



White Paper
Adult Protective Services – Senior and Long-Term Care Division
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Guardianship and Conservatorship for the Vulnerable Adults
The Changing Demographics of Montana’s Population

A guardianship and/or a conservatorship is a legal relationship that a court gives one person or agency the duty and power to make decision on behalf of another individual when a court decides an individual lacks capacity to make their own decisions.

Increased numbers of individuals lacking capacity from diminished ability often times lack the ability to perform normal activities of daily living or to provide their own care or protection. Impairment can be due to a mental, emotional, sensory, long-term physical, intellectual disability or dysfunction, brain damage, or the infirmities of aging. This is a shifting pattern that will impact our community institutions, facilities and courts.

The increase in the elder population and the number of individuals with diminished abilities is growing (COSCA 2010). This increase will result in a significant caseload for probate, civil and criminal courts. Proactive steps taken now will improve the State’s ability to improve services and address these issues in the future. “The adoption of progressive policies, development of responsive implementation resources and the sharing of data and best practices will position courts to provide timely and need-specific resources to protect those with diminished capacity as the demand for services increases.”

The purpose of this document is to summarize Montana’s current Adult Protective Services program related to Adult Guardianship and to look at other states programs to generate further discussion on this issue to protect the vulnerable adult’s citizens in Montana.

Adult Protective Services are provided by the Senior and Long Term Care Division of the Department of Public Health and Human Services. The mission of the Adult Protective Services is to provide protection of Montana's older and Disabled Adults from abuse, neglect or exploitation, while supporting the person's safety, freedom, right to self-determination in the least restrictive approach.

The principles of Adult Protective Services are;

- 1) To ensure the vulnerable adult has a choice in selecting or refusing services insofar as he/she is legally able
- 2) The vulnerable adult should do as much for him or herself as he/she is able
- 3) Protective services will be provided in a manner that recognizes independence and appropriate least restrictive environment and
- 4) Protective service intervention will be maintained until the risk is reduced or removed, or until the vulnerable adult who maintains legal capacity, refuses to accept services.

Adult Protective Services are emergency intervention activities which may include; investigating complaints of abuse, neglect or exploitation, coordinating family and community support resources, strengthening current living situations, developing and protecting personal financial resources and facilitating legal interventions.

These services are provided to Montana's vulnerable adults as defined by the State of Montana; age 60 and older, disabled or intellectually disabled adults who are at risk of physical abuse, sexual abuse, neglect and/or exploitation.

The number of vulnerable adults living in Montana communities has grown rapidly over the past few years increasing the demand for the services provided by Adult Protective Services. Investigations of allegations of abuse, neglect and exploitation have increased from 6,379 in 2011, to 7,635 in 2014. Of the 7,635 allegations received and investigated, roughly 50% were related to neglect, 17% to exploitation, 12% to abuse concerns, and 21% were requests for assistance for vulnerable adults. Total funding spent on services in fiscal year 2014 was approximately \$2.8 million which is funded at approximately 14% federal funds and 86% state general funds. In addition to the Adult Protection Specialist investigating these allegations, providing services to the vulnerable adults and their families in the community, Adult Protective Services are also taking on the role as guardian for vulnerable adults in the communities. Adult Protective Services is currently guardian for 210 vulnerable adults across the state of Montana.

Montana is aging at a faster rate than most of the other States in the Union. The 2010 U.S. Census showed that Montana's 65 and older population was at 13.4% while the United States is at 12.1%. By 2011, Montana's 65 and older population had already increased to 15.1%. Over the next 18 years, 12,775 Montanans will turn age 65 every year. U.S. census projections indicated that by 2030, Montana is expected to rank at least 5th in the Nation in the percentage of people over the age of 65. Montanans are also living longer; currently there are 175 centenarians in Montana based on the 2010 census. Addressing the needs of an aging Montana will continue to be an issue over the next 15 to 20 years." Currently Montana has 33 of its top 129 communities over the 2030 estimates.

In addition to the rising numbers of the elderly population we are also faced with increased awareness of mental illness, intellectual disabilities and military service related disabilities. With the better understanding of mental illness, intellectual disabilities and military service related disabilities this will impact the resources of each community and the need for more guardianships and/or conservatorships.

According to the Conference of State Court Administrators (COSCA) 2010 it is reported that about 6% of Americans have a serious Mental Illness which if left untreated may result in unnecessary disabilities. Approximately 3% of the population has an impairment ranging from mild to profound. About 250,000 service personnel were wounded in the Korean and Vietnam wars, and in Desert Shield/Storm. During Operation Iraqi Freedom and Enduring Freedom approximately 38,000 service personnel were wounded. It is estimated that approximately 22% of the service personnel included Traumatic Brain Injury (TBI) and Post Traumatic Stress Disorder in approximately 22% of the service members.

Adult Protective Services is the agency for the Department of Public Health and Human Services that provides protective services as outlined in Montana statute (Title 52 chapter 3). In addition to Protective services for the vulnerable adults, Adult Protective Services is by statute (Title 72, chapter 5) the agency of the state that is authorized or required by statute to provide guardianship services to vulnerable adults whom the court has determined lack capacity and need a guardian. If the court does not believe there is any other suitable person, institution, association, or nonprofit corporation the court at its discretion can appoint without consent the Department of Public and Human Services – Adult Protective Services as the guardian.

The purpose of a guardianship is outlined in Montana Code Annotated 72-5-306: Guardianship for an incapacitated person may be used only as is necessary to promote and protect the well-being of the person. The guardianship must be designed to encourage the development of maximum self-reliance and independence in the person and may be ordered only to the extent

that the person's actual mental and physical limitations require it. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those that have been expressly limited by court order or have been specifically granted to the guardian by the court.

As a general rule petitions are filed in district court to determine if a person lacks capacity and is in need of a guardian. Interested people such as family members, friends or private agencies petition the court for the appointment of a guardian. Often times Adult Protective Services will assume this role when an elderly person, physically or mentally ill person or an individual with intellectual disability is in crisis and the medical profession feels a guardian is needed to provide services, or for placement decisions to accept the person into the facility they need to have guardian in place and there does not appear to be any family, friends or others who are willing or able to take this role.

Montana Code Annotated 72-5-315 outlines the procedure for appointment of guardian.

- The incapacitated person or any person interested in the incapacitated person's welfare, including the county attorney, may petition for a finding of incapacity and appointment of a guardian.
- The court will set a date for a hearing
- Appoint counsel for the vulnerable adult if not represented by counsel
- Court will appoint medical person to examine and provide a written report to the court.
- Court will appoint a visitor who must have no personal interest in the case, be qualified with education and training in the area of the disabling condition of the vulnerable adult. The court visitor will interview the petitioner, potential guardian and interview and visit the place of residents of the vulnerable adult. The visitor then submits a report to the court.
- The vulnerable adult will attend the court hearing and is entitled to all information in the court process
- Hearing may be closed or be heard in a trial by jury.
- The court will determine if the vulnerable adult lacks capacity
- If determined by the court the vulnerable adult lacks capacity, the court will appoint a guardian of the courts choosing.

Guardianships and Conservatorships are a serious issue as they relate to an individual's freedom and rights as an individual. A guardianship or conservatorship should always be a last resort before a court appoints someone to take over the decision making authority of an individual. Sadly in many cases this is the right thing to do in order to protect the vulnerable adult, their safety and finances. For this reason there needs to be checks and balances to assure the

vulnerable adult is protected and the guardian is performing their duties as outlined by the courts. Adult Protective Services accepts this responsibility on behalf of the Department of Public Health and Human Services, however it becomes a conflict of interest when the guardian is Adult Protective Services and its staff has the duty to investigate allegations of abuse, neglect and exploitation of the vulnerable adult.

According to AARP facts one in ten older adults are victims of mistreatment; this fact also indicates only a small fraction of the cases are reported. Adult Protective Services are typically the first to be called for reports of abuse, neglect or exploitation of vulnerable adults.

Adult Protective Service responds to these calls by investigating the reports, monitoring and evaluating the situation and in many cases arranging for medical care, long term services, support systems, housing and legal services. Several studies across the United States have documented cases of abuse, neglect and exploitation of the vulnerable adults by the court appointed guardian/conservator.

One issue with guardianship is the lack of monitoring. According to a 2006 report by AARP and the American Bar Association found lack of support and monitoring by the courts.

- only 16% of the guardianships cases have someone assigned to verify the information being reported to the courts that is filed by the guardian.
- 25% reported someone has visited the ward on a regular basis
- 11% had training in the community for guardians
- Technology is not being utilized for accessing, obtaining or getting information
- Lack of funding for monitoring programs

Review of the Centers for Elders and the Courts report March 2, 2010 indicates difficulties in the court system for tracking cases and providing data; almost two thirds of the respondents in the report were not able to provide data on both filings and caseloads. "The lack of private professional guardians in local jurisdictions places added strain on the public guardian system". In this report it indicates 68% of the respondents in the research have both private and public guardians available in their jurisdiction. 72% of the cases were served by family members, 14% handled by private professional guardians and 14% served by public guardian system. "If this break-out of cases by guardian type is the norm, then the lack of private professional guardians in a jurisdiction results in a much greater demand for public guardians"

In Montana, the Montana District Court reports for 2013, new case filings were 1,061 Guardianship/Conservatorship cases and 1,527 abuse & neglect cases; unfortunately they are reported as combined for both children and adult.

Family and friends are the preferred resources for all guardianships; however many family and friends are reluctant to be appointed guardian and serve in this role. There appears to be a lack of understanding the responsibly and requirements of a guardian. There is a growing trend amongst family members that fewer were willing to serve as guardian; this will lead to increase demand on the public guardianship system.

Montana statute 72-5-312 addresses who and in what order a person may qualify to be a guardian and or conservator. For Montanans who have the means and resources these families or individuals have access to attorneys and procedures. Montanan's who lack the resources and family structure is often left without the means unless the Department steps in and takes over. The courts are often left without consistent programs and resources to make this very serious decision about an individual's freedom and right to choose. The courts are left to look over the court room and see who is willing and able to become a guardian; if not they will defer to Adult Protective Services to assume this role.

The lack of knowledge, education and training in the legal system and for the citizens of Montana prevents very capable individuals from becoming a guardian or conservator. It is very important that people in the legal system, and the community understand what a guardian/conservator can and cannot do. The courts depend on other professionals to evaluate and present facts to help make a decision about an individual's lack of capacity. The courts do not have the time or personnel to track and check up on all the guardians or conservators it put in place. The courts rely on the assumption those they appoint to these roles will abide by the rules set and protect the best interest of the individuals they are guardian or conservators for.

In order for Montana to move in front of this growing problem and provide the services in the best interest of all Montanans we need to look at our guardianship programs. We need to create a program that is focused on the need of the vulnerable adults, have a checks and balance system for reporting and investigating reports of abuse, neglect and exploitation and a system for tracking reports through the courts to gain better data and information on the magnitude of guardianships and conservatorships in Montana. Montana needs to outline what are the requirements to be a guardian

Summary of Guardianship and /or Conservatorship Programs in other States

Nebraska

The legislative bill 920 is an act relating to guardianship and conservatorship. This legislation intent is to develop a public guardianship office that will provide services for individuals when there are no private guardians or conservator available. The intent of the legislation is to provide the services only to those in whose needs are not able to be met in a less intrusive means.

The office of Public Guardianship will be developed and placed under the State Court Administrator and shall appoint a director of the office who shall be known as the Public Guardian. This person must have knowledge, education and training in Human Services Development to include intellectual disabilities, sociology, and psychology and shall have business acuity and experience in public education and volunteer recruitment. The Public guardian will hire a Deputy Public Guardian and up to 12 Associate Public Guardians to serve under the Public Guardian. The Public Guardian shall assume all duties and responsibilities of a guardian and conservator for any individuals appointed by the courts. The Public Guardian shall hire support staff as needed.

An advisory council shall be set up and members appointed by the State Court Administrator from a variety of resources: a member of the Court Judges Association, a Licensed Montana State Attorney, Social worker, Mental Health Professional, professional involved with the aged population, professional for intellectual disabilities, and other interested persons. The role of the counsel is to provide advice to the Public Guardian on issues for public guardian and public conservator.

The Public Guardian shall develop uniform system of reporting and collecting data. Develop standards of practice to include code of ethics. Develop biennial budget for the Public Guardian Program. Develop sliding fee scale for services of the Public Guardian services. Develop training resources for Public guardian and private individuals. Develop education and promote public awareness of guardianships and conservatorships. Apply for and receive funds from public and private sources to carry out the purpose and obligation of this act. The Public Guardian shall report to the State Court Administrator and prepare annual reports to the Chief Justice and Legislature.

Once Public Guardian is appointed as guardian or conservator; the Public guardian will make all ongoing efforts to locate a successor.

Delaware

There is established an Office of the Public Guardian under the State Court Administrator, with a Public Guardian who shall serve as the guardian of last resort for the citizens of Delaware who have been determined to lack capacity to make decisions regarding their persons, their property, or both. The Public Guardian shall advocate and provide guardianship services for individuals who are incapacitated, work with advocacy groups and state agencies to promote systemic reform and recommend changes in the law, procedure and policy necessary to enhance the provision of guardianship services, and act as an informational resource for the public. The Public Guardian shall serve as Executive Director of the Delaware Guardianship Commission and promote the purposes of the Commission, and shall represent the Office of the Public Guardian in matters in which the appointment of the Public Guardian is sought. The Public Guardian:

The Public Guardian shall establish case acceptance priorities and other administrative policies and procedures in consultation with the Guardianship Commission. Shall receive referrals and recommendations regarding individuals who may be in need of a guardian and independently evaluate the referral to make a determination as to the physical, social, and financial conditions of the individual, whether there are alternatives to public guardianship, and whether the individual is at risk of abuse, neglect, or exploitation. File a petition for its own appointment, or file for the appointment of any other individual as guardian where it is determined that the filing of a petition on behalf of another may avoid the need for public guardianship; or consent to serve as guardian where another entity or individual files a petition for the appointment of the Public Guardian.

When appointed as guardian by court order, shall serve as guardian of last resort, either plenary or limited; temporary guardian; or successor guardian; of the person or property, or both, of persons who are determined to be incapacitated for reasons other than minority. The Public Guardian shall have the same powers and duties as a private guardian as set out by this chapter and as defined by the court upon appointment.

- May offer advice and guidance, without court appointment as guardian, to persons who request assistance or to those on whose behalf such assistance is requested for

- the purpose of encouraging maximum self-reliance and independence and avoiding the need for appointment of a guardian.
- May take all necessary action, including programs of public education and legislative advocacy, to secure and ensure the legal, civil, and special rights of those determined by the court to be incapacitated.
 - The Public Guardian shall submit an annual report on the efforts of the office that shall be provided to the Guardianship Commission and included in the annual report of the Guardianship Commission.
 - May coordinate volunteer legal representation for wards of the office to assist with needed representation before administrative agencies and courts to pursue the legal rights and remedies of the ward and a volunteer legal community outreach program to assist the Office of the Public Guardian in educating the community about guardianship and alternatives to guardianship.
 - May apply for and accept grants, gifts and bequests of funds from other state, federal and interstate agencies, as well as private firms, individuals and foundations, for the purpose of carrying out the lawful responsibilities of the Office of the Public Guardian and the Guardianship Commission. The funds must be deposited with the State Treasurer in a restricted receipt account established to permit funds to be expended in accordance with the provision of the grant, gift, or bequest.

In any proceeding for appointment of the Office of the Public Guardian, or in any proceeding involving the estate of a person with a disability for whom the Public Guardian has been appointed guardian of the person or of the property, the court may waive any court costs or filing fees.

If the Public Guardian has been appointed guardian of the person or of the property, administrative costs and all costs incurred in the appointment procedure shall not be charged against the income or estate of the person. If at any time the court determines that the income or the estate of the person can support the payment of any part of these costs, the court may enter an order charging that part of the payment of cost against the income or estate.

Currently the Office of Public Guardian in Delaware has 10 employees; 4 guardian case managers certified by NGA, Financial unit with 3 sections – 4 staff members, an administrative personnel and the director. The advisory commission has 13 members

who provide advice and developing needs assessment for improvement or updates. Delaware reports averaging 225 people on the case load and a budget of approximately \$650,000; which averages out to \$2,889 per person per year.

Wyoming

Wyoming Guardianship Corporation (WGC) was founded as private nonprofit when legislative funding for Wyoming's public guardianship program sunsetted. WGC became a nonprofit in 1997. Wyoming's guardianship statute considers a nonprofit agency which provides professional guardianship services a "person" under the statute's legal definition.

<http://legisweb.state.wy.us/statutes/statutes.aspx?file=titles/Title3/Title3.htm>. WGC is governed by a board of directors, and the guardianship and conservator programs operate with oversight from the court, via the Wyoming Statutes referenced above. In addition, Wyoming adopted the UAGPPJA starting July 1, 2013.

WGC serve the entire state and right now serve as guardian of 153 wards and conservator in 30 cases. WGC employ professional social workers and nurses as guardians. Staffs are licensed in their profession, through the Center for Guardianship Certification, or both. Wyoming Guardianship is a member of the National Guardianship Association and they follow their professional guidelines for guardianship practice as well as their professional ethics guidelines.

WGC is a fee for service program, currently charging \$50 per month for guardianship and \$150 per month for conservatorship. All fees are court approved. WGC has the ability to (and do) adjust fees for people who are indigent. The state of Wyoming assumes the cost for legal representation with a cap of \$1,000 per individual case and will also pay the cost up to \$1,000 for a Guardian Ad-Litem if needed.

WGC is funded in part from fees charged to the vulnerable adults, but they also receive grants from the Wyoming Department of Health, one from the Substance Abuse and Mental Health Services Division and one from the Developmental Disabilities Division. The first is for wards that have serious and persistent mental illness who either live in the community or who are placed at the Wyoming State Hospital. The second is for wards who are participants on either the Adult DD Medicaid Waiver or the Adult ABI Medicaid Waiver. WGC provides outcomes and reporting to the Wyoming Department of Health in regards these guardianship services. WGC also is contracted with the Wyoming

Department of Family Services, Adult Protective Services Division where if WGC takes an APS guardianship case, WGC will be paid \$200 per case--this is capped yearly.

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Washington State Cost Benefits

The state of Washington conducted a Public Guardianship cost benefit analysis to determine if the program was meeting the goals and needs of the communities. The State of Washington State Legislature passed Substitute Senate Bill 5320 in 2007 establishing an Office of Public Guardianship (OPG) within the Administrative Office of the Courts. The analysis examined the programs outcomes and cost effectiveness of the Office of Public Guardian between 2008 and 2011. What was found in the study is that the average cost per residential client decreased from \$8,131 over a 30 month period to an average cost for providing a public guardian was \$7,907 per client during this time. Personal care decreased on average by 29 hours per month for public guardianship clients, compared to an increase in hours for similar clients. One in Five Public Guardianship clients showed improvement in self-sufficiency during this study. Washington State found their results consistent with other states that have conducted these studies and provide information that Public Guardian Programs do work.

Future Considerations for Montana Guardian Programs

- Create a state guardianship program with a director to provide guidance and oversight of a state wide guardian program
- Create an advisory council to help oversee and provide guidance to the Guardian Program
- Set up a monitoring system through Adult Protective Services to guard against abuse, neglect or exploitation by a guardian or conservators
- Create state wide training for guardianships through National Guardianship Association
- Require all potential guardians to be nationally certified
- Develop volunteer network with Adult Protective Services to monitor guardians and the wards in their homes and placements
- Develop screening process for guardianships or conservators
- Assure access for the indigent vulnerable adult to have legal counsel provided for them if unable to pay
- Set limits on number of person an individual may be guardian or conservator for
- Develop guidelines on appropriate fees for guardian, conservators and attorneys to protect vulnerable adult's assets
- Set standards for reporting and reconcile of financial reports
- Create alternatives in communities to guardianship/ Supported decision-making
- Develop process for indigent individuals or individuals without known family members who could care for or be guardian
- Develop procedures between courts, Adult Protective Services and care providers to share information and strengthen community support
- Create information system to track all guardianships/conservatorships in the State of Montana, potential abuse, filing of reports, who the guardian is and status of the case
- Create funding source to assure resources are available to implement programs and monitor program
- Allocate contingency funds to support prevention and education programs for Guardianship

RESOURCES

National Guardianship Network: <http://nationalguardianshipnetwork.org/>

National Guardianship Association Inc. <http://www.guardianship.org/>

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Results from online Survey. March 2, 2010

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