

# **The Demographic Imperative: Guardianships and Conservatorships**

**An increasing number of persons with diminished capacity are poised to transform American institutions, including the courts. What can state courts do to prepare to meet this challenge?**

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## White Paper Drafting Team

**Jeff Hall, State Court Administrator**

Washington State Administrative Office of the Courts

**Shirley Bondon, Manager**

Office of Public Guardianship

Washington State Administrative Office of the Courts

**Cherstin Hamel, Assistant Director**

Judicial Programs Department

Administrative Office of Pennsylvania Courts

**Debbie Howells, ADA Coordinator**

Florida Office of the State Courts Administrator

**Joseph Mittleman, Director,**

Judicial Programs Department

Administrative Office of Pennsylvania Courts

**Lesley Martin Ondrechen, Director**

Guardianship Certification Program

Texas Office of Court Administration

**Judy Rehak, Senior Legal Counsel**

Minnesota State Court Administrator's Office

**Nancy Swetnam, Director**

Certification and Licensing Division

Arizona Supreme Court

**Brenda K. Uekert, PhD., Principal Court Research Consultant**

National Center for State Courts

**Joseph Vradenburg, Statistics Coordinator**

Court Programs, Research and Education Division

Missouri Office of State Courts Administrator

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**Patricia W. Griffin**

State Court Administrator, Delaware

**Lilia G. Judson**

Executive Director, Indiana Division of Court Administration

**Gregory J. Linhares**

State Court Administrator, Missouri

**Arthur W. Pepin**

Director, New Mexico Administrative Office of the Courts

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Court Administrator, Administrative Office of Pennsylvania Courts

**William C. Vickrey**

Administrative Director of the California Courts

**A. John Voelker**

Director of State Courts, Wisconsin

Staff: **Richard Schauffler**

Director, Research Services, National Center for State Courts

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## Executive Summary

Each time a guardianship petition is filed, the life of a person with diminished capacity<sup>1</sup> may be forever changed. A favorable outcome could mean the court makes a well-informed decision to appoint a guardian with appropriate powers to provide for the basic needs and protection of the person with diminished capacity or to dismiss the petition as unnecessary. Alternatively, an unfavorable outcome could subject the person with diminished capacity to an unnecessary loss of fundamental rights, restriction of self-determination, loss of the freedom to choose and take risks or abuse, neglect and exploitation. Individually, state court judges regularly wrestle with these decisions on a case-by-case basis, resulting in thousands of positive outcomes. But inadequate fiscal and program resources, inconsistent practices, insufficient coordination among courts and service agencies, and the lack of consensus about standards and acceptable performance outcomes limit the courts' ability to implement innovative reforms needed to increase positive outcomes for persons with diminished capacity.

Protecting the rapidly growing number of persons with diminished decision-making capacity is an important societal responsibility that the courts and state governments cannot address alone. A coordinated national response is required to ensure that elders, persons with intellectual or cognitive impairments, individuals with mental illnesses, and veterans with disabilities receive the decision-making assistance needed to continue living life to the fullest extent, even as their decision-making capacity diminishes.

The recommendations of the Conference of State Court Administrators (COSCA) provide a roadmap for a multidisciplinary national response involving a federal and state partnership to develop a national Guardianship Court Improvement Program and to focus resources and achieve greater accountability for the well-being of vulnerable adults.

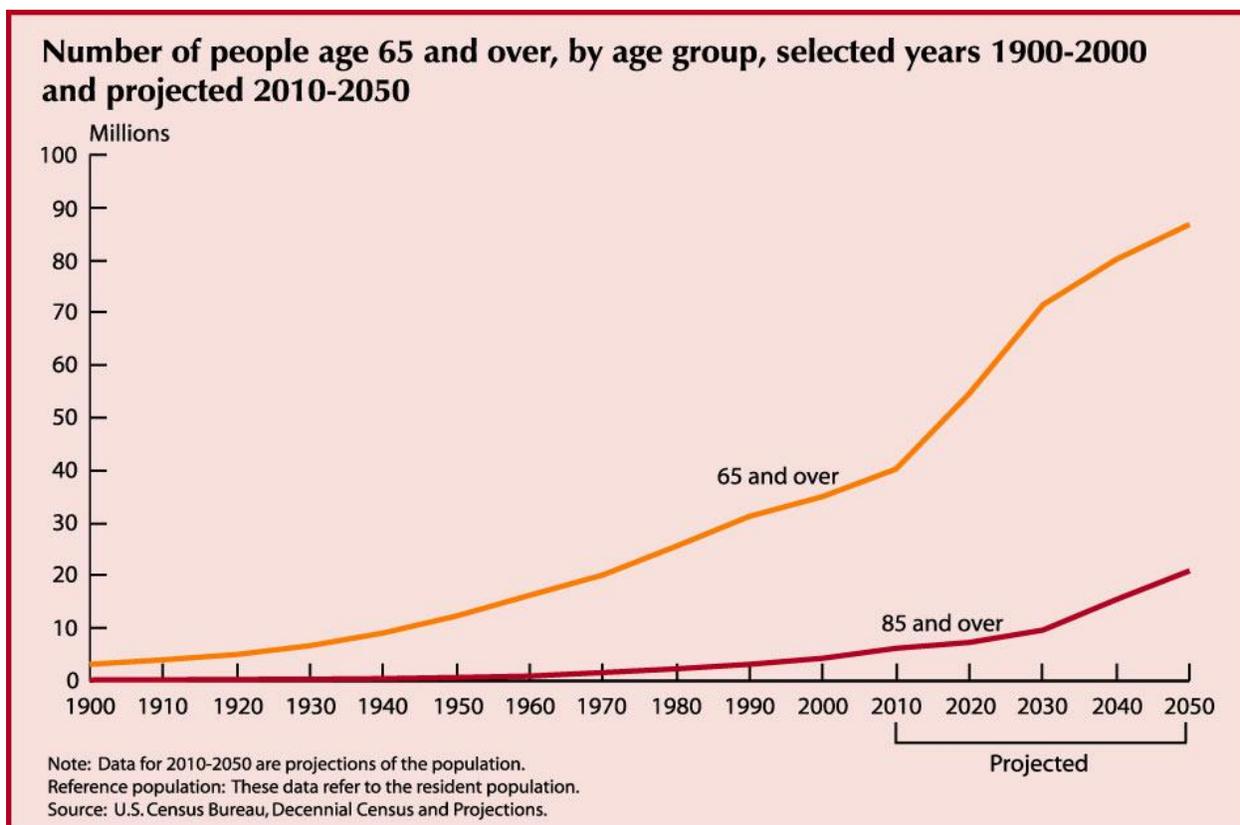
COSCA encourages each state to convene a statewide guardianship task force to review the guardianship process, court rules and statutes; make and prioritize recommendations for improvement; and implement best practices.

*The National Probate Court (NPC) standards are used as a set of guiding principles for the recommendations presented in this report and specific Standards related to the topics discussed are presented in sidebars throughout. The Standards were developed in 1993 by the National College of Probate Court Judges (NCPCJ) in partnership with the National Center for State Courts (NCSC) to set the course for increased responsiveness and efficiency of the probate courts. When they were developed, the standards were considered aspirational and sought to capture the philosophy and spirit of an effective probate court. More than a decade later, many courts are still struggling to achieve the goals NCPCJ thoughtfully developed.*

## I. Introduction/Background

Nationally, the number of persons with diminished capacity attributable to one or more causes is growing. This increase will result in significant caseload growth for probate, civil and criminal courts, which must appoint and monitor guardians where necessary and adjudicate disputes over eligibility for, and the scope of, governmental services related to mental health matters, abuse, and exploitation. Proactive steps taken by courts now will improve their ability to address larger and more complex caseloads in the future. The adoption of progressive policies, development of responsive implementation resources and the sharing of data and best practices will position courts to provide timely and need-specific resources to protect those with diminished capacity as the demand for services increases.

**Figure 1 Population Projection**



Numerous reports from diverse organizations have identified the components of our nation's evolving demographics that account for this growth. These components include—an aging population, increased longevity, increased awareness of mental illnesses and developmental disabilities, military service-related disabilities, and the consequences of advances in medical treatment.<sup>2</sup>

Numerically, aging with concomitant age-related degenerative illness accounts for the largest anticipated increase in the number of people with potentially diminished capacity.<sup>3</sup> (See Figures 1 and 2.) A National Center for Elder Abuse study cited an estimate of over 70 million Americans aged 65 years or older by 2030, approximately twice the number of elders in 2003.<sup>4</sup> Of these, almost one-seventh will be 85 years or older. In a more recent publication, the National Center for State Courts (NCSC) cited U.S. Census statistics indicating two-fifths of the nation's population will be aged 50 years or older by 2050.<sup>5</sup>

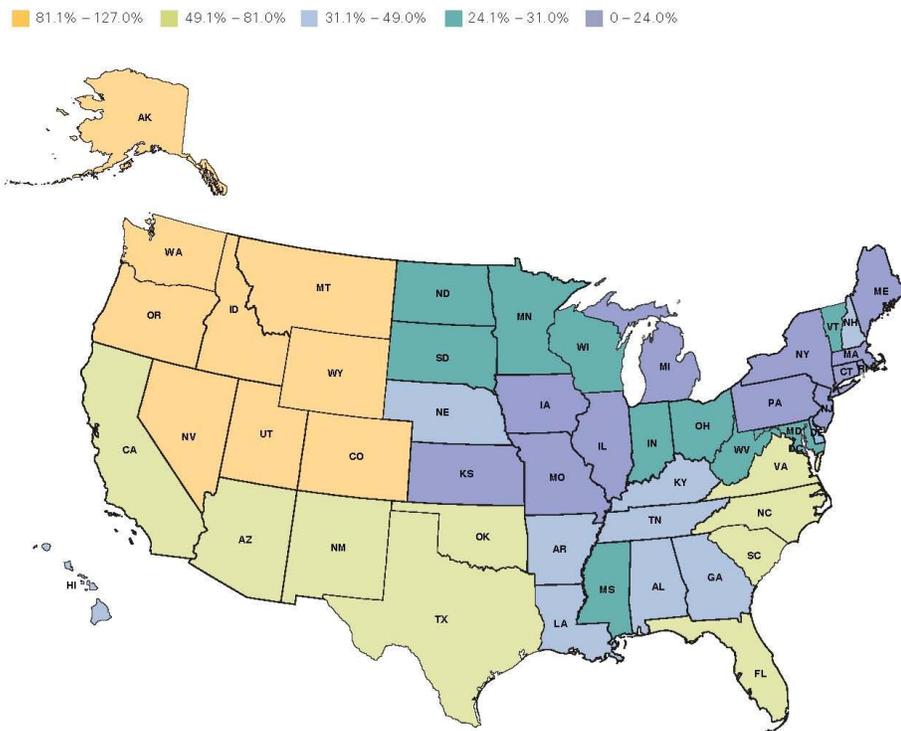
- A Guardian is an individual or an organization named by the court order to exercise limited or plenary powers over the person or the estate of an individual.
- A Guardian of the Person is a guardian who possesses limited or plenary power with regard to the personal affairs of the individual.
- A Guardian of the Estate is a guardian who possesses limited or plenary powers with regard to the real and personal property of the individual (often referred to as conservators or fiduciaries).

In addition to the rising number of cases expected as a result of the aging population, the prevalence of mental illness and an increase in mental impairment is expected to continue to make an impact on the need for guardianships. Key statistics include the following:

- About 6% of Americans have a serious mental illness, which, if left untreated, may result in unnecessary disability and incarceration.<sup>6</sup> For instance, over 5.2 million adults have co-occurring mental health and drug addiction disorders; 5.7 million adults are affected by bi-polar disorder; and 2.4 million Americans live with schizophrenia.<sup>7</sup> For many people with a serious mental illnesses, medication and targeted services can lead to improved quality of life and greater independence.
- Approximately 1-3% of the United States population is mentally challenged, with the degree of impairment ranging from mild to profound.<sup>8</sup>
- About 250,000 service personnel were wounded in action in the Korean and Vietnam wars, and in Desert Shield/Storm. More recently, almost 38,000 service personnel have been wounded in action in Operations Enduring Freedom and Iraqi Freedom.<sup>9</sup> Injury to approximately 8,300 of these men and women (or 22%) may include traumatic brain injury.<sup>10</sup> Additionally, post-traumatic stress disorder may occur in an estimated 11-20% of veterans of these two operations.<sup>11</sup>

Figure 2 below summarizes how the prevalence of Alzheimer’s in Americans aged 65 and older is expected to change by state between 2000 and 2025. Of particular note are the states anticipated to experience growth exceeding 80 percent.

**Figure 2: Changes from 2000 to 2025 in Alzheimer’s Prevalence**

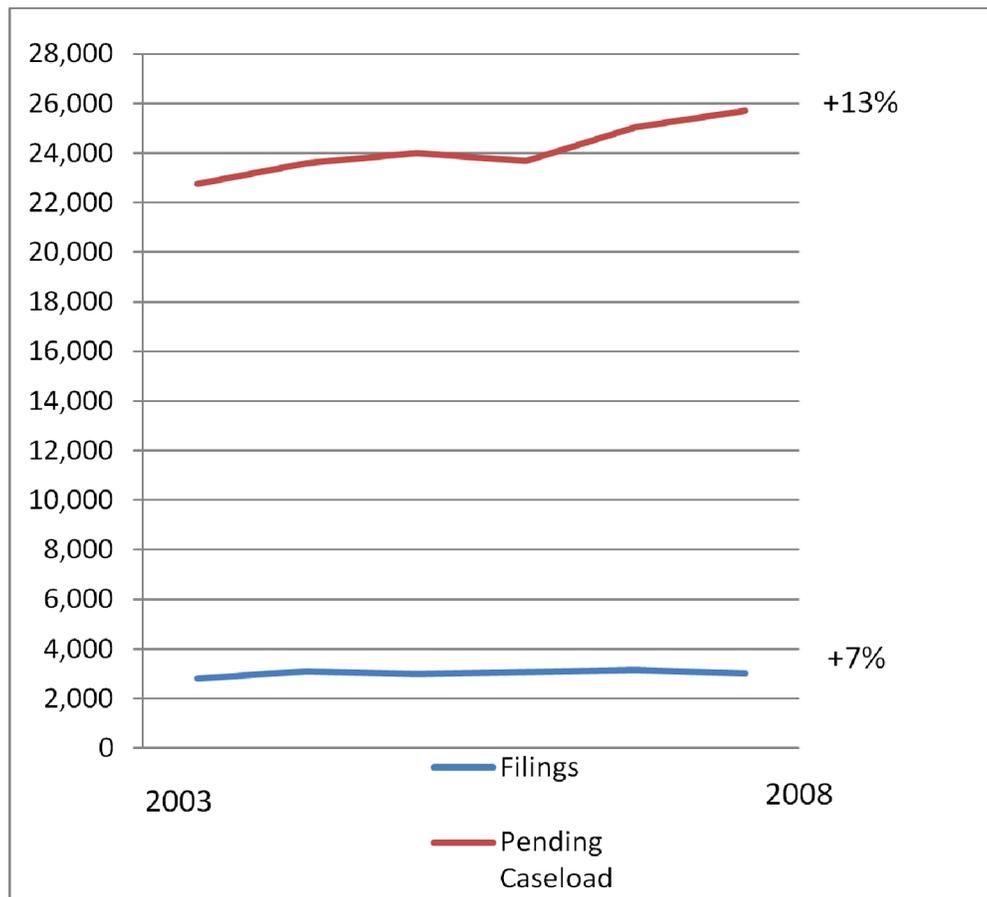


Source: Reprinted with permission from Alzheimer’s Association, *2010 Alzheimer’s Disease Facts and Figures, Alzheimer’s & Dementia*, Volume 6.

Translating these demographic trends into guardianship caseloads and caseload projections has proven difficult. Although state and territorial courts report annual caseload statistics to the NCSC, variations in court practice and reporting limit the usefulness of these data in examining guardianship caseload trends.<sup>12</sup>

However, state-based studies suggest the magnitude of the impact. Figure 3 below shows that from 2004-2008, the number of Missourians aged 60 or older increased by 10%. During this time, Figure 3 shows that the annual number of new filings of adult guardianship/conservatorship cases increased by 7% while the pending caseload increased by 13%, as these cases tend to continue over a long period of time before final disposition. Five-year trend data<sup>13</sup> from Michigan, Massachusetts, and New Hampshire suggest a similar positive relationship between elderly population growth and caseload growth.

**Figure 3 Missouri Guardianship Caseload, 2003-2008**



Source: Missouri Office of the State Courts Administrator, October 2010.

Anecdotal evidence from a number of other states and territories also shows increases in new filings of guardianship cases, active guardianship caseloads and complexity of guardianship cases.<sup>14</sup> Yet, extrapolating national trends from such ad hoc local data is problematic. Improvement in court data at all levels would assist in more precisely projecting the need for, and directing the allocation of, resources necessary to address the aging population. A more comprehensive effort is needed to collect consistent data at the local, state and national levels.

Courts must also develop and implement policies and procedures that support those who serve in a guardianship capacity and improve court oversight of the guardianship process.<sup>15</sup> Numerous studies and media articles across the country have documented cases of abuse, neglect, and exploitation of persons with diminished capacity and their estates by their court-appointed guardian.<sup>16</sup> Most recently, the Government Accountability Office highlighted twenty cases of elder abuse that occurred in guardianships, noting the failure of the state courts to screen potential guardians, adequately oversee guardians, and communicate with federal agencies.<sup>17</sup> Many

allegations involve financial negligence, misconduct or theft by a guardian or attorney, which in some instances bankrupts the estate. Other allegations, often passionately voiced, allege mental anguish caused to the person with diminished capacity or their family members as a result of inconsistent and sometimes poor decision-making by well-meaning, but unqualified guardians. In those instances, the actions of the guardian may result in unwarranted loss of self-determination or treatment that does not reflect the values, choices and preferences of the person with diminished capacity or best address that person's well-being, or unnecessary separation from a loved one, involuntary confinement or placement in settings more restrictive than individual need demands. Occasionally, allegations relate to overtreatment or, conversely, the withholding of necessary medical care.

Although the extent and severity of guardian abuse or neglect of the person with diminished capacity has not been satisfactorily quantified, the seriousness of these persistent, wide-spread allegations warrants attention. These risks have both a human and financial cost that may be minimized, and in some cases, eliminated with the adoption and implementation of proactive policies and procedures.

## II. A Call for Coordinated Effort

Since the late 1980s, many national organizations<sup>18</sup> have met and developed recommendations, model policies and laws to reform guardianship proceedings and practice, and provide decision-making assistance; but implementation has been inconsistent. While many reasons for the failure to institutionalize recommendations can be identified, two particularly challenging issues are consistently raised—failure to coordinate and lack of funding.

Protecting vulnerable adults and providing decision-making assistance to persons with diminished capacity are responsibilities shared by the courts, local, state and federal governments, and family and friends of vulnerable individuals. Responsibility sharing requires leadership—someone to champion the cause and create a means and a forum for raising and addressing problems and concerns, and developing recommendations for shared solutions that can be implemented at various levels. Individuals, organizations, and governmental entities acting in isolation will not be as effective as a concerted effort to raise the service bar for persons with diminished capacity. The persistence of local priorities and the dependence on local resources will only perpetuate the disparate nature and level of services for persons with diminished capacity which characterize services today.

### A. The Role of the Courts

Every state code includes a guardianship chapter. State statutes generally provide for key elements of an appropriate guardianship program.

Within the parameters of state statutes, courts have implemented improved practices to the extent limited resources have allowed. This implementation has been inconsistent and is often dependent on the services available in a jurisdiction or region. A coordinated effort is needed to ensure development of key standard practices and procedures that would eliminate inconsistency from jurisdiction to jurisdiction.

While many state entities share the responsibility of providing for the care and safety of vulnerable adults, state courts play a significant leadership role in the provision of decision-making assistance to persons with diminished capacity. Courts make the formal determination of incapacity, ensure fidelity to the procedural due process rights of the alleged person with diminished capacity, determine the duties of the guardian, limit restrictions to the autonomy of the person with diminished capacity, and ensure that guardians satisfy their legal fiduciary responsibility to persons with diminished capacity.

Judges depend on the information presented to the court, both in the initial screening of the guardianship petition and in the ongoing monitoring of the guardianship. Guardianship, unlike other judicial matters, begins without an adversarial hearing and once incapacity has been determined there are usually no adversaries to bring concerns to the court's attentions. Thus, court staff and judges must be well trained to evaluate information critically and address the many complicated issues that arise during the life of a guardianship. The court must be proactive to discover and respond to disputes and concerns. Absent timely information submitted by knowledgeable service providers, consistent practice and procedures, and careful, timely, and recurrent court monitoring of services to persons with diminished capacity, the safety and well-being of vulnerable adults is compromised.

## 1. Guardianship Petitions (Early Screening and Capacity Determination)

Most states have addressed the question of “Who can petition for guardianship?” But, when low income, at-risk alleged persons with diminished capacity are involved, research suggests that few individuals are willing or able to petition the court. Current practice creates a situation where many low-income individuals who need guardianship services—and are eligible to receive them—cannot gain access to services.<sup>19</sup> They are forced to rely on the assistance of concerned individuals who are willing to act on their behalf. Unfortunately, the current system may not encourage the involvement of “Good Samaritans” who may lack the knowledge to file a petition or the funds to pay an attorney.

**NATIONAL PROBATE COURT  
(NPC) STANDARD 3.3.2  
SCREENING**

- (a) The probate court should establish a process for screening all guardianship petitions and diverting inappropriate petitions.
- (b) The screening process should encourage the appropriate use of less intrusive alternatives to formal guardianship proceedings.

Although the vast majority of petitions for guardianship are filed by concerned and well-meaning individuals, petitions are sometimes initiated by organizations and individuals who may have a conflict of interest—professional guardians, guardians ad litem, administrators of long-term care facilities and hospitals, and family members who stand to benefit financially. Sometimes, if these entities do not initiate the petition, individuals needing guardianship services will not receive services.<sup>20</sup>

Individuals with substantial financial means who need guardianship services are also at risk. They may fall prey to individuals who have recently become their “friends.” These dishonest individuals are willing to act on behalf of the person with diminished capacity in order to gain access to the latter’s finances for their own personal benefit. The same can be true for family members who view their roles as guardians as a means to exploit the estate of the family member with diminished capacity.

**NATIONAL PROBATE COURT  
(NPC) STANDARD 3.3.9  
DETERMINATION OF INCAPACITY**

- (a) The imposition of a guardianship by the probate court should be based on competent evidence of the incapacity of the respondent.
- (b) The court may require evidence from professionals or experts whose training and expertise may assist in the assessment of the physical and mental condition of the respondent.
- (c) No determination of incapacity should be required in voluntary guardianship cases.

Before establishing a non-voluntary guardianship, two key facts must exist: a determination of capacity must be made and the guardianship must be necessary.<sup>21</sup> Thus, consistent procedures must be in place to inform the court that persons with alleged diminished capacity are at-risk, to determine that guardianship is needed and to determine the level of diminished capacity before ordering a guardianship, which has the potential to limit the rights of individuals. Early screening of petitions and a comprehensive assessment of capacity can minimize inconvenience and possible indignity to the persons with alleged diminished capacity, as well as the expense to the individual and the court.<sup>22</sup>

Generally, research supports a functional definition of incapacity as a continuum. Many experts now believe capacity to be specific to functional areas and not global. It is believed to fluctuate and to be situational and contextual, occurring as a result of environmental influences or other triggering events. Capacity can potentially be enhanced with education, training, rehabilitation, treatment (mental health and medical), therapy (occupational and physical), services (home and social), and assistive devices or accommodations. Yet, some state statutes and procedures approach capacity as an “all or nothing” phenomenon.

The change in capacity theory provides an opportunity to modify how guardianship and alternative programs and services are structured and delivered. Realizing this opportunity requires a comprehensive assessment process to inform judicial determination of capacity.

## 2. Appointment of Counsel

The U. S. Supreme Court's decision in *Gideon vs. Wainwright* established a right to counsel for defendants in criminal matters where their liberty is at stake. Unlike our criminal justice system, access to an attorney in a guardianship proceeding is not automatic in all jurisdictions. Yet, given that a guardianship restricts control by the person with diminished capacity over liberty and property, should not a constitutional right to counsel exist?

This question has been the subject of debate for many years. Debaters on one side argue the potential loss of fundamental rights from a guardianship proceeding is comparable to losses occurring in juvenile and criminal proceedings and counsel should always be appointed. Alternatively, the other side argues counsel should be appointed when the guardianship is contested and counsel is requested by the person with alleged diminished capacity, or when the judge determines counsel is needed. Often, counsel is considered unnecessary when there is agreement the guardianship is needed.

Because representation is key to providing procedural due process, without adequate representation or the cognitive ability for self representation, a guardianship proceeding could be viewed as unfair and could result in the unjust loss of fundamental rights. A person subject to a guardianship can lose his or her right to vote, marry, contract, make healthcare decisions and decide how to manage his or her assets. In 1987, a congressional committee opined that guardianship could be the most severe form of civil deprivation which can be imposed on a citizen in the United States.<sup>23</sup> Thus, absent a constitutional right to counsel, 28 states have established a statutory right to counsel in adult guardianship cases,<sup>24</sup> but in five of those states, counsel is to act as a guardian ad litem,<sup>25</sup> or the eyes and ears of the court. In states where right to counsel has not been addressed, courts should take a leadership role in requiring the appointment of counsel to protect the rights of persons with diminished capacity.

### **NPC STANDARD 3.3.5 APPOINTMENT OF COUNSEL**

(a) Counsel should be appointed by the probate court to represent the respondent when:

- (1) requested by an unrepresented respondent;
- (2) recommended by a court visitor;
- (3) the court, in the exercise of its discretion, determines that the respondent is in need of representation; or
- (4) otherwise required by law.

(b) The role of counsel should be that of an advocate for the respondent.

### 3. Appointment, Training and Regulation of Guardians

Some state statutes prescribe the court's responsibility to appoint and supervise qualified guardians, and require courts or other entities to establish training and guardianship monitoring programs. Some individual courts have taken the lead in this area, but again court response at the state level has been inconsistent.

Solutions utilized in some states to address this issue include regulation of guardians, establishment of probate coordinator and court accountant positions within the state court or the Administrative Office of the Courts, use of technology to gather important information and monitor guardianships, use of volunteers to monitor guardianships with reporting to the court, and inter-agency coordinating councils.

Over the past decade, a number of states have implemented regulations requiring the licensure or certification of guardians: Alaska, Arizona, California, Florida, Nevada, Texas and Washington.<sup>26</sup> In addition, Oregon has a voluntary certification program. Other states (for example, Colorado and Minnesota) have considered, but not adopted a regulation program.<sup>27</sup> While the development of certification programs is a positive step, as the GAO has warned, they do not eliminate the need to screen potential guardians adequately.<sup>28</sup>

In determining whether to establish a regulation program for guardians, states have struggled with a number of critical issues, including the need for regulation,<sup>29</sup> how much regulation is needed, what entity will administer the regulation program,<sup>30</sup> the costs of regulation,<sup>31</sup> and the responsibility for these costs.

Given that guardianship cases may go on for years, it is critical the courts have a system in place for the effective and ongoing monitoring of guardians; this procedure needs to be sustainable through changes in court personnel and funding. Implemented solutions include court visitor programs, which utilize volunteers who visit each person with diminished capacity and then report to the court on the person's welfare;<sup>32</sup> paid court accountants to review the accountings filed by guardians and flag any issues for further review by the judge; automated systems that send out reminders to guardians

#### **NPC STANDARD 3.3.13 TRAINING AND ORIENTATION**

The probate court should develop and implement programs for the orientation and training of guardians.

#### **NPC STANDARD 3.3.15 MONITORING OF THE GUARDIAN**

The probate court should have written policies and procedures to ensure the prompt review of reports and requests filed by guardians.

#### **NPC STANDARD 3.3.17 ENFORCEMENT**

(a) The probate court should enforce its orders by appropriate means, including the imposition of sanctions. These may include suspension, contempt, removal and appointment of a successor.

(b) Where the court learns of a missing, neglected or abused respondent, it should take immediate action to ensure the safety and welfare of that respondent.

when automated reports are due and identify the case when a report is not filed timely; setting of Order to Show Cause hearings by judges when identified “red flags” in a case begin to appear; issuance of “guardian arrest warrants” to compel production of documents by the guardian; and audits of guardians (by volunteers or paid staff) to ensure compliance with statutes, court rules and an established Code of Conduct. The primary focus of monitoring a guardian should be to provide the judge with the information he or she needs to ensure the protection of the person with diminished capacity.

In addition to monitoring individual cases, courts should have tools available to them to monitor the caseloads of the guardians to whom they are assigning cases. Those tools should take into account assignments which may be made in other courts as well so that a court may periodically examine the total caseload of each guardian. While a court may be aware of guardianships in its own venue, guardians may have substantial caseloads elsewhere which could affect the quality of the service which can be delivered to individual persons with diminished capacity. A court should consider the total guardian caseload and the capacity of a guardian to provide quality service under the constraints imposed by the caseload. In situations where a court might lack the technology tools to track guardian caseloads, guardians could be requested to provide a caseload list annually.

Since the 1960s, states and localities have developed programs authorizing publicly funded organizations to serve as “guardian of last resort” for persons with diminished capacity lacking the resources to employ a private guardian and lacking family and friends willing to serve. Today, nearly every state has some form of public guardianship, but programs are understaffed and significantly underfunded.<sup>33</sup> There is often a general misunderstanding by the courts, elected officials and executive branch agency officials regarding the significant responsibilities of public guardians. Because public guardians most typically serve as guardians for persons with limited funds, there is a common misperception that a public guardian does not have significant assets under his/her control. Collectively, the limited assets of the persons served by the public guardian may total a significant amount of money; if the public guardian misappropriates or steals this money, the state or local jurisdiction may be required to reimburse the estate. Thus, court oversight of public guardians must be as stringent as oversight of non-public guardians.

Individually, states continue to respond to concerns about the guardianship process with statutory reforms. Implementation has not kept pace, as the appropriation process typically has not resulted in the resources needed to implement reform. A number of courts have reformed guardianship practice on their own, but recognize the need for funding and greater coordination across state and federal entities.

## B. The Role of Federal Financing

Federal statutes provide evidence of the federal government’s role as champion and partner with state government in providing for the health and safety of elders and

persons with disabilities. The Social Security Act, enacted in 1935, was the first of many federal statutes providing for elders and persons with disabilities, and represented Congress's initial recognition and acceptance of a shared responsibility to provide a safety net for elders.

Congress continued to provide for elders and persons with disabilities through additional major legislation, including the enactment of three important statutes in 1965: the Older American's Act that established authority for grants to states for community planning and social services, research and development projects, and personnel training in the field of aging; Medicare, Title XVIII, established a health insurance program for elders; and Medicaid, Title XIX, established a health insurance program for low-income persons. Subsequent amendments to the Social Security Act established adult protective services, nutrition programs and many social service programs.

Additionally, the American with Disabilities Act (ADA) provided for protection from discrimination based on a disability, and the recently enacted Elder Justice Act<sup>34</sup> raised the issue of elder abuse and exploitation to a national level and provided a comprehensive approach to protections. Each of these statutes represents an example of the federal government partnering with state governments to provide for the care and safety of elders and persons with disabilities.

The Elder Justice Act is an example of a coordinated national response to reduce elder abuse, neglect, and exploitation. Through the Elder Justice Act, Congress will establish an Elder Justice Coordinating Council to foster coordination throughout the federal government; provide funding for coordination within states; and expand existing programs and create new ones to address abuse, neglect and exploitation of elders. But the Elder Justice Act does not go far enough. It fails to provide a plan beyond detection, investigation and prosecution. Many of the abused and exploited need help making personal and financial decisions after the abuser is removed. The Conference of State Court Administrators (COSCA) is asking the federal government to take the next step and partner with states to provide needed decision-making assistance.

The importance and urgency of providing decision-making assistance to persons with diminished capacity requires an expanded coordinated national response.

### III. Recommendations

#### A. State Actions

##### 1. Establish and Support Statewide Guardianship Task Forces

National guardianship experts consistently have recommended that states use a multidisciplinary approach to address guardianship issues. Experience has shown that involving key stakeholders in a collaborative decision-making process to resolve

guardianship issues increases the likelihood of successful program outcomes. Accordingly, the chief justice and state court administrator of each state, working with other judiciary leaders, should convene a task force<sup>35</sup> to review the guardianship process, court rules, and statutes; to make and prioritize recommendations for improvement; and to implement best practices.

The task force should be comprised of probate judges, court administrators and representatives from agencies on aging, adult protective services, AARP, guardianship care/service providers, the attorney general's office, the state mental health association, the state bar association, the state hospital association, guardianship associations, financial institutions, disability advocates, family members of persons with diminished capacity and members of the public who have experienced the guardianship process.

Although the activities of the task forces will vary, common topics may include stronger procedural due process, guardian certification, appropriate fees and services, court monitoring standards, procedures and tools, screening for least restrictive alternatives, training for all stakeholders, public guardianship demands, performance measurement, and technology solutions.

The task forces should carefully consider the following activities, which warrant special attention:

- Developing educational and training programs and materials for judges, lawyers, and others on aspects of guardianship law;
- Partnering with state bar associations and civic groups to maximize training for lawyers in all aspects of guardianship law;
- Developing guidelines on appropriate levels of attorney and guardian fees and services that will protect the assets of the estate;
- Working with clinicians to strengthen capacity assessment practices;
- Creating community outreach programs on alternatives to guardianship;
- Promoting less restrictive alternative means to guardianship, e.g., representative payees (used for Social Security, Veteran's Administration), living trusts, advance directives (including durable power of attorney);
- Developing a court-based guardianship monitoring and assistance program, including consideration of whether this extends to public guardianships;
- Providing legal counsel for persons with diminished capacity;
- Providing a consistent forum for the exchange of information on difficult cases and on pressure points in the system;
- Collaborating with long-term care ombudsman programs to ensure the rights and improve the quality of care of persons with diminished capacity in long-term care facilities;
- Identifying needs of "unbefriended" elders with diminished capacity with no appropriate and willing relatives or friends to serve as guardians, and no resources to employ an agencies or professional guardians, and finding ways to link them with service resources;
- Working with adult protective services to ensure qualified guardians for elder abuse victims and to guard against abuse or neglect by guardians;

- Developing coordination between the courts that appoint guardians and the Social Security representative payment system<sup>36</sup> to ensure appropriate services and enhance monitoring and training;
- Exchanging key data elements among courts, adult protective services and care providers to strengthen performance measurement; and
- Creating information technology and case management systems to track guardianship cases and flag potential abuses.

Information about these activities is available from studies that have been conducted, or from courts that have implemented best practices. A valuable resource is NCSC's Center for Elders and the Courts at [www.eldersandcourts.org](http://www.eldersandcourts.org). As the task forces consider their agendas and work plans, they may also want to review practices states have successfully implemented. As discussed below, if federal funding is allocated for the creation of a national guardianship court improvement program, the statewide guardianship task forces and their activities would be subsumed into that program. However, because of the uncertainty of funding for such a national program and the urgent need to address court guardianship issues, each state is strongly encouraged to establish a task force.

## 2. Provision of Technical Assistance

The NCSC should be the lead provider of technical assistance in matters related to the implementation of recommendations contained in this white paper. Working with other organizations, such as the National Guardianship Association and the American Bar Association, as appropriate, the NCSC, through its Center for Elders and the Courts (CEC), should seek funding aimed at improving the collection and reporting of data, the use of technology, judicial and court staff training, and state task force assistance. Given the work of its Center for Elders and the Courts, the NCSC is in a unique position to ensure that states receive the most current and relevant information about guardianship programs and best practices, and also to provide consulting services to task forces seeking assistance with their initiatives. The NCSC should also develop national performance measures for guardianship cases. Its *Courtools*—with modifications for the guardianship process—can serve as a foundation for performance measures.

## 3. Appointment of Counsel

Courts should ensure that the person with alleged diminished capacity has counsel appointed in every case to advocate on his or her behalf and safeguard the individual's rights.<sup>37</sup> Appointed counsel should be trained to explain the consequences of guardianship in a manner the person can understand; ensure there is no less restrictive alternative to guardianship which will provide the desired protection; ensure due process is followed; ensure the petitioner proves the allegations in the petition to the standard required in the jurisdiction; confirm the proposed guardian is qualified to serve;

and ensure the order is drafted to afford the person with diminished capacity maximum autonomy.<sup>38</sup>

## B. National Actions

### 1. Support National Data Collection Efforts

Our nation urgently needs reliable data on adult guardianships. Accurate and timely data is required to (1) shape guardianship policy, practice, training and education—and obtain the resources for system improvements; (2) determine effective case processing and monitoring of guardians by the courts; (3) gauge the extent of abuse by guardians and the extent to which guardians protect individuals from abuse; and (4) determine current and future resource needs. As set forth in the 2007 Smith/Kohl report, *Guardianship for the Elderly: Protecting the Rights and Welfare of Seniors with Reduced Capacity*, there are two complementary approaches that Congress could take to enhance the collection of data on adult guardianship:

- a. **The federal government should authorize and fund a National Guardianship Study, such as that already proposed by the National Center for State Courts (NCSC).** The survey would document the number of guardianships, identify current practices and innovative programs, and provide the basis for the development of court improvement efforts. Results from the survey would inform policymakers, courts, and key stakeholders in current and future needs for guardianship resources, as well as changes in laws, policies and practices. Congress could direct and provide funding for the Department of Health and Human Services (DHHS) Administration on Aging, the Department of Justice Bureau of Justice Statistics, or the State Justice Institute to authorize a survey that will provide an accurate estimate of the number of adults under guardianship in the United States and document current court practices.

The survey should be guided by an advisory board of national experts and key stakeholder organizations, including members of the National Guardianship Network and include the following components:

- A representative sample of courts for which data can be extrapolated to produce a national estimate.
- File reviews that will document background information, key events, the nature of the guardianship, court processes, and timeliness.
- The collection of the number of guardianships, with extrapolation to the national population, to produce a scientifically-sound estimate of current adult guardianship cases in the United States.
- Measures of well-being, if feasible, with a particular focus on cases that involve abuse, neglect or exploitation.

- b. **The federal government should support the development of local data systems.** State and local courts require assistance in the design and

implementation of databases that can readily provide updated statistics for policy-makers and practitioners to facilitate reports on key questions and promote uniform data collection across jurisdictions. These databases, in turn, can help to enhance the initial adjudication process, improve monitoring and facilitate efforts to prevent and redress abuse of vulnerable adults. Congress could direct and provide funding for the Department of Justice, Bureau of Justice Statistics, or the State Justice Institute to support court data systems to collect and maintain information on adult guardianship cases. It may also be possible to designate the DHHS Administration on Aging to undertake this task. A vehicle for the legislation might be the upcoming reauthorization of the Older Americans Act. In addition, Congress could provide funds to support a *Resource Center on Guardianship*, which would act as a repository of data and research devoted to guardianship. The Coordinating Council, which is part of the Elder Justice Act, might play a role in advice, oversight and coordination.

The support for court data systems should have four components:

- Identification of and assessment of successful systems already in place to collect information about adult guardianship;
- Funding for pilot projects to develop adult guardianship data collection systems;
- The creation of
  - A technology workgroup comprised of technology and guardianship experts to identify common data fields, create a model case management system, and integrate data using the National Information Exchange Model (NIEM);
  - A performance measurement workgroup of researchers, guardianship experts and technologists to develop a set of performance measures that can be used nationwide to document progress and ongoing needs; and
- Support for distance-learning and in-person training opportunities to distribute information to key stakeholders on the use of technology and performance measures.

Key data elements should include guardianship filing status and dispositions; type of guardianship (management of personal affairs, property or both); age of the person with diminished capacity; type of petitioner; type of guardian; filing and hearing dates; and sanctions imposed by court. Additional elements that would be desirable include placement of person with diminished capacity; length of guardianship; type of order (plenary, limited orders); representation by counsel; removal of guardian and cause.

## 2. Create and Fund a Guardianship Court Improvement Program (GCIP)

The lack of sufficient financial resources has made it difficult for state courts to improve their handling of guardianship cases and promote least restrictive alternatives. The anticipated reauthorization of the Older Americans Act in 2011 provides an opportunity

to fund a national Guardianship Court Improvement Program (GCIP) to address the guardianship crisis facing the country.

The creation of a federally funded GCIP similar to the Child Welfare Court Improvement Program (CIP) would be a highly effective, collaborative model to improve the case processing and monitoring of guardianship cases. A GCIP would allow states to conduct assessments and identify problems in the way adult guardianship works in the jurisdiction, develop strategies for addressing those identified problems, and implement system improvements.

Enacted in 1993, the CIP (which is administered by the Department of Health and Human Services), established a grant program for states to assess their judicial proceedings in child abuse cases and reduce delay in placing juveniles in permanent homes. Prompted by increased child abuse and neglect caseloads that resulted from the judicial oversight functions created by the Adoption Assistance and Child Welfare Act of 1980, the program awarded grant funding to each state's highest court to administer and direct the CIP. A hallmark of the program was that courts were expected to create partnerships with executive agencies that serve children and families.

States were not required to fund a single "program model," but had the flexibility to undertake a broad range of court reform activities and interventions related to dependency, abuse and neglect cases. Local court recipients were required to complete a detailed self-assessment, develop recommendations to improve their juvenile court systems and implement the recommended reforms. The CIP has been reauthorized yearly since its inception. The CIP model has undergone a rigorous evaluation and contains built-in accountability. Each state's overall performance in child welfare is comprehensively reviewed by the federal government; the enabling legislation mandated that courts must participate in program improvement plans.

The CIP has, among other things, reduced judicial delay in child protection cases through the enactment of tighter state deadlines, the application of caseload management principles, and restrictions on continuances; prepared judges and attorneys to handle the complexity of these cases better through the development of standards, educational materials and trainings; and improved the review and monitoring of cases through more effective judicial administration, increased collaboration with child protection agencies and judicial self-assessments. It is anticipated that similar results for guardianship cases would accrue from the creation of a GCIP program.

CCJ and COSCA, working through the NCSC, should advocate for a similar administrative structure within the Administration of Aging. Similar to the child welfare-related CIP, the highest court in each state would be eligible to apply for Older Americans Act funds to assess and make improvements to its handling of guardianship proceedings. The highest state court would develop a partnership with the State Agency on Aging to identify needs and assist with implementation. The CIP should be replicated for guardianship cases and put into practice immediately on a national basis.

### 3. Establish State Guardianship Coordinator Positions

A state guardianship coordinator position should be created within each state's administrative office of the courts to provide staff support to the statewide guardianship task force (or the GCIP, if created). Given the budgetary constraints faced by most states, it is unlikely this position can be funded until a national GCIP is established.

Responsibilities of the state guardianship coordinator might include

- Working with local courts to ensure compliance with guardianship case monitoring policies and procedures;
- Identifying sources of funding for guardianship initiatives, including the availability of grants;
- Providing training and technical assistance to judges, court staff, attorneys, guardians and others; and
- Overseeing the implementation of recommendations promulgated by the statewide guardianship task force or GCIP.

### 4. Include CCJ/COSCA Representation on National Elder Justice Coordinating Council

The CCJ and COSCA recently created a Joint Task Force on Elders and the Courts to identify the major challenges confronting the guardianship process and encourage the development of practices, procedures, guidelines and programs to meet them. In order to ensure effective and non-duplicative coordination of guardianship initiatives nationally, the CCJ/COSCA Task Force should seek representation on the national Elder Justice Coordinating Council (established by the Elder Justice Act of 2009).

### 5. Support and Fund a National Guardianship Summit for Courts

At a 2008 conference co-sponsored by the Pew Center on States and the National Center for State Courts (NCSC), adult guardianships were identified as one of the top emerging issues facing society and the courts. A national guardianship summit, similar to the landmark National Judicial Leadership Summit for the Protection of Children, would call attention to the guardianship crisis and the need for action.

CCJ/COSCA, in conjunction with the National Center for State Courts and other interested national organizations, should sponsor a national guardianship summit. As with the child protection summit, each state would be expected to send a team to the summit. Teams should include representation from the courts (probate judges, court administrators), the attorney general's office, agencies on aging and adult protective services, long-term care ombudsmen, the state mental health association, the state bar association, guardianship associations and service providers, disability advocates, tribal nations and others involved in the guardianship process.

## 6. Enact the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA)

CCJ/COSCA should educate legislators about guardianship and jurisdictional issues, and advocate for the passage of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA). There is a need for uniform guardianship jurisdiction law so that guardianship orders entered in one state can be recognized or enforced in another, established cases can be efficiently transferred from one state to another, and initial jurisdiction to appoint a guardian is fixed in the court of one state. According to the National Guardianship Association, as of May 2010, eighteen states and the District of Columbia had enacted the Act, nine states introduced it in their legislative sessions in 2010, and two states plan to introduce it in 2011.

## IV. CONCLUSION

Ensuring positive outcomes for persons with diminished capacity in guardianship proceedings requires establishing consistent best practices and procedures. Some state courts have identified many of these practices and procedures, but limited resources has restricted full implementation. If adopted, COSCA's recommendations would

- Provide essential funding for implementation of guardianship reforms;
- Help states employ subject-matter experts to coordinate implementation;
- Facilitate sharing and coordination of reforms with state and federal stakeholders;
- Equip courts with the tools needed to analyze caseloads, assess performance and identify emerging issues of court management of guardianships; and
- Strengthen accountability of outcomes.

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<sup>1</sup> The term "person with diminished capacity" is used throughout the document instead of "ward" or "incapacitated person."

<sup>2</sup> N. Karp and E. Wood, "Guarding the Guardians: Promising Practices for Court Monitoring," AARP Public Policy Institute. Washington D.C., December 2007, Research Report #2007-21.

<sup>3</sup> M.B Rothman and B.D. Dunlop, "Judicial Responses to an Aging America," *Court Review: The Journal of the American Judges Association*, Volume 42, Issue 1, 2005, pp. 8-19.

<sup>4</sup> Erica F. Wood, "State-Level Adult Guardianship Data: An Exploratory Survey," National Center on Elder Abuse, Washington, D.C., August, 2006.

<sup>5</sup> The Need for Improved Adult Guardian Data: Examining the Work of the State Courts, *Caseload Highlights*, Volume 15, Number 2. November 2008.

<sup>6</sup> "What is Mental Illness: Mental Illness Facts," National Alliance on Mental Illness.

[http://www.nami.org/template.cfm?section=About\\_Mental\\_Illness](http://www.nami.org/template.cfm?section=About_Mental_Illness), accessed on June 17, 2010.

<sup>7</sup> "Mental Illness: FACTS AND NUMBERS," *National Alliance on Mental Illness*. Arlington, VA.

<http://www.nami.org/Template.cfm?section=Search&Template=Search/SearchDisplay.cfm>, accessed on June 17, 2010.

<sup>8</sup> "Mental Retardation," *MedlinePlus Medical Encyclopedia*. A service of the U.S. National Library of Medicine and the National Institutes of Health. Page last updated: May 7, 2010. <http://www.nlm.nih.gov/medlineplus/ency/article/001523.htm>.

<sup>9</sup> "Global War on Terrorism: Casualties by Military Service Component -- Active, Guard and Reserve: October 7, 2001 through May 15, 2010." Defense Manpower Data Center (DMDC) Data, Analysis and Programs Division.

<sup>10</sup> "Traumatic Brain Injury and PTSD," *United States Department of Veterans Affairs*. National Center for PTSD, Reviewed/updated May 17, 2010. <http://www.ptsd.va.gov/professional/pages/traumatic-brain-injury-ptsd.asp>.

<sup>11</sup> "How Common is PTSD?" *United States Department of Veterans Affairs*. National Center for PTSD, Reviewed/updated Date: May 17, 2010. <http://www.ptsd.va.gov/public/pages/how-common-is-ptsd.asp>.

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- <sup>12</sup> Brenda K. Uekert and Richard Schauffler, "The Need for Improved Adult Guardianship Data," *Judicature*, Volume 93, Number 5, March 1, 2010. Erica F. Wood, "State-Level Adult Guardianship Data: An Exploratory Survey," National Center on Elder Abuse, Washington, D.C., August, 2006.
- <sup>13</sup> R. LaFountain, R. Schauffler, S. Strickland, S. Gibson, A. Mason, *Examining the Work of State Courts: A National Perspective from the Court Statistics Project*. National Center for State Courts, 2010, p. 34.
- <sup>14</sup> Brenda K. Uekert, "Adult Guardianship Court Data and Issues, Results from an Online Survey." National Center for State Courts, VA. March 2, 2010. <http://www.eldersandcourts.org/guardianship/data.html>, accessed on June 17, 2010.
- <sup>15</sup> B.K. Uekert and T. Dibble "Guardianship of the Elderly: Past Performance and Future Promises," *The Court Manager*. Volume 23, Issue 4, pp. 9-15. "What is Mental Illness: Mental Illness Facts," National Alliance on Mental Illness. [http://www.nami.org/template.cfm?section=About\\_Mental\\_Illness](http://www.nami.org/template.cfm?section=About_Mental_Illness), accessed on June 17, 2010.
- <sup>16</sup> D. Olinger, "Probate Court Rife with Lapses in Training, Oversight: Who's Protecting the Unprotected?" *The Denver Post*. 2/21/2010. Debra Cassens Weiss, "Elder Law. Elderly Millionaire is Destitute After Payment of Fees for Lawyers and Care," *ABA Journal* 4/13/2010.
- <sup>17</sup> Government Accountability Office. *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors*. (Report to the Chairman, Special Committee on Aging, U.S. Senate), GAO-10-1046. September 2010.
- <sup>18</sup> The Subcommittee on Health and Long-Term Care of the U.S. House Select Committee on Aging convened a hearing in 1987 and recommended changes to state and federal reforms. The Wingspread Conference met and made 31 recommendations in 1989. In 2001, a second national conference entitled "Wingspan" met and adopted 68 recommendations. In 2004, a follow-up session resulted in 51 Wingspan Implementation Action Steps. From 1990 to 1992 the College of Probate Judges, the National Center for State Courts, the State Justice Institute and the American College of Trust and Estate Counsel Foundation worked to develop the *National Probate Court Standards*.
- <sup>19</sup> Pamela B. Teaster, et al, *Public Guardianship: In the Best Interests of Incapacitated People?* Praeger Publishers, February, 2010.
- <sup>20</sup> *Ibid.*
- <sup>21</sup> Richard T. Vanderheiden, "Guardianship Consider the Alternatives," *National College of Probate Judge Magazine, Life & Times Fall, 2003*.
- <sup>22</sup> Coalition of Wisconsin Aging Groups – Wisconsin Guardianship Support Center, <http://www.cwaq.org/legal/guardian-support/>. *Judicial Determination of Capacity of Older Adults in Guardianship Proceeding*. Center of Excellence in Elder Abuse and Neglect. <http://www.elderabuseforensiccenter.com/index.cfm?fuseaction=dsp&page=services>
- <sup>23</sup> Joan O'Sullivan, "Role of the Attorney for the Alleged Incapacitated Person," *Stetson Law Review*, Vol. XXXI, Spring 2002, pp 687-734.
- <sup>24</sup> Sally Hurme, "Representation and Investigation in Guardianship Proceedings," ABA Commission on Law And Aging, July 2008. <http://www.abanet.org/aging/guardianship/lawandpractice/home.html>, accessed on June 29, 2010.
- <sup>25</sup> The role of guardians *ad litem* (GAL) in guardianship cases varies from jurisdiction to jurisdiction. Depending on the jurisdiction, a GAL may be appointed to assist respondent in determining interest, may be an investigator or a court representative.
- <sup>26</sup> "Certify" is defined as recognition by a governmental agency or professional board within a field as having met special qualifications. "License" is defined as to permit or authorize especially by formal license. "Regulate" is defined as to govern or direct according to rule; to bring under the control of law or constituted authority; and to make regulations for or concerning. "A Code of Ethics and Standards of Practice" are a set of conventional principles, expectations and ethics that guide the conduct of members of the profession.
- <sup>27</sup> 2009 Sunrise Review: Professional Fiduciaries, November 2009. Office of Policy, Research and Regulatory Reform, Colorado Department of Regulatory Agencies. [www.dora.state.co.us/opr/archive/2009FiduciariesSunrise.pdf](http://www.dora.state.co.us/opr/archive/2009FiduciariesSunrise.pdf).
- <sup>28</sup> See footnote 16. Using two fictitious identities, the GAO obtained guardianship certification or met certification requirements in the four states where they applied (Illinois, Nevada, New York, and North Carolina).
- <sup>29</sup> The Colorado Sunrise Review recommended against regulation of guardians, noting that oversight of guardians is currently provided by the Probate Coordinator in the Colorado State Court Administrator Office; the duties of the Probate Coordinator include reviewing the annual reports filed by guardians.
- <sup>30</sup> In Arizona, the regulation program is administered through the AOC. Other options include the model adopted by California where the Executive Branch is responsible for the regulation program, or utilization of the national Center for Guardianship Certification program.
- <sup>31</sup> Experience has demonstrated that a major cost factor is the unknown variable of the number and seriousness of complaints that may be lodged against a regulated guardian. Investigation into these complaints and processing of any related disciplinary proceedings can be very costly.
- <sup>32</sup> For example, the Court Visitor Program in Tarrant County, Texas.
- <sup>33</sup> Pamela B. Teaster, et al, *Public Guardianship: In the Best Interests of Incapacitated People?* Praeger Publishers, February, 2010.
- <sup>34</sup> The American Health Care Association reports that Title VI, Subtitle H, Sections 6701-6703 of the Patient Protection and Affordable Care Act (PPACA) signed into law by President Obama on March 23, 2010, contains the "Elder Justice Act of 2009" (EJA). The overall purpose of the EJA is to detect, prevent and prosecute elder abuse, neglect, and exploitation. The EJA is designed to address crimes committed against older persons using a multidisciplinary approach, raise national awareness of elder justice issues, and apply resources to the efforts of individuals, organizations and government entities confronting elder abuse and neglect on the front lines in healthcare settings. The EJA adds numerous new "elder justice" provisions and specific long-term care provider requirements by amending various sections in several titles of the Social Security Act (SSA). **The EJA at Section 6703(b) (3)** amends title XI of the SSA at section 1150 and **became effective on March, 23, 2010**, upon enactment of PPACA.
- <sup>35</sup> A number of states have established taskforces: Arizona, California, Florida, Nebraska, New Mexico, New York, Ohio, South Carolina, Utah and Louisiana.
- <sup>36</sup> A representative payee is an individual or organization appointed to receive entitlement benefits for someone who cannot manage or direct someone else to manage his or her money. The main responsibilities of a payee are to use the benefits to pay for the
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current and foreseeable needs of the beneficiary and save any benefits properly not needed to meet current needs. A payee must also keep records of expenses.

<sup>37</sup> Joan O'Sullivan, "Role of the Attorney for the Alleged Incapacitated Person," *Stetson Law Review*, Vol. XXXI, Spring 2002, pp 687-734.

<sup>38</sup> *Ibid.*