

**PROPOSAL FOR A STUDY
OF GUARDIANSHIP SERVICES
FOR VULNERABLE ADULTS
IN NORTH DAKOTA**

Winsor C. Schmidt, J.D., LL.M.
Human Services Committee
October 25, 2011

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FOR VULNERABLE ADULTS
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Introduction and Scope of Proposal

- Response to August 31, 2011 invitation from North Dakota Legislative Management to submit a proposal for consultant services for assistance in a study
- Table of Contents, p. 2 of proposal
- Specific areas the study is to address

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1. The Need for Guardianship Services in North Dakota

- (a) Review the number of guardians appointed by the courts and*
- (b) identify the unmet need for guardian services.*

- None of the 10 North Dakota respondents to a 2009 online survey of judges/judicial officials, court managers, and court clerk/registrar conducted through the Nat'l Assn. of Court Management and the Nat'l College of Probate Judges reported that they could provide "good" data about the number of adult guardianship case filings and the current guardianship caseload.
- 15 states have some provision for guardian licensing, certification, or registration: Alaska, Arizona, California, Florida, Georgia, Illinois, Nevada, New Hampshire, New York, New Jersey, North Carolina, Oregon, Texas, Utah, and Washington.
- A few states, like Washington, have a complete, publicly accessible, professional guardian (and agency guardian) list.

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1. The Need for Guardianship Services in North Dakota

- Since the *North Dakota Court System 2010 Annual Report* (p. 13) states that probate/guardian cases in District Courts increased by 13%, the number of guardians (unduplicated count) appointed by the courts might be obtained:
 - (a) working with the state court administrator and the new Odyssey Management System, and/or
 - (b) with each District Court and the guardianship annual report process.
- I conducted the first published studies of statewide unmet need for guardianship services in Florida and Tennessee.
- The same methodology of systematically surveying the key informants can be used to determine the extent of unmet need of identifiable (but not identified) persons in need of a guardian.

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1. The Need for Guardianship Services in North Dakota

- An alternative or supplemental approach to identifying unmet need for guardianship services is to extrapolate (a) from the published studies of unmet need and (b) the known state populations to (c) the state population of North Dakota.
- I used this approach to identify the unmet need for guardianship services in Washington State as a member of the Washington State Bar Association (WSBA) Elder Law Section Public Guardianship Task Force.
- 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.
- I also used this extrapolation approach to estimate and publish the number of New Yorkers under guardianship.

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1. The Need for Guardianship Services in North Dakota

Part (1) of the study will

- (a) review the number of guardians appointed by the courts in North Dakota and
- (a) identify the unmet need for guardianship services in the state.

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2. The Establishment of Guardianships

- (a) *Review the services available for assistance with the establishment of guardianships and*
- (b) *the process for the establishment of guardianships and*
- (c) *recommend proposed changes.*

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2. The Establishment of Guardianships

The North Dakota Legislative Council's 2003–2004 interim Criminal Justice Committee study of guardianship included standards and practices for guardians and funding for programs for individuals with mental illness, vulnerable elderly adults, and individuals with traumatic brain injuries. One focus of the committee was procedural guardianship issues.

The 2005 Legislative Assembly approved bills:

- (a) (Senate Bill 2028) authorizing the Department of Human Services to contract for the establishment and maintenance of a guardianship services system with an appropriation of \$40,000 (continued in 2005–2007 and 2007–2009),
- (b) (Senate Bill 2029) establishing a procedure for the current guardian or any interested person to file a motion for the appointment of a successor guardian, and
- (c) (Senate Bill 2030) providing for an annual report requirement for guardians and conservators.

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2. The Establishment of Guardianships

- I have 33 years of experience reviewing services to assist with establishment of guardians, the process for establishment of guardianships, and successful recommendations for changes.
- The reviewing experience includes 3 books, 26 book chapters and journal articles, 11 final reports, and 9 funded studies of guardianship in the 50 states and the District of Columbia, as well as numerous related presentations, consultations, and service responsibilities.
- One of my most recent reviewing experiences was the national study, *Public Guardianship: In the Best Interests of Incapacitated People?* (Praeger Pub. 2010) that reviews the establishment of guardianships in the 50 states and the District of Columbia, identifies 25 principal findings, makes 29 specific recommendations, and formulates them in an annotated Model Public Guardianship Act that updates my annotated Model Public Guardianship Statute from 1981.*

*Schmidt, Miller, Bell, & New. *Public Guardianship and the Elderly*, Ballinger Pub. Co. (1981). See also Schmidt, Teaster, Wood, Lawrence & Mendiondo, "Development and Trends in the Status of Public Guardianship: Highlights of the 2007 National Public Guardianship Study," 33 (5) *Mental & Physical Disability Law Reporter* 728–732 (Sept. Oct. 2009).

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2. The Establishment of Guardianships

Part (2) of the study will review:

- (a) the services available for assistance with the establishment of guardianships and
- (b) the process for the establishment of guardianships in North Dakota and
- (c) recommend proposed changes based on comparison with the 2010 Model Public Guardianship Act and other national standards [e.g., Uniform Guardianship & Protective Proceedings Act, Nat'l Probate Court Standards, Nat'l Guardianship Conference (Wingspread 1988), 2nd Nat'l Guardianship Conference (Wingspan 2002), 3rd Nat'l Guardianship Summit (Oct. 2011)]

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3. Petitioning and Other Costs

Identify petitioning and other costs associated with providing guardianship and public administrator (cf. slide 31) services and financial assistance available.

- Jan Engan, Director of the Aging Services Division, North Dakota Dept. of Human Services, testified on August 2, 2011 to the Human Services Committee that the average cost of petitioning is \$1,320, compared to the initial estimate of \$2,500, and depending on the ability to obtain pro bono services.

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3. Petitioning and Other Costs

I conducted the first 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. (Schmidt, et al., *Probate Law Journal*, 1988)
- The annual public guardian cost per client in Virginia in 1997 was \$2,662.00. (Schmidt, et al., 1997; Teaster, Schmidt, et al., *Journal of Ethics, Law & Aging*, 1999)
- The average annual public guardian cost per client in Virginia in 2002 was \$2,955.00. (Teaster & Roberto, 2003)
- The most recent research reports an average annual cost per public guardian client in Florida in 2007–2008 of \$2,648.00. (Teaster, Mendiondo, Schmidt, et al., 2009)
- Annual operating cost per living client in NYC is \$8,848.60 (Guardianship Project, Vera Institute of Justice, 2010)

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3. Petitioning and Other Costs

- 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. (Burns, et al., *Health Affairs*, 2010)
- The elderly population is 9% of the Medicaid population nationally, but accounts for 27% of program costs.
- 20% of Medicaid expenditures nationally are for nursing facility care, and 8% are for home health care.
- The median intensive care unit (ICU) length of stay for incapacitated patients without a surrogate is twice as long as other ICU patients. (White, et al., *Critical Care Medicine*, 2006)

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3. Petitioning and Other Costs

Without sufficient appropriate guardianship services, significant health care costs are incurred through inappropriate institutionalization, insufficient deinstitutionalization, excessive emergency care, and lack of timely health care.

Guardianship studies from Florida, New York, and Virginia report annual savings by guardianship programs ranging from \$2.5 million to \$13 million.

- Half of the legally incapacitated public mental hospital patients without guardians in my Florida study could have been immediately discharged if a public guardian was available. (Schmidt & Peters, *Bull. Am. Acad. L. & Psychiatry*, 1987)
- The Greater New York Hospital Association lost \$13 million in 9 months awaiting appointment of guardians for 400 un-discharged patients. (Schmidt, *Elder Law Att'y*, 1996)
- Virginia reportedly saved \$5.6 million in health care costs with appropriate public guardian services for 85 patients (\$5.2 million net for 2 years for 239 wards). (Teaster & Roberto, 2003)
- Florida saved \$3.9 million (\$1.8 million net) in health care costs in one year with appropriate public guardian services for 2,208 IPs. (Teaster, Mendiondo, Schmidt, et al., 2009)
- Vera Institute of Justice Guardianship Project (NYC) reports net savings to Medicaid of \$2.5 million for 111 clients. (2010)

I am currently conducting a funded study of "Cost Savings and Improved Access to Health Care with Guardianship Services" in Kentucky in collaboration with the Dept. of Aging & Independent Living (which oversees the Public Guardianship Program), Kentucky Cabinet for Health & Family Services.

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3. Petitioning and Other Costs

Part (3) of the study will:

- (a) identify petitioning and other costs associated with providing guardianship and public administrator services and financial assistance available, including
- (b) costs per public guardianship client, and
- (c) costs incurred by not providing timely and appropriate guardianship services.

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4. The Entities Responsible for Guardianship and Public Administrator Costs

Identify the entities currently responsible for guardianship and public administrator costs.

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4. The Entities 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 Dept. of Human Services (Developmental Disabilities Division, & 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.

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4. The Entities Responsible for Guardianship and Public Administrator Costs

- I have systematically studied the entities responsible for guardianship costs nationally and formulated recommendations in the 1981 annotated Model Public Guardianship Statute and the 2010 annotated Model Public Guardianship Act.
- Part (4) of the study will identify the entities responsible for guardianship and public administrator costs in North Dakota.

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5. 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.

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5. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services

- I have formally studied with qualitative and quantitative methodologies the interaction between the courts, counties, state agencies, and guardianship organizations regarding guardianship services since 1978 in numerous publications, presentations, consultations, and service responsibilities.
- I have formulated findings and recommendations for these interactions in formal recommendations in the 1981 annotated Model Public Guardianship Statute and the 2010 annotated Model Public Guardianship Act.

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5. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services

- Since 2003, I have served 3 terms as a member of the Certified Professional Guardian Board, Washington Courts, appointed by the Chief Justice of the Washington Supreme Court.
- The Board 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 in the state of Washington.
- 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.

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5. The Interaction Between the Courts, Counties, State Agencies, and Guardianship Organizations Regarding Guardianship Services

Part (5) of the study will address and assess the interaction between the courts, counties, state agencies, and guardianship organizations regarding guardianship services, including

- (a) a review of the duties and responsibilities of these entities and
- (b) the cooperation/collaboration and interaction between and among the entities associated with guardianship and public administrator services, and
- (c) will recommend proposed changes based on established models, standards, and best practices.

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6. The Efficacy of Statutes Governing Guardianship and Public Administrator Services

- (a) *Review the statutes governing guardianship and public administrator services,*
- (b) *evaluate the effectiveness of the statutes,*
- (c) *and recommend proposed changes.*

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6. The Efficacy of Statutes Governing Guardianship and Public Administrator Services

- I have conducted and published 2 systematic funded national reviews of the efficacy of statutes governing guardianship and public guardianship in the 50 states and the District of Columbia in 1981 and in 2010, and have published the 1981 annotated Model Public Guardianship Statute and the 2010 annotated Model Public Guardianship Act.
- 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, the Model Guardianship and Conservatorship Statute published by the ABA Developmental Disabilities Project of the Commission on the Mentally Disabled in 1982, and principles derived from the *Nat'l Probate Court Standards* (1993, 1999), the Nat'l Guardianship Conference (Wingspread 1988), and the 2nd Nat'l Guardianship Conference (Wingspan 2002).

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6. The Efficacy of Statutes Governing Guardianship and Public Administrator Services

- 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 that replicate and update the 1981 summary, analysis, and tables of guardianship and public guardianship statutes.

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6. The Efficacy of Statutes Governing Guardianship and Public Administrator Services

I can readily:

- (a) review the North Dakota statutes governing guardianship and public administrator services
- (b) evaluate the effectiveness of the statutes compared to other states and compared to national models, and
- (c) make recommendations about proposed changes,
- (d) including, where appropriate or desired, alternative recommendations from which to select.

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7. 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.*

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7. Methods for the Timely and Effective Delivery of 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 states (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. (North Dakota Century Code sections 30.1-28-11, 30.1-28-12.)
- North Dakota statute also authorizes judicial appointment of a county public administrator, who may be a corporation or limited liability company, with duties and powers to serve as ex officio public special administrator, guardian, and conservator without application to court or special appointment in specified cases. (N. D. Cent. Code sections 11-21-01, 11-21-05.)

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7. Methods for the Timely and Effective Delivery of Guardianship and Public Administrator Responsibilities and Services

- Like other states, North Dakota has the opportunity to determine the appropriate roles and responsibilities for entities, such as guardians and public administrators, involved in guardianship services.
- I have reviewed the guardianship and public administrator experiences and role allocations in other states.

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7. Methods for the Timely and Effective Delivery of Guardianship and Public Administrator Responsibilities and Services

Part (7) of the study will

- (a) identify appropriate alternative duties and responsibilities for entities involved in guardianship services,
- (b) financial responsibilities, and
- (c) the role for public administrators in providing guardianship services, and
- (d) provide estimated costs for the 2013–15 biennium by the recommended entity responsible for the costs.

The estimated costs are dependent upon the analyses in

- area (3) (slides 14–18) petitioning and other costs, and
- area (4) (slides 19–21) entities responsible for guardianship and public administrator costs.

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Information on the Individuals Who Would Conduct the Study, Including Educational and Employment Experiences (beginning on p. 11 of proposal)

- *The Elder Law Report* wrote, "Perhaps no one has studied guardianship, particularly public guardianship, more closely than Winsor Schmidt."
- My education includes the A.B. in Government, Harvard University, the J.D. in Public Law, American University, and the LL.M. in Mental Health Law, University of Virginia.
- My employment experiences include faculty appointments at Florida State University (1976–1986), the University of Memphis (1986–1998), Pace University School of Law (1989–1990), and as founding Chair of the nationally ranked Department of Health Policy and Administration, Washington State University (1998–2009).

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Information on the Individuals Who Would Conduct the Study, Including Educational and Employment Experiences (Highlights)

- I was an invited delegate to the *Third National Guardianship Summit: Standards of Excellence* hosted by the University of Utah College of Law in Salt Lake City, October 13–15, 2011, and sponsored by the National Guardianship Network (AARP; ABA Commission on Law and Aging; ABA Section on Real Property, Trust and Estate Law; Alzheimer’s Association; American College of Trust and Estate Counsel; Center for Guardianship Certification; National Academy of Elder Law Attorneys; National Center for State Courts; National College of Probate Judges; National Guardianship Association).
- I was one of the national experts at the original 1988 *Wingspread National Guardianship Symposium* in Racine, Wisconsin.
- I was also one of the experts at *Wingspan—The Second National Guardianship Conference* (2001) in St. Petersburg, Florida.

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Information on the Individuals Who Would Conduct the Study, Including Educational and Employment Experiences (Highlights)

- I am in my third three-year term as a member of the Certified Professional Guardian Board, Washington Courts, appointed by the Chief Justice of the Washington Supreme Court. I am currently Chair of the Ethics Committee, and a member of the Education Committee and the Regulations Committee.
- I have been a member of the Board of Directors, National Committee for the Prevention of Elder Abuse since 1992.
- I received the 2010 Kentucky Guardianship Association “Spirit of Guardianship Award” in recognition and appreciation of outstanding contributions to guardianship.

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Information on the Individuals Who Would Conduct the Study, Including Educational and Employment Experiences (Highlights)

- Highlighted consultations and service responsibilities relating to guardianship and statutory reform listed on pp. 12–14 of proposal.

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Company's Experience with Guardianship Services

- See p. 14 of proposal.

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Representative Samples of Summaries of Similar or Related Studies Conducted

- See pp. 14–15 of proposal.

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Status of the Implementation of Any Recommendations: Highlights and Examples

- Recommendations from my U.S. Administration on Aging funded national study, "Public Guardianship and the Elderly," and book, *Public Guardianship and the Elderly* (Ballinger 1981) (includes Model Public Guardianship Statute), were a basis for and cited in the 1988 *Wingspread National Guardianship Symposium* in Racine, Wisconsin, as well as subsequent statutory reform in at least 19 states.
- For example, the 1981 book endorsed the use of staff-to-ward ratios in guardianship programs. Since 1981, 7 states have provided for staff-to-ward ratios (Florida, New Jersey, New Mexico, Tennessee, Vermont, Virginia, Washington).
- The purpose of the 1981 national public guardianship study was to assess the extent to which public guardianship assists and hinders the elderly in securing access to rights, benefits, and entitlements. The study and book are primary sources for the 2001 *Wingspan Second National Guardianship Conference* and the 2011 *Third National Guardianship Summit*.

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Status of the Implementation of Any Recommendations: Highlights and Examples

The 1983 consultation and evaluation of the Florida Public Guardianship Pilot Program and 1983–84 *Second Year Evaluation of the Florida Pilot Program*

- (a) identified the annual public guardian cost per client in Florida
- (b) compared the efficacy of professional and volunteer programs for the delivery of guardianship services, and
- (c) led to Florida's Statewide Public Guardianship Office.

The assessment forms, guardianship plans, and guardian activity reports first used in these Florida studies were recommended and adopted not only in the subsequent Virginia studies, but also as a standard of practice in guardianship.

The 2009–2009 evaluation of Florida's public guardian programs

- (a) identified the average annual cost per public guardian client in Florida, and
- (b) demonstrated that Florida saved \$3.9 million in health care costs in one year with appropriate public guardian services.

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Status of the Implementation of Any Recommendations: Highlights and Examples

The evaluations in 1995 and 1996 of the Virginia Guardian of Last Resort and Guardianship Alternatives Demonstration Project

- (a) identified the annual public guardian cost per client in Virginia,
- (b) identified the need for reduced staff-to-ward ratios, and
- (c) led to the statewide Virginia Public Guardian and Conservator Program.

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Status of the Implementation of Any Recommendations: Highlights and Examples

- Based on my published study about guardian certification and sanctioning in Washington, we recommended that the state of Washington, and other states and entities (e.g., Center for Guardianship Certification) that certify or license guardians, should consider raising guardian certification education requirements above the high school or GED level to reduce the likelihood of guardian performance generating the imposition of more severe guardian certification sanctions.
- The Washington Supreme Court subsequently raised the minimum education requirement for a Certified Professional Guardian from a high school diploma or equivalency (GED) to requiring possession of at least an associate's degree from an accredited institution as an education minimum.
- Without data or empirical research, the Washington Supreme Court had declined to increase the minimum education requirements for certification.

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Status of the Implementation of Any Recommendations: Highlights and Examples

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- The Washington Supreme Court subsequently raised the minimum education requirement for a Certified Professional Guardian from a high school diploma or equivalency (GED) to requiring possession of at least an associate's degree from an accredited institution as an education minimum.
- Without data or empirical research, the Washington Supreme Court had declined to increase the minimum education requirements for certification.

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Status of the Implementation of Any Recommendations: Highlights and Examples

- The two phases of the national study of public guardianship funded by the Retirement Research Foundation in 2003–2004 and 2005–2006 replicating and updated my 1981 national study of public guardianship.
- The study, book, and articles are primary sources for the 2011 *Third National Guardianship Summit*.

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References for Previous Related Studies

- See pp. 16–20 of proposal.

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Proposed Contract Amounts Inclusive of All Expenses

- The proposed contract amount of \$50,000 for the contract period November 1, 2010 through June 1, 2012 is inclusive of all expenses.
- Expenses include my performance of the scope of work as outlined in the proposal.
- Other costs include cost of reports and travel expenses for three trips to North Dakota for interviews, data identification, and site visits. Lodging is budgeted at the rate provided by North Dakota law for state government officials and employees (\$69.30 per night plus tax).
- Also included in total costs is F&A at the rate of 36%.

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Questions?



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Background

The GAO recently criticized such guardian behaviors as

- (a) irregularities in guardians' annual accountings,
- (b) failure to file any interim financial reports for three years,
- (c) failure to pay a ward's taxes,
- (d) failure to visit a ward for eight months and nine months delinquency in filing a personal care plan and ward asset inventory,
- (e) failure to file an annual accounting for ten years, and
- (f) "persistent and repeated" guardianship reporting violations.

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National Guardianship Trends

3rd National Guardianship Summit: Standards of Excellence

- ▶ [AARP, Public Policy Institute](#)
- ▶ [The American Bar Association Commission on Law and Aging](#)
- ▶ [The American Bar Association 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](#)
- ▶ [The National Guardianship Association](#)

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National Guardianship Trends

3rd National Guardianship Summit: Standards of Excellence

- ▶ [ABA Comm. on Mental and Physical Disability Law](#)
- ▶ [The Arc](#)
- ▶ [The Center for Social Gerontology](#)
- ▶ [The Nat'l Adult Protective Services Association](#)
- ▶ [The Nat'l Assn. of State Long-Term Care Ombudsman Programs](#)
- ▶ [The Nat'l Assn. of State Mental Health Program Directors, Older Persons Division](#)
- ▶ [The National Committee for the Prevention of Elder Abuse](#)
- ▶ [The National Disability Rights Network](#)
- ▶ [Bazon Center for Mental Health Law](#)

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National Guardianship Trends

3rd National Guardianship Summit: Standards of Excellence

- ▶ Standards of Decision-Making/Person Centered Planning
- ▶ Guardian's Relationship to Court
- ▶ Paying for Guardianships
- ▶ Financial Decision-Making
- ▶ Medical Decision-Making
- ▶ Residential Decision-Making
- ▶ State Interdisciplinary Guardianship and Alternatives Committees

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