

**Report of the Public Guardianship Task Force
to the WSBA Elder Law Section Executive Committee**

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Introduction

The Public Guardianship Task Force of the Washington State Bar Association Elder Law Section was formed to propose a solution to the problem faced by Washington residents who need the help of a guardian but who can't pay for it. By definition, members of the population affected by the problem are poor individuals who face significant risk of personal or financial harm because they are unable "to adequately provide for nutrition, health, and housing or physical safety" or "to adequately manage property or financial affairs."¹

Approximately 16,000 current Washington residents have been determined by courts to face such risks and to need full or limited guardians.² Frequently, those appointed to serve as guardians are family members or friends who serve without fee. Sometimes those appointed are professional guardians; their fees are typically paid from the estates of the individuals for whom they serve as guardians. But not every individual who needs guardianship services has either volunteers available to provide such services or the wherewithal to pay for them. In most states public guardianship services in some form are available for those who have neither.³ In Washington, however, public guardianship services are not currently available. (For some individuals receiving Medicaid assistance in nursing homes or in other long-term-care settings, there may be indirect public subsidies for guardianship services.⁴)

¹ The quoted language is from RCW 11.88.010(1), which establishes a standard that must be met before a guardian may be appointed by a Washington court. Whether any individual needs a guardian under this statutory standard must, of course, be determined by a court in a proceeding that affords the person claimed to be in need of guardianship services the significant procedural protections due in connection with such an important determination.

² According to information provided to the task force by the King County Clerk's office, there were 4,150 active guardianship cases in King County in May 2005. Approximately 26% of Washington residents live in King County. Extrapolating from the King County figure (without adjusting for any special factors that might apply to King County) would yield 15,962 active cases in the state.

³ One survey, described in a 1993 article, found some provision for public guardianship in 42 states. Siemon, Hurme and Sabatino, *Public Guardianship: Where Is It and What Does It Need?*, 27 Clearinghouse Review 558 (1993). In addition to Washington, there was no provision for public guardianship in Iowa, Montana, Nebraska, Rhode Island, Texas, Utah and West Virginia.

⁴ Such subsidies apply primarily to Medicaid-funded nursing-home residents and to people receiving services under the alternative Community Options Program Entry System (COPES) program. Under either program most clients must pay for part of the cost of their care. Under certain circumstances and as limited by statute and rule, their payment obligation may be reduced to allow them to use their funds to pay for guardianship services. See RCW 11.92.180 and Chapter 388-79 WAC.

What happens to Washington residents who need but don't get guardianship services? Each, of course, has a unique story. Some go without needed medical treatment, or get treatment that is inappropriate or untimely. Some lose housing that might have been preserved and end up in nursing homes or other institutional settings. Some cycle repeatedly from the street to a mental hospital or jail and then back to the street. Some lose property or benefits to which they were entitled. Some are exploited or abused. And in a great many cases, significant avoidable individual misery is associated with correspondingly significant avoidable public expense.

Task force members gave their time to their assigned task with a shared belief that an organized society can and should address the needs of this vulnerable population.⁵

I. There is a significant need for public guardianship services

The task force considered both reports of individual instances of unmet need for guardianship services and published systematic research on the subject. Members concluded that there are probably approximately 4,500 Washington residents who need guardianship services and who, because of their poverty and lack of volunteer resources, are currently without them.

⁵ The premise of the task force's recommendations is that the provision of appropriate public guardianship services is warranted as a matter of sound public policy. Accordingly, this report focuses on empirical assessments of need, and on the costs and benefits of public guardianship. The task force did not attempt to resolve legal questions about when a state may be obligated to initiate guardianship proceedings or to provide public guardianship services. But it is relevant to note that there is some constitutional case law bearing on such questions. An important line of cases invalidates governmental actions based on notices that were given to incompetent individuals for whom no guardians had been appointed. For example, in *Covey v. Town of Somers*, 351 U.S. 141, 100 L.Ed 1021, 76 S.Ct. 724 (1956), a deed based on a tax foreclosure sale was set aside. Although there had been technical compliance with the notice requirements of the foreclosure statute, the Court held that "[n]otice to a person known to be incompetent who is without the protection of a guardian does not measure up to [the constitutional due process] requirement." *Id.* at 146. The federal courts of appeal have applied similar reasoning in the Social Security context. *See, e.g., Stieberger v. Apfel*, 134 F.3d 37 (2nd Cir. 1997)(as a matter of due process, an individual with a mental impairment that prevents understanding a Social Security Administration decision and the appeal process may be entitled to an extension of an appeal deadline); *Udd v. Massanari*, 245 F.3d 1096 (9th Cir. 2001)(as a matter of due process, an individual "who lacked the mental capacity . . . to understand the cessation of his disability benefits and to take the steps necessary to pursue an [SSA] appeal" may be entitled to a reopening of an adverse benefit decision and to retroactive benefits). In addition to any obligations imposed by federal and state due process clauses, the anti-discrimination provisions of the Americans with Disabilities Act may require a state to provide guardianship services when they are needed to allow an otherwise qualified individual to take advantage of a state program. *See* 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 . . .").

Task force members had both direct and indirect acquaintance with individuals in need of guardianship services but without access to them. Typical examples described to task force members have included: individuals who appear to have Alzheimer's disease or conditions with similar symptoms and who are without family support and alone; developmentally disabled adults whose aging parents are no longer able to serve as guardians because of their own deteriorating health conditions; individuals who, under the Involuntary Treatment Act, have faced extended hospitalization and repeated detentions because of crises that might have been avoided with the assistance a guardian might have provided; individuals with mental illnesses who face avoidable evictions from their apartments or foreclosures on home loans; individuals for whom significant medical-treatment decisions need to be made, who lack the capacity to make them, and for whom there is no one else with legal authority to make such decisions.

One social worker, whose clients are often disabled individuals at risk of institutionalization, related the following facts about a woman she has been trying to assist:⁶

Mary is a 73-year-old woman living alone in a rented mobile home. She has monthly income of \$800, which would be enough to meet her necessary expenses; but rather than paying her rent, utility bills and medication expenses, she purchases items of furniture or other consumer items. Her mobile home is packed with furniture and dirty dishes and "overflowing with cat litter." There is also an insect infestation. Mary had the assistance of a volunteer chore program, but the program declined to provide further services because of the condition of her home. She has been diagnosed with schizoaffective disorder, dementia and diabetes. It is only temporary help from a neighbor that has so far kept Mary from losing housing she doesn't want to leave.

Without the help of a surrogate decision maker, Mary is likely to lose her housing and to wind up in some kind of institutional setting.

Another disturbing example was related by a task force member:

David, a young adult with developmental disabilities, was living in an adult family home. His mother was his guardian. Not long after he moved

⁶ The clients' names in the examples in this section have been altered to protect their privacy.

into the home, his mother died. Over an extended period of time, David was subjected to sexual and other physical abuse in the adult family home. There was no guardian to monitor his care or to intercede. No family member or other volunteer had been available to serve.

A third example was related by another task force member:

Jane is a young woman with a subsistence income, facing an adverse action by the Department of Social & Health Services. A hearing request was made on her behalf by a caregiver; but the caregiver did not have the authority to represent her in the hearing process. After a pre-hearing conference, the administrative law judge determined that “a substantial question existed as to whether [Jane] possessed sufficient mental capacity to comprehend the nature of the proceedings.” But with no public guardianship program, there was no resource available either to obtain a capacity determination or to provide guardianship services if they were needed.⁷

Social workers, judges, doctors, hospital discharge planners, staff of case management programs and information and assistance programs, nurses, lawyers, ministers, librarians and police officers are often unable to find needed help for people in situations such as those described above. Only a small fraction of the identified need for guardianship services is met by professional guardians who take some cases without fee. The absence of resources may be especially pronounced in rural areas or for individuals who speak a language other than English. In some cases in which the Office of the Attorney General would otherwise initiate a guardianship proceeding at the request of the Department of

⁷ The ALJ dismissed the proceeding without prejudice, to give the Department an opportunity to seek a capacity adjudication and, if warranted, appointment of a guardian or a guardian ad litem. The ALJ’s decision was reversed by the DSHS Board of Appeals (BOA), which sent the case back to the ALJ for a hearing on the merits. The decision on review did not imply that the ALJ’s judgment about capacity was mistaken; it ruled that the ALJ must simply proceed in any case, because administrative rules did not provide for a capacity determination. The BOA decision is currently awaiting judicial review. Regardless of how the legal issues are resolved by the court, this story illustrates a practical problem that may arise when needed guardianship services are not available. State agencies serve, and at times find themselves in adversary hearing proceedings against, individuals who lack the mental capacity to understand official notices or to exercise administrative hearing rights. Some of those individuals need guardians but do not have access to guardianship services today.

Social & Health Services it will not do so if there is no one to serve as guardian without fee and there are inadequate resources to pay a guardian.

To quantify the problem exemplified by individual cases described to it, the task force turned to the published results of research in other states. Its objective was to provide an approximate quantitative assessment of need, one that policy makers might consider in projecting both the cost of providing public guardianship services and the cost of failing to provide such services (or the savings that such services might generate).

The most systematic empirical study the task force considered was done in Florida in 1983 and described in an article published in the *Bulletin of the American Academy of Psychiatry and the Law* in 1987.⁸ A survey found 11,147 identifiable persons reportedly in need of public guardianship services.⁹ The survey did not include residents of nursing homes or adult congregate living facilities. Washington's population in 2003 was approximately 36% of Florida's.¹⁰ Extrapolating from the 11,147 figure based on the current population ratio would yield slightly over 4,000 Washington residents in need of public guardianship services.

There are some significant factors that this extrapolation fails to reflect. On the one hand, there has been significant population growth in Florida since the 1983 study. Between 1980 and 2000, the total population of Florida grew by 64%.¹¹ The population growth information for Florida would tend to suggest that the current need for public guardianship in Florida has increased and that a corresponding increase in the projection for Washington may be warranted. On the other hand, the percentage of Washington's population that is 65 or older is much lower than Florida's – 11.2% as compared to 17.6%.¹² This difference in the composition of Washington's population would tend to suggest a need to

⁸ Schmidt and Peters, *Legal Incompetents' Need for Guardians in Florida*, 15 *Bulletin of the American Academy of Psychiatry and the Law* 69 (1987).

⁹ The assessment was based on a survey of 74 public receiving facilities, community mental health centers or clinics, 30 private receiving facilities, 11 Department of Health and Rehabilitative Services Aging and Adult Services district offices and 6 state hospitals. *Id.* at 71. The survey reported staff perceptions, not judicial determinations of legal incapacity. As the authors acknowledged, "Nonjudicial assessments of legal incompetence are of course suspect but, in the absence of better information, must necessarily suffice." *Id.* at 72.

¹⁰ The United States Census Bureau estimated Washington's population in 2003 as 6,131,445, 36% of Florida's, which was estimated as 17,019,068 in the same year. The figures are published at the following Internet address: <http://quickfacts.census.gov/qfd/states/00000.html>.

¹¹ Population growth figures are from the web site [stateofflorida.com](http://www.stateofflorida.com), based on U.S. Census Bureau data: <http://www.stateofflorida.com/Portal/DesktopDefault.aspx?tabid=95#27103>.

¹² These percentages come from the United States Census Bureau's estimated figures for 2003: <http://quickfacts.census.gov/qfd/states/00000.html>.

decrease the projection for current public guardianship need in Washington. On balance, the 4,000 figure is probably a useful approximation, noting that it does not take into account the needs of residents of nursing homes and adult congregate care facilities.

A study attempting to quantify the unmet need for guardianship services among nursing home residents was done in Tennessee in 1988 and described in an article published in the *Journal of Elder Abuse and Neglect* in 1990.¹³ The study found an unmet need for limited or full guardianship services in 4.3% of the nursing home resident population for which data were available. There are currently approximately 20,000 residents in Washington nursing homes.¹⁴ Taking 4.3% of that number would yield 860 additional individuals in need of public guardianship services.

It may be that the unmet need for guardianship in Washington is less than in Tennessee among residents of nursing homes and of residential settings where services are covered by Washington's long-term care programs. This is because, as previously mentioned, there is an indirect subsidy for private guardianship services available to certain participants in Washington's long-term care programs.¹⁵ When a court has ordered payment of guardianship fees, consistent with Department of Social & Health Services regulations, a portion of the ward's income that would otherwise go toward nursing-home or comparable care may be used to pay a guardianship fee, with the Medicaid funds making up the difference in the cost of care.¹⁶ These subsidies make guardianship services available to some people who could not otherwise afford them; but the fees available are sometimes inadequate to cover the costs of the services needed. So some clients with the greatest need for guardianship services (and in situations in which the greatest savings might be produced by effective guardianship services) remain without them.

¹³ Hightower, Heckert and Schmidt, *Elderly Nursing Home Residents' Need for Public Guardianship Services in Tennessee*, 2 *Journal of Elder Abuse and Neglect* 105 (1990). Like the Virginia study, the Tennessee study was based on staff judgments, not on judicial determinations of incapacity. Initially the Tennessee study was to include other residential facilities in addition to nursing homes, but the former were ultimately omitted from the study after initial investigation suggested a low likelihood that residents in those facilities would have unmet guardianship needs. *Id.* at 110-112.

¹⁴ The Department of Social & Health Services compiles data periodically from submissions by nursing homes. Based on information provided to the task force by Department staff, its data base showed 19,617 nursing home residents as of March 31, 2005. That data represents the population of 235 out of the state's 243 nursing homes.

¹⁵ See footnote 4 above.

¹⁶ See RCW 11.92.180 and Chapter 388-79 WAC.

Instead of using the 860 figure, extrapolating directly from the Tennessee figures, it seems reasonable to take half that amount, in acknowledgment of the need currently met by indirect subsidies. Adding 430 to the 4,000 projection explained above would yield a total projected unmet need for public guardianship services of 4,430 individuals or (to avoid the impression of greater precision than the data warrant) approximately 4,500 individuals.

Good reason to believe that approximately 4,500 Washington residents need guardianship services but can't get them signals a significant problem that ought to be addressed.

II. Public guardianship would save public funds

There are costs associated with the provision of public guardianship services. There are also significant opportunities to save public funds by providing timely and appropriate services to people in need of them; and experience elsewhere suggests that the savings should more than offset the costs.

A recent study of public guardianship services in Virginia showed annual costs per individual served of \$2,955 over the two year period 2001-02 for programs that contracted to serve a total of 212 individuals.¹⁷ Over the two year period, the programs reported savings to the State (after subtracting the program costs) of \$5.2 million. Savings resulted from, for example, arranging for discharge of individuals from state hospitals or nursing facilities to assisted living, arranging for community-based services, recovering assets and arranging for pre-paid death-related services.

The costs counted in the Virginia study did not include the costs of the judicial proceedings to establish the guardianships. For many people who appear to need public guardianship services, no incapacity determination will have yet been made and a judicial proceeding will be needed. The Office of the Attorney General in Washington currently brings guardianship proceedings in a limited number of cases referred by the Department of Social & Health Services. Its cost experience in the DSHS cases should provide a basis for projecting average costs for establishing guardianships. After a guardianship is established and a public guardian is appointed, responsibility for such matters as annual accountings would lie with the public guardianship program and its counsel. The costs of that representation were included in the Virginia study.

¹⁷ Teaster and Roberto, *Virginia Public Guardianship and Conservator Programs: Evaluation of Program Status and Outcomes*, Blacksburg VA: The Center for Gerontology, Virginia Polytechnic Institute and State University (2003).

III. Some general principles should inform policy choices

In the course of its discussions, task force members identified some general principles that, they believe, should inform policy decisions about public guardianship services. The principles emerged from discussion of the experience of task force members and of published works on public guardianship.

1. To promote services of high quality, the caseloads of public guardian programs should be limited to 20 cases per professional staff member. Guardianship services, effectively provided in a timely manner, can improve the lot of the individual who receives them. Such services can mean, for example, timely and beneficial medical care, the preservation of desired housing options and the (corresponding) avoidance of unnecessary institutionalization. On the other hand, guardianship services ineffectively provided by one who lacks adequate resources to provide them may do more harm than good. Of particular concern is the evidence that public guardians with high caseloads may promote institutionalization of the individuals they are charged with serving.¹⁸

2. To reduce the potential for conflicts of interest, public guardians should not be part of the agency charged with determining eligibility for social and health services. Important situations in which guardians may need to act for incapacitated persons may involve application to the Department of Social & Health Services for Medicaid or other public benefits or the appeal of a denial or termination of such benefits. In such situations, there is often an adversarial dimension to the relationship between the guardian and the Department. If the guardian works under the supervision of someone within the Department, any advocacy may be, or may be perceived to be, compromised.

3. Staff of public guardianship programs should not be used to screen or investigate prospective cases for guardianship. This role should be assigned to another entity, which could be the Office of the Attorney General, the Adult Protective Services Division of the Department of Social & Health Services, the mental health professionals of the State's Regional Support Networks, or to more than one entity. Screening and investigation by staff of a public guardianship program could be compromised by pressures to increase or reduce program caseload.

¹⁸ The 1:20 ratio was one of the recommendations of a March 2005 report entitled "Wards of the State: A National Study of Public Guardianship," developed as a joint project of the American Bar Association's Commission on Law and Aging and the University of Kentucky Graduate Center for Gerontology. In explaining the recommendation, the report says (at p. 165): "At some 'tipping point' chronic understaffing means that protective intervention by a public guardianship program simply may not be justified as in the best interests of the vulnerable individual. Practitioners and policymakers should determine appropriate and workable ratios. States could begin with pilot programs to demonstrate the ward outcomes achieved with specific ratios – and perhaps costs saved in terms of timely interventions that prevent crises, as well as increased use of community settings."

4. Any individual acting as a guardian in a public guardianship program should be a certified professional guardian under the Washington Supreme Court's General Rule 23. Under GR 23, the Certified Professional Guardian Board is required to adopt and implement standards of practice, training requirements and other conditions for certification of professional guardians.

Recommendations

The Task Force makes the following recommendations:

1. Public guardianship services should be available in Washington for any resident who needs guardianship services but cannot afford to pay for them. Need for guardianship services in this context should be measured by the same stringent standards that apply to any guardianship in Washington. Individuals with income at or below the federal poverty level should be presumed unable to afford guardianship services.¹⁹
2. The Legislature should establish an office of public guardianship services as an independent office within the judicial branch, associated for administrative purposes with the Administrative Office of the Courts. The office of public guardianship services should be authorized to provide public guardianship services directly through regional offices within the State, or to contract with public or private entities to provide such services.
3. For an initial period after the creation of the office of public guardianship services, the Legislature should appropriate funds sufficient for the office to implement, on a pilot basis, three local programs, at least one of which should be in a large urban setting and at least one of which should be in a rural setting. Funding should be included to study and report to the Legislature concerning the costs, savings and other benefits or problems associated with the programs.
4. Initially, public guardianship programs should provide guardianship services only. Once the programs are established, however, consideration should be given to providing additional services, including serving as agent under powers of attorney. Because it is hard to project the demand for additional services, it seems prudent to take one step at a time and address the pressing need for guardianship services (including limited guardianship services) first.

¹⁹ The federal poverty level for a single individual is currently \$798 per month. *Federal Register*, Vol. 70, No. 33, February 18, 2005, pp. 8373-8375: <http://aspe.hhs.gov/poverty/05poverty.shtml>.

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