians serving wards and incapacitated elders; and what we do not know about the statistics in each and every State and in the Federal agencies that are involved with guardianship in terms of the numbers of alleged incompetent adults, the numbers of incapacitated adults, merged with the problem that there are incapacitated minors who are also part of the mix in terms of the guardianship analysis.

What we do not know is honestly what will hurt us in the years to come. Actually, the truth of the matter is, what we don't know is hurting the people we serve now as we conduct this forum. The terribly difficult stories, like the Orshansky case that was presented in February 2003, is representative of hundreds of anecdotal commentaries and written investigations like the one published in

the Detroit Free Press in 2000 and the one that was published by the Washington Post.

There are many other investigations going on where, in a specific case or a few cases, guardians are found to have committed literal criminal acts of stealing from the estates of wards and even going so far as to commit criminal acts of abuse and physically harming or neglecting the very persons they are charged to protect. Couple that with the fact that our public agencies are going to be saddled with a significant number of vulnerable adults who have no network in the years to come and to whom they can only look or the agencies they can only look to are the Department of Social Services or Mental Health or the agency that the State Government will decide is the literal dumping ground of our impoverished, vulnerable elders who need a protection much better than that.

But the problem is we do not have a clue on what the numbers are. The report will share with you that they find the numbers are increasing, and there is some data to reflect that, for example in the largest county in North Carolina, Mecklenburg County, where Charlotte, North Carolina is, the judge of guardianships there, Martha Kern, will share with you that in the last 3 years alone, their docket numbers have mushroomed to three and four times what they were for guardianships. She knows nothing more than that fact, and that fact was garnered by an assistant clerk going through the stacks and counting files, because there is no data being collected, no systemwide process by which the numbers of guardianships are being examined, much less what is happening in the guardianships themselves.

So, if you will, Barbara, my focus is on the fact that we do not have good data, and it is just critical that we find a source by which funds could be made available where we integrate a task force that is not just driven from a Federal perspective, but it involves each and every State with a commitment to design a model by which data can be collected in these States, so that on that foundation, we can give better discourse on what is to come and the kind of dollars we are going to need to serve them.

The other piece of that is this: the laws are written for monitoring and accountability of guardians. The truth of the fact, as I write in my remarks, is truly a matter of virtual reality. What you see on the book, you think is real, but when you go out to find it, you find it is not real at all. There is literally little if any monitoring and accountability, especially for guardianship of the person. We are pretty good at making people account for the money. What concerns many of us is the quality of the life of all of our people, whether they are poor or not, needs to be accounted for in delivering that which is needed to protect their interests.

With that, I will close, and I will be glad to help in answering any questions. Thank you.

[The prepared statement of Mr. Johns follows:]

UNITED STATES SENATE
SPECIAL COMMITTEE ON AGING

Senator Larry E. Craig, Idaho, Chairman
Senator John B. Breaux, Louisiana, Ranking Member

FORUM ON GUARDIANSHIP
July 22, 2004

GUARDIANSHIP ISSUES RELATING TO STATE LAWS ON OVERSIGHT; COURT TRAINING AND MONITORING; AND LACK OF STATE AND FEDERAL COLLABORATION

By

A.Frank Johns, JD, CELA, R-G

WRITTEN TESTIMONY

GUARDIANSHIP ISSUES RELATING TO STATE LAWS ON OVERSIGHT; COURT TRAINING AND MONITORING; AND LACK OF STATE AND FEDERAL COLLABORATION

By

A. Frank Johns, JD, CELA*, R-G[1]

Mr. Chairman and members of the Committee, and Ms. Bovbjerg, and representatives of the General Accountability Office, thank you for the opportunity to participate in this forum on guardianship issues relating to state laws on oversight; court training and monitoring; and lack of state and federal collaboration.

It was with foresight and committed interest that this committee through its chair, Senator Larry Craig, requested a study of guardianship[2] by the Government Accountability Office. I am pleased to be among those invited to the committee's guardianship forum at which the GAO Report is being presented. I am certain that many of the points raised in my remarks are thoroughly examined and assessed by the GAO. As the representative of the National Academy of Elder Law Attorneys and as a member of the National Guardianship Network, I am pleased to extend the full support of these organizations in assisting in the implementation of the GAO's recommendations.

My remarks and opinions are forged from more than 25 years of legal advocacy and trial practice in guardianship, and from more than 15 years of academic writing and research. My participation is due in large measure to my membership in and extensive work with the National Academy of Elder Law Attorneys, in which I am a Fellow and past president, and one of the academy's representatives in the National Guardianship Network. It is also due to my longtime association with the National Guardianship Association, of which I was a founding Board member. Portions of this testimony were previously published in written remarks of the author submitted to this committee in 1992 and 2003.

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[1] J.D., Florida State University College of Law; CELA, *certified as an elder law attorney by the National Elder Law Foundation; partner in the firm of Booth Harrington & Johns, L.L.P., Greensboro and Charlotte, North Carolina, concentrating in Elder Law; Fellow and past president of the National Academy of Elder Law Attorneys; charter board and president-elect National Guardianship Association; past Charter Chair, Elder Law Section of the North Carolina Bar Association; Fellow in the American College of Trust and Estate Counsel (ACTEC).

[2] Like many other notes, comments and articles, the words "guardian" and "guardianship" in this written testimony include the broad spectrum of words and language used across the country to describe surrogate decision-making for another person through court appointment that transfers the power over an individual's rights, liberties, placement and finances to another person or entity. These words and language include, but are not limited to, conservatorship, interdiction, committee, curator, fiduciary, visitor, public trustee and next friend.

I. WINGSPAN AND THE RECOMMENDATIONS RELATED TO TRAINING, OVERSIGHT AND MONITORING AND COLLABORATION

In July of 1988, Wingspread – the First National Guardianship Conference produced a set of landmark recommendations for reform of guardianship across the country. More than a decade later, in November of 2001, Wingspan: the Second National Guardianship Conference was convened to examine what progress had been made in the interim, and what steps should be recommended for the future.

Wingspan conferees produced more than 75 recommendations considered by the full conference under procedures that permitted time-limited discussion and floor amendments. Recommendations that received more than 50 percent support of the conferees became the official recommendations of Wingspan. Numerous specific recommendations related to oversight, education and training, monitoring and federal linkage are shown below.

In November of this year, at a joint conference of the National Academy of Elder Law Attorneys, the National College of Probate Judges and the National Guardianship Association, an invitation only Wingspan Implementation Session will be convened to develop ways by which the states may be assisted in reforming their guardianship laws, developing guardianship data bases and expanding education and monitoring.

II. STATE STATUTORY REFORM RELATED TO OVERSIGHT

Has there been any measurable reform in state oversight of guardianship? Whether measuring reform related to due process or oversight, true reform is measured by chronicling the gains in oversight made across the country in each state's guardianship statute. Simply tracking the paper chase of reform from state to state is a daunting task made easier by Erica Wood, American Bar Association Commission on Law and Aging, and her annual review of state legislative changes in guardianship statutes for the benefit of the elder law bar and the aging network;[3] and to Sally Balch Hurme, AARP, and her graphs that track the spectrum of guardianship from beginning to end.[4]

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[3] *See* A. Frank Johns, *Tens Years After: Where is the Constitutional Crisis with Procedural Safeguards and Due Process in Guardianship Adjudication?,* 7 Elderlaw J. 33, 78-88 (Fall, 1999)(a summary of the ten years from 1988 to 1998 that Wood followed state legislative statutory reform. Note: Wood has kept the updates current through 2004).

[4] *Id.,* at 33, and 110-152, Exhibits "C" – "H" (Hurme's 1998 graphs of the 50 states and DC guardianship statutes from beginning to end). Note: Hurme has kept the guardianship current though 2004.

However, the state statutory changes are arguably less than a true measure of guardianship reform, possibly just a mask of virtual reality?[5] When this witness examined the twenty most significant empirical research projects and studies over thirty years from the '60s through the '90s, they comprised a striking composite of how far changes in the laws have gone, and how implementation of those changes may have gone virtually nowhere:

> It is analogous to the technological wizardry of virtual reality. Once you have the mask over your eyes, you see where you are going as if you were actually there - but you have gone nowhere. If seeing is believing, then you believe that you have gone as far as the images in the mask have taken you. The changes in the guardianship laws over the past several decades may only be a mask of virtual reality. The changes in law mask the real world reality, and provide for those looking through the mask the opportunity to see where they are going as if they were actually going there - but they have gone nowhere. However, since seeing is believing, they believe that real world implementation of rights, procedures, public and private programs, monitoring and enforcement benefits vulnerable and unprotected older Americans who because of intrusive intervention have been placed in the guardianship process. However, they have gone only as far as the mask of images of changes in guardianship laws has taken them.[6]

In the past, there has been unanimity and clarity in the answer to the question of measurable reform in guardianship – too many states provide little if any funded support of statutory requirements for guardianship oversight. The result has produced judicial inattention to the quality of the lives of the persons over whom the courts have jurisdiction and control.

It is clear that any attempt at reform requires re-education and training of the judiciary and the social agencies that support it. Professor Lawrence A. Frolik surmised:

> No matter how many reforms or counter-reforms are enacted, no matter how the system is modified, there is no perfection this side of paradise. Rather [than focusing on reforming the guardianship system]...those concerned [should focus on] the actors in the guardianship system, and how the actors' behaviors might be improved.[7]

There are a few well-recognized "actors in the guardianship system" where a "best practice" of education and training in the judiciary has delivered programs of productive

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[5] *See* A. Frank Johns, *Guardianship Folly: The Misgovernment of Parens Patriae and the Forecast of its Crumbling Linkage to Unprotected Older Americans in the 21st Century,* 27 Stetson L. Rev. 1, 28-29 (Summer, 1997).

[6] *Id.*

[7] *See* Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good,* 9:2 Stanford Law and Policy Review 347, 351 (Spring 1998).

oversight, monitoring and accountability.[8] Those programs should be modeled and replicated across the country. In many states, however, the probate judges are not the real problem or impediment to oversight and reform. The real problem is that guardianship is considered insignificant, not even reaching the bottom of the list of priorities over which state judicial branches are most concerned.

The question is further answered from another angle with the same unanimity and just as much clarity - there is too little, if any, current reliable data from which to draw conclusions.

Ingo Keiltz, previously associated with the National Center of State Courts, commenting at the 1992 round table of this committee, raised the need for a national database on guardianship.[9] He commented that Associated Press reporters were astonished to find that there

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[8] Several years ago, this author acknowledged many probate court judges, or judges in courts having jurisdiction over guardianships and conservatorships, that have served for all the right reasons, with heartfelt, dedicated interests in those being adjudicated in their courtrooms and subsequently being protected under their statutory duties and jurisdictional boundaries. Many are so well known that they are often named in studies and writings, or identified on panels, committees and task forces that address the issues. They include, The Honorable John Kirkendall, Probate Court Judge in Ann Arbor, Michigan, The Honorable Thomas E. Penick, Jr., Judge, Circuit Court, Clearwater, Florida, The Honorable Kristin B. Glen, Justice, Supreme Court, New York, New York, The Honorable Isabella H. Grant, Judge, Superior Court, San Francisco, California, The Honorable John R. Maher, Probate Court Judge, Kingston, New Hampshire, The Honorable Mary Sheffield, Probate Court Judge, Rolla, Missouri, and The Honorable Field Benton, Probate Court Judge, Denver, Colorado. While countless other probate court judges are included but unnamed, the committee has before it the Honorable Irvin G. Condon of Charleston County, South Carolina, and Chief Judge Mel Grossman of Broward County, Florida.

Many probate judges are similar to Judge Nikki DeShazo, a Probate Court Judge in Dallas, Texas who described her reasons for seeking a probate judgeship:

> . . . I found I really wanted to be where people could find a friend and get help. . . . I wanted to help people. I wanted to work in an area that would enhance people's feelings of self-worth. Probate Court can really be a pleasant, rewarding place to work. . . . I am distressed that societal changes have isolated people, so that they do [not] know their neighbors. There is no one to care about and look out for neighbors. Situations seem to have become very bad before any kind of help is obtained. . . . We need to learn again how to care for people. We need to develop more concern for our fellow humans.

D.M. Alford, *A Probate Judge's View*, 13 J. of Gerontological Nursing 32 (1994).

Even as altruistic as the above judges may be, there are those judges who oftentimes make up their minds before examining any evidence. Depending upon whom petitioners have for attorneys, or what bent guardian *ad litems* take, some judges habitually respond with no further inquiry before they benevolently order the AIP to the guardianship gulag. Anything more would be considered wasteful and lacking judicial economy.

[9] *See* Ingo Keiltz, *Comments Before a Roundtable Discussion on Guardianship*, Special Committee on Aging, U.S. Senate (102d Cong. 2d Sess. 1992)(Serial Number 102-22), p 34. (In their book *Reinventing Government: How the Entrepreneur's Spirit is Transforming the Public Sector*, Osborne and Gaebler assert that governments, including the courts, are in deep trouble today largely because there are huge entrenched bureaucracies that impede the very

was no data on state guardianship, and nothing existed on a nationwide basis. Keiltz made the obvious point that neither the federal government, nor each state knows how many individuals are subject to guardianship proceedings annually, what guardianship case loads correlate with population, whether or not they correlate with an elderly population and how they compare when adjusted for the population in different states, different jurisdictions and according to different administrative structures. Keiltz also asserted, as was found by professor Windsor Schmidt and other researchers,[10] that there is insufficient research on social, economic, legal and systemic factors affecting the rates at which guardianship files are created in the courts.

A database for each state and the federal government would provide empirical data by which caseloads could be more carefully forecasted and processed. If the number of wards is known, then necessary funding would provide for sufficient staff, and the cost of training and enforcement. A national database could provide consistency and uniformity in the data entry and retrieval forms of the courts, requiring the same kinds of facts and circumstances that would be gathered across the country. After more than a decade since the first guardianship roundtable, I believe funding of such a database may only be realized through a federal effort because so many states continue to struggle near bankruptcy while still in the dark when it comes to statistics regarding guardianship.

Construction of a national database of guardianship was an important concern of the delegates at Wingspan. Two Wingspan recommendations specifically addressed a lack of data, and the need for a uniform system of guardianship data collection:

4. A uniform system of data collection within all areas of the guardianship process be developed and funded.

   Comment: Although significant legislative revisions have been adopted, little data exists on the effectiveness of guardianship within each state or across the states, and less information is available about how the system actually affects the individuals involved.

53. States maintain adequate data systems to assure that required plans and reports are timely filed, and establish an electronic database to house these data while preserving privacy.

It is left to the federal agencies to determine whether or not data could be collected on a national level and integrated with the states. However, individual states have to be more involved

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things that are likely to get them out of trouble: creativity, experimentation, risk taking, innovation, consumer orientation - what a strange concept in government - and future forecasting. *Id.*, at 35.

[10] *See* Windsor Schmidt, *Guardianship - The Court of Last Resort for the Elderly and Disabled* (Carolina Academic Press 1995); *see also* L. Barritt Lisi, A. Burns, and K. Lussenden, *National Study of Guardian Systems: Findings and Recommendations* (Center for Social Gerontology 1994). The study initially proposed the funding of the construction of a national database, and was modified to only research and analysis.

and committed to beginning some form of data collection on the guardianships that are already in place.

III. STATE STATUTORY REFORM RELATING TO COURT TRAINING AND MONITORING WITH ACCOMPANYING WINGSPAN RECOMMENDATIONS

Guardianship history casts light on where guardianship has come from and where it may be headed. Guardianship's own lantern on the stern[11] "...should enable us to infer the nature of the waves ahead." [12] The history of guardianship shows that it is primarily built on the doctrine of *Parens Patriae,*[13] mandating that the State (the King) is the benevolent protector.[14] In those state jurisdictions where the doctrine of *Parens Patriae* continues as the common law or statutory foundation, edicts and reasoned dictates of probate and guardianship judges control. In recent decades, however, a competing view of how guardianship laws should function has emerged, operating from the opposite end of the legal spectrum – the contemporary view based on adversarial process and formality. While each view of the guardianship process as strong support,[15] neither provides the education and training that is now needed to prepare judges and staff for what wards and incapacitated adults will need if they are to be properly served and protected.

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[11] *See* Barbara W. Tuchman, *Epilogue - A Lantern on the Stern, The March of Folly, From Troy to Vietnam* (1984).

[12] *Id.* at 383.

[13] *See* L. Coleman, T. Solomon, *Parens Patriae Treatment: Legal Punishment in Disguise*, 3 Hastings Const. L.Q., 345-362 (1976).

[14] *See* Terry Carney, *Civil and Social Guardianship for Intellectually Handicapped People*, 8 Monash L. Rev. 199 (1982); *Parens Patriae* has been defined as the crown as ultimate parent of all citizens. *Id.* at 205, n. 30, citing *Eyre v. Shaftsbury*, 2 P. Wms. 103, 24 E.R. 659 (1722).

[15] *Compare* Lawrence A. Frolik, Melissa C. Brown, *Advising the Elderly or Disabled Client,* Chp. 17 - Adult Guardianship and Conservatorship, 17-8, 9 (Warren Gorham and Lamont 1992) (Cumm. Supp. 1998):

> . . . [A]n experienced judge may have been exposed to a great deal of unusual or odd behavior and consequently be less prone to interpret it as a lack of incompetency. In most instances, you should advise the client to waive his right to a jury trial . . . few states require the alleged incompetent to be represented by counsel . . . as a result, many guardianship hearings proceed with no counsel for the alleged incompetent. The court is expected to act in his or her best interest, however, and ensure that the hearing is conducted fairly.

with John J. Regan, *Tax Estate & Financial Planning for the Elderly,* Chp. 16 - Guardians and Conservators, 16-1, 16-23 (Matthew Bender and Co. 1992) (Cumm. Supp. 1995):

> The proper function of defense counsel in a guardianship proceeding is to defend the client against the proposed order as vigorously as if the client were on trial in a criminal proceeding. A guardianship proceeding is as much a part of the adversarial system of justice as the criminal trial.

The delegates to Wingspan also targeted widespread court education and training, including judges, guardians and related support service professionals:

9. All guardians receive training and technical assistance in carrying out their duties. Organizations, including the National Guardianship Network,[16] should develop and offer specially designed introductory and continuing guardianship courses for judges, court personnel, families, guardians, proposed fiduciaries, and attorneys practicing in the guardianship area, including training on minimum guardianship standards and ethics.

10. Attention be given to the need for mandatory education for all judges in courts hearing guardianship cases, with special attention to the educational needs of general jurisdiction judges.

11. The Internet and other technology be used to educate and communicate with lawyers, judges, guardians, and other professionals in the guardianship arena.

12. Standards and training for mediators be developed in conjunction with the Alternative Dispute Resolution community to address mediation in guardianship related matters.

    Comment: Standards and training should include identification of issues appropriate for mediation, participants in the mediation, use and role of legal representatives, and procedures to maximize self-determination of individuals with diminished capacity. The development of standards should take into consideration the recommendations of the 2000 Joint Conference on Legal and Ethical Issues in the Progression of Dementia[17] on dispute resolution, and of The Center for Social Gerontology,[18] and study whether these recommendations should be extended to all types of disability. Mediators should adhere to such standards even if not statutorily required.

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16 [Footnote part of the recommendation.] The National Guardianship Network is an informal coalition of associations interested in improving guardianship services for individuals as they age and for those with disabilities. The National Guardianship Network was formed in 2000 and its membership includes the ABA Commission on Legal Problems of the Elderly, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys (NAELA), the National Center for State Courts, the National College of Probate Judges, the National Guardianship Association, and the National Guardianship Foundation. For more information about the National Guardianship Network, contact NAELA at its address, 1604 North Country Club Road, Tucson, Arizona 85716, by telephone (520) 881-4005, by facsimile (520)325-7925, or through its Web site at <http://www. naela.com>.

17. [Footnote part of the recommendation.] *Recommendations of the Joint Conference*, 35 Ga. L. Rev. 423, 423–450 (2001).

18.[Footnote part of the recommendation.] Susan J. Butterwick, Penelope A. Hommel & Ingo Keilitz, *Evaluation of Mediation as a Means of Resolving Adult Guardianship Cases* (Ctr. for Soc. Gerontology 2001). Copies of the study are available for a fee by contacting The Center for Social Gerontology by telephone at (734) 665-1126 or by e-mail at <tcsg@tcsg.org>. A copy in PDF format is available through its Web site at <http://www.tcsg.org>.

45. States adopt minimum standards of practice for guardians, using the National Guardianship Association *Standards of Practice*[19] as a model.

    Comment: Lawyers should not be exempt from those standards. Lawyers and courts should be educated and trained in the standards.

48. The public guardianship function include broad-based information and training.

    Comment: Broad-based education and training about guardianship and alternatives can divert pressure from the public guardianship system.

Wingspan devoted a separate section to monitoring and accountability. The delegates first looked at changes in statute or regulations:

51. There be mandatory annual reports of the person and annual financial accountings to determine the status of the person with diminished capacity. The report and the accounting should be audited as frequently as possible.

52. To provide effective monitoring, the following are required: (a) a functional assessment of the abilities and limitations of the person with diminished capacity; (b) an order appropriate to meet the needs of the person with diminished capacity (with preference given to as limited a guardianship if possible); (c) an annual plan based on the assessment and an annual report, appropriately updated, based on the plan; and (d) inclusion of any other mandated reports which are the guardian's responsibility, such as reports to the Social Security Administration or the Department of Veterans Affairs.

The delegates then considered what changes should be considered in practice precepts or guidelines that would successfully implement the statutory and regulatory revisions:

53. States maintain adequate data systems to assure that required plans and reports are timely filed, and establish an electronic database to house these data while preserving privacy.

54. Courts have the primary responsibility for monitoring.

55. Monitoring is appropriate regardless of who is the guardian — family member, professional guardian, or agency guardian.

56. Guardianship issues be delegated to judges who have special training and experience in guardianship matters.

19.[Footnote part of the recommendation.] Reprinted at 31 Stetson L. Rev. ___, ___–___ (2002).

Comment: Judicial specialization should be encouraged. There is a need to increase expertise of the judiciary and the support staff in guardianship matters. This recommendation should be communicated to legislatures and chief judges who organize court systems.

Further comment on monitoring and accountability was written and published for the Committee's hearing in 2003 by Erica Wood of the ABA Commission on Law and Aging. The Commission's executive director, Nancy Coleman, is before the committee today and will surely update the committee on the Commission's current recommendations.

IV. STATE AND FEDERAL LINKAGE COULD LEAD TO GREATER FEDERAL PROTECTIONS

Are there current federal programs available to the states that could provide advocacy and protection for older Americans under guardianship?

The answer is yes. Implementing such protections through current federal systems that regulate Social Security, Pension Benefits and Veterans Benefits could be efficient and immediate. Social Security could be linked through the Representative Payees Program; pension and other deferred retirement benefits could be linked through federal oversight of qualified retirement plans; and the Department of Veterans Affairs may already be linked through its oversight of state veterans statutory guardianship laws that are in place in most states.

Federal oversight and revenue sharing to train and educate each state judicial branch and supporting social service agencies could also be a component of a proposed initiative like the Elder Justice Act. Such creative federal initiatives could address Guardianship's good by training, educating and mandating standards for public and private guardians, targeted as a source of leadership, a conduit for resources and a linkage to protection and advocacy of vulnerable older Americans of modest means.

Additionally, current federal programs and prospective initiatives could coordinate the confrontation with Guardianship's evil, mounting a national attack through the states, and through volunteer corps of national advocates, pursuing abuse, neglect and exploitation. This will not be easy when such degradation is often at the hands of the very public and private guardians that are sworn to protect the vulnerable older Americans against such risks.

One final source of protection may not be currently attractive, but it may be constitutionally required.[20] There should be developed federal regulatory directives through federal agencies with current statutory authority to guide the states in implementing consistent

[20] *Rudow v. Commissioner of Division of Medical Assistance,* 707 N.E.2d 339 (Mass. 1999)

oversight and intervention in protecting older Americans served in the guardianship process with comprehensive monitoring and accountability.

V. THREE RECOMMENDATIONS

There were three recommendations offered by this author to the committee at the 2003 hearing. Those recommendations, as modified for this forum, continue to need the committee's attention in order to protect against possible wrongdoing inflicted on vulnerable older adults in the guardianship process.

The first recommendation is to fund a major grant that has the single mission of conducting empirical research in all states and the District of Columbia from which there would be developed a primary national guardianship database.

The second recommendation is to federally fund assistance needed to investigate and study ways to implement accountability and monitoring in all states and the District of Columbia. The GAO report is just such a study. While it has limited empirical benefit because of the sample of states used to do the report, the report will be an excellent model to be followed in states not examined.

The third recommendation is to fund court models that educate and train judges, lawyers and other professionals in the guardianship process.

Such funding should be linked in partnership with the National Guardianship Network.

Respectfully submitted,

A. Frank Johns, Esq.

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Ms. BOVBJERG. Thank you very much, sir.

Ms. Coleman.

STATEMENT OF NANCY COLEMAN, DIRECTOR, AMERICAN BAR ASSOCIATION COMMISSION ON LAW AND AGING, WASHINGTON, DC

Ms. COLEMAN. Thank you.

I want to look at—I have a written statement which will be incorporated, but I want to look at several of the questions that were raised here and see if we can move forward with them. I think that the General Accounting Office, whatever you are called now——

Ms. BOVBJERG. Government Accountability Office.

Ms. COLEMAN. Government Accountability Office; thank you. OK; I am going to just call you the GAO.

Ms. BOVBJERG. It is easier.

Ms. COLEMAN. I think that the study is really quite good, and I agree with Frank that it pushes the envelope, and I think that we needed that. I do not disagree that the issue of data is important and, in fact, over 3 years ago, in some work that the ABA Commission had done, we had posited that you needed to have, in the same way that you do in the field of child abuse prevention and in a number of other areas, a taxonomy and a data set in order to be able to collect this information.

The only State that collects data on a routine basis is Ohio, and they have it for all of their jurisdictions. Now, why would Ohio be able to do it and no other State? That is the question. I guess this comes back to the question that Frank posed: where is the incentive?

Now, it turns out, if one looks at child abuse reporting, before 20 years ago, there was no systemic reporting there either, and it was because of some Federal funds and some Federal requirements and some sort of battering over the head that we now have that. What makes us think that we cannot use those similar vehicles to get at this same issue?

The second area that I think is important to look at is the monitoring. I think that Frank hit it on the head in the sense that while it may exist in law, and there are the four jurisdictions that you looked at that went beyond what the State law is, there are several reasons why the current processes are flawed. One, the reporting is poor; two, the review and investigation is not there on all parts; three, the funding is not there, so that even though you have a good statute, you have no funding for it; four, the training, and even in those States where you have mandatory training, the training can be weak; and fifth, you have the lack of relationships to the community organizations and the community links. So I think that those are the issues troubling monitoring.

I want to look at coordination now. It is absolutely true that the Social Security representative payee program leads the way in the number of people that are in it: 7 million people. Not all of those, of course, are old people. I must say that in the work that we did in the mid-nineties, there are still some major issues that they are not addressing, that is, Social Security is not addressing. The issue of how people are chosen to be representative payees still remains

a problem, and there have been a number of IG reports on that issue.

We had a grant, that is, the ABA Commission on Law and Aging, had a grant that was a joint grant from the State Justice Institute and Social Security to look at that coordination. In that report, we stated something similar to what is in the GAO report, which states very specifically you need to have coordination. You need to share information. You need to share when you have people who are bad representative payees. In fact, the ABA, as a whole, adopted that provision, which overcame the privacy and confidentiality provision, in a recommendation that we took before the ABA House of Delegates 3 years ago. So it is there. It is clear. Social Security is balking at it, and they are the only ones.

Now, the third area, and I think it is important. We took a look recently at some of the VA representative payee fiduciary relationships, and in those, you still have some problems about ownership, about appointment, and about monitoring. I do not think that monitoring of guardianships, monitoring of Social Security representative payees, and monitoring of VA fiduciaries, are all in the same ball park. There is poor management of oversight in all three. We have dealt with a little of that in the provisions of the recent legislation.

Now, the fourth area is the interstate question. The National College of Probate Judges has a model that is now incorporated into their model standards and is part of the ABA model standards on transfers of guardianships. It does not deal with the question of original jurisdiction, which is something that still needs to be looked at. However, in some work that I was fortunate enough to participate in, there is an international agreement—of course, the United States has not signed this agreement—at the Hague. It is called the Convention on International Protection of Adults.

What is important about this to this particular issue is that if, in fact, a guardianship or a power of attorney is recognized in one jurisdiction, it can be transported to a second jurisdiction. That is, the papers that said Frank Johns is the guardian for Charlie Sabatino, and Charlie Sabatino has some property in Virginia, but this was given in North Carolina, Frank can walk into Virginia and use that. So the international way of looking at this, while the U.S. has not adopted it, is a manner in which we, in the United States, can begin to look at it.

Finally, and the last point that I will make, is that while there is still an issue that exists around the use of powers of attorney, and while all of us here can go out and establish who we want to have as our powers of attorney either for finances or for health care, there is a Treasury rule that exists that says that a person who is not able to handle their own Social Security funds must have a representative payee. That flies in the nature of somebody having the ability to name who they want to have or to have a joint bank account or a direct deposit.

Now, while the numbers of older people and probably the numbers of disabled people are increasing, the numbers of people represented as having representative payees have been stable for the last 15 years. The only way that I can see how this is true is that people are using direct deposit of Social Security checks into their

bank accounts, as Social Security would have us do it, and negotiating from those joint accounts or direct deposit accounts or using powers of attorney.

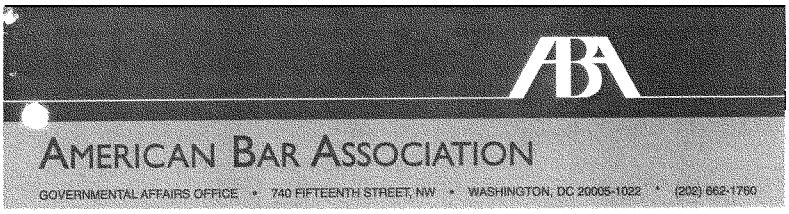
In fact, to this end, I went in and asked my friendly banker—our office happens to be above a bank—and I asked the branch manager, "What do you do, and how do you find out when somebody is no longer able to negotiate their own Social Security check? Do you report this to Social Security so that a representative payee would be appointed?" She said she did not know anything about that law.

So there is this conflict that exists that if, in fact, I am an attorney, as Frank is, or as others might be, who is counseling older people and I say, "Okay, you need to do this planning in advance so that you will not have to have a guardian or a representative payee," the conflict exists because the Federal law around representative payees and the Treasury rule says that that person must have a representative payee.

But I think that those are the kinds of things that the interagency proposal that was made in the GAO report can deal with, and I think that these are the kinds of questions to look at.

Thanks, Barbara.

[The prepared statement of Ms. Coleman follows:]



STATEMENT OF

NANCY M. COLEMAN, DIRECTOR

of the

COMMISSION ON LAW AND AGING

on behalf of the

AMERICAN BAR ASSOCIATION

for a

FORUM DISCUSSING GUARDIANSHIP

of the

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

JULY 22, 2004

Mr. Chairman:

My name is Nancy Coleman and I appreciate the opportunity to participate in this forum on guardianship on behalf of the American Bar Association, the world's largest voluntary professional organization with more than 400,000 members. I am the Director of the Association's Commission on Law and Aging, which has played a leadership role in adult guardianship reform for over 20 years. I am pleased to comment on the GAO study on guardianship released today, and will address my remarks to three related aspects of guardianship: (1) guardian accountability and monitoring; (2) coordination between state courts and federal representative payment programs; and (3) inter-jurisdictional guardianship issues.

A. Guardian Accountability and Monitoring

The American Bar Association has extensive policy on guardianship monitoring, urging the regular filing and court review of guardian accounts and reports, effective sanctions for failure to comply, training and minimum standards for guardians, and maintenance of adequate court data systems on guardianship (August 1987, February 1989, August 1991, August 2002).

The impetus for court monitoring is not an assumption that guardians are doing a poor job or abusing their appointments. On the contrary, although data is lacking, it appears that most individual and agency guardians meet the needs of at-risk, incapacitated persons, sometimes against great odds. However, oversight of guardians is an essential function of the court and a critical safeguard, given that guardianship can remove fundamental rights and liberties. Moreover, monitoring can be helpful to guardians as they fulfill one of society's most demanding roles. It also can be preventive, letting guardians know they are under they eye of the court and must meet the court's trust in appointing them. Finally, monitoring can allow the court to track guardianship practices, identify trends and make any necessary changes in procedure. All of these rationales for monitoring are underscored as our population ages, chronic illnesses including dementia become more prevalent, medical choices expand with new technologies, and the number of guardian agencies increases.

During the past 15 years, all states have revised their adult guardianship law and close to half have adopted comprehensive new codes, including stronger provisions for guardian accountability and monitoring. (See the legislative chart (updated to 2003) on guardianship monitoring produced by the ABA Commission on Law and Aging with Sally Hurme at the Commission's website at www.abanet.org/aging/guardian5.pdf). The GAO study has found that generally state law requires reports on the personal status of incapacitated persons and an accounting of the individual's finances, but that the frequency of reports, review requirements and enforcement procedures vary. A number of news articles within the past few years show instances in which monitoring procedures remain lax and vulnerable persons -- frequently elderly -- are subject to risk. In truth, there is very little data to refute or substantiate this. Statistics and research are scant. However, the press stories are an indication that monitoring practices may be lagging behind statutory standards – that there is a gap between the paper and the reality.

At the same time, courts across the country have begun to initiate model practices and procedures to ensure effective monitoring, as described by the GAO report. An examination of key elements of guardianship accountability and monitoring reveals the following. (These points are summarized from the Statement of Erica F. Wood, Associate Staff Director of the ABA Commission submitted to the Senate Special Committee on Aging at its February 2002 hearing on guardianship.)

- Guardian Training. Some states have developed guardian training handbooks and videos guiding guardian activity and answering basic questions. A few states such as Florida and New York have statutorily-required guardian training. Yet many guardians have no training at all. The cost of training is a substantial barrier, especially as states are facing budgetary shortfalls.

- Standards and Certification. An essential component of guardianship monitoring is the standard by which guardian performance is judged. The National Guardianship Association (NGA) has a *Code of Ethics* and *Standards of Practice.* In addition, through its National Guardianship Foundation, NGA has a nationwide process to certify guardians. A few states (Arizona, Washington, Florida) have developed guardian certification requirements. Certification helps to ensure courts and community that professional guardians have a basic understanding of their fiduciary duties, but it is still in its infancy and needs greater support and visibility.

- Reports and Accounts to Court. As noted by the GAO study, almost all states require guardians/conservators to submit to court periodic accountings and personal status reports on the welfare of the incapacitated person. Despite this, an ABA study of guardianship monitoring in 1991 found that in many instances the reporting requirements were not rigorously enforced – and this has been echoed in a number of troubling press accounts. There is little data on enforcement of guardian reporting requirements.

- Judicial Review. Aside from a sentinel effect, reports and accountings serve little purpose if no one looks at them. The 1991 ABA study of guardianship monitoring identified several components of an effective review process – tracking or tickler systems, designated judges responsible for review, designated financial auditors and examiners of personal status reports, and established review criteria. Yet in reality, once reports are filed, what happens to them is as varied as the number of states, courts and judges. A Florida Supreme Court Commission on Fairness survey of Circuit Courts in 2000 found very little in the way of court review. Public hearings by the Illinois Guardianship Reform Project in 1999-2000 uncovered "frustration with the inconsistency in carrying out statutory monitoring requirements [including] a laxity in closely scrutinizing annual reports."

  Beyond this, if initial paper review reveals problems, to what extent do courts send investigatory personnel out to be the "eyes and ears of the judge" and check up on the incapacitated person? Sadly, the answer appears to be "rarely." While most states authorize judges to use investigators when a "red flag" comes to the court's attention, resources are scarce. Only California has a comprehensive statewide system of regular probate court investigators. Some courts are beginning to use inventive, low-cost approaches toward review – sending a copy of the guardian report to interested third parties, asking the state public guardianship program to aid in review of private guardianships, or using volunteers and students regularly to visit incapacitated persons and guardians. Money remains a key stumbling block.

- Sanctions and Enforcement. When guardians violate their fiduciary duty, courts have a panoply of sanctions, including suspension, contempt, removal and appointment of a successor. The court also can withhold the guardian's fees, surcharge the bond or hold guardians accountable for mismanagement of property. There is little data

indicating the frequency with which these remedies are used, or how effective they are in preventing abuse or exploitation.

- Guardianship Plans. The concept of a "guardianship plan" is that the guardian should be required to submit not only an after-the-fact status report, but a forward-looking document describing to the court the proposed care of the incapacitated person. This provides the judge with a tool to measure the guardian's future performance; encourages the guardian to sit down early in the game and chart a course of action; and might be useful information for individuals listed in the notice. Little data exists to determine whether such plans are actually in use, are practical and are beneficial.

- Court Data. Courts and the public have very little accurate, reliable data about guardianship -- and without this, policymakers and practitioners are working in the dark in assessing what exists and how to improve the system. We don't know the number of persons actually under adult guardianship in the country. The GAO study noted that a third or fewer of the courts in California, Florida and New York track the number of guardianships and few track the number of incapacitated individuals under guardianship. Moreover, even when courts keep guardianship data, it may get lost in the wide variety of other case files, be mixed with data on guardianship for minors, or be lumped in with more general probate or decedents' estates data. State differences in terminology also present a real obstacle. There is no uniform method for data collection, or uniform data fields.

- Funding. Good monitoring requires sufficient resources. Courts must have funds available for staff, investigations, volunteer management, computers, software, training and materials. Financing for guardianship monitoring, however, must compete with other court needs, as well as other county and state needs, in increasingly overstrained budgets. Jurisdictions may seek multiple funding sources to finance monitoring – including state appropriations, local monies, the estate of the incapacitated person, filing fees, and grants for special projects.

Guardianship traditionally has been a creature of state law. However, because federal pensions and other funds may be managed by guardians/conservators, and because some aspects of guardianship – including monitoring -- could benefit from federal financial assistance, there may be a role for the federal government in offering funds to assist states in their efforts. In 1992, the Senate Special Committee on Aging

held a *Roundtable Discussion on Guardianship* to examine the need for federal legislation and the possible federal "hooks" for regulation. It has been twelve years since the 1992 Roundtable. As indicated in the GAO report, some courts have developed innovative "promising practices." These practices require support, visibility, and the opportunity for replication. Many different suggestions on federal funding assistance and support have been advanced by guardianship experts and interested organizations over the years. Some of these are summarized below. The ABA does not have policy on these funding approaches.

- Provide funding to support the monitoring capacity of state courts and to encourage the replication of promising practices. For example, the State Justice Institute in past years made available grants to state courts to improve court management, which could include a focus on guardian accountability.

- Encourage the development of a uniform data collection system on guardianship nation-wide, so that data collection by state courts is consistent and comparable.

- Support research on guardianship practices. During the past decade, only a handful of small projects have documented guardianship practices. Much of the criticism of guardianship proceedings stems from a few highly publicized, notorious examples of guardian abuse and neglect of wards. Whether these examples constitute the exceptions or the rule on how guardianships actually function is not known. The ABA Commission has tracked exactly what state laws have been passed, but light could be shed light on the implementation of these laws.

- Encourage state and area agencies on aging, and the long-term care ombudsman programs funded under the Older Americans Act to coordinate with state courts with guardianship supervision. Some believe that knowledge of the aging network and aging service providers could be helpful to judges in assessing guardianship plans and reviewing guardian reports. Agencies on aging could aid courts in judicial education on aging and in identifying potential community volunteers to serve as visitors or court monitors. Long-term care ombudsman could alert the court when long-term care complaints involve guardians and their wards. (The ABA Commission on Law and Aging has produced and distributed a brochure for courts on "Good Guardianship: Promising Practice Ideas on Community Links" and a mirror image brochure for the aging and disability network on "Good Guardianship: Promising Practice Ideas on

Court Links for Agencies on Aging, Adult Protective Services and Long-Term Care Ombudsman.")

- Support the technical assistance, clearinghouse, and data collection activities in the proposed Elder Justice Act that include guardianship. This recognizes that guardianship is a double-edged sword – it can aid in preventing elder abuse, yet sadly guardians sometimes can commit elder abuse.

B. Coordination Between State Courts and Federal Representative Payment Programs.

Closely related to state court guardianship systems is the much larger Social Security Representative Payment Program and other similar federal payee programs. The American Bar Association has adopted policy related directly to fiduciary performance under the Social Security Representative Payment Program (February 2002). The President signed Public Law No. 108-203 in March 2004, which included a number of provisions addressing the Social Security Representative Payment Program similar to those advocated by the Association.

The GAO study notes that state courts and federal representative payment programs serve overlapping populations but coordinate little in oversight efforts, and that information collected by state courts is generally not systematically shared with federal agencies and vice versa. Very little data is available on cases involving both guardians and representative payees.

A 2001 ABA study on *State Guardianship and Representative Payment* funded by the State Justice Institute recommended "a better exchange of information, liaison, and continuing education opportunities between the state guardianship and SSA representative payment systems." With the assistance of a broad-based advisory committee, the study identified specific practices that might aid both fiduciary systems to ensure better accountability and safeguard the rights and the funds of incapacitated persons and/or federal beneficiaries. These practices address five related aspects of the guardianship system:

1. Determining whether a guardianship is needed. When a guardianship petition is filed, if the respondent's only source of income is from the Social Security Administration or other government program and if the respondent has a representative payee, courts should recognize that a conservator need not be appointed, unless there are other compelling circumstances. Moreover, a representative payee may be able to provide valuable information on the individual's finances, functional capacity and living circumstances. Thus, the court routinely might seek to ascertain the Social Security benefit and representative payment status of respondents, and might interview the payee for critical information.

2. Limiting the guardianship order. Judges might consider representative payment in framing limited orders, and should have available model representative payment clauses for guidance. A limited order could exclude management of Social Security benefits but ensure that function is integrated with the broader financial and personal decision-making to be handled by the guardian.

3. Determining the suitability of the proposed guardian. If the proposed guardian has been a representative payee, his or her record (obtained with a Consent for Release of Information) could assist the court in evaluating the person's actions in a fiduciary role.

4. Monitoring the guardianship. In instances where it would be helpful, courts could require guardians who are also representative payees to supplement annual guardianship accounts and reports with copies of the reports they have submitted to SSA. In addition, courts could examine SSA records, if accessible through appropriate Consents for Release of Information, to identify instances of cases involving guardians also serving as representative payees in which there has been evidence of substandard performance or breach of fiduciary duty.

5. Exchanging information between the two systems. Regular exchange of information and educational opportunities between state courts with guardianship jurisdiction and the SSA representative payment program can offer significant benefits for each in strengthened monitoring and accountability. Moreover, coordination between state courts and SSA field offices could foster joint efforts to recruit volunteers and provide public information. To promote better understanding, state court administrative offices could develop and present course units on the representative payment system for judges and court staff; and SSA filed offices could receive information or training

sessions on the state guardianship process. (The ABA Commission has produced a model judicial education curriculum unit on the representative payment system.) To advance coordination and exchange of information between the two fiduciary systems, American Bar Association policy makes two specific recommendations for federal action (February 2002).

- First, the ABA urges the Social Security Administration to "recognize state and territorial courts with guardianship, juvenile, or family law jurisdiction as judicial entities entitled to access federal agency records relating to representative payees (with or without such fiduciaries' prior consent) within the statutory exception to the federal Privacy Act which permits disclosure of such information 'pursuant to the order of a court of competent jurisdiction' [5 U.S.C. §552a(b)(11)]."

- Second, the ABA supports a requirement that organizations that make application to serve as representative payee for an individual SSA beneficiary should "provide advance notice of their intention to family members (parents, siblings, children, and grandparents) of beneficiaries and to other legal representatives and, in so doing, advise such parties of SSA's general preference for appointment of individual payees with a demonstrated interest in the beneficiary over organizational payees [20 C.F.R. §§ 404.2021 & 416.635, 640 & 645]."

C. Inter-jurisdictional Guardianship Issues

The GAO study highlights complications that can arise when guardianship of an adult involves more than one state, and notes that this can affect a court's capacity to provide effective oversight. Indeed, as society becomes increasingly mobile, respondents frequently have ties to several states. Respondents, incapacitated individuals, family members, caregivers, and property may be located in several different jurisdictions. Sometimes family conflicts can trigger abrupt movement of an incapacitated person across state lines, making enforcement of guardianship orders difficult.

Therefore, interstate guardianship questions may arise as to: (1) the most appropriate state in which to file a petition; (2) the most effective process for transferring a guardianship from one state to another; (3) instances in which petitions have been filed in more than one state; and (4) the need for recognition of guardianship across state

borders. American Bar Association policy urges the adoption of "standard procedures to resolve interstate jurisdiction controversies and to facilitate transfers of guardianship cases among jurisdictions" (August 2002).

To address these critical issues the National College of Probate Judges convened an Advisory Committee to study the incidence of interstate guardianships and explore ways to foster cooperation among courts with guardianship jurisdiction. I served as a member of this Advisory Committee. The Committee developed five standards on interstate guardianship, which are now included in the *National Probate Court Standards.* These standards aim toward a concept of guardianship "portability" in which a guardianship established in one state could be transferred to another efficiently and without an unnecessary re-litigation of the question of capacity – absent a showing of abuse or other compelling circumstances. The standards also encourage judges and court staff to communicate about specific guardianship cases that cross state lines. Federal government assistance in further study of interstate issues and in bringing visibility to the National Probate Court Standards would help to improve court oversight.

However, in today's global society, jurisdictional issues extend beyond interstate issues. Individuals with questionable or diminished capacity and their families may travel or live in several countries and may confront complicated problems involving recognition of a guardianship, recognition of a durable power of attorney, choice of law, and need for cooperation among countries of the world.

Thus, a Hague Convention on the International Protection of Adults was adopted by the Hague Convention in October 1999. The Convention aims to provide an international solution to conflicting assertions of state authority over disputes involving incapacitated adults. I served as a representative of the United States to the drafting committee for this Convention. ABA policy ((February 2000) urges that: (1) the U.S. Senate give its advice and consent to the ratification of the Hague Convention; and (2) the U.S. Congress enact legislation implementing the Convention's provisions.

Thank you for the opportunity to offer comments at the Senate Special Committee on Aging forum on adult guardianship.

Ms. BOVBJERG. Thank you very much.

Ms. Armstrong.

STATEMENT OF DEBBIE ARMSTRONG, DEPUTY SECRETARY, NEW MEXICO AGING AND LONG TERM SERVICES DEPARTMENT, SANTA FE, NM

Ms. ARMSTRONG. Thank you. First of all, I am very honored to be here. I was a last-minute substitute, so I do not have a written statement. I will provide that later. But I am going to talk a little bit about the experience we have with guardianship in New Mexico. I think what I have to say is that it follows right along with the findings in the GAO.

A couple of things that we have done: first of all, along the same lines as has been discussed, there is no accounting, no data or information about who all has guardianships or how many, unless it is a public guardian; we have some information about that, because we are funding them. But otherwise, there is only a requirement to do an annual report. There is no requirement in the law that that report get reviewed by anyone. So, it is completely dependent upon the judge as to whether they have the interest, the time, the staff to do that, and to the most extent, I do not believe it is done in hardly any court.

So, there really is no accountability, nor do we have a mechanism to assess fines or so forth that other States may have for failing to file that report or to perform the duties as expected. But a couple of things that we did in New Mexico, and with good intentions, still are not working well, and that is the creation of a public guardianship program. We did it in the late eighties, and—the startup funding to create a separate nonprofit entity to do this work was provided through legislative appropriation.

The budget that goes toward public guardianship has grown in the late eighties from about $250,000 to a little over $2 million. We have about 380 wards of public guardians and about 200 that have treatment guardianship. Most of those public guardian situations go to one contracted entity, that one that was started, and there are lots of allegations against that entity about fraud, about exploitation, about inappropriate placement of their wards, and it is because they are essentially a monopoly, and it has become very difficult to control.

We have tried moving contract oversight, actually, from the AG's office, who was not acting on a lot of the issues as advocates thought that they ought to. Contract oversight was moved to an advocacy organization, the Developmentally Disabled Planning Council.

There are still problems with the representative payee situation. In New Mexico, we have separate provisions to do a guardianship or a conservatorship. In the public guardian situations, the courts determine that the ward does not have the money to pay for a guardian. That is why they need a public guardian. So the court assumes that there is no need to appoint a conservator. So, the public guardian, by default, often becomes the representative payee and essentially the conservator of whatever little income there might be; and there are reports of potential exploitation, even in that limited circumstance.

Among the nonpublic guardians, issues still arise with coordination between the representative payee and the guardian where even if the guardianship has been removed, that person is still the representative payee. So, there are still issues going on.

There is also no requirement for training. So, other than in the public guardianship context, with contract requirement that they utilize appropriately-trained staff, there is not a required training in statute. In setting up guardianships, we have tried to do some things to protect, to the greatest extent possible, the appropriateness of guardianship by having both a guardian ad litem representing the proposed ward and a court-appointed visitor doing an independent assessment of the need for guardianship.

We still find, and I am speaking a lot from my experience with the ombudsman program and their dealing with residents of nursing facilities who may have guardianship, that some guardianships seem inappropriate. We have fought the guardian on a number of occasions from inappropriately moving a resident. We had an instance last year where the publicly-funded guardian moved, against the wishes of the resident, who was very well-established in a facility and happy there, moved to one closer to where the guardianship office was, which meant completely leaving the community and any friends and support systems that were there.

So, as you have reported in the GAO study, we find the same things happening in New Mexico. Thank you.

Ms. BOVBJERG. Thank you very much.

I want to welcome Robert Aldridge. I was introducing everyone before he arrived, and I held off introducing him so he could hear the nice things I said about him. Robert Aldridge is an attorney in Idaho. His practice is focused on estate planning, taxation, probate and elder law. He is past chairman and current legislative chairman of the Taxation, Probate and Trust Section of the Idaho State Bar, and he represents the bar on the Idaho Work Force Investment Board and is vice president of the board and the one-stop chairman for the Work Force Investment Board.

He is also the long-term chairman of Retirement Jobs of Idaho, which provides nonprofit training to allow the elderly to reenter the workforce. He serves on the Legislative Oversight Committee, created by the Idaho Legislature, that is currently studying the guardianship and conservatorship system of Idaho by providing expertise and technical assistance to the Governor, the legislature and the supreme court.

He brings a wealth of perspective on this issue, and we look forward to his comments.

STATEMENT OF ROBERT L. ALDRIDGE, ELDER LAW ATTORNEY, BOISE, ID

Mr. ALDRIDGE. Thank you. When I was here in February 2003 with Mr. Johns, we were primarily talking then about the horrors of the system on the appointment side, what was happening on the intake. What, really, I have tried to focus on in my written remarks is now what happens after appointment? How do you monitor? How do you control? That is somewhat counterintuitively still involved in the preappointment process in many cases. By doing

certain things at the front end, you eliminate a lot of the problems at the back end.

So, we have tried to create in Idaho a very detailed statutory requirement for the initial filings, for the contents of those. Our bar section has published a set of forms books in terms of guardianship and similar types of proceedings that is extremely detailed, has charts, flows and so forth that could lead literally anyone through that process.

We also have worked hard to maintain the independence of the guardian ad litem, the court visitor, from the process, to make sure they are not in some way controlled by the petitioning parties and also to make sure that the guardian ad litem is a continuation after the appointment. The guardian ad litem acts on as almost, in a sense, a second look acting on behalf of the person throughout the entire process.

Also, we do a lot of front end requirements for reporting through the court visitor and so forth to establish initially what are the assets. We require written plans from the proposed conservator/proposed guardian so that in advance, we know what is supposed to be happening. This gives a basis, then, for the monitoring system to know whether things are being followed.

We also recently adopted a statute based, in part, on some of the ABA statistics and other statistics showing that in many cases, felons were a disproportionate percentage of those who were abusing, either physically or financially or otherwise, the elderly. A requirement that a court could appoint a felon as a conservator or guardian but only after finding by clear and convincing evidence that it was in the best interests of a ward, et cetera. So, at the front end, you have to very clearly keep track of how the system sets up its initiation.

After the appointment has been made, a series of things: No. 1, we try to have very strong volunteer committees on our bar section with AARP and et cetera. We have outside entities that help in the monitoring process and in training. We also have created permanent staff attached to the court but paid through State funds that actually monitors every single guardianship, every single conservatorship, looks at all the status reports, reads all of the financial reports; goes out and, with the guardian, visits or sometimes without the guardian, visits.

We also have created very detailed requirements for the reports themselves so that somebody just doesn't turn in a check ledger and say that's my report. Those are extremely detailed, and they are in the form books online and so forth. We have also given the court the ability to, on its own initiative, if no one else acts, to impose all sorts of fines, to make people disgorge funds, to undo what has been done.

We have also done a great deal of work on training. It is mandatory that the people who act as guardians who especially, if not professionals in that area, have to have training. So we have created videos; we have extensive handbooks that we have created for each of those offices; and those are mandated to be gone through, and especially with some help from AARP, we have been able to do that in some detail.

The thing that I think has worked best, and it has been referenced several times, is the tracking of cases. We started at the top at the Idaho Supreme Court and completely rebuilt what we call the ISTAR system, which is the court case tracking system. We can now tell you exactly how many cases of guardianship and conservatorship there are; what kind they are; which ones are developmentally disabled, which ones are minors, which ones are adults; which ones are active, which ones are closed; which ones have reports, which ones do not, et cetera, and that has tremendously helped in terms of monitoring these. We are not having to have, as was referenced, clerks wander down and dig through dusty paper files to find out which cases are even there for the things that have been filed.

We have also tried to do information sharing. We have coordinated with the VA, which has independent requirements for those who are in the VA system and tried to get uniform methods of reporting and sharing of information with them. We also share with the equivalent of your office with the Ombudsman for the Elderly and the Commission on Aging, with health and welfare, all of the abuse statistics we can and try to get those into the system as quickly as possible.

So, our emphasis has been trying to make the job easy, so that it does not require a tremendous amount of money or staff to do; that it takes the efforts spread over a number of different areas at as little cost as possible.

I would like to echo what has been said about the problems with Social Security. We continuously have cases in which there is an appointment of a conservator. They are then made the representative payee. The next day, the person who has been abusing the elderly fiscally walks in, changes it back to themselves and off goes the money again. It is a huge problem.

We have gotten together with the VA and solved that problem. We have not solved it with Social Security. I think that is one of the main things we still see as a problem, because for many of our elderly under conservatorship, that is the money. That is all they have is Social Security. When that disappears, now, we see increased societal costs in Medicaid, Medicare and others.

[The prepared statement of Mr. Aldridge follows:]

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STATEMENT/TESTIMONY
Senate Special Committee on Aging
July 22, 2004
Oversight and other Protections in Adult Guardianship

1. General Background of Idaho Systems

Idaho adopted the Uniform Probate Code in 1972, the first State in United States to do so. The Code covers a multitude of subjects, but deals with all protective procedures except developmental disability cases, which are in a separate area. Starting in 1989, the Idaho law on protective procedures has been substantially revised, especially concerning conservatorship and guardianship. The emphasis of the changes has been to provide increased protection to the elderly (and others who are the subject of such actions, normally because of disabilities). Most of these changes have not been based on proposals from the Uniform Code Commissioners; instead, they have been crafted in Idaho to deal with specific problems in the setting of a State that has few public protections for the elderly and extremely limited budgets for any public protections that do exist.

The primary impetus for the changes has come from the Taxation, Probate & Trust Section of the Idaho State Bar, often in partnership with other interest groups such as AARP. At the time of the commencement of the changes in 1989, I was the chairman of the Section, and I have been the Legislative Committee Chairman for the Section for the last sixteen years. The Legislative Committee now consists of approximately thirty-two members, from a wide range of interests, including law, bank trust departments, governmental and quasi-governmental agencies, social workers, accountants, AARP representatives, and others, depending on the exact issue. All participation is voluntary and without pay of any nature, other than one hired law clerk. Funding for expenses, and the law clerk, is provided by the Bar Section.

The Idaho legislature meets annually for approximately sixty days, commencing in the first week of January. The legislature itself has very limited expertise, and no professional staff, in areas relating to the protection of the elderly. The administrative agencies charged with such protection (primarily the Idaho Commission on Aging and the Adult Abuse section of the Department of Health & Welfare) have severely limited budgets and personnel.

The Idaho judicial system hears cases regarding the elderly almost exclusively at the Magistrate level. Only one Magistrate in the entire State of Idaho, in Ada County, works primarily in the probate/protective proceedings area, and even that Magistrate is also assigned other cases. In all other counties in the State, assignment of protective proceeding cases is random rotated among all available Magistrates. Magistrates have, at most, one staff member.

2. Oversight of Conservators and Guardians in Idaho: Pre-appointment

For clarity, it should be noted that Idaho calls those who deal with the financial affairs of the protected person a "conservator" and those who deal with the health and personal care of the protected person a "guardian", unlike many States which refer to those categories, respectively, as "guardian of the estate" and "guardian of the person", or similar titles. Oversight of Conservators and Guardians is provided by a series of methods. The procedures in this section are not technically "oversight" because they occur prior to appointment, but they are important because they give protection to the Ward and tend to result in appointment of qualified conservators and guardians. Additionally, these procedures identify the needs of the Ward for protection, and the assets of the Ward, independently from the allegations of the petitioning party.

a. Initial Proceedings Protection of a ward begins with the initial requirements for petitions and proceedings. The statutes themselves spell out, in detail, all requirements, providing a primer for the Court and attorneys, especially those who are not experts in protective proceedings. Additionally, our Bar Section has prepared a detailed Forms book for protective proceedings, with checklists and procedure charts, to guide practitioners, and courts, through the process. This Forms book is provided free of charge to all courts in the state. This promotes uniformity in proceedings throughout the State.

b. Requirements for Court Visitors and Guardians ad Litem

i. Court Visitor The statutes require that every proceeding commence with the appointment of a Court Visitor. The Court Visitor must be "trained in law, nursing, psychology, social work, or counseling" and is deemed to "an officer, employee or special appointee of the Court" and must have "no personal interest in the proceeding". The statute spells out in great detail the required contents of the Court Visitor's report, which must be furnished to the Court and all interested persons. As part of the required contents of the report, the Court Visitor must assess the financial assets of the Ward.

ii. Guardian ad Litem The Guardian ad Litem must be an attorney. The statute requires the Guardian ad Litem to act solely in the best interests of the Ward. The Guardian ad Litem also submits a report to the Court and appears at the hearing on behalf of the Ward. Like the Court Visitor, the Guardian ad Litem must interview all interested persons in the case, as well as meet with all medical, nursing home, or care providers involved with the Ward.

c. Independent Appointment of Court Visitor and Guardian ad Litem The court appoints the Court Visitor and the Guardian ad Litem. In larger counties, revolving lists of qualified persons or entities are used. This ensures the independence of both.

d. Right to Hire Independent Counsel The Ward has the right to retain independent counsel in addition to the Guardian ad Litem.

e. Priority of Appointment The Idaho priority list for appointment has been substantially

changed from the Uniform Probate Code. Under our current Code, the protected person can nominate his or her choice as conservator or guardian orally or in writing during the proceedings, if capable of doing so. If no such nomination is made, then the person or entity that the protected person had previously named to fulfill similar roles (the agent named in a financial powers of attorney as to conservatorship, and the agent named in a medical directives or medical powers of attorney as to guardianship) is the first priority for appointment. Only if none of those choices had been expressed by the protected person will the standard listings in the Uniform Probate Code (based on relationships such as spouse, then adult children) be used. The Court Visitor and the Guardian ad Litem are required to ascertain and report these choices to the court.

f. Limitations on Temporary and Special Appointments The prior Code allowed ex parte temporary appointments of conservators or guardians for up to six months (but with unlimited renewals) without any hearing, without any notice to the protected person, without appointment of a Guardian ad Litem, without appointment of a Court Visitor, and without any required reporting or notices to the protected person or any other "interested persons" under the Code. This allowed tremendous abuse without any protection. The Code was revised dramatically to severely limit the ability to obtain temporary appointments without showing of extreme emergency and to require notice within forty-eight hours to the protected person and others, and with an extensive listing of the rights of the protected person to obtain immediate hearings and other protections. The maximum time limit for appointment was deceased to sixty days. Only the limited powers absolutely necessary to protect the immediate health and safety of the protected person could be granted. A Guardian ad Litem was required to be appointed and the protected person additionally had the right to independent counsel. On request of any interested person, a hearing must be held within five days and a Court Visitor appointed. Temporary appointments could not be renewed. Conservatorship powers are limited to preservation and protection of the assets, and maintenance of the Ward. Any petition for a temporary appointment of a conservator must be accompanied by a petition for a permanent conservator.

g. Felons as Guardians or Conservators Idaho law now requires that if a felon petitions to be conservator or guardian, the court must find by clear and convincing evidence that the appointment is in the best interests of the Ward. This is true even if the felon has priority for appointment under the Code.

h. Required Submission of Financial and Care Plans Petitioning conservators and guardians must submit written detailed plans for management of the assets and of the welfare of the Ward. These plans are reviewed by the Court and the Guardian ad Litem and any interested person.

i. Requirement of Limited Appointment Unless the need is shown for a general appointment, the Court is to make only a limited appointment, covering the exact needs of the Ward by detailing the specific limited powers of the conservator or guardian. These needs are identified in the reports of the Court Visitor and the Guardian ad Litem and by testimony at hearing.

3. Oversight of Conservators and Guardians in Idaho: Post-appointment

a. Fiduciary Review Committee, Guardianship Monitoring, Legislative Oversight Committee Initial attempts were made by the Bar Section to determine whether required reporting by guardians and conservators were being filed, and if filed, were being reviewed by the Court. Incredibly, the case computer listing system of the State could not even identify which cases were conservatorship/guardianship cases, much less whether reports had been filed. After prolonged work with the Idaho Supreme Court to revamp the system, an analysis was made of existing cases in Ada County, Idaho. The vast majority had no initial inventories or any annual reports. A volunteer Fiduciary Review Committee was established, composed of several attorneys (including myself) and a trust officer and an accountant. The Committee attempted to track down non-reporters and then obtain reports. Then, the reports which showed serious violations on their face were assigned to a committee member who pursued correction of the violations, including court action if necessary. All participation was on a pro bono basis, with expenses provided by the Bar Section. In a three year period, in just Ada County, literally millions of dollars were recovered. There is now a pilot program through the Idaho Department of Finance, the Idaho Office of the Attorney General, and the Idaho court system, to extend this program Statewide and to institutionalize the process, rather than relying on volunteers. There is also a Guardianship Monitoring program in Ada County which provides permanent staff to coordinate training and monitoring of guardians and conservators. This program reviews every inventory, accounting, and status report submitted to the court and takes any followup proceedings necessary. The program also provides training and ongoing monitoring of guardians after appointment, with substantial help from AARP and other volunteers. Finally, the Idaho Legislature this session created a Legislative Oversight Committee, of which I am a member, to propose ongoing legislation and funding for protection of the elderly, including independent review of all conservator and guardian reports in the entire State.

b. Continued Guardian ad Litem Participation After Appointment Legislative changes, and increased judicial enforcement, are now ensuring that Guardians ad Litem remain active in protective cases, unless the Court finds that such additional protection is not needed – for example, if the Guardian/Conservator is a long term spouse and the assets are all community and limited in size. The Guardian ad Litem reviews all reports submitted by the Guardian and Conservator and monitors the status of the Ward independently. The Guardian ad Litem can bring motions before the Court at any time to protect the Ward, including challenging actions of the guardian or conservator, challenging the accuracy of reports or the failure to submit reports, challenging the appropriateness of expenditures or fees and costs, and so forth.

c. Court Enforcement A new section of the Code was created to give the Court clear ability to enforce reporting and proper actions by conservators and guardians on its on initiative. The Court could impose fines and could surcharge the conservator/guardian for misapplied funds.

d. Required Reports An initial inventory of the asset and debts of the Ward must be filed within 90 days of appointment and served on all interested persons, including the Guardian ad Litem. Accounting reports must be submitted at least annually, or more often if required by the Court. Mandatory reporting forms for the inventory, accountings,

and status reports are provided to the conservator and guardian by the Court at the time of appointment. These forms are also available in the Forms Book and online. Substantive proof of the contents of the reports must accompany the reports. We are currently expanding the description of the required substantiation for enactment in our next legislative session.

e. Handbooks for Conservators and Guardians The Bar Section has written and published, without charge, separate detailed handbooks for the Conservator and for the Guardian. These are given out at the time of appointment. The Conservator or Guardian must verify in writing to the Court that the handbook has been read and understood. Additional training is available, both by video and through the Guardianship Monitoring program.

f. Training Financial Institutions and Law Enforcement to Recognize Fiscal Abuse by Conservators and Other Fiduciaries Idaho has implemented, by statute, training of financial institutions in the recognition of fiscal abuse, including by Conservators, Trustees, Powers of Attorney, and other fiduciaries. The statute also provides legal immunity to the financial institution for good faith reporting of such apparent fiscal abuse. Programs are in place to train law enforcement personnel in how to recognize and investigate fiscal abuse, and to train prosecutors how to prosecute fiscal abuse cases. New statutes are being enacted to expand the definition of, and punishment for, fiscal abuse of the elderly, with enhanced penalties when the fiscal abuse involves retirement funds, housing, and so forth.

g. Clear Procedures For Transfer of Guardianships Idaho has implemented procedures required for transfer of a Ward out of or into the State of Idaho. These procedures include direct coordination of the original appointing court and the Idaho court if the transfer is into the State of Idaho, or the Idaho appointing court and the proposed new court of jurisdiction if the transfer is out of the State of Idaho. This coordination is judge to judge. This eliminates jurisdictional problems and ensures that a Ward does not lose the protection of law during or after a transfer.

h. Clear Tracking of Protective Cases The Court computer tracking system has been substantially modified to clearly identify and track all protective proceedings. The system can distinguish adult and minor cases, as well as developmentally disabled cases. The system can identify whether proper reports have been filed and whether the case is active or closed.

4. REMAINING NEEDS, PROBLEMS

a. Grants for State or Private Programs Idaho, like many States, is experiencing severe budget deficits. There are, therefore, few sources for funds for innovative programs. Existing state programs protecting the elderly are being slashed or eliminated. State legislators are reluctant to fund programs until they are proven. Federal grants to establish pilot programs for innovative methods to protect the elderly would enable local volunteers to establish the programs and then, when the worth of the programs is documented, lobby them into existence as State programs.

b. Establishment of Basic Rights of the Elderly as Fundamental Due Process The fundamental right of the elderly to self-determination, to make their own decisions, must be protected. These rights must be enumerated and made a part of the very fabric of all protective proceedings. Such rights must be removed from the elderly only as a last resort, and only to the extent absolutely necessary, and then only after full due process, and with careful examination of all available alternatives. The emphasis must be on protection of the elderly, not the convenience of others, including the convenience of the judicial system. The dignity of the elderly must be preserved at all costs, in the face of a system which creates justifiable fear in the elderly and which is often indifferent to, or even contemptuous of, the emotional needs of the elderly when that justifiable fear is expressed. That justifiable fear by the elderly is sometimes even characterized as paranoia and used as proof of the need for protective proceedings. Far too often, the system strips the elderly of their assets, their comforts, and, ultimately, their human dignity.

c. Training of Judges and Other Court Personnel and Creation of Central Resources Because of the limited number of protective proceeding cases that magistrates in smaller counties handle, more training of the magistrates and their support personnel is needed. Additionally, the smaller courts need access to expertise, resources, and statistics.

d. Recognition by Social Security and Other Agencies of Protective Appointments As noted in the GAO Report, Social Security procedures for representative payees allows fiscal abuse of the elderly even when a conservator has been appointed.

e. Creation of State and National Databases on Abuse of the Elderly, Including Fiscal Abuse This should not only include raw numbers, but names, so that local courts can ascertain if a proposed conservator or guardian has committed fiscal or other abuse of the elderly in other states. Currently, it is far too easy for an abuser to simply move across a state line and file a petition for conservatorship or guardianship in the new state.

Ms. BOVBJERG. Thank you very much.

I wanted to start off by asking some general questions. One of the general things I wanted to observe is that what we see both in terms of collection and information of data and on monitoring is you have, at the Federal Government level, issues within the Federal programs, the benefit programs that appoint representative payees. If there had not been such monitoring issues at the Social Security Administration, we would not have seen the legislation that became law last January, the Social Security Protection Act, which took on the management of the representative payee program.

This is also true in terms of sharing information. GAO can make recommendations to Federal agencies about how they should interact with each other, share information and coordinate. But one of the things I wanted to ask this panel, since I am really the only one from the Federal level participating, is how best can the Federal Government support an interaction between the States and the Federal Government, and also among the States?

Frequently, at GAO, when we are thinking about these things, we run into unfunded mandate issues or run into just simply the diversity of the States, which make us not want to be prescriptive in any particular way. Because you each have somewhat different perspectives on this, I wondered if each of you could take that on a little bit.

Mr. ALDRIDGE. I am not shy on that issue.

What I think we need initially is the ability to have funding for unusual, innovative programs. In Idaho, we have been able to do that more easily because we are small, and we can do that largely through volunteers, but trying to get an individual program through the legislature is very difficult.

So, we need first of all funding to get the program in place. When it is in place, we need to be able to show statistics and data, and that is where that needs to be shared across State boundaries; not just within us, but we know what wheels have already been invented. So, we can use that to get eventual legislative funding.

We also need data bases on who has abused the elderly. Right now, when somebody comes in and petitions, it can be very difficult to find out whether, that person, we passed the nice felon statute. We may not be able to get that information, especially if it involves abuse of the elderly. So, all those central areas need to be there so that we can track people as they go across the system.

We also—we created from our end, at least, some pretty good tracking of transfers of cases, but I think that could be better coordinated in some ways through the Federal level, so that you have some central way to find out where people are, and if you transfer, how do you get courts together? How do you get them to discuss where is the proper jurisdiction?

Ms. COLEMAN. Can I ask—I mean, it seems to me that there are both questions of transfer, and then, there is the question of where is the proper venue for this to take place, and who is then going to monitor it?

In the transfer question, the issue is if both ward and guardian or conservator are moving to another State, or you have a second possibility, and that is for those who live along borders i.e., you

know, along a State line. If you are going to place somebody from Ohio in a Kentucky nursing home, how is it that you have the authority to then make decisions about that person, given that these are mostly State issues?

OK; I agree with you that those are the kinds of questions that need to be addressed. They are partially addressed in the National College of Probate Judges model. However, it does not deal with original jurisdiction, so you go back to the *Orshansky* case or some of the other infamous cases.

The Hague answered that question by presence and choice of law. Now, according to the Hague Convention, Mrs. Orshansky is in the district at the time that that original petition was made, then, they ought to look at it there. However, there were some other issues. If Ms. Orshansky was in New York, then, it should have taken place in New York, and that is who should hold the ground as to where it is.

Because Ms. Orshansky had stated her choice of who she wanted to make decisions about where she wanted to be, the court should have looked at that. Again, I think those are issues.

I think that the major question that Barbara poses is one of asking how should the Federal Government agencies interact with State agencies, and where does the flow of information occur? I think that is a much harder question. In the case of where you have, as you have in Idaho, figured out a way to work with the VA in their appointments, we need to have better ways of working with Social Security, because it is the gorilla. It has 7 million people who have representative payees. Nobody else has that.

The question here is, and there are some civil liberties issues, whether or not you can maintain lists of people in a State who may have abused or been convicted of abuse or, as in the case in Pennsylvania recently, the State said you cannot.

So, let us look at the kinds of questions of what information you can keep and what you cannot keep and whether or not there is a choice for somebody to have been rehabilitated.

Mr. JOHNS. Single shots at any given problem may focus on the answer and the narrow focus. However, I think, Barbara, your request was for what the broader view would dictate in terms of how larger bodies of those who can study what is wrong and deal with the answers and come up with models by which implementation might occur; I think that is where you were focusing.

Let me suggest two things: first, out of the Wingspan Conference of 2001 came a series of 75 recommendations, and I must acknowledge Charlie Sabatino as being one of the co-chairs of that conference with me. What we found was that with those recommendations, we are at a loss to see how we might implement them. So what we have focused on is the organization of the National Guardianship Network.

What we did was to bring together several significant national players, organizations like the ABA Commission on Law and Aging, the National College of Probate Judges, and two of the judges who are renowned, including current sitting president Irv Condon, who will be sharing remarks at this forum, are participants in this network; including the National Guardianship Asso-

ciation, people that you interviewed, and my organization, the National Academy of Elder Law Attorneys.

The focus of that network is to come together periodically to ask, "Have we done anything?" If we have done something, what is it? Is there a source from which we might be given some monies, like a Federal foundation that would then open up additional task forces beyond just a Federal agency design.

What we are realizing is this is a difficult way to deal with it, because you are almost in a vacuum. When that network comes together and talks, the organizations that are represented there are saying, "Well, we cannot keep it moving in the organizations in which we are currently functioning. We need something else, something more."

We have identified that something else, and it is a conference that is set for this November in Colorado Springs, where representatives of the GAO will present your study. The point is in this conference there is going to be a Wingspan Implementation Session where invited delegates will specifically design a framework by which we go to each and every State and say, "Here is the basis by which change might occur in your State. Here are the people that we have worked with in your State at this conference who are going to help us show you how to take these steps."

Part of what the GAO could do is help design, or at least look at, ways by which we talk to Federal agencies that you are saying need to be talking among themselves. We believe they need to be talking with us as well.

Ms. BOVBJERG. They think that, too.

Mr. JOHNS. Yes, and we have extended that to asking the chief justices of the supreme courts of all the States to send representatives as participants to this conference, because we know that the hierarchy and the leadership of these judiciaries are the ones who look at how they are going to gather data, how they are going to deal with the issues.

If we can at least make them aware of the fact that this is a crisis in the offing, that in the next few years, they are going to have to deal with it one way or the other, then, they may well come to the table with us and accept our models and begin implementation.

Ms. BOVBJERG. I just wanted to add that GAO did recommend that Social Security convene an interagency study group that would include representatives from States and from courts. We thought the sharing among Federal agencies was the easy part, frankly, but it is being done in bits and pieces. However, we thought that the real question was how federal agencies could share data back and forth with the courts.

I do not really want to make SSA's argument, because they disagreed with us, as you will see in this report, but they cited a couple of things as being barriers to this. The main one was the Privacy Act. They felt that they do not have a routine use agreement under the Privacy Act, and we believe that this is why they should convene an interagency task force.

I think one of the concerns that I know that Social Security will have is that there are 50 States and the District of Columbia, and there are all of these courts, and they will feel that they have to have separate agreements with each. So for them it will be a com-

plicated and potentially time-consuming thing to do. It is the same process that they use to get death information, for example, from States. They have to have special agreements with each one.

But we think that perhaps there is future work to be done on how SSA and states reach these agreements and how, perhaps, to think about them, differently. But certainly, they need to take this on in the area of guardianship. As you were talking, I was thinking about the diversity of States, and also the courts within each State. Perhaps Ms. Armstrong could talk about this a little bit as it relates to New Mexico. The State says "These are our standards for guardianship, and, we are not seeing courts not meeting those standards." GAO did not perform a compliance review."

But we did see quite a range in the way that state standards are implemented. So, I wonder even if you could get to a point where there is agreement upon the kinds of data to collect, and how to share the data back and forth. How would this really work on the ground? Do you have a feeling for that?

Ms. ARMSTRONG. You are right that in New Mexico, like many other States, it is very different in every court, because it is largely dependent on the judge. I do not have any great ideas. I think that as a State that is struggling, we would like to see models be developed that can be adopted by courts rather than each one doing their own thing. Recognizing that it is a national crisis would be persuasive in regard to adopting those models.

Dealing with the issues with representative payees and Social Security and their interaction and the jurisdictional issues you raised are definitely issues in New Mexico. We have border communities where that is an issue. So I do not have a great answer, but recognizing that it is a national problem and developing models that can be replicated and give courts something to work with would be very helpful.

Ms. COLEMAN. Barbara, I want to add a piece of history to this. In 1987, the Associated Press did an unprecedented set of investigations that resulted in the fall of 1987, in a week in September, that all of the AP reporters did pieces on guardianship. That was used to push and push and push a whole lot of other investigative and legislative changes that we have seen over the last 25 years. I believe—I am going to give you credit—no, no, I truly mean this right now, that the fact that you have taken your study and targeted it at what I believe are the five most important issues will, in fact, raise that visibility in a way that I am hopeful, given that we have pending the Elder Justice Act; given that Frank's program has invited, lo and behold, not under his guidance, all of the chief justices or their representatives, because it is the chief justices, if they agree to it, who can order States to put into place common definitions and basic data collection.

I believe that if we looked at the computerization of courts—you know, yesterday, we talked about, the press talked about, the computerization of medical records, we will be able to more or less, given the impetus of this report and this study, push people in that direction. So, I think that is the way that we can look to move forward and push on these kinds of issues.

Now, again, I think that when the ABA did its study on the privacy question that Social Security disagreed with us on, and that

it still disagree with you on today—I brought in two experts on privacy; we had a paper written on that, which I will share with you. We really did come to the conclusion that it could be overcome, and it is overcome in a variety of ways.

You know, Social Security shares its data base with a lot of people. So, it is not as though it cannot do it with courts. It is not as though it does do it with a lot of other folks. I think it is overcomeable, and I think it is an issue which they have to be pressed on, and your report will press them publicly.

Mr. JOHNS. Barbara, if I might, I believe that Nancy is exactly right on the point she makes. I think, too, however, that we are actually talking about something that may be two or three steps beyond where we are. All I would like to do is just talk to them generally. All I would like to hear is that some groups met for discussion. We are not talking about sharing the data yet. Let us just talk about what the problems are. Let us find a forum to which these agencies are invited; at which our courts are represented.

I must ask that you add one other identified group to those who are going to be talking together. You said the State agencies, and you mentioned the State agencies, the Federal agencies and the State courts, but there are major consumer group organizations, including the National Academy, including the ABA, including NGA that should be at the forum.

Ms. BOVBJERG. I did not mean to leave them out.

Mr. JOHNS. Many groups in the private sector would love to be in the room just to talk about it. I think what we have missed is that significant pieces of empirical data have been collected, and reported, the last one being the one out of the Center for Social Gerontology in 1994, which was 2 years late in developing the actual data so that it could be published.

So really, we are probably—this report is only 12 to 14 years after real data has been looked at it all. The beauty of the report that you have done is that it is current, and it may produce dialog. I think the great benefit that could come from today is that we identify those who would come together and identify a place and then say, "Will you please come and set an agenda by which we begin talking about what we need to do together."

Mr. ALDRIDGE. I would like to say amen to that. The only way we were able to build things was to create very, very broad groups to come before them. For example, right now, we have currently a grant fund proposal that we are working through Senator Craig's office to try to fund some innovative ways of doing training. But that training is going to involve everything from AARP to Kin Care Coalitions to National Academy of Law Representatives, whoever we can get to be in that. We try to pull in hospital associations, nursing homes, whoever might be there. The broader that coalition is, the broader that base, the more likely you are going to get things done.

Ms. BOVBJERG. Let me ask you about burden, because one of the things we heard, and I think you brought this up, Robert, earlier on is the states and courts would do more monitoring if they had the funds. I was wondering about the data collection and the data sharing as well, because you have all been, and I am gratified to hear this, very positive about our recommendations addressing

these things. But I wonder what might this represent at the point of collection? Is that something we have to worry about? I am thinking about implementation.

Mr. JOHNS. Yes, but even then, to say that it is too great a burden, you are putting too much paperwork on us; there is no way that we are going to be able to go out there and do this, there is a great way to excuse yourself from beginning at all. So you are right. It is a good question to ask: well, how much of a burden do you think it might be?

Let me answer in one way. When North Carolina, revised its statute in 1987, the reformers were up against the guardianship judges who were really trying to impede reform. In the end, we maneuvered a way that created a very simple, one-page data gathering statement that the guardian of a person must file. The truth of the matter is that the burden of that component of data gathering is not great at all.

The fact that none of the administrative offices cared to follow through on collecting the data from the guardians is part a cultural, part historical explanation of what guardianship is—partially a political quagmire.

Ms. COLEMAN. Barbara, you know, one of the questions which Social Security often asks about is the purpose of the representative payee program. The purpose of the representative payee program in 1939, when it was created, was a way to pay benefits. To a large extent, the representative payee program still is that. Yet, it has become and is traded upon as sort of a stepchild or less-intrusive guardianship.

Now, if you are listening to what Frank just said, you have the sense that people do not want to change. They do not want to accept the responsibility in the court system in North Carolina that once you've made somebody a guardian, you do not need to worry about it anymore. So you have the same sort of lack of responsibility both in the Social Security representative payee program and in many of the guardianship programs where the courts say that they already put somebody in that place, so they do not have to worry about it any more.

So let us look at it together and ask the questions: Which States currently do not know how many people are under a guardianship? How many are alive? How many are dead? How many are actually in institutions? How many are living in the community? If you cannot answer those questions, what is it that would allow people to be able to answer those questions fairly quickly?

Well, you would if, in fact, you had a computerized data base. In Idaho, you know where those people are. You must be able to account for them. So was it burdensome, Robert?

Mr. ALDRIDGE. No, it was not burdensome at all. We did a series of things. One, again, we tried to build a coalition so that the burden was shared. Information came from a lot of different areas, and so, we enlisted the nursing homes and assisted livings and so forth to be a part of the reporting system. We also went out to the financial institutions and, No. 1, gave them statutory definitions of potential fiscal abuse and then immunity if they reported it, very much along the lines of child abuse reporting.

We also did the actual training. We went through the State. I went all over the State with a group of people, and we trained bank tellers and vice-presidents how to recognize fiscal abuse, where to report it. So you can enlist a lot of players to come in. If you do that, it is not burdensome at all. Again, the resistance to change is hard to overcome, but if you tell them we will do 90 percent of it, and we will put your 10 percent at the end, a lot of times, you can get it done.

Mr. JOHNS. An anecdotal comment, Barbara. In the Baltimore County area, there is a significant advocate named Joan O'Sullivan. Joan is a professor of law in that community and has been a passionate advocate for individuals caught in guardianship processes. Joan, on her own, with a professor colleague of hers, knew that there was very little data about guardianships in Baltimore County. They designed a fairly simple survey, and on their own, with students they had, went out and surveyed all of the community and looked at all of the guardianship files in that county, and the compilation of it and then some of her conclusions drawn from it was not a significant difficult task to do.

Compare that with the fact that I took that survey with her blessing. I went to North Carolina to the Office of Administrative Courts, explaining that I would go find some funding help from a private source if the AOC would just give me the blessing to go to the major metropolitan counties in North Carolina to do this survey to gather the data.

The response from the administrator of the court system was that our computer system was such that there was no way we could integrate the data you gather, and it was so low a priority that they did not care to try. That was the literal answer that was given, and we are still without the information. So it is not that it is a burden, but Nancy certainly hits it correctly: based on history and based on the fact that inertia is hard to come by, you cannot get them moving in any direction at all. They would rather sit on what they have, until the firestorms and horror stories mount in such a way that the AP Gulag stories of late 1987 erupts again to show that too many of our elders are being harmed.

The numbers are going to be so great—in fact, they may already be that great—that we are really losing time, and that is the painful part of this.

Ms. BOVBJERG. This is a frustration; it brings me to the frustration of this project. We started off when Senator Craig's staff came to us and said, "What about these reports surfacing about abuse, especially after hearing last year? We are hearing about Ms. Orshansky's story for example."

So, GAO was planning to look at the incidence and the frequency of abuse in guardianships and discovered that we could not even find out how many guardianships there were, let alone the frequency of abuse, which we were hoping was low. We were hoping that these were horrifying but anecdotal stories. So we ended up recommending that, to manage an effective guardianship program, even though it is not one program but many programs nationwide, you really need basic information.

But in looking at the monitoring side, where we looked at what we called the exemplary programs? Many of you told us these were

the programs that do some of the things that you folks have been talking today, getting people out there to actually see the person under guardianship and evaluate their condition.

I guess the question I wanted to pose to the panel is how prevalent do you think abuse under guardianship is? That is one thing. Is there something that could be done, is there something at the Federal level that we could do to reduce and prevent abuse? Perhaps, I don't know, it is a legislative solution, or perhaps it is something that we can try to get agencies to think about, but is there something that we could do that would help address what we think is the problem, even if we do not know how big it is?

Mr. JOHNS. Yes.

Ms. BOVBJERG. I should stop with these long questions.

Mr. JOHNS. To follow up with the yes answer, the explanation is that the probability is that because you get to go see how the exemplary programs are run, and then, when you see them, you see that there are few, if any, reports of abuse, it leads to the logical conclusion that the horror stories are few and far between.

Ms. BOVBJERG. Or perhaps prevented from becoming horror stories.

Mr. JOHNS. In those communities. But those are a very small percentage of the total number of communities in which you are going to find the data—we believe that is going to be difficult. Let me say on behalf of the National Guardianship Association that to paint guardians generally as the bad guys is really a simplistic sound bite that is unfair and improperly fired in terms of a round.

Many, many guardians educate themselves, and through the NGA, they conduct education and training, the likes of which we really have not seen before. That is really new. However, there are the unscrupulous profiteers and those who would be predators, and we really have no way to be sure who they are, and that is truly the problem.

Mr. ALDRIDGE. We went through a process that identified that for us. When we started all this in 1989, I undertook it as a project of our bar section working with the local probate court. We started with the situation where there was absolutely no monitoring whatsoever. We had no way to identify anything, et cetera. So we started in that condition. We then built a system, found out who was there, et cetera, and now had a data base of cases. We were able to go directly to those and see how many of those did have abuse.

Now, abuse is difficult, because there is a tendency to look only at the guardian, but there may be other abuses: the petitioning attorney or others may be charging exorbitant fees or acting inappropriately, et cetera. It is a broad spectrum. But nonetheless, in those cases, there was a very high percentage that had some form of abuse in them.

Now that we have the system in place, the amount of abuse is extremely small. So, it tells at least to me in our system, it said to me that yes, there is a lot of abuse out there, and it can be easily prevented with the right techniques.

Mr. JOHNS. The one other answer I had, if I might, is this. For example, in North Carolina, when there is a guardianship, and there is very little money, and there is only a Social Security check, the clerks have the discretion to disregard any accounting for that

Social Security check and the funds and how they are spent for that ward. They just say, "Well, what we are going to do is just give you Letters of Guardianship the Person, for which we ask little or no information about."

The guardian then goes to get the Social Security check as representative payee. Now, Social Security may think because we have anointed the person with Letters of Guardianship, there is some oversight somewhere. But the truth of the matter is that the guardian is getting that check, and there is no accountability.

Now, in fairness to North Carolina's view of it, the more experienced judges will control that expense to that family, dragging it through a process that requires accounting and then some form of audit just to see to it that they get that check is so burdensome that we believe that for these people who, No. 1, are vulnerable, and No. 2, are of such modest means that that is about all they get, we felt it was easiest to just give it to the person standing as representative payee, because the Federal Government is watching them.

Ms. BOVBJERG. I would say on the representative payee program that generally, the Social Security Administration program is watching the big players—the representative payees, many of them nursing homes, that have many wards—and that it reviews their use of the funds regularly. You are right about the single ones. Just so everyone here knows, the SSA IG is embarking on a study sampling the single representative payees and taking a look at what conditions are there, which may be, as far as I know, really the first time something like that has been been done. But there is a lot of concern, I know, as they go out and do this that they will be sending investigators out to descend on a family who is acting as the representative payee for a disabled child or that will frighten people unnecessarily and make them do unnecessary paperwork.

So they are really trying to balance the need for better information against burdening individuals. They are struggling with it, but they are just getting started.

I wondered if we should open up for any questions that anyone in the audience might have. I know we are doing everything miked for the record, and so, if anyone does have a question, I would invite you to come over here to the podium where we have a mike that you could ask the panelists. You do not have to, but I thought because this is a forum, perhaps we should open it up to audience participation.

Do you have a question?

Ms. COLEMAN. Perhaps while people are thinking of questions let me just comment on the issue that I think is a cross-issue. Social Security asks a person who is a representative payee to send in a report annually and to say how the money that the person received was spent. But it does not ask it in a way that says, "I as the representative payee, spent $250 on clothes and $650 on food" or that the representative payee had anything in their back pocket to substantiate that. They ask for percentages.

So it does not even know, nor does it look back to see whether or not the reporting happens. This is the crossover issue: when you have a guardian and a representative payee, you have one agency

telling the other agency that the other one is watching, and nobody is watching. I think that the issue still remains even with those triennial look-sees that Social Security does of the institutional and, now, large payees. I think that there is still the potential for a whole lot of abuse.

There is double-dealing, according to Social Security. One of the representative payees that we looked at in 1995, 1996, charged a fee. They legitimately could charge a fee. But they also charged a fee because they were out of state. In order for the beneficiary to get a check, they had to make a long-distance phone call, have a check sent to a rural post office box, pay for the Federal Express, and then pay for the check cashing.

Now, how much money do you think they lost from their benefit check paying those service charges. What kind of protection was that for the beneficiary? So you have just got to look more at that or an agency that charges itself for services.

Mr. ALDRIDGE. One other thing we have not talked about that we have tried to enlist as another player is the criminal investigation side. We are in the midst of setting our abuse of the elderly to include being a misdemeanor up to $1,000, but a felony for anything above that or which involves physical abuse, even if they are acting as conservator, guardian, trustee, power of attorney, whatever. Then, we are setting a method to train police officers how to investigate that, because right now, they do not know how. They know how to investigate physical abuse, but they do not know fiscal.

So, I think that is something where we can list some players, because I think right now, most people who are representative payees, et cetera, just are not afraid. They are not worried about what is going to happen to them from Social Security or from the court systems. But if they know that regardless of whether those people are satisfied, there is potentially a police officer out there waiting to put handcuffs on them if they have made off with even a dollar on and a felony if it is over $1,000, you may see more compliance.

Ms. BOVBJERG. Well, let me ask the two of you who are in the trenches in the States: What about the VA? My understanding is that VA has a field examination requirement where they send folks out to see the person who is the beneficiary and to talk to the financial fiduciary. Do you think that they are achieving better results, that VA is acting to prevent and deter abuse by doing that? Do they have a better record than SSA?

Ms. ARMSTRONG. Yes; I am not sure I know the detail how it works in New Mexico. What we have seen is that the VA system, is separate, and they do their guardianships, and I think, when the VA budget gets crunched there is less and less monitoring of the guardianships and less involvement just because of a budgetary issue.

Mr. JOHNS. They have made it so complicated in North Carolina, where they have absolutely insisted on a separate statutory design for a veteran guardianship process that everybody runs away from them, because when you are caught up in their process, you cannot even get through the dialing problem of tracking somebody down. You will never speak to a human being in the VA. If they do actually go out and check, we have never seen them, and we have done literally hundreds and hundreds of VA cases over the last 26 years,

and talk about making something much more difficult for the consumers when you are trying to do something which will protect their interests, the VA is doing that.

Mr. ALDRIDGE. We have kind of gone the opposite way in Idaho. Kim Tisch and I are on a first-name basis, and we routinely split up duties. Very often, they are heading out to someplace, and so, we will tag into that and get the information from them, or they know that we are in the middle of a guardianship, and we are going to be getting info, and so, we feed that back to them. They have been very cooperative.

Now, that may be the function of a small State compared to a large one, where the numbers are more manageable, but it has been the direct opposite where we are, and it has been a very profitable alliance.

Ms. COLEMAN. Last month, the veterans benefits committee on the House side had a hearing to look at similar legislation to the Social Security Protection Act. The VA itself objected and said it does not have problems in that regard. It does not have fiduciary problems. Yet a year ago, the VA IG said, "In fact, it does have problems of financial abuse." So again, you are asking one part of the VA versus another part of the VA, and I think representative Susan Davis from San Diego who has sponsored some legislation on that.

Ms. BOVBJERG. It also sounds like from what Frank is saying and what you are saying, Robert, that it may also be based on relationships that have been formed between a particular State and the particular region of the Federal agency, which is kind of discouraging too, I guess.

Mr. ALDRIDGE. Well, another thing, too, that I think that any solutions we come up with have to recognize is that there is a huge disparity between the urban side and the rural side. I am on the Work Source Board for Idaho. Technically, our entire State for Federal Work Source is rural, including our capital city. It is deemed to be rural. We have entire counties that are bigger than a number of States and have less than 5,000 people in them.

The solutions to work there are very different than when you have, you know, the downtown boroughs of New York City, and I think that any ultimate solution that comes up would have to take that into effect.

Ms. BOVBJERG. Well, we have talked a lot about what GAO recommended, which I am very gratified by, being from GAO. We've talked about data collection and about the need for better coordination across States, coordination between States and the Federal Government, and within Federal agencies. What other reforms should we be thinking about at the Federal level? I recognize that guardianship is not a Federal program, but the Federal Government still has an interest; certainly has pieces of programs that intersect but with guardianship but, in fact, as you say, Nancy, representative payees are not guardians. What other reforms should we think about? We have the ear of the Senate Aging Committee today.

Mr. JOHNS. I have one suggestion, and it has been made before. It comes from a published decision in 1999 in a case that I cite in a footnote of my testimony titled *Rudow* v. *State Medical Services*

Commissioner in the State of Connecticut. What the case addressed was if you are going to advocate the due process interests of someone who has no money, then, how are you going to find appropriate representative counsel to advocate those interests?

What they realized was that on issues of quality of care within nursing home environments where Medicaid patients were housed, and they were also the wards of guardianships, but they were eligible for Medicaid, therefore, they, by definition, had little or no money; and the lawyers asserted that as a due process mandate, that Medicaid funding that came out to the facility must carve out monies sufficient for legal counsel to advocate the due process interests of the ward not just in terms of the adjudication of capacity but also in terms of monitoring and advocating the interests of those individuals under the guardianship throughout the process of the guardianship.

I would suggest that part of those Medicaid dollars be set aside for due process and advocacy interests of those who have no way to advocate their interests on their own.

Mr. ALDRIDGE. Absolutely. Our major problem in our State is people whom we know are being wronged, and there is no way to get that into court. There are simply no dollars to pay for it. We do as much pro bono work as we can, but there are limits. You can only do so much. If that were a formalized program, then, that would be a tremendous help. Again, that reforms the system. When the people who are out there know that that is in place, then, they change. They take it into effect.

Mr. JOHNS. The impact, Barbara, I know that you can sense that the fiscal impact would be a tremendous hurdle that we would have to overcome, because all of the health care interests' lobbies would realize that that would be a carve-out of dollars that they are supposed to get in the end. So unless you are going to say to them, "Well, we are not going to hurt the reimbursement basis on which you receive your Medicaid dollars. You have got to then show in your analysis fiscally that there is some increase in budgetary funding that is going to cap that out."

Ms. COLEMAN. I cannot tell you exactly, but we did review all of the State Medicaid plans, and if, in fact, it exists in the State Medicaid plan that you can pay for guardianship services, then, the guardian can be paid for. So it exists although I cannot pull the number of states off the top of my head.

Mr. JOHNS. Well, it was in Connecticut, because that was the basis on which they could litigate the case.

Ms. COLEMAN. I am just saying that we looked at a number of other States to be able to look at that.

Again, I would go back to the example that I used earlier, about child abuse reporting. It was the incentive that the Feds used to get States to do reporting across the board on child abuse, you know, using common definitions; now, States fought it, but they would have lost their foster care money.

I grant you, I can go back and say, "OK, Nancy, you know as well as I do that the Keys Amendment sanction to make sure that board and care facilities in 1976 were in compliance with those five standards did not work. It is still there in Medicaid in the assisted living waiver programs. It still does not work." On the other hand,

there may be some other things to think about, because we do not have Title 20.

Ms. BOVBJERG. What do you think from the State perspective, Debbie?

Ms. ARMSTRONG. I think to see the initiatives that were talked about would be wonderful. I think it would be well-received. I am particularly intrigued with the thought of the Medicaid involvement, not just from a funding perspective, but I think that would contribute to the overall quality of care and decrease of the abuses that we see in the system. Because in New Mexico, 70 to 80 percent of the nursing home beds are Medicaid.

Mr. JOHNS. Well, the tension that we have is the tension between your invitation to do that which is right and to make the law within our States complicit compared to what Nancy is saying, which is to get them to do it if we have to use language that promotes enforcement, then, the whole view of a federalist mandate on the States, and the States saying—the States will come back in today's world with the argument of sovereign immunity; you are not going to tell us what to do, and you did not carefully pin down in the language of your Federal law that this is a mandate to which we have to ascribe—the tensions are very clear.

If we can create a forum in which we talk together about how we become more proactive about this, and we invite the States to join with us to begin a uniform laws movement, if we did it from a perspective that says, "Well, let us look at it in a way in which those who know well how to write the law have designed uniform language, then we go to the ABA, ALI uniform laws premise and try to construct a way by which that language would then be lobbied to the States to invite their agreement; at least we have dialog occurring."

Above all, I believe that what this forum does for us is to, No. 1, make real the documentation and the investigation that you and your colleagues have done in the GAO, and then, No. 2, give us a way to say let us talk and go out and invite the talking. Hopefully, our conference in November will just spur that along a bit.

I will note for the record that we have given Senator Craig several formal invitations to be our keynote speaker and that we are going to have representatives of the GAO there, because that dialog, we believe is so significant.

Ms. BOVBJERG. Well, I appreciate everything that you have brought to the table today, literally. I want to thank the Senate Aging Committee and Senator Craig for inviting us all today. I want to thank those of you who stuck with us all afternoon for coming. I especially want to thank Debbie and Robert for coming, really, at quite the last minute, I understand. I really appreciate that, and I think we have laid out a problem that is only going to become more acute and that there is, in fact, a Federal role in working with States and courts to try to address some of these issues.

So thank you, everyone, very much.

[Whereupon, at 3:43 p.m., the forum concluded.]

A P P E N D I X

STATEMENT FOR THE RECORD

EDWIN L. WALKER
DEPUTY ASSISTANT SECRETARY FOR POLICY AND PROGRAMS
ADMINISTRATION ON AGING
U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES

FORUM ON GUARDIANSHIP
SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

JULY 22, 2004

Mr. Chairman, Senator Breaux, Members of the Committee, fellow participants in this Forum, and guests, it is my pleasure to provide comment on the GAO report and to discuss the opportunities and challenges inherent in protecting vulnerable elderly individuals under or in need of guardianship. With respect to the report, we agree that guardians should be adequately trained and monitored, and that governmental agencies and courts should coordinate their efforts and share information concerning guardians and representative payees.

Guardians play a critical role in protecting vulnerable individuals and in helping them to obtain the care and services they require. Most guardians are conscientious, but some mistreat, neglect, or exploit their wards. The Older Americans Act (OAA) mandates that the Administration on Aging (AoA) serve as the effective and visible advocate for older Americans and their concerns. As such, AoA is committed to protecting vulnerable seniors under or in need of guardianship.

According to the OAA, States shall undertake activities to develop, strengthen, and carry out programs for the prevention and treatment of elder abuse, neglect, and exploitation, including providing public education and outreach, conducting training, and ensuring the coordination of elder rights programs. Many local areas use OAA funding to support elder abuse prevention multi-disciplinary teams, which can include adult protective services (APS) workers, area agency on aging staff, police, medical professionals, and court personnel.

OAA-funded long-term care ombudsman programs in every State provide information to residents of long-term care facilities and those in need of long-term care,

help residents and their families resolve problems, and advocate for systemic changes to improve care and protect residents' rights. They are often the first to investigate complaints of abuse, including those that involve seniors who are under guardianship or representative payee programs.

The OAA is also one of the top funding sources for low-income senior legal assistance programs. There are approximately 1,000 OAA legal services providers nationwide, which provide over one million hours of legal assistance per year. These legal programs help to ensure that older Americans and their caregivers receive critical information in areas such as consumer protection, public benefits, health and financial advance planning, and guardianship. The OAA mandates a legal assistance developer in each State to coordinate and enhance legal activities and to maintain the rights of seniors at risk of guardianship. The OAA also has supported statewide projects to enhance seniors' access to legal assistance, including through help-lines and the Internet.

Guardianship can remove our most basic rights, so it should be imposed only as a last resort. Legal services programs funded under the OAA promote alternatives to guardianship, such as financial powers of attorney and health care advance directives. These instruments empower seniors to decide who will make their decisions when they are unable to do so, reducing their risk for victimization and limiting the number of unnecessary guardianships. Senior legal providers also advocate for alternatives to guardianship or limited guardianships when representing prospective wards before the court, and they petition the court to appoint an emergency guardian when a senior with diminished capacity is being abused, neglected or exploited.

AoA supports national legal resource centers that provide State and local legal providers with training and informational materials on a range of legal topics, including guardianship and alternatives to guardianship. OAA funding supported the development of the following materials: *Lawyer's Tool Kit for Health Care Advance Planning* and Spanish language versions of the video, brochure, and advance directive form: *In Your Hands: The Tools for Preserving Personal Autonomy* created by the ABA Commission on Law and Aging; *Health Care Decision-Making* and *Protective Arrangements for Incapacitated Persons* training modules created by the AARP Foundation's National Training Project; and the brochure *Considering Guardianship for Someone You Care About? Consider Mediation* produced by The Center for Social Gerontology.

Money management programs also serve as an effective means to limit unnecessary guardianships. These programs assist seniors who have difficulty managing their financial affairs; they include help with bill paying and may assist with complex tasks such as maintaining payroll records for personal attendants. In Massachusetts' statewide program, areas agencies on aging work with AARP trained volunteers to help over 1,000 low-income seniors maintain their independence. AoA's National Center on Elder Abuse (NCEA) produced the report *Daily Money Management Programs: A Protection Against Elder Abuse.*

We are also committed to protecting seniors under guardianship. Aging network programs partner with courts to train guardians and court personnel, verify guardianship plans and reports, visit wards, and serve as guardians. For example, the Indiana Long-Term Care Ombudsman provides probate judges with brochures on long-term care for distribution to newly appointed guardians, and the area agency on aging in West Palm

Beach, Florida is working with the local court's Elder Justice Center to recruit volunteers for a guardianship monitoring program. The Georgia Long-Term Care Ombudsman has partnered with APS to train probate judges, and both programs report abuse by guardians to the courts. NCEA recently collaborated with the ABA Commission on Law and Aging to develop brochures for courts and aging network providers that highlight these and other model collaborative efforts.

AoA supports the manner in which the GAO has addressed this important issue. The findings reinforce our approach to protecting those under or in need of guardianship. AoA is carrying out the GAO recommendation for HHS to "study options for compiling data from Federal agencies and State agencies, such as adult protective services agencies, concerning the incidence of elder abuse in cases in which the victim had granted someone the durable power of attorney or had been assigned a fiduciary, such as a guardian or representative payee…." This year NCEA will work with all State APS agencies to determine the incidence of elder abuse reports and the characteristics of victims and perpetrators. States will cite the number or percentage of perpetrators of elder abuse who served as the victims' powers of attorney, guardians, or representative payees.

AoA agrees to explore "cost-effective pilot and demonstration projects" to develop approaches for compiling guardianship data and to facilitate solutions for interstate jurisdictional issues. HHS is the co-chair of the Federal Elder Justice Interagency Working Group. We agree that HHS should serve on the interagency study group charged with developing "options for improving interagency cooperation and Federal-State cooperation in the protection of incapacitated elderly and non-elderly people." AoA will provide additional guidance to ombudsman and other aging network

programs on notifying courts and Federal agencies of substantiated abuse reports that involve seniors who have guardians or representative payees.

Programs funded under the OAA provide legal representation to seniors under or in need of guardianship and help courts to train and monitor guardians. The GAO findings highlight the need for better coordination and information sharing between governmental agencies and courts, and for more data collection.

I wish to thank the Chairman for convening and hosting this forum. We at AoA look forward to working with Congress to address these and other issues that impact on the lives of vulnerable older Americans.

MICHIGAN

"PROTECTING THE RIGHTS OF PERSONS WITH DISABILITIES"

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July 28, 2004

VIA FASCIMILE 202-228-1067

Honorable Larry Craig
United States Senate
Washington D.C. 20510

RE: Senate Special Committee on Aging Forum- "Protecting Older Americans Under Guardianship: Who is Watching the Guardian?"

Dear Senator Craig:

We understand that on July 22, 2004 the Aging Committee held the above referenced forum in order to further explore the misuse of guardianship imposed over the elderly. Michigan Protection and Advocacy Service, Inc. (MPAS) is the agency designated by the Governor to implement the federally authorized protection and advocacy systems for people with disabilities. As part of our mandate, we have been involved in monitoring guardianship and conservatorship issues in Michigan and taking efforts to improve effectiveness and accountability.

In 2000, Michigan Protection and Advocacy Service, Inc., entered into a collaborative effort with the Developmental Disabilities Institute at Wayne State University (DDI) and the Wayne State University Law School to study the guardianship process in Michigan which we referred to as the Court Watch Project. Enclosed is a copy of the Final Report and Recommendations of the Court Watch Project.

The impetus for this project began with national statistics showing Michigan ranked highest among reporting states in the number of adult guardianship

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filings in 1990. Subsequently, in 1996, serious abuses of the guardianship system reported in the media led the Michigan Supreme Court to appoint a Task Force on Guardianship and Conservatorship. Their charge was to examine guardianship in Michigan and to make recommendations for improvement. The Task Force concluded that there are too many guardians appointed in Michigan and made recommendations to prevent unnecessary guardianships and to provide some regulation of the system. As a result of that report, several pieces of legislation have been passed to encourage alternatives to guardianship. Other recommendations of the Task Force regarding education and other reforms have yet to be implemented.

These efforts have not been able to eradicate the problems with Michigan's guardianship system that have continued to surface in the media and are well known to advocates working on behalf of adults with disabilities and older citizens. The Court Watch Project was designed to address these issues through an extensive gathering of empirical data in four Michigan county probate courts shows how the guardianship process is actually being conducted.

The enclosed report provides the results of this data-gathering effort and makes recommendations about how the current guardianship system in Michigan might be improved. We hope you will find the results of the Court Watch Project informative and illustrative of efforts that have been taken and efforts that need to be taken in order to enhance the effectiveness of guardianships in Michigan. If you have any questions regarding this report, please feel free to contact me at (248) 473-4104

Very Truly Yours,

Amy E. Maes, Esq.
Director of Legal Services

cc: Senator Debbie Stabenow
Senator Carl Levin

THE COURT WATCH PROJECT

A Monitoring of Guardianship Proceedings in Four Michigan Probate Courts

FINAL REPORT AND RECOMMENDATIONS

By: MICHIGAN PROTECTION AND ADVOCACY SERVICE, INC.
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November 2003

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Introduction

> "Although the purpose of guardianship is management of another, we must (r)ecognize guardianship for what it really is: the most intrusive, non-interest serving, impersonal legal device known and available to us and as such, one which minimizes personal autonomy and respect for the individual, has a high potential for doing harm and raises at best a questionable benefit/burden ratio. As such, it is a device to be studiously avoided." E.S. Cohen[i]

Guardianship is the legal process in which an individual is deemed incompetent to make decisions regarding the management of him/her self or his/her property and the authority to make those decisions is transferred to another individual. The use of guardianship has spanned centuries and until recently, received little scrutiny. Those who have examined the guardianship process closely have begun to regard guardianship not as a paternalistic mechanism to protect vulnerable individuals, but rather as the legal removal of a person's basic civil and legal rights and as such, it is fraught with the potential for abuse and misuse. Thus, careful consideration of the need for guardianship and the exploration of alternatives is essential.

In Michigan, guardianship reform began in 1974 when a new guardianship statute, specifically for individuals with developmental disabilities, was passed as part of the Mental Health Code. This law stated as its purpose, "to encourage the development of maximum self-reliance and independence in the person."[ii] A list of safeguards for persons facing the imposition of guardianship was put into place including the right to counsel, independent evaluations, a hearing, and a jury trial.[iii] A legal preference was established for **partial** guardianships for specific decisions rather than full guardianship over all possible life decisions.[iv] It specified that guardianship "shall be utilized only as

is necessary to promote and protect the well-being of the individual . . ."[v] (Emphasis added.)

In 1988, the Michigan legislature followed this trend by enacting the Michigan Guardianship Reform Act covering the appointment of guardians for "legally incapacitated persons".[vi] This law covers any adult who does not fall under the label of "developmental disability" and would include people with mental illness and older adults. The changes made in this law were similar to the Developmentally Disabled Guardianship Statute in the Mental Health Code and included provisions that guardianship appointments be made only to encourage "self-reliance and independence in the person."[vii]

Despite these efforts to ensure no one had a guardianship imposed unnecessarily, Michigan's guardianship numbers increased steadily. In a 1990 national study of twenty-two states, Michigan far exceeded the other states in numbers of guardianship petitions filed.[viii] As of December 31, 2002, there were a total of 66,223 adults in the state of Michigan who had a guardian or conservator.[ix]

Furthermore, there have been reports of serious improprieties and abuses connected to guardianship and conservatorship proceedings in Michigan.[x] For example, in 1996, it was discovered that Guardian, Inc., a large Wayne County corporate guardian with over 600 wards, was found to be engaged in widespread financial and personal exploitation of the people it was charged to serve. Employees of Guardian, Inc. bought multiple funeral plots for individual wards, providing kickbacks to the participating funeral homes. Wards were removed from their homes and placed in nursing homes while their homes and personal belongings were sold for far less than their worth, or

simply disappeared. One individual's home was sold for $500, to a relative of a Guardian, Inc. officer.[xi] The principals of Guardian, Inc. were eventually convicted of federal felony charges in relation to fraud and abuse of their wards and received prison terms, but those convictions could not compensate the wards whose lives had been devastated by the actions of those who had been legally charged with making decisions in their best interest.[xii]

As a direct result of these reports, the Elder Law and Advocacy Section of the Michigan State Bar drafted a resolution requesting the Michigan Supreme Court to create a task force on guardianships and conservatorships. In September of 1996 the Representative Assembly of the Michigan State Bar Association unanimously adopted the resolution. Other organizations and advocacy groups also contacted the Court to support the idea. In November of 1996, the Michigan Supreme Court officially created the Task Force on Guardianships and Conservatorships. Its mission was stated as the following:

> The Task Force on Guardianships and Conservatorships will examine how the judiciary, legislature, and executive branch agencies can better protect the interests of those for whom guardianship or conservatorship is sought. The Task Force will initiate its work with a review of the recommendations of the Michigan Adult Services Task Force. The Task Force will recommend changes in court rules and management policies, statutes, and make other recommendations as appropriate to improve the ability of trial courts to protect the rights and interests of those unable to protect themselves, while maximizing the independence of individuals in need of protection.[xiii]

The Court appointed 25 people to the Task Force with the Honorable Phillip E. Harter, Chief Judge of the Calhoun County Probate Court, as chairperson. Represented on the Task Force were probate court judges, probate court registers and staff members, both houses of the Michigan Legislature, relevant executive branch agencies, several

advocacy groups, the State Bar Association, academia, and members of the probate bar. In July of 1998, the Task Force published the following final eleven recommendations, adopted unanimously:

Recommendations on How to Reduce Unnecessary Petitions for Guardianships and Conservatorships

Recommendation 1:

Each county should establish a local resource for citizens to help assess ~~the need for guardianships and conservatorships, to share resources, to resolve~~ issues outside the probate court system, and to assist in developing alternatives to guardianships and conservatorships.

Recommendation 2:

Existing statutory provisions for medical treatment decisions are inadequate or not recognized by many, and therefore, legislation should be explored.

Recommendation 3:

A broad education effort emphasizing the presumption of competency and alternatives to guardianship should be targeted particularly at hospitals, nursing homes, and other medical or psychological personnel.

Recommendation 4:

Statutes and court rules should be changed so as to clarify that decisions of patient advocates have priority over all other substantive decision makers.

Recommendations on How to Reduce Unnecessary Appointments of Guardians and Conservators.

Recommendation 5

Probate Court forms used for petitioning the court for, and ordering the appointment, of a guardian or conservator should be amended so as to provide for, respectively, more screening information and separate findings on functional capacity and the necessity for the appointment.

Recommendation 6:

Guardians ad litem should include information evaluating functional capacity in their investigations and reports to the court, and should recommend the use of mediation services to resolve disputes, which may come up over the terms of a prospective guardianship.

Recommendation 7:

Judges should have their initial mandatory training supplemented with instruction on cognitive and physical impairments, mental illness, and the aging process, and should periodically be required to receive subsequent training which both refreshes old standards and introduces new issues.

Recommendations on How to Better Manage Guardianships and Conservatorships

Recommendation 8:

Minimum ethical standards for professional guardians and professional conservators should be promulgated and enforced.

Recommendation 9:

Those courts failing to follow statutory and court rule requirements should be compelled by the Supreme Court to comply.

Recommendation 10:

Statutes, court rules, forms, and practice should be changed so as to require the court to review the annual accountings of guardians and conservators, order bonds or restrictions in relation to property and estates, and confirm both the decisions to sell real estate and the sale price.

Recommendation 11:

Courts should increase the recruitment of volunteer guardians, and more guardians who are state-agency-funded-and-monitored should be provided as guardians of last resort.[xiv]

The recommendations are geared toward reducing guardianship appointments as well as providing more protection from abuse and more opportunity for independence for those who have guardians.

Coinciding with the work of the Task Force were legislative actions that reflected attitude and public policy changes about individuals with disabilities and guardianship. In 1996, person-centered planning was written into the Mental Health Code as a requirement for all recipients of mental health services.[xv] Person-centered planning is defined as "a process of planning for and supporting an individual that honors the individual's preferences, choices and abilities".[xvi] The person-centered-planning process

assumes that all people have preferences, regardless of their level of disability. Through this process, the person's preferences are determined by any method possible. In some cases, observations of the individual's behavior by those closest to them are used to determine preferences. Such preferences are then honored as long as they are not harmful to the individual.[xvii] Person-centered planning is also considered a guiding principle for the elderly and disabled.[xviii] The Public Health Code has long mandated that people who are elderly and disabled take part in their own treatment plans.[xix] It is now the policy of the Michigan Department of Community Health that "services need to be consumer-driven and may also be consumer-run. This policy supports the broadest range of options and choices for consumers in services. It also supports consumer-run programs which empower consumers in decision-making with regard to their own services."[xx]

As the law and policy established person-centered-planning and individual's rights to make decisions about their support options, Self-Determination Initiatives began to emerge in Michigan. The Robert Wood Johnson Foundation provided funding to 19 states, including Michigan, for Self-Determination Initiative demonstration projects. The projects are intended to challenge the almost total control that public funders and providers have over the life choices of individuals with disabilities and their families. Individuals with disabilities and their families have little or no say about which providers are to supply services or what those services should be. Changing this imbalance of power and control is the goal of self-determination. Decision-making by the consumer is key to this effort. Obviously, appointing a guardian to make decisions for the consumer can defeat this process.

However, asserting that each individual should make their own decisions doesn't negate each individual's need for help, assistance and support. Families, friends, and professional agencies all work together to give this support. Courts are now acknowledging that these supports can negate the need for guardianship. Although Michigan courts have not considered this issue, the Iowa Supreme Court has recognized that outside supports for an individual may negate the need for guardianship.

> In making a determination as to whether a guardianship should be established . . . the court must consider the availability of third party assistance to meet a . . . proposed ward's need for such necessities . . . [xxi]

National policy-makers have also reiterated that support should negate guardianship. Tom Nerney, Executive Director of the Center for Self-Determination has stated:

> We have to reject the very idea of incompetence. We need to replace it with the idea of "assisted competence". This will include a range of supports that will enable individuals with cognitive disabilities to receive assistance in decision-making that will preserve their rights. . . [xxii]

Stanley S. Herr, Professor Law, University of Maryland School of Law has studied guardianship laws over the world. He states:

> A number of countries have adopted new legislation in recent years to minimize the use of guardianship, to impose only its least restrictive alternatives, and to introduce other innovations. . . The imposition of guardianship posed important ethical, legal and practical problems for the disability rights community. . . The ethical questions involve ideas of paternalism, liberty, prevention of harm and exploitation, beneficence, and the power relationships between guardian and ward. Finding better answers will implicate vital principles of self-determination, including freedom, authority, support and responsibility.[xxiii]

Thus, courts and policy-makers all over the country are exploring alternatives to guardianship that include the combined support of friends, family and professionals as a

way to avoid guardianship imposition in order to preserve the choices of individuals with disabilities.

Other Michigan legislative efforts have continued this trend. The Estates and Protected Individuals Code (EPIC) was adopted, effective April 1, 2000, replacing the Revised Probate Code. The Probate and Estate Planning Section of the State Bar began this effort. This Section spent eight years to simplify, modernize and ensure interstate uniformity of the Probate Code, culminating in Senate introduction of "The Estate Settlement Act". The Elder Law and Advocacy Section of the State Bar, joined by other disability organizations, suggested language changes to ensure that recent reforms were protected and promoted. Specifically, they wanted to ensure consistency with the 1988 Guardianship Reform Act. Also, in light of the recent guardianship scandals reported by the media and the resultant Supreme Court Task Force, they wished to assure the new law reflected consistency with the Task Force's recommendations.

Finally, EPIC was passed and its changes regarding guardianship help to promote the dignity of adults who are subject to guardianship or conservatorship. One provision provides that a guardian shall consult his/her ward about major decisions whenever meaningful communication is possible.[xxiv] The Act also establishes a clear and convincing evidence standard for the imposition of a conservatorship.[xxv] Although this standard has existed for guardianships, it has never been established before for conservatorships. EPIC establishes the right to the same due process protections for conservatorship proceedings as exist for guardianship.[xxvi] It also includes provisions for a limited conservatorship.[xxvii]

In 2001, the Michigan legislature passed new guardianship statutes under EPIC as a response to the Michigan Supreme Court Task Force recommendations. These bills include that:

- Two separate findings must be made on the record to grant a guardianship: a) the individual is an "incapacitated individual" and b) imposition of guardianship is NECESSARY to provide for the individual's needs.
- Guardians Ad Litem must assess cases for whether alternatives are possible and if so, advise the court.
- All guardians must visit their wards at least every 3 months.
- A power of attorney for health care takes precedence over a subsequently appointed guardian over health care.
- A guardian shall serve a copy of the annual report on the ward and all other interested persons.
- A conservator shall serve a copy of the inventory on the protected person, regardless of the individual's presumed mental capacity to understand it, and upon all other interested persons.
- A guardian cannot sell real property without a hearing and court order.
- A guardian must consult the ward about important decisions.

The trend in all these reform efforts is twofold: First, to stop unnecessary guardianships from being imposed, thus maximizing independence and self-determination of all Michigan citizens; second, to ensure that vulnerable people who have had guardianship imposed are not subject to financial and emotional abuse as evidenced by cases reported in Michigan in recent years.

All of these efforts have contributed to resolving guardianship problems in Michigan. However, the most important recommendations of the Supreme Court Task Force remain undone. No agencies or organizations have stepped forward to initiate

statewide efforts at education about the necessity for guardianship and alternatives to guardianship. There have also been no efforts to systemically create resources in each county that would assess the need for guardianship and assist in creating alternatives before the petitions are filed in local courts. A few individual counties have made efforts along these recommendations and the results in these communities are being closely watched.

In addition, there has been a lack of research in Michigan as to what happens in the courts at guardianship hearings, what problems can be identified in the guardianship system, and what recommendations can be made to improve the guardianship system. In 2000, Michigan Protection and Advocacy Service, Inc. (MPAS) embarked on a collaborative effort with the Developmental Disabilities Institute at Wayne State University (DDI) and the Wayne State University Law School to study the current state of guardianship in Michigan. This study sought to address the issues and recommendations of the Supreme Court's Task Force by gathering data in four Michigan county probate courts (Wayne, Oakland, Macomb, and Genesee) as to how the guardianship process is actually being conducted. Trained courtroom observers ultimately sat through almost 260 guardianship hearings, subsequently reviewed all of the available probate files for each of those hearings, and finally attempted to contact the petitioner in a sample of cases for a phone interview. The data collected was then analyzed by researchers at DDI to answer questions about the guardianship process. This report provides information on the current state of guardianship in Michigan and offers recommendations as to how what we now know about guardianship can be used to

improve the guardianship system in Michigan so that it will not fail the vulnerable citizens it was designed to protect.

Method

Six sub-questions were formulated to fulfill the aims of the study, namely:

1. What is the relative frequency of specific guardianship decisions by participant's type of disability? Does the likelihood of a specific decision vary by county of hearing?
2. Does the presence of an attorney for the respondent influence guardianship decisions?
3. Does the involvement of a guardian ad litem (GAL) influence the decision to award full guardianship?
4. Are there reliable differences in the rate of appointment of full guardianship by the presence/absence of specific members of the court (i.e., the respondent, the respondent's attorney, the GAL)? Might this difference vary by the category of disability?
5. What are the primary reasons that petitioners cite for filing for guardianship?
6. What constitutes 'best practice' in terms of ensuring due process in making a guardianship decision?

The sample for this study was drawn from the dockets of judges across four Michigan counties: Genesee, Macomb, Oakland, and Wayne. Cases were sampled from

12 judges across the four counties. All cases involved guardianship decisions, either regarding individuals who are legally incapacitated (n = 223), or individuals with a developmental disability (n = 27) (nine cases are missing identifiers as to whether they involve individuals with a legally incapacitating condition or a developmental disability). The total sample of courtroom cases observed was 259 (N = 259), divided across the four counties (Genesee n = 60, Macomb n = 53, Oakland n = 76, Wayne n = 68; two cases did not have county identifiers). Data for the study was collected in three phases from courtroom observation, court files, and telephone surveys.

In phase one, courtroom observation, in situ coding followed a protocol (see appendix) whereby observers noted the presence or absence of specific persons and their actions during the proceeding. Law students from the Wayne State University Law School and research assistants at the Michigan Protection and Advocacy Society, Inc. (MPAS, Inc) gathered the courtroom data. In phase two, court files for the previously observed courtroom cases were reviewed. Assistants from MPAS, Inc systematically requested all the files representing the full sample of cases observed, and they were able to obtain files for 83.4% (n = 216) of the court-observed cases. The missing cases were distributed evenly across three of the four counties sampled (Genesee n = 4, Macomb n = 7, Oakland n = 24, Wayne n = 8). Oakland County's elevated number of missing cases was due to later courtroom observations (15 additional cases) carried out to corroborate early findings from data analysis. All court files were reviewed using a checklist and content analysis procedure whereby the presence or absence of specific documents and information within the files was tallied (see appendix). Phase three involved telephone interviews with a sample of individual petitioners for guardianship. Researchers from the

Developmental Disabilities Institute at Wayne State and MPAS, Inc. conducted the interviews. The names and telephone numbers of individual petitioners for guardianship were culled from the court files, and these individuals were asked to complete a brief survey over the telephone. The survey consisted of questions assessing the type of guardianship sought, reasons for seeking guardianship, and the referral source(s) that recommended the individual file for guardianship (see appendix). Categories for reasons for seeking guardianship were created from a list of categories generated by two separate raters. Reason for seeking guardianship was categorized separately by two raters, and a third rater resolved differences in category coding. Final interrater agreement (kappa) was above 0.80, indicating that this was a reliable system of coding. For numerous reasons, including confidentiality invoked by institutions, lawyers, and social workers, and the mobility of the sample, researchers were only able to contact approximately 40% (n = 94) of the sample, and of those contacted, approximately one-third refused the survey. Therefore, 64 petitioners completed the telephone survey. Fifty-nine (n=59) of the telephone surveys involved persons who are legally incapacitated, and the remaining five cases involved individuals with a developmental disability. Of the 64 surveys, 62 indicated at least one reason for seeking guardianship.

Data Limitations

Though the data reported here were collected so as to allow for generalization both within and across counties, and to suggest possible statewide educational initiatives and policy recommendations, two cautions should be noted in interpreting the findings. First, a limited number of judges was sampled from each county and this may introduce some bias into the data set, inasmuch as the judges sampled may not have been

representative of all judges ruling on guardianship cases in the county. More confident predictions can be made from the full data set, and/or from counties in which multiple judges were sampled, particularly Wayne County, in which five judges were sampled. Second, the limited participation in the telephone survey prevents confidently generalizing from the results obtained from this sample. However, the responses obtained do provide data from which to generate future hypotheses and suggest additional lines of research for future studies. With these cautions in mind, the majority of the reported results focus on cross-county (whole sample) phenomena, while a minority target issues that may be of concern to particular counties.

Findings

The findings from the study are organized by research question.

Question # 1: What is the relative frequency of specific guardianship decisions by participant's type of disability? Does the likelihood of a specific decision vary by county of hearing?

Overall, the vast majority of decisions (>70%) were for full guardianship, with less than 4% of all requests for guardianship being denied. Table 1 presents the results for all guardianship decisions by type of disability. The frequency of obtaining full guardianship varied by the disability of the respondent. Those individuals with a developmental disability (DD) were less likely (odds ratio (OR) = 0.64)[1] than those individuals with a Legally Incapacitating (LIP) condition to be assigned full

[1] The definition of an odds ratio is the ratio of occurrence of one condition divided by the ratio of occurrence of a second condition. An odds ratio greater than one indicates a greater likelihood of the event occurring, and an odds ratio of less than one indicates a decreased likelihood of the event occurring (relative to the comparison condition).

guardianship, though the chi-square test of these frequencies did not reach significance. Individuals with a developmental disability were more than five times as likely (OR = 5.86) as those with LIP status to be assigned limited guardianship, and this chi-square was highly significant ($p = .004$). There were no situations in which a petitioner for an individual with DD was awarded temporary guardianship. Decisions involving individuals with DD were almost equally as likely as decisions involving LIP individuals to be delayed to allow for medical or mental health evaluations (OR = 1.14), though the small sample size involved (i.e., only one case involving a developmentally disabled individual continued for such an evaluation) precludes drawing any firm conclusions regarding reasons for such delays.

Table 2 presents the guardianship decisions by county. Across all four counties, decisions for limited and temporary guardianship accounted for only 2-21% of all outcomes. These results indicate that while guardianship decisions are most likely to end in a decision for full guardianship, it is important to examine what other factors might lessen this likelihood. In this sample, county itself was an important factor. Wayne County, with the smallest proportion of DD cases, (3.1%) had the highest rate of granting limited or temporary guardianship (48%). These results are counterintuitive, given that those individuals with a developmental disability are more likely to be placed under limited or temporary guardianship and that Wayne County had the lowest proportion of these cases sampled. While this may initially look to be the result of the limited number of judges sampled in the other three counties, pooling the sample and comparing all counties to Wayne County results in a very consistent picture: every other county awards limited or temporary guardianship in less than 25% of cases. Thus the granting of full

guardianship appears to be a function of both the type of disability represented in the case and the county of hearing.

Question # 2: Does the presence of an attorney for the respondent influence guardianship decisions?

The presence of an attorney for the respondent, per se, did not predict a significantly greater likelihood of the granting of limited or temporary guardianship. However, when the actions of the respondent's attorney were entered into a logistic regression, the greater the level of pro-respondent activity in which the attorney engaged, the more likely it was that the decision would be for less than full guardianship. Pro-respondent activity included the following actions: presenting evidence supporting the respondent, presenting non-testimonial evidence, cross-examining the petitioner's witness, and challenging non-testimonial petitioner evidence. As indicated in Table 3, as pro-respondent attorney actions increased, the likelihood of a full guardianship decision decreased significantly. These findings indicate that it is not merely the presence of representation, but the activities associated with representation that matter in limiting the likelihood of a decision for full guardianship.

It is also of note that less frequent granting of full guardianship occurred with similar frequency across individuals with different types of disabilities who had representation. So, for instance, among those individuals with a developmental disability who had representation, the rate of full guardianship was approximately sixty percent (60%), while for individuals who were legally incapacitated and had representation, the rate for full guardianship was about fifty-five percent (54%). Taken together these

findings indicate that the presence and quality of representation positively predict the likelihood of a less-than-full guardianship decision for individuals from either disability category.

Question # 3: Does the involvement of a guardian ad litem (GAL) influence the decision to award full guardianship?

The guardian ad litem (GAL) is a court appointed guardian who serves to represent the interests of the respondent in recommending the appropriate type and scope of guardianship, as well as whether mediation versus judgment should be sought in obtaining a guardianship decision. The specific duties of the GAL which were assessed included: visiting the respondent, explaining the meaning of a guardianship appointment, explaining to the respondent their rights (including the right to attend the hearing, and the right to a jury trial), and informing the respondent of the person or persons seeking guardianship (these actions together compose the GAL index). Thus, in theory, the GAL serves as the primary source of information in the enactment of due process, ensuring that the respondent is informed of the proceedings about to take place and facilitating the respondent's further actions regarding the guardianship proceedings.

There are two observations that are of note when examining the effect of GAL activity on judge decision-making. The first is that there was a large discrepancy between the observed data that the GAL shared in court and the data that was presented in the court file. In all cases the file reflected a more pro-respondent stance than the demonstrated court behavior of the GAL. For instance, according to courtroom data, the GAL reported that the respondent desired to attend the courtroom proceedings in less

than two percent of all cases. Conversely, in the court files, more than thirty-five percent (35%) of all respondents expressed an interest in attending the proceedings. Additionally, in three out of four other action categories, courtroom observation indicated that GALs completed their duties about half the time, while in the file review the GALs indicated that they completed these duties over ninety percent of the time (see Table 4). The second observation is that GAL action did not predict significant variance in guardianship outcome. In light of the abovementioned discrepancies, the finding that a composite index of GAL courtroom actions did not predict full versus limited guardianship is not surprising

Question # 4: Are there reliable differences in the rate of appointment of full guardianship by the presence/absence of specific members of the court (i.e., the respondent, the respondent's attorney, the GAL)? Might this difference vary by the category of disability?

Though presence or absence of specific members of the court may, in some cases, be a necessary condition for the balanced consideration of guardianship, it is by no means sufficient. Analyses completed with this data set indicate that it is actions taken by specific officers of the court, versus their mere presence, that predict variance in guardianship decisions. As stated earlier, the mere presence of an attorney does not, itself, predict variance in guardianship decisions, while attorney action does predict such variance. Similarly, the length of time to a judge's decision did not predict outcome above and beyond the prediction afforded by the judge's actions within that time. As indicated in Table 5, the more comprehensive the judge's actions (i.e., asking about the

respondent's view on the merits of the case, explaining the basis for his decision) the more likely it was that a decision other than full guardianship was rendered. Finally, the presence of the respondent in court had a powerful effect on guardianship decisions. Even after controlling for length of hearing, the presence of the respondent had an independent effect on the prediction of the outcome. Table 6 indicates that a decision for full guardianship was significantly less likely when the respondent was present than when the respondent was absent (OR = .39).

The limited sample of individuals with a developmental disability prohibits more sophisticated analyses about the independent effect of disability type on guardianship outcome. As stated previously, cross-tabulations indicated that the disability of the respondent had an effect on the guardianship decision, and frequency analyses indicated that 85% of respondents with a developmental disability had an attorney present, while only 7.3% of respondents who were legally incapacitated had an attorney present. Similarly, 85% of respondents with a developmental disability were present in the courtroom, as compared to 17.8% of the respondents who were legally incapacitated.

In order to examine the effect of length of hearing by respondent disability on guardianship decisions, t-tests were conducted. Results indicated that there was a significant difference in length of time by disability category. Specifically, guardianship decisions involving a person with a developmental disability took significantly more time than decisions involving a person who was legally incapacitated (6-10 minutes versus 3-5 minutes, respectively). While this finding points to possible differences in process (judge, attorney, and/or GAL actions) that could result in differential decisions about guardianship, it is not possible to identify which processes are independent of one another

and therefore which one(s) are driving the observed effect. Identifying the specific actions of judges and attorneys by the disability of the respondent would allow for more appropriate generalizations about what types of actions determine guardianship outcomes.

Question # 5: What are the primary reasons that petitioners cite for filing for guardianship?

Only completed interviews in which there was inter-rater agreement were examined to address this question (51/62 cases, kappa = 0.82). The most frequently endorsed reason for seeking guardianship was to aid in medical decision-making, or to ensure medical care (30/51 cases, 59%). Two other concerns, finances and general care, tied for the second most frequently cited reason (n = 17/51, 33%). The final category of "Other" reasons was endorsed six times. Examples of reasons that were coded in the "Other" category included legal decision-making without clear consequence for the respondent (such as disposing of property after death), a family's desire to retain guardianship after another family member with guardianship rights died, and a family gaining guardianship because they "just thought we should do so." One third of telephone survey respondents cited multiple reasons for seeking guardianship (17/51, 33%). Taken together these results indicate that it is often multiple concerns that drive the decision to seek guardianship, though the most pressing concern seems to involve medical decision-making. Given that the vast majority of individuals responding to the survey were petitioning for guardianship for a legally incapacitated person, the preponderance of medical concerns is not surprising.

Question # 6: What constitutes 'best practice' in terms of ensuring due process in making a guardianship decision?

Ensuring due process appears to involve the coordinated efforts of multiple officers of the court. Timely and pro-active effort by the GAL to both ensure the attendance of respondents and to inform respondents of their rights is a first step in safeguarding due process. The discrepancy between courtroom observation data and court file data indicates that this first line of advocacy may be somewhat compromised. Methodical case consideration by the judge, including inquiry into the status of the respondent and the respondent's wishes, and explanation for the final decision, is a powerful predictor of outcome and thus serves as an indicator of due process. This holds true even after length of hearing is controlled, again indicating that specific actions are driving this effect. Attorney advocacy for the wishes of the client is important, as it was attorney action, not simply attorney presence, that predicted variance in guardianship decisions. Having an attorney that presents testimony in favor of the respondent's position and challenges testimony from the petitioner increases the respondent's likelihood of achieving his/her desired outcome. Coordinated efforts to educate all involved persons (GAL, attorney, judge) are necessary to ensure that due process is observed on a continuing basis.

Conclusions

1. The majority of petitions for guardianship are filed because of medical concerns and, in many cases, lack of knowledge about medical alternatives to guardianship by petitioners and medical providers. Indeed, interviews with petitioners indicated; "The nursing home told me to go to court;" the hospital "would not release him unless guardianship was obtained;" the "nurse said she thought guardianship was better than power of attorney;" the nursing home "wanted her to obtain it if she wanted to carry out her wishes of no life support;" the "hospital told me they wouldn't accept a power of attorney;" they were told that guardianship "would allow nursing home placement." It is apparent that in many cases neither petitioners nor medical providers are aware of medical alternatives to guardianship and rights of individuals to use those alternatives.

2. Other petitions are filed for financial, general care and "other" reasons. These petitioners, too, indicated lack of knowledge about the requirements for this process: "I wanted a divorce and they told me I would be able to control the money [if I got guardianship instead]; "Apartment Management would not force her & her mother out of the low-income housing complex;" "Social Security recommended she obtain guardianship for ease of decision-making for husband;" "if guardianship is granted, it could help her make the decision as to whether she should get sterilization".

3. Interviews showed many petitioners did not have knowledge about types of guardianship – i.e. partial v. full: "I had no idea there was [sic] different types;" "Knew nothing about guardianship. Filed petition and got what he got;" "I didn't know what to apply for"; "no idea;" "They just gave it to me. I just told them what I wanted to prevent;" "Just asked for guardianship – did not specify the type;" "Went for full and was granted – no specific explanation."

4. The more pro-active judges and attorneys are at guardianship hearings, the less likely a person will have a full guardian appointed. Specifically, if the judge inquires into the status of the respondent and the respondent's wishes, and gives an explanation for the final decision, the individual is significantly less likely to have a full guardianship imposed. And, if attorneys present testimony in favor of the individual's position and challenge testimony from the petitioner, there is a significantly less likelihood of having full guardianship imposed.

5. If a respondent is present at the hearing there is significantly less likelihood that a full guardianship will be ordered.

6. There was a large discrepancy between what was reported in the file, and what the GAL's presented in court. Specifically, while the files showed that 35% of individuals expressed an interest in being in court for their hearing, this was only reported in court 2% of the time. Also, although courtroom observation

indicated that GAL's completed their other duties about half the time, (such as visiting the individual and explaining their rights,) the file review indicated the GAL's completed these duties over ninety percent of the time.

Recommendations

1. Education: Although the Supreme Court Task Force on Guardianship and Conservatorship made recommendations that comprehensive education about alternatives to guardianship is needed, no funds have been appropriated for this effort and no concentrated, statewide education effort has ever been attempted. It has been shown again in this report that the reasons people seek guardianship are often because they or the people advising them are not aware of alternatives or their rights to those alternatives. Education about alternatives to guardianship for disability provider organizations, health care providers, school systems, and the public needs to be reinforced by a concentrated state plan with funds to carry it out. Among others, the Department of Community Health, the Office for Services on Aging, the Family Independence Agency, and advocacy organizations should be key players in this effort.

2. Education Content: Specific alternatives that should be taught include person-centered planning, durable powers of attorney, and family consent policies. Although almost all hospitals have family consent policies, some medical staff are not aware of them and recommend families take their loved ones to court

to obtain powers they already have under the medical providers policies. Other medical providers, mental health agencies, and schools may also have informal family consent policies, but they are not universally implemented. Some of these providers do not have family consent or power of attorney policies because they are not aware they are viable options. These providers may be under the impression that guardianship is the only form of surrogate decision-making that is legally acceptable. The development of formal family consent and other surrogate decision-making policies and their implementation needs to be encouraged. Model policies should be developed and offered as part of the education efforts about alternatives.

In addition, the importance of the legislative requirement to make separate findings of "incapacity" and "necessity" should be emphasized in educational materials. Presumably, the reason for the added emphasis of this requirement by the legislature was that many guardianships in the past were awarded solely on the basis of incapacity, and necessity was not considered. In these cases, even though the person was legally "incapacitated", alternatives outside guardianship were sufficient to get the individual the services and supports they needed without guardianship. As an example, an individual may not be able to make medical decisions, but the medical providers are willing to accept the family's authorization for services and there is no need for guardianship. Or, a power of attorney is in effect that would negate the need for guardianship. Specifically, attorneys and GAL's should be aware of the requirement for necessity under the statute and be knowledgeable about

alternatives so they can zealously advocate, when possible, for less intrusion than guardianship into an individual's life.

3. Single Point Entry: Although the Supreme Court Task Force also recommended that each county should establish a local resource for all citizens to be able to resolve the need for guardianship issues, again no concerted effort has been undertaken. There should be a resource in every county that has information about alternatives to guardianship and be able to provide resources to people in their area. It is clear that the flow of petitions needs to be stopped before they get to the courthouse by providing information to people that they can use to resolve issues without guardianship. Again, a statewide education effort to establish such resources is needed, including written information resources. This effort should be implemented with, among others, the Department of Community Health, Office on Services to the Aging, the Family Independence Agency, and advocacy organizations.

4. Legislation: Legislative reform has met with more success than other recommendations of the Task Force. Important legislation has been passed since the Task Force report in the Estates and Protected Individuals Code. This includes; clarification that a patient advocate takes precedence over guardianship; the requirement of separate court findings on the record of capacity and necessity in order to appoint guardianship; requirements that GAL's must determine if alternatives exist and advise limited powers; requirement that a professional guardian may only be appointed if no one else

is willing to serve; a requirement that guardians must visit the individual every 3 months. However, more needs to be done. A family consent statute which most other states have would be very helpful, a clarification of guardian's rights in end-of-life decision making, and more ethical standards for professional guardians are some of the issues that still need to be addressed. In addition, since none of the changes so far have been made in the Mental Health Code that covers guardianship for individuals with developmental disabilities, comparable changes need to be made there.

5. Courts: This information should be disseminated to judges, attorneys, and GAL's involved in the guardianship process. Judges and other court officials are interested in assuring the rights of individuals in their courts, and such information may be useful in their practice. Specifically, it would be valuable to judges and attorneys to know that the more active their own participation in the process, the less likelihood of full guardianship appointments. It is also valuable to know that when the respondent is in court, there is also less likelihood of full guardianship appointments. Perhaps more efforts could be made to assure the respondents who wish to attend their hearings are able to do so.

This report identifies that there is a continued need for guardianship reform in Michigan. Just as supports have evolved since the 70's to assist people with disabilities to participate in education, employment, housing and other community opportunities, supports are now evolving to assist people in decision-making. "Assisted living" has replaced institution living, and "supported employment" has provided more job

opportunities. The concept of "assisted competence" now continues the evolution that enables people with disabilities and the elderly the dignity and freedom to develop and participate in the lives they want and choose. "Assisted competence" means careful consideration of supports from friends, family and professionals that can provide assistance to individuals. The use of these supports and other alternatives to guardianship can help preserve the rights and dignity of Michigan citizens.

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[i] Winsor C. Schmidt, *Guardianship of the Elderly in Florida: Social Bankruptcy and the Need for Reform*, 55 Fla. B.J. 189, 189 (Mar. 1981) (quoting E.S. Cohen, Speech, *Protective Services and Public Guardianship: A Dissenting View* (31st Annual Meeting of the Gerontological Socy., Dallas, Tex., Nov. 20, 1978)
[ii] MCL 330.1602; MSA 14.800 (502)
[iii] MCL 330.1615, 1617; MSA 14.800 (615), (617)
[iv] MCL 330.1612 (2); MSA 14.800 (612) (20
[v] MCL 330.1602 (1); MSA 14.800 (602) (10
[vi] MCL 700.5301 et seq; MSA 27.15301 et seq
[vii] MCL 700.5306 (2); MSA 27.15306 (20
[viii] National Center for State Courts Statistic Project, 1990
[ix] Michigan Supreme Court, State Court Administrative Office, Probate Caseload Detail Report-Statewide, 01/01/2002 through 12/31/2002
[x] Preliminary Report of Receiver, John M. Chase, Jr. to the Wayne County Probate Court, In the estate of Alice M. Esper, File N. 90-845340-CG, 1996
[xi] Detroit Free Press, Section A, page 10A, Wednesday, May 24, 2000
[xii] U.S. of America v. Paulette Horton, U.S.D.C. E.D. Mich, S. Div, #99-80508
[xiii] Michigan Supreme Court Task Force on Guardianships and Conservatorships Final Report, 1998, 1.1 Institution and Composition of the Task Force, p.1
[xiv] Id. 3. 0 Recommendations of the Task Force, pp 6 –9
[xv] MCL 330.1712; MSA 14.800 (712)
[xvi] MCL 330.1700 (g); MSA 14.400 (700) (g)
[xvii] Michigan Department of Community Health, Person-Centered Planning Practice Guideline
[xviii] Michigan's Long Term Care Work Group Report and Recommendations, June, 2000 at 21.
[xix] MCL 333.20201 (3) (d); MSA 14.15 (20201)
[xx] Michigan Department of Community Health, Consumerism Guideline
[xxi] In the Matter of Hedin, Iowa Supreme Court, (1995)
[xxii] Common Sense, Issue 6 – 1999; a Publication of the National Program Office on Self-Determination, University of New Hampshire, Institute on Disability, funded by the Robert Wood Johnson Foundation
[xxiii] Id.
[xxiv] MCL 700.5314 (1); MSA 27.15314 (1)
[xxv] MCL 700.5406 (6); MSA 27 15406 (6)
[xxvi] MCL 700.5406 (2), 5406 (4); MSA 27.15406 (2), 27.15406 (4)
[xxvii] MCL 700.5419 (1); MSA 27.15419 (1)

Appendix A:
Data Tables

Table 1: Guardianship Decision by Disability Type (N = 251) [2]

Disability	Denied	Full	Limited	Temp.	MD/MH Evaluation	Other[3]
	Decision					
LIP	5/215 (2.3)	156/215 (72.6)	10/214 (4.7)	9/214 (4.2)	7/214 (3.3)	41/216 (18.9)
DD	0/27 (0.0)	17/27 (63.0)	6/27 (22.2)**	0/27 (0.0)	1/27 (3.7)	4/27 (14.8)
Total	5/242 (2.1)	173/242 (71.5)	16/241 (6.6)	9/241 (3.7)	3/241 (3.3)	45/243 (18.5)

Note: Numbers in parentheses represent percentages by cell.
** $p < .01$

[2] There were 9 incomplete cases (i.e., no disability code entered) in the dataset. Those cases have been deleted from this analysis.
[3] This category includes hearings continued for various reasons, e.g., to include respondent, to include an attorney for the respondent, and also includes idiosyncratic codings by the court observer. This category is not mutually exclusive of other categories and as such the total count may exceed the total number of cases represented in each disability group.

Table 2: Guardianship Decision by County (N = 249)

County	Denied	Full	Limited	Temp.	Other
	Decision				
Genesee	1/57 (1.8)	45/57 (78.9)	1/57 (1.8)	0/57 (0.0)	11/57 (19.3)
Macomb	1/52 (1.9)	40/52 (76.9)	6/51* (11.8)	1/51 (2.0)	5/52 (9.6)
Oakland	0/75 (0.0)	57/75 (76.0)	1/75 (1.3)	2/75 (2.7)	15/76 (19.7)
Wayne	6/65 (9.2)	34/65** (52.3)	8/65* (12.3)	6/65* (9.2)	17/65 (26.2)
Total	8/249 (3.2)	176/249 (70.7)	16/249 (6.4)	9/249 (3.6)	48/249 (19.3)

* $p < .05$

** $p < .01$

Table 3: Guardianship Decision (Full vs. Other) Predicted by Attorney Action

Variable	Odds Ratio	95% Confidence Interval
Attorney Index	0.25*	(0.07, 0.93)
Constant	4.78	

* $p < .05$

Table 4: Discrepancy Between GAL Action during Courtroom Observation and File Review

	Observation		File	
Activity	N	% Yes	N	% Yes
Resp. wants to attend	177	1.1	60	36.7
Resp. wants counsel	200	3.0	41	36.6
Made a visit	186	78.5	170	97.6
Explained guardianship	183	47.0	140	94.3
Explained rights	183	43.7	146	93.2
Told name of proposed guardian	180	50.0	147	94.6

Table 5: Guardianship Decision (Full vs. Other) Predicted by Judges' Actions and Hearing Length

Variable	Odds Ratio	95% Confidence Interval
Judges' Actions	0.72*	(0.53, 0.98)
Hearing Length	0.97	(0.67, 1.40)

* $p < .05$

Table 6: Guardianship Decision (Full vs. Other) Predicted by Respondent Presence and Hearing Length

Variable	Odds Ratio	95% Confidence Interval
Respondent Presence	0.39**	(0.21, 0.75)
Hearing Length	0.82	(0.63, 1.05)

** $p < .01$

Appendix B:
Observations Summary Charts

Note: **Numbers in parentheses are number of occurrences (raw data).**

Chart 1:
Outcomes for Persons with Developmental Disabilities

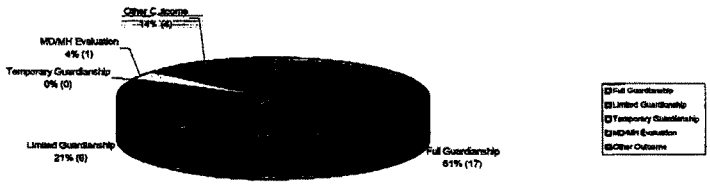

Chart 2:
Outcomes for Legally Incapacitated Persons (LIPs)

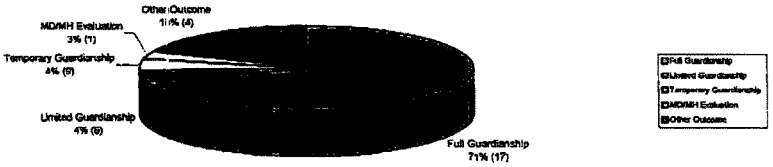

Chart 3:
Occurences: Observation vs. GAL Report

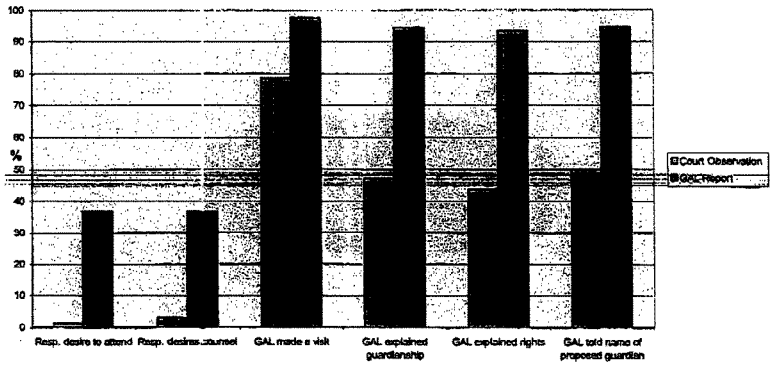

Chart 4:
Time in Hearing

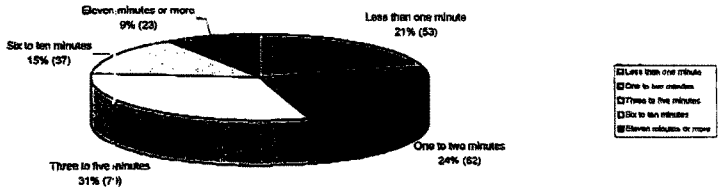

Chart 5:
Attorney Actions Predict Outcome: No Action

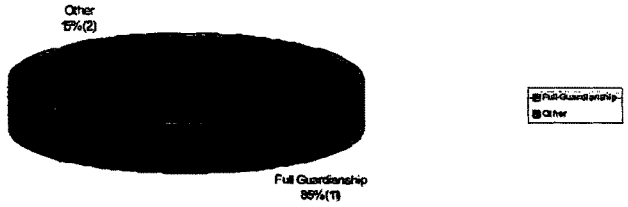

Chart 6:
Attorney Actions Predict Outcome: One or More Actions

Chart 7:
Judges' Appropriateness Predicts Outcome: No Action Taken

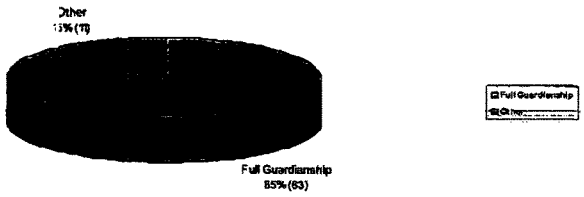

Chart 8:
Judges' Appropriateness Predicts Outcome: One Action Taken

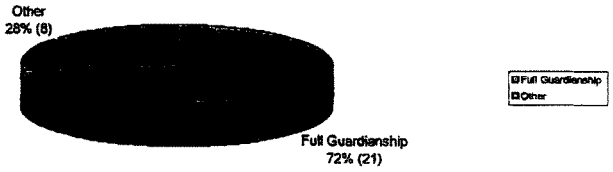

Chart 9:
Judges' Appropriateness Predicts Outcome: Two Actions Taken

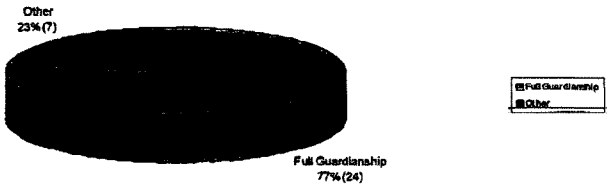

Chart 10:
Judges' Appropriateness Predicts Outcome: Three or Four Actions Taken

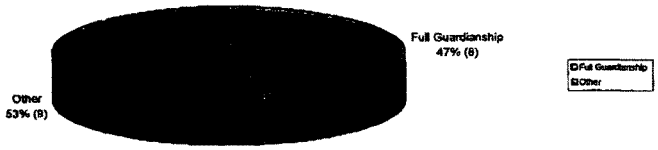

Chart 11:
Respondent's Presence on Outcome: Respondent Absent

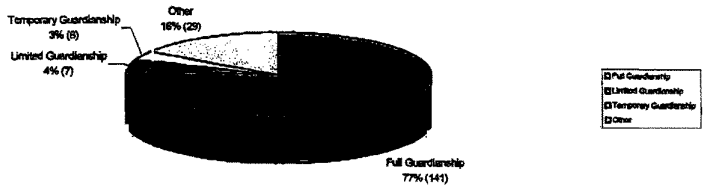

Chart 12:
Respondent's Presence on Outcome: Respondent Present