

HUMAN SERVICES COMMITTEE
Representative Alon Wieland, Chairman
January 17, 2012

Progress Report

Winsor Schmidt
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Good morning Chairman Wieland and members of the Human Services Committee. I am Winsor Schmidt, faculty member at the University of Louisville School of Medicine. Thank you for the opportunity to provide this progress report and status of the "Study of Guardianship Services for Vulnerable Adults in North Dakota." I acknowledge and appreciate the time, information, cooperation, and assistance of the individuals and organizations I have interviewed.¹

Scope of the Study

The study addresses "an analysis of the need for guardianship services

¹ Tina Bay, Director, Developmental Disabilities Division, Dept. of Human Services
 Aaron Birst, Executive Director, North Dakota State's Attorneys Association, and
 Legal Counsel, North Dakota Association of Counties

David Boeck, Director of Legal Services, North Dakota Protection and Advocacy
 Project

Donna Byzewski, Director of Guardianship Services, Catholic Charities North
 Dakota

Connie Cleveland, Assistant State's Attorney, Cass County

Jan Engan, Director, Aging Services Division, Department of Human Services

Kevin Glatt, Auditor/Treasurer, Burleigh County

Sally Holewa, North Dakota State Court Administrator

Paul Murphy, State's Attorney, Foster County

Debbie Nelson, Auditor/Treasurer, Grand Forks County

Devra Smestad, Auditor/Treasurer, Ward County

Terry Traynor, Assistant Director of Policy and Programs, North Dakota
 Association of Counties, and the dozen or more County Social Service Directors
 attending our two-hour meeting on January 12

Audrey Uhrich, Program Director and Certified Guardian, Guardian and Protective
 Services, Inc.

Gerald VandeWalle, Chief Justice, North Dakota Supreme Court

Judy Vetter, Administrator and Certified Guardian, Guardian and Protective
 Services, Inc.

Carole Watrel, Guardian, Visitor, and Volunteer, American Association of Retired
 Persons, North Dakota

Mark Westereng, Public Administrator, Northwest Judicial District

Rodger Wetzel, State President, American Association of Retired Persons, North
 Dakota

in the state; the establishment of guardianships; petitioning costs and other costs associated with providing guardianship services; the entities responsible for guardianship costs; the interaction between the courts, counties, state agencies, and guardianship organizations regarding guardianship services; the efficacy of statutes governing public administrator services; and methods for the timely and effective delivery of guardianship and public administrator responsibilities and services."

Guardianship and Public Administrator Statute Introductory Definitions

North Dakota Century Code chapters 30.1-26 and 30.1-28 govern guardianship services in North Dakota. North Dakota Century Code chapter 11-21 governs public administrator services. A guardian is "Any competent person or a designated person from a suitable institution, agency, or nonprofit group home."² A guardian is court appointed after a guardianship hearing for an "incapacitated person" (the "ward") defined as "any adult person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, or chemical dependency to the extent that the person lacks capacity to make or communicate responsible decisions concerning that person's matters of residence, education, medical treatment, legal affairs, vocation, finance, or other matters, or which incapacity endangers the person's health or safety."³ A public administrator is an individual, corporation, or limited liability company appointed by the presiding judge as ex officio guardian and conservator for the county.⁴

I. The Need for Guardianship Services in North Dakota – Review the Number of Guardians Appointed by the Courts and Identify the Unmet Need for Guardian Services

A. Number of Guardians Appointed by the Courts

There were 2,038 guardianship and conservatorship cases in North Dakota in 2010.⁵ There were 323 new filings in 2010 and an average of 311 new appointments per year from 2008-2010.

B. Unmet Need for Guardian Services: Quantity

² N. D. Cent. Code section 30.1-28-11(1).

³ N. D. Cent. Code section 30.1-26(2), (6).

⁴ N. D. Cent. Code section 11-21-01, 11-21-05.

⁵ Testimony of Sally Holewa, State Court Administrator, Human Services Committee, Oct. 25, 2011.

In 2007, the North Dakota Legislature approved funding for 35 additional openings for corporate guardianship services for people with developmental disabilities that reduced a long waiting list of unmet need.⁶ The Guardianship Program of Catholic Charities was projected to reach capacity of 414 wards by October 2011. Catholic Charities is reportedly facing a new waiting list of at least 25 people with developmental disabilities needing guardianship services.⁷

There is some published research on the extent of need for public guardianship. A 1983 survey in Florida found 11,147 identifiable persons reportedly in need of a public guardian.⁸ Florida's population in 1983 was 10,704,805.⁹ North Dakota's population in 2010 was 672,591.¹⁰ A "projection" or extrapolation from the published 1983 Florida study suggests 700 comparable persons in need of a public guardian in North Dakota.¹¹

Partly to address the nursing home gap¹² in published assessments of the need for public guardianship, a 1988 study of elderly nursing home residents in Tennessee found 3,003 residents in need of public limited guardianship, conservator, representative payee, and power of attorney services.¹³ The unmet need for plenary conservatorship of person and property among elderly Tennessee nursing home residents

⁶ Testimony of Larry Bernhardt, Executive Director, Catholic Charities North Dakota, Senate Appropriations Committee, Jan. 19, 2011.

⁷ Interview with Donna Byzewski, Director of Guardianship Services, Catholic Charities, Jan. 14, 2012. Interview with David Boeck, Director of Legal Services, North Dakota Protection and Advocacy Project, Jan. 13, 2012.

⁸ Schmidt & Peters, "Legal Incompetents' Need for Guardians in Florida," 15 *Bulletin of the American Academy of Psychiatry and the Law* 69 (1987). The survey included Florida's 74 public receiving facilities, community mental health centers, and clinics; 30 private receiving facilities; 11 Aging and Adult district services; Developmental Services institutional and residential placements; and six state hospitals. The survey did not include private clients residing in nursing homes and in adult congregate living facilities, and the survey did not include transients. Several informants suggested 10% of nursing home residents in south Florida were incapacitated but without a guardian. (The population of Florida in 2010 was 18,801,310 with 17.3% age 65 or older. The population of North Dakota in 2010 was 672,591, with 14.5% age 65 or older.)

⁹ CensusScope (Florida): http://www.censusscope.org/us/s12/chart_popl.html

¹⁰ North Dakota Quick Facts from the US Census Bureau:
<http://quickfacts.census.gov/qfd/states/38000.html>

¹¹ This projection is arguably high because Florida has had a higher proportion of persons over age 65.

¹² The 1983 Florida survey did not include private clients residing in nursing homes and adult congregate living facilities. Schmidt & Peters, *supra* note 8, at 78.

¹³ Hightower, Heckert & Schmidt, "Elderly Nursing Home Residents' Need for Public Guardianship Services in Tennessee," 2 (3/4) *J. Elder Abuse & Neglect* 105 (1990).

was 364 residents.¹⁴ Tennessee's population in 1988 was 4,819,872.¹⁵ (North Dakota's population in 2010 was 672,591 with 14.5% 65 or older.) A preliminary "projection" or extrapolation from the published 1988 Tennessee nursing home study suggests a minimum of 51 elderly nursing home residents with an unmet need for a plenary public guardian in North Dakota.¹⁶

Therefore, a projected total population-based need for plenary public guardian services in North Dakota is 751 individuals.¹⁷

The Developmental Disabilities Division contracts with Catholic Charities North Dakota to serve 414 wards in the 2011-2013 biennium.¹⁸ The Aging Services Division reports funding for assistance (petitioning and other related costs) with the establishment of 32 guardianships in the current biennium, and "a modest annual payment

¹⁴ *Id.* at 114-116 (1.2% of 30,336 total nursing home residents). (The population of Tennessee in 2010 was 6,346,105 with 13.4% 65 or older. The population of North Dakota in 2010 was 672,591, with 14.5% 65 or older.)

¹⁵ CensusScope (Tennessee): http://www.censusscope.org/us/s47/chart_popl.html

¹⁶ This projection is arguably low because Tennessee has had a lower proportion of persons over age 65.

¹⁷ I used this population-based approach in 2005 to calculate 4,265 residents in need for public guardianship services in Washington State for the Washington State Bar Association (WSBA) Elder Law Section Public Guardianship Task Force. *Cf. Report of the Public Guardianship Task Force to the WSBA Elder Law Section Executive Committee*, pp. 5-7 (August 22, 2005), available at <http://www.wsba.org/Legal-Community/Sections/Elder-Law-Section/Guardianship-Committee>

The *Report of the Public Guardianship Task Force* resulted in public guardianship legislation in Washington State that was endorsed by twenty-two state advocacy organizations, passed the House 98-0 and the Senate 49-0 on April 17, 2007, and was signed by the Governor. See Wash. Rev Code chapter 2.72.

The most recent follow-up multi-year study of the need for public guardianship services in Washington by the Washington Institute for Public Policy used two different sources and methods (2009 census data and 2011 survey of care providers) to confirm that between 4,000 and 5,000 individuals may potentially qualify for a public guardian in Washington State. Mason Burley, *Assessing the Potential Need for Public Guardianship Services in Washington State*, Olympia: Washington State Institute for Public Policy (Dec. 2011). Burley acknowledges that "this number [4,318 from American Community Survey census data] remains consistent with previous calculations about guardianship needs." *Id.* at p. 5.

This population-based extrapolation approach was also used to estimate and publish the number of New Yorkers under guardianship. Schmidt, "Public Guardianship Issues for New York: Insights from Research," 6 (3) *Elder Law Attorney* 31 (Fall 1996).

¹⁸ Testimony of Tina Bay, Director, Developmental Disabilities Division, Human Services Committee, Oct. 25, 2011.

for 16 appointed guardians in the first year and 32 appointed guardians in the second year.¹⁹

This leaves a projected total population-based unmet need for plenary public guardian services in North Dakota at 305 individuals.

C. Unmet Need for Guardian Services: Guardianship Standards

1. Guardianship Staff-to-Client Ratio

The Council on Accreditation (COA)²⁰ has developed and is applying adult guardianship accreditation standards. One of the COA Adult Guardianship Service Standards (7) prescribes that guardianship caseload sizes “support regular contact with individuals and the achievement of desired outcomes.”²¹ The accompanying COA Research Note states: “Studies of public guardianship programs have found that lower staff-to-client ratios are associated with improved outcomes and recommend a 1:20 ratio to eliminate situations in which there is little to no service being provided.”²² One of North Dakota’s principal corporate guardianship programs reports a guardianship staff-to-client ratio of 1:36-39. One of the several public administrators serving as guardian reports a part-time guardian caseload ranging from 22 to 29 with wards housed 210 miles apart.

2. Guardian Visitation-of-Ward Standard

¹⁹ Testimony of Jan Engan, Director, Aging Services Division, Human Services Committee, Oct. 25, 2011.

²⁰ COA is Catholic Charities North Dakota’s overall accrediting agency.

“The Council on Accreditation (COA) partners with human service organizations worldwide to improve service delivery outcomes by developing, applying, and promoting accreditation standards. . . . In 2005, COA accredited or was in the process of accrediting more than 1,500 private and public organizations that serve more than 7 million individuals and families in the United States, Canada, Bermuda, Puerto Rico, England and the Philippines.” <http://www.coastandards.org/about.php>

²¹ Council on Accreditation Adult Guardianship Service Standards: http://www.coastandards.org/standards.php?navView=private&core_id=1274

²² Council on Accreditation Adult Guardianship Service Standards: http://www.coastandards.org/standards.php?navView=private&core_id=1274

See also Wash. Rev. Code section 2.72.030. (Washington’s office of public guardianship is prohibited from authorizing payment for guardianship services “for any entity that is serving more than twenty incapacitated persons per certified professional guardian.” Adopted in many states, the Uniform Veterans’ Guardianship Act provides that no person may be a guardian for more than five wards at one time.)

A North Dakota Olmstead Commission Work Group and the North Dakota Aging Services Division developed and published the *Guardianship Handbook: A Guide for Court Appointed Guardians in North Dakota* (Dec. 2008),²³ which cites *North Dakota Guardianship: Standards of Practice for Adults* as a source to explain the expectations and responsibilities of being a guardian.²⁴ North Dakota Guardianship (NDG) Standard 13(V) prescribes that the guardian of the person “shall visit the ward monthly.” NDG Standard 23(III) states that “The guardian shall limit each caseload to a size that allows the guardian to accurately and adequately support and protect the ward, that allows a minimum of one visit per month with each ward, and that allows regular contact with all service providers.”

North Dakota guardians and guardian organizations seem challenged to comply with ward visitation standard with currently available resources for public guardianship.

3. Licensing, Certification, or Registration of Professional Guardians

On the subject of guardian standards, the Second National Guardianship Conference in 2002 recommended that “Professional guardians — those who receive fees for serving two or more unrelated wards — should be licensed, certified, or registered.”²⁵ As a follow-up to such recommendations, the National Academy of Elder Law Attorneys (NAELA), the National Guardianship Association, and the National College of Probate Judges convened a Wingspan Implementation Session at their joint conference in 2004 to identify implementation action steps, including the following steps relating to guardian certification: “[t]he supreme court of each state should promulgate rules[,] and/or the state legislature of each state should enact a statutory framework[,] to require education and certification of

²³ North Dakota Department of Human Services:

<http://www.nd.gov/dhs/info/pubs/aging.html>

²⁴ *North Dakota Guardianship: Standards of Practice for Adults*, adapted with permission from the National Guardianship Association (9/21/05) and published by the Aging Services Division (4/15/06): <http://www.nd.gov/dhs/info/pubs/aging.html>

²⁵ “Wingspan-The Second National Guardianship Conference, Recommendations,” 31 Stetson Law Review 595, 604 (2002). Primary sponsors of the second national guardianship conference (the first was held in 1988) were the National Academy of Elder Law Attorneys, Stetson University College of Law, and the Borchard Center of Law and Aging. Co-sponsors were the American Bar Association (ABA) Commission on Legal Problems of the Elderly, the National College of Probate Judges, the Supervisory Council of the ABA Section on Real Property, Probate and Trusts, the National Guardianship Association, the Center for Medicare Advocacy, the Arc of the United States, and the Center for Social Gerontology, Inc.

guardians as well as continuing education within the appointment process to ensure that all (*i.e.*- professional and family) guardians meet core competencies.”²⁶ Also, “NGF [National Guardianship Foundation; renamed Center for Guardianship Certification] should facilitate the discussion of and act as a resource for States to establish, at minimum, a requirement for statewide registration of professional guardians. This discussion should include: . . . [p]roviding models for certification, re-certification, and de-certification.”²⁷ There are fifteen states with some provision for guardian licensing, certification or registration.²⁸ For example, the Certified Professional Guardian Board in the state of Washington has formal legal responsibility for certification applications, standards of practice, training, recommendation and denial of certification, continuing education, grievances and disciplinary sanctions, and investigation of certified professional guardians. These responsibilities include regulation and formal standards of practice for many of the interactions between certified professional guardians (including the public guardians who are required to be certified) and the courts, counties, state agencies, and guardianship organizations and agencies in the state.

Some of the guardianship stakeholders interviewed expressed some concerns about oversight and monitoring of guardians and guardian annual reports,²⁹ and lack of such requirements as criminal

²⁶ National Academy of Elder Law Attorneys, National Guardianship Association & National College of Probate Judges, *National Wingspread Implementation Session: Action Steps on Adult Guardianship Process* (2004), at p. 7, available at www.guardianship.org/reports/07GuardianshipMonitoring.pdf.

²⁷ *Id.*, at 8-9.

²⁸ Alaska, Arizona, California, Florida, Georgia, Illinois, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Texas, Utah, and Washington. See the sections on: the GAO report on guardianship abuse, neglect, and exploitation of seniors; professional guardian licensing, certification, and registration; and guardian certification in the states in Schmidt, Akinci & Magill, “Study Finds Certified Guardians with Legal Work Experience Are at Greater Risk for Elder Abuse Than Certified Guardians with Other Work Experience,” 7 (2) *NAELA Journal* (National Academy of Elder Law Attorneys) 171-197 (Fall 2011).

²⁹ See, e.g., ABA Commission on the Mentally Disabled & Commission on Legal Problems of the Elderly, *Guardianship: An Agenda for Reform--Recommendations of the National Guardianship Symposium and Policy of the American Bar Association* (1989) (the Wingspread conference; six recommendations on accountability of guardians: “training and orientation, review of guardians reports, public knowledge and involvement, guardianship standards and plans, role of attorneys, and role of judges”); Commission on National Probate Court Standards, *National Probate Court Standards*, Williamsburg: National Center for State Courts (1993, 1999) (specific procedures for guardianship monitoring: “training and outreach, reports by guardians, practices and procedures for review of reports, reevaluation of the necessity for guardianship, enforcement of court orders, and final report before discharge”);

background checks and credit checks.

II. The Establishment of Guardianships - Review the Services Available for Assistance with the Establishment of Guardianships and the Process for the Establishment of Guardianships and Recommend Proposed Changes

The Aging Services Division reports funding for assistance (petitioning and other related costs) with the establishment of 32 guardianships in the current biennium.³⁰

North Dakota Century Code section 30.1-28 specifies the judicial process for the establishment of guardianships. Highlights follow. Any interested person may petition for the appointment of a guardian for an allegedly incapacitated person. No filing fee may be required for a petition by a member of the individual treatment plan team or by any state employee. The court shall set a hearing date, appoint an attorney to act as guardian ad litem, appoint a physician or clinical psychologist to examine the proposed ward, and appoint a visitor to interview the proposed guardian and proposed ward. If the attorney appointed as guardian ad litem or other attorney is retained by the proposed ward to act as an advocate, the court may determine whether the guardian ad litem should be discharged. The visitor's

Hurme & Wood, "Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role," 31 (3) *Stetson L. Rev.* 872 (Spring 2002); Naomi Karp & Erica Wood, *Guardianship Monitoring: A National Survey of Court Practices*, Washington, D.C.: AARP Public Policy Institute (June 2006) (found continued wide variation in guardianship monitoring practices, a frequent lack of guardian report and accounts verification, limited visitation of individuals under guardianship, and minimal use of technology in monitoring); Naomi Karp [AARP Public Policy Institute] & Erica Wood [ABA Commission on Law and Aging], *Guarding the Guardians: Promising Practices for Court Monitoring*, Washington, D.C.: AARP Public Policy Institute (December 2007) (promising practices regarding: reports, accounts, and plans; courts actions to facilitate reporting; practices to protect assets; court review of reports and accounts; investigation, verification, and sanctions; computerized database and other monitoring technology; links with community groups and other entities; guardian training and assistance; funds for monitoring); National Conference of Commissioners on Uniform State Laws, *Uniform Guardianship and Adult Protective Proceedings Act*, Chicago (1997) (includes provisions on guardianship monitoring and commentary about the significance of "an independent monitoring system . . . for a court to adequately safeguard against abuses"); "Wingspan—The Second National Guardianship Conference, Recommendations," 31 (3) *Stetson L. Rev.* 595-609 (Spring 2002) (seven recommendations on monitoring and accountability building on Wingspread) (see also related articles on pp. 611-1055)

³⁰ Testimony of Jan Engan, Director, Aging Services Division, Human Services Committee, Oct. 25, 2011.

duties include discussing an "alternative resource plan"³¹ for an alternative to guardianship. The proposed ward must be present at the hearing in person "unless good cause is shown for the absence. Good cause does not consist only of the physical difficulty of the proposed ward to attend the hearing." The proposed ward's counsel may request a closed hearing. The court may convene at any other location in the best interest of the proposed ward. "If the court approves a visitor, lawyer, physician, guardian, or temporary guardian appointed in a guardianship proceeding, that person may receive reasonable compensation from the ward's estate if the compensation will not unreasonably jeopardize the ward's well-being." The court may appoint a guardian only after finding in the hearing record based on clear and convincing evidence that: (1) the proposed ward is an incapacitated person; (2) there is no available alternate resource plan which could be used instead of the guardianship; (3) the guardianship is the "best means of providing care, supervision, or habilitation"; and (4) the powers and duties given the guardian are the "least restrictive form of intervention consistent with the ability of the ward for self-care."

North Dakota Century Code section 30.1-28-10 authorizes the court to "exercise the power of a guardian pending notice and hearing or, with or without notice, appoint a temporary guardian for a specified period of time, not to exceed ninety days, if:

- a. An alleged incapacitated person has no guardian and an emergency exists; or
- b. An appointed guardian is not effectively performing the guardian's duties, and the court finds that the welfare of the ward requires immediate action."

Some of the guardianship stakeholders interviewed expressed some concerns with the judicial process for the establishment of guardianships. Concerns included but were not necessarily limited to the following: filing fees not waiveable for indigents; limited legal assistance from state's attorneys or Attorney General attorneys for petitioners in indigent cases; no right to counsel or public defender for

³¹ North Dakota Century Code section 30.1-26-01(1):

"Alternative resource plan" means a plan that provides an alternative to guardianship, using available support services and arrangements which are acceptable to the alleged incapacitated person. The plan may include the use of providers of service such as visiting nurses, homemakers, home health aides, personal care attendants, adult day care and multipurpose senior citizen centers; home and community-based care, county social services, and developmental disability services; powers of attorney, representative and protective payees; and licensed congregate care facilities.

the proposed ward if the proposed ward cannot afford counsel;³² some proposed wards reportedly not present at hearings in some courts; and, appointment of “emergency” guardians without notice and a hearing for up to ninety days.

III. Petitioning and Other Costs - Identify Petitioning and Other Costs Associated with Providing Guardianship and Public Administrator Services and Financial Assistance Available

The Aging Services Division reports that the average cost of petitioning was \$1,474 in the previous biennium compared to the initial estimate of \$2,500, and depending on the ability to obtain pro bono services.³³ Also, provisions in 2011 HB 1199 provided 16 guardians “a modest annual payment of \$500” to offset some guardian costs, 32 guardians in year two of the biennium. The Developmental Services Division reports \$2,052,416 for 414 wards during the 2011-2013 biennium, including \$51,720 in petitioning costs.³⁴ The daily rate is \$6.52 per ward in the first year (\$2,380 per client annually), and \$6.71 per ward in the second year (\$2,449 per client annually).

There are several published studies of costs associated with providing public guardianship services. The annual public guardian cost per client in Florida in 1983 was \$2,857.00.³⁵ The annual public guardian cost per client in Virginia in 1997 was \$2,662.00.³⁶ The average annual public guardian cost per client in Virginia in 2002 was \$2,955.00.³⁷ The

³² Over twenty-five states require the appointment of counsel in guardianship proceedings, generally making counsel available without charge to indigent respondents.

³³ Testimony of Jan Engan, Director, Aging Services Division, Human Services Committee, Oct. 25, 2011.

³⁴ Testimony of Tina Bay, Director, Developmental Disabilities Division, Human Services Committee, Oct. 25, 2011.

³⁵ Winsor Schmidt, Kent Miller, Roger Peters & David Loewenstein, *A Descriptive Analysis of Professional and Volunteer Programs for the Delivery of Public Guardianship Services*, 8(2) Probate Law Journal 125, 149 (1988).

³⁶ See Winsor Schmidt, Pamela Teaster, Hillel Abramson & Richard Almeida, *Second Year Evaluation of the Virginia Guardian of Last Resort and Guardianship Alternatives Demonstration Project*, Memphis, TN: The University of Memphis Center for Health Services Research (July 1997); Pamela Teaster, Winsor Schmidt, Hillel Abramson & Richard Almeida, “Staff Service and Volunteer Staff Service Models for Public Guardianship and “Alternatives” Services: Who is Served and With What Outcomes?,” 5(2) *Journal of Ethics, Law & Aging* 131, 144 (1999).

³⁷ Pamela Teaster & Karen Roberto, *Virginia Public Guardian and Conservator Programs: Evaluation of Program Status and Outcomes*, Blacksburg, VA: The Center for Gerontology, Virginia Polytechnic Institute and State University (December 2003), p. 11.

average annual cost per public guardian client in Florida in 2007-2008 was \$2,648.00.³⁸ The average annual cost per public guardian client in Washington in 2008-2011 was \$3,163.00.³⁹ The annual operating cost per guardianship client in New York City in 2010 was \$8,648.60.⁴⁰

An area of study related to costs is the extent to which guardianship is cost effective, as well as the extent to which not having sufficient guardianship services probably costs significantly more than having sufficient guardianship services.

Disabled and vulnerable populations like those served by guardians experience disproportionately high health care costs. Medicaid enrollees with disabilities are 17% of the Medicaid population nationally and account for 46% of federal Medicaid costs, and for long health care duration.⁴¹ The elderly population is 9% of the Medicaid population nationally, but accounts for 27% of program costs. Twenty percent of Medicaid expenditures nationally are for nursing facility care, and 8% are for home health care. One percent of the population accounted for 20.2% of total health care expenditures in 2008 and 20% of the population in the top 1% retained this ranking in 2009; the top 1% accounted for 21.8% of the total expenditures in 2009 with an annual mean expenditure of \$90,061.⁴² The median intensive care unit (ICU) length of stay for incapacitated patients without a surrogate is twice as long as other ICU patients.⁴³

Without sufficient appropriate guardianship services, significant health care costs are incurred through inappropriate institutionalization,

³⁸ Pamela Teaster, Marta Mendiondo, Winsor Schmidt, Jennifer Marcum, & Tenzin Wangmo, *The Florida Public Guardian Programs: An Evaluation of Program Status and Outcomes*, Report for the Florida Department of Elder Affairs Statewide Public Guardianship Office, Lexington, KY: University of Kentucky Graduate Center for Gerontology (August 2009), p. 3.

³⁹ Mason Burley, *Public Guardianship Costs in Washington State: Cost and Benefits*, Olympia: Washington State Institute for Public Policy (Dec. 2011), p. 16.

⁴⁰ The Guardianship Project, *Summary of Medicaid Cost-Savings*, New York: Vera Institute of Justice, Inc. (2010).

⁴¹ See, e.g., Marguerite Burns, Nilay Shah & Maureen Smith, "Why Some Disabled Adults In Medicaid Face Large Out-Of-Pocket Expenses," 29(8) *Health Affairs* 1517 (2010).

⁴² Steven Cohen and William Yu, *The Concentration and Persistence in the Level of Health Expenditures over Time: Estimates for the U.S. Population, 2008-2009*, Agency for Healthcare Research and Quality (AHQR), Statistical Brief #354 (Jan. 2012).

⁴³ Douglas White, J. Randall Curtis, Bernard Lo & John Luce, "Decisions to Limit Life-Sustaining Treatment for Critically Ill Patients Who Lack Both Decision-Making Capacity and Surrogate Decision-Makers," 34(8) *Critical Care Medicine* 2053 (2006).

insufficient deinstitutionalization, excessive emergency care, and lack of timely health care. Guardianship studies from Florida, New York, and Virginia report annual savings by guardianship programs ranging from \$3.9 million to \$13 million. Half of the legally incapacitated public mental hospital patients without guardians in a Florida study could have been immediately discharged if a public guardian was available.⁴⁴ The Greater New York Hospital Association lost \$13 million in nine months awaiting appointment of guardians for 400 un-discharged patients.⁴⁵ Virginia saved \$5.6 million in health care costs in one year with appropriate public guardian services for 85 patients.⁴⁶ Florida saved \$3.9 million in health care costs in one year with appropriate public guardian services.⁴⁷ Washington State concluded that: the decrease in average costs of residential settings exceeded the cost of providing a guardian within 30 months in 2008-2011; clients with a public guardian had a decrease of an average 29 hours in personal care hours needed each month, compared with an increase in care hours for similar clients; 21% of clients with a public guardian had a reported improvement in self-sufficiency in the previous three months.⁴⁸ The Vera Institute of Justice Guardianship Project in New York City saved a reported net Medicaid cost-savings of \$2,500,026 for 111 guardianship clients in 2010.⁴⁹

Catholic Charities North Dakota reports residential placement moves from a more restrictive and expensive setting to a less restrictive setting for 22 guardianship clients in 2011, including seven clients moving from the North Dakota State Hospital, two clients moving from the Developmental Center, two clients moving from a nursing home to an Individualized Supported Living Arrangement (ISLA), and one client moving from a hospital to a nursing home.

IV. The Entities Responsible for Guardianship and Public Administrator Costs - Identify the Entities Currently Responsible for Guardianship and Public Administrator Costs

Entities responsible for guardianship and public administrator costs in North Dakota have included general fund appropriations to the

⁴⁴ Schmidt & Peters, *supra* note 8.

⁴⁵ Schmidt, *supra* note 17, at 36 n. 26.

⁴⁶ Teaster & Roberto, *supra* note 37.

⁴⁷ Teaster, Mendiondo, Schmidt, et al., *supra* note 38.

⁴⁸ Burley, *supra* note 39, at pp. 16, 19, 20.

⁴⁹ Guardianship Project, *supra* note 40 (nursing home avoidance among Medicaid clients; hospital avoidance among Medicaid clients; mental health facility cost avoidance among Medicaid clients; delayed spend-down/Medicaid avoidance; Medicaid liens paid).

Department of Human Services (Developmental Disabilities Division, and Aging Services Division) to contract with an entity to create and coordinate a unified system for the provision of guardianship services (a) to vulnerable adults who are ineligible for developmental disabilities case management services, and (b) to individuals diagnosed with a mental illness, traumatic brain injury, or elderly individuals age sixty years and over.

Counties have provided some appropriations for several public administrators in North Dakota.

V. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services - Review the Duties and Responsibilities of These Entities and the Cooperation/Collaboration and Interaction Between and Among the Entities Associated with Guardianship and Public Administrator Services and Recommend Proposed Changes

Based on interviews of one to three hours with at least 18 guardianship stakeholders in North Dakota, as well as several dozen county social service directors, the interaction between the courts, counties, state agencies, and guardianship organizations regarding guardianship and public administrator services seems generally good. There is apparently some tension with the counties regarding funding of public administrators appointed by presiding district judges.

The most recent national study of public guardianship found that the original taxonomy for state public guardianship programs remains appropriate: (1) a court model, (2) an independent state office, (3) a division of a social service agency, and (4) a county agency.⁵⁰

Court model. . . . [T]he court model . . . establishes the public guardianship office as an arm of the court that has jurisdiction over guardianship and conservatorship. . . . In 2007, statutory provisions show five states with a court model. In Delaware, Hawaii, Mississippi, and Washington the public guardian is located in the judiciary. In Georgia, recent legislation created a public guardianship program in which qualified and trained individuals are approved and registered by the county probate court to serve as public guardians, yet the training,

⁵⁰ Pamela Teaster, Winsor Schmidt, Erica Wood, Sarah Lawrence & Marta Mendiondo, *Public Guardianship: In the Best Interests of Incapacitated People?*, Praeger Publishers (2010).

administration, and funding of the program is through the Division of Aging in the Department of Human Resources, which must maintain a master list of registered public guardians.⁵¹

Independent agency model. . . . [T]he independent state office model [i]s one in which the public guardianship office is established in an executive branch of the government that does not provide direct services for wards or potential wards. . . . Today, statutory provisions show four states that approximate this model: Alaska, in which the office is located in the Department of Administration; Illinois, in which the Office of State Guardian (one of the state's two schemes) is located in the guardianship and advocacy commission; Kansas, in which the Kansas Guardianship Program is independent, with a board appointed by the governor; and New Mexico, in which the office of guardianship is in the developmental disabilities planning council.

Social service agency. . . . [T]he [1981] Schmidt study strongly maintained that placement of the public guardianship function in an agency providing direct services to wards presents a clear conflict of interest. . . .

The percentage of states with statutes providing a potential for conflict appears to have increased. More than half of the forty-four states with public guardianship statutory provisions name a social service, mental health, disability, or aging services agency as guardian, or as the entity to coordinate or contract for guardianship services. For example, Connecticut names the Commissioner of Social Services. New Hampshire authorizes the Department of Health and Human Services to contract for public guardianship services. Vermont, Virginia, Florida, and other states charge the Department on Aging with administration of the public guardianship program.

. . . [S]ome of the states with potential conflict of interest had sought to alleviate the problem within the statutory scheme, for example, by providing that the agency is not to serve unless there is no other alternative available. The majority of statutes include such language today. Moreover, most specify that a key

⁵¹ "The courts are a tempting location, but the judges, who recognized a need for public guardianship, themselves voiced discomfort with the potential conflict of interest and responsibility for administrative activity." *Id.*

duty of the public guardian is to attempt to find suitable alternative guardians. In Florida, the statewide Office of Public Guardian must report within six months of appointment on efforts to find others to serve. A few statutes include more specific language addressing conflict of interest. For instance, the Illinois Office of State Guardian may not provide direct residential services to legally incapacitated persons. . . . Indiana requires that regional guardianship programs have procedures to avoid conflict of interest in providing services. Montana prohibits the appointment of guardians who provide direct services to the incapacitated person, but makes an exception for the agency serving in the public guardianship role.

County model. Approximately thirteen of the statutory schemes locate the public guardianship function at the county level, and a number of others have designed programs coordinated at the state level but carried out administratively or by contract at the local or regional level. For example, in Arizona, the county board of supervisors appoints a public fiduciary, and in California the county board creates an office of public guardian. In Idaho, the board of county commissioners creates a “board of community guardian.” In Missouri, the county public administrators serve as public guardian.

North Dakota is currently a hybrid of the social service agency model and the county model (public administrator as guardian). Stakeholders expressed concerns about lack of uniformity and statewide coverage in guardianship services.

The Second National Guardianship Conference recommends that:

States provide public guardianship services when other qualified fiduciaries are not available.

Comment: This function may be provided through independent state agencies, contracts with private agencies, or by other means.⁵²

VI. The Efficacy of Statutes Governing Guardianship and Public Administrator Services - Review the Statutes Governing

⁵² Wingspan, *supra* note 25, at p. 600.

The Third National Guardianship Summit (Oct. 2011) recommended: “To ensure the right of access to guardianship services, states should provide public funding for: Guardianship services for those unable to pay. . . .”

<http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/>

Guardianship and Public Administrator Services, Evaluate the Effectiveness of the Statutes, and Recommend Proposed Changes

North Dakota is included in the five 2010 State Public Guardianship Statutory Charts and tables⁵³ of the significant elements in guardianship and public guardianship statutes.

The review, evaluation, and recommendations will be forthcoming.

VII. Methods for the Timely and Effective Delivery of Guardianship and Public Administrator Responsibilities and Services - Determine the Appropriate Duties and Responsibilities for Entities Involved in Guardianship Services, Financial Responsibilities, and the Appropriate Role for Public Administrators in Providing Guardianship Services. Provide Estimated Costs for Guardianship Services for the 2013-15 Biennium by Recommended Entity Responsible for These Costs.

North Dakota has statutory provisions for (a) guardianship of incapacitated persons, and, (b) like a number of other states⁵⁴ (e.g., Arizona, California, Michigan, Missouri, Nevada) for county public administrators. North Dakota statute identifies who may be judicially appointed as guardian, including a nonprofit corporation and an appropriate government agency, and the general court-specified powers and duties of a guardian to the ward.⁵⁵ North Dakota statute also authorizes judicial appointment of a county public administrator, who may be a corporation or limited liability company, with duties and powers to serve as ex officio public special administrator, guardian, and conservator without application to court or special appointment in specified cases.⁵⁶

Like other states, North Dakota has the opportunity to determine the appropriate roles and responsibilities for entities, such as guardians and public administrators, involved in guardianship services.

Part VII of the study will identify appropriate alternative duties and responsibilities for entities involved in guardianship services, financial responsibilities, and the role for public administrators in providing

⁵³ Teaster, Schmidt, et al. (2010), *supra* note 50, at pp. 173-212.

⁵⁴ See, e.g., Teaster, Schmidt, et al. (2010), *supra* note 50, at pp. 25, 58, 90, 110, 215, 227, 229-31.

⁵⁵ North Dakota Century Code sections 30.1-28-11, 30.1-28-12.

⁵⁶ N. D. Cent. Code sections 11-21-01, 11-21-05.

guardianship services, and provide estimated costs for the 2013-15 biennium by the recommended entity responsible for the costs. The estimated costs are dependent upon the analyses in area III petitioning and other costs, and areas IV and V above.

Thank you for the opportunity to study guardianship services for vulnerable adults in North Dakota.