



Report of the Guardianship and Conservatorship Study Group

State Court Administrator's Office

January 2009

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Purpose of the Study. The State Court Administrator was requested in 2007 Laws of Minnesota Chapter 126 to convene a study group to make recommendations to the Legislature regarding the following areas of conservatorship and guardianship: the rights of wards and protected persons; powers and duties of conservators and guardians; certification and registration; pre-screening and diversion from guardianship or conservatorship; complaint processes; training; financial auditing and reimbursement of attorneys, guardians and conservators. The legislation required inclusion of representatives from the following groups: representatives from probate divisions of the district courts in both the metropolitan area and greater Minnesota; county adult protection services; the Minnesota State Bar Association; the Department of Veterans Affairs; the Minnesota Association for Guardianship and Conservatorship; The National Guardianship Association; agencies providing guardianship and conservatorship services; organizations providing training for guardians and conservators; the offices of the ombudsman for mental health and developmental disabilities and the long term care ombudsman; and advocates for seniors and for people with a range of disabilities, including developmental disabilities, mental illness, and traumatic brain injuries. The members of the study group are identified in Appendix A.

Methodology. The study group met six times to receive information from subcommittees and discuss recommendations from the members. No appropriation was provided for the study so members contributed their time and the resources of the groups they represented. No detailed empirical data was gathered. Court records indicate the number of guardianship and conservatorship cases is increasing. Approximately 3000 guardianship and conservatorship cases are filed annually. The number of open guardianship and conservatorship cases approximates 22,500. As active participants in the guardianship and conservatorship arena, members provided anecdotal information from various perspectives and their own experiences. Information about studies conducted by the American Bar Association, the National Center for State Courts and local court and community initiatives was discussed.

The study group reviewed the probate law concerning guardianships and conservatorships and noted that it had been substantively revised in 2003. The Guardianship and Conservatorship laws are codified in Minnesota Statutes 524.5. Guardians are appointed and removed by the court and serve according to the powers and limitation imposed by the court. Minnesota Statutes, Chapter 524.5 generally provides for a background check of persons who are appointed to serve as guardians and conservators. It also provides for the appointment of counsel for the protected person through the time to appeal the guardian appointment unless the proposed ward has made a knowing and intelligent waiver of counsel, or for such other reason as the court may direct. The statute further requires the court to consider whether less restrictive alternatives are available to assist the proposed ward and imposes a duty on the court to grant to a guardian only those powers necessitated by the ward's limitations and demonstrated needs and to encourage development of the ward for self reliance. The law provides for the appointment of a court visitor to inform the protected person of the substance of the guardianship petition and other information specified by statute. The court visitor is required to file a report with the court

about the appropriateness of the guardianship. This report includes information on whether less restrictive means of intervention are available, the type of guardianship recommended and the limitations, if any, on the powers to be granted to the limited guardian. The law further provides for annual reporting on the well-being of the ward and for termination or revision of the guardianship powers as appropriate to the condition of the ward. Each year, within 30 days after the anniversary date of an appointment, the guardian is required to send to the ward a notice of the right to request a termination or modification of the guardianship.

Similarly, the court may grant to conservators only those powers necessary to provide for demonstrated needs of the protected person and may require the conservator to file a bond conditioned upon faithful discharge of all duties. The conservator must report to the court annually or as the court otherwise directs a listing of the assets of the estate under the conservator's control and a listing of the receipts, disbursements, and distributions during the reporting period. The court is mandated to establish a system of monitoring of conservatorships, including the filing and review of conservator's reports and plans. The court may appoint a visitor to review a report or plan and make such other investigation as the court directs.

Goals. Demographics indicate that the percentage of the Minnesota population over the age of 65 will increase significantly in the next several decades. That fact will potentially increase the need for guardianships and conservatorships, the need for resources for court and protective services, and the need to insure that those services for the protection of individuals are effectively rendered and monitored.

Funding for services for persons with disabilities of various types is unlikely to increase for the foreseeable future. The lack of increased funding impacts many critical areas in the guardianship and conservatorship arena: the availability of mechanisms at the county level to assist families in determining appropriate alternatives for assisting, caring for, and safeguarding persons with disabilities and the availability of court staff to monitor closely guardianships and conservatorships.

Implementation Timeframe. The study group discussed alternatives that could be implemented in the short term as well as alternatives that would require additional funding should it become available. The study group was aware of the current service reductions imposed by the Judicial Branch to address the existing budget shortfall and of the projected state budget shortfall for the 2010 – 2011 biennium in which the Judicial Branch and state agencies are being asked to identify the implication of a 10% budget reduction.

In spite of the anticipated lack of resources to implement recommendations in the short term, the study group nonetheless saw value in proceeding with its deliberations and in making recommendations that could be implemented over a longer timeframe when funding became available. Implementation of any of the study group's alternatives is dependent on the availability of additional funding and staff.

Observations and Recommendations. The following observations and recommendations are not presented in priority order.

The study group discussed the need for greater awareness on the part of family members, concerned persons, guardians, conservators, and others about the duties, responsibilities and limitations of guardianships and conservatorships. This apparent lack of knowledge is demonstrated by unreasonable family expectations of the guardian being able to control the behavior of the ward, situations in which the guardian or conservator actually or seemingly exceeds the authority conferred by the court or makes choices which the ward is capable of making, or lack of information about where and how to raise questions or concerns about guardian or conservator responsibilities and limitations.

Education in the Law and Best Practices. The study group was informed about helpful materials and web sites that discuss the nature of guardianships and conservatorships and the duties and responsibilities under Minnesota law¹. The study group recommends the development of easily accessible information that can provide information to interested and concerned parties. Information about guardianships and conservatorships prepared in cooperation with Legal Aid programs is currently available on the Minnesota courts website at www.mncourts.gov at the Self-Help Center location. More public education can be done along the lines of the recommendations below. In this area, the study group recommends:

- Provide publicly accessible information for families and interested persons about the roles and limitation of the guardianship/conservatorship process describing what a guardianship or conservatorship can accomplish and what it may not be able to accomplish on behalf of the ward or the concerns of the families.
- Provide mandatory education and training for persons appointed as a guardian or conservator as a condition of appointment, to be delivered as inexpensively as possible, including:
 - Court prepared video which could be provided to newly appointed guardians
 - Centralized and/or electronic point of reference for guardian/conservator training materials

¹ Minnesota Association for Guardianship and Conservatorship
<http://www.minnesotaguardianship.org/>

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

Minnesota State Bar Association – Elder Law Section
<http://www.mnbar.org/sections/elder-law/index.asp>

American Bar Association – Commission on Law and Aging
<http://www.abanet.org/aging/>

- Education courses for guardians to facilitate knowledge of the law and current best practices offered through professional guardian associations, pro bono service organizations, or the court on a central or regional basis
- Specific training on the details of preparing and submitting annual accounts and well-being reports, as well as the necessity of providing notice of right to petition for restoration and the advisability of health care directives

Investigation and Screening Services in Support of Persons in Need of Protection.

Education alone will not replace the need for careful investigation and screening of situations in which the services of a guardian or conservator may be necessary or in determining the scope of the duties to be performed by a guardian or conservator. Protective services at the county level and court visitor services at the court level can provide the court with necessary information to make informed decisions about the need for a guardian and the level of services needed by the protected person. In many cases, a proposed ward will have been receiving county social services for some time prior to a decision to impose a conservatorship or guardianship. Inclusion of a social services representative as part of the screening process in cases where the proposed ward has been receiving services would aid the court in determining the need for and limitations on a proposed conservatorship or guardianship. Recommendations in this area include:

- Provide necessary funding and professional resources for pre-decision assessment of the need for a guardian and the least restrictive alternatives for proposed ward.
- In cases where a proposed ward has been receiving social services, include a representative from social services as an interested party in conducting the pre-decision screening process.

Use Technology to Expand Case Monitoring by the Court and Interested Persons.

The Minnesota courts case management system records critical court events, sends automated notices of case events to required parties, and allows for the generation of case management and exception reports to assist court personnel in tracking and managing the nearly 3,000 guardian and conservator cases filed annually and the approximately 22,500 open cases. The annual filings are only a part of the workload managed by the courts as they attempt to monitor the annual well-being and financial reports required by statute. Access to the case management system, made public on the web in 2007, allows members of the public to query case status information by ward or by guardian. Aggregate information on guardians can be difficult to obtain because the system is case based. Study group members considered the system a helpful start to providing timely information on guardianships. Easier public accessibility would be helpful. Court documents are not available on-line at the present time and are not likely to be for some time. Therefore, the court order listing the powers and duties of the guardian and/or conservator would at the present time need to be requested from the issuing court if a query about the limitations of the guardian/conservator arose. The study group discussed the following recommendation.

- Develop state-wide court technology to provide central registration of all guardians and conservators. This registration should be with the Minnesota State Court Administrator's Office. The reporting requirements would include: name, county, limitations on

guardianship/conservatorship, notations indicating if required reporting of financial and well-being statements are not filed or not filed according to time requirements; this would be public record. The costs of developing and maintaining such a registry would need to be determined and a funding mechanism identified.

Financial Report Monitoring. The Second Judicial District has been piloting the automation of financial reporting by conservators, who will be able to submit financial reports on-line. The system would retain the reports from year to year, thus building the financial information from the prior year closing balance and allowing comparison of expenditures and other financial information over time. By specifying the reporting format and providing internal mathematical audit checks, the accuracy of the financial information can be quickly ascertained by the reporter and then subsequently by the court. In addition, it has been represented that the reporting system can identify anomalous spending for the court. The study group recommends:

- Expand the use of technology to perform financial audits, with consistent, uniform practices and procedures for preparing the reports and auditing them by qualified audit personnel. Use as a basis the program developed and being pilot tested by the Second Judicial District to improve accuracy and ease of reporting and auditing statewide.

The courts are discussing using technology to centralize the review of annual conservator financial accounting reports. The centralization of this process would allow hiring specialized staff to examine these reports in a systematic manner to identify disparities and the need for additional investigation. Local courts currently may not have the time, staff, or expertise to perform the auditing function in a thorough manner to detect indicators of possible problems over time. The use of technology and specialized staff could assist the courts in addressing the following recommendations of the study group.

- Encourage the court system to hold guardians and conservators more accountable, particularly with regard to the timely filing of annual financial and well-being reports.
- Develop state-wide court technology to provide additional information about guardians and conservators to promote timely, uniform, consistent practices.

Complaint Processing. The study group spent considerable time discussing the need for a process by which complaints about the performance of guardians and conservators could be addressed. Some members believed that a motion to the court already provides an adequate method for addressing complaints about a guardian or conservator. Others expressed concern that wards or family members are hesitant to engage further with the formalities of the legal system for a variety of reasons.

The study group received anecdotal information but was not able to quantify the number and nature of the complaints to identify more specifically what kind of complaint process would address the perceived needs. The study group heard concerns that well-being reports are incomplete or not actually reflective of changes in the ward's well-being. Given the importance of well-being to the ward and to the court's determination of limitations on the guardian, the study group felt an audit function for well-being would be appropriate. At present, audit of well-

being is done only when a complaint is received. The use of the court visitor as an auditor of well-being was discussed. Expansion of the court visitor role would represent a significant cost increase were the courts to provide staff to perform this additional audit function routinely. As an alternative, the possible development of a volunteer “home visitor” program was suggested. The use of volunteers to perform this monitoring function would require coordination and training, presumably by court staff.

The study group did not recommend a particular model for the processing of complaints. Supervision of any complaint process should reside with the courts given the court role in appointing and removing guardians and conservators. The study group articulated the following goals and recommendations with respect to a complaint process.

- Establish a complaint process through which complaints against the guardian/conservator can be reviewed and resolved more easily.
- Provide an expedited access to the court process for resolution of concerns about guardian responsibilities and limitations, especially concerning end of life issues or other time sensitive issues. This may be facilitated by the reduction of filing and motion fees.
- Provide additional resources for court visitors or other court staff on a county, district, or statewide basis for reviewing complaints and making recommendations for the appropriate forum for resolution. State-wide coordination of any complaint process would require additional funding and staffing.
- Develop a protocol for review of well-being and apply it uniformly to annual reviews.

The study group received information from the Conflict Resolution Center (formerly Minneapolis Mediation Program) about its development of a mediation program for concerns of the elderly. The proposed program is voluntary, brings together guardians, wards, health care providers, family members, and relevant others with a goal of facilitating an agreed-upon solution to the issues in dispute. The program is relatively new, fee based, and currently operating on a pilot basis. As the population ages, conflicts relating to the protected person and the family, the guardian, and/or medical providers are likely to increase. Consensual resolution of those issues in a mediation setting which may allow more time to develop mutually agreeable alternatives than a court setting allows should be explored. Adequate safeguards to protect the ward would be a necessary component of such a program. The study group recommends:

- Explore the development of alternative dispute resolution processes for resolution of ward/guardian/family concerns about social-personal care concerns either through court ordered mediation or through voluntary participation by parties with adequate safeguards for the ward.

Certification of Professional Guardians. The study group also discussed the certification of professional guardians at some length but did not reach a consensus. The discussion about certification focused on professional guardians and conservators--those guardians or conservators who represent multiple wards for a fee. It was noted that states

requiring certification make exceptions for family member guardians and for guardians carrying a minimal number of cases.

Currently decisions on qualifications for appointment as a guardian are made individually in each case by the court. The guardian or conservator must pass a criminal background check.

Certification programs generally include initial testing to insure competency, requirement for continuing education, a complaint process by which the actions of a guardian may be monitored, and a process for decertifying guardians or conservators who fail to adhere to the agreed upon professional standards.

Currently guardians may voluntarily obtain certification through a national professional association. The test is not specific to Minnesota law. The professional association provides continuing education programs for the benefit of guardians. The professional association has a process by which the certification can be removed. That process involves an investigation by a committee of association members and recommendation to a supervising committee. Revocation of the certification results in the person no longer being able use the certification designation. Decertification arguably makes a particular member a less viable candidate for future appointment.

State implementation of a certification process would include the identified elements of establishing credential requirements, testing to insure the requirements are met for admittance into the field, requiring and monitoring continuing education, and monitoring performance typically through a complaint system. State imposed certification precludes the consideration or appointment of persons unable to demonstrate competency from the business of administering guardianships or conservatorships. A testing requirement would likely impose additional qualifying and financial burdens on those seeking entry into the field and may make recruitment difficult especially where no prescribed course of study for entry into the field exists. A state administered certification program requires the certifying entity to develop, validate and offer a test on a regular basis to qualify persons for appointment. It may involve the development or certification of training programs. Standards for decertification would be required as well. The cost of developing a certification process would need to be explored further. The cost of certification is typically born by the applicants through imposition of a fee. The number of certification applicants must be sufficient to generate adequate fee revenue to cover the costs of administering the certification process.

A benefit of a certification program would be the systematic training of guardians and a test of minimum competency. A significant deterrent to a state imposed certification program is the increased costs of becoming a guardian, making recruitment more difficult and requiring an increased caseload to meet the additional expenses of remaining certified. As a consequence, wards may receive less individualized attention where guardians take on increased caseloads. From the state court perspective, additional staff would be required to develop and test certification criteria, develop or monitor training programs, investigate complaints, and hold hearings on the decertification of guardians. It is unclear that a ward is better served by a certification process than by removal of the guardian upon motion to the appointing court or by

the imposition of a bonding requirement which is available under current law. If further safeguards are required, the study group recommends:

- Require that a bond (which may be waived by the court) be posted by all conservators. Currently a bond is permissive at the discretion of the court.

As the population ages and the number of guardianships increase, it may be necessary to re-visit the certification issue but because of the process costs, both for the individual guardian and the state, the availability of alternative protections for the ward, and the potential negative impact on recruitment and caseloads, the study group did not come to consensus on recommending certification at the present time, especially if the educational needs of both professional and family-member guardians can be met by the other recommendations of the study group.

Imposition of Fines and Penalties for Non-Compliance with Reporting Requirements. The study group also discussed and rejected the suggestion that fines and penalties be imposed for non-compliance with reporting requirements. Most guardians are not professionals, and most members of the study group agreed that imposition of fines and penalties in such cases is not helpful to insure compliance. The court has the authority on an order to show cause to require correction of any deficiencies. Imposition of fines and penalties would simply make it more difficult to find family members or others willing to act as guardian or conservator.

Guardianships, Conservatorships and Family Dynamics. Court participants indicate that a small percentage of guardianships and conservatorships return to court to re-litigate issues. Many of those issues arise not because of deficiencies in performance of the guardian or conservator, but because of conflicting views between the appointed guardian or conservator and other family members on the wants, needs, and treatment of the ward. The way in which funds are dispersed, the perception of a private benefit to the caretaker, and the depletion of the estate all give rise to contention. There was significant agreement among the members of the study group that family dynamics play a significant part in creating complaints. The possible ameliorating affects of a mediation process are discussed above, but neither the courts nor the legislature are well-able to address issues of family dynamics except on a case-by-case basis.

Conclusion. The use of education materials to better inform members of the public and potential guardian and conservator candidates about the nature of the role and the duties and responsibilities of a guardian or conservator could result in a better understood and more effective use of these processes for persons in need of protection.

Adequate funding and professional resources for pre-decision assessment of the need for a guardian and identification of the least restrictive alternative is critical.

The use of technology by conservators to prepare and by the courts to audit the required annual financial reports has the potential for increasing the effectiveness of the monitoring process. The Second Judicial District pilot project to automate the financial reporting process should be expanded to other judicial districts. The audit review function could be centralized

and professional auditors used to review the annual reports potentially increasing the quality of the review.

The public can query court records on-line to determine the status of guardianship and conservatorship cases and whether reports have been filed in a timely manner. The ready availability of this information can be useful to family members and others in monitoring performance of guardians and conservators. Creating a guardian register may provide the public with more easily accessible data about guardians. Expanded use of technology in the future to view actual court documents may provide additional time critical information. The cost of providing access to documents on-line should be studied prior to implementation.

Alternative dispute resolution processes bringing together the family, care givers, the ward and the guardian in a non-adversarial setting can provide an additional forum for resolution of issues where adequate safeguards are provided for the ward. Fees paid from the estate of the ward would finance these services. Consensual resolution of issues in a mediation setting may ameliorate inter-familial tension and reduce complaints.

Implementation of additional administrative processes, expanded use of technology, or development of new protocols or best practices for the review of well-being reports would require additional staff and additional funding at the state and/or local court level. Complaint investigation, certification, training, production of education materials by court personnel are functions which the courts will be unable to reengineer or perform with the current or reduced staffing. While courts are continuing to explore the use of technology to make court information more readily available to members of the public and to provide informational resources to particular audiences, development of those tools necessarily entails new costs and the devotion of staff resources which do not appear to be available in the 2010-2011 biennium.

APPENDIX A

Guardianship and Conservatorship Study Group

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