

GUARDIANSHIP FOR VULNERABLE ADULTS IN NORTH DAKOTA: RECOMMENDATIONS REGARDING UNMET NEEDS, STATUTORY EFFICACY, AND COST EFFECTIVENESS

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ABSTRACT

Guardianship is grounded in the concept that the state must, in some instances, serve as a general guardian for people with legal disabilities such as persons with disabling intellectual disabilities or mental illness. North Dakota faces a significant unmet need for legal guardians and struggles to catch up to the needs of these vulnerable adults. Many issues arise when developing an efficient and effective model for state guardianship services including costs in staffing, petitioning, and administration of the services. As with most complex services, guardians must address all aspects of a vulnerable adult's life, which naturally includes interaction between courts, local governments, agencies, and non-governmental entities.

Legal issues arise in all aspects of interplay between the guardian, the vulnerable adult, and stakeholders. Procedural due process safeguards adults from incorrect designation as a legally incapacitated adult subject to the power of the state. Also, statutes and agency rules seek to address issues regarding the power a guardian has over the affairs of an adult subject to state guardianship authority. This Article addresses all of these concerns and analyzes North Dakota's current structure related to guardianships. This Article also recommends and analyses different models the state could use to more effectively address the needs of this vulnerable adult population.

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I. INTRODUCTION

Eighty-nine 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.¹

The above case of guardianship in North Dakota, described by DKK Guardian and Conservatorship Services Inc., Jamestown, North Dakota, raises a number of the state's current guardianship challenges: an increasing population of older, vulnerable individuals without willing and responsible family members or friends, great geographic distances, health care access and cost, risk of abuse or neglect, risk of violence, and organization, funding, and cost-effectiveness of guardian services. This Article presents the results of a study of guardianship services for vulnerable adults in North Dakota commissioned by the North Dakota Legislative Council. The study reviews the North Dakota statutes governing guardianship and public administrator services, evaluates the effectiveness of the statutes compared to other states, and compares North Dakota to national models. This study includes interviews of one to three hours with at least thirty-two guardianship stakeholders in North Dakota.²

1. Letter from Kristie Kinzell, DKK Guardian and Conservatorship Services, Inc., Jamestown, North Dakota, to Winsor Schmidt (Mar. 27, 2012) (on file with the author).

2. See Winsor Schmidt, Final Report: A Study of Guardianship Services for Vulnerable Adults in North Dakota, p.1, n.1 (May 30, 2012) (names and affiliations of guardianship

Guardianship is grounded in *parens patriae* (“parent of the country”), which refers to the authority and responsibility of the state as sovereign to serve as general guardian or “super guardian” for people with legal disabilities, including children and persons with disabling intellectual disabilities or mental illness. 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.

North Dakota defines a guardian as “[a]ny competent person or a designated person from a suitable institution, agency, or nonprofit group home.”³ A guardian is court appointed after a guardianship hearing for an “incapacitated person” (“ward”) defined as:

any adult person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, or chemical dependency to the extent that the person lacks capacity to make or communicate responsible decisions concerning that person’s matters of residence, education, medical treatment, legal affairs, vocation, finance, or other matters, or which incapacity endangers the person’s health or safety.⁴

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.⁵

In a configuration requested by the Legislative Council, this Article addresses several issues. First in Part II, I will provide an analysis of the need for guardianship services in North Dakota. In Part III, I will discuss how guardianships are established, and in Part IV petitioning costs and other costs associated with providing guardianship services. Part V will address the entities responsible for guardianship costs, and Part VI the interaction between the courts, counties, state agencies, and guardianship organizations regarding guardianship services. Part VII will discuss the efficacy of statutes governing guardianship and public administrator services, and finally, Part VIII will discuss methods for the timely and effective delivery of guardianship and public administrator responsibilities and services.

II. THE NEED FOR GUARDIANSHIP SERVICES IN NORTH

stakeholders), *available* at www.legis.nd.gov/assembly/62-2011/docs/pdf/hu053012appendixc.pdf.

3. N.D. CENT. CODE § 30.1-28-11(1) (2010).

4. N.D. CENT. CODE §§ 30.1-26-01(2), (6) (2010).

5. N.D. CENT. CODE §§ 11-21-01, 05 (2012).

DAKOTA

This first section identifies the extent of the need for guardianship services in North Dakota. Section A will address the number of guardians appointed by the courts, and the quantity of unmet need for guardian services. Section B will discuss the unmet need for guardian services measured by qualitative standards, i.e., the ratio of guardianship staff to clients, the guardian ward visitation standard, and standards regarding guardian licensing, certification, or registration.

A. NUMBER OF GUARDIANS APPOINTED BY THE COURTS AND THE UNMET NEED FOR GUARDIAN SERVICES

There were 2038 guardianship and conservatorship cases in North Dakota in 2010.⁶ There were 323 new filings in 2010 and an average of 311 new appointments per year from 2008-2010.⁷ In 2007, the North Dakota Legislature approved funding for thirty-five additional openings for corporate guardianship services for people with developmental disabilities that reduced a long waiting list of unmet need.⁸ The Guardianship Program of Catholic Charities was projected to reach capacity of 414 wards by October 2011.⁹ Catholic Charities is reportedly facing a new waiting list of at least twenty-five people with developmental disabilities needing guardianship services.¹⁰

Another source for identifying the unmet need for guardian services in North Dakota is a Guardianship Needs Assessment Survey conducted from January to February 2012 through the North Dakota Long Term Care Association of the fifty-eight Assisted Living Facilities, sixty-four Basic Care Facilities, and eighty-two Nursing Facilities. The response rate ranged from 69% to 79%.¹¹ 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: 7 adults for assisted living facili-

6. *Human Services Interim Committee Meeting*, 62nd North Dakota Legislative Assembly (Oct. 26, 2011) Interim Session (testimony of Sally Holewa, State Court Administrator).

7. *Id.*

8. *Consideration of SB 2012 before the S. Comm. on Appropriations*, 62nd North Dakota Legislative Assembly (Jan. 19, 2011) (testimony of Larry Bernhardt, Executive Director, Catholic Charities North Dakota).

9. *Id.*

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

11. E-mail from Shelly Peterson, President, North Dakota Long Term Care Association, to Winsor Schmidt (Feb. 6, 2012) (on file with author).

ties, 46 adults for basic care facilities, and 296 adults for nursing facilities.¹² 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: seven adults assisted living facilities, forty-four adults for basic care facilities, and sixty-four adults for nursing facilities.¹³

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: zero for the developmental center and twelve adults for the state hospital.¹⁴ 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: zero¹⁵ for the developmental center and nine adults for the state hospital.¹⁶

A person who is incapacitated enough to need a guardian, but who does not have 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 remains autonomous. However, when a person is incapacitated and without a guardian, responsible decisions do not occur and a person loses autonomy.

There is some published research on the extent of the need for public guardianship. A 1983 survey in Florida found 11,147 identifiable persons reportedly in need of a public guardian.¹⁷ Florida's population in 1983 was 10,704,805.¹⁸ North Dakota's population in 2010 was 672,591.¹⁹ A

12. North Dakota Long Term Care Association, *Guardianship Needs Assessment Survey Results 2* (2012).

13. *Id.*

14. E-mail from Alex Schweitzer, Superintendent, North Dakota State Hospital, North Dakota Development Center (Feb. 17, 2012) (on file with author).

15. Catholic Charities provides guardianship services for individuals who need a court-appointed guardian in the developmental center. Schweitzer, *supra* note 14.

16. *Id.*

17. *See generally* Winsor Schmidt & Roger Peters, *Legal Incompetents' Need for Guardians in Florida*, 15 BULL. AM. ACAD. PSYCHIATRY & L. 69 (1987). The survey included Florida's seventy-four public receiving facilities, community mental health centers, and clinics, thirty private receiving facilities, eleven 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.

18. CENSUSSCOPE (FLORIDA), http://www.censusscope.org/us/s12/chart_pop1.html (last visited Sept. 11, 2013).

“projection,” or extrapolation, from the published 1983 Florida study suggests seven hundred comparable persons in need of a public guardian in North Dakota.²⁰

Partly to address the nursing home gap²¹ in published assessments of the need for public guardianship, a 1988 study of elderly nursing home residents in Tennessee found 3003 residents in need of public limited guardianship, conservator, representative payee, and power of attorney services.²² The unmet need for plenary conservatorship of person and property among elderly Tennessee nursing home residents was 364 residents.²³ Tennessee’s population in 1988 was 4,819,872.²⁴ (North Dakota’s population in 2010 was 672,591 with 14.5% age sixty-five or older.) A preliminary “projection” or extrapolation from the published 1988 Tennessee nursing home study suggests a minimum of fifty-one elderly nursing home residents with an unmet need for a plenary public guardian in North Dakota.²⁵

Therefore, a projected total population-based need for plenary public guardian services in North Dakota is 751 individuals.²⁶ The Developmental

19. NORTH DAKOTA QUICK FACTS FROM THE UNITED STATES CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/38000.html> (last visited Sept. 10, 2013).

20. *Id.* This projection is arguably high because Florida has had a higher proportion of persons over age sixty-five. The population of Florida in 2010 was 18,801,310 with 17.3% age sixty-five or older. The population of North Dakota in 2010 was 672,591, with 14.5% age sixty-five or older.

21. The 1983 Florida survey did not include private clients residing in nursing homes and adult congregate living facilities. Schmidt & Peters, *supra* note 17, at 78.

22. See generally David Hightower, Alex Heckert & Winsor Schmidt, *Elderly Nursing Home Residents’ Need for Public Guardianship Services in Tennessee*, 2 J. ELDER ABUSE & NEGLECT 105 (1990).

23. *Id.* at 114-16 (1.2% of 30,336 total nursing home residents).

24. CENSUSSCOPE (TENNESSEE), http://www.censusscope.org/us/s47/chart_popl.html (last visited Sept. 10, 2013).

25. This projection is arguably low because Tennessee has had a lower proportion of persons over age sixty-five. The population of Tennessee in 2010 was 6,346,105 with 13.4% age sixty-five or older. The population of North Dakota in 2010 was 672,591, with 14.5% age sixty-five or older.

This estimated fifty-one elderly nursing home residents with an unmet need for a plenary public guardian in North Dakota compares favorably to the sixty-four Nursing Facilities adults reported to need a court-appointed guardian and to not have willing and responsible family members or friends to serve as a guardian or resources to employ a guardian. See *infra* Part II.B.

26. This population-based approach was successfully used in 2005 to calculate 4265 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, WSBA Elder Law Section Executive Committee [hereinafter Public Guardianship Task Force], 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

Disabilities Division contracts with Catholic Charities North Dakota to serve 414 wards in the 2011-2013 biennium.²⁷ The Aging Services Division reports funding for assistance (petitioning and other related costs) with the establishment of thirty-two guardianships in the current biennium, and “a modest annual payment” for sixteen appointed guardians in the first year and thirty-two appointed guardians in the second year.²⁸ 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. There are twenty-five people with developmental disabilities on the Catholic Charities waiting list, seven adults in assisted living facilities, forty-four adults in basic care facilities, sixty-four adults in nursing facilities, and nine adults in the State Hospital.²⁹ The difference of 156 individuals may be accounted for by such factors as: (a) the 69% to 79% response rate for the Long Term Care Association survey; (b) limited community hospital unmet need information (e.g., estimated fifteen to twenty 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.³⁰ The unmet need for plenary public guardian services in North Dakota is 305 individuals.

House 98-0 and the Senate 49-0 on April 17, 2007, and was signed by the Governor. See WASH. REV. CODE § 2.72 (2008).

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 four thousand and five thousand individuals may potentially qualify for a public guardian in Washington State. See Mason Burley, *Assessing the Potential Need for Public Guardianship Services in Washington State*, WASH. INSTITUTE FOR PUB. POL’Y, Dec. 2011, at 3. Burley acknowledges, “this number [4,318 from American Community Survey census data] remains consistent with previous calculations about guardianship needs.” *Id.* at 5.

This population-based extrapolation approach was also used to estimate and publish the number of New Yorkers under guardianship. See generally Winsor Schmidt, *Public Guardianship Issues for New York: Insights from Research*, 6 ELDER L. ATT’Y 31 (1996).

27. *Human Services Interim Committee Meeting*, 62nd North Dakota Legislative Assembly (Oct. 26, 2011) (testimony of Tina Bay, Director, Developmental Disabilities Division).

28. *Human Services Interim Committee Meeting*, 62nd North Dakota Legislative Assembly (Oct. 26, 2011) (testimony of Jan Engan, Director, Aging Services Division, Human Services Committee).

29. See North Dakota Long Term Care Association, *supra* note 12. See also Interview with David Boeck, *supra* note 10; Interview with Donna Byzewski, *supra* note 10.

30. See *supra* text accompanying notes 12-13.

B. UNMET NEED FOR GUARDIAN SERVICES: GUARDIANSHIP STANDARDS

This section analyzes the unmet need for guardian services measured by qualitative standards. The first part addresses staff-to-client ratios in guardianship. The second part examines the visitation-of-ward standard for guardians. The third part discusses licensing, certification, and registration of professional guardians.

1. *Guardianship Staff-to-Client Ratio*

The Council on Accreditation (“COA”)³¹ has developed, and is applying, adult guardianship accreditation standards. One of the COA Adult Guardianship Service Standards prescribes that guardianship caseload sizes “support regular contact with individuals and the achievement of desired outcomes.”³² The accompanying COA research note states: “[s]tudies 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.”³³

31. 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 Currently, COA accredits or is in the process of accrediting more than 2,000 private and public organizations that serve more than 7 million individuals and families in the United States, Canada, Bermuda, Cuba, Germany, Italy, Japan Puerto Rico, South Korea, the Philippines and the United Kingdom.

About COA, COUNCIL ON ACCREDITATION, <http://www.coastandards.org/about> (last visited Jan. 8, 2014).

32. Council on Accreditation Adult Guardianship Service Standards (Standard AG7), available at <http://coanet.org/standard/ag/7/> (last visited Jan. 8, 2014).

33. *Id.*; see PAMELA TEASTER, WINSOR SCHMIDT, ERICA WOOD, SUSAN LAWRENCE & MARTA MENDIONDO, PUBLIC GUARDIANSHIP: IN THE BEST INTERESTS OF INCAPACITATED PEOPLE?, 23-25, 138, 143, 152, 162 (A.B.A. 2010) (recommending 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.”).

See also WASH. REV. CODE § 2.72.030(6) (2013) (Washington’s office of public guardianship is prohibited from authorizing payment for guardianship services “for any entity that is serving more than twenty incapacitated persons per certified professional guardian.”). Adopted in thirty-one 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. Nisha Thakker, *The State of Veterans’ Fiduciary Programs: What Is Needed to Protect Our Nation’s Incapacitated Veterans?*, 28 BIFOCAL 2006, at 1, 23 (“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” (citing to 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 67 (2003).

One of North Dakota's principal corporate guardianship programs reports a guardianship staff-to-client ratio of 1:36-39 (1:40 as of July 1, 2009).³⁴ One of the several North Dakota public administrators serving as guardian reports a part-time guardian caseload ranging from twenty-two to twenty-nine with wards housed 210 miles apart.³⁵ 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),³⁶ which cites *North Dakota Guardianship: Standards of Practice for Adults* as a source to explain the expectations and responsibilities of being a guardian.³⁷ The North Dakota Guardianship ("NDG") Standard 13(V) prescribes that the guardian of the person "shall visit the ward

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.

Winsor Schmidt, *Legal Framework for Evaluating Public Guardianship in Virginia*, presented at the Annual Scientific Meeting of the Gerontological Society of America (Nov. 22, 2004) (citing *Tenberg v. Washoe Cnty. Pub. Admin.*, No. CV99-01770 (Family Court, Second Judicial District Court, Nevada, filed March 15, 1999)). The *Tenberg* case was settled.

34. See Bernhardt Testimony, *supra* note 8.

35. Telephone interview with Debbie Nelson, Auditor/Treasurer, Grand Forks Cnty., Devra Smestad, Auditor/Treasurer, Ward Cnty., and Mark Westereng, Public Adm'r, Nw. Judicial Dist. (Jan. 12, 2012).

36. NORTH DAKOTA DEP'T OF HUMAN SERV., <http://www.nd.gov/dhs/info/pubs/aging.html> (last visited Sept. 12, 2013).

37. N.D. DEP'T OF HUMAN SERV., NORTH DAKOTA GUARDIANSHIP: STANDARDS OF PRACTICE FOR ADULTS (2006), *available at* <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 person under guardianship] 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." *Raven v. Dep't of Soc. & Health Servs.*, 273 P.3d 1017, 1028 (Wash. Ct. App. 2012). The guardian in *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 person under guardianship] was hospitalized [with severe skin ulcers]), and five in 2006." *Id.* at 1023. On appeal, the Washington Supreme Court reversed the court of appeals and held, *inter alia*, that substantial evidence does not support the conclusion that the guardian's conduct meets the statutory definition of neglect. However, the court found that the actions of the Department of Social and Health Services against the guardian were "substantially justified" and rejected the guardian's request for attorney fees. *Raven v. Dep't of Soc. & Health Servs.*, No. 87483-2 (Wash., Feb. 12, 2013) (en banc).

monthly.”³⁸ NDG Standard 23(III) states that “[t]he 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.”³⁹ 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 (“Wingspan”) recommends, “Professional guardians—those who receive fees for serving two or more unrelated wards—should be licensed, certified, or registered.”⁴⁰ 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. The following steps relating to guardian certification were addressed at the conference:

The supreme court of each state should promulgate rules[,] and/or the state legislature of each state should enact a statutory framework[,] to require education and certification of guardians as well as continuing education within the appointment process to ensure that all (i.e., professional and family) guardians meet core competencies . . . 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

38. NORTH DAKOTA GUARDIANSHIP: STANDARDS OF PRACTICE FOR ADULTS, *supra* note 37, at 9.

39. *Id.* at 17.

40. *Wingspan-The Second Nat'l Guardianship Conference, Recommendations*, 31 STETSON L. REV. 595, 604 (2002) [hereinafter *Wingspan*]. 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. This discussion should include: . . . [p]roviding models for certification, re-certification, and de-certification.⁴¹

Since at least the 2001 Wingspan conference, national conferences and stakeholders have clearly endorsed licensing, certification, or registration of professional guardians.

There are fifteen states with some provision for guardian licensing, certification, or registration.⁴² For example, the Certified Professional

41. NAT'L ACADEMY OF ELDER LAW ATTORNEYS, NAT'L GUARDIANSHIP ASSOCIATION & NAT'L COLLEGE OF PROBATE JUDGES, NAT'L WINGSPAN IMPLEMENTATION SESSION: ACTION STEPS ON ADULT GUARDIANSHIP PROCESS (2004) [hereinafter WINGSPAN IMPLEMENTATION], at 7, 8-9, available at <http://www.guardianshipsummit.org/summit-history/>. The Wingspan national guardianship conference recommends that states should "adopt minimum standards of practice for guardians, using the National Guardianship Association Standards of Practice as a model." *Wingspan*, supra note 40, at 604. See NAT'L GUARDIANSHIP ASSOCIATION, STANDARDS OF PRACTICE (3d ed. 2007), conclusion at http://www.guardianship.org/guardianship_standards.htm.

42. Alaska, Arizona, California, Florida, Georgia, Illinois, Nevada, New Hampshire, New Jersey, New York, North Carolina, Oregon, Texas, Utah, and Washington. See the sections on: guardianship abuse, neglect, and exploitation of seniors; professional guardian licensing, certification, and registration; and guardian certification in the states, in Winsor Schmidt, Fevzi Akinci & Sarah Magill, *Study Finds Certified Guardians with Legal Work Experience Are at Greater Risk for Elder Abuse Than Certified Guardians with Other Work Experience*, 7 NAELA J. 171, 176-80 (2011).

The state of Washington has a guardian certification program for professional guardians established in 1997 that includes certification requirements, standards of practice, and disciplinary procedures. WASH. REV. CODE § 11.88.008; Washington Courts, General Rule 23 (Sept. 1, 2010), available at http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=117.

Washington publicly reports disciplinary actions for guardians and guardian agencies. See *Certified Professional Guardian Program*, WASHINGTON COURTS, http://www.courts.wa.gov/programs_orgs/Guardian/ (last visited Sept. 19, 2013); Certified Professional Guardian Board, Administrative Regulations 003 relating to Public Records, available at http://www.courts.wa.gov/committee/?fa=committee.child&child_id=57&committee_id=117.

Arizona requires certification and licensing of all fiduciaries, except family members, who meet eligibility requirements, including a high school degree or experience as a guardian, conservator, or personal representative. ARIZ. REV. STAT. § 14-5651 (2006). As part of the fiduciary certification program, the Arizona Supreme Court established the Fiduciary Compliance Audit Authority. *Certification & Licensing*, ARIZONA JUDICIAL BRANCH, <http://www.azcourts.gov/cld/FiduciaryLicensingProgram.aspx> (last visited Sept. 19, 2013). The five most common fiduciary audit findings are: (1) late required court case filings; (2) inaccurate required court case filings; (3) undocumented fiduciary actions and decision making; (4) business and fiduciary certification number is not used on court documents; and (5) incompetent fiduciary management of client caseload. See *Certification & Licensing: Licensed Fiduciary Compliance Audit*, ARIZONA JUDICIAL BRANCH, <http://www.azcourts.gov/cld/FiduciaryLicensingProgram/ComplianceAudit.aspx> (last visited Sept. 19, 2013).

The private Center for Guardianship Certification ("CGC") offers certification of individual professional guardians. The U.S. Government Accountability Office ("GAO") reported that CGC did not require Social Security numbers or other identifying information, did not verify educational or professional credentials, and did not conduct background or credit checks for fictitious certification applicants. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS 25

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.⁴³ 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.⁴⁴

Some of the guardianship stakeholders in North Dakota expressed concerns about oversight and monitoring of guardians and guardian annual reports,⁴⁵ and lack of such requirements as criminal background checks and credit checks. As recommended by the Wingspan Implementation Session of the NAELA, the NGA, and the National College of Probate Judges, North Dakota “should enact a statutory framework to require education and

(2010). The fictitious applicants passed the National Certified Guardian Examination and “were listed on the organization’s website as nationally certified guardians.” *Id.* at 26.

43. WASH. REV. CODE § 11.88.008; Washington Courts, General Rule 23 (Sept. 1, 2010), available at http://www.courts.wa.gov/committee/?fa=committee.home&committee_id=117.

44. *Id.*

45. *See, e.g.*, ABA COMM’N ON THE MENTALLY DISABLED & COMM’N ON LEGAL PROBLEMS OF THE ELDERLY, GUARDIANSHIP: AN AGENDA FOR REFORM—RECOMMENDATIONS OF THE NATIONAL GUARDIANSHIP SYMPOSIUM AND POLICY OF THE AMERICAN BAR ASSOCIATION (1989) (the Wingspread conference; six recommendations on accountability of guardians: “training and orientation, review of guardians reports, public knowledge and involvement, guardianship standards and plans, role of attorneys, and role of judges”); NAT’L COLLEGE OF PROBATE JUDGES, NATIONAL PROBATE COURT STANDARDS (2013) (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”); Sally Hurme & Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, 31 STETSON L. REV. 872 (2002); Naomi Karp & Erica Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STETSON L. REV. 143 (2007) (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 & ERICA WOOD, GUARDING THE GUARDIANS: PROMISING PRACTICES FOR COURT MONITORING (2007) (promising practices regarding: reports, accounts, and plans; court 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 (1997) (includes provisions on guardianship monitoring and commentary about the significance of “an independent monitoring system . . . [for a] court to adequately safeguard against possible abuses”); *Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1200-02 [hereinafter *Third Guardianship Summit*] (Recommendations 2.3, 2.5, 3.1, 3.5 relating to active court monitoring); *Wingspan*, *supra* note 40, at 595-609 (seven recommendations on monitoring and accountability building on Wingspread).

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.”⁴⁶ 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.”⁴⁷ In consideration of national standards, the successful experiences of fifteen other states, North Dakota stakeholder concerns about oversight and monitoring of guardians and guardian annual reports, and lack of criminal background checks and credit checks, North Dakota should license, certify, or register professional guardians, including education, continuing education, and adoption of minimum standards of practice.

III. THE ESTABLISHMENT OF GUARDIANSHIPS

This section reviews the establishment of guardianships and the services available for assistance with the establishment of guardianships. Later, I will provide some recommendations for changes. Compared with the significant unmet need for guardianships, and the complexity of establishing guardianships, assistance with establishment of guardianships is limited. The Aging Services Division reported funding for assistance (petitioning and other related costs) with the establishment of thirty-two guardianships in the current biennium.⁴⁸

North Dakota Century Code chapter 30.1-28 specifies the judicial process for the establishment of guardianships. Any interested person may petition for the appointment of a guardian for an allegedly incapacitated person.⁴⁹ No filing fee may be required for a petition by a member of the individual treatment plan team or by any state employee.⁵⁰ 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.⁵¹

46. *Wingspan Implementation*, *supra* note 41, at 7. The 2013 North Dakota Legislature passed House Bill 1041 appropriating \$70,000 to the supreme court for developing and delivering guardianship training for the July 1, 2013 to June 30, 2015 biennium. *See* ABA Commission on Law and Aging, *State Adult Guardianship Legislation: Directions of Reform-2013*, p. 11, available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_final_guardianship_legislative_update_12-18-13.authcheckdam.pdf.

47. *Wingspan*, *supra* note 40, at 604.

48. *See* Engan Testimony, *supra* note 28.

49. N.D. CENT. CODE § 30.1-28-03(1) (2010).

50. *Id.*

51. *Id.* § 30.1-28-03(3).

If the attorney appointed as guardian ad litem, or another attorney is retained by the proposed ward to act as an advocate, the court may determine whether the guardian ad litem should be discharged.⁵² The visitor's duties include discussing an "alternative resource plan"⁵³ 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."⁵⁴

The proposed ward's counsel may request a closed hearing.⁵⁵ The court may convene at any other location in the best interest of the proposed ward.⁵⁶ "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."⁵⁷ 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."⁵⁸ North Dakota Century Code section 30.1-28-10 authorizes the court to:

exercise the power of a guardian pending notice and hearing or, with or without notice, appoint a temporary guardian for a specified period of time, not to exceed ninety days, if: (a) An alleged incapacitated person has no guardian and an emergency exists; or (b) An appointed guardian is not effectively performing

52. *Id.* § 30.1-28-03(4)(c).

53. N.D. CENT. CODE § 30.1-26-01(1) (2012). "Alternative resource plan" means: a plan that provides an alternative to guardianship, using available support services and arrangements that 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.

Id.

54. N.D. CENT. CODE § 30.1-28-03(7) (2012).

55. *Id.*

56. *Id.* § 30.1-28-03(8).

57. *Id.* § 30.1-28-03(9).

58. *Id.* § 30.1-28-04(2)(c).

the guardian's duties, and the court finds that the welfare of the ward requires immediate action.⁵⁹

The process for establishing guardianships is extensive and complicated.

Some of the guardianship stakeholders expressed concerns with the judicial process for the establishment of guardianships. These 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,⁶⁰ 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 three recommendations are based on the concerns expressed by some of the guardianship stakeholders with the judicial process for the establishment of guardianships. First, North Dakota should change from voluntary reporting of abuse or neglect to mandatory reporting of abuse or neglect.⁶¹ Second, North Dakota should adopt model recommendations regarding the right to counsel and the duties of counsel representing the proposed ward at the hearing.⁶² Third, North Dakota should adopt section 311 of the Uniform Guardianship and Protective Proceedings Act related to emergency guardian.⁶³

IV. PETITIONING AND OTHER COSTS

This section identifies petitioning and other costs associated with providing guardianship and public administrator services, as well as available financial assistance. The Aging Services Division reports 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.⁶⁴ Provisions in 2011 HB 1199 provided sixteen guardians "a

59. *Id.* § 30.1-28-10(1).

60. TEASTER ET AL., *supra* note 33, at 20. Over twenty-five states require the appointment of counsel in guardianship proceedings, generally making counsel available without charge to indigent respondents. *Id.*

61. *See infra* text accompanying notes 136-48.

62. *See infra* text accompanying notes 153-58.

63. *See infra* text accompanying notes 219-24.

64. *See Engan Testimony, supra* note 28.

modest annual payment of \$500” to offset some guardian costs; thirty-two guardians in year two of the biennium.⁶⁵ The Developmental Services Division reports \$2,052,416 for 414 wards served by Catholic Charities North Dakota during the 2011-2013 biennium, including \$51,720 in petitioning costs.⁶⁶ 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).⁶⁷ These annual costs per client in North Dakota can be compared to other states.

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 \$2,857.00.⁶⁸ The annual public guardian cost per client in Virginia in 1997 was \$2,662.00.⁶⁹ The average annual public guardian cost per client in Virginia in 2002 was \$2,955.00.⁷⁰ The average annual cost per public guardian client in Florida in 2007-2008 was \$2,648.00.⁷¹ The average annual cost per public guardian client in Washington in 2008-2011 was \$3,163.00.⁷² The annual operating cost per guardianship client in New York City in 2010 was \$8,648.60.⁷³ An area of study related to annual 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

65. *Id.*

66. *See* Bay Testimony, *supra* note 27.

67. *Id.*

68. Winsor Schmidt, Kent Miller, Roger Peters & David Loewenstein, *A Descriptive Analysis of Professional and Volunteer Programs for the Delivery of Public Guardianship Services*, 8 PROB. L. J. 125, 149 (1988).

69. *See* WINSOR SCHMIDT, PAMELA TEASTER, HILLEL ABRAMSON & RICHARD ALMEIDA, SECOND YEAR EVALUATION OF THE VIRGINIA GUARDIAN OF LAST RESORT AND GUARDIANSHIP ALTERNATIVES DEMONSTRATION PROJECT, (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 J. ETHICS, L. & AGING 131, 144 (1999).

70. TEASTER & ROBERTO, *supra* note 33, at 11.

71. 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, 3 (University of Kentucky Graduate Center for Gerontology August 2009), available at http://elderaffairs.state.fl.us/doea/pubguard/SPGO_Evaluation_09.pdf.

72. MASON BURLEY, PUBLIC GUARDIANSHIP IN WASHINGTON STATE: COST AND BENEFITS 16 (2011).

73. The Guardianship Project, Summary of Medicaid Cost-Savings (Vera Institute of Justice, Inc., 2010) (on file with author).

for 46% of federal Medicaid costs, and for long health care duration.⁷⁴ The elderly population is 9% of the Medicaid population nationally, but accounts for 27% of program costs.⁷⁵ 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 \$90,061.⁷⁶ The median intensive care unit (“ICU”) length of stay for patients without capacity and without a surrogate is twice as long as other ICU patients.⁷⁷

Without sufficient appropriate guardianship services, significant health care costs are incurred through inappropriate institutionalization, insufficient deinstitutionalization, excessive emergency care, and lack of timely health care. Guardianship studies from Florida, New York, and Virginia report annual savings by guardianship programs ranging from \$3.9 million to \$13 million.⁷⁸ 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.⁷⁹ The Greater New York Hospital Association lost \$13 million in nine months awaiting appointment of guardians for 400 un-discharged patients.⁸⁰ Virginia saved \$5.6 million in health care costs in one year with appropriate public guardian services for eighty-five patients.⁸¹ Florida saved \$3.9 million in

74. See, e.g., Marguerite Burns, Nilay Shah & Maureen Smith, *Why Some Disabled Adults In Medicaid Face Large Out-Of-Pocket Expenses*, 29 HEALTH AFF. 1517 (2010).

75. See, e.g., BARRY FURROW ET AL., HEALTH LAW: CASES, MATERIALS AND PROBLEMS 570 (6th ed. 2008).

76. Steven Cohen & 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, Statistical Brief 354 (Jan. 2012).

77. See generally 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 CRITICAL CARE MED. 2053 (2006). See also Anirban Basu, Romina Kee, David Buchanan & Laura Sadowski, *Comparative Cost Analysis of Housing and Case Management Program for Chronically Ill Homeless Adults Compared to Usual Care*, 47 (1pt2) Health Services Research 523 (2012) (housing and case management program for chronically ill homeless adults generated annual cost savings of \$6,307 per person); Laura Sadowski, Romina Kee, Tyler VanderWeele & David Buchanan, *Effect of a Housing and Case Management Program on Emergency Department Visits and Hospitalizations Among Chronically Ill Homeless Adults: A Randomized Trial*, 301 (17) JAMA 1771 (2009) (housing and case management reduces hospital days and emergency department visits for chronically ill homeless adults).

78. Schmidt, *supra* note 26, at 36 n.26 (New York); Schmidt & Peters, *supra* note 17 (Florida); Teaster et al., *supra* note 71 (Florida); TEASTER & ROBERTO, *supra* note 33 (Virginia).

79. See generally Schmidt & Peters, *supra* note 17.

80. Schmidt, *supra* note 26, at 36 n.26.

81. TEASTER & ROBERTO, *supra* note 33.

health care costs in one year with appropriate public guardian services.⁸² Washington State concluded that the decrease in average costs of residential settings exceeded the cost of providing a guardian within thirty months in 2008-2011. Clients with a public guardian had a decrease of an average of twenty-nine hours in personal care 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.⁸³ The Vera Institute of Justice Guardianship Project in New York City obtained a reported net Medicaid cost-savings of \$2,500,026 for 111 guardianship clients in 2010.⁸⁴

North Dakota has experienced some deinstitutionalization through guardianship. Catholic Charities North Dakota reports residential placement moved from a more restrictive and expensive setting to a less restrictive setting for twenty-two guardianship clients in 2011. Seven clients moved from the North Dakota State Hospital, two clients moved from the Developmental Center, two clients moved from a nursing home to an Individualized Supported Living Arrangement (“ISLA”), and one client moved from a hospital to a nursing home.

V. THE ENTITIES RESPONSIBLE FOR GUARDIANSHIP AND PUBLIC ADMINISTRATOR COSTS

Section 1 of 2011 House Bill No. 1199 specified that the study of guardianship services for vulnerable adults must include “the entities responsible for guardianship costs.”⁸⁵ States generally provide for state funding or county funding of public guardianship costs, but North Dakota takes an unusual hybrid approach.⁸⁶ Entities responsible for guardianship and public administrator costs in North Dakota have included general fund appropriations to the Department of Human Services (Developmental Disabilities Division, and Aging Services Division) to contract with an entity to create and coordinate a unified system for the provision of guardianship services (a) to vulnerable adults who are ineligible for developmental disabilities case management services, and (b) to individuals

82. Teaster et al., *supra* note 71.

83. Burley, *supra* note 72, at 16, 19, 20.

84. Guardianship Project, *supra* note 73 (nursing home avoidance among Medicaid clients, hospital avoidance among Medicaid clients, mental health facility cost avoidance among Medicaid clients, delayed spend-down/Medicaid avoidance, and Medicaid liens paid).

85. North Dakota Legislative Council, Study of Guardianship Services—Background Memorandum (2011).

86. *See, e.g.*, TEASTER ET AL., *supra* note 33.

diagnosed with a mental illness, traumatic brain injury, or elderly individuals age sixty years and over.⁸⁷ Counties have provided some appropriations for several public administrators and guardians ad litem in North Dakota.⁸⁸

Systematic information about county appropriations is unavailable because, for example, many counties do not have a specific line item for such expenses.⁸⁹ A recent “educated guesstimate” is that North Dakota counties are spending \$180,000 total per year, with bigger counties spending \$10,000-15,000 per year, and each county averaging \$2,000 per year.⁹⁰ Burleigh County spent \$15,874 on guardian ad litem expenses in 2011 and \$15,236 for 2012 as of July 2012.⁹¹ Grand Forks guardian ad litem services costs ranged from \$15,034 in 2003 to \$9,704 in 2011, with a low of \$4,299 in 2009 and a high of \$22,682 in 2007.⁹²

VI. THE INTERACTION AMONG THE COURTS, COUNTIES, STATE AGENCIES, AND GUARDIANSHIP ORGANIZATIONS REGARDING GUARDIANSHIP SERVICES: ALTERNATIVE PUBLIC GUARDIANSHIP MODELS

Based on interviews of one to three hours with at least thirty-two 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. This section assesses the interaction among the courts, counties, state agencies, and guardianship organizations regarding guardianship and public administrator services. This section also reviews the alternative models for providing public guardianship services, and makes recommendations for changes.

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

87. See, e.g., North Dakota Legislative Council, *supra* note 85.

88. See, e.g., *Human Serv. Interim Comm.*, 62nd North Dakota Legislative Session (July 31, 2012) (testimony of Aaron Birst, Legal Counsel, North Dakota Association of Counties.).

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

division of a social service agency; and (4) a county model.⁹³ “The court model establishes the public guardianship office as an arm of the court that has jurisdiction over guardianship and conservatorship.”⁹⁴ Five states have statutory provisions for location of the public guardian in the judiciary: Delaware, Georgia, Hawaii, Mississippi, and Washington.⁹⁵ “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.”⁹⁶ Four states follow the independent state office model: (1) Alaska locates the public guardian office in the Department of Administration; (2) Illinois has the Office of State Guardian (one of the state’s two public guardian schemes) in the guardianship and advocacy commission; (3) Kansas has an independent Kansas Guardianship Program with a board appointed by the Governor; and (4) New Mexico has the office of guardianship in the developmental disabilities planning council.⁹⁷

The third model for state public guardianship programs is the division of a social service agency model. “The placement of the public guardianship function in an agency providing direct services to IPs presents a clear conflict of interest.”⁹⁸ More than half of the forty-four states with statutory provision for public guardianship follow the social service agency conflict of interest model and name a social service, aging, disability, or mental health services agency as guardian.⁹⁹

93. TEASTER ET AL., *supra* note 33, at 7, 23-25, 123, 151, 246-47. See also WINSOR SCHMIDT, KENT MILLER, WILLIAM BELL, & ELAINE NEW, PUBLIC GUARDIANSHIP AND THE ELDERLY (Ballinger 1981); John Regan & Georgia Springer, Protective Services for the Elderly: A Working Paper, (U.S. Senate Special Committee on Aging 1977).

94. TEASTER ET AL., *supra* note 33, at 23.

95. *Id.* In Georgia, the country probate court approves and registers qualified and trained individuals to serve as public guardians, but the Department of Human Resources Division of Aging coordinates training and administration for the program. *Id.* “The courts are a tempting location, but the judges, who recognized a need for public guardianship, themselves voiced discomfort with the potential conflict of interest and responsibility for administrative activity.” *Id.* at 152.

96. *Id.* at 23.

97. *Id.*

98. *Id.* One of the first explanations of the conflict of interest follows: “The 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 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.” SCHMIDT ET AL., *supra* note 93, at 38.

99. *Id.* at 24 (Connecticut names the Commissioner of Social Services as guardian; New Hampshire authorizes the Department of Health and Human Services to contract for guardian

The fourth model for state public guardianship programs is the county model. “Approximately thirteen 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.”¹⁰⁰ In Arizona, for example, the county board of supervisors appoints the public fiduciary.¹⁰¹ County boards create the offices of public guardian in California.¹⁰² The Idaho boards of county commissioners create boards of community guardians.¹⁰³ The county public administrators in Missouri serve as public guardians.¹⁰⁴

North Dakota is currently a hybrid of the social service agency model and the county model, public administrator as guardian.¹⁰⁵ The state appropriates general funds to the Department of Human Services (Developmental Disabilities Division, and Aging Services Division) to contract for guardianship services, and some counties provide appropriations for public administrators who serve as guardians.¹⁰⁶ Stakeholders expressed concerns about lack of uniformity and statewide coverage in guardianship services.

The Second National Guardianship Conference recommends that states “provide public guardianship services when other qualified fiduciaries are not available.”¹⁰⁷ This public guardianship function “may be provided through independent state agencies, contracts with private agencies, or by

services; Florida, Vermont, and Virginia have the Department on Aging administer the public guardian program).

Conflict of interest states have struggled to address the problem:

[S]ome of the states with potential conflicts 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.

Id.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.* at 24-25.

104. *Id.* at 25.

105. *See supra* Part. V.

106. *See Birst Testimony, supra* note 88.

107. *Wingspan, supra* note 40, at 604.

other means.”¹⁰⁸ Further, North Dakota should change from the hybrid of the social service agency model and the county model (public administrator as guardian).¹⁰⁹

VII. THE EFFICACY OF STATUTES GOVERNING GUARDIANSHIP AND PUBLIC ADMINISTRATOR SERVICES

North Dakota Century Code chapters 30.1-26 and 30.1-28 govern guardianship services in North Dakota.¹¹⁰ Century Code chapter 11-21 governs public administrator services.¹¹¹ 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

108. *Id.* The Third National Guardianship Summit recommends: “To ensure the right of access to guardianship services, states should provide public funding for: Guardianship services for those unable to pay” *Third Guardianship Summit, supra* note 45, at 1202 (Recommendation #3.3). 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. See Symposium, *Third Nat’l Guardianship Summit: Standards of Excellence*, 2012 UTAH L. REV. 1155 (2012).

Based on a line of cases invalidating government actions when legal notices are provided to incompetent persons with no guardian, a state may be legally obligated to provide public guardianship services. Public Guardianship Task Force, *supra* note 26, at 2 n.5 (citing cases); see also *Vecchione v. Wohlgemuth*, 377 F. Supp. 1362, 1363 (E.D. Pa. 1974), *further proceedings*, 426 F. Supp. 1297, 1301 nn. 4-5 (E.D. Pa. 1977), *aff’d*, 558 F.2d 150 (3d Cir. 1977), cert. denied, 434 U.S. 943 (1977) (state’s summary seizure and control of mental hospital patients’ assets and property without procedural due process safeguards are unconstitutional and necessitate guardianship petitions and appointment of public guardians); *In re Gamble*, 394 A.2d 308, 311 (N.H. 1978) (the state must bear expenses of guardianship proceedings and guardians as part of statutory liability for support); SCHMIDT ET AL., *supra* note 93, at 48-49, 218-19, 244-46 (regarding establishment of public guardianship program in Pennsylvania by the *Vecchione* litigation and in New Hampshire after *Gamble*).

In addition to these federal and state due process obligations, the Americans with Disabilities Act (“ADA”) may require public guardianship services when necessary for non-discriminatory state program eligibility of an otherwise qualified individual. Public Guardianship Task Force, *supra* note 26, at 2 n.5 (citing 42 U.S.C. § 12132 (“no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits or the service, programs, or activities of a public entity”). Non-discrimination under the ADA may require non-institutional community-based treatment of people with mental disabilities. See *generally* *Olmstead v. L.C.*, 527 U.S. 581 (1999). The absence of appropriate guardianships is recognized as a barrier to community integration under *Olmstead*: facilitation of discharge, prevention of institutionalization, qualification for benefits. See TEASTER ET AL., *supra* note 33, at 130, 132-33, 158; Virginia’s *Olmstead* Strategic Plan (2012), at 20-21. Regarding potential supplemental funding sources for guardianship through Medicaid and Medicare, see Catherine Seal & Spencer Crona, *Standards for Guardian Fees*, 2012 UTAH L. REV. 1575, 1593, 1595-602 (deduction from Patient Paid Amount or Net Available Monthly Income, personal needs allowance, targeted case management funds, Administrative Claiming; hospital discharge planning field, and Community-based Care Transitions Program).

109. See *infra* Part. VIII for prioritized recommended alternatives.

110. N.D. CENT. CODE §§ 30.1-26, 30.1-28 (2012).

111. N.D. CENT. CODE § 11-21 (2012).

second and most recent national study of public guardianship in the fifty states and the District of Columbia.¹¹² 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; guardianship petition; annual report; emergency guardian; temporary guardians; limited guardian).¹¹³

This section reviews the North Dakota statutes governing guardianship and public administrator services. This section will evaluate the effectiveness of the statutes compared to other states and compared to national models and provide some recommendations for changes. Section A will discuss the types of public guardianship programs and public guardian subjects. Section B will focus on due process issues potential petitioners and respondents will encounter. Section C discusses the assessment of alleged incapacitated persons, including medical and psychological examinations, civil liberties, and who may serve as a guardian. Section D will focus on the powers and duties of public guardians. Finally, in Section E will discuss some additional guardianship statutory provisions. Each of these sections is followed by recommended statutory language.

112. TEASTER ET AL., *supra* note 33, at 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.

113. *See* TEASTER ET AL., *supra* note 33, at 173-212.

A. TYPE OF PUBLIC GUARDIANSHIP PROGRAM AND PUBLIC
GUARDIAN SUBJECTS

North Dakota has an “implicit” statutory scheme for public guardianship.¹¹⁴ In 1981, there were twenty-six implicit statutory schemes for public guardianship in twenty-six states, and fourteen explicit schemes in thirteen states.¹¹⁵ A generation later, there were eighteen implicit statutory schemes for public guardianship in eighteen states, and twenty-eight explicit schemes in twenty-seven states.¹¹⁶ More states added public guardianship programs, and more states have explicit statutory schemes for public guardianship.¹¹⁷

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.¹¹⁸

North Dakota should adopt an explicit statutory scheme for public guardianship.¹¹⁹

North Dakota provides general fund appropriations to the Department of Human Services for the Developmental Disabilities Division and Aging Services Division to contract with an entity to create and coordinate a unified system for the provision of guardianship services: (a) to vulnerable adults who are ineligible for developmental disabilities case management services; and (b) to individuals diagnosed with a mental illness, traumatic brain injury, or elderly individuals age sixty years and over.¹²⁰ 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, twenty of the thirty-four states with some provision for public guardianship:

114. *Id.* at 179, 235.

115. *Id.* at 17.

116. *Id.*

117. *Id.*

118. Pamela Teaster, Erica Wood, Susan Lawrence & Winsor Schmidt, *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 206 (2007).

119. *See infra* Part. VIII for prioritized recommended alternatives.

120. *Cf.* TEASTER ET AL., *supra* note 33, at 235.

[G]enerally provided for public guardianship services for incompetents, 17 provided services specifically 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 [came] into focus only recently. . . .

[T]he overwhelming majority of the state statutes provided for services to incapacitated individuals who were determined to require guardians under the adult guardianship law, but who had 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 service¹²¹

This kind of segregation based on specific clinical conditions risks: (a) *Olmstead*¹²² liability concerns; and (b) vulnerable individuals with dual or multiple diagnoses and eligibilities falling through the cracks of single clinical, categorical public guardian services.

North Dakota should provide public guardian services for all eligible incapacitated persons similarly, and not particular public guardian services for persons with particular diagnoses or categories.¹²³ The Model Public Guardianship Act¹²⁴ recommends the following statutory language:

Any incapacitated person residing in the state who cannot afford to compensate a private guardian or conservator and who does not

121. *Id.* at 17.

122. *Olmstead v. L.C.*, 527 U.S. 581, 597 (holding “[u]njustified isolation . . . is properly regarded as discrimination based on disability.”).

123. *See infra* Part. VII for prioritized recommended alternatives.

124. TEASTER ET AL., *supra* note 33, at 149-72. The 2010 Model Public Guardianship Act is a distillation, compilation, and synthesis of existing state statutes, Regan and Springer’s Model Public Guardianship Act from the 1977 report to the U.S. Senate Special Committee on Aging on Protective Services for the Elderly, an earlier statute prepared by Legal Research and Services for the Elderly in 1971, the Uniform Guardianship and Protective Proceedings Act (1997), the Model Guardianship and Conservatorship Statute published by the American Bar Association Developmental Disabilities Project of the Commission on the Mentally Disabled in 1982, and principles derived from the National Probate Court Standards (1993, 1999), the National Guardianship Conference (Wingspread 1988), and the Second National Guardianship Conference (Wingspan 2002). *Id.* at 149.

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.¹²⁵

B. PROCEDURAL DUE PROCESS SAFEGUARDS IN GUARDIANSHIP

Judicial process highlights for the establishment of guardianships and guardianship stakeholder concerns are described above in Part II related to the establishment of guardianships.¹²⁶ The significant relevant elements in guardianship and public guardianship statutes from the most recent national study of public guardianship are addressed in the following six sections.

1. *Potential Petitioners*

North Dakota provides that “[a]ny person interested in the welfare of an allegedly incapacitated person may petition for the appointment of a guardian.”¹²⁷ 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.¹²⁸ 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.¹²⁹

Such petitioning could present several conflicts of interest. First, if the program relies on fees for its operation, or if its budget is dependent on the number of individuals served, the program might petition more frequently, regardless of individual needs. On the other hand, the program might . . . ‘only petition for as many guardianships as it desires, perhaps omitting some persons in need of such services.’ Or it could “cherry pick,” petitioning only for those individuals easiest or least costly and time-consuming to serve.¹³⁰

There is a formal ethics advisory opinion observing that “[t]he practice of nominating oneself as guardian automatically raises the appearance of

125. TEASTER ET AL., *supra* note 33, at 119.

126. *See supra* Part. II.

127. N.D. CENT. CODE § 30.1-28-03(1) (2012).

128. TEASTER ET AL., *supra* note 33, at 19.

129. *Id.* at 29.

130. *Id.* at 29-30.

self-dealing.”¹³¹ Vermont prohibits the office of public guardianship from petitioning for guardianship: “Neither the office of public guardian or its designees may petition for guardianship.”¹³² 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.”¹³³

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.”¹³⁴

The recommended statutory language for this section is as follows (underlined language is recommended amendment):

30.1-28-03. 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, 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.¹³⁵

131. WASH. CERTIFIED PROF'L GUARDIAN BD., Ethics Advisory Op. 2005-001(2006), available at http://www.courts.wa.gov/committee/?fa=committee.display&item_id=1210&committee_id=127 (discussing when a Certified Professional Guardian may petition for appointment of oneself as guardian). “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.” NAT'L GUARDIANSHIP ASS'N STANDARDS OF PRACTICE 16 (4th ed. 2013) available at http://www.guardianship.org/guardianship_standards.htm.

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.” *Adult Guardianship Conflict of Interest*, COUNCIL ON ACCREDITATION (2013), 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 40, at 608.

132. VT. STAT. ANN. tit. 14 § 3092(b) (2013).

133. TEASTER ET AL., *supra* note 33, at 165.

134. *Id.*

135. N.D. CENT. CODE § 30.1-28-03 (2012).

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.¹³⁶

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. . . .¹³⁷

The following concerns are expressed by stakeholders 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) there are inconsistent adult protection services state-wide and lack of state funding to provide them. North Dakota¹³⁸ is reportedly one of only five states (Colorado, New Jersey, New York, and South Dakota)¹³⁹ without mandatory reporting of elder abuse and neglect. However, New Jersey has required mandatory reporting of institutionalized elder abuse since March 29, 2010.¹⁴⁰ New York requires mandatory reporting of abuse or neglect in a residential health care facility.¹⁴¹ Further, South Dakota has required mandatory reporting of elder or disabled adult abuse or

136. TEASTER ET AL., *supra* note 33, at 165.

137. *Id.*

138. See N.D. CENT. CODE § 50-25.2-03 (2013) (discussing 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 § 50-25.2-05(2) (2013). See generally Laura Mosqueda & Aileen Wiglesworth, Coroner Investigations of Suspicious Elder Deaths, U.S. Dep’t of Justice (2012).

139. Laws Related to Elder Abuse, Mandatory Reporting to Adult Protective Services, available at http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html.

140. See N.J. STAT. ANN. § 52:27G-7.1 (West 2013).

141. See N.Y. PUBLIC HEALTH LAW § 2803-d (Consol. 2013).

neglect since July 1, 2011.¹⁴² Therefore, North Dakota is one of only two states without mandatory reporting of vulnerable adult abuse and neglect.¹⁴³

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%).¹⁴⁴ A national study of adult protective services found 253,421 reports of abuse of adults aged sixty and over; 83 reports for every 100,000 people.¹⁴⁵ Yet eighty-four percent of abuse incidents are not reported.¹⁴⁶ 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. North Dakota should change from voluntary reporting of abuse or neglect to mandatory reporting of abuse or neglect.

The recommended statutory language for this section follows (underlined language is recommended amendment; strike through language is recommended deletion):

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

142. See S.D. CODIFIED LAWS § 22-46-9 (2013).

143. Only Colorado and North Dakota have lacked mandatory reporting of vulnerable adult abuse and neglect. Effective July 1, 2014, Colorado will require mandatory reporting of abuse or exploitation of at-risk elders. COLO. REV. STAT. § 18-6.5-108.

144. RON ACIEMO, MELBA HERNANDEZ-TEJADA, WENDY MUZZY & KENNETH STEVE, FINAL REPORT: THE NAT'L ELDER MALTREATMENT STUDY, NAT'L INSTITUTE OF JUSTICE 38-57 (2009). See Xinqi Dong & Melissa Simon, *Elder Abuse as a Risk Factor for Hospitalization*, 173 (10) JAMA INTERNAL MEDICINE 911 (2013) (reported elder abuse, psychological abuse, financial exploitation, and caregiver neglect are each associated with increased rate of hospitalization).

See generally RICHARD BONNIE & ROBERT WALLACE (EDS.), ELDER MISTREATMENT: ABUSE, NEGLECT AND EXPLOITATION IN AN AGING AMERICA (The National Academies Press 2003); Mark Lachs & Karl Pillemer, *Elder Abuse*, 364 LANCET 1263 (2004). See also Deborah Saunders, Issue Paper on Abuses of Alternatives to Guardianship, National Center for State Courts (2012).

145. PAMELA TEASTER, TYLER DUGAR, JOANNE OTTO, MARTA MENDIONDO, ERIN ABNER & KARA CECIL, THE 2004 SURVEY OF STATE ADULT PROTECTIVE SERVICES: ABUSE OF ADULTS 60 YEARS OF AGE AND OLDER, REPORT TO THE NAT'L CTR ON ELDER ABUSE, ADMINISTRATION ON AGING (2006).

146. NAT'L CTR ON ELDER ABUSE, NAT'L ELDER ABUSE INCIDENCE STUDY (1998).

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.¹⁴⁷

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 finan-

147. This is the proposed legislation to amend N.D. CENT. CODE § 50-25.2-03. The 2013 North Dakota Legislature passed Senate Bill 2323 to require mandatory reporting of abuse or neglect of vulnerable adults and penalties for failure to report effective Aug. 1, 2013. N.D. CENT. CODE §§ 50-25.2-03 and 50-25.2-10.

cial 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.¹⁴⁸

3. *Notice and Hearing*

Almost all of North Dakota's provisions for notice and hearing are comparable to the Uniform Guardianship and Protective Proceedings Act ("UGPPA").¹⁴⁹ The most significant exception is the absence of provisions for informing the proposed ward, or ward,¹⁵⁰ of rights at the hearing and of the nature, purpose, and consequences of appointment of a guardian. North Dakota should adopt a version of UGPPA notice provisions regarding rights at the hearing and the nature, purpose, and consequences of appointment of a guardian: "The notice must inform the ward or proposed ward of the ward or proposed ward's rights at the hearing and include a description of the nature, purpose, and consequences of an appointment of a guardian."¹⁵¹

The recommended statutory language for this section follows (underlined language is recommended amendment):

148. This is the proposed legislation to amend N.D. CENT. CODE § 50-25.2-13.

149. See *State Law Charts and Updates: Notice in Guardianship Proceedings*, ABA, available at http://www.americanbar.org/groups/law_aging/resources/state_law-charts_updates.html; see *State Law Charts and Updates: Conduct and Findings of Guardianship Proceedings*, ABA, available at http://www.americanbar.org/groups/law_aging/resources/state_law-charts_updates.html.

150. The Third National Guardianship Summit recommends: "Where possible, the term *person under guardianship* should replace terms such as *incapacitated person*, *ward*, or *disabled person*." *Third Guardianship Summit*, *supra* note 45, at 1199 (Recommendation #1.7). See *supra* note 108 for a description of the Third National Guardianship Summit, including the ten sponsoring and nine co-sponsoring national organizations.

See also Jan La Forge, *Preferred Language Practice in Professional Rehabilitation Journals*, 57 J. REHABILITATION 49 (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>.

Cf. American Psychiatric Association, *Diagnostic and Statistical Manual* (DSM-IV-TR, 4th ed., text revised) ("[a] common misconception is that a classification of mental disorders classifies people, when actually what is being classified are disorders that people have;" thus, DSM-IV "avoids the use of such expressions as 'a schizophrenic' or 'an alcoholic' and uses the more accurate, but admittedly more cumbersome, 'an individual with Schizophrenia' or 'an individual with Alcohol Dependence.>").

151. See Uniform Guardianship and Protective Proceedings Act, § 404(a), available at http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20proceedings/ugppa_final_97.pdf.

30.1-28-09. Notices in guardianship proceedings [in pertinent part]
 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.¹⁵²

4. *Right to Counsel; Legal Counsel for Indigents*

Some of the North Dakota guardianship stakeholders expressed 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. “[T]here is a growing recognition of the ‘right to counsel’ as an empty promise for a vulnerable indigent individual. Thus, over twenty-five states require the appointment of counsel, generally making counsel available without charge to indigent respondents.”¹⁵³ Further:

The public guardianship process is designed to be adversarial. The significance of effective, adversarial counsel for both the process and the proposed ward cannot therefore be overemphasized. Any failure of guardianship processes can be attributed in large measure to inappropriately paternalistic and condescendingly informal proceedings facilitated by counsel, whose real client is too seldom the alleged proposed ward.¹⁵⁴

152. This is the proposed legislation to amend N.D. CENT. CODE § 30.1-28-09(3).

153. TEASTER ET AL., *supra* note 33, at 20. In North Dakota, the Commission on Legal Counsel for Indigents (“CLCI”) was legislatively established in 2005 pursuant to N.D. CENT. CODE §§ 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 . . .

N.D. CENT. CODE § 54-61-01(1) (2012). *Cf.*, Application of Rodriguez, 607 N.Y.S.2d 567 (N.Y. 1992) (indigent person has constitutional right to counsel at civil competency proceeding).

154. TEASTER ET AL., *supra* note 33, at 157. *See, e.g.*, In re Lee, 754 A.2d 426 (Md. 2000) (guardianship counsel inadequate where attorney waived client’s right to be present and tried to prevent a hearing on the client’s disability). *Cf., e.g.*, TEASTER ET AL., *supra* note 33, at 4 (*quoting* GEORGE ALEXANDER & TRAVIS LEWIN, THE AGED AND THE NEED FOR SURROGATE MANAGEMENT 135 (1972)).

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 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 reaffirmed 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.¹⁵⁵

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

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

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.

155. *Wingspan*, *supra* note 40, at 601.

The National Probate Court Standards state: "The role of counsel should be that of an advocate for the respondent." Nat'l College of Probate Judges, National Probate Court Standards, Standard 3.3.5(B) (2013). See also Joan O'Sullivan, *Role of the Attorney for the Alleged Incapacitated Person*, 31 STETSON L. REV. 686 (2002); Michael Perlin, *Right to Counsel in Guardianship Proceedings*, in *Mental Disability Law: Civil and Criminal* at 278-83 (2d ed. 1998), and 100-04 (2012 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'"); Winsor Schmidt, *Accountability of Lawyers in Serving Vulnerable, Elderly Clients*, 5 J. OF ELDER ABUSE & NEGLECT 39 (1993).

customarily charged by attorneys in this state for comparable services.¹⁵⁶

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”¹⁵⁷

Counsel for all proposed wards would probably facilitate negotiation, settlement, and achievement of more cost effective, least restrictive alternative, resolution for the proposed ward. North Dakota should adopt model recommendations regarding the right to counsel and the duties of counsel representing the proposed ward at the hearing. The recommended statutory language for this section follows:

30.1-28-03. Procedure for court appointment of a guardian of an incapacitated person [in pertinent part].

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:

(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~~

156. TEASTER ET AL., *supra* note 33, at 167. Originally recommended by REGAN & SPRINGER, *supra* note 93.

157. *Id.* Originally recommended by REGAN & SPRINGER, *supra* note 93.

~~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. The proposed ward has a right of trial by jury.

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.¹⁵⁸

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 eleven to twenty-seven states,¹⁵⁹ not including North Dakota. Recommendations for the right to a jury trial in guardianship proceedings range from Regan and Springer's endorsement

158. This is the proposed legislation to amend N.D. CENT. CODE § 30.1-28-03.

159. TEASTER ET AL., *supra* note 33, at 20. Kentucky, for example, makes a jury trial mandatory. *Id.*

to the U.S. Senate Special Committee on Aging in 1977¹⁶⁰ to the Model Public Guardianship Act in 2010:¹⁶¹ “The AIP [alleged incapacitated person] shall have the right to trial by jury.”¹⁶² North Dakota should adopt a right to trial by jury in guardianship proceedings. The recommended statutory language for North Dakota Century Code section 30.1-28-03(7) regarding the right of trial by jury in Part VII(4) above.

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

Since 1981, the number of states that provide a right to cross-examination in guardianship proceedings has gone from only nine states to thirty-five states,¹⁶³ including North Dakota. Thirty-six states, including North Dakota, require “clear and convincing evidence” as the standard of proof in guardianship proceedings.¹⁶⁴ New Hampshire requires “beyond a reasonable doubt.”¹⁶⁵ North Carolina and Washington use “clear, cogent, and convincing evidence.”¹⁶⁶ The Model Public Guardianship Act recommends “clear, unequivocal, and convincing evidence” as the standard of proof.¹⁶⁷ Since 1981, the number of states that provide a right to appeal in guardianship proceedings has gone from only three states to at least twenty-nine, including North Dakota.¹⁶⁸ North Dakota should consider

160. REGAN & SPRINGER, *supra* note 93.

161. TEASTER ET AL., *supra* note 33, at 149-72. *See supra* note 124 for a description of the Model Public Guardianship Act.

162. *Id.* at 167.

Cf., e.g., In re Dep’t of Soc. Work of Beth Isr. Med. Ctr., 764 N.Y.S.2d 87 (N.Y. 2003) (right to jury trial in guardianship proceeding); In re Arnold A., 634 N.Y.S.2d 343 (N.Y. 1995) (state constitutional right to trial by jury in involuntary civil commitment).

163. TEASTER ET AL., *supra* note 33, at 20-21.

164. *Id.* at 21.

165. *Id.* at 21, 188.

166. *Id.* at 21, 189, 193.

167. *Id.* at 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. Public guardianship is easily conceptualized as the denaturalization or deportation of an individual’s legal autonomy as a citizen. *Id.* at 157.

Cf., 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).

168. *See* TEASTER ET AL., *supra* note 33, at 21; N.D. CENT. CODE § 30.1-28-05(2).

changing the standard of proof in guardianship proceedings to clear, unequivocal, and convincing evidence.

The recommended statutory language for this section follows:

30.1-28-04. (5-304) Findings—Order of appointment [in pertinent part]:

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;

(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.¹⁶⁹

C. ASSESSMENT OF ALLEGED INCAPACITATED PERSON, CIVIL LIBERTIES, SELECTION OF GUARDIAN

This section addresses assessment of alleged incapacitated persons, the preservation of civil liberties, and the selection of guardians. The first part analyzes the determination of capacity in guardianship proceedings. The second part reviews the preservation of civil rights under guardianship. The third part considers the selection of guardians including conflicts of interest and the desirability of bonding requirements, professional liability insurance, and fingerprint, criminal history, and credit background checks.

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

169. This is the proposed legislation to amend N.D. CENT. CODE § 30.1-28-04.

Psychological Association, and the National College of Probate Judges.¹⁷⁰ Clinical examinations are important evidence for judicial determinations of legal incapacity. At least forty states, including North Dakota, provide for examination of the proposed ward by a physician, and thirty-one states, including North Dakota, specifically include a psychologist.¹⁷¹

The Uniform Guardianship and Protective Proceedings Act authorizes courts to order a professional evaluation of the respondent.¹⁷² The National Probate Court Standards advise, “[t]he imposition of a guardianship by the probate court should be based on clear and convincing evidence of the incapacity of the respondent and that a guardianship or conservatorship is necessary to protect the respondent’s well-being or property.”¹⁷³ According to the national public guardianship study:

170. ABA COMMISSION ON LAW AND AGING, AMERICAN PSYCHOLOGICAL ASS’N, & NAT’L COLLEGE OF PROBATE JUDGES, JUDICIAL DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS (2006). *See also, e.g.*, NAT’L CENTER FOR STATE COURTS, IDENTIFYING AND RESPONDING TO ELDER ABUSE, NEGLECT, AND EXPLOITATION: A BENCHMARK FOR JUDGES; LORI STIEGEL, RECOMMENDED GUIDELINES FOR STATE COURTS HANDLING CASES INVOLVING ELDER ABUSE (ABA 1996).

Cf., ABA COMMISSION ON LAW AND AGING & AMERICAN PSYCHOLOGICAL ASS’N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS (2005); GARY MELTON, JOHN PETRILA, NORMAN POYTHRESS & CHRISTOPHER SLOBOGIN, PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS (3rd ed. 2007); RANDY OTTO, & KEVIN DOUGLAS (EDS.), HANDBOOK OF VIOLENCE RISK ASSESSMENT (2010).

171. TEASTER ET AL., *supra* note 33, at 21.

N.D. CENT. CODE § 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 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.

Id.

Cf., Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act § 304.

172. Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act § 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. . . .

173. Nat’l College of Probate Judges, National Probate Court Standards, Standard 3.3.9 (2013).

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.¹⁷⁴

Unfortunately, the available research finds significant problems with clinical evidence in guardianship proceedings for older adults.¹⁷⁵ Much clinical evidence is incomplete. The mean length of written clinical reports for guardianship of older adults ranges between eighty-three words in Massachusetts (with two-thirds of the written evidence illegible) and 781 words in Colorado (one to three pages) compared to twenty-four pages for the mean length of child custody evaluations.¹⁷⁶ Several North Dakota stakeholders report difficulties with insufficient physician specialists for clinical evaluations in guardianship proceedings.

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

The AIP [alleged incapacitated person] has the right to secure an independent medical and/or psychological examination relevant to the issues involved in the hearing at the expense of the state if the person is unable to afford such examination and to present a report of this independent evaluation or the evaluator’s personal testimony as evidence at the hearing. At any evaluation, the AIP has the right to remain silent, the right to refuse to answer questions

174. TEASTER ET AL., *supra* note 33, at 21, (citing Michael Mayhew, *Survey of State Guardianship Laws: Statutory Provisions for Clinical Evaluations*, 27 BIFOCAL 1, 14 (2005)).

175. Jennifer Moye, Stacey Wood, Barry Edelstein, Jorge Armesto, Emily Bower, Julie Harrison & Erica Wood, *Clinical Evidence in Guardianship of Older Adults is Inadequate: Findings from a Tri-State Study*, 47 GERONTOLOGIST 604, 608, 610 (2007).

176. *Id.* at 604, 610. Accord Kris Bulcroft, Margaret Kielkopf & Kevin Tripp, *Elderly Wards and Their Legal Guardians: Analysis of County Probate Records in Ohio and Washington*, 31 GERONTOLOGIST 156, 157, 160 (1991); Roger Peters, Winsor Schmidt & Kent Miller, *Guardianship of the Elderly in Tallahassee, Florida*, 25 GERONTOLOGIST 532, 537–38 (1985); see also Jennifer Moye, Steven Butz, Daniel Marson & Erica Wood, *A Conceptual Model and Assessment Template for Capacity Evaluation in Adult Guardianship*, 47 GERONTOLOGIST 591 (2007) (model and template for capacity evaluation in guardianship assessing medical condition, cognition, functional abilities, values, risk of harm and level of supervision needed, and means to enhance capacity); Jennifer Moye, Ronald Gurrera, Michele Karel, Barry Edelstein & Christopher O’Connell, *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).

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.¹⁷⁷

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

The recommended statutory language for this section follows:

30.1-28-03. Procedure for court appointment of a guardian of an incapacitated person [in pertinent part]

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. 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.¹⁷⁸

177. TEASTER ET AL., *supra* note 33, at 167 (from Regan and Springer to the U.S. Senate Special Comm. on Aging, *supra* note 93). *Cf., e.g.*, In re Guardianship of K-M, 866 A.2d 106 (Maine 2005) (guardianship respondents have a due process liberty interest in refusing a psychological examination); Matter of A.G., 785 N.Y.S.2d 313 (N.Y. Sup. Ct. 2004) (Fifth Amendment right to remain silent applies to a guardianship hearing).

178. N.D. CENT. CODE § 30.1-28-03 (2010).

2. *Civil Liberties Preserved*

Compared with only ten states in 1981, at least twenty-seven 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.”¹⁷⁹ One of the best delineations of non-delegable and delegable rights in guardianship is Florida, which states:

[R]ights retained by the individual (such as the right to retain counsel, to receive visitors and communicate with others, to privacy); rights that may be removed by court order, but not delegated to the guardian (such as right to marry, vote, have a driver’s license); and rights that are removable and delegable to the guardian (such as right to contract, to sue, and defend lawsuits).¹⁸⁰

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

On the question of who may be a guardian, most states, including North Dakota, use a priority hierarchy of the legally incapacitated person’s nominee, spouse, adult child, parent, relative, or friend (“the usual probate priority scheme”).¹⁸¹ 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.¹⁸² However, the practice is allowed if the court “makes a specific

179. TEASTER ET AL., *supra* note 33, at 22. N.D. CENT. CODE §§ 30.1-28-04(3)-(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* (Avon Books 1979), at 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: COURT OF LAST RESORT FOR THE ELDERLY AND DISABLED* 6 (Carolina Academic Press 1995). *Cf., e.g.,* In re Gamble 394 A.2d 308, 309 (N.H. 1978) (“An incompetent person is reduced to the status of a child . . .”).

180. TEASTER ET AL., *supra* note 33, at 22.

181. *Id.* See N.D. CENT. CODE § 30.1-28-11 (2010).

182. N.D. CENT. CODE § 30.1-28-11(1) (2010).

finding that the appointment presents no substantial risk of a conflict of interest.”¹⁸³

The North Dakota statute authorizes “[a]ny appropriate government agency, including county social service agencies”¹⁸⁴ as eighth priority to serve as guardian, except that “[n]o institution, agency, or nonprofit group home providing care and custody of the incapacitated person may be appointed guardian.”¹⁸⁵ A compilation of state statutes on the authority of adult protective services agencies to act as guardian of a client concluded:

This raises concerns about conflict of interest. As an agency that receives and investigates reports of suspected elder abuse, APS may be called upon to investigate allegations that a guardian abused, neglected, or exploited the incapacitated person for whom he or she acts as surrogate decision-maker. If an APS agency serves as guardian for its clients, it will face a conflict of interest if such allegations are raised against the agency. Additionally, staff members who act as guardians of agency clients face a conflict of interest if they need to advocate within their own agency for additional resources for the incapacitated people they are serving. As a result, many states prohibit APS agencies from acting as guardian for program clients or limit the agency to serving as a temporary guardian until a non-agency guardian can be appointed.¹⁸⁶

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.”¹⁸⁷ 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

183. *Id.*

184. N.D. CENT. CODE § 30.1-28-11(3)(h) (2010).

185. *Id.* § 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.” *Id.*

186. Lori Stiegel & Ellen Klem, ABA Commission on Law and Aging (2007), at 1, *available at* http://www.americanbar.org/groups/law_aging/resources/elder_abuse.html.

187. N.D. CENT. CODE § 30.1-28-11(3)(g) (2010).

also does not address the qualifications of the employee, volunteer, or other person responsible for the guardianship.

As recorded above, some of the North Dakota guardianship stakeholders expressed 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.¹⁸⁸ The U.S. Government Accountability Office recently reported:

[H]undreds of allegations of physical abuse, neglect, and financial exploitation of wards by guardians in 45 states and the District of Columbia, between 1990 and 2010. In 20 selected closed cases from 15 states and the District of Columbia, GAO found that guardians stole or improperly obtained \$5.4 million from 158 incapacitated victims, many of them seniors. GAO's in-depth examination of these 20 closed cases identified three common themes: (1) state courts failed to adequately screen the criminal and financial backgrounds of potential guardians; (2) state courts failed to adequately monitor guardians after appointment, allowing the continued abuse of vulnerable seniors and their assets; and (3) state courts failed to communicate ongoing abuse by guardians to appropriate federal agencies like the Social Security Administration (SSA), the Department of Veterans Affairs (VA), and the Office of Personnel Management (OPM), which manages federal employee retirement programs. Guardians serve as federal representative payees on one percent of SSA cases, 13 percent of VA cases, and 34 percent of OPM cases.¹⁸⁹

188. See ABA Commission on Law and Aging, *Guardian Felony Disqualification and Background Requirements*, available at http://www.americanbar.org/groups/lawaging/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.").

189. See Schmidt et al., *supra* note 42, at 176 (citing GAO, *supra* note 42, at 4, 6). An attorney member of the National Guardianship Association provided information on over three hundred cases of alleged neglect, abuse, and exploitation by guardians between 1990 and 2009.). See, e.g., Stephen Lee, *Jury: County Did Do Damage*, Grand Forks Herald, Sept. 13, 2013 (former public administrator negligent in handling estate of elderly woman but misdeeds caused no damages; state and federal prosecutors investigating); Stephen Lee, *Grand Forks County Not Liable for Guardian*, Grand Forks Herald, Aug. 30, 2013 (former public administrator "did breach a fiduciary" but the breach did not cause any damages).

The Second National Guardianship Conference recommends “[a]ll 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.”¹⁹⁰ North Dakota should require that the information in the petition for appointment of a guardian, and in the visitor’s report, about the qualifications of the proposed guardian¹⁹¹ include the results of fingerprint, criminal history, and credit background checks before appointment of a guardian.

The recommended statutory language for this section follows:

30.1-28-03. Procedure for court appointment of a guardian of an incapacitated person [in pertinent part]:

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

(g) The occupation and qualifications of the proposed 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.¹⁹²

D. POWERS AND DUTIES OF PUBLIC GUARDIANS

This section addresses the powers and duties of public guardians. The first part considers specification of one agency to serve as public guardian. The second part considers public guardian conflicts of interest. The third part reviews general probate powers for public guardians, as well as ward visitation standards.

190. *Wingspan*, *supra* note 40, at 607. For example, the state of Washington requires certified professional guardians and certified professional guardian agencies to maintain \$500,000 of error and omissions insurance that covers acts of the guardian or agency and employees of the guardian or agency. Wash. Certified Professional Guardian Board, Regulation 704 Insurance, available at http://www.courts.wa.gov/committee/?fa=committee.child&child_id=73&committee_id=117.

191. N.D. CENT. CODE §§ 30.1-28-03(2)(g) and 30.1-38-03(6)(h)(2) (2010).

192. This is the proposed legislation to amend N.D. CENT. CODE § 30.1-28-03 (2012).

1. *Specified Agency as Public Guardian*

At least forty-four states specify a particular agency to serve as public guardian.¹⁹³ North Dakota authorizes “[a]ny appropriate government agency, including county social service agencies” to serve as guardian as eighth priority,¹⁹⁴ except that “[n]o institution, agency, or nonprofit group home providing care and custody of the incapacitated person may be appointed guardian.”¹⁹⁵ 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.¹⁹⁶ North Dakota should specify one public guardian agency to serve as public guardian.¹⁹⁷

2. *Conflict of Interest Raised/Remedied*

In reviewing the extent to which public guardianship assists or hinders vulnerable adults in securing access to rights, benefits, and entitlements, a core conclusion of the U.S. Administration on Aging funded first national public guardianship study was that success is dependent on the clear consideration that “[t]he public guardian must be independent of any service providing agency (no conflict of interest).”¹⁹⁸ 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

193. TEASTER ET AL., *supra* note 33, at 202-07.

194. N.D. CENT. CODE § 30.1-28-11(3)(h) (2012).

195. N.D. CENT. CODE § 30.1-28-11(1) (2012). 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.

196. N.D. CENT. CODE §§ 11-21-01, 05 (2010). 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.

197. *See infra* Part.VIII(C) for prioritized recommended alternatives.

198. Winsor Schmidt, *Guardianship of the Elderly in Florida: Social Bankruptcy and the Need for Reform*, 55 (3) FLA. B. J. 189, 192 (1981). *See, e.g.*, Crawford v. Minnesota, 468 N.W.2d 583 (Minn. Ct. App. 1991) (problematic dual role of case manager as guardian monitoring herself); In re Jewish Ass’n for Servs. for the Aged, 251 A.D.2d 105 (N.Y. App. Div. 1998) (finding a conflict of interest by service agency as guardian); In re Patrick BB, 284 A.D.2d 636 (N.Y. App. Div. 2001) (appointment of creditor and service provider New York State Association for Retarded Children as guardian not authorized); SCHMIDT ET AL., *supra* note 93, at 16-17, 34, 38, 170, 174-75, 183-84, 193.

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.¹⁹⁹

The Model Public Guardianship Act provides, “[c]onflict 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.”²⁰⁰ North Dakota should make the office of public guardian independent from all service providers.²⁰¹

3. *General Probate Powers for Public Guardians*

While most state statutes provide 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.²⁰²

For example, mandatory duties may include specifications about visits to the [person under guardianship]. At least eight states dictate the frequency of public guardianship [person under guardianship] 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.²⁰³

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

199. SCHMIDT ET AL., *supra* note 93, at 38.

200. TEASTER ET AL., *supra* note 33, at 162.

201. *See infra* Part.VIII(C) for prioritized recommended alternatives.

202. *See* TEASTER ET AL., *supra* note 33, at 25, 202-07.

203. *Id.* at 25. *See supra* text accompanying notes 36-39.

and manage volunteers, and intervene in private guardianship proceedings, if necessary.²⁰⁴

The Model Public Guardianship Act provides the office of public guardian with the same general probate powers and duties as a private guardian.²⁰⁵ The Model Public Guardianship Act provides a statutory alternative²⁰⁶ of twelve mandatory duties²⁰⁷ and eight other powers.²⁰⁸ The Act also allows the public guardian, as director of the office of the public guardian, to delegate guardian decision-making functions to paid professional staff with an undergraduate degree and a degree in law, psychology, or social work, and certification.²⁰⁹ North Dakota guardians and guardian organizations should comply with the ward visitation standards, NDG Standard 13(V) stating that the guardian of the person “shall visit the ward monthly” and NDG Standard 23(III) stating that “[t]he 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.”²¹⁰ North Dakota should list additional duties and powers for the public guardian modeled after those in the Model Public Guardianship Act.²¹¹

The recommended statutory language for this section follows:

204. *Id.*

205. *Id.* at 154, 163.

206. *Id.* at 164-65.

207. *Id.*

208. *Id.* at 165.

209. *Id.* at 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].

Id. at 165.

Cf. Winsor Schmidt, Fevzi Akinci & Sarah Wagner, *The Relationship Between Guardian Certification Requirements and Guardian Sanctioning: A Research Issue in Elder Law and Policy*, 25 (5) BEHAV. SCI. & LAW 641 (2007) (“83.3% of [General Equivalency Diploma] or [high school] graduates are likely to have more severe sanctions compared with 76.4% undergraduate or higher education, and 47.7% with an AA [Associate of Arts] or Tech [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).”).

210. NORTH DAKOTA GUARDIANSHIP: STANDARDS OF PRACTICE FOR ADULTS, *supra* note 37, at 17.

211. *See infra* Part.VIII(C).(3) for duties and powers for the public guardian.

30.1-28-12. (5-312) General powers and duties of guardian [in pertinent part]:

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.²¹²

E. ADDITIONAL GUARDIANSHIP PROVISIONS

The 2010 national public guardianship study of additional guardianship elements (e.g., provision for termination, restoration, guardianship petition, annual report, emergency guardian, temporary guardians, and limited guardian) shows that North Dakota joins most states in addressing all of these elements.²¹³ Stakeholders highlighted several concerns. The following two sections will address the annual report and emergency guardianship issues.

1. *Annual Report*

Some of the guardianship stakeholders expressed concerns about oversight and monitoring of guardians and guardian annual reports. Unlike a number of states, North Dakota does not have statutory provisions for active court review of annual reports.²¹⁴ There is extensive literature and numerous national recommendations about changing from passive court monitoring to active court monitoring.²¹⁵ "California has the most

212. This is the proposed legislation to amend N.D. CENT. CODE § 30.1-28-12.

213. TEASTER ET AL., *supra* note 33, at 26-29, 208-12.

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

215. See references cited in *supra* note 45. The Third National Guardianship Summit made specific recommendations related to active court monitoring. See *Third Guardianship Summit*, *supra* note 45, at 1200-02 (Recommendations #2.3, 2.5, 3.1, 3.5). See *supra* note 108 for a

comprehensive model of review, with a regular visit to each [incapacitated person] by a court investigator six months after appointment and every year thereafter.”²¹⁶ 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. North Dakota should establish a system for active monitoring of guardianship annual reports, including filing and review of annual reports and plans.²¹⁷

The recommended statutory language for this section follows:

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

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.²¹⁸

description of the Third National Guardianship Summit, including the ten sponsoring and nine co-sponsoring national organizations.

216. TEASTER ET AL., *supra* note 33, at 27. *See also* Guardianship Task Force, Report of the Guardianship Task Force to the [Washington State Bar Association] Elder Law Section Executive Committee (Aug. 2009), at 12: In one county, a guardianship monitoring program discovered that a man who was guardian of his ninety-eight 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.

217. *See* Uniform Guardianship and Protective Proceedings Act § 420(d).

218. This is the proposed legislation to amend N.D. CENT. CODE § 30.1-28-12.1.

2. *Emergency Guardian*

Several of the guardianship stakeholders expressed significant concerns with the temporary guardian statute.²¹⁹ 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; (f) limited duration (North Dakota allows up to ninety days, several states allow no more than ten days); and (g) specific language about the standard of proof.²²⁰ An important issue “is that due process safeguards for emergency guardianship typically are less stringent than for permanent guardianship, yet emergency guardianship often functions as a gateway 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.”²²¹ At least one federal district court ruled a state emergency guardianship statute unconstitutional because it lacked sufficient due process protection.²²²

North Dakota should adopt section 311 of the Uniform Guardianship and Protective Proceedings Act related to emergency guardian. The recommended statutory language for this section follows:

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.

219. N.D. CENT. CODE § 30.1-28-10 (2012). The 2013 North Dakota Legislature passed House Bill 1040 that repealed the statutory provision for temporary guardians. S.L. 2013, ch. 250, section 3.

220. See Emergency Guardianship, available at http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html.

221. TEASTER ET AL., *supra* note 33, at 28; see also Peter Barrett, *Temporary/Emergency Guardianships: The Clash Between Due Process and Irreparable Harm*, 13 BIFOCAL No. 4, 3 (1993); Angela Gandy, *Emergency Guardianship Statutes: An Analysis of Legislative Due Process Reforms Since Grant v. Johnson*, 30 BIFOCAL No. 2, 28 (2008).

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

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.²²³

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

223. N.D. CENT. CODE § 30.1-28-10.

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.²²⁴

VIII. METHODS AND COSTS FOR THE TIMELY AND EFFECTIVE DELIVERY OF GUARDIANSHIP AND PUBLIC ADMINISTRATOR RESPONSIBILITIES AND SERVICES

This section describes methods and costs for the timely and effective delivery of guardianship and public administrator responsibilities and services. The first part reviews North Dakota's current provisions for guardianship and public administrator responsibilities and services. The second part summarizes the extent of guardian coverage by county for guardianship and public administrator responsibilities and services. The third part provides the recommended prioritization of public guardianship models for North Dakota. The fourth part describes the estimated biennium costs of the private contractor model with a 1:36-39 staff-to-ward ratio, and the cost savings from public guardianship with a 1:20 staff-to-ward ratio.

A. NORTH DAKOTA'S CURRENT PROVISIONS FOR GUARDIANSHIP AND PUBLIC ADMINISTRATOR RESPONSIBILITIES AND SERVICES

North Dakota has statutory provisions for: (a) guardianship of legally incapacitated persons, and (b) like a number of other states (e.g., Arizona, California, Michigan, Missouri, Nevada) for county public administrators.²²⁵ North Dakota statutes identify 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 person under guardianship.²²⁶ North Dakota statutes also authorize judicial appointment of a county public administrator, who may

224. This is the proposed legislation to amend N.D. CENT. CODE § 30.1-28-10. The 2013 North Dakota Legislature passed House Bill 1040 adopting the recommended language for emergency guardianship. N.D. CENT. CODE § 30.1-28-10.1.

225. *See, e.g.*, TEASTER ET AL., *supra* note 33, at 25, 58, 90, 110, 215, 227, 229-31.

226. N.D. CENT. CODE §§ 30.1-28-11, 12.

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.²²⁷

B. EXTENT OF GUARDIAN COVERAGE BY COUNTY FOR
GUARDIANSHIP AND PUBLIC ADMINISTRATOR RESPONSIBILITIES
AND SERVICES

The counties in North Dakota reportedly with a public administrator (“PA”), without a PA, and the counties served by a non-profit corporation with offices in Bismarck are listed below.

Counties with PA	Counties without a PA	Counties w Bis. PA
Benson	Adams	Burleigh
Burleigh	Barnes	Dickey
Cass	Billings	Emmons
Cavalier	Bottineau	Grant
Dickey	Bowman	Kidder
Emmons	Burke	Logan
Grand Forks	Divide	McIntosh
Grant	Dunn	McLean
Griggs	Eddy	Mercer
Kidder	Foster	Morton
Logan	Golden Valley	Oliver
McIntosh	Hettinger	Sheridan
McLean	LaMoure	
Mercer	McHenry	
Morton	McKenzie	
Nelson	Mountrail	
Oliver	Pembina	
Ramsey	Pierce	
Rolette	Ransom	
Sheridan	Renville	
Stutsman	Richland	
Towner	Sargent	
Traill	Sioux	

227. N.D. CENT. CODE §§ 11-21-01, 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.

Ward	Slope	
Williams	Stark	
	Steele	
	Walsh	
	Wells	

Twenty-eight (53%)²²⁸ of North Dakota's fifty-three counties apparently do not have a public administrator. The 2010 census population of the twenty-eight counties is 151,026, which is 22.5% of North Dakota's population of 672,591. One non-profit corporation,²²⁹ with offices in Bismarck (Burleigh County), is reportedly the PA for twelve counties.²³⁰ These twelve counties have a 2010 census population of 147,799 (21.9% of the state population) and cover an area of 16,031 square miles (23.2% of the state).²³¹ One of North Dakota's principal corporate guardianship programs reports a guardianship staff-to-client ratio of 1:36 to 1:39 (1:40 as of 7/1/09),²³² compared with the recommended 1:20 ratio. One of the several public administrators in North Dakota serving as guardian reports a part-time guardian caseload ranging from twenty-two to twenty-nine with wards housed 210 miles apart.²³³

C. RECOMMENDED PRIORITIZATION OF PUBLIC GUARDIANSHIP MODELS FOR NORTH DAKOTA

There are four models for public guardianship nationally are: (1) a court model; (2) an independent state office; (3) a division of a social service agency; and (4) a county model.²³⁴ North Dakota is currently a

228. 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 twenty-ninth county, Grand Forks, reportedly resigned on Jan. 20, 2012. The 2010 census population of Grand Forks County is 66,861. The public administrator in a thirtieth county, Rolette, reports not being a guardian for anyone for more than ten years. The 2010 census population of Rolette County is 13,937.

229. Guardian and Protective Services, Inc.

230. Burleigh, Dickey, Emmons, Grant, Kidder, Logan, McIntosh, McLean, Mercer, Morton, Oliver, Sheridan. GUARDIAN AND PROTECTIVE SERVICES, INC., www.gapsinc.org (last visited Sept. 13, 2013).

231. 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).

232. See *supra* Part.II.B.1.

233. *Id.*

234. See *supra* Part.VI; see also REGAN & SPRINGER, *supra* note 93; SCHMIDT ET AL., *supra* note 93; TEASTER ET AL., *supra* note 33, at 7, 123, 151, 246-47.

hybrid of the social service agency model and the county model (public administrator as guardian).²³⁵ 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*

Recommended statutory language for an independent state office is modeled after the Commission on Legal Counsel for Indigents. The proposed, North Dakota Century Code chapter 54-61 statutory language can be found within the final report.²³⁶

2. *County Model*

The dearth of public administrators in North Dakota's counties (twenty-eight of fifty-three counties without a PA) suggests that delivery of PA responsibilities and services is currently untimely and ineffective. Timely and effective PA responsibilities and services appear to require replacement of uneven county funding with state funding of a PA for each of North Dakota's fifty-three counties. This funding level would reduce the guardianship caseload ratio from the reported 1:22-1:29 on a part-time basis to a 1:20 staff-to-client ratio on a full-time basis.

The recommended statutory language for this section follows:

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

235. *See supra* Part.VI; *see also supra* text accompanying notes 104-05; TEASTER ET AL., *supra* note 33, at 247-48.

236. For the recommended legislative text, *see* Winsor Schmidt, Final Report: A Study of Guardianship Services for Vulnerable Adults in North Dakota, 56-59 (May 30, 2012) *available at* www.legis.nd.gov/assembly/62-2011/docs/pdf/hu053012appendixc.pdf.

beyond a ratio of 20 wards per one paid professional staff person.²³⁷

3. *Alternative County Model*²³⁸

The third choice for timely and effective delivery of guardianship responsibilities and services is an alternative county model based on the Model Public Guardianship Act²³⁹ that would establish an independent office of public guardian within each of North Dakota's counties. The recommended statutory language for this model is contained in the final report.²⁴⁰

4. *Court Model*²⁴¹

The fourth choice for timely and effective delivery of guardianship and public administrator responsibilities and services is a court model that would establish an office of public guardianship within the administrative office of the courts. The judiciary is one of the appropriate locations for housing the office of public guardianship because a legal guardian is an agent of the court, appointed by the court, and accountable to the court. A guardian is a representative of the judge who has the authority and responsibility of the state as sovereign under *parens patriae* to serve as

237. N.D. CENT. CODE § 11-21-01 (2013).

238. Based on the Model Public Guardianship Act, TEASTER ET AL., *supra* note 33, at 149-72.

239. *Id.*

240. For the recommended legislative text, see Winsor Schmidt, Final Report: A Study of Guardianship Services for Vulnerable Adults in North Dakota, 60-68 (May 30, 2012) available at www.legis.nd.gov/assembly/62-2011/docs/pdf/hu053012appendixc.pdf.

241. See WASH. REV. CODE § 2.72.005-.900. The Washington Office of Public Guardianship is one of the most highly evaluated and most compliant programs in the country with national public guardianship standards and recommendations. See Burley, *supra* note 24; Burley, *supra* note 72; Mason Burley, *Public Guardianship Services in Washington State: Pilot Program Implementation and Review*, Olympia, WA; Washington State Institute for Public Policy (2009). In addition to the state of Washington, Delaware (operating successfully since 1974), Georgia, Hawaii, Mississippi, and the District of Columbia have court models for public guardianship services. See SCHMIDT ET AL., *supra* note 93, at 25-57, and TEASTER ET AL., *supra* note 33, at 15-30 for additional information about these court model programs, including detailed case studies of the Delaware Office of Public Guardian, one of the five most active and experienced states with public guardianship.

Cf., e.g., *Kicherer v. Kicherer*, 400 A.2d 1097, 1100 (Md. 1979) (“In reality the court is the guardian; an individual who is given that title [of guardian] is merely an agent or arm of that tribunal in carrying out its sacred responsibility.”); *In re Gamble*, 394 A.2d 308, 309-10 (N.H. 1978). (a probate judge appoints the guardian; for separation of powers reasons, the State cannot file an incomplete guardianship petition and delegate its executive responsibility for obtaining guardians to the probate courts).

general guardian or “super guardian” for people with legal disabilities who lack capacity to make decisions. The recommended statutory language for this section is contained in the final report.²⁴²

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.²⁴³ The daily rate is \$6.52 per ward in the first year (\$2380 per client annually), and \$6.71 per ward in the second year (\$2449 per client annually). The current unmet need for plenary public guardian services in North Dakota based on survey responses is 149 individuals (twenty-five people with developmental disabilities on the Catholic Charities waiting list, seven adults in assisted living Facilities, forty-four adults in basic care facilities, sixty-four adults in nursing facilities, and nine adults in the State Hospital).²⁴⁴ The next two sections address the estimated biennium costs of the current private contractor model with a 1:36-39 staff-to-ward ratio and estimated costs savings from public guardianship with a 1:20 staff-to-ward ratio.

1. *Estimated Biennium Costs of Current Private Contractor Model with 1:36-39 Staff-to-Ward Ratio*

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, are in the chart below, plus the 149 individuals currently in need of plenary public guardian services:

\$1,044,170	414 wards at \$6.91 ²⁴⁵	daily rate (2013-2014)
\$375,800	149 wards at \$6.91	daily rate (2013-2014)
\$1,074,392	414 wards at \$7.11 ²⁴⁶	daily rate (2014-2015)
\$386,677	149 wards at \$7.11	daily rate (2014-2015)

242. For the recommended legislative text, see Winsor Schmidt, Final Report: A Study of Guardianship Services for Vulnerable Adults in North Dakota 69-72 (May 30, 2012) available at www.legis.nd.gov/assembly/62-2011/docs/pdf/hu053012appendixc.pdf.

243. See Bay Testimony, *supra* note 27.

244. See *supra* Part II.B.

245. 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.

246. 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.

\$53,225 ²⁴⁷	<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 wards²⁴⁸ 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)
\$53,225	<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.

2. *Cost Savings from Public Guardianship with 1:20 Staff-to-Ward Ratio*

The Washington State Institute for Public Policy evaluated the costs and benefits of the public guardianship program in Washington over a thirty-month period. The study found that while the average public guardianship cost per client over the thirty-month period was \$7,907, the average decrease in residential costs per client from moves to less restrictive environments was \$8131 over the thirty-month period.²⁴⁹ Total savings from reduced residential costs alone exceeded total public guardian program costs within thirty months.

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

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

248. See *supra* Part II.B. The 2013 North Dakota Legislature passed House Bill 1041 appropriating \$828,600 for the purpose of providing grants to counties for public or private guardianship services for the July 1, 2013 to June 30, 2015 biennium. Qualified individuals must have income at or below 100% of the federal poverty level or be Medicaid-eligible. House Bill 1041 also appropriated \$70,000 to the Supreme Court for developing and delivering guardianship training for the biennium. See ABA Commission on Law and Aging, State Adult Guardianship Legislation: Directions of Reform-2013, at 11, *available at* http://www.americanbar.org/content/dam/aba/administrative/law_aging/2013_final_guardianship_legislative_update_12-18-13.auth_checkdam.pdf.

249. Burley, *supra* note 72, at 16. Residential costs for each public guardian client average \$2400 per month at the start of the guardianship. *Id.* at 14. However, average residential costs for each public guardian client steadily decline to \$1300 per month after thirty months (2.5 years). *Id.* This is a forty-six percent decline in residential costs alone.

clients (an average of twenty-nine hours per client per month) compared with an increase in care hours for similar clients without a public guardian.²⁵⁰ The Washington study also reported that twenty-one percent of public guardianship clients showed improvement in self-sufficiency (e.g., decreasing dependence on personal caregiver or nurse) during the thirty-month period.²⁵¹

There are 305 individuals²⁵² with a current unmet need for plenary public guardian services in North Dakota, and numerous persons under guardianship who are not receiving the recommended 1:20 staff-to-ward ratio. Without appropriate, adequately staffed guardian services, these individuals are likely at least accruing unnecessarily high residential costs (average \$2400²⁵³ per month each), unnecessarily high personal care hours per month (average twenty-nine each), and decreased self-sufficiency, not to mention unnecessarily high health care costs.

IX. CONCLUSION

Guardianship is grounded in the *parens patriae* responsibility of the state as sovereign to serve as general guardian or super guardian for people with legal disabilities, especially vulnerable adults with disabling intellectual disabilities or mental illness. While the court in reality serves as the super guardian, the court appoints or delegates a legal guardian as an agent to exercise fiduciary, guardian authority and responsibilities for an individual ward (“incapacitated person”). This Article presented the results of a study of guardianship services for vulnerable adults in North Dakota.

While there were 2038 guardianship and conservatorship cases in North Dakota in 2010, and an average of 311 new appointments per year from 2008-2010, the unmet need for plenary public guardian services in North Dakota is 305 individuals. There is also an unmet need for guardian services measured by the need to reduce guardian staff-to-client ratios to 1:20 compared with reported full-time guardian ratios of 1:36-39 and of a part-time guardian ratio of 1:22-29. There is an unmet need for guardian services measured by non-compliance with the minimum ward visitation standard of one visit per month for each ward. There is an unmet need for guardian services measured by the lack of criminal background checks and credit checks of guardians, and the lack of universal licensing, certification,

250. *Id.* at 1, 19.

251. *Id.* at 1, 19-20.

252. 149 plus 156. *See supra* Part II.B.

253. Burley, *supra* note 72, at 14.

or registration of professional guardians, including education, continuing education, and formal adoption of enforced minimum standards of practice.

This study of guardianship services for vulnerable adults systematically reviewed the North Dakota statutes governing guardianship and public administrator services, evaluated the effectiveness of the statutes compared to other states and compared to national models, and made specific recommendations for changes. Recommended changes included a recommended prioritization of public guardianship models for North Dakota: (1) independent state office; (2) county model; (3) alternative county model; and (4) court model. The study also analyzed petitioning and other costs associated with providing guardianship services.

The estimated biennium costs of the current private contractor model with the 1:36-39 staff-to-ward ratio were provided. The estimated costs savings from public guardianship with a 1:20 staff-to-ward ratio were also provided. Based on studies in other states, total savings from reduced residential costs alone exceed total public guardian program costs within thirty months. Without appropriate, adequately staffed guardian services, individuals with unmet need for guardian services are likely at least accruing unnecessarily high residential costs, unnecessarily high personal care hours per month (average twenty-nine each), and decreased self-sufficiency, as well as unnecessarily high health care costs. There are significant opportunities to improve guardianship for vulnerable adults in North Dakota.

X. APPENDIX: 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 de-identified North Dakota case accounts that are generously provided. These cases are from DKK Guardian and Conservatorship Services Inc., Jamestown, North Dakota.

[A] 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. 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.

[An] 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.

[A] 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.

[A] 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.

[An] 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.

The following cases are from Guardian, Fiduciary & Advocacy Services (“GFAS”), Fargo, North Dakota (*names changed to maintain confidentiality):

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.

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.

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!