

Issue Brief for Working Group #6: Developing a Guardianship Court Improvement Program

Commissioned Paper:

- The Case for a Guardianship Court Improvement Program; Federal Funding to State Courts Could Improve Guardianship Systems and the Lives of Millions of Older Adults and People with Disabilities, by Pogach & Wu

Statement of Issue:

How can we bring about real change in the adult guardianship system? While guardianship is a state-based institution, are there important rationales for federal investment in state court-related reforms? Can the federal child welfare Court Improvement Program serve as a model for a national adult Guardianship Court Improvement Program to provide federal funding and an infrastructure of support?

Background:

While there have been some improvements in guardianship law and practice over the past three decades, significant issues affecting the lives and rights of vulnerable adults remain. There is a need for: (1) more emphasis on exploring less restrictive options -- including supports and supported decision-making -- prior to appointment of a guardian; (2) procedural due process safeguards including the right to and appointment of counsel; (3) a more functional determination of an adult's abilities and need for support rather than a determination based on diagnosis; (4) judicial orders that limit the guardian's authority to only what is necessary; (5) solid court oversight and imposition of sanctions on guardian who violate the law and breach their fiduciary duties; (6) collection and maintenance of consistent adult guardianship data; and (7) strong standards for guardian practice and training.

Over the past three decades, state guardianship laws have moved ahead on many of these fronts. Moreover, significant changes were driven by three landmark multidisciplinary consensus "summits," model acts by the Uniform Law Commission, standards established by the National College of Probate Judges and by the National Guardianship Association; and development of education and training materials for judges, lawyers, and guardians.

But while guardianship laws have changed, implementation in practice has been uneven. The marked gap between law and practice has been daunting for advocates and policymakers seeking the twin themes of this Summit – maximizing autonomy and ensuring accountability. Reports of inappropriate, overbroad, or abusive guardianship have continued to appear in the

media. However, the prevalence of such malfeasance is unknown, as most state court systems collect very little relevant data. In 2018, the U.S. Senate Special Committee on Aging identified “persistent and widespread challenges” in adult guardianship, and recommended focusing on the need for better data, as well as strengthening oversight, promoting alternatives to guardianship, and enhancing practices leading to restoration of rights.

Where We Stand in Practice:

The challenges to adult guardianship reform are significant, including the following:

- Practices differ significantly by court and by state;
- The cases are complex – often marked by mental illness, medication issues, family conflict, undue influence, institutionalization, and service fragmentation;
- The solutions are complex – with an inherent tension and a need for balancing risks, protections and self-determination;
- Funding for improvements and research has been scarce;
- Judges frequently have general jurisdiction caseloads without an intensive guardianship focus, and judicial turnover is high;
- Institutionalized biases can lead to unnecessary and overly restrictive guardianships; and
- Guardianship is not consistently included in elder justice reform agendas.

These obstacles are substantial; and neither courts, nor legislatures, nor guardianship practitioners can overcome them alone. That is why the Third National Guardianship Summit in 2011 recommended that states create Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS). Today – thanks in part to support from the U.S. Administration on Community Living, the State Justice Institute, and state sources, a total of 27 states have convened WINGS or similar collaborative court-community partnerships, and some 23 are currently active.

A 2016 – 2020 WINGS pilot and evaluation by the ABA Commission on Law and Aging, with support from the Administration on Community Living, showed that while WINGS clearly have advanced adult guardianship reform, their modestly funded efforts have not been enough to significantly improve outcomes for adults subject to, or potentially subject to, guardianship. WINGS have built a foundation, but generally have not been able to undertake more costly and intensive efforts such as data management and strong, consistent monitoring practices. WINGS require ongoing funding support and technical assistance to realize their potential for creating and sustaining systemic change.

Programs like WINGS should exist in every state, and to be effective must have a national support infrastructure. Such a model, called the State Court Improvement Program (CIP) has

existed for child welfare cases – which have some strong parallels with adult guardianship cases – since its creation and funding by Congress 28 years ago. The CIP has made marked advances in court processes for children and families.

In 1993, Congress designated funds for the child welfare state Court Improvement Program (CIP). The CIP provided grants to state court systems to conduct assessments of their foster care and adoption laws and judicial processes, and to develop and implement a plan for system improvement. Congressional goals in creating the CIP were to: (1) support state courts in improving the legal process in the child welfare system; (2) improve outcomes for children and families; and (3) enhance collaboration among courts, child welfare agencies and tribes. The CIP is administered by the U.S. Department of Health and Human Services, Administration for Children and Families, Children’s Bureau.

In the early years of the CIP, each state court engaged in a self-assessment and had wide discretion to determine priority areas for improvement. Due to the success of the program, in 2006 Congress authorized additional CIP grants to support data collection and analysis, as well as training and education. The CIP aims to promote continuous quality improvement (CQI). State courts are required to create and submit a five-year strategic plan, updated as needed to reflect self-assessment results and CQI efforts.

For the last several years, Congress has funded a total of \$30 million annually for the CIP, for distribution among all state courts, Puerto Rico, and tribal courts. The highest state court may apply for funding for a basic grant, a data grant, and a training grant.

Prior to enactment of the child welfare CIP, some policymakers expressed concerns about federal intervention into state court practices, as well as the independence of the judiciary. However, state courts were not required to apply for the federal funding – although all state courts did so, apparently perceiving that the benefits of the funding outweigh any restrictions resulting from the participation. Moreover, the CIP initially gave the courts considerable discretion, making open-ended grants that allowed the courts to select and pursue their own priorities. While subsequent reauthorizations have imposed additional guidelines, states have continued to apply for the funding and participate in the program.

Can the successful and experienced child welfare CIP serve as a model for adaptation to create and sustain systems change in adult guardianship? Can it improve guardianship court processes, improve outcomes for individuals subject to guardianship – and enhance collaboration among court, aging and disability networks, public and private bars, and other stakeholders?

Discussion Prompts:

1. Why aren't state WINGS enough for systems change? What lessons learned from WINGS will be useful in establishing a national Guardianship Court Improvement Program (GCIP)? How might current state WINGS transition to become part of a national GCIP?
2. What are the obstacles to establishing a national Guardianship Court Improvement Program, and how can they be overcome?
3. Are there other approaches besides a GCIP that would accomplish the same kinds of adult guardianship systems change, and sustain that change?
4. What kind of state self-assessment should initiate a state GCIP? How much discretion should state courts have in selecting priorities in a state GCIP? In evaluation of outcomes and impacts?
5. What kinds of stakeholders would collaborate in a state GCIP? In what ways would they collaborate?
6. What are the rationales for federal intervention in a traditionally state guardianship system?
7. How much federal funding would be necessary for systems change, and how could an infrastructure of funding and support be sustained over time?
8. In what ways should a guardianship CIP differ from a child welfare CIP?
9. What kinds of technical assistance or "capacity building" for state courts would be required and how would it be delivered?
10. In addition to an appropriation, would federal legislation be necessary to secure a GCIP? What should be its provisions?
11. What organizational coalition-building is needed to promote the GCIP concept? What role should NGN and its organizations play?