

HUMAN SERVICES COMMITTEE
Representative Alon Wieland, Chairman
May 30 2012

**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 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

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 Pamela Teaster, Winsor Schmidt, Erica Wood, Sarah Lawrence & Marta Mendiando, *Public Guardianship: In the Best Interests of Incapacitated People?*, Praeger Publishers, pp. 23-25 (Copyright 2010 by Teaster, Schmidt, Lawrence, Mendiando, and the American Bar Association) (recommended 1:20 ratio: “No office of public guardian shall assume responsibility for any [incapacitated persons] beyond a ratio of 20 [incapacitated persons] per one paid professional staff.”), at pp. 138, 143, 152, 162.

See also Wash. Rev. Code section 2.72.030(6) (Washington’s office of public

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 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

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 31 states (not including North Dakota), the Uniform Veterans' Guardianship Act provides that no person may be a guardian for more than five wards at one time. Thakker, "The State of Veterans' Fiduciary Programs: What Is Needed to Protect Our Nation's Incapacitated Veterans?," 28 (2) *Bifocal* 1, 23 (Dec. 2006) [no person other than bank or trust company shall be guardian of more than five wards at one time, unless all the wards are members of one family" UVGA § 4 (1942)].

The Virginia Department for the Aging "contracted with the local [Virginia] programs for a maximum staff to ward ratio of 1:20 and the programs were able to maintain [an average of] this ratio, serving between 10 and 35 wards per evaluation year." Pamela Teaster & Karen Roberto, *Virginia Public Guardians and Conservator Programs: Evaluation of Program Status and Outcomes*, Blacksburg, VA: The Center for Gerontology, Virginia Polytechnic Institute and State University (December 2003), at p. 67.

A class action law suit in 1999 against a County Public Administrator providing public guardianship services in Nevada alleged that the

Guardian fails to engage sufficient numbers of professional personnel to be able to adequately assess and periodically reassess the needs of each of its individualized wards, to adequately formulate and periodically revise an individualized case plan for each of its wards, to insure the implementation of such case plans and to insure minimal professional interactions with each ward on an ongoing basis.

Schmidt, "Legal Framework for Evaluating Public Guardianship in Virginia," 57th Annual Scientific Meeting of the Gerontological Society of America, November 22, 2004, Washington, D.C., *citing* Tenberg v. Washoe County Public Administrator and Washoe County, No. CV99-01770 (Family Court, Second Judicial District Court, Nevada, filed March 15, 1999). The *Tenberg* case was settled.

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

(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 — 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

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).

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.

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, 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

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).

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

background checks and credit checks.

As recommended by the Wingspan Implementation Session, North Dakota “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.” 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

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”); Third National Guardianship Summit: Standards of Excellence, Recommendations #2.3, 2.5, 3.1, 3.5 relating to active court monitoring (Oct. 2011); Wingspan, *supra* note 26, at pp. 595-609 (Spring 2002) (seven recommendations on monitoring and accountability building on Wingspread) (see also related articles on pp. 611-1055).

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

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 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

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.

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 waivable 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.

The following recommendations are based on the concerns expressed by some of the guardianship stakeholders with the judicial process for the establishment of guardianships.

A. Mandatory Reporting of Vulnerable Adult Abuse and Neglect.

Recommendation: North Dakota should change from voluntary reporting of abuse or neglect to mandatory reporting of abuse or neglect. See section VI.B.2. for statutory language.

B. Right to Counsel; Legal Counsel for Indigents

Recommendation: North Dakota should adopt model recommendations regarding the right to counsel and the duties of counsel representing the proposed ward at the hearing. See section VI.B.4. for statutory language.

C. Emergency Guardian

³³ Over 25 states require the appointment of counsel in guardianship proceedings, generally making counsel available without charge to indigent respondents. Teaster, et al. (2010), *supra* note 23, at p. 20.

Recommendation: North Dakota should adopt section 311 of the Uniform Guardianship and Protective Proceedings Act related to emergency guardian. See section VI.E.2. for statutory language.

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

The Aging Services Division reports that the average cost of petitioning was \$1,474 in the previous biennium compared to the initial estimate of \$2,500, and depending on the ability to obtain pro bono services.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

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.

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 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,

³⁹ Pamela Teaster, Marta Mendiondo, Winsor Schmidt, Jennifer Marcum, & Tenzin Wangmo, *The Florida Public Guardian Programs: An Evaluation of Program Status and Outcomes*, Report for the Florida Department of Elder Affairs Statewide Public Guardianship Office, Lexington, KY: University of Kentucky Graduate Center for Gerontology (August 2009), p. 3.

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

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 (AHQR), Statistical Brief #354 (Jan. 2012).

⁴⁴ Douglas White, J. Randall Curtis, Bernard Lo & John Luce, "Decisions to Limit Life-Sustaining Treatment for Critically Ill Patients Who Lack Both Decision-Making Capacity and Surrogate Decision-Makers," 34(8) *Critical Care Medicine* 2053 (2006).

insufficient deinstitutionalization, excessive emergency care, and lack of timely health care. Guardianship studies from Florida, New York, and Virginia report annual savings by guardianship programs ranging from \$3.9 million to \$13 million. Half of the legally incapacitated public mental hospital patients without guardians in a Florida study could have been immediately discharged if a public guardian was available.⁴⁵ The Greater New York Hospital Association lost \$13 million in nine 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

⁴⁵ Schmidt & Peters, note 9.

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).

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.

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 model.⁵¹

Court model. The court model establishes the public guardianship office as an arm of the court that has jurisdiction over guardianship and conservatorship. . . . In 2007, statutory provisions revealed 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

⁵¹ Teaster, et al. (2010), *supra* note 23, at pp. 7, 23-25, 123, 151, 246-247. See also Winsor Schmidt, Kent Miller, William Bell, & Elaine New, *Public Guardianship and the Elderly* (Ballinger 1981); John Regan & Georgia Springer, U.S. Senate Special Committee on Aging, *Protective Services for the Elderly: A Working Paper*, Washington, D.C.: GPO (1977).

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

Independent [state office] model. The 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 IPs [incapacitated persons] or potential IPs. . . . 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. The placement of the public guardianship function in an agency providing direct services to IPs 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 44 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.

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." Teaster, et al. (2010), at p. 152.

. . . [S]ome of the states with potential conflict of interest had sought to alleviate the problem within the statutory scheme, for example, by providing that the agency is not to serve unless there is no other alternative available. The majority of statutes include such language today. Moreover, most specify that a key duty of the public guardian is to attempt to find suitable alternative guardians. In Florida, the statewide Office of Public Guardian must report on efforts to find others to serve within six months of appointment. 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 IPs. . . . 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 13 of the statutory schemes place 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

Recommendation: North Dakota should change from the hybrid the social service agency model and the county model (public administrator as guardian). See section VII for prioritized recommended alternatives.

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

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. . . ." Third National Guardianship Summit: Standards of Excellence, Recommendation #3.3 (2011), available at <http://www.guardianshipsummit.org/summit-guardian-standards-and-recommendations/>. The Third National Guardianship Summit, supported by grants from the State Justice Institute and the Borchard Center on Law and Aging, was a multi-disciplinary consensus conference of the National Guardianship Network and co-sponsoring organization delegates at the University of Utah College of Law. The National Guardianship Network includes the AARP Public Policy Institute, the ABA Commission on Law and Aging, the ABA Section of Real Property, Trust and Estate Law, the Alzheimer's Association, the American College of Trust and Estate Counsel, the Center for Guardianship Certification, the National Academy of Elder Law Attorneys, the National Center for State Courts, the National College of Probate Judges, and the National Guardianship Association. The co-sponsoring organizations included the ABA Commission on Mental and Physical Disability Law, the Arc, the Center for Social Gerontology, the National Adult Protective Services Association, the National Association of State Long-Term Care Ombudsman Programs, the National Association of State Mental Health Program Directors (Older Person Division), the National Committee for the Prevention of Elder Abuse, the National Disability Rights Network, and the Bazelon Center for Mental Health Law.

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; legal counsel for 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; 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

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 23, 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

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. See section VII for prioritized recommended alternatives.

2. Public Guardian Subjects

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

⁵⁷ Teaster, et al. (2010), *supra* note 23, 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).

⁶⁰ *Cf., e.g.,* Teaster, et al. (2010), *supra* note 23, at p. 235.

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 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

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.”)

⁶³ Teaster, et al. (2010), *supra* note 23, 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

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

See section VII for prioritized recommended alternatives.

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 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

Conference (Wingspread 1988), and the Second National Guardianship Conference (Wingspan 2002).

⁶⁴ Teaster, et al. (2010), *supra* note 23, at p. 165.

⁶⁵ See section II.

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

⁶⁷ Teaster, et al. (2010), *supra* note 23, at p. 19.

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 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."

Statutory language:

30.1-28-03. (5-303) Procedure for court appointment of a guardian of an incapacitated person.

1. Any person interested in the welfare of an allegedly incapacitated person may petition for the appointment of a guardian.

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, *supra* note 26, at p. 608.

⁷⁰ Vt. Stat. Ann. Section 14-3092(b).

⁷¹ Teaster, et al. (2010), *supra* note 23, at p. 165.

except that the office of public guardian may not petition for the appointment of the office of public guardian as guardian. No filing fee under this or any other section may be required when a petition for guardianship of an incapacitated person is filed by a member of the individual treatment plan team for the alleged incapacitated person or by any state employee in the performance of official duties.

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,

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).

New York, North Dakota, South Dakota)⁷⁵ without mandatory reporting 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.

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

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).

Statutory language:

50-25.2-03. ~~Voluntary~~ Mandatory reporting of abuse or neglect - Method of reporting.

1. A person who has reasonable cause to believe that a vulnerable adult has been subjected to abuse or neglect, or who observes a vulnerable adult being subjected to conditions or circumstances that reasonably would result in abuse or neglect, ~~may~~ shall report the information to the department or the department's designee or to an appropriate law enforcement agency. A law enforcement agency receiving a report under this section shall immediately notify the department or the department's designee of the report.

2. A person reporting under this section ~~may~~ shall make an oral or written report, as soon as possible. To the extent reasonably possible, a person who makes a report under this section shall include in the report:

- a. The name, age, and residence address of the alleged vulnerable adult;
- b. The name and residence address of the caregiver, if any;
- c. The nature and extent of the alleged abuse or neglect or the conditions and circumstances that would reasonably be expected to result in abuse or neglect;
- d. Any evidence of previous abuse or neglect, including the nature and extent of the abuse or neglect; and
- e. Any other information that in the opinion of the person making the report may be helpful in establishing the cause of the alleged abuse or neglect and the identity of the individual responsible for the alleged abuse or neglect.

50-25.2-13. Information, education, and training programs.

1. The department, in cooperation with county social service boards and law enforcement agencies, shall conduct a public information and education program. The elements and goals of the program must include:

- a. Informing the public regarding the laws governing the abuse or neglect of vulnerable adults, the ~~voluntary~~ mandatory reporting authorized by this chapter, and the need for and availability of adult protective services.
- b. Providing caregivers with information regarding services to alleviate the emotional, psychological, physical, or financial

stress associated with the caregiver and vulnerable adult relationship.

2. The department, in cooperation with county social service boards and law enforcement agencies, shall institute a program of education and training for the department, the department's designee, and law enforcement agency staff and other persons who provide adult protective services.

3. Notice and Hearing

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

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 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 *supra* note 53 for a description of the Third National Guardianship Summit, including the ten sponsoring and nine co-sponsoring national organizations.

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/pfanguage.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

guardian.”⁸³

Statutory language:

30.1-28-09. Notices in guardianship proceedings.

. . .

3. The notice must be printed with not less than double-spaced twelve-point type. 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.

4. Right to Counsel; Legal Counsel for 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 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

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

⁸⁴ Teaster, et al. (2010), *supra* note 23, at p. 20.

In North Dakota, the Commission on Legal Counsel for Indigents (CLCI) was legislatively established in 2005 pursuant to N.D. Code sections 54-61-01, et seq., “for the purpose of developing and monitoring a process for the delivery of state-funded legal counsel services for indigents which are required under the Constitution of North Dakota and the United States Constitution and any applicable statute or court rule. The commission shall provide indigent defense services for indigent individuals determined by the court to be eligible for and in need of those services pursuant to the standards and policies of the commission governing eligibility for such services.” N.D. Code section 54-61-01(1).

Cf., e.g., Application of Rodriguez, 169 Misc. 2d 929, 607 N.Y.S.2d 567 (Sup. Ct. 1992 (indigent person has constitutional right to counsel at civil competency proceeding)).

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

The Model Public Guardianship Act recommends the following

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, *supra* note 26, at p. 601.

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).

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 model recommendations regarding the right to counsel and the duties of counsel representing the proposed ward at the hearing.

Statutory language:

30.1-28-03. (5-303) Procedure for court appointment of a guardian of an incapacitated person.

. . .

3. Upon the filing of a petition, the court shall set a date for hearing on the issues of incapacity, appoint an attorney to act as ~~guardian ad litem~~ legal counsel and advocate for the proposed ward, appoint a physician or clinical psychologist to examine the proposed ward, and appoint a visitor to interview the proposed guardian and the proposed ward.

4. The duties of the attorney include:

⁸⁷ *Id.* at p. 167. Originally recommended by Regan & Springer, *supra* note 51.

⁸⁸ Teaster, et al. (2010), *supra* note 23, at p. 167. Originally recommended by Regan & Springer, *supra* note 51.

- a. Personally interviewing the proposed ward;
- b. Explaining the guardianship proceeding to the proposed ward in the language, mode of communication, and terms that the proposed ward is most likely to understand, including the nature and possible consequences of the proceeding, the right to which the proposed ward is entitled, and the legal options that are available; and
- c. Representing the proposed ward as ~~guardian ad litem advocate. If the appointed attorney or other attorney is retained by the proposed ward to act as an advocate, the attorney shall promptly notify the court, and the court may determine whether the attorney should be discharged from the duties of guardian ad litem.~~
- d. Zealously advocate the course of actions chosen by the proposed ward.

...

7. The proposed ward and attorney 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 and the proposed ward's attorney ~~has~~ have the right to present evidence, and to cross-examine witnesses, including the court-appointed physician and the visitor. The issue may be determined at a closed hearing if the proposed ward or the proposed ward's counsel so requests.

8. The court shall take all necessary steps to make the courts and court proceedings accessible and understandable to impaired persons. Accordingly, the court may convene temporarily, or for the entire proceeding, at any other location if it is in the best interest of the proposed ward.

9. 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 commission on legal counsel for indigents shall provide indigent legal counsel services for indigent individuals determined by the court to be eligible for and in need of those services in a guardianship proceeding pursuant to the standards and policies of the commission governing eligibility for such services.

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 trial by jury in guardianship proceedings.

Statutory language:

30.1-28-03. (5-303) Procedure for court appointment of a guardian of an incapacitated person.

7. The proposed ward and attorney 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 and the proposed ward's attorney ~~has~~ have the right to present evidence, and to cross-examine witnesses, including the court-appointed physician and the visitor. The issue may be determined at a closed hearing if the proposed ward or the proposed ward's counsel so requests. The proposed ward has a right of trial by jury.

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

⁸⁹ Teaster, et al. (2010), *supra* note 23, at p. 20. Kentucky, for example, makes a jury trial mandatory.

⁹⁰ *Id.* at pp. 157, 167.

Cf., e.g., Arnold A. v. Sanchez, 166 Misc. 2d 493, 634 N.Y.S.2d 343 (Sup. 1995) (state constitutional right to trial by jury in involuntary civil commitment).

⁹¹ *Id.* at pp. 20-21.

⁹² *Id.* at p. 21.

recommends “clear, unequivocal, and convincing evidence” as the standard of proof.⁹³

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.”

Statutory language:

30.1-28-04. (5-304) Findings - Order of appointment.

. . .

2. At a hearing held under this chapter, the court shall:

. . .

c. Appoint a guardian and confer specific powers of guardianship only after finding in the record based on clear, unequivocal, and convincing evidence that:

(1) The proposed ward is an incapacitated person;

(2) There is no available alternative resource plan that is suitable to safeguard the proposed ward's health, safety, or habilitation which could be used instead of a guardianship;

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. [references omitted] Public guardianship is easily conceptualized as the denaturalization or deportation of an individual’s legal autonomy as a citizen. [p.157]

Cf., e.g., Woodby v. INS, 385 U.S. 276, 285 (1967); Chaunt v. United States, 364 U.S. 350, 353 (1960); Schneiderman v. United States, 320 U.S. 118, 125, 159 (1943). The U.S. Supreme Court suggests that states are “free to use that standard” of clear, unequivocal, and convincing evidence. Addington v. Texas, 441 U.S. 418 (1979).

⁹⁴ See N.D. Cent. Code section 30.1-28-05(2); Teaster, et al. (2010), *supra* note 23, at p. 21.

(3) The guardianship is necessary as the best means of providing care, supervision, or habilitation of the ward; and

(4) The powers and duties conferred upon the guardian are appropriate as the least restrictive form of intervention consistent with the ability of the ward for self-care.

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, the American Psychological Association, and the 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

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 23, 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 guardian;
- (3) Recommendations, if any, on the powers to be granted to 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 24 pages for the mean length of child custody evaluations.¹⁰¹ Several

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 23, 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).

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

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.

Statutory language:

30.1-28-03. (5-303) Procedure for court appointment of a guardian of an incapacitated person.

. . .

7. The proposed ward and attorney 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

in Tallahassee, Florida," 25 *Gerontologist* 532, 537–38 (1985). See also Jennifer Moyer 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 Moyer 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 23, at p. 167 (from Regan & Springer to the U.S. Senate Special Comm. on Aging, *supra* note 51).

ward to attend the hearing. The proposed ward and the proposed ward's attorney ~~has~~ have the right to present evidence, and to cross-examine witnesses, including the court-appointed physician and the visitor. The issue may be determined at a closed hearing if the proposed ward or the proposed ward's counsel so requests. The proposed ward has a right of trial by jury. The proposed ward has the right to secure an independent medical or psychological examination relevant to the issues involved in the hearing at the expense of the state if the proposed ward is unable to afford such examination and to present a report of this independent examination or the evaluator's personal testimony as evidence at the hearing. At any examination, the proposed ward 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 chapter.

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 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

¹⁰³ Teaster, et al. (2010), *supra* note 23, 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.),

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 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

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 23, 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).

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.

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.

As recorded above in section I.C.3., some of the North Dakota guardianship stakeholders interviewed expressed some concerns about oversight and monitoring of guardians and guardian annual reports, and lack of such requirements as criminal background checks and credit checks. Twenty-seven states, not including North Dakota, have specific guardian background requirements like a credit check, or disqualify 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

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).

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.”).

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 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.

Statutory language:

30.1-28-03. (5-303) Procedure for court appointment of a guardian of an incapacitated person.

. . .

2. The petition for appointment of a guardian must state:

. . .

g. The occupation and qualifications of the proposed

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.

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

guardian, including the results of fingerprint, criminal history, and credit background checks;

. . .

6. The visitor shall have the following duties:

. . .

h. The visitor's written report must contain:

. . .

(2) A statement of the qualifications and appropriateness of the proposed guardian, including the results of fingerprint, criminal history, and credit background checks;

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. See section VII for prioritized recommended alternatives.

2. Conflict of Interest Raised/Remedied

¹¹⁵ Teaster, et al. (2010), *supra* note 23, 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.

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 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. See section VII for prioritized recommended alternatives.

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

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 Schmidt, et al., *supra* note 51, at pp. 16-17, 34, 38, 170, 174-175, 183-184, 193.

¹²⁰ Schmidt, et al., *supra* note 51, at p. 38.

¹²¹ Teaster, et al. (2010), *supra* note 23, at p. 162.

¹²² See Teaster, et al. (2010), *supra* note 23, at pp. 25, 202-207.

[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

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

¹²³ *Id.* at p. 25.

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.

powers.¹²⁸ The Act also allows the public guardian, as director of the office of the public guardian, to delegate guardian decision-making

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- (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 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.

functions to paid professional staff with an undergraduate degree, a degree in law, psychology, or social work, and certification.¹²⁹

Recommendation. North Dakota guardians and guardian organizations should comply with the ward visitation standards, North Dakota Guardianship (NDG) Standard 13(V) that the guardian of the person “shall visit the ward monthly” and NDG Standard 23(III) 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.”

Statutory language:

30.1-28-12. (5-312) General powers and duties of guardian.

...

5. When exercising the authority granted by the court, the guardian shall safeguard the civil rights and personal autonomy of the ward to the fullest extent possible by:

- a. Involving the ward as fully as is practicable in making decisions with respect to the ward's living arrangements, health care, and other aspects of the ward's care; ~~and~~
- b. Ensuring the ward's maximum personal freedom by using the least restrictive forms of intervention and only as necessary for the safety of the ward or others;
- c. Visiting the ward at least monthly; and
- d. Not assuming responsibility for any wards beyond a ratio of twenty wards per one paid professional staff.

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 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 ($p < 0.01$).”).

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

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

¹³⁰ Teaster, et al. (2010), *supra* note 23, 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.

The Third National Guardianship Summit (Oct. 2011) made the following recommendations related to active court monitoring:

Recommendation #2.3

The court should monitor the well-being of the person and status of the estate on an on-going basis, including, but not limited to:

- Determining whether less restrictive alternatives will suffice
- Monitoring the filing of plans, reports, inventories and accountings
- Reviewing the contents of plans, reports, inventories and accounting
- Independently investigating the well being of the person and status of the estate
- Ensuring the well-being of the person and status of the estate, improving the performance of the guardian, and enforcing the terms of the guardianship order.

Recommendation #2.5

The court should use available technology to:

- Assist in monitoring guardianships
- Develop a database of guardianship elements, including indicators of potential problems
- Schedule required reports

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 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

Statutory language:

30.1-28-12.1. Annual reports and accounts - Failure of guardian to file.

- Produce minutes from court hearings
- Generate statistical reports
- Develop online forms and/or e-filing
- Provide public access to identified non-confidential, filed documents.

Recommendation #3.1

The court should promote sound administrative practices relating to guardianship fees by:

- Encouraging the continuity of judicial experience and expertise on the probate bench, and encouraging specialization of probate courts in accordance with the National Probate Court Standards
- Actively monitoring the reasonableness of fiduciary fees
- Creating and maintaining training programs for participants in the guardianship process
- Collecting data regarding fiduciary fees and costs
- Promoting timely review and approval of fees
- Promoting electronic filing.

Recommendation #3.5

The court and court-appointed counsel should actively and timely monitor fiduciary fees.

Third National Guardianship Summit: Standards of Excellence, Recommendations #2.3, 2.5, 3.1, 3.5 (2011), available at

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

See *supra* note 53 for a description of the Third National Guardianship Summit, including the ten sponsoring and nine co-sponsoring national organizations.

¹³³ Teaster, et al. (2010), *supra* note 23, 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 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).

1. The court shall establish a system for active monitoring of guardianships, including the timely filing and review of guardians' annual reports.

2. The court may appoint a visitor to review an annual report, interview the ward, and make any other investigation the court directs.

3. If a guardian fails to file an annual report as required by section 30.1-28-12, fails to file a report at other times as the court may direct, or fails to provide an accounting of an estate, the court, upon its own motion or upon petition of any interested party, may issue an order compelling the guardian to show cause why the guardian should not immediately make and file the report or account, or be found in contempt for failure to comply.

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

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 23, 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).

Uniform Guardianship and Protective Proceedings Act related to emergency guardian.

Statutory language:

~~30.1-28-10. (5-310) Temporary guardians.~~

~~1. The court may 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.~~

~~2. A temporary guardian is entitled to the care and custody of the ward and the authority of any permanent guardian previously appointed by the court is suspended so long as a temporary guardian has authority. A temporary guardian may be removed at any time. A temporary guardian shall make any report the court requires. In other respects the provisions of this title concerning guardians apply to temporary guardians.~~

~~Appointment of temporary guardian does not have the effect of an adjudication of incapacity or the effect of limitation on the legal rights of the ward other than those specified in the court order. Appointment of a temporary guardian is not evidence of incapacity.~~

30.1-28-10. Emergency guardian.

1. If the court finds that compliance with the procedures of this chapter will likely result in substantial harm to the alleged incapacitated person's health, safety, or welfare, and that no other person appears to have authority and willingness to act in the circumstances, the court, on petition by a person interested in the alleged incapacitated person's welfare, may appoint an emergency guardian whose authority may not exceed sixty days and who may exercise only the powers specified in the order. Immediately upon receipt of the petition for an emergency guardianship, the court shall appoint an attorney to represent the alleged incapacitated person in the proceeding. Except as otherwise provided in subsection (2), reasonable notice of the time and place of a hearing on the petition must be given to the alleged incapacitated person's and any other persons as the court directs.

2. An emergency guardian may be appointed without notice to the alleged incapacitated person's and the alleged incapacitated person's attorney only if the court finds from affidavit or other sworn

testimony that the alleged incapacitated person will be substantially harmed before a hearing on the appointment can be held. If the court appoints an emergency guardian without notice to the alleged incapacitated person's, the alleged incapacitated person must be given notice of the appointment within 48 hours after the appointment. The court shall hold a hearing on the appropriateness of the appointment within five days after the appointment.

3. Appointment of an emergency guardian, with or without notice, is not a determination of the alleged incapacitated person's incapacity.

4. The court may remove an emergency guardian at any time. An emergency guardian shall make any report the court requires. In other respects, the provisions of this chapter concerning guardians apply to an emergency guardian.

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

A. North Dakota's Current Provisions for Guardianship and Public Administrator Responsibilities and Services

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

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.

specified cases.¹⁴¹

B. Extent of Coverage for Guardianship and Public Administrator Responsibilities and Services

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 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).

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),¹⁴⁶ compared with the recommended 1:20 ratio. One of the several public administrators serving as guardian reports a part-time guardian caseload ranging from 22 to 29 with wards housed 210 miles apart.

C. Recommended Prioritization of Public Guardianship Models for North Dakota

There are four models for public guardianship nationally: (1) a

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.

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 See section I.C.1., *supra*.

court model, (2) an independent state office, (3) a division of a social service agency, and (4) a county model.¹⁴⁷ North Dakota is currently a hybrid of the social service agency model and the county model (public administrator as guardian).¹⁴⁸ Stakeholders expressed concerns about lack of uniformity and statewide coverage in guardianship services.

I recommend the following prioritization of models for the timely and effective delivery of public guardianship services in North Dakota.

1. Independent State Office

Statutory language (modeled after the Commission on Legal Counsel for Indigents, N. D. Cent. Code chapter 54-21):

CHAPTER 54-6? COMMISSION ON PUBLIC GUARDIANSHIP

54-6?-01. Commission on public guardianship - Membership.

1. The commission on public guardianship is established for the purpose of developing and monitoring a process for the delivery of state-funded public guardianship services under the Constitution of North Dakota and the United States Constitution and any applicable statute or court rule. The commission shall provide public guardianship services for individuals determined by the court to be eligible for and in need of those services pursuant to the standards and policies of the commission governing eligibility for such services.

2. The commission consists of the following members:

a. Two members appointed by the governor, one of whom must be appointed from a county with a population of not more than ten thousand.

b. Two members of the legislative assembly, one from each house, appointed by the chairman of the legislative management.

c. Two members appointed by the chief justice of the supreme court, one of whom must be appointed from a county with a population of not more than ten thousand.

d. One member appointed by the board of governors of the state bar association of North Dakota.

3. Appointing authorities shall make their initial appointments to the commission before [date].

4. Initially, as determined by lot, one member will serve for one year,

¹⁴⁷ See section V, *supra*. See Regan & Springer, *supra* note 51; Schmidt, et al., *supra* note 51; Teaster, et al. (2010), *supra* note 23, at pp. 7, 123, 151, 246-247.

¹⁴⁸ See section V, *supra*; Teaster, et al. (2010), *supra* note 23, at pp. 247-248.

three members will serve for two years, and three members will serve for three years. At the expiration of the initial terms, the appointing authorities designated in subsection 2 shall make appointments for three-year terms. A member may not serve more than two consecutive three-year terms plus any initial term of less than three years.

5. Individuals appointed to the commission should have experience in guardianship services or other cases in which appointed guardian services are required or should have demonstrated a commitment to quality public guardianship matters. Membership of the commission may not include any individual, or the employee of that individual, who is actively serving as a judge, state's attorney, assistant state's attorney, guardian or public administrator, or law enforcement officer.

6. A member of the commission is entitled to reimbursement for travel and expenses as provided by law for other state officers. If not otherwise employed by the state of North Dakota, a member is entitled to receive per diem compensation of sixty-two dollars and fifty cents for each day devoted to attending meetings or performing other duties relating to the official business of the commission.

7. One of the two appointees of the chief justice, as determined by the chief justice, shall convene the commission's first meeting no later than [date]. The members of the commission shall select the chairman of the commission within thirty days after the commission's first meeting and annually thereafter.

54-6?-02. Commission responsibilities.

1. The commission shall:

a. Develop standards governing the delivery of public guardianship services, including:

(1) Standards governing eligibility for public guardianship services;

(2) Standards for maintaining and operating regional public guardian offices if established;

(3) Standards prescribing minimum experience, training, and other qualifications for contract public guardians and public guardians;

(4) Standards for contract public guardian and public guardian caseloads, provided that no contract public guardian and no public guardian shall assume responsibility for any ward beyond a ratio of 20 wards per one paid professional staff person;

(5) Standards for the evaluation of contract public guardians and public guardians;

(6) Standards for independent, competent, and efficient

representation of clients whose cases present conflicts of interest;

(7) Standards for the reimbursement of expenses incurred by contract public guardians; and

(8) Other standards considered necessary and appropriate to ensure the delivery of adequate public guardianship services.

b. Establish and implement a process of contracting for public guardianship services.

c. Establish public guardian offices in the regions of the state as the commission considers necessary and appropriate.

d. Establish a method for accurately tracking and monitoring caseloads of contract public guardians and public guardians.

e. Approve and submit a biennial budget request to the office of the budget.

2. Upon the request of a county or city, the commission may agree to provide public guardianship and public administrator services in the county or city for those cases in which the county or city is otherwise required to provide such services. Moneys received by the commission in accordance with an agreement under this subsection must be deposited in the public guardianship administration fund.

3. The commission shall adopt rules for the exercise of its authority under this chapter in a manner generally consistent with the notice and comment provisions of section 28-32-11.

54-6?-02.1. Contract services.

The commission on public guardianship shall contract for public guardianship services at a minimum level of no more than fifty percent of its biennial caseload.

54-6?-03. Commission director - Responsibilities.

1. The commission shall appoint a director who must be chosen on the basis of training, experience, and other qualifications considered appropriate. The director must be an attorney licensed and eligible to practice law in this state at the time of appointment and at all times during service as director. The director may be removed for cause by a majority vote of commission members.

2. The director shall:

a. Assist the commission in developing standards for the delivery of adequate public guardianship services;

b. Administer and coordinate delivery of public guardianship services and supervise compliance with commission standards;

c. Recommend the establishment of public guardian offices when considered necessary and appropriate to the delivery of adequate public guardianship services;

d. Conduct regular training programs for guardians, contract public guardians, public guardians, and public administrators;

e. Subject to policies and procedures established by the commission, hire the professional, technical, and support personnel, including attorneys, social workers, and other qualified professionals to serve as public guardians, considered reasonably necessary for the efficient delivery of public guardianship services;

f. Prepare and submit to the commission a proposed biennial budget for the provision of public guardianship services; an annual report containing pertinent data on the operation, needs, and costs of the public guardian contract system and any established public guardian offices; and any other information as the commission may require;

g. Submit the annual report required under subdivision f to the legislative council; and

h. Perform other duties as the commission may assign.

54-6?-04. Records, files, and information - Accessibility - Confidentiality.

Any file, record, or information regarding representation of a party under sections 54-6?-01 through 54-6?-03 which are attorney work-product or otherwise subject to any attorney-client privilege are confidential and may not be disclosed except in accordance with a court order or in response to applicable discovery rules. All other case-related records are exempt from disclosure except as otherwise provided in rules adopted by the commission. Information or records obtained by the commission relating to allegations of misconduct by an attorney in the employ of, or providing public guardian services for, the commission are exempt from disclosure except as otherwise provided in rules adopted by the commission unless and until the matter is referred for formal disposition under rules adopted by the supreme court.

2. County Model

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 the reported 1:22-29 on a part-time basis to a 1:20 staff-to-client ratio on a full-time basis.

Statutory language:

11-21-01. Public administrator - Appointment - Term of office. The presiding judge of the judicial district in which a county is located ~~may~~ shall, after consultation with the judges of the judicial district, appoint a state-funded public administrator for that county. A public administrator may be a corporation or limited liability company. The initial appointments under this section may be made upon completion of the terms of public administrators elected in 1984. The public administrator shall hold office for four years and until a successor is appointed and qualified. The presiding judge may appoint a single public administrator to serve more than one county within the district court's jurisdiction. No public administrator shall assume responsibility for any ward beyond a ratio of 20 wards per one paid professional staff person.

3. Alternative County Model¹⁴⁹

Statutory language:

Public Guardianship Act

Section 1. Title

This Act shall be known as the Public Guardianship Act.

Section 2. Declaration of Policy and Legislative Intent

The legislature of the state of North Dakota recognizes that some persons in the state, because of incapacity, are unable to meet varying essential requirements for their health or personal care or to manage varying essential aspects of their financial resources. The legislature finds that private guardianship is inadequate where there are no willing and responsible family members or friends to serve as guardian, and where the incapacitated person does not have adequate income or wealth for the compensation of a private guardian and payment of court costs and fees associated with the appointment proceeding. The legislature intends through this Act to establish the office of public guardian to furnish guardianship services at reduced or

¹⁴⁹ Based on the Model Public Guardianship Act, Teaster, et al., *supra* note 23, at pp. 147-172.

no cost for individuals who need them and for whom adequate services otherwise may be unavailable.

The legislature intends to treat liberty and autonomy as paramount values for all state residents and to authorize public guardianship only to the minimum extent necessary to provide for health or safety, or to manage financial affairs, when the legal conditions for appointment of a guardian are met. The legislature intends to establish public guardianship that permits incapacitated persons to participate as fully as possible in all decisions that affect them; that assists such persons to regain or develop their capacities to the maximum extent possible; and that accomplishes such objectives through the use of the least restrictive alternatives. This Act shall be liberally construed to accomplish these purposes.

Section 3. Definitions

- (a) The definitions found in chapter 30.1-26 and chapter 30.1-28 shall apply to this Act.
- (b) "Court" means [the local or county court or branch having jurisdiction in matters relating to adult guardianships].
- (c) "Office" means the office of public guardian.
- (d) "Paid professional staff" means an individual employed by the office of public guardian who exercises decision-making authority for incapacitated persons for whom the office is serving as guardian.
- (e) "Public guardian" means the director of the office of public guardian.
- (f) "Values history survey" means a form documenting an individual's values about health care.

Section 4. Establishment of Office

- (a) Establishment of Office. Each county within the state shall establish an independent office of public guardian. The office may not be established by contract.
- (b) 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.
- (c) Authority. The office of public guardian is authorized to take any actions on behalf of an incapacitated person that a private guardian may take, except as otherwise provided in this Act.
- (d) Effectiveness; Staffing Ratio. No office of public guardian shall assume responsibility for any incapacitated persons beyond a ratio of twenty incapacitated persons per one

paid professional staff. When this ratio has been reached, the office of public guardian may not accept further appointments. The office shall adopt procedures to ensure that appropriate notice is given to the court.

Section 5. Appointment of Public Guardian

- (a) Appointment. The county board of commissioners shall appoint a public guardian to administer the office of public guardianship. The public guardian shall be appointed for a term of five years. The public guardian shall be a licensed attorney, shall be hired based on a broad knowledge of law, human development, sociology, and psychology, and shall have business acuity.
- (b) Part-time Appointments. If the needs of the local jurisdiction do not require that a person hold only the position of public guardian, the county board of commissioners may appoint an individual as public guardian on a part-time basis with appropriate compensation, provided that no other part-time position occupied by such individual may present any conflict of interest.
- (c) Compensation. The county board of commissioners shall fix the compensation for the position of public guardian.
- (d) Succession in Office. When a person is appointed as public guardian, he or she succeeds immediately to all rights, duties, responsibilities, powers, and authorities of the preceding public guardian.
- (e) Continuation of Staff Activities. When the position of public guardian is vacant, staff employed by the office shall continue to act as if the position were filled.
- (f) Time Limit to Fill Vacancy. When the position of public guardian becomes vacant, the county board of commissioners shall appoint a successor in office within forty-five days.

Section 6. Bond Required

- (a) General Bond. The office of public guardian shall file with the clerk of the court in which the office is to serve a general bond in the amount fixed by the county board of commissioners, payable to the state or to people of the county in which the court is seated and issued by a surety company approved by the presiding judge of the judicial district in which the county is located. The bond shall be

- conditioned upon the faithful performance by the office of public guardian of duties as conservator or guardian.
- (b) Nature of Bond. The general bond and oath of the public guardian is in lieu of the bond and oath required of a private conservator or guardian.

Section 7. Powers and Duties

- (a) Appointment by Court. The office of public guardian may serve as guardian and/or conservator, after appointment by a court pursuant to the provisions of chapter 30.1-26 and chapter 30.1-28.
- (b) Same Powers and Duties. The office of public guardian shall have the same powers and duties as a private guardian or conservator, except as otherwise limited by law or court order.
- (c) Delegation of Powers and Duties. 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 or university; have a degree in law, social work, or psychology; and be certified by the Center for Guardianship Certification.
- (d) 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 incapacitated person, to the extent known.
 - (2) Establish criteria and procedures for the conduct of and filing with the court for each incapacitated person 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 incapacitated person 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 incapacitated person 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 incapacitated person 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 incapacitated person 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 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 biennial 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 commissioners and the state court administrator office.
- (e) 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.

Section 8. Persons Eligible for Services

- (a) Eligible persons. 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.

Section 9. Allocation of Costs

- (a) Determination of Costs. If the office is appointed guardian or conservator for an incapacitated person, the administrative costs of the public guardianship services and the costs incurred in the appointment procedure shall not be charged against the income or the estate of the incapacitated person, unless the court determines at any time that the person is financially able to pay all or part of such costs.
- (b) Financial Ability. The ability of the incapacitated person to pay for administrative costs of the office or costs incurred in the appointment procedure shall be measured according

- to the person's financial ability to engage and compensate a private guardian. The ability is dependent on the nature, extent, and liquidity of assets; the disposable net income of the person; the nature of the guardianship or conservatorship; the type, duration, and the complexity of the services required; and any other foreseeable expenses.
- (c) Investigation of Financial Ability. The office shall investigate the financial status of a person for whom a court is considering the appointment of the office. In connection with such investigation, the office may require the alleged incapacitated person to execute and deliver written requests or authorizations to provide the office with access to records of public or private sources, otherwise confidential, needed to evaluate eligibility. The office may obtain information from any public record office of the state or of any subdivision or agency thereof upon request, without payment of any fees ordinarily required by law.
 - (d) In any proceeding for appointment of the office, or in any proceeding involving an individual for whom the office has been appointed conservator or guardian, the court may waive any court costs or filing fees.

Section 10. Right to Services

- (a) Right to Services. Each incapacitated person served by the office has the right to prompt and adequate personal and medical care, treatment, and rehabilitative services to meet needs for protection from physical injury, illness, or disease, and for restoration of the abilities to care for oneself and to make one's own informed decisions about care and treatment services.
- (b) Petition for Order to Provide Services. If the office is unable to secure such services out of funds available from the incapacitated person's estate and income and other private and governmental benefits to which he or she is entitled, the office or the incapacitated person may petition the court for an order requiring the state or to provide necessary funds for services that would implement the individual's right to services. Such petition shall provide complete details concerning funds and other benefits at the public guardian's disposal and justification for the necessity and appropriateness of the services for which finances are unavailable. Upon receipt of the petition, the court shall schedule the matter for a hearing within twenty

days and cause the petition and notice of the hearing to be served upon the public guardian, the incapacitated person, the person's attorney, and appropriate state officials. In preparation for the hearing, the appropriate state officials shall have access to relevant care and treatment records of the individual. At the hearing, the burden of proof by a preponderance of the evidence shall be upon the petitioning party.

- (c) Order. At the conclusion of the hearing, the court shall enter an order dismissing the petition or requiring the state to provide the necessary funds for any services to which the individual has a right under subsection (a).

Section 11. Duties of State Court Administrator Office

- (a) The state court administrator office shall provide training and support for the local offices of public guardian; encourage consistency in data collection, forms, and reporting instruments; and facilitate the exchange of information and promising practices.
- (b) The state court administrator office shall contract with an appropriate research or public policy entity with expertise in gerontology, disabilities, and public administration for an evaluation of the local offices of public guardian.
 - (1) The evaluation shall include an analysis of costs and offsetting savings to the state, and other benefits from the delivery of public guardianship services.
 - (2) An initial report is due two years following the effective date of this Act and thereafter reports with recommendations are due to the governor and the legislature four years following the effective date of the Act.

Section 12. Statewide Public Guardianship Advisory Committee

- (a) The governor shall establish a public guardianship advisory committee consisting of the following members:
 - (1) Two persons designated by the supreme court;
 - (2) Two senators and two members of the House of Representatives from the state legislature;
 - (3) One person from the state agency on aging, and one person from the area agency on aging;
 - (4) One person from the state protection and advocacy system, and one person from the state developmental disabilities council;

- (5) One person from the state long-term care ombudsman;
 - (6) One person from the state guardianship association; and
 - (7) One person from the state bar association.
- (b) Members of the committee shall each serve a three-year term, subject to renewal for no more than one additional three-year term; except that the first appointments to the committee shall be for terms of varying duration, as specified by the governor. A vacancy occurring other than by expiration of term shall be filled for the unexpired term.
 - (c) Members shall receive no compensation for their services, but may be reimbursed for travel and other expenses incurred in the discharge of their duties.
 - (d) The purpose of the committee shall be to report to and advise the governor and the legislature on the means for effectuating the purposes of this Act.
 - (e) The meetings of the advisory committee shall be open to the public, with agendas published in advance, and minutes available to the public. The public notice of all meetings shall indicate that accommodations for disability will be available on request.

Section 14. Authorization of Appropriations

To carry out the purposes of this Act, there is authorized to be appropriated \$ _____ for the fiscal year ending _____, \$ _____ for the fiscal year ending _____, and \$ _____ for the fiscal year ending _____.

Section 15. Effective Date

This Act takes effect _____.

4. Judicial Model¹⁵⁰

Statutory language:

Office of Public Guardianship

Section 1. Intent.

¹⁵⁰ Based on Wash. Rev. Code chapter 272.

In establishing an office of public guardianship, the legislature intends to promote the availability of guardianship services for individuals who need them and for whom adequate services may otherwise be unavailable. The legislature reaffirms its commitment to treat liberty and autonomy as paramount values for all Washington residents and to authorize public guardianship only to the minimum extent necessary to provide for health or safety, or to manage financial affairs, when the legal conditions for appointment of a guardian are met. It does not intend to alter those legal conditions or to expand judicial authority to determine that any individual is incapacitated.

Section 2. Definitions.

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

- (1) "Office" means the office of public guardianship.
- (2) "Public guardian" means an individual or entity providing public guardianship services.
- (3) "Public guardianship services" means the services provided by a guardian or limited guardian appointed under chapters 30.1-26 and 30.1-28, who is compensated under a contract with the office of public guardianship.
- (4) "Long-term care services" means services provided through the department of human services either in a hospital or skilled nursing facility, or in another setting under a home and community-based waiver authorized under 42 U.S.C. Sec. 1396n.

Section 3. Office of public guardianship created – Appointment of public guardianship administrator.

- (1) There is created an office of public guardianship within the administrative office of the courts.
- (2) The supreme court shall appoint a public guardianship administrator to establish and administer a public guardianship program in the office of public guardianship. The public guardianship administrator serves at the pleasure of the supreme court.

Section 4. Public guardianship program – Contracts for public guardianship services – Adoption of eligibility criteria and minimum standards of practice – Duties of office – Report to legislature, study.

The public guardianship administrator is authorized to establish and administer a public guardianship program as follows:

- (1)(a) The office shall contract with public or private entities or individuals to provide public guardianship services to persons age eighteen or older whose income does not exceed two hundred percent

of the federal poverty level determined annually by the United States department of health and human services or who are receiving long-term care services through the North Dakota department of human services. Neither the public guardianship administrator nor the office may act as public guardian or limited guardian or act in any other representative capacity for any individual.

(b) Public guardianship service contracts are dependent upon legislative appropriation. This chapter does not create an entitlement.

(c) The initial implementation of public guardianship services shall be on a pilot basis in a minimum of two geographical areas that include one urban area and one rural area. There may be one or several contracts in each area.

(2) The office shall, within one year of the commencement of its operation, adopt eligibility criteria to enable it to serve individuals with the greatest need when the number of cases in which courts propose to appoint a public guardian exceeds the number of cases in which public guardianship services can be provided. In adopting such criteria, the office may consider factors including, but not limited to, the following: Whether an incapacitated individual is at significant risk of harm from abuse, exploitation, abandonment, neglect, or self-neglect; and whether an incapacitated person is in imminent danger of loss or significant reduction in public services that are necessary for the individual to live successfully in the most integrated and least restrictive environment that is appropriate in light of the individual's needs and values.

(3) The office shall adopt minimum standards of practice for public guardians providing public guardianship services. Any public guardian providing such services must be certified by the Center for Guardianship Certification.

(4) The office shall require a public guardian to visit each incapacitated person for which public guardianship services are provided no less than monthly to be eligible for compensation.

(5) The office shall not petition for appointment of a public guardian for any individual. It may develop a proposal for the legislature to make affordable legal assistance available to petition for guardianships.

(6) The office shall not authorize payment for services for any entity that is serving more than twenty incapacitated persons per certified professional guardian.

(7) The office shall monitor and oversee the use of state funding to ensure compliance with this chapter.

(8) The office shall collect uniform and consistent basic data elements regarding service delivery. This data shall be made available to the

legislature and supreme court in a format that is not identifiable by individual incapacitated person to protect confidentiality.

(9) The office shall report to the legislature on how services other than guardianship services, and in particular services that might reduce the need for guardianship services, might be provided under contract with the office by [date]. The services to be considered should include, but not be limited to, services provided under powers of attorney given by the individuals in need of the services.

(10) The office shall require public guardianship providers to seek reimbursement of fees from program clients who are receiving long-term care services through the department of human services to the extent, and only to the extent, that such reimbursement may be paid, consistent with an order of the superior court, from income that would otherwise be required by the department to be paid toward the cost of the client's care. Fees reimbursed shall be remitted by the provider to the office unless the public guardianship administrator directs a different disposition.

(11) The office shall require public guardianship providers to certify annually that for each individual served they have reviewed the need for continued public guardianship services and the appropriateness of limiting, or further limiting, the authority of the public guardian under the applicable guardianship order, and that where termination or modification of a guardianship order appears warranted, the superior court has been asked to take the corresponding action.

(12) The office shall adopt a process for receipt and consideration of and response to complaints against the office and contracted providers of public guardianship services. The process shall include investigation in cases in which investigation appears warranted in the judgment of the administrator.

(13) The office shall contract for a study. An initial report is due two years following [date], and a second report by [date]. The study shall analyze costs and offsetting savings to the state from the delivery of public guardianship services.

(14) The office shall develop standardized forms and reporting instruments that may include, but are not limited to, intake, initial assessment, guardianship care plan, decisional accounting, staff time logs, changes in condition or abilities of an incapacitated person, and values history. The office shall collect and analyze the data gathered from these reports.

(15) The office shall identify training needs for guardians it contracts with, and shall make recommendations to the supreme court and the legislature for improvements in guardianship training. The office may offer training to individuals providing services pursuant to this chapter or to individuals who, in the judgment of the administrator or the

administrator's designee, are likely to provide such services in the future.

(16) The office shall establish a system for monitoring the performance of public guardians, and office staff shall make in-home visits to a randomly selected sample of public guardianship clients. The office may conduct further monitoring, including in-home visits, as the administrator deems appropriate. For monitoring purposes, office staff shall have access to any information relating to a public guardianship client that is available to the guardian.

(17) During the first five years of its operations, the office shall issue annual reports of its activities.

Section 5. Waiver of court costs.

The courts shall waive court costs and filing fees in any proceeding in which an incapacitated person is receiving public guardianship services funded under this chapter.

Section 6. Administrator may develop rules.

The public guardianship administrator may develop rules to implement this chapter. The administrator shall request and consider recommendations from an advisory committee in the development of rules.

Section 7. Severability.

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

D. Estimated Costs

The Developmental Services Division reports \$2,052,416 for 414 wards during the 2011-2013 biennium, including \$51,720 in petitioning costs.¹⁵¹ 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

¹⁵¹ Testimony of Tina Bay, Director, Developmental Disabilities Division, Human Services Committee, Oct. 25, 2011.

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:

| | |
|-------------------------------|---|
| \$1,044,170 | 414 wards at \$6.91 ¹⁵² daily rate (2013-2014) |
| \$375,800 | 149 wards at \$6.91 daily rate (2013-2014) |
| \$1,074,392 | 414 wards at \$7.11 ¹⁵³ daily rate (2014-2015) |
| \$386,677 | 149 wards at \$7.11 daily rate (2014-2015) |
| <u>\$53,225¹⁵⁴</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 1:20.¹⁵⁵ The certified professional

¹⁵² 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.

¹⁵³ 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.

¹⁵⁴ Calculated at 2.91% increase to the 2011-2013 amount.

¹⁵⁵ 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.")

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:

| | |
|-------------------------------|--|
| \$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 \$10.99 ¹⁵⁶ daily rate (2014-2015) |
| \$597,691 | 149 wards at \$10.99 daily rate (2014-2015) |
| <u>\$53,225¹⁵⁷</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, 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).¹⁵⁸

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 |

¹⁵⁶ 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.

¹⁵⁷ Calculated at 2.91% increase to the 2011-2013 amount.

¹⁵⁸ Burley, *supra* note 40, at p. 16.

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 |

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.¹⁵⁹ 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.¹⁶⁰

VIII. Guardianship Cases

In the two national public guardianship studies in which I participated, we tried to not only involve all of the third party stakeholders, but also to interview persons under guardianship in order to get the first person perspective. In lieu of interviewing persons under guardianship in North Dakota, please consider the following deidentified North Dakota case accounts that are generously provided.

From DKK Guardian and Conservatorship Services Inc., Jamestown, North Dakota:

52 year old gentleman from Cass County. Normal life, ran a construction company. Got a brain stem infection and now is paralyzed on one side and has an addiction to pain pills. His behaviors and actions required him to have a guardian. His entire social security check pays for his mortgage. He cannot afford utilities, insurance, etc. Since appointed guardians, we have helped him get Medicaid, food stamps, fuel assistance, average 400 + miles per month to assist with medical appointments, placement interviews/issues, daily phone calls to assure safety.

¹⁵⁹ *Id.* at pp. 1, 19.

¹⁶⁰ *Id.* at pp. 1, 19-20.

Placement is pending. Upon moving to placement, we will have to clean out his entire home, place belongings in a storage unit-paid for by us, and sell the property. There is no money for us to obtain our monthly fee.

89 year old woman. Lives alone in the middle of nowhere. Home is a disaster. No running water, sewage system, toilet, etc. Rotten food, cat feces, garbage, and clutter everywhere. Since appointed guardians, we have weekly taken out groceries to her and as needed (150 miles round trip), called daily for reminders to take medications, taken her to several medical appointments (180 miles round trip), built new steps out of lumber we have, met with water, sewer, and fuel companies and set up services. She greets anyone that comes up to the front yard with a shotgun. She gets \$557 per month social security. There is no money for us to obtain our monthly fee.

20 year old male. Spent the majority of his youth and adult years institutionalized. Within one year, he had obtained numerous legal charges (terrorizing x 2, writing checks out of a non-existent account x 3, NSF x 2, assault x 2) and several credit cards debts. He was sent to the NDSH for the first 10 months, he was out for two months, and was also sent to the ND State Penitentiary for 18 months. When institutionalized, he does not get his social security but yet we still are responsible to get him to his court hearings, depositions, trial dates, and contact creditors, etc. re: unpaid debts. There is no money for us to obtain our monthly fee.

65 year old woman. Lives in her own home. Constantly calls her bill companies and changes information, signs herself up for things she does not need that cost more money than she has. Her only source of income is social security. We have put in fans, painted her windows, put in a door, built new steps and downstairs railing, taken her to several out of town medical appointments, and spent several hours on the phone dis-enrolling her from programs she has set herself up for and changing the billing address back to our address. She pays us \$35 per month for a guardian fee as she is unable to pay the 5% we charge.

18 year old male. Homeless and does not receive any income. Is able to maintain a job for short periods of time and uses the small amount of income for food. We got him an apartment in the homeless shelter and we donated him several items (microwave, small fridge, foreman grill, sandwich maker, dishes, clothes, shoes, winter clothes). We have made several trips to Fargo to get him items needed. He does not have a phone. There is no money for us to obtain our monthly fee.

From Guardian, Fiduciary & Advocacy Services (GFAS), Fargo, North Dakota (*names changed to maintain confidentiality):

1. John* was an 80 year old man with dementia whose only living relative was an adult son who was too far away to help him with any of his day to day needs. John was always a frugal man, scrimping and saving every dollar he earned throughout his career as a school janitor. About two years ago he was befriended by a seemingly nice and helpful young lady who he ended up naming as his durable power of attorney. Unfortunately, the young lady who seemed so sincere ended up cashing in John's life savings and taking more than \$150,000 worth of his assets, including his home. She used John's money to buy herself a brand new car, a camper, a piece of vacation land to put the camper on, to take her and her family on lavish vacations and even to make huge improvements to her own home.

Thankfully a local banker picked up on the suspicious activity and made a referral that ultimately led to the appointment of our agency as John's Conservator. We were able to put an end to the financial exploitation that was taking place and to protect what assets John had left from any further exploitation. We filed both criminal and civil lawsuits against the perpetrator in the hopes some of John's life-long savings will be able to be recovered, as well as his home.

2. Carol* is an 83 year old woman who is living a comfortable and fulfilling life in a local nursing home. She is surrounded by people she considers friends, people who care about her, and who make great efforts to ensure that she is well taken care of. This is a drastic change from the lifestyle

she was living just a few short years ago when she had to be removed from an abusive household.

Carol had been living with her adult son and was relying on her retirement benefits from Social Security to pay for her groceries and other personal needs. Unfortunately, Carol's son was taking her Social Security check from her each month and leaving her with nothing to eat. She was admitted to the hospital multiple times for malnutrition and severe injuries from being beaten. She was deathly afraid of her son and insisted that none of the hospital staff approach him about her circumstances, as that would anger him. On her last admission to the hospital, she weighed less than 90 pounds and her injuries were even more severe than on previous admissions. It was then that the hospital staff insisted that she not return to the home and they pursued a guardianship. Our agency was appointed and a restraining order was obtained to protect her from her son.

We helped to find an appropriate place for Carol to live where she could recover and regain her strength without the threat of her son's violence. She is no longer suffering from malnutrition, she is no longer living in fear from her abusive son, and she is back in control of her hard-earned retirement funds.

3. Helen* was a recent widow who had relied on her husband for all of her care. She had severe dementia and had no children or siblings to look out for her after the loss of her husband. It was a concerned neighbor who made the call that got our agency involved in Helen's life. She had noticed that Helen had been wearing the same clothes since her husband's funeral several weeks earlier and that she had lost a significant amount of weight. She in fact weighed less than 80 pounds when she arrived at the hospital to be evaluated.

Our agency coordinated Helen's transfer from the hospital to a more structured environment for her to live in, where she would be sure to receive 3 full meals every day, be reminded to change her clothes, and get all the medications she needed. We took care of going through her apartment, making sure her belongings were brought

to her new place of residence, her apartment was cleaned and notice given to the landlord, telephone services transferred and all of the other usual tasks that go into moving from one place to another. Our staff continues to be involved in Helen's life, attending her care conferences, communicating regularly with her care providers, shopping for any personal items she needs, and making sure her care is paid for every month. She has been thriving in her new environment and in fact, just celebrated her 100th birthday!

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