

ADULT GUARDIANSHIPS: A “BEST GUESS” NATIONAL ESTIMATE AND THE MOMENTUM FOR REFORM

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A projection of active pending adult-guardianship cases nationwide demonstrates the need for improved data collection. Retrospectively, 2010 may be remembered as a pivotal year in the call for guardianship reform at both federal and state levels.

Guardianship is a relationship created by state law in which a court gives one person or entity (the guardian) the duty and power to make personal or property decisions for another (the ward, or incapacitated person). While specific terminology varies from state to state, guardianships tend to be distinguished between guardianships of the person and guardianships of the estate (conservatorships).¹

Guardianships—a guardian is lawfully authorized to make decisions in place of an adult who is determined by the court to be incapable of caring for himself or herself.

Conservatorships—a conservator is authorized to make decisions regarding the real or personal property of an adult who is determined by the court to be incapable of making those decisions.

Guardianship Issues

Due to the seriousness of the loss of individual rights, guardianships are a “last resort.” The court can order either a full or limited guardianship for incapacitated persons. Under full guardianship, wards relinquish all rights to self-determination, and guardians have full authority over their wards’ personal and financial affairs: Wards lose all fundamental rights, including the right to manage their own finances, buy or sell property, make medical decisions for themselves, get married, vote in elections, and enter into contracts. For this reason, limited guardianships—in

“The appointment of a guardian or a conservator removes from a person a large part of what it means to be an adult: the ability to make decisions for oneself. . . . We terminate this fundamental and basic right with all the procedural rigor of processing a traffic ticket.”

*- Utah Judicial Council’s ad hoc Committee on Probate Law and Procedure
(February 2009)*

which the guardian’s powers and duties are limited so that wards retain some rights depending on their level of capacity—are preferred.

The guardianship process can vary significantly by state, court, and judge. Generally, the process begins with the determination of incapacity and the appointment of a guardian. Interested parties, such as family or public agencies, petition the court for appointment of guardians. The court is then responsible for ensuring that the alleged incapacitated person’s rights to due process are upheld, while making provisions for investigating and gauging the extent of incapacity, if any. Should the individual be deemed incapacitated, the judge appoints a guardian and writes an order describing the duration and scope of the guardian’s powers and duties. The court also holds the guardian accountable through monitoring and reporting procedures for the duration of the guardianship and can expand or reduce guardianship orders, remove guardians for failing to fulfill their responsibilities, and terminate guardianships and restore the rights of wards who have regained their capacity.

Guardianships were designed to protect the interests of incapacitated adults and elders, in particular. Yet Congress, national advocacy organizations, and the media have increasingly highlighted the abuse of guardianships and conservatorships as a means to exploit older persons. Uekert and Dibble (2008) note five major challenges for the court: (1) the determination of capacity, (2) costs associated with

administering guardianships, (3) training and education standards for judges and court staff, (4) court monitoring of guardianships, and (5) the collection of data.

A National Estimate and the Case for Improving Data Collection

This article focuses on the last of these challenges. In many ways, the absence of accurate national information regarding the numbers of people affected by guardianships, the conditions under which a guardianship is imposed, the services and alternatives being offered, the frequency and nature of misfeasance by guardians, and the possible warning signs of abuse hampers the ability of the courts,

service agencies, policy makers, advocates, and others to address the issues. For example, accurate information could be used to inform the provisions of the federal government’s Elder Justice Act, advance national guardianship standards, and develop court improvement programs. Furthermore, case-file data could be used to develop court performance measures that enable state courts to use evidence-based practices to improve processes. For this reason, it is critical to introduce into this discussion a national estimate of adult guardianship cases.

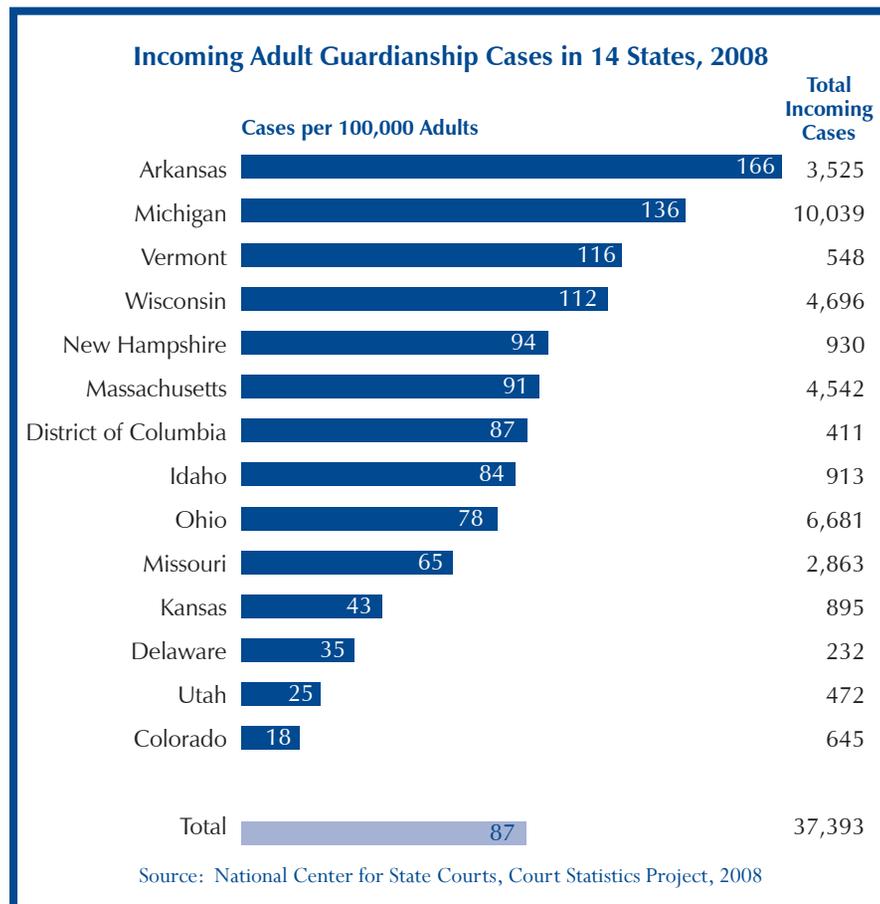
State court caseload data on adult guardianships is collected through the National Center for State Courts’ Court Statistics Project (CSP). Currently, few states are able to report complete statewide adult-guardianship caseload data, because these cases are counted in a generic probate case type or otherwise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

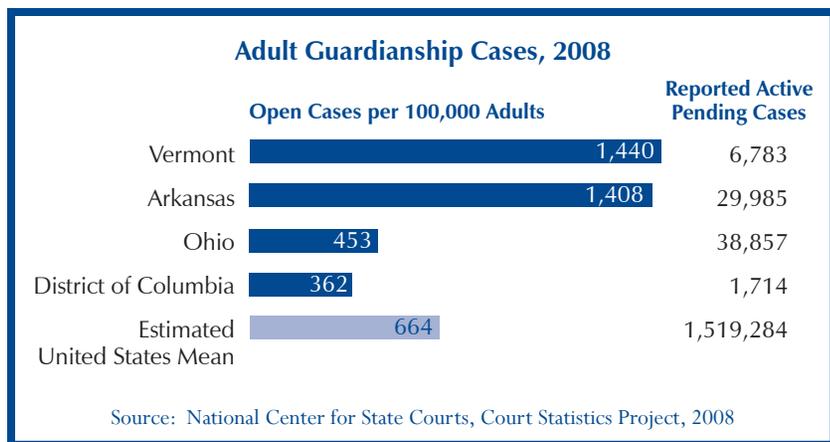
Despite the lack of comprehensive national data, 14 states report adult guardianship filings annually. The chart shows the number of incoming adult guardianship cases and the number of cases per 100,000 adults. The median number of incoming adult guardianship cases per 100,000 adults is 87. Conservatorship cases, which are not broken out by juvenile and adult, are not included in this analysis

Incoming guardianship cases represent only a fraction of all active pending cases. Guardianship cases often remain active for years and, in some cases, decades. Of these states, just four can differentiate active pending adult-guardianship cases (see chart on following page).

Adult Guardianship Cases, 2008

The reliance of projecting national estimates on data provided by four states is less than ideal. Yet the data, which do not include adult conservatorships, provide the best available figures for active pending adult guardianships at this time. Using an





average from the four states, there are 664 active pending cases per 100,000 adults. When applied to the U.S. adult population, this would mean there are 1.5 million active pending adult-guardianship cases. However, the variance between states is high, and the number of active pending adult-guardianship cases could range from fewer than 1 million to more than 3 million.

The ongoing challenges in documenting the number of adult guardianship and conservatorship cases have been the subject of numerous reports and calls for action. In 2007 Senators Gordon Smith and Herb Kohl, chairs of the U.S. Senate Special Committee on Aging, issued a report on “Guardianship for the Elderly” that encouraged the collection and review of electronic case data (Smith and Kohl, 2007). Subsequent calls for improved data collection include the following:

- In 2009 the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) passed Resolution 14, “Encouraging Collection of Data on Adult Guardianship, Adult Conservatorship, and Elder Abuse Cases by All States.”
- In 2010 the CCJ-COSCA Joint Task Force on Elders and the Courts issued a report recommending that “each state court system should collect and report the number of guardianship, conservatorship, and elder abuse cases that are filed, pending, and concluded each year” (Uekert, 2010). Each conference endorsed the recommendation.

- In 2010 COSCA adopted a policy paper urging funding for a National Guardianship Survey and support for the development of local data systems (COSCA, 2010). CCJ also endorsed this paper.

2010: Building Momentum for Guardianship Reform

Retrospectively, 2010 may be remembered as a pivotal year in the call for federal and state guardianship reform. A study by the General Accountability Office (GAO) highlighted cases of abuse and financial exploitation in guardianship cases; state task forces addressed guardianship and probate problems within their states; CCJ and COSCA issued reports and recommendations calling for system improvements; and national resources and events were launched or planned.

National Study

At the request of the U.S. Senate Special Committee on Aging, the GAO investigated the financial exploitation, neglect, and abuse of seniors in the guardianship system (GAO, 2010). GAO investigators focused on 20 cases in which guardians stole or improperly obtained assets from incapacitated victims. In the majority of these cases, the GAO found that the potential guardians were inadequately screened and there was insufficient oversight of guardians after appointment. Furthermore, the GAO, using fictitious identities, obtained guardianship certifications or met certification requirements in Illinois, Nevada, New York, and North Carolina. None of the courts or certification organizations used by those states checked the credit history or validated the Social Security numbers of the fictitious applicants. The investigation suggested that little had changed to protect incapacitated seniors since the GAO’s 2004 report on guardianships.

State Task Forces

At least three state supreme courts (Arizona, Nebraska, and South Carolina) established task forces to address guardianship issues. Following local media reports highlighting instances in which people lost much of their estates to attorneys and fiduciaries appointed to protect them, the Arizona Supreme Court created a task force to examine the conduct of probate courts. The task force presented an interim report to the Arizona Judicial Council in October and expects to issue a final report in June 2011. The report is expected to be a significant body of work

that includes such things as proposed legislation, fee schedules, and fee blueprints. The Nebraska Supreme Court appointed a task force in the aftermath of a high-profile case in which a court-appointed guardian had stolen large sums of money from several people under her care. In October, the Nebraska Joint Review Committee issued its final recommendations, elements of which have since been included in a bill introduced by the Nebraska legislature.² The South Carolina Supreme Court issued a task force report that noted the importance of probate courts and vulnerable adult issues, including guardianships and conservatorships.

CCJ/COSCA Recommendations

In March, the CCJ/COSCA Joint Task Force on Elders and the Courts issued a report based on an informal survey of guardianship data and issues. Among the recommendations was a call for federal, state, and private funding to support:

- Collection and analysis of national information regarding the number of guardianships and effective court practices.
- Development, evaluation, dissemination, and implementation of written and online material to inform nonprofessional guardians and conservators of their duties and responsibilities.
- The use of technology to improve guardianship reporting and accountability.
- Development, documentation, evaluation, dissemination, and evaluation of effective guardianship-monitoring procedures and technologies.
- Development and delivery of judicial training materials and courses.

COSCA's policy paper (2010) challenges states to establish guardianship task forces, improve court responses (with technical assistance), and appoint counsel in every case. At the federal level, the paper recommends supporting national data-collection efforts; creating a Guardianship Court Improvement Program (GCIP); including CCJ/COSCA representation on the National Elder Justice Coordinating Council; supporting a National Guardianship Summit for Courts; and enacting the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. COSCA adopted the policy paper in December 2010, and CCJ endorsed it in January 2011.

National Resources

In June 2010, the National Center for State Courts launched the Center for Elders and the Courts (CEC).³ This Web site provides state and national resources on aging issues, elder abuse, and guardianships and features:

- An interactive map that allows users to access information on specific state laws related to elder abuse and adult guardianships, as well as links to state resources on aging.
- A database of "promising practices," such as court technologies and administration procedures that have been successfully implemented by courts.
- Ten training videos on such topics as creating an elder justice center, creating an elder protection court, and working with adult protective services.

Several products are scheduled to be introduced in 2011, including an elder abuse curriculum designed for presentation by state judicial educators and an elder abuse toolkit for the courts.

2011 Events and Activities

The National Guardianship Network received a grant to plan and present the Third National Guardianship Summit in October 2011.⁴ This summit follows the 1988 National Guardianship Symposium and the 2001 National Guardianship Conference. The theme of the 2011 summit is "Standards of Excellence." It will focus on development of standards for guardians and conservators and the establishment and operation of state guardianship committees. Additionally, late in 2010, grants were awarded by the State Justice Institute, the Borchard Foundation, and the ACTEC Foundations to enable the National College of Probate Judges, in partnership with the National Center for State Courts, to update the *National Probate Court Standards* to include best practices developed since the initial standards were promulgated in 1994.

National leadership and resources are needed to develop true and lasting reforms to protect the welfare of incapacitated adults.

Hopes and Concerns for the Future

Data

Improving the guardianship process and the quality of services provided to incapacitated adults is hampered by the lack of basic information. Reliable national data is needed not only on the actual number of guardianship cases that are filed, pending, and closed each year, but also on such important background information as the relationship between parties to a guardianship proceeding; age of respondents; the level and nature of disabilities when a guardianship is imposed; the scope of the guardianship order (e.g., limited, plenary, temporary, conservatorship); the value of the estate; the amount of guardian expenses and guardian and attorney fees; the level of Social Security and federal assistance; whether counsel has been appointed for the respondent or ward; the basis for determining incapacity; and the completeness and accuracy of annual accountings. In addition to guiding reform efforts, this information could be used for developing national performance measures for guardianship cases.

Federal Funding Assistance

The guardianship process has been likened to the child welfare process, as the court is responsible for the welfare of the individual placed under its watch. The handling of child welfare cases has greatly benefited from the 1993 Child Welfare Court Improvement Project (CIP).⁵ CIP grants are used to assess handling of child-abuse-and-neglect cases and make needed improvements; train judges, legal personnel, and attorneys in handling child welfare cases; strengthen the capacity of states to collect relevant data for performance measurement; and improve timeliness of decisions regarding safety, permanency, and well-being of children. The CIP includes an array of National Resource Centers to provide information and technical assistance. CCJ, COSCA, and members of the National Guardianship Network have called upon the federal government to implement a similar program for adult guardianships—a Guardianship Court Improvement Program (GCIP). National leadership and resources are needed to develop true and lasting reforms to protect the welfare of incapacitated adults.

Improved Methods for Preventing and Detecting Financial Exploitation of Vulnerable Adults

Finally, there is growing concern about abuses of vulnerable adults that occur outside the guardianship system—abuses that typically go undetected unless criminal laws are violated. Because a guardianship limits or abrogates the rights of the ward, it is considered an option of last resort. There is a strong preference for less-restrictive alternatives, such as appointment of a representative payee or authorized representative, durable powers of attorney, and use of joint accounts. The extent of financial exploitation that occurs in these relationships, especially power of attorney, is unknown. However, high-profile cases of power-of-attorney abuses may eventually lead to a call for some level of oversight.

ENDNOTES

¹ The following definitions are consistent with the definitions used by the Court Statistics Project (CSP). For the exact CSP definitions, visit the CSP home page at www.ncsconline.org/D_Research/csp/CSP_Main_Page.html, where you can view the *State Court Guide to Statistical Reporting*.

² At the time of this writing, LB157 was being debated, with the expectation that the bill will be signed into law by the end of the legislative session (June 2011).

³ The CEC was made possible through a generous grant from the Retirement Research Foundation of Chicago.

⁴ The National Guardianship Network includes AARP; Alzheimer's Association; ABA Commission on Law and Aging; ABA Section of Real Property, Probate, and Trust Law; American College of Trust and Estate Counsel Center for Guardianship Certification; National Academy of Elder Law Attorneys; National Center for State Courts; National College of Probate Judges; and the National Guardianship Association.

⁵ Omnibus Budget Reconciliation Act of 1993—Sec. 13712 (PL 103-66).

RESOURCES

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