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USE OF VOLUNTEERS IN GUARDIANSHIPS

2006 Edgar & Margaret Sandman Fellowship



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2006 Edgar & Margaret Sandman Fellowship

Adrienne Foederer '07

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Use of Volunteers in Guardianships

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EXECUTIVE SUMMARY

Guardianship, specifically the lack of guardians and guardianship services, is a problem that continues to grow as the number of unbefriended individuals in the United States increases. While this issue has not yet become an emergency, it will soon become one if remedial steps are not taken to create additional guardianship programs. This study explores the current status of New York guardianship law, the current programs providing guardianship services within the state and nationwide, and a discussion on how volunteers may be utilized in the search to provide guardians for incapacitated adults in need.

The report initially focuses on a small sampling of entities providing guardians throughout New York State. While it is apparent that entities throughout the state are providing guardianship services, it is clear that most of the state receives limited assistance with guardianship and the burden for providing guardianship services to incapacitated adults falls squarely upon the shoulders of Adult Protective Services (“APS”) and court appointed attorneys.

I have specifically profiled other states to compare and contrast the various methods the rest of the nation has implemented to help solve the guardianship problem. The profile includes discussion on programs from Florida, Illinois, Iowa, Kansas, New Hampshire, New Jersey, Ohio, Rhode Island, Texas, Virginia, and Wisconsin. Any of the various programs, or a combination thereof, could serve as models in creating additional guardianship programs to extend the continuum of care in New York State.

Many of the programs cited above used differing methods to provide guardianship services, but a common thread is seen throughout the programs: the use of volunteers. The report considers the various capacities volunteers can be used in providing guardianship services,

as well as the steps that must be completed before the implementation of a volunteer program is possible. While these steps are numerous and cumbersome, it is certain that the problems leading to the need for increased guardianship services, if left unchecked, will continue to get worse before they get better.

Volunteers, especially organized into decision-making panels, are a viable option to help solve this problem. The multitude of preexisting guardianship programs in New York show that establishing such a program can be successfully done. These preexisting programs are great resources for assistance and advice and are ecstatic at the prospect of additional programs being created to enhance the amount of care available to the community. This report's analysis of the various forms a program using volunteers can assume, coupled with the cooperative atmosphere of the current guardianship programs in New York State, will hopefully lead to further implementation of guardianship programs to further enhance the quality of living in the community.

I. Introduction

As the population in America continues to live longer, the population of unbefriended adults¹ progressively expands. In July, 2003, the American Bar Association Commission on Law and Aging released a telling study on this very subject. The study identified the unbefriended population as adults lacking decisional capacity, valid advance directives, and legally authorized surrogates, or family and friends to serve in a decision-making capacity.² The study stated that in the year 2000 there were 35 million Americans age 65 or older, and that by the year 2030 that number is expected to double.³ Of that population, one in ten people 65 and over, and nearly half of the people 85 and over, have dementia and are (or soon will be) in need of guardianship services.⁴ Additionally, it is estimated that 3-4% of nursing home residents, or approximately 60,000 individuals, are unbefriended.⁵ Lastly, of the 35 million elderly Americans, 30% of them lived alone. Of that 30% there is no way to predict how many individuals were truly in need of some type of health care or financial decision-making assistance.⁶

The Capital District is not immune from this problem. Currently, the Capital District's guardian of last resort is The Department of Social Services ("DSS") acting through Adult Protective Services ("APS"). DSS is doing the best it can, but their numbers indicate that they could use some assistance. This year, the Albany County DSS is guardian of 41 individuals with

¹ To the best of the author's knowledge, this term was coined by Naomi Karp and Erica Wood in their 2003 American Bar Association study Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly.

² N. Karp & E. Wood. Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly. (American Bar Association 2003)

³ Id. At 14

⁴ Id.

⁵ Id.

⁶ Id.

five or six pending temporary guardianships. Additionally, Rensselaer County DSS is guardian of 33 individuals with three additional cases that will be going to court in the near future. This represents over 70 guardianships that DSS has not requested.

The results of the ABA study and an undeniably expanding elderly population have led to an increased emphasis on the need for guardianship, a growing area of concern for every state in the nation. Each state has attempted to solve the problem of unbefriended adults in a variety of ways. Some states use public guardianship programs (programs funded with government money employing government employees as staff guardians), with volunteers as guardians or as supplemental support for the program's professional staff guardians. Other states utilize not-for-profit companies to provide guardianship through volunteer appointments, or a hybrid program combining professional staff with volunteers, allowing either volunteer or staff to serve as guardian depending upon the circumstances. Other states have decided to use surrogate-decision making panels, composed of volunteers, to provide one-time consent for a ward in need. Some states feel that any or all of the above named options are appropriate and use a combination of mechanisms to fill the void.

In attempting to discover a model guardianship program composed of a panel of volunteers servicing incapacitated adults, an in-depth investigation of current guardianship programs was performed. The hope is that one, or a combination of many, may serve as a successful model to expand the range of guardianship services available to make the community a better place. This report contains an in-depth discussion of New York State guardianship law and the various organizations within the state that provide guardianship services. Additionally, there is a discussion of different states and their chosen approaches to solve the problem of

guardianship. The report presents these approaches by those programs which use volunteers to act as guardians, use staff and volunteers to act as guardians, use volunteers as supplemental support to staff guardians, and those which do not use volunteers at all. Next, the report discusses various states' frustrations with unfunded or under-funded programs, as well as legislative changes which have resulted in a drastic decrease in much needed revenue for guardianship programs. The report then explores three surveys completed by Florida, Ohio, and Wisconsin. Lastly, the report contemplates the advantages and disadvantages of utilizing volunteers, in some capacity, to serve as guardian for an incapacitated adult or assist a staff guardian providing guardianship services.

II. Guardianship in New York

New York State has four relevant statutes providing for guardianship appointments. Each contemplates, in detail, the purpose and process of the guardianship from appointment to termination. These statutes were designed to assist individuals in making health care and financial decisions when there is no other least restrictive means available. If an incapacitated person has a guardian, it alleviates undue delays in the present healthcare system and promotes the patient's best interests physically and financially.⁷

A. Article 81

Article 81 allows appointment of a guardian when the court determines an individual is incapacitated or when an individual voluntarily accepts the appointment of a guardian.⁸ The court will determine a person is incapacitated and requires a guardian if the person has "functional limitations," which he or she fail to appreciate and "will suffer harm because of

⁷ N.Y. MEN. HYG. LAW §§ 80.01 & 81.01; N.Y. SURR. CT. PRO. ACT LAW § 1750, 2002 Amm. Note

⁸ N.Y. MEN. HYG. LAW § 81.15

[those] functional limitations.”⁹ Whether the guardian is appointed with the consent of the alleged incapacitated person or involuntarily, the guardian still must act according to “the least restrictive form of intervention.”¹⁰

The element of incapacity is defined by section 81.02 of the statute and states that a person shall be determined incapacitated if he/she “is likely to suffer harm because...the person is unable to provide for personal needs and/or property management; and the person cannot adequately understand and appreciate the nature and consequences of such inability.”¹¹

Article 81 also provides guidance for who is eligible to become a guardian. Generally, individuals over 18 years of age¹² or not-for-profit corporations¹³, social services officials,¹⁴ and public agencies authorized to act as guardians, and community guardian programs are eligible to serve as guardians.¹⁵ Corporations authorized to act as community guardians are permitted by the Social Services Law.¹⁶ Guardian appointment follows a strict hierarchy. Guardians may be

⁹ *Id.* § 81.15 (b)(1)—(4)

¹⁰ *Id.* § 81.15 (a)(4) & (b)(5)

¹¹ *Id.* § 81.02 (b). The definition has been further clarified by case law. See *In re Commissioner of Social Servs.*, 275 A.D.2d 713 (2d Dep’t, 2000) (affirming the appointment of a guardian where the appellant was mildly retarded and suffering from respiratory problems, heart disease, and morbid obesity because appellant was unable and incapable to understand her medical conditions and their implications); *In re Wogelt*, 223 A.D.2d 309 (1st Dep’t, 1996) (holding that it was inappropriate for the lower court to appoint a different guardian than the person an elderly widow voluntarily consented to have act as her guardian)

¹² Oftentimes, the court will appoint an attorney as guardian. See *In re Joseph*, 307 A.D.2d 469 (3d Dep’t 2003); *In re Estate of Gustafson*, 308 A.D.2d 305; *In re Arnold “O”*, 256 A.D.2d 764 (3d Dep’t 1998); *In re Wingate*, 627 N.Y.S.2d 257 (Sup. Ct. 1995); *In re McNally*, 755 N.Y.S.2d 818 (Sup. Ct. 2003)

¹³ A limited exception exists for profit corporations. They are eligible to be guardians of the property as opposed to not-for-profits which can be guardians of the person and the property.

¹⁴ Cases where the Department of Social Services has been appointed guardian include *Columbia Mem’l Hosp. v. Barley*, 16 A.D.3d 748 (3d Dep’t 2005); *In re Lee “I”*, 265 A.D.2d 750 (3d Dep’t 1999); *In re Sutkowy*, 270 A.D.2d 943 (4th Dep’t 2000) and *In re Lois F.*, 209 A.D.2d 856 (3d Dep’t 1994); but cf *In re Lula XX*, 224 A.D.2d 750 (concluding that because of incapacitated person’s (“IP’s”) deep seeded resentment towards DSS, they were not the appropriate choice for guardianship) and *In re Commission of Cayuga County Dep’t of Social Servs. for Appointment of a Guardian for Bessie C.*, 225 A.D.2d 1027 (4th Dep’t 1996) (holding DSS was improper guardian because the ward was on Medicare and there was a potential conflict of interest)

¹⁵ N.Y. MEN. HYG. LAW § 81.19 (a)

¹⁶ N.Y. Soc. Servs. Law §473-d . Under the Social Services Law, Community Guardian Programs are not-for profit organizations that contract with, or otherwise have an agreement with, local social services officials to provide

appointed (1) through written nomination by the ward, (2) verbally by the ward, or (3) through the court using a factors test to determine the appropriateness of the guardianship based on their credentials and their relationship with the incapacitated ward.¹⁷ Courts will generally honor a nomination unless the proposed guardian is unfit or the ward refuses to consent to the guardian.¹⁸ In the event that there is no qualified individual or community guardianship program available, a creditor or a direct or indirect provider or employer of the incapacitated person's health care and/or educational and residential services may be appointed guardian.¹⁹ However, one thing the statute and courts are adamant about preventing is the appointment of a guardian who has a conflict of interest with the case.²⁰ Additionally, while Mental Hygiene Legal Service

guardianship services to eligible individuals. *Id.* § 473—d (1)—(2). The individuals must be a recipient of adult protective services and lack a capable guardian. *Id.* §473—d (2). These programs are authorized to “obtain such medical, social, mental health, legal and other services. . .to which the person is entitles and [] are required for the persons safety and well-being. . .” *Id.* § 473—d (3)(c). The staff of the community guardian programs, who act under the auspices of the not-for-profit to provide guardianship services, are limited to health care professions, and any remuneration obtained through the guardianship is “paid over to the social services district.” *Id.* §§ 473—d (3)(d) & (h).

¹⁷ N.Y. MEN. HYG. LAW § 81.19 (b). Case law illustrates the deference given towards a ward in deciding who his/her guardian will be, as evidenced in cases where appellate courts have criticized lower courts for stepping outside their authority and appointing an unnecessary additional or alternate guardian. *See In re Commissioner of Cayuga County Dep't of Social Servs. For Appointment of a Guardian for Bessie C.*, 225 A.D.2d 1029 (4th Dep't, 1996) (hereinafter *Bessie C.*); *In re Robinson*, 272 A.D.2d 176 (1st Dep't, 2000); *In re Bertha W.*, 767 N.Y.S.2d 657 (2d Dep't, 2003).

¹⁸ *Id.* *See In re Lois F.*, 209 A.D.2d 856 (3rd Dep't, 1994) (clarifying the definition of “unfit” by holding that a mother who was physically and mentally incapable of providing for her child, unable to make sound judgments, and unwilling to cooperate with the child's caregivers was unfit to act as her child's guardian); *Nora McL. V. Peggy D.*, 762 N.Y.S.2d 128 (3rd Dep't, 2003) (Appointing an independent guardian and removing the previous requested guardian because the court found the guardian unfit because she was stealing the wards money).

¹⁹ N.Y. MEN. HYG. LAW § 81.19 (e)

²⁰ *Id.* § 81.19 (d)(8). *See* Part 35 of 22 NYCRR which limits the appointing of the court evaluator and attorneys as guardians who have crossed certain compensation ceilings. Additionally, courts have held that, absent a finding of no other guardian, the court's appointment of the Commissioner of Social Services for a Medicaid patient or the Office of Mental Retardation and Developmental Disability or New York Association for Retarded Children for a potential debtor was inappropriate. *See Bessie C.*, 225 A.D.2d 1029 (4th Dep't, 1996); *In re Patrick “BB”*, 284 A.D.2d 636 (3rd Dep't, 2001).

(“MHLS”) often serves as the legal advocate for an incompetent ward in court proceedings, under no circumstances may MHLS serve as a guardian.²¹

Guardians can have authority over the ward’s person, property or both. This fiduciary duty and power is derived from the statute and defined by the court order granting guardianship.²² This order allows guardians of the property to preserve, protect, and act as a fiduciary to always be able to provide and support for the ward and those persons depending upon support from the ward.²³ Property transfers must be verified by the court.²⁴ Courts have been instrumental in determining how far financial benefits to another can be stretched.²⁵ Unlike property transfers, authority over the person allows the guardian to provide personal care, housing arrangements, confidential record release, education, and benefit decisions without court intervention.²⁶ Generally speaking, the authorities and duties of a guardian expire with the ward’s death.²⁷

The final responsibility placed upon a guardian is to file initial and annual reports to the court detailing the “steps the guardian has taken to fulfill his or her responsibilities.”²⁸ Reports summarize the actions taken by the guardian as well as the changes in health status to the ward.

²¹ *Id.* § 81.19 (f)

²² N.Y. MEN. HYG. LAW § 81.20

²³ *Id.* § 81.21 (a)

²⁴ *Id.* § 81.21 (b)

²⁵ Courts have allowed estate planning tactics to be used by guardians to prevent all assets from being expended on nursing care costs. *See In re DaRonco*, 638 N.Y.S.2d 275 (Sup. Ct., 1995); *In re Baird*, 634 N.Y.S.2d 971 (Sup. Ct., 1995) (allowing wards to make themselves appear poorer on paper in order to provide for their families).

²⁶ *Id.* § 81.22 (a). While this power is generally broad it has been judicially limited. *See In re Appointment of a Guardian for Gordon*, 619 N.Y.S.2d 235 (Sup. Ct., 1994) & *In re Beth Israel Medical Ctr.*, 619 N.Y.S.2d 239 (Sup. Ct. 1994) (concluding a guardian may not consent to a ward’s admission in “a mental hygiene facility” or “chemical dependence facility”); *In re Lowe*, 688 N.Y.S.2d 389 (Sup. Ct., 1999) (holding that a guardian may not revoke any appointment a ward previously made in a valid health care directive, limiting the guardian’s end-of-life decision making abilities).

²⁷ *In re Glener*, 202 A.D.2d 503 (2d Dep’t, 1994); *In re Kantor*, 624 N.Y.S.2d 348 (Sup. Ct., 1995); *In re Estate of Baron*, 692 N.Y.S.2d 882 (Sur. Ct., 1999).

²⁸ N.Y. MEN. HYG. LAW § 81.30 (a)

Initial reports need to be sent to the court evaluator and counsel for the ward²⁹ while the annual reports need to be sent to the ward and court examiner and be filed at the clerk's office.³⁰

Where no family members are willing or able, the most prevalent model of guardianship in New York State is attorneys accepting Article 81 appointments. Wards with substantial estates have no problem finding an attorney willing to serve as guardian, as guardians are permitted to receive reasonable compensation for their services through a fee schedule or predetermined statutory allocation. However, attorney appointments also include pro bono Article 81 appointments where the ward does not have sufficient funds to reimburse the attorney for his or her services.

This latter group of appointments is generally less desirable, and became an issue brought to the forefront in the 2004 Report from the Guardian & Fiduciary Services. The 2004 report recommended the development of a new fiduciary structure “intend[ing] to substitute merit for favoritism in the selection process and [to] allow full public access to appointment and compensation information.”³¹ The new rules set out standards for the creation of appointment lists to track an attorney's qualification and training, limitations on the number of appointments that an individual attorney may receive (permitting only one “high value” ward appoint per year), and preventing appointment when the attorney's annual appointment compensation exceeded \$50,000.³² While much has been done to improve the fiduciary appointment system, many reforms are still being contemplated.³³ The goal remains to make the guardianship process

²⁹ *Id.* § 81.30

³⁰ *Id.* § 81.31

³¹ Guardian & Fiduciary Services, Restoring Public Trust and Confidence: Fiduciary Appointment Reform in New York

³² *Id.*

³³ *Id.*

fair and equal to all, which has resulted in an increase in the amount of pro bono Article 81 guardianships. Currently, these attorneys compose the largest group of “volunteer guardians” in New York State.

B. Article 17-A

The Surrogate Court Procedure Act (“SCPA”) also provides for the appointment of a guardian. Article 17-A of the SCPA pertains to guardians of mentally retarded and developmentally disabled persons. Guardianship is warranted when an individual is either mentally retarded or developmentally disabled and the appointment is in the best interests of the ward.³⁴ A label of mental retardation or developmental disability does not automatically confer “incapacity” and the need for a guardian, only in cases where the individual is incapable to manage his/her daily affairs.³⁵

The SCPA has repetitious eligibility requirements for guardians similar to those of Article 81. Any eligible guardian includes “a parent, any interested person eighteen years of age or older . . . including a corporation authorized to serve as a guardian as provided for by this article. . . .”³⁶ However, there is a limitation on corporate guardianship. The statute provides that no corporation may be guardian of the person unless the corporation is a not-for-profit and organized and existing for that purpose, among others.³⁷ The scope of the guardian’s power is plenary under Article 17-A, allowing the guardian to make any and all health care decisions,

³⁴ N.Y. SURR. CT. PRO. ACT LAW (“SCPA”) §§ 1750 & 1750—a

³⁵ *In re* Individual with a Disability for Leave to Change Her Name, 760 N.Y.S.2d 293 (Civ. Ct., 2003) & *In re* Chantel R., 791 N.Y.S.2d 324 (Sur. Ct., 2004) (holding that incapacity is a condition precedent to the appointment of a guardian, and without that incapacity the individual is permitted to make his/her own decisions)

³⁶ N.Y. SCPA § 1751

³⁷ *Id.* § 1760

including end-of-life decisions.³⁸ However, there is a provision allowing a limited guardian of the property.³⁹ In the event of an unfit guardian, the ward or another (on the ward's behalf) may petition the court for modification of the original guardianship order, which the court can modify according to the subsequent needs of the ward.⁴⁰

C. Article 79

Another guardianship statute which may only be used in very limited circumstances is Article 79 of New York's Mental Hygiene Law. Article 79 only pertains to veterans and their children.⁴¹ Under Article 79, if a director of the United States Veteran's Administration feels that a guardian is necessary for a veteran, one must be appointed prior to the payment of the individual's veteran's benefits.⁴² When Article 79 is applicable, it generally supersedes "any inconsistent provision of the law relating to incompetents, conservatees or infants."⁴³ Any guardian providing Article 79 guardianship services may only serve five wards unless the guardian is a bank or trust corporation or the wards are all members of the same family.⁴⁴ The guardian is responsible for receiving and acting as a fiduciary for the ward's benefits from the Veteran's Administration and income derived from those benefits.⁴⁵ Like Article 81 guardianships, the guardian must file annual accountings with the court cataloguing expenses and expenditures related to the ward's benefits and income from those benefits.⁴⁶ A guardian

³⁸ *Id.* § 1750-b. *See In re M.B.* (Anonymous), 21 A.D.3d 28 (2d Dep't, 2005) *rev.* 813 N.Y.S.2d 349 (2006)

³⁹ *Id.* § 1756

⁴⁰ *Id.* § 1755

⁴¹ N.Y. MEN. HYG. LAW § 79.03

⁴² *Id.*

⁴³ *Id.*

⁴⁴ N.Y. MEN. HYG. LAW § 79.05

⁴⁵ *Id.* § 79.09

⁴⁶ *Id.* § 79.17

may receive compensation for his/her services not to exceed 5% of the income of the ward during any year.⁴⁷

D. Article 80

An alternative to guardianship in certain limited situations is New York's Mental Hygiene Law Article 80 surrogate decision-making committees ("SDMC"). Prior to the advent of these Article 80 panels, a consumer that needed major medical treatment that was neither an emergency nor authorized by a surrogate needed to obtain a court order for consent.⁴⁸ The process of obtaining a court order is often long, cumbersome and expensive. In order to circumvent this process, caregivers would deem patients of questionable mental competence sufficiently competent to consent to the major medical procedure and act upon the questionable consent or the physicians performing the treatment would accept facility director's authorization for the major medical treatment.⁴⁹ While the end result succeeded in getting the consumer the medical intervention needed, it fundamentally denied patients the protection and safeguards incorporated into the common law doctrine of informed consent.⁵⁰ Therefore, Surrogate Decision-Making Committees were statutorily created to facilitate more timely decision making while preserving the substantive protections of the patient's interests.⁵¹

Unlike Article 81 and 17-A, Article 80 committees are not individual guardians that follow a patient through life although the law now provides for the individual to be the subject of an SDMC application for all his/her life if s/he once had an SDMC determination made on

⁴⁷ *Id.* § 79.21

⁴⁸ New York State Commission on Quality Care and Advocacy for Persons With Disabilities *available at* <http://www.cqcapd.state.ny.us/sdmcforms/sdmc.htm>

⁴⁹ Clarence Sundram & Paul Stavis, *The First Ten Years of New York's Surrogate Decision-Making Law: History and Development available at* <http://www.cqcapd.state.ny.us/sdmcforms/SDMC1st10years.htm>

⁵⁰ *Id.*

⁵¹ *Id.*

his/her behalf.⁵² These panels meet on a single occasion to determine capacity and consent for a single, specific major medical condition. However, the ward or consumer may call upon the panel for multiple, subsequent major medical decisions, and each time the panel will determine the temporary capacity, eligibility and best interests of the consumer. When a consumer needs a major medical procedure requiring general anesthesia, a significant invasion of bodily integrity or a significant risk to the consumer, a request can be submitted on behalf of the consumer to present his or her case before an interdisciplinary panel seeking that panel to consent to the medical procedure.⁵³

First, the respondent (a nurse or caregiver of the consumer) submits a petition to the Commission on Quality of Care and Advocacy for Persons with Disabilities (“CQCAPD”).⁵⁴ Included with the petition are a signed Certification of Capacity completed by a licensed psychologist or psychiatrist certifying lack of capacity, a signed Certification of Need For Major Medical Treatment filled out by a physician or dentist outlining the diagnosis, the proposed treatment and its risks and/or benefits and a supplemental medical information form which summarizes the patient’s medical status and history including test results, current medication and the ability or inability to withstand anesthesia.⁵⁵ Upon review of the paperwork, a nurse from the CQCAPD determines if the case is appropriate to be heard by a panel and if any additional information needs to be collected.⁵⁶ If the nurse feels the case is appropriate for a panel, the request is passed down to the Regional Dispute Resolution Center in the geographic area where

⁵² N.Y. MEN. HYG. LAW § 80.07 (a)(1)

⁵³ New York State Commission on Quality Care and Advocacy for Persons With Disabilities *available at* <http://www.cqcapd.state.ny.us/sdmcforms/sdmc.htm>

⁵⁴ N.Y. MEN. HYG. LAW § 80.07

⁵⁵ Clarence Sundram & Paul Stavis, *The First Ten Years of New York’s Surrogate Decision-Making Law: History and Development available at* <http://www.cqcapd.state.ny.us/sdmcforms/SDMC1st10years.htm>

⁵⁶ N.Y. MEN. HYG. LAW § 80.07 (c)

the consumer resides, and that regional coordinator organizes a date and time for the panel to convene. At the hearing, a consumer is eligible for the panel to provide informed consent on his/her behalf if the panel determines, by clear and convincing evidence, that the consumer is incapacitated and has no other guardians and by a preponderance of the evidence, the medical treatment is in the consumer's best interest.⁵⁷ If those three prerequisites are determined in the affirmative, the panel can initiate consent for the one requested major medical treatment/s. This consent is a legally valid decision, subject to judicial review; however, it is limited to major medical treatments and does not include at this time the withdrawal or discontinuation of life-sustaining treatment. For example, the panel may deny an application for a feeding tube if it is not in the person's best interests but may not hear an application for the removal of a feeding tube. The consumer's due process rights are protected because he/she is provided with notice of the committee meeting, representation by counsel (Mental Hygiene Legal Services), clear statutory standards for decision-making, a neutral decision maker, a record and a right to judicial review.⁵⁸

The panels are a workable alternative to the court system because they are user-friendly, balanced, and less adversarial. Each panel is composed of four individuals.⁵⁹ These individuals each represent a different portion of the health care and advocacy systems, doctors, attorneys, family members and former recipients of services, social workers and advocates.⁶⁰ The panel conducts the hearing and makes affirmative decisions for consent based upon a three person

⁵⁷ N.Y. MEN. HYG. LAW § 80.07 (a)

⁵⁸ Clarence Sundram & Paul Stavis, *The First Ten Years of New York's Surrogate Decision-Making Law: History and Development available at* <http://www.cqcapd.state.ny.us/sdmcforms/SDMC1st10years.htm>

⁵⁹ N.Y. MEN. HYG. LAW § 80.05 (f)

⁶⁰ *Id.* § 80.05 (c)

concurrence.⁶¹ The authority for the panel to consent is limited to that one, specific, major medical surgery or other treatments related to that surgery and the administration of anesthesia and such related or continuing diagnostic, medical or dental procedures necessitated by the original treatment.⁶² The panel may be reconvened by conference call to address a request for additional surrogate decision-making related to the major medical treatment which was the subject of the initial hearing.⁶³ If at any time during the proceeding a parent, spouse, adult child, or legal guardian objects to the panel acting, the panel proceedings regarding the patient will cease.⁶⁴ In April 2006, the jurisdiction of the panels was extended to include OMRDD residents in nursing home facilities.⁶⁵ Additionally, OMRDD has expanded the surrogate decision maker qualification to extend to an actively involved relative.⁶⁶ This does *not* mean next of kin; it means an adult family member that is authorized, willing and available to make decisions on behalf of the ward. This allows the category of people able to consent on behalf of an individual in an OMRDD facility to expand. Hypothetically, this means that the SDMCs will not have to be convened as often to give consent for consumers because there is a qualified family member available (thanks to the broadened definition of an acceptable decision maker), that would be more appropriate to give consent.

While there is no fee for service providers or consumers to use SDMCs, there is a significant cost to the state involved in running the committees. The committees are funded through New York State's budget process. This funding provides staff to train the volunteer

⁶¹ *Id.* § 80.07 (d)—(e)

⁶² *Id.* § 80.07 (g)

⁶³ Interview with Rhonda Corcoran, on file with author

⁶⁴ *Id.*

⁶⁵ E-mail received from Pat Johnson July 24, 2006, on file with author

⁶⁶ 14 NYCRR § 633.11 & 633.99

panel members as well as costs associated with paperwork and mailing. Although this seems to generate immediate costs, the creation and implementation of SDMCs have taken a considerable burden off the court systems while still protecting the rights of vulnerable individuals. A 1998 study by the Brookdale Center on Aging of Hunter College, which concluded that when compared to the court system, the dollars spent on the SDMC buy much greater efficiency. This is because the SDMC program maximizes the use of available personnel and funds by utilizing volunteers and contracting with Regional Dispute Resolution Centers. By taking advantage of regional centers, SDMCs have drastically diminished the costs associated with travel, overtime and additional CQCAPD state employee staffing.

III. Current Guardianship Programs in New York

Based upon the statutory schemes in New York State, various organizations have perfected the services they deliver; however, the organizations tend to serve limited populations largely driven by the existence of guardianship statutes that serve different populations. It is impossible for one program to meet every individual's guardianship needs, especially with multiple guardianship statutes to operate under; however, population specific guardianship specialization has resulted in a patchwork approach to guardianship in the state. Certain populations (with limited exceptions) have been excluded from the equation altogether. These populations include adults not able to return to the community, adults not identified or eligible for Adult Protective Services ("APS"), and a portion of individuals who are classified as mentally retarded or developmentally disabled that are in need of termination of life-sustaining treatment.

In attempting to identify a model guardianship program utilizing volunteers to service incapacitated adults, an in-depth investigation of current guardianship programs was performed with the hope that one, or a combination of many, may serve as a successful model to expand the range of guardianship services available to make the community a better place. However, the subsequent programs the report will discuss are not an exhaustive list of guardianship programs in the state.

A. Lifespan

Lifespan is a not-for-profit organization in Rochester, New York committed to providing information, guidance and services to assist the elderly. Lifespan operates a multitude of programs including a senior center, guardianship and ombudsman program.

Lifespan's guardianship program is currently staffed by more than seventy salaried professionals. Additionally, the program employs an ethics committee to assist in making medical and financial decisions for its wards. The majority of the members of the ethics committee are not affiliated with Lifespan; however, one board member does sit on the committee. The committee is composed with a range of professional experience and opinion, having representatives from the legal, health care, religious, and social work communities. Most of the committee members are recommended by current or prior committee members. Members serve for as long as they wish.

Currently Lifespan serves as guardian in 30 cases. While the organization has had more in the past, it has been forced to become more selective in accepting cases, striking a balance between the number of highly complex guardianship cases and those that are relatively simple. This balance prevents Lifespan from overextending itself to the point where it could not provide

the requisite services for its wards and ensures adequate funding for the continuation of the guardianship program.

Lifespan's guardianship cases generate primarily from Monroe County, although on occasion it has taken guardianship cases from surrounding counties. Lifespan acts as a guardian of last resort. After being contacted by the courts, staff members investigate the potential ward to see if there are any other family members or friends that would be a more appropriate guardian. If the search produces no one, Lifespan will accept the guardianship. Staff professionals are responsible for carrying out the day to day guardianship duties and are supported by the organization's ombudsman program. This program trains independent volunteers and assigns them to long term care facilities to listen, mediate, negotiate, propose and facilitate solutions to the facilities' and residents' concerns and problems. While staff professionals visit their wards once a month, far exceeding the statutory requirement of four times a year, the ombudsman volunteers visit the ward every week. While the ombudsman visits are not documented in the annual court reports, it's another way Lifespan can attend and protect to the needs of its wards. Although the guardianship program is considered one of the smaller programs because it serves so few clients, it is one of Lifespan's more financially demanding programs.

Lifespan has an annual operating budget of \$5.3 million. It receives support from the government, United Way, various foundations, private contributions and service fees. Because Lifespan's guardianship program has been operational for a decade, it is considerably well-established. However, the fees collected as compensation for guardianship services only fund 35% of the program. This means that Lifespan is responsible for funding the remaining 65%

through grants and contributions. Presently this does not pose a problem; however, this money is not infinite, and there is a genuine concern that although the program has enormous potential to expand there is an inability to continue providing it long term due to a lack of funding.

While Lifespan acts as guardian in Article 81 and Article 17-a cases, it is predominantly an Article 81 guardian. This carries much different implications than being an Article 17-a guardian. Article 81 hearings can be distinguished from Article 17-a hearings on a variety of levels. One of the most significant is the cost. A relatively simple Article 81 hearing can cost up to six thousand dollars. Additionally, the wards that become too frail to live independently and are sent to a nursing home pay for that care until their assets are depleted and become eligible for Medicaid. As a guardian, two of the biggest issues faced are bankrupting your clients with fees and providing substandard care or placing the clients in the nursing homes and having no assets left from which to collect the fees. Unfortunately, there is no way around this financial dilemma. Article 81 proceedings are exponentially more expensive than their Article 17-a counterparts because of the costs associated with attorneys and preparing reports. This leads to Lifespan turning down three times as many guardianship cases as it accepts. While the program has unlimited potential to expand, it is constricted by a lack of funding.

B. NYSARC, Inc.

NYSARC, Inc. is the largest not-for-profit organization in the country serving individuals with mental retardation and other developmental disabilities and their families.⁶⁷ NYSARC has a combined operating budget of over \$1 billion and is present in 61 of New York's 62 counties.

⁶⁷ <http://www.nysarc.org/>

NYSARC not only provides mentally retarded and developmentally disabled individuals and their families with a wide range of services, it vigorously advocates for their rights.⁶⁸

NYSARC has a board of directors and state guardianship committee. However, under the umbrella of NYSARC are 57 local chapters (“ARCs”). Each ARC has its own local board of directors as well as its own local guardianship committee. Each local chapter is committed to foster community inclusion and acceptance for each of its members.

Generally, an application for standby or primary guardianship is requested by a family member of the potential ward and a local Service Coordinator or the local Guardianship Coordinator evaluates whether a guardian is appropriate and assists the family with initiating the guardianship application. Ultimately, the Guardianship Coordinator presents the application to the local guardianship committee for review and approval. If the local guardianship committee feels guardianship is appropriate, it will submit the committee’s recommendations and the application to the ARC’s local board of directors. The local board of directors reviews the case, relying heavily on the recommendations submitted by the local guardianship committee, and if they feel it is appropriate, they send the application to NYSARC. After reviewing the application to ensure that it is properly completed and that all the necessary supporting documentation is attached, NYSARC forwards the application to the NYSARC state guardianship committee. After careful consideration, the state guardianship committee either approves or disapproves of the guardianship and relays its decision back to NYSARC. If the application is approved, NYSARC prepares a consent form to act as guardian that is signed by the agency’s Vice President. Once the consent form is signed, NYSARC contacts the ARC.

⁶⁸ <http://www.nysarc.org/>

Depending on the type of guardianship originally sought, the local ARC may contact the parent or choose to hire local counsel to initiate the guardianship petition to Surrogates Court, or NYSARC may prepare it for them.

Assuming the ARC prefers that NYSARC prepare the petition, and that the Surrogate's Court approves the petition, NYSARC will be appointed guardian of the person. NYSARC does not do ANY guardianship proceedings of the property under Article 17-A or any guardianships under Article 81. NYSARC solely deals with guardianship proceedings initiated under Article 17-A, pertaining to guardianship of mentally retarded and developmentally disabled persons.

Because NYSARC is a not-for-profit corporation organized and existing to serve as guardian, among other things, for mentally retarded and developmentally disabled individuals, it is appropriate for NYSARC to be a candidate to initiate and accept guardianships. NYSARC currently has 450 guardianships; 200 cases where NYSARC serves as the primary guardian⁶⁹, 100 where NYSARC serves as the standby guardian⁷⁰ and 150 where NYSARC serves as the alternate guardian.⁷¹

Upon receiving a court order granting plenary authority over the person of the ward, NYSARC then has the power to delegate the obligations of the court order to the local ARC where the individual would receive guardianship services. NYSARC is able to transfer its authority to the local ARC because the ARC is an agent of the corporation. The ARC then passes the guardianship on to the local board of directors (still agents of the company) and finally to the local guardianship committee.

⁶⁹ A primary guardian is the principle agent authorized to make decisions on behalf of the ward.

⁷⁰ A standby is responsible to take over the duties of a primary guardian in the event of that guardian's death, resignation or incapacity. *Id.* § 1757

⁷¹ The alternate is responsible to take over the duties of the standby guardian in the event of that standby guardian's death, resignation or incapacity. *Id.*

The authority of the ARC and its board, in acting on behalf of NYSARC, is explicitly laid out in NYSARC's policy and procedures manual. This manual details every protocol and decision making authority available to the ARC. Moreover, the ARCs conduct peer partnering on each other to assess how well the ARCs are abiding by the protocols and procedures. Each local chapter chooses its own peer partner and shares with that partner the local chapter's self assessment.⁷² The peer partner then conducts its own review of the chapter using the same self assessment tools, and those results are reported to the ARC chapter coordinator and chairperson.⁷³ Each ARC has the opportunity to opt out of peer review, but in the place of peer review they are subject to corporate review conducted by the associate executive director for guardianship services every two years.

Every ARC's local guardianship committee is composed of members and from the local board of directors as well as other individuals. The non-members make up the majority of the local guardianship committee. This committee effectively makes all decisions pertaining to the ward under the ARC's care. In the event of a poor outcome subsequent to the delivery of services to a ward, which results in a lawsuit against NYSARC for a breach of care, the local board members recuse themselves from the local guardianship committee. It is then the local guardianship committee's duty, because their primary obligation is to their ward, to vigorously pursue the litigation against NYSARC, the corporate guardian. The local guardianship will serve as the advocate for the ward in the litigation against NYSARC, for breaching its duty to its ward. Because the local guardianship committee no longer has any local board members on it, the

⁷² NYSARC Corporate Guardianship Training Presentation, on file with the author

⁷³ *Id.*

committee is essentially functioning independently of the NYSARC corporate umbrella. This way, NYSARC is not accused of suing itself and having a conflict of interest.

C. Community Guardians

New York State has a state agency, the Office of Children and Family Services (“OCFS”) with two main areas of responsibility. The first deals with programs and the second deals with support. The program division encompasses the Divisions of Development and Prevention Services, and Rehabilitation Services, the Offices of Youth Development, and Workforce Development, the Commission for the Blind and Visually Handicapped and the Council on Children and Families. The support division includes the Divisions on Administration, Legal Affairs, Public Affairs, and Information Technology and the Offices of Strategic Planning and Policy Development, and Investigations. OCFS is the pinnacle of the hierarchy. At the county level there is the Department of Social Services (“DSS”) which has two main departments; adults and children. Adult protective services (“APS” or “PSA”), is a subdivision within the adult department of the DSS. In New York City, DSS is called Human Resources Administration (“HRA”). HRA oversees services in all five boroughs. DSS and HRA are identically structured and perform the same functions.

APS deals with the care of adults (18+) residing within the community (of the county or borough) who lacks the capacity to care for themselves and have no one who is willing to help them.⁷⁴ APS determines whether the living environments are safe for its clients and potential clients.⁷⁵ If APS is called into a situation, and they determine that the living situation is unfit, they try to get the person to become part of the APS caseload voluntarily. If the person refuses,

⁷⁴ N.Y. SOCIAL SERVS. LAW § 473 (1); 18 NYCRR § 457.1 (c)

⁷⁵ 18 NYCRR § 457.1 (d)

APS can petition the court to have the ward temporarily removed for the unsafe conditions and attempt to clean up and rectify the hazards.⁷⁶ If the conditions are improved, the person may return to the home, however if the person appears to be unfit to make their own medical and financial decisions, APS may commence a guardianship proceeding.

DSS is a guardian of last resort. This means, if a county attorney or private entity (e.g., hospital) brings a guardianship petition and the court determines that the ward is in need of guardianship services but doesn't have anyone to provide them; the court will appoint DSS to act as guardian through the Commissioner. If it is not dismissed, a guardianship proceeding can end in one of two ways: the ward will be returned to the community or the ward will have to be placed in an institutional setting. DSS *only* has jurisdiction over wards that will return *back* to the community. Those that are going to an institutional setting are not within the purview of DSS⁷⁷.

In 1986, New York passed legislation initiating the community guardianship program. The community guardianship program was an optional program allowing the social services districts to contract with a not for profit corporation or local government agency to provide conservatorship or committee services, now known as guardianship, for eligible individuals.⁷⁸ The goal of the program was to enable the state and its localities to serve the growing number of incompetent adults living in the community more effectively.⁷⁹ Additionally, the community guardians were required to utilize their best efforts to maintain the clients in the community.⁸⁰

⁷⁶ 18 NYCRR § 457.11 (a) & (k)

⁷⁷ Anecdotally, some DSS Commissioners have been appointed for individuals placed in a nursing home.

⁷⁸ N.Y. SOCIAL SERVS. LAW § 473—d (2)

⁷⁹ Bill Jacket c. 846, Budget Report on Bills: Arguments in Support

⁸⁰ Bill Jacket c. 846, Cesar A. Perales, Department of Social Services, Discussion: Purpose and Effect

A guardianship that would be acquired by the Community Guardian Program was initiated by a social services official bringing the petition to court to appoint a community guardian. A guardian was appropriate if the person was eligible for and receiving APS, without a capable friend, relative or responsible agency willing to serve, living outside a hospital or residential facility or, temporarily living in a hospital or facility with an anticipated arrival back into the community shortly thereafter and not currently receiving statutory community support for mental illness or out-patient services.

There were fiscal implications that arose with the enactment of the community guardianship programs. Because they were ultimately run through DSS, the budget allocation was determined under Title XX of the Social Services Act which provides a spending cap. Any money spent in excessive of the cap was reimbursed through an “over claim.” The over claim was a mechanism in which the state and local government each contributed 50% of the additional costs to supplement the DSS budget. However, there was no net increase in the cost to the state because the reimbursement they were required to supply was at the same level as authorized under current law.

Prior to the 1986 legislation, HRA had sought arrangements with private attorneys to serve as court appointed conservators or committees. However, subsequent to the legislation, New York City has been the only locality to utilize the community guardian program. New York City has contracted with not-for-profit organizations to have those organizations become the default guardians for adults who are determined to need a guardian and for whom the Commissioner would otherwise be appointed. The three agencies serving as community

guardians are Self Help, New York Foundation for Senior Citizens (“NYFSC”),⁸¹ and Jewish Association for Services for the Aged (“JASA”).⁸² Community guardianships are appointed for actions initially brought to court by DSS as well as those brought by private institutions, such as hospitals, where DSS is serving as the guardian of last resort.⁸³ Community guardians have the same powers and jurisdiction as DSS, meaning that they only deal with people in the community.⁸⁴ Community guardianship programs, like APS, operate many other subsidiary programs; therefore, guardianship is only a portion of the whole.

The NYFSC’s mission is to help protect the health and welfare of the mentally impaired.⁸⁵ The foundation acts as a guardian of the person and/or property for those adults that are a part of APS, in need of special services.⁸⁶ These services include psychiatric, medical, legal, financial management, social services, heavy cleaning, shopping, transportation and administration of various benefits (i.e., food stamps, Medicare, Medicaid, etc.).⁸⁷ NYFSC also provides services to a limited number of people in institutional settings. The program which provides services to adults in long-term care settings is Institutional Guardian Services (“IGS”). While the IGS program can serve clients who are in the community and then enter a nursing home or other institutional setting, it is not designed nor funded to service many clients. Like the

⁸¹ The NYFSC was the very first Community Guardian Program. When it was started in 1987, it operated as a pilot project until 1990 at which time HRA-APS contracted with Self-help and JASA as well. Since 1990 these three agencies continue to provide services.

⁸² JASA is an organization composed of over 3,000 staff and volunteers providing services for Manhattan, Queens, Brooklyn, the Bronx, Nassau and Suffolk counties. Services include case management, mental health clinics and treatments, caregiver respite services, housing and legal assistance, advocacy, and a community guardian program. <http://www.jasa.org>

⁸³ N.Y. SOCIAL SERVS. LAW § 473—d (2)

⁸⁴ *Id.* § 473—d (2)(c). Prior litigation has also established that the community guardianship programs have no obligation to continuing acting as guardian for a ward that was residing in the community and needs to be transferred to an institution. *In re Jewish Ass'n for Servs. for the Aged*, 674 N.Y.S.2d 34 (1st Dep’t 1998).

⁸⁵ <http://www.nyfsc.org/about/mission.html>

⁸⁶ http://www.nyfsc.org/services/support_commguard.html

⁸⁷ *Id.*

community guardianship provided, the IGS follows a staff-only model of providing services. IGS is really meant to serve as a stop-gap in the event that the HRA-DSS Commissioner is appointed guardian for a client in a nursing home.

Another program run by the NYFSC community guardians is the ombudsman program. This program operates in New York City as the State Office for the Aging's Long Term Ombudsman Program operates elsewhere in New York State. When the Office for the Aging does not or can not personally provide the long term care ombudsman services, it contracts with a number of other suitable agencies to provide the service on its behalf. Their mission is to work to enhance the lives of residents in long term care facilities.⁸⁸ The members, highly trained volunteers, actively visit facilities throughout the city, bonding with residents.⁸⁹ Members are charged with monitoring and protecting elder resident's health, safety and general welfare. The volunteers are mandated to work no less than four hours a week.⁹⁰

The remainder of the New York social service districts do not have contracts with not-for-profit corporations; therefore, if DSS is appointed guardian, DSS must act as guardian. Community guardianship may not have caught on upstate because these communities may lack sufficient eligible clients to warrant the creation of a not for profit corporation to carry out the guardianship services.

Another problem with the community guardianship program is its narrow scope. The legislation severely restricts the ability of the community to assist residents in need of conservatorship or a committee because the program is only applicable in a small range of circumstances. Supreme Court Justice and former County Executive Peter F. Cohalan, from

⁸⁸ <http://www.nyfsc.org/services/ombuds.html>

⁸⁹ *Id.*

⁹⁰ *Id.*

Suffolk County, agreed with the creation of the program but lamented that the residents in need of these services in Suffolk reside in nursing homes where return to the community is highly unlikely.⁹¹ Therefore, these residents are ineligible for the community guardianship program because they do not fulfill one of its statutory requirements.

D. Family Service Society of Yonkers

Family Service Society of Yonkers (“FSSY”) is a not-for-profit organization that provides “dignity, individualized care and protection” to individuals in Westchester county and the Bronx.⁹² FSSY provides a variety of home care and adult services. FSSY is a licensed home care service agency with a staff including nurses, social workers, personal care aides, home health aides, and house keepers.⁹³

Among the adult care services provided by FSSY is guardianship. FSSY is the only not-for-profit in Westchester County serving as a guardian of last resort. FSSY provides guardianship services for a wide range of adults including those that live in their own homes, adult residences, assisted living environments, nursing homes, and hospitals.⁹⁴ Guardianship services that FSSY provide includes assessments, arrangement of necessary home health services, evaluations, marshalling of the ward’s assets, submission of tax returns and court reports, application for government benefits, and frequent visitation and contact with the wards.⁹⁵

The FSSY guardianship program started as a pilot in Westchester County, and has been so successful that the service has been expanded into the Bronx County. Between the two counties the agency has 260 active guardianship cases. Both programs were initially funded

⁹¹ Bill Jacket c. 846, Peter F. Cohalan, Suffolk County, Discussion: Purpose and Effect

⁹² <http://www.fssy.org>

⁹³ <http://www.fssy.org/homecare.htm>

⁹⁴ <http://www.fssy.org/guardian.htm>

⁹⁵ *Id.*

through small county start-up grants from the county and judiciary. In both counties the FSSY programs serves as guardian of last resort, so FSSY is contacted by the court when a guardian is needed and no one else is available. FSSY never acts as petitioner in guardianship cases. Petitions come from APS, nursing homes, and community referrals. Prior to initiating the second program in Bronx County, FSSY had the opportunity to meet and negotiate strategy with the Bronx County judiciary. A necessary compromise that both parties reached was to only have three judges hear guardianship cases to improve the quality and continuity of appointments.⁹⁶ This was a drastic change from how the judiciary previously dealt with guardianship cases, which were given to any judge at random. In Bronx County, FSSY has an overlapping and reciprocal relationship with the community guardian programs, each entity referring cases to each other to guarantee that wards are appropriately placed into the correct guardianship program.

FSSY uses a staff only model to provide guardianship services to its wards. FSSY also has an executive director and board of directors. FSSY's board of directors is not involved in decision making for the wards. The executive director of FSSY makes all final decisions. If a decision is difficult to make, the director will consult the appropriate parties for advice, whether that be the ward's doctors and case managers or financial and health care delivery staff at FSSY.

Because FSSY is a home health care service provider and guardian, there may be a potential conflict of interest. Should FSSY as guardian seek to hire FSSY's home care services? In order to avoid a conflict, prior to utilizing any of the agency's services, FSSY gets three quotes from competing services to compare prices. If the price comparison shows the agency is

⁹⁶ This was not a problem in Westchester County because there is only one judge in the county.

still the most prudent choice, then the agency will be chosen to deliver services. This solves the conflict of interest concerns because the use of the agency is not motivated by financial benefits.

E. The Vera Institute

The New York State Office of Court Administration has recently collaborated with the Vera Institute of Justice to develop and test a new guardianship service entitled The Guardianship Project.⁹⁷ Currently there are over 6,000 individuals in New York City alone receiving guardianship services. This project employs a wide range of professionals (from social workers to accountants), who work as a team to serve wards providing higher-quality services than an individual guardian would be able to. The Project was appointed guardian to its first case in April 2005, and by April 2008 the Project anticipates to have 300 clients.⁹⁸

One subsection of the project is the Guardianship Assistance Network. This service provides support to lay person guardians.⁹⁹ By offering such a support system, the goal is that people will feel more comfortable acting as guardian for their family members and friends and there will be a diminished need for professional guardians.¹⁰⁰ The Guardianship Assistance Network uses professional guardians and staff to train lay persons to act as guardian for their loved ones.

⁹⁷ Vera Institute of Justice: The Guardianship Project *available at* http://www.vera.org/project/project1_1.asp?section_id=6&project_id=74

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

IV. Guardianship Nationwide¹⁰¹

In response to the increasing numbers of unbefriended elderly and growing need for guardians, many states have discovered a multitude of mechanisms to attempt to solve the problem. The following section focuses first on states that use volunteers to serve as individual guardian of the ward. Then, the section explores states using volunteer panels to act as decision makers. Next, the section discusses the use of volunteers as supplemental support to professional, staff guardians. The section then focuses on states that provide guardianship services without the assistance of volunteers. Finally, this section explores surveys detailing the frustration programs have encountered with insufficient and discontinued funding, the need for guardians, and the best practices of volunteer guardianship programs.

A. Programs Using Volunteers as Guardians

Unlike many other states, Kansas has a state-wide volunteer guardianship program. The Kansas Guardianship Program is a “partnership involving the State of Kansas and its citizen volunteers to assist certain adults legally determined to be unable to manage for themselves.”¹⁰² The program was initiated in 1979 and established as “a separate public instrumentality” in 1995.¹⁰³ The program is a corporation that is funded through the state and governed by a seven member board of directors.¹⁰⁴ Six of the board members are appointed by the Governor and the last is appointed by the Chief Justice.¹⁰⁵ The board is responsible for employing the necessary staff to administer the program at a local level, “accept and receive grants, gifts or donations...

¹⁰¹ In the Appendix, there are charts tallying responses provided for the guardianship programs interviewed indicating the capacity in which volunteers are used in guardianship, sources of funding and referrals, and volunteer recruiting and training methods.

¹⁰² KN Stat.. Ann. § 74-9603 (a) (*hereinafter* “K.S.A.”)

¹⁰³ Kansas Guardianship Program Brochure available at <http://www.ksgprog.org/BecomeVolunteer/Overview.pdf>

¹⁰⁴ K.S.A. § 74-9603 (a)

¹⁰⁵ Kansas Guardianship Program Brochure available at <http://www.ksgprog.org/BecomeVolunteer/Overview.pdf>

report on the corporation's activities...on or before February 1 of each year... enter into contracts... [and] adopt bylaws for the corporation.”¹⁰⁶

The program was designed to “recruit volunteers to serve as court appointed guardians or conservators, or both, of adults who are found by the court to be in need of this level of protection.”¹⁰⁷ Guardianship may be provided by an adult or by a not-for-profit corporation. However, with the Kansas Guardianship Program, the individual volunteer is named guardian of the ward. Adults that qualify for volunteer guardianship are those deemed impaired¹⁰⁸ or those who wish to appoint a voluntary conservator, yet have no family members willing or able to assume the responsibilities of a surrogate decision-maker.¹⁰⁹ Adults can either have a guardian (a guardian of the person) or a conservator (a guardian of the estate).

The Kansas Guardianship Program serves vulnerable adults by recruiting volunteers who are willing to advocate and protect their ward's rights.¹¹⁰ Vulnerable adults are identified by SRS (Adult Protective Services) and SRS makes a formal request to the guardianship program for an approved volunteer that may be nominated by the court to serve as the adult's guardian or conservator.¹¹¹ Then the guardianship program “matches” a volunteer to the potential ward or conservatee.¹¹² Much like New York, Kansas has a poverty affidavit that may be filed in court to waive the potential ward's obligation to pay filing fees. The lost costs are then taxed to the county of residence of the proposed ward.

¹⁰⁶ K.S.A. § 74-9603 (b)

¹⁰⁷ *Id.* § 74-9602

¹⁰⁸ Impaired is defined as “any adult person whose ability to receive and evaluate relevant information or to effectively communicate decisions, or both...is impaired such that the person lacks the capacity to manage such person's estate...and who is in need of a guardian or a conservator, or both.” K.S.A. § 59-3051

¹⁰⁹ Kansas Guardianship Program Brochure available at <http://www.ksgprog.org/BecomeVolunteer/Overview.pdf>

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

If the court feels that the guardianship is appropriate, the court will appoint the volunteer guardian of the ward. Once the volunteer is appointed, the Kansas Guardianship Program “contracts with the [volunteer] to provide a high level of advocacy and protection to the ward... requires monthly reports of activities undertaken on behalf of the ward... provides a small monthly stipend to the volunteer...to offset out-of-pocket expenses; [and] provides ongoing training of and support to the volunteer.”¹¹³ Volunteers are expected to advocate on behalf of their wards, to provide them with access to services they need, monitor the quality of those services, visit between two and four times a month, manage the finances and estate, and provide the courts and Kansas Guardianship Program the requisite paperwork.¹¹⁴ Although the program does not require the volunteers serve a specified term of years, it is stressed that the commitment made by the volunteers is considerable. This is illustrated by the fact that 65% of the program’s volunteers have served for five or more years and 31% have served for 10 or more years.

One of the most critical aspects of the Kansas Volunteer Guardianship Program is its extensive volunteer screening process. Because this program services the entire state, it does not have the luxury of having only a few training sessions per year. The program is always in need of volunteers, and the ebb and flow of wards in need and individuals willing to serve them differs depending on which part of the state one is in. Therefore, the recruitment and training becomes very individualized and personalized because there are constant waves of people coming in and out of the program throughout the year.

While the Kansas Volunteer Guardianship Program has paid staff, the staff is never allowed to initially take a guardianship and stabilize it, then pass it on to a volunteer. Rightly or

¹¹³ *Id.*

¹¹⁴ *Id.*

wrongly, every request for a guardianship that is approved is the sole responsibility of the individual volunteer. The program serves 14,000 wards through 830 volunteers. The program's guidelines stipulate that no volunteer may serve more than five wards, but only a handful of volunteers actually carry that many. Approximately 75% of the volunteers only serve one or two people. The program does have waiting lists, but the size of each list is dependant upon the area of Kansas and the available pool of volunteers.

After speaking with Jean Krahn, the Director of the Kansas Volunteer Guardianship Program, she concluded that there were three essential elements to running a successful guardianship program. The first was an extensive screening process, including face-to-face interviews. Although some states are turning to certification as the standard criteria for eligibility as a volunteer guardian, there is no substitute for having a person experienced in the nuances of a guardianship program sit down and interview a potential volunteer to assure that the volunteer is a good fit for the program. Additionally, support staff is essential. Volunteers will be more efficient and effective if they have the proper staff to recruit, train, guide, and encourage them. Lastly, there must be the understanding that volunteerism is a pay status, not a job title. Volunteers are professional individuals essential to the implementation and success of a guardianship program. That being said, just because they are not getting paid does not diminish the role they serve. A program can not have an expectation that volunteers will make a hefty emotional and physical commitment to the program, as well as a fiscal commitment. Programs *must* pay volunteers a stipend to cover their out-of-pocket expenses. Therefore, in order to have a successful volunteer guardianship program, the program must have an extensive screening

process, phenomenal support staff, and a stipend available to volunteers to cover their out-of-pocket expenses.

Unlike Kansas, Ohio provides guardianship services on a county by county basis. This results in a patchwork of guardianship programs, illustrating a variety of different approaches to providing guardianship.¹¹⁵ The Muskingham County Volunteer Guardianship Program (“MCVGP”) is embarking on its second year of guardianship services. The MCVGP serves individuals sixty years of age and older that reside in Muskingham County and are determined incompetent.¹¹⁶ Upon receiving a referral, the MCVGP assesses the need for a guardian, the level of family involvement, and any less restrictive alternatives possible for the potential ward. The program attempts to pair volunteers to wards with similar interests, backgrounds, and values.

The director of the MCVGP is the only staff member, and it is her responsibility to recruit, train, and appoint the volunteers. Many organizations in Ohio become hybrid entities, hiring a nucleus of staff members that support the volunteer guardians. In the event of a difficult case, such as a volatile individual or one with involved family members, the staff member can assume the guardianship for a few months to get it stabilized and then transfer it to a volunteer guardian when the time is right. This way more guardianship cases of varying severities and complexities can be accepted. Unfortunately, due to a lack of funding the MCVGP only has the director on staff and must turn down complex guardianships because it would be inappropriate and unfair to the ward and volunteer guardian to accept such cases without the requisite professional support. Currently the MCVGP has thirteen volunteers of various professional backgrounds including social workers, nurses, and professional caregivers. Of those thirteen

¹¹⁵ Alternate methods of providing guardianship services will be discussed in subsequent sections of this report.

¹¹⁶ http://www.mcguardianship.org/pb/wp_347c3daf/wp_347c3daf.html

volunteers, the program has matched two of them with wards. This is not due to a lack of referrals. On the contrary, there have been several referrals; however, they are inappropriate for the volunteers to assume. Due to the lack of professionals on staff and the complexity of the court reporting requirements, the MCVGP does not assume guardianships of the estate. The program only accepts guardianship of the person

Like most other Ohio volunteer programs, the MCVGP appoints the volunteer guardian. The fact that the individual is personally appointed, thus personally liable, raises a host of liability concerns. It is not unusual to have organizations take out insurance policies on behalf of their volunteers to protect them from potential liability. This alone makes some individuals weary of becoming a volunteer.

In contrast to MCVGP, the Central Ohio Area Agency on Aging (“COAAA”) has been serving older Ohioans for over 30 years. This agency is located in Columbus, and services five counties (Franklin, Fairfield, Fayette, Pickway and Delaware). The agency provides a wide variety of services including assessments, home and community based services, information, education, and caregiver support.¹¹⁷

The Volunteer Guardian program matches qualified volunteers with people who are without family or friends and need someone to make decisions on their behalf. These volunteers become guardian of the person and aid their wards in making sound personal health care decisions. The agency focuses its efforts on a very selective population (individuals residing in nursing homes), turning away people with hostile or volatile situations and those with family still

¹¹⁷ <http://www.coaaa.org>. In addition to the volunteer guardianship program, COAAA offers programs such as adult foster home, care choice, long term care, ombudsman, MediCARES, PASSPORT, RSS Senior Options, Service coordination, and Title III. *Id.*

involved.¹¹⁸ Generally speaking, COAAA turns down potential wards because they do not fit within the guardianship criteria, as opposed to not having adequate funding resources.

The agency strives to provide excellent care for residents by providing volunteers with support, training, and technical assistance (including a volunteer attorney to aide in legal issues).¹¹⁹ Currently, the agency has 60 active guardianships, two full-time staff members, and one part-time staff member. Volunteers are trained and screened by COAAA's staff, matched up with an appropriate ward, and appointed legal guardian and primary decision maker for the ward. Recruitment occurs continuously. In the 13 years Julia Nack has been recruiting and training the agency's volunteers, she has found the largest volunteer demographic is middle-aged, full-time employees, with families and many other volunteer obligations.

A problem often encountered in recruitment is the high turnover of health care staff. The COAAA is continuously contacting hospitals, discharge planners, social service workers, and nursing home staff to explain the referral process and the appropriate candidates for guardianship. This dialogue creates a positive relationship resulting in quality referrals. However, Nack has seen the effects of an industry with a high employment turnover. Sometimes these relationships with health care organizations appear to disintegrate because the agency ceases to receive quality referrals from the hospital or nursing home staff. Generally, the staff that was contacted and educated about guardianship has left and taken up employment elsewhere, and the replacement has little understanding about the guardianship process. Therefore, the COAAA must remain in constant contact with these institutions to continue educating new staff in order to ensure a reliable stream of quality referrals.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

Another Ohio organization utilizing volunteers is the Cincinnati Area Senior Services which “provides legal guardians to elderly individuals who can no longer protect their personal interests.”¹²⁰ For the last forty years the organization has been providing guardian of the person services for residents sixty years of age or beyond who live in nursing or group homes and are/were residents of Hamilton County.¹²¹

Cincinnati Area Senior Services operates primarily through volunteers. Although there is one part-time staff member, Lori Luken, the staff is concerned with retaining and providing support to the current guardians as opposed to acquiring a caseload of wards themselves. Currently the program has sixty volunteers paired with approximately 100 wards. Having elderly volunteers has been a benefit to the Senior Services program (which only serves as guardian to wards in nursing or group homes) because many of the volunteers have had first hand experience with the nursing home environment and understand how things operate.

In order to qualify for guardianship, the potential ward must reside in supervised setting. Additionally, the ward must be sixty years of age or older and be incapable of making personal decisions. When Luken is contacted with a potential guardianship, she matches the ward up with a suitable volunteer. Then Luken and the volunteer will visit the ward, so that the volunteer can meet him/her. The volunteer then has a week to decide whether or not to accept the appointment. Unlike some other programs, there is not an extensive trial period to establish a relationship. However, this has only posed a problem once for the organization. Matching occurs relatively seamlessly because Luken asks each potential volunteer, during the pre-screening process, what, if any, preferences they have in a ward and those requests are taken into

¹²⁰ <http://www.senserv.org>

¹²¹ *Id.*

consideration while the potential matches are being made. Generally, matches become solidified within three months (depending on logistical considerations) and the waiting list has a maximum of five people on it.

Like many other organizations in Ohio, the guardianship program offered by Senior Services is one of many services available to the elderly population from the corporation. This allows Senior Services to pool its capital in order to supplement the guardianship budget. Senior Services used to receive funding from the local county probate court; however, that has since been withdrawn. While the probate court provides no funding support for the guardianship *program* it does offer a modest annual stipend to the *individual* volunteer (through the indigent fund¹²²), which the volunteer may apply for if he/she so chooses. The attorneys that perform the filing are also entitled to a reduced fee schedule, payable from the indigent fund.

Much like Ohio's approach, in Wisconsin each county is responsible for ensuring that guardianship is established when needed due to its protective services role.¹²³ This has led Wisconsin to attack guardianship in a piecemeal fashion with each of its 72 counties determining which types of programs to run. One of the largest volunteer guardianship programs is in Dane County. The program targets older adults (age sixty and older) who have no family or friends to assume the role of guardian and no financial resources to pay for a corporate guardian. In order for the elderly adults to qualify for services they must be indigent and found legally incompetent by the court.¹²⁴

¹²² See discussion *infra* A State's Attempt to Improve the Plight of Guardianship: Frustration with Unfunded or Under-Funded Programs

¹²³ Wis. Stat. § 55.04 (1)

¹²⁴ South Madison Coalition of the Elderly: Volunteer Guardian Program *available at* <http://www.madision.com/communitites/smce/about.php>

In order to help this vulnerable population, the program “recruits, trains and provides ongoing support to volunteers willing to serve as legal guardians for older adults in need.”¹²⁵

When a volunteer is accepted into the program, a training time is scheduled. After training, the program offers quarterly meetings with speakers and a newsletter with updates, as well as continual one-on-one support for the volunteers as requested.

If the Court determines that the individual is indigent and incapacitated, the Volunteer Guardianship Program will match the ward with a volunteer. The volunteers are asked to visit wards monthly (specifically three to six hours per month) and keep in continual contact with the ward’s service providers to ensure the ward is getting all the services he/she requires.

A second renowned Wisconsin guardianship program is offered through the Legal Aid Society of Milwaukee, Inc.¹²⁶ The Milwaukee Volunteer Guardianship Program, was funded through a grant from the State of Wisconsin Health & Family Services for a number of years. In 2003, a budget crunch caused the state to cease funding all volunteer guardianship programs. Fortunately, the Milwaukee program has continued through alternate funding sources.

The Legal Aid Society has launched an innovative program entitled the GAIN project, intended to “recruit and train more than 300 volunteers to serve as court appointed guardians.”¹²⁷ When a ward is determined incompetent by the court and there is a suitable volunteer match, the volunteer is named the guardian. Milwaukee’s volunteer program only provides volunteer guardians to serve as guardian of the person. The project has been successful and generated guardians for nearly 600 wards suffering from cognitive impairments such as Alzheimer’s, Down Syndrome, mental retardation, brain injuries, stroke, dementia, and chronic mental illness.

¹²⁵ *Id.*

¹²⁶ <http://www.lasmilwaukee.com/index.html>

¹²⁷ *Id.*

Another state recognizing the benefits of a guardianship program administered through volunteers is Rhode Island. Meals on Wheels of Rhode Island, has recently initiated a volunteer guardian program designated to service the entire state.

In order to be eligible for the program, a potential ward needs to be sixty years of age or older, indigent, and have no family, friends or other willing adults available to serve as guardians.¹²⁸ The program only acts as guardian of the person for the ward, avoiding court mandated annual accountings and bonding requirements. If after reviewing a referral, the volunteer guardianship program coordinator feels that guardianship is appropriate, a petition is initiated and the coordinator matches a volunteer to the potential ward. There are currently 65 active guardianships and there are always between fifteen and twenty potential wards waiting for a volunteer match.

The Meals on Wheels program is composed entirely of volunteers. If the person is accepted into the program, he/she is required to go to a two-day training session that lasts eight hours. Meals on Wheels also provides continuing education seminars to its volunteers on various topics such as funeral arrangements, end-of-life decision making, value clarification, and assistive devices. Additionally, the program holds round table discussions to allow members to share their volunteer experiences with one another. The continuing education sessions are optional. Presently, the typical guardian is between 40 and 60 years of age and is highly educated. Generally speaking, guardians are Caucasian females that are still working at least part time.

¹²⁸ *Id.*

While this new program is filling in some of the guardianship gaps in Rhode Island, there are still many in need. Because the program is composed solely of volunteers, many of the complicated guardianship cases are inappropriate for a volunteer to handle and must be turned away. If there was additional funding to hire staff guardians these cases would no longer present a problem. Additionally, if staff members were hired and given manageable caseloads of 35-50 guardianships, not only would the “problem” cases receive much needed attention, but the program’s growing wait list would be minimized.

Another state grappling to find an appropriate way to ensure guardianship to elderly members of society, and choosing a volunteer guardian program, is New Jersey. Hunterdon County has developed New Jersey’s *only* volunteer guardianship program for adults. Volunteer Guardianship One-on-One, Inc. is an organization that serves as guardian of last resort. If there is a ward without family or friends, the court contacts the agency and a volunteer is matched with the ward. Then the individual volunteer is named guardian of the ward. The program is relatively new, and therefore still small. There are a total of eleven volunteers and eleven wards served. Volunteers are each paired with one ward.

The agency recruits volunteers through informal methods. It relies on its current volunteers to promote the program through word of mouth. The agency offers an eight to nine hour training session at least twice a year. The program does not experience much of a turn-over rate because the program makes it very clear that volunteering as a guardian is a life long commitment (barring any exigent circumstances). The commitment and responsibilities associated with being a volunteer guardian generally terminate upon the death of the ward.

The One-on-One guardianship agency was created by a surrogate court judge with intimate knowledge of the need for guardianship services. Due to the creator's station in the judicial system, the agency continues to have strong ties to the court today. The agency receives a substantial amount of assistance from the legal community, having a fair number of attorneys volunteer their time and skill to the program. There are also additional professionals who provide pro bono services, such as accountants. Because APS generally brings the petition, the court fees are paid by APS and the county. Additionally, thanks to the generous professional volunteers associated with the program and its ties to the court, the organization does not have to pay attorney or court fees.

The agency is funded through a variety of sources, although it is continuously seeking contributions to enhance its \$35,000 operating budget. If there was an increase in funding, the agency would augment the salaries of the support staff who assist in case management.

Other than funding, the agency felt that the other largest obstacle for the program was finding appropriate volunteers. While the training sessions would attract a number of individuals, many were solely concerned with issues concerning family members and their own lives, and not the lives of the potential wards that remained strangers to them. Also, the program felt there is an immense amount of pressure when the court calls requesting a volunteer because the court is seeking an individual to immediately become appointed, irrespective of that individual's relationship with the ward. The program is always seeking to make the best suited match for both ward and volunteer, but the urgency of getting a body appointed makes this matching strenuous. Although the agency has a mechanism in place to slow the process down in order to properly match a volunteer to a ward (the board members of the agency can temporarily

assume the role of guardian while a match is perfected, although that has never had to happen), the process is still complicated and time consuming. The agency also felt that the process could be simplified if there were an increased number of trained, ready, and willing volunteers at the agency's disposal.

Lastly, Polk County is one, if not the only, county in Iowa that is fortunate enough to have a volunteer program instituted and available so that people in the community do not have to go without a surrogate decision maker. The Polk County Volunteer Guardianship and Conservatorship Program services a population that proposed substitute decision-maker legislation was intended to aid; "people with mental illness, developmental disabilities, mental retardation, and/or senior citizens who lack the capacity to care for themselves."¹²⁹ The Polk County Attorney's Office has approximately 900 guardianships and conservatorships open, of which 256 are handled by its eighty volunteers.¹³⁰

Volunteers are drawn to the program for a variety of reasons. The program provides the potential volunteer with training and education about what is involved in being a guardian and/or conservator. If the individual still wishes to become a volunteer, the program staff matches the volunteer up to a case, or cases. The authority of the volunteer is established by the court order handed down at the guardianship hearing.

¹²⁹ *Id.*

¹³⁰ *Id.*

B. Programs Using Volunteer Panels to Act as Surrogate Decision-Makers

The use of volunteer decision-making panels is relatively rare. Currently, only three states have chosen to utilize such a model. These states are New York¹³¹, Iowa, and Texas.

Iowa has instituted state and local substitute medical decision-making boards.¹³² These boards are extremely similar to New York's Surrogate Decision-Making Committees. The state boards are responsible for instituting policy and guidelines for the local boards, and serving as a guardian in the absence of a local board.¹³³ A local board is composed of appointed volunteer medical professionals and lay persons.¹³⁴ Although there is no statutorily imposed prerequisites for the individuals the board serves, most consumers come from state institutions for the mentally retarded and developmentally disabled.¹³⁵ The board is allowed to consent to major medical treatment and residential placement decisions but *not* end of life-sustaining treatment decisions.¹³⁶ There are nine local boards that cover approximately one tenth of the state.¹³⁷ These boards receive no state funding and a very small number of cases.¹³⁸

Texas also utilizes a Surrogate Decision-Making Program. This program, enacted in 1993, was also based on the experience and success of the surrogate decision making panels in New York.¹³⁹ The panel's decision-making authority is *limited* to individuals who are residents in intermediate care facilities for the mentally retarded.¹⁴⁰ Texas has both general and specific

¹³¹ The discussion on volunteer decision-making panels in New York State is located *supra* at Guardianship in New York: Article 80.

¹³² Iowa Code § 135.28 & 29

¹³³ *Id.* § 135.28

¹³⁴ *Id.* § 135.29

¹³⁵ N. Karp & E. Wood, Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

health care consent statutes for the mentally retarded, so the panel generally serves in cases where an interdisciplinary team in the facility has determined that the resident lacks the ability to consent, there is no actively involved surrogate, and there is a need for a decision to be made concerning psychotropic medicine and/or “highly restrictive behavior procedures.”¹⁴¹

The program is run by the Texas Department of Mental Health & Mental Retardation.¹⁴² If the intermediate care facility the resident is living in decides that the resident needs the panel to make a decision on his/her behalf, the facility applies to the Department of Mental Health & Mental Retardation for the use of a surrogate decision-making committee.¹⁴³ The committee is composed of three to five trained volunteers. Volunteers include attorneys, disability advocates, and people “with demonstrated expertise or interest in the care and treatment of persons with mental disabilities.”¹⁴⁴

If the Department of Mental Health & Mental Retardation feels that a committee is warranted, the resident of the facility will receive notice of the committee proceeding.¹⁴⁵ The committee then holds its review.¹⁴⁶ The committee must make its determination on whether to consent based upon whether there is clear and convincing evidence presenting indicating the treatment promotes the resident’s best interests.¹⁴⁷ In 2001, the committee heard over 490 cases.¹⁴⁸ However, these decision-making committees are *only* available in counties with the

¹⁴¹ N. Karp & E. Wood. Incapacitated and Alone: Health-Care Decision-Making for the Unbefriended Elderly 25 (American Bar Association 2003)

¹⁴² *Id.* at 26

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ N. Karp & E. Wood. Incapacitated and Alone: Health-Care Decision-Making for the Unbefriended Elderly 26 (American Bar Association 2003)

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

intermediate care facilities, which means approximately 80% of the counties in Texas are not eligible for the committee decision-making program.¹⁴⁹

C. Programs Using Both Staff and Volunteers to Act as Guardian

Many states use multiple types of guardianship programs to service their needs. While many counties in Ohio appoint volunteers to act as guardians, some choose to use a hybrid model appointing both staff and volunteers. An agency illustrating this point is Adult Guardianship Services (“AGS”) from Cuyahoga County (Cleveland). AGS is a not-for-profit organization that “recruits, trains and supervises volunteers to become court-appointed guardians.”¹⁵⁰ AGS provides indigent and severely mentally retarded adults with guardianship of the person services by “authorizing and coordinate[ing] comprehensive plans of care.”¹⁵¹

For the last 16 years AGS has provided Cuyahoga County with substantial guardianship services.¹⁵² Last year alone, AGS served 502 wards, providing 341 consultations, investigating 187 referrals, and awarding 115 new guardianships.¹⁵³ The number of guardianship appointments and services has been on a steady increase for the last five years. AGS accomplishes this monumental task with the aide of 17 paid staff, 144 volunteer guardians, and 25 volunteer attorneys.¹⁵⁴

AGS utilizes its 17 paid staff members to stabilize complex guardianship cases. Generally, after six to nine months with a staff member, the guardianship is able to be transferred to a volunteer. However, wards that are more independent and living in the community, or have

¹⁴⁹ *Id.*

¹⁵⁰ <http://www.charityadvantage.com/lutheranmetro/ags.asp>

¹⁵¹ *Id.*

¹⁵² <http://www.agscleveland.org>

¹⁵³ *Id.*

¹⁵⁴ *Id.*

complex medical or mental health histories generally remain permanent wards of the staff member. With the influx of referrals and assessments, staff are more readily being appointed initial guardian to give the volunteer guardians the opportunity to visit the ward and develop a potential relationship. This four to six week trial period is essential to ensuring that both the ward and volunteer guardian are able to work together and have an amicable and positive relationship. While having the staff initially take the case and work through the preliminary health care and placement issues detracts from the volunteer guardian's participation and involvement in initial critical decision making on behalf of the ward, the number of referrals and influx of wards requires it.

Another state using hybrid local guardianship organizations is Texas. Guardianship Services is a not-for-profit Texas organization that serves "to provide guardianship and alternate services to legally and functionally incapacitated individuals who have no family member or friend willing, able, or suitable to serve in that capacity."¹⁵⁵ The organization recruits, trains, and supports volunteers to act as court appointed guardians and/or bill payers and representative payees.¹⁵⁶ The organization has a budget of approximately \$625,000.

In 2004, the program had 154 volunteers accepting guardianship cases and represented over 200 wards.¹⁵⁷ In order for an individual to be eligible for guardianship services, he/she must be a resident of Tarrant County and have no family or friend to serve as a decision-maker.¹⁵⁸ More difficult cases are initially given to one of the eighteen individuals on staff for

¹⁵⁵ Guardianship Services, Inc. *available at* <http://www.guardianshipservices.org>

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

stabilization, and then transferred to a volunteer guardian.¹⁵⁹ If the volunteer is found to be suitable for the program, he/she must complete twelve hours of training for the guardianship program and/or four hours training for the money management programs.¹⁶⁰ Volunteers must commit to serve one year in the organization; however, most generally serve for the lifetime of the ward.¹⁶¹

The individuals that choose to become volunteer guardians represent a broad range of community members. The ages of volunteers span from 21 to 78 years of age.¹⁶² Each volunteer spends an average of two hours and forty-five minutes with their ward per week, and approximately two years and seven months serving as a volunteer guardian/money manager per case.¹⁶³ Generally speaking, each volunteer only has one ward, although over thirty volunteers serve two or more wards simultaneously.¹⁶⁴ Each volunteer is responsible for visiting his/her ward regularly, making placement decisions, arranging for medical care, managing the ward's finances, and advocating for quality care.¹⁶⁵ Although the actual times vary per case, a volunteer usually spends an hour or two a week with his/her ward. Additionally, prior to committing to becoming the guardian of any ward, the volunteer has the opportunity to meet with the ward to ensure that they will have a productive relationship together.¹⁶⁶

Each year, volunteers spend over *eight thousand* man hours performing guardianship services for their wards.¹⁶⁷ The approximated cost of hiring staff to perform this work is

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ Guardianship Services, Inc. available at <http://www.guardianshipservices.org>

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ Guardianship Services, Inc. available at <http://www.guardianshipservices.org>

\$136,000. The cost of recruiting and training a volunteer is about \$100, which totals around \$15,400.¹⁶⁸ Although there is no estimated figure, the amount of money this organization saves the state must be quite substantial. The cost of serving one ward, for one year, using a volunteer, is \$1,060 or less than \$100 a month.¹⁶⁹

Family Eldercare is another organization very similar to Guardianship Services. Family Eldercare also serves frail, elderly individuals by pairing the ward with a volunteer advocate that is supported by a staff case manager.¹⁷⁰ In the event that there is no volunteer ready, able, or willing to serve a ward, the professional case manager serves as guardian or money manager.¹⁷¹ The case managers appear to serve a unique role in the guardianship process. In each case, a case manager is assigned to the ward to make a “complete initial client assessment, make appropriate referrals and obtain pro-bono legal assistance through Volunteer Legal Services of Texas.”¹⁷²

Unlike Guardianship Services, the staff at Family Eldercare is all registered with the National Guardianship Foundation.¹⁷³ Additionally, Family Eldercare also has an ethics committee at its disposal, composed of community leaders and representatives from the medical community, to help address the various ethical issues that arise when providing care for another.¹⁷⁴

Family Eldercare has also released productivity data. In 2003, the Family Eldercare volunteers provided the elderly Central Texans with approximately *two thousand five hundred*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Family Eldercare available at <http://www.familyeldercare.org>

¹⁷¹ *Id.*

¹⁷² FAQs: Family Eldercare’s Guardianship Program Survey available at <http://www.fecguardianship.org/faq.asp>

¹⁷³ Family Eldercare available at <http://www.familyeldercare.org>

¹⁷⁴ *Id.*

hours of free guardianship services. This translates into approximately \$41,000 in services. Much like Guardianship Services, although the numbers have not been provided indicating how much this volunteer service has saved the state, it is sure to be a substantial figure.

D. Programs Using Volunteers as Supplemental Support to Staff Guardians

Illinois, acting through the Office of the State Guardian (“OSG”), does not utilize volunteers to act as guardians; however, it does use volunteers in another innovative way. The OSG has implemented the Volunteer Guardianship Advocate Program where volunteers “improve the quality of life for wards of the [OSG] by...provid[ing] companionship, oversight, and [advocacy]” to achieve individually tailored service to the wards of the state.¹⁷⁵

Once a volunteer is accepted into the program, it is their responsibility to frequently visit the wards (with an OSG mandated minimum of once a month) and provide the wards with an advocate and friend. These regular meetings allow the volunteer to get to know the wards financial and health care preferences, which the volunteers then communicate to the OSG. This communication allows the OSG to enhance the ward’s health and progress and adequately address their service needs. In return, the OSG provides the volunteer direction, training, and resources.¹⁷⁶

Initially, the relationship the OSG envisioned was to use volunteers as a supplement to the staff guardians. However, a small number of the volunteers have taken to the program and impressed the staff. In these cases the relationship between the OSG, volunteer, and ward has evolved. At first the ward and volunteer were matched and the staff member served as a monitor and go-between. Now, the volunteer can take a more proactive role, functioning almost as an

¹⁷⁵ Illinois Guardianship & Advocacy Commission: The Volunteer Guardianship Advocate Program *available at* <http://gac.state.il.us/osg/vgap.htm>

¹⁷⁶ *Id.*

equivalent to a staff member guardian. However, the select few guardians who have demonstrated immense passion and skill and requested further responsibility will never have complete decision making power, especially in instances concerning essential medical decision-making involving a high degree of intrusiveness or controversy. While it is exciting that some volunteers have become so involved and integral to the guardianship process, the program still primarily functions to provide the staff guardians with supplemental support.

E. Programs in which the State Staff Acts as Guardians

In many states, a state agency serves as a guardian of last resort. While there may be additional programs offered, if a potential ward is not suitable he or she will default into a public guardianship program offered through the state.

Illinois is such a state. Once an individual utilizes the public guardian program and the state is appointed his/her guardian, standby guardianships are rarely pursued. Illinois has a two-tiered system of public guardianship. The Office of the State Guardian (“OSG”) is the largest public guardianship agency of its kind in the United States, serving nearly 5,300 adult disabled wards.¹⁷⁷ The OSG is one of three divisions of the Illinois Guardianship and Advocacy Commission (“IGAC”). The IGAC was established as a model civil rights organization. The OSG specifically handles the personal, financial, and legal affairs of its clients who include adults that are developmentally disabled and/or mentally ill and disabled. The OSG has seven regional offices throughout the state.¹⁷⁸

When OSG receives a referral for a potential ward, it mails the petitioner a “Referral and Client Status Form” to gather information on the potential ward. There is no charge for the

¹⁷⁷ Illinois Guardianship & Advocacy Commission: Office of the State Guardian *available at* <http://gac.state.il.us/guardfaq.html>

¹⁷⁸ *Id.*

referral process to the OSG. After the petitioner completes and returns the form, the case is screened by an OSG case worker and, if appropriate, an investigation is initiated. OSG is able to be appointed guardian of the property if the potential ward's estate is *less than* \$25,000. If the estate is greater than \$25,000 then the case is referred to the County Public Guardian. The case is only returned to the OSG if the county does not have a County Public Guardian or if the County Public Guardian turns the case away. If the ward becomes a ward of the OSG and has available assets, the OSG is permitted to charge a reasonable fee (determined on a sliding scale basis) for their services.¹⁷⁹

The second tier of the public guardianship system involves County Public Guardians. The state of Illinois has 102 counties, three of which have *both* a Public Administrator and Public Guardian and seventeen which have *neither* a Public Administrator nor a Public Guardian.¹⁸⁰ The remaining 82 counties have either a Public Administrator or a Public Guardian within the county.¹⁸¹

The largest County Public Guardian agency is in Cook County. The county has an adult and juvenile division.¹⁸² The adult division receives public guardianship appointments through the Probate Court for adults eighteen years of age or older with assets of *at least* \$25,000. Generally, the county serves as plenary guardian of both the person and estate. Last year the county served 800 wards, cared for \$50 million worth of assets, and acquired 100 new appointments. Currently, over one third of their wards continue to live in the community.¹⁸³

¹⁷⁹ *Id.*

¹⁸⁰ Public Guardian/Administrator Listing *available at* http://gac.state.il.us/osg/public_guardian.htm

¹⁸¹ *Id.*

¹⁸² Cook County Public Guardian *available at* <http://www.publicguardian.org>

¹⁸³ *Id.*

Referrals are processed in the same manner as those received by the OSG.¹⁸⁴ First a referral is made, then an investigation and field assessment occurs, and finally, if appropriate, a petition is filed in Probate Court to appoint the County guardian. Potential wards are required to be residents of Cook County, have estates valued over \$25,000, meet the definition of a “disabled person”, and be without any family, friend or other willing person to assume guardianship. The County Public Guardian does not file a petition for a ward seeking appointment of a third party for the ward.¹⁸⁵

Like Illinois, New Jersey also has a public guardianship program which, in certain circumstances, uses the state as a guardian of last resort. New Jersey has one relevant adult guardianship statute located within the New Jersey Rules of the Court.¹⁸⁶ This statute allows the court to appoint an individual to become a guardian from a statutory hierarchy. The order of appointment is the incapacitated ward’s spouse, next of kin, or “such other person who will accept appointment as the court determines is in the best interests of the [ward].”¹⁸⁷

The Office of the Public Guardian steps in as an “other person who will accept appointment” if the ward does not have any other suitable family or friends to assume the role of guardian. The Office of the Public Guardian is an agency of the state “that makes legal, financial and healthcare decisions for individuals age sixty and older who have been determined by a Superior Court judge to be incapacitated.”¹⁸⁸ The state agency employs a staff of attorneys,

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ N.J. Court Rules, 1969 R. 4:86-1 et al

¹⁸⁷ *Id.* 4:86-6 (c)

¹⁸⁸ New Jersey Department of Health and Senior Services: Office of the Public Guardian *available at* http://www.state.nj.us/health/senior/sa_opg.shtml

investigators, care managers, and accountants to assist it in providing unbefriended elderly with the services they need.

The Office of the Public Guardian is *only* appointed when there is no one else to assume the responsibility of guardian. Although the agency *never* initiates a proceeding in court, it is named guardian. Various other institutions serve as petitioners and initiate the court proceeding and then suggest naming the Office of the Public Guardian as guardian. Once the Office of the Public Guardian is appointed, it is responsible for developing an individualized care plan based on the ward's needs, as well as implementing the plan and ensuring that the required services are actually being delivered.

The Office of the Public Guardian can serve as both guardian of the person and guardian of the estate, depending upon the needs of the ward. Additionally, the Office of the Public Guardian *may* be appointed guardian of an individual who is *not* incapacitated to serve as a volunteer conservator. This is appropriate “if the Court believed the individual requires assistance with managing his or her financial or proprietary affairs.”¹⁸⁹ Generally speaking, these rare instances of guardianship are temporary and only for a short duration of time.

New Hampshire has also instituted a state-wide public guardianship program. There is still the option to have a private individual retain guardianship of the person, estate or both.¹⁹⁰ The public guardianship program was designed to address those situations where private guardianship was unavailable.¹⁹¹ When an individual is incapacitated “and there is no relative, friend, or other interested person available. . .the probate court may appoint the public

¹⁸⁹ *Id.*

¹⁹⁰ *See* N.H. Rev. Stat. Ann. § 464-A et al.

¹⁹¹ *Id.* § 547-B:2

guardianship and protection program as the guardian of the person, estate, or both.”¹⁹² The statute also allows the public guardianship program to serve as guardian for an unbefriended elderly individual with assets.¹⁹³

The public guardian is granted full authority to make any health care decisions the ward could have made if he/she would have retained capacity, including the ability to withdrawal life-sustaining treatment.¹⁹⁴ Although the statute does not specifically state that the guardian has authority to withdrawal life-sustaining treatment, the statute also does not indicate that this authority needs to be specifically delegated to the guardian.¹⁹⁵ Recent litigation has determined that the power to make end-of-life decisions *is* now considered inherent in the guardian’s authority. However, this is not a plenary power and can be limited by court order in any fashion the court deems appropriate.¹⁹⁶ In the event that there *is* another relative or interested party available to be guardian, but that individual wishes to have some professional support, the public guardian may be appointed co-guardian with the relative or family member.¹⁹⁷ In the event one of the two co-guardians is unavailable, the other co-guardian may exercise decision making authority on behalf of the whole.¹⁹⁸ While co-guardianship is allowed by the statute, both public guardianship agencies are extremely reluctant to use it.

New Hampshire has appointed two not-for-profit agencies to serve as public guardians. Both agencies are under contracts which fix “the cost per guardianship and shall permit the

¹⁹² *Id.* § 547-B:3

¹⁹³ *Id.*

¹⁹⁴ *Id.* § 547-B:4

¹⁹⁵ *Id.* § 464-A

¹⁹⁶ N.H. Rev. Stat. Ann. § 547-B:4

¹⁹⁷ *Id.* § 547-B:5

¹⁹⁸ *Id.*

contracting organization to subcontract for such consulting services as may be necessary....”¹⁹⁹

Per the contract, the state sets an allocation of the amount of mentally ill and developmentally disabled clients that are eligible to receive a public guardianship. When a petitioner approaches the court for a public guardianship, the state first assesses whether there are any open slots in either of the public guardianship agencies for the ward to be transferred to. If there are not, the ward is placed on a waiting list until a slot becomes available.

Additionally, the public guardianship programs can accept individuals outside the contract limits that are nursing home residents receiving Medicaid or private pay clients with sufficient assets to cover the costs of the guardianship services. For example, one of the non-for-profit organizations, Granite State Guardianship Services, charges wards receiving guardianship of the person services on a per diem basis and guardianship of the estate services on an hourly basis.²⁰⁰

Both public guardianship programs are fully staffed by professionals, and neither chooses to use volunteers for the guardianship program. The staff guardians (which range from six to twelve) have case loads of multiple wards (anywhere from 55 to 65 individuals). Unlike APS in New York, even though the public guardianship program serves as a guardian of last resort, the program never initiates a petition in court. The only requirement for the ability to petition is that the potential wards must reside in New Hampshire. The person filing the petition is responsible for paying the court’s filing fee as well as attending the guardianship hearing. If the individual is indigent there is a court initiated mechanism available to waive the fee.

¹⁹⁹ *Id.*

²⁰⁰ <http://www.nh.gov/judiciary/probate/guardianship.htm>

After filing the petition, the ward's situation is assessed to determine if he/she is an appropriate candidate for public guardianship. If the ward is indigent, he/she is unable to qualify for public guardianship unless he/she is mentally ill and/or developmentally disabled (falling into the category of individuals covered by the state contracts) or he/she is in a nursing home receiving Medicaid. In some circumstances the two public guardian programs will provide guardianship services on a pro-bono basis, but those situations are few and far between.

The two public guardianship organizations, The Office of the Public Guardian and Granite State Guardianship Services, perform nearly identical operations. While the organizations differ in size and the number of guardianship services they perform, staff members for both organizations have approximately equivalent caseloads. They both service between 55-65 clients per staff member. The larger organization reported having a slight influx in the staff to client ratio at times, going as high as approximately 70 wards per staff member. However, the program stated that numbers that high were a rare occurrence.

Much like New Hampshire, Florida has multiple mechanisms available to serve as guardian, including public guardianship with a local guardianship program. Public guardianship is administered by the Statewide Public Guardianship Office located within the Department of Elder Affairs.²⁰¹ The Statewide Public Guardianship Office ("SPGO") contracts with sixteen agencies across the state, servicing approximately 20 of the state's 67 counties. The SPGO is charged with "ensuring that every Floridian in need of a guardian receives the services of a

²⁰¹ Teaster et al., *Wards of the State: A National Study of Public Guardianship*, available at <http://www.mc.uky.edu/gerontology/research%20reports/wards%20of%20the%20state%20public%20guardianship%20final%20copy.pdf>

qualified guardian.”²⁰² In order to qualify for public guardianship, an individual must be an indigent adult, 18 years of age or older, with no suitable family or friends willing to serve as guardian.

Public guardianship programs serve as Florida’s “guardian of last resort.” In order to ensure that there is no other family available to serve as guardian, the SPGO utilizes Autotrak. This “is a Web-based search tool that provides a list of possible relatives, contingent upon the availability of information.”²⁰³

The Florida law allows either an individual or corporation to be appointed guardian. Therefore, the SPGO can contract with any person or corporation qualified as a professional guardian. In order to be a professional guardian an entity needs to retain an attorney, complete a professional guardian course approved by the SPGO, pass the Florida Professional Guardian Competency Exam, post a blanket fiduciary bond, and provide services to at least three wards.²⁰⁴ Generally, the local programs are not-for-profit agencies, although the state does have a contract with an individual and with a university to provide guardianship services. The Florida statute also imposes a maximum staff to ward ratio of 1:40. If the appointed guardian is a not-for-profit agency, the staff guardians are required to go through the professional guardian training while the support staff is not. Once a professional guardian’s 1:40 ratio is reached (whether he/she

²⁰² Statewide Public Guardianship Office, Protecting Florida’s Most Vulnerable Citizens, available at <http://elderaffairs.state.fl.us/english/PUBGUARD/SPGObrochure.pdf>

²⁰³ Statewide Public Guardianship Office, Moving Forward: Statewide Public Guardianship Office Annual Report 2005, available at <http://elderaffairs.state.fl.us/english/PUBGUARD/MovingForwardComplete.pdf>

²⁰⁴ Statewide Public Guardianship Office, Protecting Florida’s Most Vulnerable Citizens, available at <http://elderaffairs.state.fl.us/english/PUBGUARD/SPGObrochure.pdf>

operates as an individual or as an employee of a not-for-profit), there is “an unmet need in the locality [for any additional cases,] with no last resort decision-maker.”²⁰⁵

The local guardianship contracts are funded through a variety of sources. In 2004, the SPGO spent approximately \$3.9 million dollars for the 16 counties it serviced. Of their budget, 70% of the expenses were staff salary and benefits and the remaining 30% were operational expenses.²⁰⁶ In 2004, the state funded approximately 20% of the local guardianship programs.²⁰⁷ The breakdown of the 2004 state financing showed that three of the fourteen programs received over 85% of their funding from the state, while the other eleven programs received less than 7.5% of their funding from the state.²⁰⁸ During a current interview with Michelle Hollister, she indicated that the state funding had not changed much and some of the contracts are 100% state funded, while some receive no state funding.

According to the local contracts, the SPGO is prohibited from petitioning the court unless there is *no one* else available to petition. Generally APS initiates the petition. Irrespective of who petitions, all court fees are waived due to a statute that was recently passed waiving all filing fees and court costs for the public guardianship programs.

The public guardianship program serves approximately 2,200 people a year. However, this number remains relatively stagnant, not allowing for many new individuals to receive services. Florida has never contemplated using volunteers in their public guardianship program.

²⁰⁵ Teaster et al., Wards of the State: A National Study of Public Guardianship, available at <http://www.mc.uky.edu/gerontology/research%20reports/wards%20of%20the%20state%20public%20guardianship%20final%20copy.pdf>

²⁰⁶ Statewide Public Guardianship Office, Moving Forward: Statewide Public Guardianship Office Annual Report 2005, available at <http://elderaffairs.state.fl.us/english/PUBGUARD/MovingForwardComplete.pdf>

²⁰⁷ *Id.*

²⁰⁸ *Id.*

In lieu of volunteers, individual professional guardians providing services in areas without a local public guardianship program are being appointed as pro bono guardians.

Virginia also utilizes a state wide public guardianship program that is funded by the Virginia Department of the Aging. The Department is responsible for “facilitat[ing] the creation of local or regional programs to provide services as public guardians or conservators and find[ing], coordinate[ing], administer[ing] and manag[ing] such programs.”²⁰⁹ The Department is permitted to contract with local or regional public *or* private entities to perform the requisite guardianship or conservatorship duties.²¹⁰ The State submits a request for proposals from local entities wishing to serve as public guardians. The local entities then submit their proposals. If the State feels the entity would effectively serve as a public guardian, the State approaches the local entity to negotiate a contract which will stipulate the array of responsibilities, obligations, and manner in which the entity will serve as public guardian.

The Department of Aging utilized this statutory delegation to contract with human service agencies to provide public guardianship services for a predetermined number of people in a specific local geographic area.²¹¹ The Department of Aging designates a maximum number of individuals that may be serviced with the funds provided to the service agency.²¹² These numbers range from 10 to 55 individuals.²¹³ Prior to July 1, 2006, there were a total of 12 service agencies in Virginia that are able to accommodate 312 individuals.²¹⁴ Services have recently been expanding, adding three local public guardian programs and an additional 56 slots

²⁰⁹ Va. Code Ann. § 2.2-711

²¹⁰ *Id.*, § 2.2-712

²¹¹ Virginia Public Guardianship Program *available at* <http://www.aging.state.va.us/vapublicguardp gm.htm>

²¹² *Id.*

²¹³ <http://www.aging.state.va.us/vaguardlist.htm>

²¹⁴ *Id.*

for individuals in need of public guardianship.²¹⁵ However, services are still not available in every locality, and in the areas in which services are provided, they are limited and there are often people in need of public guardianship that are forced to wait.²¹⁶

In order to qualify for public guardianship an individual must be incapacitated, indigent, and have no suitable family member or friend to assume the role of guardian.²¹⁷ Potential wards are referred to the service agencies by adult care facilities, APS, hospitals or any other organization dealing with indigent and/or incapacitated individuals.²¹⁸ After information is gathered about the individual, the case is presented to a multi-disciplinary panel from the local guardianship program (service organization) to determine if services can be provided.²¹⁹ If the local guardianship program and court agree that services are required, the court will appoint the local guardianship program guardian.²²⁰

In 2005, Virginia enacted additional legislation in an effort to service the uncovered areas of the state which were unable to receive public guardianship services.²²¹ SB 719 states that if an individual is identified by the court as incapacitated, living in an area without a local public guardianship program, and a guardian and/or conservator can not be identified within one month, any local public guardianship program within 60 miles of the individual may be appointed guardian.²²² However, if the local public guardianship program has already reached the state

²¹⁵ Phone interview with Janet Brown, August 11, 2006, on file with the author

²¹⁶ <http://www.aging.state.va.us/vapublicguardsteps.htm>

²¹⁷ <http://www.aging.state.va.us/vaguardlist.htm>

²¹⁸ <http://www.aging.state.va.us/vapublicguardsteps.htm>

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ Commission on Law & Aging: American Bar Association, State Adult Guardianship Legislation: Directions of Reform – 2005, available at <http://www.abanet.org/aging/guardianship/06/gdlegisupdate0106.doc>

²²² *Id.*

stipulated maximum allocation of wards, the individual is placed on a waiting list and continues to await the appointment of a guardian.²²³

Virginia does not utilize volunteers to serve in any type of decision-making capacity in the public guardianship programs. The local programs are actually contractually forbidden to have a volunteer serve in such a capacity. However, local programs can use volunteers to serve in alternate, non decision-making capacities such as friendly visits or escorts for grocery shopping.

In Texas, the Department of Aging & Disability Services (DADS) was created in September, 2004, to “provide a comprehensive array of aging and disability services, supports, and opportunities that are easily accessed in local communities.”²²⁴ DADS is charged with providing guardianship services to individuals directly or through contracts with local guardianship programs for individuals referred through APS or CPS.²²⁵ Services provided include capacity assessments, identifying guardianship alternatives, and attempting to identify other persons or organizations that are willing, able, and appropriate to serve as guardian.²²⁶ If all of these options are explored and exhausted, DADS may file an application in court to become appointed guardian.²²⁷

At first blush this appears identical to the role that APS plays in New York State. Actually, DADS essentially took over the role APS used to play in guardianship as a result of an APS reform project. However, unlike New York, DADS does not serve as an essential “guardian of last resort,” available to become appointed by any third party filing a petition with

²²³ *Id.*

²²⁴ Department of Aging & Disability Services *available at* <http://www.dads.state.tx.us/services/index.html>

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

the court. This is because APS (and now DADS) may *only* be appointed guardian in situations in which APS files the application with the court and agrees to be appointed. Additionally, APS does not service all of the counties in Texas. Hence this is not a “guardian of last resort” provision.

F. A State’s Attempt to Improve the Plight of Guardianship: Frustration with Unfunded or Under-Funded Programs

Iowa’s legislature passed a piece of legislation that created an Office of Substitute Decision Making. This legislation “establish[es] a state office of substitute decision mak[ing] and authorize[es] the establishment of local offices...to provide substitute decision-making services to adults and their estates.”²²⁸ The state office would be charged with creating and administering a statewide network of surrogate decision makers, including the use of volunteers and volunteer organizations.²²⁹ While the office would be part of the state and therefore receive state funding, it would also be allowed to establish and collect “a schedule of reasonable fees for the costs of...services” from wards with the ability to pay such costs.²³⁰ These fees would be deposited into the general fund for the state and reinvested back in the substitute decision-making programs.²³¹

In order for an individual to qualify for the substitute decision-making services he/she must be a resident of the area in which the local office is located, eighteen years of age or older, without suitable family and/or friends to serve as guardian, and incompetent. Additionally, guardianship or conservatorship must be the least restrictive means available.²³² While another

²²⁸ Iowa Code § 231E.2 (2)(a)

²²⁹ *Id.* § 231E.4 (1) & (4)(b)

²³⁰ *Id.* § 231E.4 (6)(e)

²³¹ *Id.* § 231E.9

²³² *Id.* § 231E.6

individual or entity is generally required to petition on behalf of the potential ward, the state can petition if the appointed guardian is not fulfilling his/her duties or is subject to removal, a willing guardian is unavailable, or the best interests of the ward require the state's involvement.²³³

Unfortunately, the legislation can not be implemented until it receives funding. Despite figures from a Needs Assessment Survey conducted in 1989, in which 27 counties responded that 3,586 individuals were in need of a substitute decision-maker, the legislation remains unfunded.²³⁴ Many practitioners and advocates are extremely aware of the overwhelming need for guardianship and are working on a state wide committee to attempt to implement the prior unfunded legislation.

Four years ago, the Texas Health and Human Services Commission (HHSC) Guardianship Advisory Board recommended the establishment and implementation of a state-wide guardianship program.²³⁵ The program would be two-tiered, utilizing the current local guardianship programs to continue functioning as they presently are, and instituting a default state agency to act as a "guardian of last resort" for those individuals that can not receive services from a local program.²³⁶

The Guardianship Advisory Board identified factors such as an increasing number of individuals in need of guardianship due to the aging Texas population, the lack of a guardian of last resort, family and friends willing to act as guardians but without the financial means to pursue judicial action, inadequate county support of local guardianship programs, and the

²³³ *Id.* § 231E.7

²³⁴ Iowa Assoc. of Community Providers, 2006 Legislative Agenda: Talking Points, <http://www.iowaproviders.org/Member%20Info%20Section/2006%20Talking%20Points%20FINAL.doc>

²³⁵ 2002 HHSC Guardianship Advisory Board Annual Report on the Development and Implementation of a Statewide Guardianship Program in Texas *available at* http://www.hhsc.state.tx.us/si/gat/reports/GAT_rpt_12_2002.pdf at 1.

²³⁶ *Id.* at 12—13.

inadequate education and accountability of the probate court system, all of which indicate the need for a statewide program.²³⁷ The Guardianship Advisory Board recommended a substantial increase in funding from the state (approximately \$956,000), in order to implement the guardianship program.²³⁸ The State answered, increasing the initiatives funding by \$400,000. However, the State refused to appoint a state agency to act as a guardian of last resort. While the funding increased the operating budget to approximately \$800,000, and the extra money directly benefited local guardianship programs, it is still inadequate to serve a population of approximately four thousand who are still in need of guardianship services.

Florida is another state suffering from legislative change that resulted in a decrease in desperately needed funding. A number of its public guardianship programs relied heavily on revenue from an optional county ordinance. Counties who chose to enact the ordinance imposed up to an additional \$15 fee on any civil filing. These additional filing fees were applied directly to the public guardianship contract. However, in July, 2004, a Constitutional revision was passed saying that the state should solely fund the public guardianship programs and the county ordinances were eliminated. The biggest hurdle for the SPGO has been to replace this revenue source. Subsequent to the amendment, the state allocated enough funding to keep the existing public guardianship programs open; however, there has not been a further increase in state dollars in the past few years. This means that any new public guardianship programs that have been created have been financed through county dollars or another funding source other than state dollars.

²³⁷ *Id.* at 2

²³⁸ *Id.* at 19

In an attempt to reinstate a permanent source of funding, the 2005 Legislative Session “entertained language providing for add-on fees for public guardianship,” similar to that which existed in the repealed county ordinances.²³⁹ Unfortunately, none of the funding proposals were adopted, but the issue has been resubmitted for the next legislative session.²⁴⁰ Additionally, the SPGO has turned outward to the counties to attempt to collectively solve funding issues.²⁴¹ Lastly, the SPGO could seek Medicaid matching funds; however, it did not this past year due to anticipated changes in Florida’s Medicaid plan.²⁴²

Ohio illustrates yet another instance of governmental change resulting in drastic consequences to its funding. Ohio probate courts developed a similar mechanism for providing consistent financial support to indigent clients. Each probate court had an indigent fund. This fund is based upon a percentage of the filing fees obtained by the courts for probate proceedings. Unfortunately, the courts have recently changed their filing fee schedule, decreasing the overall amount of fees necessary for filing petitions in probate court. This has resulted in a seriously depleted indigent fund. In larger counties, such as Cuyahoga (Cleveland), this does not really pose much of a problem because there is still a steady volume of people utilizing the probate courts. However, in smaller counties, this has drastically decreased a pool of funding that the volunteer guardianship programs heavily relied upon. The indigent fund used to serve as funding for the probate courts to contract with guardianship agencies. In some counties, because the fund is non-existent, so is the contract that used to be funded by it.

²³⁹ Statewide Public Guardianship Office, Moving Forward: Statewide Public Guardianship Office Annual Report 2005, available at <http://elderaffairs.state.fl.us/english/PUBGUARD/MovingForwardComplete.pdf>

²⁴⁰ *Id.*

²⁴¹ *Id.*

²⁴² *Id.*

G. Volunteers Acting as Guardians: Surveys of Need and Best Practices

A study completed in Florida in 2004 estimated that between 5,000 and 10,000 individuals per year are in need of a public guardian (meaning that they are an indigent adult without family or friends).²⁴³ These numbers illustrated a clear discrepancy in the number of individuals in need and the number of individuals being served. The study also indicated that the average cost of serving a ward in the public guardianship program ranged from \$298 to \$126, averaging about \$197 per ward.²⁴⁴ These figures range due to the costs of staffing and the amount of pro bono legal work that is available to the local guardianship program.²⁴⁵

The study also found an issue with the general knowledge about the program. Surveys discovered that statewide, roughly half of the individuals polled knew about the guardianship program. In counties with local public guardian programs approximately three quarters of the individuals polled knew about the guardianship programs. However, the agency that was the most aware of the local guardianship programs was APS and APS receives the most referrals from local human service professionals about individuals in perceived need of guardianship services. Therefore, although many human service professionals were unaware of the guardianship programs, they would refer the individuals to APS which had intimate knowledge of, and would in turn refer to, the local guardianship program. APS serves as the likely middle man in the placement of individuals in need of guardianship.

In September, 2005, the Ohio Guardianship Association (“OGA”) created a survey and compiled the information retrieved concerning non-attorney, non-family guardianship services in

²⁴³ Office of Program Evaluation & Planning: Florida Department of Elder Affairs, Public Guardianship: An Assessment of Need 2004, available at <http://elderaffairs.state.fl.us/english/PUBGUARD/SPGO1228.pdf>

²⁴⁴ *Id.*

²⁴⁵ *Id.*

Ohio.²⁴⁶ In this survey, the OGA found that 19 programs in Ohio are providing guardianship services for 25 counties.²⁴⁷ There are seven additional counties in Ohio that did not provide data because they are in some phase of establishing a guardianship program. Of the remaining counties, a program was not listed that served that county. The OGA found that twelve of the fifteen programs are private, not-for-profit affiliates and the remaining three programs are government-affiliated. One of the most interesting facts the study recovered was that, on the average, 92% of all the wards served by these county programs were indigent (having assets worth \$10,000 or less). Additionally, full-time guardianship staff members take on a case load of approximately 45 cases, while volunteers generally manage one case (although the state-wide average for those participating programs was 1.4 cases per volunteer). Funding was gathered from a myriad of sources, however:

Approximately 70% of all guardianship services is funded by the state of Ohio (\$5,100,000), earmarked to serve one exclusive [state-wide] population, those individuals with mental retardation or developmental disability. Approximately 30% of guardianship services are provided by other not-for-profit and government programs scattered throughout the state, used to serve all non-MR/DD incompetent individuals, funded by numerous sources, representing \$2,300,000.²⁴⁸

In 2004, “[t]he Wisconsin Guardianship Support Center, a project of the Elder Law Center of the Coalition of Wisconsin Aging Groups, conducted a survey...to identify successful methods that volunteer guardianship programs use to recruit, train, monitor and support

²⁴⁶ Survey provided by the OGA and is on file with the author.

²⁴⁷ Of the 19 established programs, 15 provided data for the OGA survey.

²⁴⁸ *Id.*

volunteer guardians.”²⁴⁹ The survey contemplated a variety of categories such as reasons for success and failure of volunteer programs, recruitment and training tactics, and mechanisms for volunteer support. The survey found that programs attributed success to a low ratio of wards to a guardian, availability, skill, and support of staff, positive relationships with the probate and circuit courts, and careful matching and monitoring of volunteers and their wards. On the other hand, programs attributed failure to a lack of funding, staff and volunteer time, and volunteers, as well as difficulty in completing court mandating accountings.

When programs were asked about their recruiting methods the overwhelming favorite was informal networking through word of mouth. This networking was accomplished by direct appeals by the agency’s staff to their friends, colleagues, and existing volunteers and through current guardians recruiting new guardians. The second most popular form of advertising was placing ads in the local newspapers. Other widely used recruiting methods including conducting community presentations about the volunteer program at churches, civic groups and other community organizations, placing ads and articles in newsletters, and circulating posters, brochures and flyers. Many of the agencies surveyed indicated they utilized a combination of these methods for recruitment.

When approving applications for a potential volunteer, the survey found that two-thirds of all volunteer organizations ran a criminal background check and requested references pertaining to the volunteer’s employment, volunteer experience and experience with guardianship. Additionally, an overwhelming number of agencies (86%) utilized the same training method of distributing printed information to their volunteers in conjunction with an in-

²⁴⁹ Coalition of Wisconsin Aging Groups, Volunteer Guardianship Programs: Best Practices Survey 2004 available at www.cwag.org

person training session. Generally speaking, these training sessions were conducted on a one-on-one basis, although approximately one-third of responding agencies chose to conduct the in-person training in a group setting. While agencies appear to use the same general screening and training methods, of the forty agencies polled only three *required* a concrete time commitment from their volunteers. This commitment ranged from one to two years.

One of the most helpful sections of the survey deals with the barriers to volunteer recruitment and retention. Because the volunteer guardianship programs surveyed indicated that programs fail due to lack of volunteers, this is an essential section indicating what problems must be solved to create and run a successful volunteer guardianship program. The programs surveyed felt there were multiple barriers to recruitment. These included a shortage of people with the appropriate skills, time, and interest to participate in the volunteer program. Additionally, the complexity and longevity of some of the guardianship cases (and the impending liability that accompanies it) intimidates volunteers. Moreover, there appears to be an overwhelming ignorance as to what guardianship services are really about, who they affect, and how they affect them. This ignorance also prevents people from volunteering. Lastly, people are not interested in participating because the compensation (or lack thereof) is disproportionate to the overwhelming amount of time, effort, and responsibility required from a volunteer, so people feel that the commitment is not “worth it.” The survey attributed difficulty in retaining volunteers to two things, lack of staff support and lack of immediate ward placements for volunteers.

V. A Potential Solution: Proposed Methods to Tackle Guardianship With Volunteers

There are a multitude of reasons why a program utilizing volunteers to act in a guardianship capacity should be initiated. While a volunteer panel is strongly suggested, because grouping volunteers into panels would lessen the burden of decision-making off a single individual and foster carefully considered personal and financial determinations for incapacitated adults in need, using volunteers in any capacity would serve as a productive, important, and fulfilling volunteer activity for individuals in the community.

Furthermore, using volunteers to offer additional guardianship services would enhance and extend the continuum of quality care and services offered to residents of New York. While there are existing guardianship programs throughout the state, adding another mechanism of providing guardianship services will only increase the opportunity for the community to identify and aide an incapacitated adult in need before the situation escalates to an emergency. The presence of a volunteer in an adult incapacitated person's ("AIP") life will decrease the opportunities for elder abuse. A volunteer's active involvement with the AIP will serve as protection to the AIP and will make an individual attempting to exploit the AIP's finances less likely to act because he or she will be more likely to be caught.

Additionally, having extra eyes and ears in the community will help to ensure that AIPs are receiving the appropriate level of care. The entire motivation behind guardianship statutes is to provide an AIP with the least restrictive alternative to allow the AIP to live life as independently yet as safely, as possible. Often AIPs who have no family or friends go without any type of home care or other interventions because they are an unidentified population in need. Their need is not discovered until the AIP is extremely ill and requires emergency medical care

services and hospitalizations. Sometimes an individual will undergo a hospitalization and then he or she will be placed unnecessarily in a nursing home or other comparable institution. There is no need for an adult to live on a continuum servicing only extremes. Volunteers can assist in these situations.

Currently in New York, the burden to handle guardianship issues with AIPs lacking a willing and able family member or friend falls upon APS. Because its time is consumed with these guardianship matters, APS is unable to respond to acute care needs in other situations because its time is consumed with these guardianship matters. By allowing volunteers to assist in identifying AIPs and assuring that they receive appropriate home care services and financial assistance, APS will be able to service other sectors of the community that are equally in need of its assistance. Additionally, the AIP will have the benefit of proper case management, ensuring that the spirit of the guardianship legislation has been achieved by providing the AIP with the least restrictive means of living. Moreover, the volunteer has the fulfillment of being able to bond with a person truly in need and acting to enhance that person's quality of life.

A. How Should the Program Be Organized?

There appear to be four likely scenarios in which volunteers could be used to serve in a guardianship capacity in New York State. In each of these three scenarios, the first and most important element is the locus of the program. These volunteer programs should be housed within a not-for-profit corporation. If an individual does not act as guardian, New York law permits a not-for-profit to be named by the court as the guardian, and then the corporation may delegate its decision-making powers to agents of the corporation, such as volunteers.

This statutory provision gives New York quite an advantage. By allowing the corporation to act as guardian, the corporation is not locked into one person (such as a volunteer) being the only individual able to sign necessary paperwork or make decisions for the ward. While the optimal situation would involve the same individual or individuals continuously acting as decision-maker, sometimes emergencies occur at inconvenient times when these individuals can not be reached and decisions need to be made. The ability of the corporation to be named guardian and delegate its responsibilities allows flexibility and peace of mind for the ward, volunteer, and corporation. In the event that something were to happen to the ward and the volunteer was on vacation (or unavailable for some other reason), the corporation could speak on behalf of the ward instead of being forced to await the return of the volunteer.

Additionally, this statutory provision allows an instantaneous remedy if a volunteer no longer wants to participate as the decision-maker for the ward. While many guardianship programs have indicated that volunteer turnover is not an issue because of careful recruitment and screening techniques and the volunteer's commitment to the program, ward, and cause, in the unlikely chance that a volunteer wished to step down the corporation would be able to accommodate the request. The provision eliminates the need for a court proceeding to have another guardian reappointed because the corporation, and not the individual or individuals acting as agents under the corporate umbrella, is named as guardian. Therefore, the corporation can delegate decision-making authority to different volunteers and still not breach its duty as the court appointed guardian.

Furthermore, having the corporation appointed as the guardian alleviates much of the potential concern and anxiety a volunteer could fear surrounding the issue of liability. In the

unlikely event that something were to occur to the ward while he or she was under the care of the corporation, the volunteer would be protected from liability because he or she would be shielded under the corporation's umbrella. Because individual volunteers would not be held personally liable for these situations, it is anticipated that individuals would be more likely to volunteer their services. This is not to imply that the quality of individual volunteers will diminish because more people will feel comfortable to volunteer. The fear of liability affects all individuals equally. In order to protect itself, the corporation can easily acquire insurance that covers potential mishaps that may occur while a volunteer is acting in a guardianship capacity.²⁵⁰

B. How Should Volunteers Be Used?

The not-for-profit corporation could use volunteers to serve in a guardianship capacity in four potential ways. First, the corporation could have an individual volunteer appointed guardian. Second, the court could appoint the corporation as guardian and have the corporation delegate its decision-making authority to a panel of volunteers. Third, the corporation could run a hybrid program where the corporation's staff is initially appointed to stabilize the guardianship and then it is transferred to a volunteer. Lastly, the corporation could be appointed guardian, using the corporation's staff to deliver guardianship services and having volunteers act as supplemental support to the staff.

i. Appoint Individual Volunteer Guardians

The first way a not-for-profit could use volunteers in guardianship services is to have individual volunteers appointed guardian. However, this model fails to take advantage of the New York State statute allowing a corporation to be appointed guardian and delegating these

²⁵⁰ An example of a volunteer insurance can be found on The Cima Companies, Inc. website at <http://www.cimaworld.com/files/volunteer-insurance-web-doc.pdf>

powers to an agent. Appointing an individual volunteer as the guardian limits the flexibility of how the individual and corporation may serve the ward. The individual volunteer guardian is the one mandated to visit the ward, complete the financial accountings, and sign all of the health care and residential placement documentation. The individual volunteer is also the person liable in the case of a lawsuit. Although the volunteer can protect him or herself by seeking out insurance, that purchase is an expensive proposition for an unpaid volunteer. The volunteer would also be responsible for posting a bond if he or she was named guardian of the property (in the event that the ward had assets).

Appointing an individual volunteer as guardian creates both a burden and a benefit for the corporation. Having an individual volunteer act as guardian limits the types of guardianship cases the corporation could take because certain individuals requiring guardianship services present needs that are too complex and difficult for a volunteer. These cases include adults with serious mental illness and individuals who continue to reside in the community and require an abundance of complex case management. It is neither fair to the volunteer nor the ward to assign these cases to someone who is not a professional with the expertise to manage these cases. However, the benefit is that the program would develop very distinct guidelines for the types of individuals eligible for its guardianship services. This advice was emphasized by Linda Proffit (AGS) and Julia Nack (COAAA). They stressed that every program must start with narrowly tailored criteria and adhere to those criteria so that the program can reach its expectations and fulfill its obligations.

There are three potential ways a program can narrow its admissions criteria. Programs can only offer certain guardianship services (Article 81, Article 17-A and/or Article 79), require

wards be a specific age to receive services (18 and older, 55 and older or 65 and older) or live in a supervised setting (nursing homes, hospitals, adult homes). COAAA runs a program based upon the latter criteria, appointing individual volunteers to serve as guardian for sixty individuals in nursing homes. Cincinnati Area Senior Services is another program which has narrowed its program by the ward's age and residence, appointing individual volunteers to serve individuals sixty and older that reside in nursing homes. The advantage of narrowing the scope of a program is that the corporation could draw a permanent line as to which types of cases are appropriate for volunteers to handle and prevent the corporation from falling into the trap of over-extending its volunteers and resources.

ii. Appoint Corporate Guardian Which Delegates Decision-Making Authority to a Panel of Volunteers.

The second option for using volunteers in a guardianship capacity is to have the volunteers serve on a decision-making panel, having their authority granted to them by the corporation which has been appointed guardian. This model is very similar to those of the Article 80 SDMCs (in form) and NYSARC, Inc (in substance).

The main difference between this proposed panel and the SDMC is that unlike the SDMC which makes a single health care decision for a ward, this proposed panel would follow the ward, presumably for the duration of his or her life, to make all personal and financial decisions for him/her. In that respect, the proposed panel would be very similar to the NYSARC panels which act as a decision-maker for an individual for the duration of his/her lifetime. This would mean constant involvement and visitation with the ward, as opposed to a single appearance. Different demands are placed on the volunteers because in order to make quality decisions and provide continuous care, the same volunteers should be making every decision for an individual

ward. Unlike the SDMC, which has the ability to choose from any of its volunteers to sit on a panel and make a decision, this panel would have to ensure that the same individuals participate in every subsequent decision made on behalf of each individual ward in order to achieve quality and continuous care.

These individuals would then be responsible for visiting with the ward and knowing what is going on in the ward's life. In order to provide quality, consistent decision-making, the same group of volunteers must be responsible for the same group of wards. Thus, assigning the volunteers and wards to panels by geographic regions makes the most sense.

This geographic location would serve as a tool to determine which volunteers would provide services to which wards. NYSARC and the SDMCs are the epitome of this geographic organization. NYSARC uses local ARCs and their guardianship advisory boards to make decisions for individuals residing within the geographic reach of the local ARC. This makes meetings and visitation convenient for the volunteer because the corporation is not requiring an excessive amount of travel. Volunteers are generally active and involved members of the community with families and other obligations. Immense requirements for travel will most likely turn a potential volunteer away from the program because he or she wants to assist an individual that needs help, not sit in a vehicle and travel all over the state.

Therefore, a subset of the corporation's volunteers would be responsible for a subset of the wards the corporation is appointed guardian for. While this entire subset of volunteers would not always be available to sit on every panel and make every decision, it is much easier to have

ten volunteers²⁵¹ from the same county, rather than 200 volunteers scattered throughout the state, become intimately involved and able to make quality decisions for a group of wards. Limiting the amount of individuals serving on each panel also limits the amount of information that needs to be disseminated to each volunteer. The corporation has fewer administrative headaches concerning completing reports on each ward and ensuring that each report is copied and distributed to every volunteer involved. The ward receives a consistent standard of decision making, the distribution of the ward's confidential information is kept at a minimum, and the job of the volunteers is more manageable. Each volunteer knows that he or she is responsible for intimately knowing information on a very finite set of individuals, instead of being inundated with information for an undetermined number. The volunteer also has the comfort of having a corps of nine other people consistently available for support and consultation.

iii. Appoint Corporate Guardian and Staff Guardians Stabilize Complex Cases, Then Transfer Them to Volunteer Guardians.

This third model allows for a program to expand the scope of services it offers, as well as using volunteers in the highest guardianship capacity. In this model, a corporation could delegate a guardianship to a volunteer, unless the guardianship is too complex or the situation is too volatile. In the latter situation, a staff member of the corporation could stabilize the guardianship and then transfer it to a volunteer. If the ward's situation was too complicated for transfer, the corporation also has the ability to assign the staff member to permanently retain the guardianship.

²⁵¹ These numbers are merely for illustrative purposes and do not represent and substantive research or recommendations as to the size of the panels or number of wards each panel should serve.

This hybrid model is beneficial for a variety of reasons. More wards can receive services because the corporation is prepared to assume a broader range of individuals. Additionally, courts will not become impatient with the program while it tries to find a suitable volunteer match. The program can immediately assign a staff member, allowing the ward to immediately receive the care he/she needs and allowing volunteers an opportunity to meet with the ward to ensure a productive and meaningful relationship will ensue. Furthermore, if the case cannot be transferred, a staff member can retain the case as well as twenty-four other complex cases while still maintaining an appropriate case load. AGS in Cleveland is a great example of such a program, where seventeen staff members stabilize guardianships and then transfer appropriate ones to a volunteer within six to nine months.

There are also disadvantages to such a model. The first and foremost is funding. Staff guardians require a salary and funding to keep the program in existence is hard enough to come by without considering money for salaries. Additionally, having staff stabilize the guardianship precludes the volunteer from being involved in the initial, and often important, placement and case management decisions. Moreover, the broader the scope of services offered, the greater the opportunity for over extension.

iv. Appoint Corporate Guardian, Staff Act as Decision-Maker and Volunteers Act as Supplemental Support.

In this final model, a staff member of the corporation would serve as the ward's decision-maker instead of an individual volunteer, hybrid combination of staff and volunteers or a panel of volunteers. Paid professional staff members acting as guardians offer some distinct advantages. As previously alluded to, a paid staff guardian is probably better suited to take the complex and difficult cases that are inappropriate for a volunteer to take. This would allow the

corporation to expand the types of individuals to whom it could provide guardianship services. Additionally, having staff guardians allows the corporation to dictate the amount of time and the extent to which the staff needs to be available for their wards. Guardianship is a 24 hour a day job. While it may not be inappropriate to expect volunteers to be available to make decisions for a ward in which they are appointed guardian, it may be unrealistic to think that a volunteer will be willing to shoulder such heavy responsibility. This is not the case with a staff guardian, because it is his or her job to be available to act 24 hours a day in the case of an emergency. Of course, the most prominent disadvantage to utilizing staff as guardians is that the corporation must provide the staff with salaries. This could pose potential problems with revenue, which will be discussed later.

Although this last model utilizes staff as the primary decision-makers that is not to suggest that there is not a role for volunteers to play. This is best illustrated by the guardianship program in Illinois. General Counsel and acting Director of the IGAC, John Wank, uses volunteers to assist staff guardians in multiple ways. Volunteers serve as friendly visitors, taking notes about the ward and his/her treatment, progress, and wishes and writing reports to help supplement the staff guardians' reports and understanding about the quality and consistency of case management services being delivered.

Having volunteers act in such a capacity is beneficial for the ward because it gives him/her another individual to turn to for advice, help, and support. The volunteer may be more instrumental in serving that purpose than the guardian is, depending on the relationship the ward has with both the staff member and the volunteer. If the ward perceives the volunteer as more of a friend and peer, the ward may be more candid with the volunteer and disclose information that

is vital to providing optimal care. The volunteer would ultimately be serving as the liaison between the guardian and the ward.

Volunteers could also assist by completing forms and paperwork or providing professional advice. Reporting is a very time consuming and tedious task but nonetheless essential to guardianship. Programs could seek out retired accountants and CPAs to assist the staff in performing financial accountings. Additionally, volunteers that have served in the health care profession could be assembled into an ethics panel. This panel, like those offered by Lifespan and Family Eldercare in Texas, could be convened on an as needed basis to discuss the courses of actions pursued by the staff as well as difficult pending health care cases. This way the guardianship program has reassurance from an unbiased third party and retired health care and accounting professionals have the opportunity to use their special skills to give back to the community.

C. Partnerships: How Can A Not-For-Profit Identify A Population Of Persons in Need?

There is a recognized problem concerning guardianship of the unbefriended elderly and a multitude of reasons why volunteers should be used to satisfy this problem. Assuming that a not-for-profit corporation decides to pursue this worthy cause and initiate a volunteer guardianship program, there remains a fundamental problem in its implementation. How is the program going to find AIPs that are in need of its services?

The first entity a guardianship program could decide to partner with is a hospital and/or nursing home. By collaborating with either or both of these organizations, a guardianship program would discover practical and financial benefits. Practically, hospitals and nursing homes are places where AIPs are initially identified. Many times the emergency room at the

hospital receives an individual who is in serious need of medical attention, and after the individual is stabilized, the hospital realizes that the individual is incapacitated and alone. If there was a guardianship program that was partnered with that area hospital, the hospital would be saved the time, effort, and aggravation of attempting to find another suitable guardian. The same holds true with a nursing home. Although the number has not been quantified, it is estimated that a significant percent of individuals in nursing homes are incapacitated and alone.²⁵² A nursing home would benefit greatly from having an organization to turn to with these patients that are in need of guardianship.

This would not only serve the interests of the hospitals and nursing homes by lessening their burden of finding suitable guardians for wards in need, it would provide a prerequisite class that a guardianship program would be able to serve. In order for a guardianship program to be successful, it must avoid getting too large too quickly. If this happens the program will overextend its resources and be forced to disband. A good way to operate within the program's means is to set out distinct identifying criteria for the type of wards being served. A program that limited its scope to residents of nursing homes or hospitals has a finite population of individuals to work with. This prevents the program from taking on too much.

A financial benefit could also be derived if the guardianship program contracted with the hospital and/or nursing home to serve as guardian for the ward. If the program charged the hospital and/or nursing home a referral fee per person, it would allow the guardianship program to acquire revenue for its services, since the AIP will generally not have assets. The referral fee will also prevent the guardianship program from receiving inappropriate candidates (i.e. wards

²⁵² N. Karp & E. Wood. Incapacitated and Alone: Health Care Decision-Making for the Unbefriended Elderly. (American Bar Association 2003)

with family members available to serve as guardians, although the family member may be difficult to deal with). Additionally, the program could work out a contract with local nursing homes to charge them a flat fee, per person, to ensure that so long as the court has predetermined that the corporation is a suitable entity for serving individuals in hospitals and/or nursing homes and it deems the ward in need of a guardian, the program will automatically serve as guardian. Furthermore, partnering with these agencies would prevent the guardianship program from having to seek out AIPs and act as petitioner in the court. The guardianship program could avoid a substantial amount of court fees by requiring the hospital and nursing homes to act as petitioners, nominating the program to serve as guardian.

The hospitals will save money because they know that they have a default guardian and will not be wasting unnecessary dollars keeping the ward in the hospital while they otherwise search for a suitable guardian. Additionally, nursing homes will have the benefit of a decision-maker for their clients which will make treating the clients easier (because the AIP will have a person that can consent, as opposed to waiting until the AIP gets so ill that there is an emergency situation where consent is presumed), and decrease the potential for a nursing home to be accused of acting as both decision-maker and provider of care.

Another similar entity that a guardianship program could partner with, that relates strongly with the aforementioned entities, is APS. Generally, when an AIP is discovered at a hospital or nursing home, APS is the one that is appointed as guardian. A guardianship program stepping into that role will alleviate that burden from APS. Because APS is considered the guardian of last resort in New York State, a guardianship program that is willing to partner with

APS would also have the benefit of partnering with an entity that receives numerous referrals for individuals in need, as well as one willing to act as petitioner in court.

Programs that have worked closely with APS in New York State have been highly successful, as illustrated by the three Community Guardian programs in New York City. A not-for-profit approaching DSS to replicate such a program north of New York City may be a possibility, although it has yet to be pursued.

One of the downfalls of having such a relationship with DSS is that the guardianship program is expanding the scope of the population that it services. A program being appointed guardian by DSS is going to encounter individuals who reside in the community, not just those in contained, supervised institutional environments like hospitals and nursing homes. This is not necessarily a bad thing; it is just something that needs to be taken into serious consideration to prevent the program from accepting more individuals from DSS than it has resources to accommodate.

Another category of entities that may be appropriate partners are those currently providing care services to the elderly in the community. These entities include charitable organizations providing meals, services, and companionship to the elderly residing in the community. The advantage to partnering with such an entity is two-fold. First, if an individual does not require full-blown guardianship, the community care services offered by the organization are already established and available. This will ensure that an individual receiving services is always receiving the least restrictive means of assistance in his or her life. Second, it extends the continuum of care the community care organization can provide to an individual. Instead of being forced to abandon an individual when his or her needs exceed the capabilities of

the community care organization, the organization will be able to further accommodate the individual by providing the final service he or she will need, guardianship.

Once again, the guardianship program would not have to worry about identifying a population that is in need of services. The community care organization already has intimate ties and knowledge of this population because it has been delivering meals and fixing fences for it. Additionally, the community care organization could serve as petitioner, once again allowing for the guardianship program to avoid petition and court fees. Furthermore, the community care giver would have the same peace of mind as a nursing home, knowing that there is now another entity that can consent to decisions so that if the community care organization is offering case management and home health care services, it is not in danger of being accused of serving the dual role of decision-maker and service provider.

D. The Necessary Evil: Funding

The most problematic area of anything in life seems to boil down to money. Guardianship programs flourish or fail based upon their sources of funding. When revenue streams run dry, whether it is because contracts can no longer be funded or legislative change discontinues court filing fees, programs are forced to fold. Therefore, how is a program going to find sufficient funding in order to operate?

Guardianship is an expensive undertaking. Most individuals that are in desperate need of guardianship have no assets to pay for guardianship services. Additionally, filing and court fees require money. Article 81 guardianships are not inexpensive things. Thus, a delicate balance must be maintained because there are two very certain realities, guardianship is expensive and many wards are unable to pay for it.

The most common way new guardianship programs become funded is seeking aid from the United Way. Therefore, a new program should definitely contact the United Way and inquire about funding opportunities. Guardianship coordinators are also active campaigners. They are constantly fundraising in order to increase the operating budget for their programs. Fundraising is most likely going to be another necessity for a new program. Programs also apply for grants and rely on private donor contributions. The problem with these two funding sources is that they are neither constant nor consistent. Some may suggest that a new program turn to the State. While the State may approve the guardianship program, there is no guarantee of subsequent funding for the program after its approval. Additionally, even if funding is received from the State, there is no guarantee that it is a constant source to rely upon.

There are a few solutions to these funding problems. The first is for the guardianship program to encompass a very small part of what the not-for-profit organization does. If the corporation is able to rely on revenue from other services it provides, it could creatively reallocate some of that revenue towards the guardianship program to ensure that it could remain solvent. However, if a not-for-profit offers case management and home care services to individuals, and also serves as guardian for those individuals, it opens the door for the organization to be accused of having a conflict of interest. This is because the organization is making the decision to pay itself, which seems to be financially motivated as opposed to serving the best interests of the ward. Other organizations faced with this same issue, such as FSSY, have effectively dealt with it, such as requiring three quotes from other local organizations providing home health care to ensure that the guardianship program's organization is the

cheapest. Additionally, in order for the guardianship program to avoid the appearance of self-dealing, the not-for-profit could create a subsidiary corporation dedicated solely to guardianship.

Another funding solution is to offer ancillary guardianship services in addition to actually serving as guardian. The not-for-profit could offer guardianship training to lay-persons. Court-appointed individuals serving as guardian of their families and friends need guidance in what to do as guardian. Training sessions could be advertised by the courts and conducted by the guardianship program bi-weekly to address these needs. Additionally, the not-for-profit could create and sell a manual or handbook for lay guardians. This book could compile relevant agency names and numbers, contact information and requirements for public benefits, contact information for home care agencies and community assistance programs²⁵³, and other such information that would be helpful in acting as a case manager for a family member or friend. Additional specialized training and assistance could also be offered specifically for filing annual accountings for wards.

Additionally, a not-for-profit could operate a hot line to provide lay guardians with assistance whenever they needed it. This hotline could be a toll-number, charging a small fee per call, providing advice and assistance. The hotline could be staffed by a combination of trained volunteers, retired professionals, and staff.

As previously mentioned, programs could also initiate contracts and referral fees with referring agencies. These fees can constitute a steady stream of income while preventing the guardianship program from receiving inappropriate referrals.

²⁵³ The best example of this idea is found in the Kansas Guardianship Program: Handbook. Section VI of the handbook outlines benefits provided by the Social Security Administration, Veteran's Administration, Railroad Retirement, Medicare, Medicaid and a variety of other sources. Additionally, it provides advice on how to apply for income assistance programs and health care support services. Kansas Guardianship Program, Kansas Guardianship Program: Handbook, 57—79 (2004).

There is no easy way around the issue of funding. Another reality is that while volunteers are a less expensive method of providing guardianship services, they are not a free method. Guardianship Services in Texas released numbers illustrating this fact, stating that volunteers donated 8,000 man hours to guardianship and that the cost to recruit and train the volunteers was \$15,400 as opposed to the cost to hire a staff member, which was \$136,000. Additionally, Family Eldercare in Texas also released figures indicating that their volunteers donated 2,500 man hours to guardianship which translated into \$41,000 in services. However, there are costs associated with volunteers. They need to be recruited, screened, trained, and supported.

Additionally, programs generally offer reimbursement for reasonable travel and out-of-pocket expenses. The Kansas Guardianship Program specifically recommended, and offers, a small stipend to its volunteers to compensate them for their time and energy. While reimbursing travel expenses may not be extravagant compensation for a volunteer, it is still compensation. Programs must anticipate the costs associated with utilizing volunteers.

E. Guardian of the Person v. Guardian of the Property

A relatively short, yet important, discussion needs to be had pertaining to the scope of guardianship activities a not-for-profit program will take on. One of the sources of failure for a volunteer guardianship program is expanding too quickly. Thus, the specifications of a guardianship program need to have a narrowly tailored scope. This can be accomplished by a multitude of factors including the ward's age (only accepting wards that are 18 and older, 55 and older, or 65 and older), place of residence (only accepting wards that live in a supervised health care setting such as a nursing home), or type of guardianship services required. In discussing the

latter, the program has three options: serve as guardian of the person, guardian of the property, or both. There are advantages and disadvantages to each option.

Many programs in Ohio, Rhode Island's Meals on Wheels program, and New Jersey's One-on-One, Inc. program choose to use volunteers to serve as guardian and also choose to only offer guardian of the person services only. This is for a multitude of reasons. If a program decides to offer guardianship of the property, the program (and by extension its volunteers) are responsible for filing annual financial accountings for each ward. These accountings are long and cumbersome, and many volunteers do not wish to be bothered with the paperwork. If these accountings are not properly and timely completed and submitted to the court it will result in serious problems for the not-for-profit. While there are not any immediate financial implications for the not-for-profit, it may lose its appointment as guardian of the ward and would be a highly unlikely candidate for reappointment to another ward with assets. Therefore, to circumvent all of those potential issues, programs choose to not offer guardianship of property services and concentrate solely on guardianship of the person. This is also very practical because most of the clients that are in need of guardianship services are indigent; thus, the financial accountings would not have to be completed for a majority of the caseload. This is easily illustrated if numbers in Ohio are representative of the numbers in New York, where approximately 92% of the wards served will not have estates substantial enough to require an accounting.

However, if a program were to offer guardian of the property services, that program would be entitled to commissions for its services. This presupposes that the program is guardian of a ward with assets substantial enough to be able to pay for his/her health care and

guardianship services.²⁵⁴ These commissions can be quite hefty if the ward has a sizeable estate. However, if this is the case there is generally not an issue finding a private attorney to serve as guardian. This would mean that the program would have an extremely positive relationship with the judiciary and achieve priority status over private attorneys in order to receive those types of appointments. This is not an impossible feat, as illustrated by FSSY in Yonkers, which does receive guardianship appointments for individuals with sizeable estates. However, if the program is qualified yet does not receive those appointments and they go to private attorneys instead, the program would be unable to benefit from those commissions. Even if the program did receive wards with sizable estates, this is not a permanent source of funding that the program can count on. Therefore, while the commissions have the potential to represent a significant portion of revenue, it would be nearly impossible to predict operating budgets year to year because those commissions could easily decrease, increase, or disappear. Although it seems a majority of wards will be indigent and therefore a program's reliance on commissions may be of little consequence, whether or not a program will offer guardian of the estate services is an important decision that must be made because of the fiduciary and accounting responsibilities that will accompany it.

²⁵⁴ Daily money management programs may be a more beneficial resource to some individuals than a full-blown guardianship. Daily money managers are responsible for general budgeting and bill paying. Some programs, like the one offered through AARP, provide discounted or free services to low-income individuals. The only downfall to this is that there is only one such program advertised in New York State, operating in Utica. However, there is an additional pilot program offering financial planning for indigent clients not eligible for the AARP program. *See* <http://www.aarrpmp.org>.

F. Volunteers: Recruitment, Screening, Retention

Each guardianship program has many similarities in its recruitment, screening, and retention procedures. Many programs heavily rely on their current volunteers to act as recruiters and screeners. These volunteers recommend friends, family members, co-workers, etc. that they believe would be a good match for the program. The current volunteer is constantly promoting the program while attempting to get his or her contact interested in volunteering too. Many programs have commented that because the volunteers are in the trenches, they have the best idea as to which individuals are best suited to become future volunteer guardians.

This is not to say that guardianship programs do not use traditional forms of advertising to recruit volunteers. A majority of the guardianship programs placed advertisements in magazines and newspapers and reached out to the community to spread the message of incapacitated adults in need. In addition to printed advertisements, coordinators make contact with discharge staff and nurses at hospitals, nurses and aides at nursing homes and mental health facilities, and APS workers. By making connections with professionals who understand the need and, once trained as to who is an appropriate candidate for guardianship, are in the position to make quality and consistent referrals, guardianship programs fare much better. For a new program, both of these methods are extremely important to help publicize the program. While these methods may become less important as time passes and the program establishes a reputation for itself, they appear fairly essential at the outset. Ideally, a guardianship program will also use these professional connections to recruit potential volunteers for its program, picking from a pool of trained health care professionals. The cautionary advice about acquiring volunteers and wards from such health care institutions is that those particular establishments

tend to have high turnover rates with their personnel. Therefore, a program needs to maintain routine contact with each institution to ensure that the new staff is fully apprised of the guardianship program and its volunteer opportunities.

The important thing a new guardianship program choosing to recruit volunteers needs to remember is that volunteerism is merely indicative of an individual's pay scale, not his or her ability to serve and manage the responsibility associated with guardianship. Therefore, volunteer programs should screen volunteers as they screen potential employees. Screening ordinarily encompasses criminal and abuse background checks. This is necessary for a program to perform if it is allowing anyone, staff or volunteer, to work with and care for a vulnerable population. Furthermore, fingerprinting and credit checks may also be used. Many programs ask volunteers to list prior volunteer experience and a various number of personal references. This is a highly useful tool that should also be used. By seeing what types of volunteer activity an individual has previously participated in, it will give a guardianship organization an indication of the type of work and the amount of time the individual is willing to dedicate to volunteerism. Additionally, personal references (especially those relating to volunteer work) are one of the most reliable and efficient ways to discover what an individual's work ethic is like. References may highlight issues that need to be discussed in a face-to-face interview.

Of all the screening tools that have been mentioned, successful programs insist that a face-to-face interview be incorporated into the screening process. A new guardianship program should definitely utilize this tool. Interviews are a unique opportunity to meet potential volunteers and get an impression of who they are and what they represent. This is crucial because, as One-on-One, Inc. in New Jersey experienced, some volunteers become involved for

their own personal reasons. Additionally, guardianship involves an enormous degree of responsibility. It is essential that a volunteer understands the personal and fiduciary responsibility (if finances are involved) expected of him/her, and that the volunteer is the type of individual able to ask for help when help is needed.

Many highly successful programs attribute their quality volunteers to their volunteer coordinators. These coordinators conduct face-to-face interviews with potential volunteers, as well as matching the volunteers with their wards. The coordinators have an uncanny intuition and ability to sense those individuals that are becoming involved in guardianship for the right or wrong reasons. Having a trusted staff person or volunteer to act as a gatekeeper for the organization is a key screening tool in guaranteeing that the organization accepts quality volunteers, suited to act as guardians, and willing to remain guardians for an extended period of time. While many programs rely on volunteers to do this informal recruiting and screening for them, a new program would not have this luxury. Thus, having someone to act in this capacity is essential for a new program. Many programs used a staff member to conduct such interview, although that is not to say that this position could not be filled by a volunteer.

After a volunteer has been successfully screened, the program wishes to keep him/her as long as possible. The majority of programs interviewed expressed that they did not encounter a problem with retention and turn-over of volunteers. The programs stated that most of their volunteers stayed on for as long as was physically possible. Thus, many programs did not feel the need to make their volunteers sign a commitment form. The Wisconsin Best Practices Survey indicated that of the forty programs polled, only three required commitment forms from volunteers. These forms requested a commitment of either one or two years. The advantage to

having an individual sign such a form is obvious; there is a guarantee that the program will have a guardian for a certain amount of time. This emphasizes the importance of the commitment to the volunteer. This may intimidate some individuals to the point that he or she refuses to sign on; thus, a commitment form may serve as a screening device. However, if an individual does sign the form, and later decides that he or she wishes to terminate the volunteer appointment, it may not be a wise idea to make him or her fulfill the contract obligation just because it was a signed writing. With something as important as guardianship, there is no advantage to forcing individuals to serve in a capacity in which they are uncomfortable or obstinate.

Another reason why a majority of programs do not require commitment forms from potential volunteers is because of the recruitment done by their current volunteers. A volunteer knows their family and friends far better than a person spending a few hours giving an interview does. While the interviewer may be a solid judge of character, the current volunteer is a valuable resource to express the exact time commitment required to the potential volunteer. Most volunteer programs expressed their tendency to overemphasize the importance and commitment involved with guardianship to potential volunteers to ensure that the individual was fully aware of the responsibility he or she was taking on. While a verbal representation by a program of the volunteer's duties may be adequate to inform the potential volunteer, the personal knowledge one volunteer has of another potential volunteer is just as much, if not more, valuable as the oral disclaimer. Therefore, screening should be a multi-tiered process, combining background and abuse checks with face-to-face interviews and oral representations by the program coordinator as well as personal knowledge of the potential volunteer from a current volunteer.

If a volunteer panel was enacted, one may want to consider having the members of the panels sign a commitment form to assure that the same pool of people are available to serve the needs of the same ward for a set period of time. While this seems like a good idea in theory, it may not be practical. One of the frequent reasons stated for having volunteers quit a program is because they are forced to wait for guardianship matches and become bored and disinterested. In order to combat this problem, a volunteer program could have continual recruitment and training like the Kansas Volunteer Guardianship Program. Although the increased training would cost the program some additional money, it would also allow the volunteer pool to stay replenished. However, continual recruiting would make it impossible to guarantee when and how many individuals would join the panels at any given time. Thus, even if a commitment form were required from each volunteer, continual training and hiring means waves of indistinct numbers of individuals signing commitment forms at random intervals. Consequently, there would still be gaps in between the amount of time the volunteers would be committed.

Alternatively, while some programs do not require individuals to sign a commitment form, they do require individuals to sign contracts prior to being able to become appointed a guardian. It appears that the purpose for the contract is to formalize the relationship between the volunteer and the guardianship program/agency. This is advantageous because it explicitly delineates the responsibilities and obligations of each party. Additionally, if the volunteer were to breach the contract, “termination” of the relationship with the volunteer would be warranted and professional. However, many other organizations do not feel the need to have their volunteers sign contracts. Initially, having a contract with volunteers serving on a panel (or in any guardianship capacity in a new program) may be a prudent step since a commitment form is

impracticable, because the contract would allow the organization to concisely express its goals for both the volunteer and guardianship program. Perhaps, after time passes, this will no longer be necessary. However, it is always nice to have an unambiguous document to provide an individual which explains the policies and obligations of both the individual and organization.

G. Training the Volunteers

Training volunteers is accomplished predominantly by two methods, training sessions conducted by a staff member/experienced volunteer of the guardianship program and/or a written manual. Many organizations use these training mechanisms simultaneously. However, organizations do vary how the training sessions are conducted (i.e. one-on-one versus group sessions). Both methods have benefits and disadvantages, but in the end the most practical method for conducting training sessions will depend on how an organization decides to implement its volunteers into the program after recruitment. If the organization has recruiting year-round, but only has training sessions once a month or half a dozen times a year, a group training session could be organized. However, if the program is continually accepting and placing volunteers, such as the Kansas Guardianship Program, training is done more on an individual basis depending on the ebb and flow of incoming volunteers.

Having individualized training sessions places a heavier demand and burden on the individual the program appoints to serve as the volunteer trainer. However, one-on-one sessions seem to be more conducive to questions and candid conversation between the volunteer and the individual training the volunteer. One of the most cited reasons for volunteers leaving a program is boredom. While it is unclear whether the manner in which training is offered would help or hinder efforts at decreasing boredom, open training offers the benefit of not having to wait until

the next predetermined training day. The immediate attention given to train the volunteer may, or may not, keep him/her more stimulated and interested in the program.

Group training sessions offer the converse. Some programs feel that conversation more easily occurs in a group setting. Thus, more of a volunteer's questions will be asked and addressed in such a forum. However, this venue is not conducive to *every* participant asking his/her questions. Additionally, group training would be less stressful on the trainer because it would occur a few times a year with ample time to plan and organize. However, this delay may cost the program some volunteers because they become bored and impatient.

Another important question that must be answered is the type of information that will be presented to a volunteer during training sessions. First and foremost, the guardianship program needs to clearly express its mission, including the policies and procedures of the organization. The training must also address maintaining professional boundaries between the volunteer and client. This is for the peace of mind of the program and volunteer, so that the program does not have to continually search for volunteers because they are quitting due to overwhelming work demands. Most importantly, the training needs to explicitly detail what the volunteer is expected to do and what his or her responsibilities are. This must be an honest, open discussion. The volunteer needs to know the situation he or she is committing to. This is essential for the program as well, to ensure that the program is recruiting individuals that are genuinely committed to furthering its mission.

Additionally, training should include a detailed discussion of the law surrounding guardianship, confidentiality, and acting as a decision-maker for another person. The training should also offer a basic discussion on aging and the disabilities associated with it. Moreover,

the training should superficially acquaint the volunteers with the various state and community organizations that can be contacted for community support and public benefits. Often, a more detailed discussion of these organizations and their contact information is documented in a written handbook which supplements the training session. These handbooks, as previously discussed, could be an invaluable resource to share or sell to lay persons serving as guardians for their families or friends.

There are a multitude of other topics that should be discussed with volunteers. Often, programs offer these topics as continuing education seminars that are not mandatory to go to. These seminars are vital. They should be held to address new changes in the law and/or benefits programs. Additionally, they are a great way for the volunteers to stay connected and support one another. Some additional continuing education seminar topics may include sensitivity training, grief counseling, signs of elder abuse and exploitation, and conflict resolution tactics.

Other training mechanisms included pairing a potential volunteer up with an experienced volunteer, to have the new volunteer see first hand what the life of a guardian is like. Additionally, if the potential volunteer agrees to join the program, he or she now has an experienced mentor to approach with questions or concerns. This is a fantastic way to connect volunteers to one another and form an informal support network. Moreover, programs can offer round table discussions to allow volunteers and staff members to share their experiences and advice with one another. This also lays a foundation of support.

A piece of information discovered through researching successful guardianship programs was that volunteers tend to remain with a program and exceed the program's expectations when they feel supported. It is amazing what people will do for one another when they feel confident

and competent to act. This confidence comes from strong emotional and physical support. Volunteers need to know that in times of confusion or trouble there is a resource that they can turn to for guidance and answers. Mentors are a perfect solution because they can serve this function.

H. Matching Volunteers to Wards

A positive and productive relationship between the guardian and ward is essential to the health and welfare of both parties. Therefore, there are many things that a program must take into consideration when matching a guardian with a ward. Those include the distance the volunteer must travel, the special needs of the ward and the guardian's comfort level with those needs, the availability of the volunteer, the complexity of the ward's situation, the relationship between the ward and guardian, and the volunteer's willingness to accept the ward's case.

Three programs in Ohio put a special emphasis on the last two considerations. AGS in Cleveland requires the volunteer to meet the ward prior to accepting a guardianship appointment. COAAA requires the volunteer, accompanied by the program coordinator, to meet the ward and then the volunteer has a week to decide whether or not to keep the appointment. Having a preliminary meeting before assigning a guardian appears to be a logical and essential prerequisite.

Additionally, COAAA, as well as MCVGP, attempt to pair the wards to potential volunteers based on their similar interests, backgrounds, and values. This is determined through a survey that the programs give their volunteers upon their acceptance with the program. This is another set of information that should be incorporated into volunteer screening and used by the guardianship coordinators.

I. After the Training Occurs: What Next?

After the program has decided how it will offer guardianship services (i.e. through a volunteer, staff member, hybrid model, or volunteer panel) and it has hired those individuals responsible for serving as guardians, what does the program need to do? It needs to stay organized.

Guardianship programs need to find or invent uniform, simple forms for everything. The program should provide form check lists to its staff/volunteer guardians outlining the types of medical or financial information that should be kept in a ward's file. This will make a volunteer's life easier because he or she is being told what is important and what to look out for. By taking the guessing out of the compilation of information, the volunteer and the guardianship program will avoid aggravation and frustration. Consequently, the ward's file will contain the complete record of substantively important information, which is a necessary component of providing guardianship services. Thus, in the case of an emergency, if the volunteer or staff member is unable to respond there is no doubt that the ward's file is complete.

The program should provide contact lists of guardians and back-up guardians, and distribute these lists to the health care or assisted living facilities in which the wards live. Communication is essential between all points of the ward's health care provider continuum. This way, if an emergency were to occur, the health care facility would have all the information necessary without having to waste time searching for names and numbers.

One of the most important, yet most infuriating, aspects of guardianship is the accountings required by the court. Therefore, the guardianship program should create standard health and financial report forms that must be filled out by the guardian. These forms should

also be able to be submitted to the court for the annual accountings. The program should retain a check-list for itself of when wards were appointed to the program and when reports to the court need to be submitted. This list should flag the program six months before the report is due so that the program can send the guardian the correct forms and ensure that they are completed. The list should also remind the program to check in with the guardian a month before the report is due so that the program can ensure the guardian has completed the form. The program could even require, much as the Kansas Guardianship Program does, that the guardian send a copy of the report to the guardianship program so that the program can ensure that the form was filled out correctly. This is imperative because wards are appointed guardians at various times in the year; therefore, annual reports are not submitted in any sort of predictable, organized fashion. As previously mentioned, if the reports are not properly completed, the program is in jeopardy of losing its opportunity to be appointed guardian.

This organization should not be confined solely to the practices associated with guardianship; it should also be practiced in the screening of guardians. Programs should create checklists for face-to-face interviews as well. These lists should outline questions that every potential volunteer must answer, as well as a scoring system to delineate how the interviewer felt the potential volunteer performed. This way there is objective criteria when it comes to interviewing and hiring individuals. This will, once again, result in a program being forced to concisely define the types of staff/volunteers it wants to employ and how that employment process should work. It also allows every person interviewing to operate under the same assumptions. The clearer and narrower the guardianship program becomes in its hiring and operation, the smoother it will run.

VI. Conclusions

The problems leading to the need for guardianship will continue to get worse before they get better. Guardianship is a service that almost every individual will eventually need. While there is no present emergency in finding guardians, there are a substantial number of people who are in need, or going to be in need, of guardianship. There is no need to let the situation escalate into a crisis before solutions are implemented.

These solutions are numerous. While a volunteer panel is a viable option to help remedy the overwhelming need for guardianship, there are other solutions available that take advantage of utilizing volunteers. Any one, or combination, of these programs would serve to better the community by giving individuals an important opportunity to volunteer and allowing the continuum of care to be extended for those in need.

However, there is a lot of work that must be done before any of these programs utilizing volunteers can be implemented. The program needs to recruit a not-for-profit to agree to the idea. Additionally, a funding stream must be acquired and the not-for-profit must define the narrow scope of individuals it is willing to serve and assemble a detailed set of policies and procedures pertaining to guardianship. Moreover, the judiciary would have to approve of and have faith in the guardianship program. Lastly, volunteers would have to be recruited and trained.

While the aforementioned list seems daunting, it can be done. There are multiple programs in New York that are already in existence and successful. These programs are fantastic resources for assistance and advice. These entities are excited about the prospect of another

program to further enhance the amount of care available to the community; thus, they are extremely cooperative. While all of these reasons are compelling to start a program as soon as possible, the reality of the situation is that something must be done, and it must be done soon.

Appendix

**Type(s) of Guardianship Services Performed by
Various New York Guardianship Agencies**

Guardianship Program	Article 81	Article 17-A	Article 80
NYSARC		X	
Lifespan, Inc.	X	X	
CQCAPD			X
DSS	X		
Community Guardianship Programs	X		
Vera Institute			
Family Services of Yonkers	X		
Court Appointed Attorneys	X		

Capacity in Which Volunteers Are Used in New York Guardianship Programs

Guardianship Program	Use Staff Guardians Only	Use Volunteers to Supplement Staff Guardians	Use Volunteers as Guardians
NYSARC			X
Lifespan, Inc.	X	X	
CQCAPD			X
DSS	X		
Community Guardianship Programs	X	X	
Vera Institute			
Family Services of Yonkers	X		
Court Appointed Attorneys	X		