

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

**Preliminary Final Report: Study of Guardianship Services for
Vulnerable Adults in North Dakota**

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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 preliminary final report of the "Study of Guardianship Services for Vulnerable Adults in North Dakota." I acknowledge and appreciate the time, information, cooperation, and assistance of numerous individuals and organizations.¹

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Association of Counties, and the dozen or more County Social Service Directors
attending our two-hour meeting on January 12

Scope of the Study

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

Parens patriae ("parent of the country") refers to the authority and responsibility of the state as sovereign to serve as general guardian or "super guardian" for people with legal disabilities who are unable to take care of themselves and have no one else to take care of them; for example, children, and persons with disabling intellectual disabilities or mental illness.

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

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

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

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

Another source for identifying the unmet need for guardian services in North Dakota is a Guardianship Needs Assessment Survey conducted January-February 2012 through the North Dakota Long Term Care Association of the 58 Assisted Living Facilities, 64 Basic Care Facilities, and 82 Nursing Facilities. The response rate ranged from 69% to 79%. The results for the number of adults in each facility type who do not already have a guardian and who need a court-appointed guardian (unmet need for a guardian) are:

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

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

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

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.

7 adults	Assisted Living Facilities
46 adults	Basic Care Facilities
296 adults	Nursing Facilities

The results for the number of adults in each facility type who need a court-appointed guardian and do not have willing or responsible family members or friends to serve as a guardian or resources to employ a guardian are:

7 adults	Assisted Living Facilities
44 adults	Basic Care Facilities
64 adults	Nursing Facilities

The Guardianship Needs Assessment Survey was also used for the Developmental Center and for the State Hospital. The results for the number of adults in each facility who do not already have a guardian and who need a court-appointed guardian (unmet need for a guardian) are:

None	Developmental Center
12 adults	State Hospital

The results for the number of adults in each facility who need a court-appointed guardian and do not have willing or responsible family members or friends to serve as a guardian or resources to employ a guardian are:

None ⁸	Developmental Center
9 adults	State Hospital

A person who is incapacitated enough to need a guardian, but lacks willing and responsible family members or friends to serve as guardian, or resources to employ a professional guardian, is almost unimaginably helpless. With a guardian, surrogate decisions occur and a person is autonomous. With incapacity and without a guardian, a person is decisionless and loses autonomy.

There is some published research on the extent of need for public guardianship. A 1983 survey in Florida found 11,147 identifiable

⁸ Reported to be provided by Catholic Charities.

persons reportedly in need of a public guardian.⁹ Florida's population in 1983 was 10,704,805.¹⁰ North Dakota's population in 2010 was 672,591.¹¹ A "projection" or extrapolation from the published 1983 Florida study suggests 700 comparable persons in need of a public guardian in North Dakota.¹²

Partly to address the nursing home gap¹³ 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.¹⁴ The unmet need for plenary conservatorship of person and property among elderly Tennessee nursing home residents was 364 residents.¹⁵ Tennessee's population in 1988 was 4,819,872.¹⁶ (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.¹⁷

⁹ 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.

¹⁰ CensusScope (Florida): http://www.censusscope.org/us/s12/chart_popl.html

¹¹ North Dakota Quick Facts from the US Census Bureau:
<http://quickfacts.census.gov/qfd/states/38000.html>

¹² This projection is arguably high because Florida has had a higher proportion of persons over age 65. (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.)

¹³ The 1983 Florida survey did not include private clients residing in nursing homes and adult congregate living facilities. Schmidt & Peters, *supra* note 9, at 78.

¹⁴ Hightower, Heckert & Schmidt, "Elderly Nursing Home Residents' Need for Public Guardianship Services in Tennessee," 2 (3/4) *J. Elder Abuse & Neglect* 105 (1990).

¹⁵ *Id.* at 114-116 (1.2% of 30,336 total nursing home residents).

¹⁶ CensusScope (Tennessee): http://www.censusscope.org/us/s47/chart_popl.html

¹⁷ This projection is arguably low because Tennessee has had a lower proportion of persons over age 65. (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.)

This estimated 51 elderly nursing home residents with an unmet need for a plenary public guardian in North Dakota compares favorably to the 64 Nursing Facilities adults reported to need a court-appointed guardian and to not have willing

Therefore, a projected total population-based need for plenary public guardian services in North Dakota is 751 individuals.¹⁸

The Developmental Disabilities Division contracts with Catholic Charities North Dakota to serve 414 wards in the 2011-2013 biennium.¹⁹ 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" for 16 appointed guardians in the first year and 32 appointed guardians in the second year.²⁰

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

The unmet need for plenary public guardian services in North Dakota based on survey responses is 149 individuals (25 people with developmental disabilities on the Catholic Charities waiting list; 7 adults in Assisted Living Facilities; 44 adults in Basic Care Facilities; 64

and responsible family members or friends to serve as a guardian or resources to employ a guardian. *Supra*, p. 4.

¹⁸ 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, "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).

¹⁹ Testimony of Tina Bay, Director, Developmental Disabilities Division, Human Services Committee, Oct. 25, 2011.

²⁰ Testimony of Jan Engan, Director, Aging Services Division, Human Services Committee, Oct. 25, 2011.

adults in Nursing Facilities; 9 adults in the State Hospital). The difference of 156 individuals may be accounted for by such factors as: (a) the 79% to 69% response rate for the Long Term Care Association survey; (b) limited community hospital unmet need information (e.g., estimated 15-20 individuals per year in one Fargo area hospital); (c) the transient and homeless populations; and (d) some of the 149 individuals may be accounted for by the 232 (296 minus 64) adults in Nursing Facilities who do not have a guardian but need a guardian and reportedly have willing and responsible family members or friends or resources to employ a guardian.

The unmet need for plenary public guardian services in North Dakota is 305 individuals.

C. Unmet Need for Guardian Services: Guardianship Standards

1. Guardianship Staff-to-Client Ratio

The Council on Accreditation (COA)²¹ 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."²² 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."²³ One of North Dakota's principal corporate guardianship programs reports a guardianship staff-to-client ratio of 1:36-39 (1:40 as of 7/1/09). One of the several public

²¹ 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>

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

²³ 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(6) (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.

administrators serving as guardian reports a part-time guardian caseload ranging from 22 to 29 with wards housed 210 miles apart.

There is an unmet need for guardian services in North Dakota to reduce the staff to client ratio to 1:20.

2. Guardian Visitation-of-Ward Standard

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),²⁴ which cites *North Dakota Guardianship: Standards of Practice for Adults* as a source to explain the expectations and responsibilities of being a guardian.²⁵ 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 the 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 recommends, "Professional guardians — those who receive fees for serving two or more unrelated wards —

²⁴ North Dakota Department of Human Services:
<http://www.nd.gov/dhs/info/pubs/aging.html>

²⁵ *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>

A recent court of appeals decision in Washington state concludes that a guardian's "duty generally was to provide, to the extent reasonably possible, all the care [the ward] needed. We view the specific acts, such as infrequent visits, which the [Department of Social and Health Services] Board characterized as duties, to be evidence of [the guardian's] failure to meet her general duty." *DHHS v. Raven*, No. 40809-1-II (Wash. Ct. App., March 2012), at p. 23, available at <http://www.courts.wa.gov/opinions/?fa=opinions.disp&filename=408091MAJ>
The guardian in *DHHS v. Raven* was charged with violation of the Abuse of Vulnerable Persons Act for behavior that included a log of guardian visits "evidenced only six in 2004, two in 2005 (both when Ida [the ward] was hospitalized [with severe skin ulcers]), and five in 2006" (p. 11).

should be licensed, certified, or registered.”²⁶ 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 guardians as well as continuing education within the appointment process to ensure that all (i.e.- professional and family) guardians meet core competencies.”²⁷ 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.”²⁸

There are 15 states with some provision for guardian licensing, certification or registration.²⁹ For example, the Certified Professional Guardian Board in the state of Washington has formal legal responsibility for certification applications, standards of practice,

²⁶ “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.

²⁷ 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 <http://www.guardianshipsummit.org/summit-history/>

The Wingspan national guardianship conference recommends that states should “provide public guardianship services when other qualified fiduciaries are not available.” Wingspan, *supra* note 26, at p. 604.

²⁸ *Id.*, at 8-9.

²⁹ 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).

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,³⁰ and lack of such requirements as criminal background checks and credit checks.

As recommended by the Wingspan Implementation Session, North Dakota "should enact a statutory framework to require

³⁰ 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"); 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).

education and certification of guardians as well as continuing education within the appointment process to ensure that all (*i.e.*- professional and family) guardians meet core competencies." As recommended by the Wingspan national guardianship conference, North Dakota should "adopt minimum standards of practice for guardians, using the National Guardianship Association Standards of Practice as a model."

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.³¹

North Dakota Century Code chapter 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 duties include discussing an "alternative resource plan"³² 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

³¹ Testimony of Jan Engan, Director, Aging Services Division, Human Services Committee, Oct. 25, 2011.

³² N.D. Cent. 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.

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: no mandatory reporting of vulnerable adult abuse and neglect; perception of less follow through or investigation in some cases (that is, disagreement about the timing and urgency for intervention); guardianship 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 the proposed ward if the proposed ward cannot afford counsel;³³ 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

³³ Over 25 states require the appointment of counsel in guardianship proceedings, generally making counsel available without charge to indigent respondents.

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.³⁴ 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.³⁵ 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 \$2,857.00.³⁶ The annual public guardian cost per client in Virginia in 1997 was \$2,662.00.³⁷ The average annual public guardian cost per client in Virginia in 2002 was \$2,955.00.³⁸ The average annual cost per public guardian client in Florida in 2007-2008 was \$2,648.00.³⁹ The average annual cost per public guardian client in Washington in 2008-2011 was \$3,163.00.⁴⁰

³⁴ Testimony of Jan Engan, Director, Aging Services Division, Human Services Committee, Oct. 25, 2011.

³⁵ Testimony of Tina Bay, Director, Developmental Disabilities Division, Human Services Committee, Oct. 25, 2011.

³⁶ 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).

³⁷ 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).

³⁸ 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.

³⁹ Pamela Teaster, Marta Mendiando, 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.

⁴⁰ Mason Burley, *Public Guardianship in Washington State: Cost and Benefits*, Olympia: Washington State Institute for Public Policy (Dec. 2011), p. 16.

The annual operating cost per guardianship client in New York City in 2010 was \$8,648.60.⁴¹

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.⁴² 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 \$90,061.⁴³ The median intensive care unit (ICU) length of stay for incapacitated patients without a surrogate is twice as long as other ICU patients.⁴⁴

Without sufficient appropriate guardianship services, significant health care costs are incurred through inappropriate institutionalization, 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.⁴⁵ The Greater New York Hospital Association lost \$13 million in nine

⁴¹ The Guardianship Project, *Summary of Medicaid Cost-Savings*, New York: Vera Institute of Justice, Inc. (2010).

⁴² 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).

⁴³ 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 (AHRQ), Statistical Brief #354 (Jan. 2012).

⁴⁴ Douglas White, J. Randall Curtis, Bernard Lo & John Lucie, "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).

⁴⁵ Schmidt & Peters, note 9.

months awaiting appointment of guardians for 400 un-discharged patients.⁴⁶ Virginia saved \$5.6 million in health care costs in one year with appropriate public guardian services for 85 patients.⁴⁷ Florida saved \$3.9 million in health care costs in one year with appropriate public guardian services.⁴⁸ 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.⁴⁹ 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 2010.⁵⁰

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 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 60 years and over.

⁴⁶ Schmidt, *supra* note 18, at 36 n. 26.

⁴⁷ Teaster & Roberto, *supra* note 38.

⁴⁸ Teaster, Mendiondo, Schmidt, et al., *supra* note 39.

⁴⁹ Burley, *supra* note 40, at pp. 16, 19, 20.

⁵⁰ Guardianship Project, *supra* note 41 (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).

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 22 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.⁵¹

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, administration, and funding of the program is through the Division of Aging in the

⁵¹ Pamela Teaster, Winsor Schmidt, Erica Wood, Sarah Lawrence & Marta Mendiolo, *Public Guardianship: In the Best Interests of Incapacitated People?*, Praeger Publishers (Copyright 2010 by Teaster, Schmidt, Lawrence, Mendiolo, and the American Bar Association).

Department of Human Resources, which must maintain a master list of registered public guardians.⁵²

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

⁵² "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.*

available. The majority of statutes include such language today. Moreover, most specify that a key 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,

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.⁵³

⁵³ Wingspan, *supra* note 26, at p. 604.

The Third National Guardianship Summit (Oct. 2011) recommends: "To ensure the right of access to guardianship services, states should provide public funding for: Guardianship services for those unable to pay. . . ." (Recommendation #3.3)

VI. The Efficacy of Statutes Governing Guardianship and Public Administrator Services - Review the Statutes Governing Guardianship and Public Administrator Services, Evaluate the Effectiveness of the Statutes, and Recommend Proposed Changes

This section reviews the North Dakota statutes governing guardianship and public administrator services, evaluates the effectiveness of the statutes compared to other states and compared to national models, and makes recommendations about proposed changes, including, where appropriate or desired, alternative recommendations from which to select.

North Dakota Century Code chapters 30.1-26 and 30.1-28 govern guardianship services in North Dakota.⁵⁴ North Dakota Century Code chapter 11-21 governs public administrator services.⁵⁵

North Dakota is included in the five 2010 State Public Guardianship Statutory Charts and tables of the significant elements in guardianship and public guardianship statutes from the second and most recent national study of public guardianship in the 50 states and the District of Columbia.⁵⁶ The significant elements in guardianship and public guardianship statutes from the second national study include the following:

- A. Type of public guardianship program and public guardian subjects
- B. Procedural due process safeguards in guardianship (e.g., potential petitioners; investigation of vulnerable adults in need; notice and hearing; right to counsel; free counsel to indigents; right to jury trial; cross examination; standard of proof; appeal/review)
- C. Assessment of alleged incapacitated person, civil liberties, selection of guardian (e.g., medical examination;

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

⁵⁴ N. D. Cent. Code chapter 30.1-26 and N. D. Cent. Code chapter 30.1-28, available at <http://www.legis.nd.gov/cencode/t30-1.html>

⁵⁵ N. D. Cent. Code chapter 11-21, available at <http://www.legis.nd.gov/cencode/t11.html>

⁵⁶ Teaster, et al. (2010), *supra* note 51, at pp. 173-212.

Updated state selected adult guardianship statutory tables with citations for each provision are available at the Web site for the American Bar Association Commission on Law and Aging:

http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

psychological examination; other examination; civil liberties preserved; who serves as guardian—general probate priority; input by alleged incapacitated person)

D. Powers and duties of public guardians (e.g., specified agency as public guardian; conflict of interest raised/remedied; general probate powers for public guardians)

E. Additional guardianship provisions (e.g., provision for termination; restoration; incapacitated person petition; annual report; emergency guardian; temporary guardians; limited guardian)

A. Type of Public Guardianship Program and Public Guardian Subjects

1. Type of Public Guardianship Program: Implicit or Explicit

North Dakota has an “implicit” statutory scheme for public guardianship.⁵⁷ In 1981, there were 26 implicit statutory schemes for public guardianship in 26 states, and 14 explicit schemes in 13 states. A generation later, there were 18 implicit statutory schemes for public guardianship in 18 states, and 28 explicit schemes in 27 states.⁵⁸ More states added public guardianship programs, and more states have explicit statutory schemes for public guardianship.

Implicit schemes often name a state agency or employee as guardian of last resort when there are no willing and responsible family members or friends to serve, whereas explicit schemes generally provide for an office and the ability to hire staff and contract for services. Over time states shifted markedly toward enactment of explicit public guardianship schemes—which are more likely to have budgetary appropriations and which may have greater oversight than is required for private guardians or for guardians under an implicit scheme.⁵⁹

Recommendation: North Dakota should adopt an explicit statutory scheme for public guardianship.

2. Public Guardian Subjects

⁵⁷ Teaster, et al. (2010), *supra* note 51, at pp. 179, 235.

⁵⁸ *Id.* at p. 17.

⁵⁹ Teaster, Wood, Lawrence & Schmidt, “Wards of the State: A National Study of Public Guardianship,” 37 (1) *Stetson Law Review* 193, 206 (Fall 2007).

North Dakota has general fund appropriations to the 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 60 years and over.⁶⁰ North Dakota statute authorizes judicial appointment of a county public administrator with duties and powers to serve as ex officio guardian and conservator in specified cases.

In 1981, of the 34 states with some provision for public guardianship, 20 states

generally provided for public guardianship services for incompetents, 17 provided specifically for services for individuals with mental retardation who needed a guardian, 19 targeted incapacitated elderly persons, and 11 provided a form of public guardianship for minors. The majority of public guardianship schemes served limited categories of beneficiaries. Fewer than half of the 34 states had provisions to aid 3 or more targeted groups. . . . [T]he specific needs of individuals with mental retardation and elders had "come into focus only recently" . . .

In 2005, the overwhelming majority of the state statutes provide for services to incapacitated individuals who are determined to need guardians under the adult guardianship law, but who have no person or private entity qualified and willing to serve. Modern guardianship codes rely more on a functional determination of incapacity and less on specific clinical conditions. Thus, states are less likely to segregate specific categories of individuals for service, instead filling the void created when a judge determines a person is incapacitated but no one is there to act as guardian.⁶¹

This kind of segregation based on specific clinical conditions risks (a) *Olmstead*⁶² liability concerns and (b) vulnerable individuals with dual or multiple diagnoses and eligibilities falling through the cracks of

⁶⁰ Cf., e.g., Teaster, et al. (2010), *supra* note 51, at p. 235.

⁶¹ *Id.* at p. 17.

⁶² *Olmstead v. L.C.*, 527 U.S. 581, 598 (1999) ("Unjustified isolation . . . is properly regarded as discrimination based on disability.")

single clinical, categorical, or siloed public guardian services.

Recommendation: North Dakota should provide for public guardian services for all eligible incapacitated persons similarly, and not particular public guardian services for particular diagnoses or categories. The Model Public Guardianship Act⁶³ recommends the following statutory language:

Any incapacitated person residing in the state who cannot afford to compensate a private guardian or conservator and who does not have a willing and responsible family member or friend to serve as guardian or conservator is eligible for the services of the office of public guardian where the individual resides or is located.⁶⁴

B. Procedural Due Process Safeguards in Guardianship

Judicial process highlights for the establishment of guardianships and guardianship stakeholder concerns are described above in section II related to the establishment of guardianships.⁶⁵ The significant relevant elements in guardianship and public guardianship statutes from the most recent national study of public guardianship follow.

1. Potential Petitioners

North Dakota provides that “Any person interested in the welfare of an allegedly incapacitated person may petition for the appointment of a guardian.”⁶⁶ The national study found that virtually all states have such language, which is consistent with the Uniform Guardianship and Protective Proceedings Act (1997) allowing “an individual or a person

⁶³ Teaster, et al. (2010), *supra* note 51, at pp. 149-172.

The 2010 Model Public Guardianship Act is a distillation, compilation, and synthesis of existing state statutes, Regan and Springer’s Model Public Guardianship Act from the 1977 report to the U.S. Senate Special Committee on Aging on Protective Services for the Elderly, an earlier statute prepared by Legal Research and Services for the Elderly in 1971, the Uniform Guardianship and Protective Proceedings Act (1997), the Model Guardianship and Conservatorship Statute published by the American Bar Association Developmental Disabilities Project of the Commission on the Mentally Disabled in 1982, and principles derived from the *National Probate Court Standards* (1993, 1999), the National Guardianship Conference (Wingspread 1988), and the Second National Guardianship Conference (Wingspan 2002).

⁶⁴ Teaster, et al. (2010), *supra* note 51, at p. 165.

⁶⁵ See pages 9-11.

⁶⁶ N. D. Cent. Code section 30.1-28-03(1).

interested in the individual's welfare to file."⁶⁷

A central question to the effectiveness of public guardianship is whether public and private guardianship agencies may petition for appointment of themselves as guardian, a potential conflict of interest.

Such petitioning could present several conflicts of interest. First, if the program relies on fees for its operation, or if its budget is dependent on the number of individuals served, the program might petition more frequently, regardless of individual needs. On the other hand, the program might . . . "only petition for as many guardianships as it desires, perhaps omitting some persons in need of such services." Or it could "cherry pick," petitioning only for those individuals easiest or least costly and time-consuming to serve.⁶⁸

There is a formal ethics advisory opinion observing that: "The practice of nominating oneself as guardian automatically raises the appearance of self-dealing."⁶⁹ Vermont prohibits the office of public guardianship from petitioning for guardianship: "Neither the office of public guardian or its designees may petition for guardianship."⁷⁰ This is similar to the statutory language recommended by the 2010 Model Public Guardianship Act: "The office of public guardian may: Not initiate a petition of appointment of the office as guardian or

⁶⁷ Teaster, et al. (2010), *supra* note 51, at p. 19.

⁶⁸ *Id.*

⁶⁹ Washington Certified Professional Guardian Board, Ethics Advisory Opinion 2005-001-Professional Guardian Petitioning for Appointment (March 2006, revised January 2010), available at

http://www.courts.wa.gov/committee/?fa=committee.display&item_id=1210&committee_id=127

The National Guardianship Association *Standards of Practice* state: A guardian who is not a family guardian may act as petitioner only when no other entity is available to act, provided all alternatives have been exhausted." [NGA Standard 16 II(E)]

The Council on Accreditation *Adult Guardianship Service Standards* state: "The organization only petitions the court for its own appointment as guardian when no other entity is available." (AG 6.04, available at

http://www.coastandards.org/standards.php?navView=private&core_id=1273

The Second National Guardianship Conference recommends, "A lawyer petitioning for guardianship of his or her client *not* . . . seek to be appointed guardian except in exigent or extraordinary circumstances, or in cases where the client made an informed nomination while having decisional capacity." See "Wingspan—The Second National Guardianship Conference Recommendations," 31 *Stetson L. Rev.* 595, 608 (2002).

⁷⁰ Vt. Stat. Ann. Section 14-3092(b).

conservator.”⁷¹

Recommendation: North Dakota should adopt a prohibition against the public guardian petitioning for appointment of itself: “The office of public guardian may not initiate a petition of appointment of the office as guardian or conservator.”

2. Investigation of Vulnerable Adults in Need

In 1981, only a handful of states addressed the problem of “discovering the identity of those individuals who are in need of public guardianship services,” usually by means of professional reporting laws or an investigatory body.⁷²

Today, the landscape has changed completely. Every state has enacted and administers an APS [adult protective services] law with: reporting requirements for various professions; investigation of possible abuse, neglect, or exploitation; and mechanisms to address problems of at-risk adults, including the initiation of a guardianship. Indeed, in many cases, APS programs are a primary referral source for public guardianship programs. Because of these developments in APS, as well as the aging of the population, many more cases are likely to come to the attention of public guardians . . .⁷³

The following concerns are expressed in North Dakota about adult protective services and guardianship: (a) there is no mandatory reporting of vulnerable adult abuse and neglect, (b) there is perception of less follow through or investigation of vulnerable adult abuse and neglect in some cases (that is, disagreement about the timing and urgency for intervention), and (c) inconsistent adult protection services statewide and lack of state funding to provide them. North Dakota⁷⁴ is reportedly one of only five states (Colorado, New Jersey, New York, North Dakota, South Dakota)⁷⁵ without mandatory reporting

⁷¹ Teaster, et al. (2010), *supra* note 51, at p. 165.

⁷² *Id.* at p. 19.

⁷³ *Id.*

⁷⁴ See N.D. Cent. Code section 50-25.2-03 (“voluntary reporting”). North Dakota does require mandatory notification by the Department of Human Services or designee of “a violation of a criminal statute or an imminent danger of serious physical injury or death of the vulnerable adult” to the appropriate law enforcement agency. N.D. Cent. Code section 50-25.2-05(2).

⁷⁵ Laws Related to Elder Abuse, Mandatory Reporting to Adult Protective Services, available at

of elder abuse and neglect. However, New Jersey requires mandatory reporting of institutionalized elder abuse effective March 29, 2010; New York requires mandatory reporting of abuse or neglect in a residential health care facility, and South Dakota requires mandatory reporting of elder or disabled adult abuse or neglect effective July 1, 2011. Therefore, North Dakota is one of only two states without mandatory reporting of vulnerable adult abuse and neglect.⁷⁶

Twelve percent of community-dwelling elders without severe cognitive incapacity reported at least one form of elder abuse victimization [physical (4.6%), sexual (0.6%), or emotional (4.6%) mistreatment or neglect (5.1%)] in a recent year, not including financial exploitation by family (5.2%) and lifetime financial exploitation by a stranger (6.5%).⁷⁷ A national study of adult protective services found 253,421 reports of abuse of adults age 60+, 832 reports for every 100,000 people.⁷⁸ Yet 84% of abuse incidents are not reported.⁷⁹ While adult protective services are beyond the scope of this guardianship services study, mandatory reporting of vulnerable adult abuse and neglect is important for investigation and identification of vulnerable adults in need of guardianship services.

Recommendation: North Dakota should change from voluntary reporting of abuse or neglect to mandatory reporting of abuse or neglect.

3. Notice and Hearing

http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html

⁷⁶ N.J. Stat. Ann. section 52:27G-7.1; N.Y. Public Health Law section 2803-d; S. D. Codified Laws Ann. section 22-46-9. Only Colorado and North Dakota lack mandatory reporting of vulnerable adult abuse and neglect. The Colorado Senate passed a bill (Senate Bill 78) establishing a task force to make recommendations for requiring mandatory reporting of at-risk adult abuse on March 27, 2012,

<http://coloradosenate.org/home/press/senate-passes-bipartisan-bill-by-senator-evie-hudak-to-fight-elder-abuse-today>

⁷⁷ Ron Aciemo, Melba Hernandez-Tejada, Wendy Muzzy & Kenneth Steve, *Final Report: The National Elder Maltreatment Study*, National Institute of Justice (2009).

See generally R. Bonnie & R. Wallace (eds.), *Elder Mistreatment: Abuse, Neglect and Exploitation in an Aging America*, Washington, DC: The National Academies Press (2003). See also Deborah Saunders, *Issue Paper on Abuses of Alternatives to Guardianship*, National Center for State Courts (2012).

⁷⁸ P. Teaster, J. Otto, T. Dugar, M. Mendiondo, E. Abner, & K. Cecil, *The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older*, Report to the National Center on Elder Abuse, Administration on Aging, Washington, D.C. (2006).

⁷⁹ National Center on Elder Abuse, *National Elder Abuse Incidence Study*, Washington, DC: U.S. Administration on Aging (1998).

Almost all of North Dakota's provisions for notice are comparable to the Uniform Guardianship and Adult Protective Proceedings Act (UGAPPA).⁸⁰ The most significant exception is the absence of provisions for informing the proposed ward, or ward,⁸¹ of rights at the hearing and of the nature, purpose, and consequences of appointment of a guardian.

Almost all of North Dakota's provisions for hearing are comparable to the Uniform Guardianship and Adult Protective Proceedings Act (UGAPPA).⁸²

Recommendation: North Dakota should adopt a version of UGAPPA notice provisions regarding rights at the hearing and the nature, purpose, and consequences of appointment of a guardian: "The notice must inform the ward or proposed ward of the ward or proposed ward's rights at the hearing and include a description of the nature, purpose, and consequences of an appointment of a guardian."⁸³

4. Right to Counsel; Free Counsel to Indigents

Some of the North Dakota guardianship stakeholders interviewed expressed some concerns with no right to counsel or public defender for the proposed ward if the proposed ward cannot afford counsel. Procedural due process safeguards in guardianship are meaningless without counsel to exercise the safeguards: "there is a growing recognition of the 'right to counsel' as an empty promise for a vulnerable indigent individual. Thus, over 25 states require the

⁸⁰ See Notice in Guardianship Proceedings, Adult Guardianship State Legislative Charts, available at

http://www.americanbar.org/groups/law_aging/resources/state_law-charts_updates.html

⁸¹ The Third National Guardianship Summit recommends, "Where possible, the term person under guardianship should replace terms such as incapacitated person, ward, or disabled person." Third National Guardianship Summit: Standards of Excellence, Recommendation #1.7 (2011), available at

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

See also La Forge, "Preferred Language Practice in Professional Rehabilitation Journals," 57 (1) *The Journal of Rehabilitation* 49-51 (1991); Texas Council for Developmental Disabilities, People First Language - Describing People with Disabilities, available at

<http://www.txddc.state.tx.us/resources/publications/pflanguage.asp>

⁸² See Conduct and Findings of Guardianship Proceedings, Adult Guardianship State Legislative Charts, available at

http://www.americanbar.org/groups/law_aging/resources/state_law-charts_updates.html

⁸³ See Uniform Guardianship and Adult Protective Proceedings Act, section 404(a).

appointment of counsel, generally making counsel available without charge to indigent respondents.”⁸⁴ Further:

The public guardianship process is designed to be adversarial. The significance of effective, adversarial counsel for both the process and the alleged incapacitated person cannot therefore be overemphasized. Any failure of guardianship processes can be attributed in large measure to inappropriately paternalistic and condescendingly informal proceedings facilitated by counsel, whose real client is too seldom the alleged incapacitated person.⁸⁵

The Second National Guardianship Conference recommends,

28. Counsel always [is] appointed for the respondent and act as an advocate rather than as guardian *ad litem*.

29. The Wingspread Recommendation regarding the role of counsel as zealous advocate be amended and affirmed as follows: Zealous Advocacy—In order to assume the proper advocacy role, counsel for the respondent and the petitioner shall: (a) advise the client of all the options as well as the practical and legal consequences of those options and the probability of success in pursuing any one of these options; (b) give that advice in the language, mode of communication and terms that the client is most likely to understand; and (c) zealously advocate the course of actions chosen by the client.⁸⁶

⁸⁴ Teaster, et al. (2010), *supra* note 51, at p. 20.

⁸⁵ *Id.* at p. 157. *Cf., e.g., id.* at p. 4 quoting Alexander and Lewin:

Under the present system of “Estate Management by Preemption” we divest the incompetent of control of his property upon the finding of the existence of serious mental illness whenever divestiture is in the interest of some third person or institution. The theory of incompetency is to protect the debilitated from their own financial foolishness or from the fraud of others who would prey upon their mental weaknesses. In practice, however, we seek to protect the interest of others. The state hospital commences incompetency proceedings to facilitate reimbursement for costs incurred in the care, treatment, and maintenance of its patients. Dependents institute proceedings to secure their needs. Co-owners of property find incompetency proceedings convenient ways to secure the sale of realty. Heirs institute actions to preserve their dwindling inheritances. Beneficiaries of trusts or estates seek incompetency as an expedient method of removing as trustee one who is managing the trust or estate in a manner adverse to their interests. All of these motives may be honest and without any intent to cheat the aged, but none of the proceedings are commenced to assist the debilitated.

⁸⁶ “Wingspan-The Second National Guardianship Conference, Recommendations,” 31

The Model Public Guardianship Act recommends the following right to counsel language:

The AIP [alleged incapacitated person] has the right to counsel whether or not the person is present at the hearing, unless the person knowingly, intelligently, and voluntarily waives the right to counsel. If the [AIP] cannot afford counsel or lacks the capacity to waive counsel, the court shall appoint counsel who shall always be present at any hearing involving the person. If the person cannot afford counsel, the state shall pay reasonable attorney's fees as customarily charged by attorneys in this state for comparable services.⁸⁷

The Model Public Guardianship Act also recommends specification of the duties of counsel: "The duties of counsel representing an alleged incapacitated person at the hearing shall include at least: a personal interview with the person; counseling the person with respect to his or her rights; and arranging for an independent medical and/or psychological examination . . ."⁸⁸

Counsel for all proposed wards would probably facilitate negotiation, settlement, and achievement of more cost effective, least restrictive alternative, resolution for the proposed ward.

Recommendation: North Dakota should adopt the recommendations of the Model Public Guardianship Act regarding the right to counsel and the duties of counsel representing the proposed ward at the hearing.

Stetson Law Review 595, 601 (2002).

The National Probate Court Standards state: "The role of counsel should be that of an advocate for the respondent." *National Probate Court Standards*, Standard 3.3.5. See also, e.g., O'Sullivan, "Role of the Attorney for the Alleged Incapacitated Person," 31 (3) *Stetson Law Review* 686-734 (Spring 2002); Perlin, "Right to Counsel in Guardianship Proceedings," in *Mental Disability Law: Civil and Criminal* at pp. 278-283 (2nd ed., 1998), and pp. 90-95 (2009 Cumulative Supplement) ("commentators generally recommend that counsel's role should be the same in both [guardianship and involuntary civil commitment]: 'a zealous advocate for the client'"); Schmidt, "Accountability of Lawyers in Serving Vulnerable, Elderly Clients," 5 (3) *Journal of Elder Abuse and Neglect* 39-50 (1993).

⁸⁷ *Id.* at p. 167. Originally recommended by John Regan & Georgia Springer, U.S. Senate Special Committee on Aging, *Protective Services for the Elderly: A Working Paper*, Washington, D.C.: GPO (1977).

⁸⁸ Teaster, et al. (2010), *supra* note 51, at p. 167. Originally recommended by Regan & Springer, *supra* note 87.

5. Right to Jury Trial

Since 1981, the number of states that provide a right to a jury trial in guardianship proceedings has gone from 11 to 27 states,⁸⁹ not including North Dakota. Recommendations for the right to a jury trial in guardianship proceedings range from Regan and Springer to the U.S. Senate Special Committee on Aging in 1977 to the Model Public Guardianship Act in 2010: "The AIP [alleged incapacitated person] shall have the right to trial by jury."⁹⁰

Recommendation: North Dakota should adopt a right to right to trial by jury in guardianship proceedings.

6. Cross Examination; Standard of Proof; Appeal/Review

Cross Examination. Since 1981, the number of states that provide a right to cross-examination in guardianship proceedings has gone from only nine states to 35 states,⁹¹ including North Dakota.

Standard of Proof. Thirty-six states, including North Dakota, require "clear and convincing evidence" as the standard of proof in guardianship proceedings.⁹² New Hampshire requires "beyond a reasonable doubt." North Carolina and Washington use "clear, cogent, and convincing evidence." The Model Public Guardianship Act recommends "clear, unequivocal and convincing evidence" as the standard of proof.⁹³

⁸⁹ Teaster, et al. (2010), *supra* note 51, at p. 20. Kentucky makes a jury trial mandatory.

⁹⁰ *Id.* at pp. 157, 167.

⁹¹ *Id.* at pp. 20-21.

⁹² *Id.* at p. 21.

⁹³ *Id.* at pp. 157, 166:

The suggested standard of proof is "clear, unequivocal, and convincing" evidence. Such a standard is intended to inform the fact finder that the proof must be greater than for other civil cases. While it might be argued that an individual suffering from [incapacity] is not [him or herself] at liberty or free from stigma, we are quite comfortable with our assessment that it is much better at this time for [such] a person to be free of public guardianship than for a person to be inappropriately adjudicated a ward of the public guardian. The provision of functional, rather than causal or categorical, criteria should facilitate the use of the standard. The clear, unequivocal, and convincing evidence standard is utilized in such analogous proceedings as deportation, denaturalization, and involuntary civil commitment. [reference omitted] Public guardianship is easily conceptualized as the denaturalization or deportation of an individual's legal autonomy as a citizen. [p.157]

Appeal/Review. Since 1981, the number of states that provide a right to appeal in guardianship proceedings has gone from only three states to at least 29, including North Dakota.⁹⁴

Recommendation: North Dakota should consider changing the standard of proof in guardianship proceedings to “clear, unequivocal, and convincing evidence.”

C. Assessment of Alleged Incapacitated Person, Civil Liberties, Selection of Guardian

1. Medical Examination; Psychological Examination; Other Examination

The determination of capacity of older adults in guardianship proceedings has received book-length treatment in a collaboration of the American Bar Association Commission on Law and Aging, American Psychological Association, and National College of Probate Judges.⁹⁵ Clinical examinations are important evidence for judicial determinations of legal incapacity. At least 40 states, including North Dakota, provide for examination of the proposed ward by a physician, and 31 states, including North Dakota, specifically include a psychologist.⁹⁶

⁹⁴ See N.D. Cent. Code section 30.1-28-05(2); Teaster, et al. (2010), *supra* note 51, at p. 21.

⁹⁵ ABA Commission on Law and Aging, American Psychological Association, & National College of Probate Judges, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings*, ABA and APA (2006). See also, e.g., National Center for State Courts, *Identifying and Responding to Elder Abuse, Neglect, and Exploitation: A Benchcard for Judges*; Lori Stiegel, *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse*, ABA (1996).

Cf., e.g., ABA Commission on Law and Aging & American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (April 2005); G. Melton, J. Petrila, N. Poythress & C. Slobogin, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, 3rd ed., NY: Guilford Press (2007); R. Otto, & K. Douglas (Eds.), *Handbook of Violence Risk Assessment*, NY: Routledge/Taylor & Francis (2010).

⁹⁶ Teaster, et al. (2010), *supra* note 51, at p. 21.

N.D. Cent. Code section 30.1-28-03(3) states “Upon the filing of a petition, the court shall . . . appoint a physician or clinical psychologist to examine the proposed ward, and appoint a visitor to interview the proposed guardian and the proposed ward.” The visitor “is a person who is in nursing or social work” and has the duty to file a written report that must contain:

- (1) A description of the nature and degree of any current impairment of the proposed ward's understanding or capacity to make or communicate decisions;
- (2) A statement of the qualifications and appropriateness of the proposed

The Uniform Guardianship and Protective Proceedings Act authorizes the court to order a professional evaluation of the respondent.⁹⁷ The National Probate Court Standards advise, "The imposition of a guardianship by the probate court should be based on competent evidence of the incapacity of the respondent."⁹⁸ According to the national public guardianship study:

A growing number of states provide for a comprehensive, interdisciplinary team approach. For instance, Florida uses a three-member examining committee; Kentucky calls for an interdisciplinary evaluation by a physician, psychologist, and social worker; North Carolina alludes to a "multi-disciplinary evaluation;" and Rhode Island sets out a detailed clinical assessment tool.⁹⁹

Unfortunately, the available research finds significant problems with clinical evidence in guardianship proceedings for older adults.¹⁰⁰ Much clinical evidence is incomplete. The mean length of written clinical reports for guardianship of older adults ranges between 83 words in Massachusetts (with two-thirds of the written evidence illegible) and 781 words in Colorado (one to three pages) compared to

guardian;

(3) Recommendations, if any, on the powers to be granted to the proposed guardian, including an evaluation of the proposed ward's capacity to perform the functions enumerated under subsections 3 and 4 of section 30.1-28-04 [legal rights "to vote, to seek to change marital status, to obtain or retain a motor vehicle operator's license, or to testify in any judicial or administrative proceedings," and "other specific rights"]; and

(4) An assessment of the capacity of the proposed ward to perform the activities of daily living.

Cf., e.g., UGPPA section 304.

⁹⁷ UGPPA section 305:

At or before a hearing under this [article], the court may order a professional evaluation of the respondent and shall order the evaluation if the respondent so demands. If the court orders the evaluation, the respondent must be examined by a physician, psychologist, or other individual appointed by the court who is qualified to evaluate the respondent's alleged impairment. . . .

⁹⁸ Commission on Nat'l Probate Court Standards, Nat'l College of Probate Judges & Nat'l Ctr. for State Courts, *National Probate Courts Standards*, Standard 3.3.9 (1993).

⁹⁹ Teaster, et al. (2010), *supra* note 51, at p. 21, *citing* Michael Mayhew, "Survey of State Guardianship Laws: Statutory Provisions for Clinical Evaluations," 27 *Bifocal* 1, 14 (2005).

¹⁰⁰ Jennifer Moyer, "Clinical Evidence in Guardianship of Older Adults Is Inadequate: Findings from a Tri-State Study," 47 *Gerontologist* 604, 608, 610 (2007).

24 pages for the mean length of child custody evaluations.¹⁰¹ Several North Dakota stakeholders report difficulties with insufficient physician specialists for clinical evaluations in guardianship proceedings.

The Model Public Guardianship Act recommends the following provision regarding evaluation:

The AIP [alleged incapacitated person] has the right to secure an independent medical and/or psychological examination relevant to the issues involved in the hearing at the expense of the state if the person is unable to afford such examination and to present a report of this independent evaluation or the evaluator's personal testimony as evidence at the hearing. At any evaluation, the AIP has the right to remain silent, the right to refuse to answer questions when the answers may tend to incriminate the person, the right to have counsel or any other mental health professional present, and the right to retain the privileged and confidential nature of the evaluation for all proceedings other than proceedings pursuant to this Act.¹⁰²

Recommendation: North Dakota should consider adopting the Model Public Guardianship Act provision regarding evaluation in guardianship.

2. Civil Liberties Preserved

Compared with only 10 states in 1981, at least 27 states, including North Dakota, have a statutory provision aimed at preserving

¹⁰¹ *Id.* at pp. 604, 610. *Accord* Kris Bulcroft et al., "Elderly Wards and Their Legal Guardians: Analysis of County Probate Records in Ohio and Washington," 31 *Gerontologist* 156, 157, 160 (1991); Roger Peters et al., "Guardianship of the Elderly in Tallahassee, Florida," 25 *Gerontologist* 532, 537-38 (1985). *See also* Jennifer Moye et al., "A Conceptual Model and Assessment Template for Capacity Evaluation in Adult Guardianship," 47 *Gerontologist* 591 (2007) (model and template for capacity evaluation in guardianship assessing medical condition, cognition, functional abilities, values, risk of harm and level of supervision needed, and means to enhance capacity); Jennifer Moye et al., "Empirical Advances in the Assessment of the Capacity to Consent to Medical Treatment: Clinical Implications and Research Needs," 26 *Clinical Psychol. Rev.* 1054 (2006) (clinical judgment for capacity determination can be unreliable; no consensus regarding reliability and validity of instrument-based consent capacity assessment).

¹⁰² Teaster, et al. (2010), *supra* note 51, at p. 167 (from Regan & Springer to the U.S. Senate Special Comm. on Aging, *supra* note 87).

civil rights under guardianship. Such provisions state that the individual under guardianship “retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted by order to the guardian by the court.”¹⁰³

3. Who Serves as Guardian—General Probate Priority; Input by Alleged Incapacitated Person

For the question of who may be guardian, most states, including North Dakota, use a priority hierarchy of the incapacitated person’s nominee, spouse, adult child, parent, relative, or friend (“the usual probate priority scheme”).¹⁰⁴ The North Dakota statute is sensitive to the conflict of interest posed by an employee of an agency, institution, or nonprofit group home providing direct care to the proposed ward also serving as guardian.¹⁰⁵ However, the practice is allowed if the court “makes a specific finding that the appointment presents no substantial risk of a conflict of interest.”¹⁰⁶

The North Dakota statute authorizes “[a]ny appropriate government agency, including county social service agencies”¹⁰⁷ as eighth priority to serve as guardian, except that “No institution, agency, or nonprofit group home providing care and custody of the

¹⁰³ Teaster, et al. (2010), *supra* note 51, at p. 22. N.D. Cent. Code sections 30.1-28-04(3) and (4) state:

3. Except upon specific findings of the court, no ward may be deprived of any of the following legal rights: to vote, to seek to change marital status, to obtain or retain a motor vehicle operator's license, or to testify in any judicial or administrative proceedings.

4. The court may find that the ward retains other specific rights.

In most states, a finding of legal incapacity restricts or takes away the right to: make contracts; sell, purchase, mortgage, or lease property; initiate or defend against suits; make a will, or revoke one; engage in certain professions; lend or borrow money; appoint agents; divorce, or marry; refuse medical treatment; keep and care for children; serve on a jury; be a witness to any legal document; drive a car; pay or collect debts; manage or run a business. Robert Brown, *The Rights of Older Persons*, NY: Avon Books (1979), at p. 286. “The loss of any one of these rights can have a disastrous result, but taken together, their effect is to reduce the status of an individual to that of a child, or a nonperson. The process can be characterized as legal infantilization.” Winsor Schmidt, “Guardianship of the Elderly in Florida: Social Bankruptcy and the Need for Reform,” in Winsor Schmidt (ed.), *Court of Last Resort for the Elderly and Disabled*, Durham, N.C.: Carolina Academic Press (1995), at p. 6.

¹⁰⁴ Teaster, et al. (2010), *supra* note 51, at p. 22. See N.D. Cent. Code section 30.1-28-11.

¹⁰⁵ N.D. Cent. Code section 30.1-28-11(1).

¹⁰⁶ *Id.*

¹⁰⁷ N.D. Cent. Code section 30.1-28-11(3)(h).

incapacitated person may be appointed guardian.”¹⁰⁸ A compilation of state statutes on the authority of adult protective services agencies to act as guardian of a client concluded:

This raises concerns about conflict of interest. As an agency that receives and investigates reports of suspected elder abuse, APS may be called upon to investigate allegations that a guardian abused, neglected, or exploited the incapacitated person for whom he or she acts as surrogate decision-maker. If an APS agency serves as guardian for its clients, it will face a conflict of interest if such allegations are raised against the agency. Additionally, staff members who act as guardians of agency clients face a conflict of interest if they need to advocate within their own agency for additional resources for the incapacitated people they are serving. As a result, many states prohibit APS agencies from acting as guardian for program clients or limit the agency to serving as a temporary guardian until a non-agency guardian can be appointed.¹⁰⁹

The North Dakota statute authorizes a “nonprofit corporation established to provide guardianship services” as seventh priority to serve as guardian, provided that the corporation files “with the court the name of the employee, volunteer, or other person who is directly responsible for the guardianship of each incapacitated person,” and notifies the court when the person “ceases to so act, or if a successor is named.”¹¹⁰ The statute is unclear whether the nonprofit corporation established to provide guardianship services is authorized to provide other services, including care or custody services that may trigger conflict of interest concerns. The statute also does not address the qualifications of the employee, volunteer, or other person responsible for the guardianship.

Twenty-seven states, not including North Dakota, have specific guardian background requirements like a credit check, or disqualify

¹⁰⁸ N.D. Cent. Code section 30.1-28-11(1). There is an exception to the exception: However, if no one else can be found to serve as guardian, an employee of an agency, institution, or nonprofit group home providing care and custody may be appointed guardian if the employee does not provide direct care to the proposed ward and the court makes a specific finding that the appointment presents no substantial risk of a conflict of interest.

¹⁰⁹ Lori Stiegel & Ellen Klem, “APS as Guardian Explanation,” ABA Commission on Law and Aging (2007), p. 1, available at http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html

¹¹⁰ N.D. Cent. Code section 30.1-28-11(3)(g).

felons from serving as guardian.¹¹¹ The U.S. Government Accountability Office recently reported

hundreds of allegations of physical abuse, neglect, and financial exploitation of wards by guardians in 45 states and the District of Columbia, between 1990 and 2010. In 20 selected closed cases from 15 states and the District of Columbia, GAO found that guardians stole or improperly obtained \$5.4 million from 158 incapacitated victims, many of them seniors. GAO's in-depth examination of these 20 closed cases identified three common themes: 1) state courts failed to adequately screen the criminal and financial backgrounds of potential guardians; 2) state courts failed to adequately monitor guardians after appointment, allowing the continued abuse of vulnerable seniors and their assets; and 3) state courts failed to communicate ongoing abuse by guardians to appropriate federal agencies like the Social Security Administration (SSA), the Department of Veterans Affairs (VA), and the Office of Personnel Management (OPM), which manages federal employee retirement programs. Guardians serve as federal representative payees on one percent of SSA cases, 13 percent of VA cases, and 34 percent of OPM cases.¹¹²

The Second National Guardianship Conference recommends, "All persons, including lawyers who serve in any guardianship capacity, be subject to bonding requirements. Further, lawyers who serve as guardians should have professional liability insurance that covers fiduciary activities."¹¹³

Recommendation: North Dakota should require the information

¹¹¹ See ABA Commission on Law and Aging, *Guardian Felony Disqualification and Background Requirements*, available at http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

See also Deborah Saunders, *Criminal Background Checks for Guardians*, National Center for State Courts (2012) (quoting U.S. Senator Gordon Smith: "Some respondents cautioned against appointing guardians without in-depth investigation into their character and qualifications, including criminal and credit background checks, and recommended that guardian candidates provide a sworn statement to the court attesting to their fitness to serve prior to their appointment.").

¹¹² See Schmidt, et al., *supra* note 29, at p. 176 (citing U.S. Gov't Accountability Office, *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, GAO-10-1046 (2010), pp. 4, 6. An attorney member of the National Guardianship Association provided information on over 300 cases of alleged neglect, abuse, and exploitation by guardians between 1990 and 2009.)

¹¹³ Wingspan, *supra* note 26, at p. 607.

in the petition for appointment of a guardian, and in the visitor's report, about the qualifications of the proposed guardian¹¹⁴ to include the results of fingerprint, criminal history, and credit background checks before appointment of a guardian.

D. Powers and Duties of Public Guardians

1. Specified Agency as Public Guardian

At least 44 states specify a particular agency to serve as public guardian.¹¹⁵ North Dakota authorizes "[a]ny appropriate government agency, including county social service agencies" to serve as guardian as eighth priority,¹¹⁶ except that "No institution, agency, or nonprofit group home providing care and custody of the incapacitated person may be appointed guardian."¹¹⁷ 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 guardian and conservator without application to court or special appointment in specified cases.¹¹⁸

Recommendation. North Dakota should specify one public guardian agency to serve as public guardian.

2. Conflict of Interest Raised/Remedied

In reviewing the extent to which public guardianship assists or hinders vulnerable adults in securing access to rights, benefits, and entitlements, a core conclusion of the U.S. Administration on Aging-funded first national public guardianship study was that success is dependent on the clear consideration that "The public guardian must be independent of any service providing agency (no conflict of

¹¹⁴ N.D. Cent. Code sections 30.1-28-03(2)(g) and 30.1-28-03(6)(h)(2).

¹¹⁵ Teaster, et al. (2010), *supra* note 51, at pp. 202-207.

¹¹⁶ N.D. Cent. Code section 30.1-28-11(3)(h).

¹¹⁷ N.D. Cent. Code sections 30.1-28-11(1). There is an exception to the exception: However, if no one else can be found to serve as guardian, an employee of an agency, institution, or nonprofit group home providing care and custody may be appointed guardian if the employee does not provide direct care to the proposed ward and the court makes a specific finding that the appointment presents no substantial risk of a conflict of interest.

¹¹⁸ N. D. Cent. Code sections 11-21-01, 11-21-05. A public administrator is an individual, corporation, or limited liability company appointed by the presiding judge, after consultation with the judges of the judicial district, as ex officio guardian and conservator for the county.

interest).¹¹⁹ The study explained:

The [service providing] agency's primary priority may be expedient and efficient dispersal of its various forms of financial and social assistance. This can be detrimental to the effectiveness of the agency's role as [public] guardian. If the ward is allocated insufficient assistance, if payment is lost or delayed, if assistance is denied altogether, or if the ward does not want mental health service, it is unlikely that the providing agency will as zealously advocate the interests of that ward.¹²⁰

The Model Public Guardianship Act provides, "Conflict of Interest. The office of public guardian shall be independent from all service providers and shall not directly provide housing, medical, legal, or other direct, non-surrogate decision-making services to a client."¹²¹

Recommendation. North Dakota should make the office of public guardian independent from all service providers.

3. General Probate Powers for Public Guardians

While most state statutes provide that the public guardian has the same duties and general probate powers as any other guardian, many state statutes list additional duties and powers for the public guardian.¹²²

For example, mandatory duties may include specifications about visits to the [incapacitated person]. At least eight states dictate the frequency of public guardianship [incapacitated person] visits or contacts. A few states require the public guardianship program to take other actions, such as developing individualized service plans, making periodic reassessments, visiting the facility of proposed placement, and attempting to secure public benefits.¹²³

¹¹⁹ Winsor Schmidt, "Guardianship of the Elderly in Florida: Social Bankruptcy and the Need for Reform," 55 (3) *Florida Bar Journal* 189, 192 (1981). See also Winsor Schmidt, Kent Miller, William Bell, & Elaine New, *Public Guardianship and the Elderly* (Ballinger 1981), at pp. 16-17, 34, 38, 170, 174-175, 183-184, 193.

¹²⁰ Schmidt, et al., *supra* note 119, at p. 38.

¹²¹ Teaster, et al. (2010), *supra* note 51, at p. 162.

¹²² See Teaster, et al. (2010), *supra* note 51, at pp. 25, 202-207.

¹²³ *Id.* at p. 25.

Most of the additional listed duties for the public guardian are programmatic in nature.

Statutes may require the public guardianship entity to maintain professional staff; contract with local or regional providers; assist petitioners, private guardians, or the court; provide public information about guardianship and alternatives; contract for evaluations and audits; and maintain records and statistics. Public guardianship statutes frequently set out additional powers as well as duties, for example, the authority to contract for services, recruit and manage volunteers, and intervene in private guardianship proceedings, if necessary.¹²⁴

The Model Public Guardianship Act provides the office of public guardian with the same general probate powers and duties as a private guardian.¹²⁵ The Model Public Guardianship Act provides a statutory alternative¹²⁶ of twelve mandatory duties¹²⁷ and eight other

¹²⁴ *Id.*

¹²⁵ *Id.* at pp. 154, 163.

¹²⁶ *Id.* at pp. 164-165.

¹²⁷ *Id.* The mandatory duties are listed as follows:

Other Duties. The office of public guardian shall:

- (1) Use the substituted judgment principle of decision-making that substitutes as the guiding force in any surrogate decision the values of the IP [incapacitated person], to the extent known.
- (2) Establish criteria and procedures for the conduct of and filing with the court for each IP of: a values history survey, annual functional assessment, decisional accounting reports, and such other information as may be required by law.
- (3) Prepare for each IP within 60 days of appointment and file with the court an individualized guardianship or conservatorship plan designed from a functional assessment.
- (4) Personally visit each IP at least twice a month; and maintain a written record of each visit, to be filed with the court as part of the guardian's report to court.
- (5) Visit any facility in which an IP is to be placed if outside his or her home.
- (6) Have a continuing duty to seek a proper and suitable person who is willing and able to serve as successor guardian or conservator for an IP served by the office.
- (7) Develop and adopt written standards of practice for providing public guardianship and conservatorship services.
- (8) Establish record-keeping and accounting procedures to ensure (i) the maintenance of confidential, accurate, and up-to-date records of all cases in which the office provides guardianship or conservatorship services; and (ii) the collection of statistical data for program

powers.¹²⁸ The Act also allows the public guardian, as director of the office of the public guardian, to delegate guardian decision-making functions to paid professional staff with an undergraduate degree, a degree in law, psychology, or social work, and certification.¹²⁹

evaluation, including annually the number of guardianship and conservatorship cases open, the number handled by the office and their disposition, the age and condition of clients, and the number institutionalized.

- (9) Establish and provide public information about procedures for the filing, investigation, and resolution of complaints concerning the office.
- (10) Prepare a yearly budget for implementation of the Act.
- (11) Contract for an annual independent audit of the office by a certified public accountant.
- (12) Prepare an annual report for submission to the county [board of supervisors; council] and the state court administrative office.

¹²⁸ *Id.* at pp. 164-165. The other powers are listed as follows:

Other Powers: The office of public guardian may:

- (1) Not initiate a petition of appointment of the office as guardian or conservator.
- (2) On motion of the office, or at the request of the court, intervene at any time in any guardianship or conservatorship proceeding involving an alleged incapacitated person or an incapacitated person by appropriate motion to the court, if the office or the court deems such intervention to be justified because an appointed guardian or conservator is not fulfilling his or her duties, the estate is subject to disproportionate waste, or the best interests of the individual require such intervention.
- (3) Employ staff necessary for the proper performance of the office, to the extent authorized in the budget for the office;
- (4) Formulate and adopt policies and procedures necessary to promote the efficient conduct of the work and general administration of the office, its professional staff, and other employees.
- (5) Serve as representative payee for public benefits only for persons for whom the office serves as guardian or conservator.
- (6) Act as a resource to persons already serving as private guardian or conservator for education, information, and support.
- (7) Make funeral, cremation, or burial arrangements after the death of an incapacitated person served by the office if the next of kin of the incapacitated person does not wish to make the arrangements or if the office has made a good faith effort to locate the next of kin to determine if the next of kin wishes to make the arrangements.
- (8) Not commit an incapacitated person to a mental health facility without an involuntary commitment proceeding as provided by law.

¹²⁹ *Id.* at pp. 154, 164:

The public guardian may delegate to members of the paid professional staff powers and duties in making decisions as guardian or conservator and such other powers and duties as are created by this Act, although the office of public guardian retains ultimate responsibility for the proper performance of these delegated functions. All paid professional staff with decision-making authority at least shall have graduated from an accredited four-year college

Recommendation. North Dakota should list additional duties and powers for the public guardian modeled after those in the Model Public Guardianship Act.

E. Additional Guardianship Provisions

The 2010 national public guardianship study of additional guardianship elements (e.g., provision for termination; restoration; incapacitated person petition; annual report; emergency guardian; temporary guardians; limited guardian) shows that North Dakota joins most states in addressing all of these elements.¹³⁰ Stakeholders highlighted several concerns.

1. Annual Report

Some of the guardianship stakeholders interviewed expressed some concerns about oversight and monitoring of guardians and guardian annual reports. Unlike a number of states, North Dakota does not have statutory provision for active court review of annual reports.¹³¹ There is an extensive literature and numerous national recommendations about changing from passive court monitoring to active court monitoring.¹³² "California has the most comprehensive model of review, with a regular visit to each incapacitated person by a court investigator six months after appointment and every year thereafter."¹³³ Annual reports are the sole means of accountability for

or university; have a degree in law, social work, or psychology; [and be certified by the state guardian certification entity].

Cf. Schmidt, Akinci & Wagner, "The Relationship Between Guardian Certification Requirements and Guardian Sanctioning: A Research Issue in Elder Law and Policy," 25 (5) *Behavioral Sciences and the Law* 641 (2007) ("83.3% of [General Equivalency Diploma] or [high school] graduates are likely to have more severe sanctions compared to 76.4% undergraduate or higher education, and 47.7% with an [Associate of Arts] or [Technical] degree, respectively. Guardians with an A.A. or Tech degree are 0.28 times less likely to have more severe sanctions than guardians with an undergraduate degree or higher education ($p < 0.01$).").

¹³⁰ Teaster, et al. (2010), *supra* note 51, at pp. 26-29, 208-212.

¹³¹ See Monitoring Following Guardianship Proceedings (2010), available at http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

¹³² See references cited *supra* note 30.

¹³³ Teaster, et al. (2010), *supra* note 51, at p. 27. See also, e.g., Guardianship Task Force, Report of the Guardianship Task Force to the [Washington State Bar Association] Elder Law Section Executive Committee (August 2009), at p. 10:

In one county, a guardianship monitoring program discovered that a man who was guardian of his 98-year-old stepmother had failed to file court-required financial plans. Further investigation showed that he was \$30,000 behind in payments to her nursing home. A subsequent criminal investigation resulted

guardianships. Without the timely filing and active review of annual reports for accuracy and comprehensiveness, there is little guardianship accountability.

Recommendation. North Dakota should establish a system for active monitoring of guardianship annual reports, including filing and review of annual reports and plans.¹³⁴

2. Emergency Guardian

Several of the guardianship stakeholders interviewed expressed significant concerns with the temporary guardian statute.¹³⁵ Compared with the emergency guardianship statutes in other states, North Dakota lacks the following statutory provisions for temporary (emergency) guardianship: (a) required petition details; (b) notice required; (c) specific language about the right to a hearing pre and post order; (d) right to counsel at the hearing; (e) presence of the proposed ward at the hearing; (e) limited duration (North Dakota allows up to 90 days; several states allow no more than 10 days); (f) specific language about the standard of proof.¹³⁶

An important issue “is that due process safeguards for emergency guardianship typically are less than for permanent guardianship, yet emergency guardianship is often a door to the more permanent status [as reported in North Dakota]. Thus, some individuals may end up in a guardianship with less than full due process protection.”¹³⁷ At least one federal district court ruled a state emergency guardianship statute unconstitutional because it lacked sufficient due process protection.¹³⁸

Recommendation. North Dakota should adopt section 311 of the Uniform Guardianship and Protective Proceedings Act related to emergency guardian.

VII. Methods for the Timely and Effective Delivery of

in the guardian’s conviction for stealing more than \$200,000 from the guardianship estate.

¹³⁴ See Uniform Guardianship and Protective Proceedings Act section 420(d).

¹³⁵ N.D. Cent. Code section 30.1-28-10.

¹³⁶ See Emergency Guardianship, available at

http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html

¹³⁷ Teaster, et al. (2010), *supra* note 51, at p. 28. See also Peter Barrett, “Temporary/Emergency Guardianships: The Clash Between Due Process and Irreparable Harm,” 13 *BIFOCAL* 3 (1992-1993).

¹³⁸ See *Grant v. Johnson*, 757 F. Supp. 1127 (D. Or. 1991).

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 states¹³⁹ (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.¹⁴⁰ 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.¹⁴¹

Twenty-eight (53%)¹⁴² of North Dakota's 53 counties apparently do not have a public administrator. The 2010 census population of the 28 counties is 151,026, which is 22.5% of North Dakota's population of 672,591.

One non-profit corporation,¹⁴³ with offices in Bismarck (Burleigh County), is reportedly the public administrator for 12 counties.¹⁴⁴

¹³⁹ See, e.g., Teaster, et al. (2010), *supra* note 51, at pp. 25, 58, 90, 110, 215, 227, 229-31.

¹⁴⁰ N.D. Cent. Code sections 30.1-28-11, 30.1-28-12.

¹⁴¹ N. D. Cent. Code sections 11-21-01, 11-21-05. A public administrator is an individual, corporation, or limited liability company appointed by the presiding judge, after consultation with the judges of the judicial district, as ex officio guardian and conservator for the county.

¹⁴² Adams, Barnes, Billings, Bottineau, Bowman, Burke, Divide, Dunn, Eddy, Foster, Golden Valley, Hettinger, LaMoure, McHenry, McKenzie, Mountrail, Pembina, Pierce, Ransom, Renville, Richland, Sargent, Sioux, Slope, Stark, Steele, Walsh, Wells.

The public administrator in a 29th county, Grand Forks, reportedly resigned on January 20, 2012. The 2010 census population of Grand Forks County is 66,861.

The public administrator in a 30th county, Rolette, reports not being a guardian for anyone for more than 10 years. The 2010 census population of Rolette County is 13,937.

¹⁴³ Guardian and Protective Services, Inc.

¹⁴⁴ Burleigh, Dickey, Emmons, Grant, Kidder, Logan, McIntosh, McClean, Mercer, Morton, Oliver, Sheridan.

These 12 counties have a 2010 census population of 147,799 (21.9% of the state population) and cover an area of 16,031 square miles¹⁴⁵ (23.2% of the state).

A. Alternative A for Effective Delivery of Public Administrator Responsibilities and Services

The dearth of public administrators in North Dakota's counties suggests that delivery of public administrator responsibilities and services is currently untimely and ineffective.

Recommendation. Timely and effective public administrator responsibilities and services appear to require replacement of uneven county funding with state funding of a public administrator in each of North Dakota's 53 counties at a funding level that would reduce guardianship caseload ratio from 1:22-29 on a part-time basis to a 1:20 staff-to-client ratio on a full-time basis.

B. Alternative B for Delivery of Guardianship Responsibilities and Services

The Developmental Services Division reports \$2,052,416 for 414 wards during the 2011-2013 biennium, including \$51,720 in petitioning costs.¹⁴⁶ 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).

The current unmet need for plenary public guardian services in North Dakota based on survey responses is 149 individuals (25 people with developmental disabilities on the Catholic Charities waiting list; 7 adults in Assisted Living Facilities; 44 adults in Basic Care Facilities; 64 adults in Nursing Facilities; 9 adults in the State Hospital).

The estimated costs for guardianship services for the 2013-15 biennium based on the Developmental Services Division private contractor model for the 414 wards of the 2011-2013 biennium follow, plus the 149 individuals currently in need of plenary public guardian services follow:

¹⁴⁵ This area is larger than the size of Massachusetts (7,800 square miles), Connecticut (4,842), Delaware (1,948), and Rhode Island (1,033) combined (15,623 square miles).

¹⁴⁶ Testimony of Tina Bay, Director, Developmental Disabilities Division, Human Services Committee, Oct. 25, 2011.

\$1,044,170	414 wards at \$6.91 ¹⁴⁷ daily rate (2013-2014)
\$375,800	149 wards at \$6.91 daily rate (2013-2014)
\$1,074,392	414 wards at \$7.11 ¹⁴⁸ daily rate (2014-2015)
\$386,677	149 wards at \$7.11 daily rate (2014-2015)
<u>\$53,225¹⁴⁹</u>	<u>petitioning costs</u>
\$2,546,082	TOTAL

The estimated costs for guardianship services for the 2013-15 biennium based on the Developmental Services Division private contractor model for the 156 wards of the additional unmet need follow:

\$393,455	156 wards at \$6.91 daily rate (2013-2014)
\$404,843	156 wards at \$7.11 daily rate (2014-2015)
<u>\$53,225</u>	<u>petitioning costs</u>
\$851,523	TOTAL for 156 wards

These estimated costs are for a staff to client ratio of 1:36-39. The recommended ratio is 1:20.

The Office of Public Guardianship in the state of Washington's Administrative Office of the Courts contracts with certified professional guardians to provide public guardianship services for a daily rate of \$10.68 per ward (not to exceed \$325 per month, \$525 per month in the first three months of a case; \$3,900 per year) with a required staff to ward ratio of no more than 1:20.¹⁵⁰ The certified professional guardians providing public guardianship services also comply with the minimum monthly ward visit standard.

The estimated costs for guardianship services for the 2013-15 biennium based on the 1:20 staff-to-ward ratio private contractor model for the 414 wards of the 2011-2013 biennium follow, plus the 149 individuals currently in need of plenary public guardian services follow:

¹⁴⁷ Calculated at 2.91% increase to the 2012-2013 rate, the same percent increase as the \$6.52 to \$6.71 increase for 2012-2013.

¹⁴⁸ Calculated at 2.91% increase to the 2013-2014 rate, the same percent increase as the \$6.52 to \$6.71 increase for 2012-2013.

¹⁴⁹ Calculated at 2.91% increase to the 2011-2013 amount.

¹⁵⁰ Burley, *supra* note 40, at p. 16. See also Wash. Rev. Code section 2.72.030(6) (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.")

\$1,613,855	414 wards at \$10.68 daily rate (2013-2014)
\$530,832	149 wards at \$10.68 daily rate (2013-2014)
\$1,660,699	414 wards at \$10.99 ¹⁵¹ daily rate (2014-2015)
\$597,691	149 wards at \$10.99 daily rate (2014-2015)
<u>\$53,225¹⁵²</u>	<u>petitioning costs</u>
\$4,456,302	TOTAL

Recommendation: This is the estimated cost for guardianship services for the 2013-15 biennium based on the recommended 1:20 staff-to-ward ratio private contractor model for the 414 wards of the 2011-2013 biennium follow, plus the 149 individuals currently in need of plenary public guardian services.

The Washington State Institute for Public Policy evaluated the costs and benefits of the public guardianship program in Washington over a 30-month period. The study found that while the average public guardianship cost per client over the 30-month period was \$7,907, the average decrease in residential costs per client from moves to less restrictive environments was \$8,131 (an average savings per client of \$7.47 per month, \$0.25 per day).¹⁵³

Based on these reported savings, the estimated costs for North Dakota persons without timely and effective guardianship services at a 1:20 staff-to-ward ratio follow:

\$1,651,632	414 persons at \$10.93 daily rate (2013-2014)
\$594,428	149 persons at \$10.93 daily rate (2013-2014)
\$1,698,476	414 persons at \$11.24 daily rate (2014-2015)
<u>\$611,287</u>	<u>149 persons at \$11.24 daily rate (2014-2015)</u>
\$4,555,823	TOTAL

The estimated costs for the 156 individuals of the additional unmet need without timely and effective guardianship services at a 1:20 staff-to-ward ratio follow:

\$622,354	156 persons at \$10.93 daily rate (2013-2014)
<u>\$640,006</u>	<u>156 persons at \$11.24 daily rate (2014-2015)</u>
\$1,262,360	TOTAL for 156 persons

¹⁵¹ Calculated at 2.91% increase to the 2013-2014 rate, the same percent increase as the \$6.52 to \$6.71 increase for 2012-2013.

¹⁵² Calculated at 2.91% increase to the 2011-2013 amount.

¹⁵³ Burley, *supra* note 40, at p. 16.

These conservative savings from decreased average residential costs do not include the savings reported by the Washington State Institute for Public Policy from decreased personal care hours for public guardianship clients (an average of 29 hours per client per month) compared with an increase in care hours for similar clients without a public guardian.¹⁵⁴ The Washington study also reported that 21% of public guardianship clients showed improvement in self-sufficiency (e.g., decreasing dependence on personal caregiver or nurse) during the 30-month period.¹⁵⁵

C. Alternative C for Delivery of Guardianship Responsibilities and Services

There are four models for public guardianship nationally: (1) a court model, (2) an independent state office, (3) a division of a social service agency, and (4) a county agency. 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. Alternative C is a choice of one of these four based on the strengths and weaknesses of each model described previously, and the particular needs of North Dakota.

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

¹⁵⁴ *Id.* at pp. 1, 19.

¹⁵⁵ *Id.* at pp. 1, 19-20.