

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

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Abstract

Guardianships are an important, and growing, case type under the jurisdiction of state courts. Guardianships involve the civil rights and well-being of vulnerable adults whose capacity is being called into question due to physical or mental disability. Although processing guardianship cases is a state court responsibility, the increasing need for consistent data and interstate coordination, and considerable federal investment in services for individuals subject to guardianships, justify federal investment in state court reforms related to guardianships. A successful model for federal investment in state courts already exists. The child welfare Court Improvement Program has contributed to state court reforms in cases involving a similarly vulnerable population. This paper argues that a modest federal investment in state court guardianship reforms could pay big dividends in improved outcomes for older adults and people with disabilities.

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I. Introduction

Court appointment of a guardian confers a grave authority, transferring the agency to make most of life’s decisions, both big and small, from the individual to the guardian.² Yet the court’s state funded resources are rarely sufficient to ensure the protection of an individual’s due process rights, provide sufficient training for guardians to discharge their duties according to legal and professional standards, and engage in continued oversight and monitoring.

In the United States, guardianship law is state law. The administration and oversight of guardianship falls to state courts. State agencies may provide services to persons under guardianship or at risk of needing guardianship, as well as petitioning for guardianship on behalf of residents, or run a public guardianship program for individuals who do not have another option, but it is the courts that bear the primary burden of protecting the rights and well-being of individuals alleged to need a guardian.

The court’s role presents significant challenges. Individuals alleged to need a guardian may be among the least prepared litigants to navigate the judicial system, lacking adequate legal representation and other supports and services. Furthermore, courts often lack the necessary infrastructure – court staff with investigative and forensic skills, suitable capacity assessment resources, and remote hearing capabilities - to ensure hearings will produce sufficient evidence to determine whether a guardianship is truly necessary or identify red flags for abuse, neglect, and exploitation.

Demographic trends in both the aging population and population of people with disabilities indicate a coming increase in guardianships, exacerbating the strain on state courts.³

² A note on terminology: Guardianship terminology varies by state. In this report, the generic term “guardianship” refers to guardian of the person as well as guardian of the property, frequently known as “conservator.” “Ward” is an outdated, although still frequently used statutory term, with a negative connotation. Other terms include “protected person,” and “respondent.”

³See Conference of Chief Justices, Conference of State Court Administrators, Resolution 14: Encouraging Collection of Data on Adult Guardianship, Adult Conservatorship, and Elder Abuse Cases by All States (August

Courts appoint guardians to provide decision-making support and substitution and protection from harm for a wide range of people who need assistance due to age related cognitive decline or dementia, intellectual or developmental disability, psychiatric disability, traumatic brain injuries, or substance abuse disorders.⁴ As the population of individuals 65 and older, and in particular individuals 85 and older, rapidly expands in the next few decades,⁵ so too will the number of people living with Alzheimer’s and other dementias.⁶ It is also possible that an unanticipated result of deinstitutionalization will be an increase in guardianship for young people with disabilities living in the community, as a means to provide case management for community based services.⁷

Studies of populations that may need guardians abound, but there is a dearth of data regarding the number of individuals with guardians in the United States. The most comprehensive study to date estimates one to more than three million people in the United States have been appointed a guardian.⁸ Without a national data collection system, it is impossible to assess how often the appointment of a guardianship fulfills its intended purpose: managing the affairs of an individual who cannot do so independently in the least restrictive manner possible. Most state statutes and the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act include a strong preference for limited guardianship,⁹ but anecdotal data suggests most guardians are appointed with plenary powers.¹⁰

2009), https://www.ncsc.org/_data/assets/pdf_file/0016/23704/08012009-encouraging-collection-of-data-on-adult-guardianship-adult-conservatorship.pdf.

⁴ “People under adult guardianship – even those who are in the aging population – are people with disabilities by definition...” National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination*, p. 44 (2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.

⁵ U.S. Administration for Community Living, “2019 Profile of Older Americans,” p. 3, 4, <https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2019ProfileOlderAmericans508.pdf>.

⁶ Alzheimer’s association, *2020 Alzheimer’s Disease Facts and Figures*, p. 18, https://www.alz.org/media/Documents/alzheimers-facts-and-figures_1.pdf.

⁷ National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination*, p. 66-67 (2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.

⁸ Uekert, Brenda K. and Richard Van Duizend, “Adult Guardianships: A “Best Guess” National Estimate and the Momentum for Reform,” *National Center for State Courts, Future Trends in State Courts*, p. 109 (2011).

⁹ Lanier, Ellie Crosby, *Understanding the Gap Between Law and Practice: Barriers and Alternatives to Tailoring Adult Guardianship Orders*, *Buff. Public Interest L.J.* 155, 156 (2019).

¹⁰ See, e.g., ABA Commission on Law and Aging, *Less Restrictive Alternative References in State Guardianship Statutes*, https://www.americanbar.org/content/dam/aba/administrative/law_aging/06-23-2018-lra-chart-final.pdf See ABA Commission on Law and Aging, “Limited Guardianship of the Person and Property” (2017), https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartlimitedguardianshipofthepersonandproperty.pdf; ABA Policy 113, (August 2017), Report to House of Delegates at 2; Uniform Guardianship, Conservatorship, and other Protective Arrangements Act, §301(a)(1)(2017).

A common theme runs through guardianship studies: data is lacking, but anecdotal evidence indicates repeated egregious examples of guardian misconduct. Tragically, recent reports describe the same kinds of abuses and systemic failures first documented in a landmark Associated Press investigative report of guardianship systems across the country in 1987.¹¹ Several federal sources, including a 2018 report from the U.S. Senate Committee on Aging, have found “unscrupulous guardians acting with little oversight have used guardianship proceedings to . . . obtain control of vulnerable individuals and . . . to liquidate assets and savings for their own personal benefit.”¹² In the last two decades, the U.S. Government Accountability Office profiled numerous cases of guardians who financially exploited or neglected older adults.¹³

Notwithstanding the lack of data and resources, state-based efforts have led to important reforms. State legislatures have reformed guardianship codes to affirm individual rights and due process protections, states have developed public guardianship, court monitoring, and volunteer visitor programs, and guardians have embraced state and national standards of practice and certification requirements. But these efforts are not enough; the rights of persons with guardians remain inadequately protected. A 2020 study of the most comprehensive guardianship reform initiative to date, Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS), concluded state-based efforts would continue to achieve only moderate results without continuing financial and technical assistance support.¹⁴ True systems change requires sustained federal government support.

Congress provides benefits and services to millions of people with guardians under the Social Security Act, Americans with Disabilities Act, Older Americans Act, Veteran’s benefits, Medicare and Medicaid benefits, and a host of other statutes and programs. These same individuals remain at risk of abuse, neglect, and exploitation in court appointed

¹¹ Balch, Bridget, “Unguarded: A three-part series on how Richmond’s guardianship process leaves vulnerable people unprotected,” Richmond Times-Dispatch, Nov. 30, 2019, https://www.richmond.com/news/local/unguarded-a-three-part-series-on-how-richmond-s-guardianship/article_d39e242e-9213-5600-8150-da9566c143b7.html; Cordeiro, Monivette, “Rebecca Fierle, disgraced Orlando guardian at center of statewide scandal, arrested on abuse, neglect charges,” Orlando Sentinel, Feb. 10, 2020, <https://www.orlandosentinel.com/news/florida/guardians/os-ne-orlando-guardian-rebecca-fierle-arrest-20200211-awhldpb555he7dj2esgfcpemf4-story.html>; Aviv, Rachel, “How the Elderly Lose Their Rights,” The New Yorker, Oct. 9, 2017, <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>; Heild, Colleen, “Who guards the guardians? Ayudando was a family affair,” Albuquerque Journal, Jul. 29, 2017, <https://www.abqjournal.com/1040519/ayudando-guardian-firm-was-a-family-affair.html>.

¹² Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans (November 2018), p. 5, [Guardianship Report 2018 gloss compress.pdf \(senate.gov\)](https://www.senate.gov/committees/subcommittees/aging/guardianship-report-2018-gloss-compress.pdf).

¹³ See U.S. Government Accountability Office, “Elder Abuse: The Extent of Abuse by Guardians is Unknown, but Some Measures Exist to Help Protect Older Adults,” GAO-17-33 (2016), <https://www.gao.gov/assets/690/681088.pdf>, acknowledging “the extent of elder abuse by guardians nationally is unknown due to limited data.”

¹⁴ WINGS Briefing Paper, p. 16.

guardianships.¹⁵ Some federal agencies have provided grant opportunities for state reform or funded training resources, but these efforts are at the discretion of individual agencies, subject to change with each annual budget, and limited to modest sums.

The ongoing COVID 19 pandemic crisis has further exposed the grave consequences of the federal government's failure to address the impact of guardianship on the lives of millions of Americans. As state and federal government scrambled to respond to the crisis, they provided little, if any, support to guardians. For example, guardians were not permitted, particularly in the early months of the pandemic, to visit their clients in nursing facilities. Federal guidance was silent on the role of guardians, addressing only essential healthcare workers.¹⁶ Some, but not all, states eventually expanded access to family members, including guardians.

There is a precedent for Congress to acknowledge and support the tremendous impact of state court systems on millions of Americans who require assistance. Congress first funded a Child Welfare Court Improvement Program (CWCIP) for state child welfare courts in 1993.¹⁷ This program has continued uninterrupted and currently provides \$30 million a year to states, territories, and tribes. The current CIP has yielded positive results for state child welfare systems; providing technical assistance to state courts, connecting state systems all over the country to learn from each other, and funding courts to design their own data collection systems. A 2010 report by the Conference of State Court Administrators noted that:

The CIP has, among other things, reduced judicial delay in child protection cases through the enactment of tighter state deadlines, the application of caseload management principles, and restrictions on continuances; prepared judges and attorneys to handle the complexity of these cases better through the development of standards, educational materials and trainings; and improved the review and monitoring of cases through more effective judicial administration, increased collaboration with child protection agencies and judicial self-assessments.¹⁸

A similar model for adult guardianship, an Adult Guardianship Court Improvement Program (GCIP), is not a novel concept. National organizations such as the Conference of Chief Justices/Conference of State Court Administrators, American Bar Association's House of

¹⁵ See [Guardianship Report 2018 gloss compress.pdf \(senate.gov\)](#), p. 12, noting the federal government's role in guardianship through the provisions of SSA and VA, and the ongoing issue of barriers to communication between these federal agencies and guardianship courts.

¹⁶ See, e.g., Center for Medicare & Medicaid Service Center for Clinical Standards and Quality/Survey & Certification Group, [Memorandum: Nursing Home Visitation – COVID-19](#) (Sept. 17, 2020), <https://www.cms.gov/files/document/qso-20-39-nh.pdf>.

¹⁷ See sec iv. *Infra*.

¹⁸ Conference of State Court Administrators, *The Demographic Imperative: Guardianships and Conservatorships*, (2013), p. 17. https://cosca.ncsc.org/_data/assets/pdf_file/0009/6030/cosca-white-paper-2010.pdf.

Delegates, and the National Council on Disability have expressed support for a GCIP.¹⁹ Just as it did with the CWCIP, Congress can fund such a program without encroaching on the independence of state courts.

In the next Section (II) we will describe the origins of American guardianship as a state-run institution, with virtually no federal influence or support. Section III reviews reform efforts in the last 30 years, including Congressional activity, tracing the inevitable path to a GCIP as the next step in guardianship reform. In Section IV we describe the CWCIP in greater detail, examining how the program has evolved and continues to provide support and coordination to child protection courts and provides a strong model for federal investment in a GWCIP. Section V lays out a theoretical blueprint for a GCIP. This paper concludes with specific recommendations for a new Guardianship Court Improvement Program.

II. The Evolution of Guardianship as a State-Based Institution

1. Guardianship law is state law

The legal underpinnings of state guardianship laws originate in the English concept of the King as the father of all his subjects, or *parens patriae*. In the early 14th century, Parliament passed the “Royal Prerogative,” anointing the King as guardian over his kingdom, and establishing his responsibility to care for individuals who could not manage their own property, with the goal of preventing chaos in the kingdom.²⁰ This prerogative did not extend to providing a social safety net for individuals with disabilities who needed support and protection from harm.²¹

The Royal Prerogative evolved into the *parens patriae* doctrine, asserting the King’s and, later, the government’s duty to take care of those who could not care for themselves.²² A formal proceeding to carry out this duty developed in English law, with numerous methods to protect the assets and, in rare instances, the well-being of individuals who need assistance.²³ *Parens Patriae* traversed the Atlantic with the early British colonists, allowing states to protect those unable to protect themselves. For example, a 1702 Connecticut law charged the

¹⁹ Conference of Chief Justices and Conference of State Court Administrators, Resolution 3 in Support of the Guardianship Accountability and Senior Protection Act (adopted February 1, 2012), [In Support of The Guardian Accountability and Senior Protection Act](#), ABA Resolution 105, adopted August 3 – 4, 2020, [105 20A \(americanbar.org\)](#); National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* (ncd.gov), p. 21 (2018); Robert, Amanda, “ABA pushes for a federal guardianship court improvement program,” *ABA Insider* (Feb 1, 2021), <https://www.abajournal.com/magazine/article/aba-pushes-for-a-federal-guardianship-court-improvement-program>.

²⁰ Mitchell, Anina M., *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, Legal Services Corporation, 1409 (1978).

²¹ Sabatino, Charlie, and Basinger, Susan, 6 *Journal of Mental Health and Aging* 119-144, 121 (2000).

²² [Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination \(ncd.gov\)](#), p 54.

²³ Wood, Erica, *History of Guardianship*. In Quinn, Mary Joy (Ed.) *Guardianship of Adults: Achieving Justice, Autonomy, and Safety* (pp. 17-47, p. 19). (Springer 2005).

hometown or current residence of such individuals with the duty of ensuring their care and safety.²⁴

Under the Tenth Amendment of the United States Constitution, which reserves all powers not expressly delegated to the federal government or prohibited to states, to state governance, *parens patriae* falls squarely to the states. The earliest American laws addressing the state's role in caring for individuals with disabilities were enacted in response to the establishment of institutions for people with "mental disabilities."²⁵ The 1845 case *Josiah Oakes* drew attention to the questionable choice of committing an elderly man because he was engaged to a "young woman of unsavory character."²⁶ A movement in the second half of the nineteenth century for humane treatment of people with mental illness led to the enactment of laws regulating commitment procedures.²⁷

By the mid-twentieth century, state statutory law bifurcated the courts' jurisdiction into two protective processes for people deemed "incompetent" or "incapacitated." Courts could order the commitment of an individual who presented a risk of harm to self or others due to mental illness, exercising the police power invested in the mental health commitment process. Alternatively, courts could appoint a guardian to manage the property and, eventually, the personal affairs of those who could not protect themselves.

Consistent with *parens patriae*, early state guardianship laws were designed to protect property, with minimal acknowledgment of individual rights and due process protections.²⁸ Bluntly stated, "informality is the hallmark of competency (guardianship) proceedings."²⁹ Unlike the essential protections guaranteed to criminal defendants, such as court appointed counsel and notice,³⁰ guardianship laws were designed to smooth the way for the petitioner to easily secure the appointment of a guardian and minimize the alleged incapacitated person's ability to object.³¹ Guardianship proceedings were relaxed and untethered to rules of evidence and

²⁴ [Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination \(ncd.gov\)](#), p 54.

²⁴ Wood, Erica, History of Guardianship. In Quinn, Mary Joy (Ed.) Guardianship of Adults: Achieving Justice, Autonomy, and Safety (pp. 17-47, p. 19).(Springer 2005).

²⁵ The first mental hospital was founded in Williamsburg, VA in 1753. Wood, Erica, History of Guardianship. In Quinn, Mary Joy (Ed.) Guardianship of Adults: Achieving Justice, Autonomy, and Safety (pp. 17-47, p. 19)(Springer 2005).

²⁶ Wood, Erica, History of Guardianship. In Quinn, Mary Joy (Ed.) Guardianship of Adults: Achieving Justice, Autonomy, and Safety (pp. 17-47, p. 20).(Springer 2005).

²⁷ Id.

²⁸ Sabatino, Charlie, and Basinger, Susan, 6 Journal of Mental Health and Aging 119-144, 122 (2000).

²⁹ John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 Wm. & Mary L. Rev. 569, 603 (1972).

³⁰ Mitchell, Anina M., *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, Legal Services Corporation, 1412 (1978).

³¹ Id. 1415 (1978).

procedure, due to their allegedly “non-adversarial” nature, with all parties purportedly sharing a common goal to protect the individual’s best interests.³²

2. Advocates Take on Guardianship Laws

In the 1960s, advocates began to challenge the use of the state’s police power to confine and commit individuals with intellectual and psychiatric disabilities. Additionally, advocates insisted states had an affirmative duty to treat the disability that led to the exercise of police power rather than simply keeping the individual in an institution indefinitely.³³

A series of Supreme Court decisions regarding mental health commitment did not directly address guardianship, but “they did lead to a changed understanding of the constitutional implications of infringing on individual liberty due to disability or supposed incompetence.”³⁴ For example, in *O’Connor v. Donaldson*, the Supreme Court acknowledged parallels between the various forms of state police power and *parens patriae* over individuals with disabilities:

...an inevitable consequence of exercising the *parens patriae* power is that the ward’s personal freedom will be substantially restrained, whether a guardian is appointed to control his property, he is placed in the custody of a third party, or committed to an institution. Thus, however the power is implemented, due process requires that it not be invoked indiscriminately.³⁵

The path to guardianship reform also became entwined with the disability rights movement for somewhat practical or logistical reasons: the closing of institutions for people with disabilities led to the unintended result of an increase in guardianships. Many individuals who were placed in institutions as children had been separated from their families, and now guardianships were deemed necessary to consent to community placement.³⁶ At least one scholar predicted that this increase in guardianship would lead to guardianship statutes becoming “the new battleground for litigation and social debate over the rights of individuals to personal liberty and self-determination as against the state’s interest in protection or control.”³⁷

The early stirrings of calls for reform of guardianship laws followed suit in the 1970s. In a seminal article, law professor John Regan described state statutory criteria for incapacity as “insensitive to the needs of the elderly” and “vague and “overreaching,” and proposed “the all-

³² [Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination \(ncd.gov\)](#). p.55.

³³ [Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination](#), p 41 (ncd.gov).

³⁴ [Id.](#), 55.

³⁵ *O’Connor v. Donaldson*, 422 U.S. 563, 583 (1975)(concurrency).

³⁶ [Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination](#), p 45 (ncd.gov)

³⁷ Mitchell, Anina M., *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, Legal Services Corporation, 1413 (1978).

or-nothing character of the control over the ward ... is too sweeping.”³⁸ By the early 1970s some state legislatures amended state guardianship laws, for the first time addressing individual and due process rights for individuals in guardianship proceedings.³⁹ As state legislatures embarked on the revision process, they did so without any national standards or guidance. It was not until 1978 that the American Bar Association developed a model guardianship statute. In 1982, the Uniform Law Commission enacted the first in a series of model laws, most recently enacting the progressive, comprehensive 2017 Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA).⁴⁰ As of the publication of this article, only Maine and Washington have adopted the full UGCOPAA.⁴¹

III. The History of Guardianship Reform

1. Expanding reform beyond statutory amendments

Until the late 1980s, statutory amendments were the primary demonstration of efforts towards reform, with a few notable exceptions.⁴² Early studies identified systemic issues with guardianship practice, such as a 1972 study that found guardianship was primarily used by third parties for their own benefit.⁴³ In 1986, a National Conference of the Judiciary on Guardianship Proceedings for the Elderly, sponsored by the American Bar Association Commission on Legal Problems of the Elderly and the National Judicial College, recognized the need for increased due process protections in guardianship, releasing the following Statement of Recommended Judicial Practices:

We as judges and other court related professionals from twenty-six states recognize the serious implications of guardianship proceedings for the elderly. We have concluded that steps can be taken to ensure due process protections for elderly respondents without making the process overly time-consuming or cumbersome. We are aware that societal perceptions of aging may affect the guardianship process, and have resolved to guard against this. We affirm the

³⁸ John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 Wm. & Mary L. Rev. 569, 603 - 608 (1972).

³⁹ See [Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination \(ncd.gov\)](https://www.ncd.gov), p. 53, for a TimeLine of Major Legislative and Policy Initiatives for Guardianship Law, 1975 – 2017.

⁴⁰ UGCOPAA, <https://www.uniformlaws.org/viewdocument/final-act-no-comments-13?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c&tab=librarydocuments>.

⁴¹ See UGCOPAA homepage, <https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c>.

⁴² See Hurme, Sally, and Wood, Erica, Introduction: Symposium Third National Guardianship Summit: Standards of Excellence, 2012 Utah L. Rev. 1157 (2012), noting there were “some important early stirrings of reform,” but the movement really gained momentum in 1987 when “Like a shaft of light came the massive Associated Press report.”

⁴³ Wood, Erica, History of Guardianship. In Quinn, Mary Joy (Ed.) *Guardianship of Adults: Achieving Justice, Autonomy, and Safety* (pp. 17-47, p. 21). (Springer 2005).

need to maximize autonomy of the elderly ward, using the least restrictive alternative for his/her particular needs.⁴⁴

Given each state's unique guardianship statute and the great diversity of state judicial structures, it is no surprise that guardianship practices among states varied widely. In fact, in many states, practices developed locally by county. Regional discrepancies between and within states continue today. In many states, each court has unique forms, only some counties pay for court appointed counsel or public guardians, and monitoring programs are only available in major cities or well-funded jurisdictions.

2. 1987: A call to action

In 1987, the Associated Press released a series of articles on guardianships it called "the biggest investigative effort in the history of the Associated Press", a year-long investigation in 50 states and the District of Columbia, titled "*Guardians of the Elderly: An Ailing System*."⁴⁵ Dozens of AP journalists reviewed 2200 randomly selected guardianship court files, finding widespread failure to monitor guardianships post appointment. In what remains one of the few efforts to collect national statistics,⁴⁶ the report found forty-eight percent of the files were missing at least one annual accounting, only sixteen percent of the files contained status reports about the person, and thirteen percent of the files were empty but for the initial court order appointing a guardian.⁴⁷

The AP investigation highlighted the grave consequences of limited funding, infrastructure and other resources for courts: "After giving guardians such great power over elderly people, overworked and understaffed court systems frequently break down, abandoning those incapable of caring for themselves."⁴⁸ Judges rationed judicial review to address budgetary constraints. A Phoenix, Arizona probate court commissioner, who received information on sixty cases a day but only audited twelve each year commented, "We don't have many resources. Once in a while I'll yank one (a case file) and audit it."⁴⁹ In Collier County, Florida, the court clerks could not account for numbers of guardianship cases, as one clerk stated, "there are only two of us here. We don't have time for all that."⁵⁰ A probate judge in Rhode Island spoke frankly: "I don't know where the wards are, who's caring for them, what

⁴⁴ Statement of Recommended Judicial Practices (1986) cited in Hurme, Sally Balch and Erica Wood, *Guardian Accountability Then and Now: Tracing Tenets for an Active Court Role*, Stet. Law Rev. 869 (2002).

⁴⁵ Associated Press, *Guardians of the Elderly: An Ailing System*, 1987.

<https://apnews.com/article/1198f64bb05d9c1ec690035983c02f9f>.

⁴⁶ Wood, Erica F., *State Level Adult Guardianship Data: An Exploratory Survey*, American Bar Association Commission on Law and Aging for the National Center on Elder Abuse (2006), p. 11 [Microsoft Word - gd data report final 8-06_2_.doc \(acl.gov\)](#).

⁴⁷ Associated Press, *Guardians of the Elderly: An Ailing System*, p. 4, 1987.

⁴⁸ Id. 1.

⁴⁹ Id. 11.

⁵⁰ Id.

they're doing. I have no support staff, I have no welfare workers. I have no aides. I have no assistants and I have no money."⁵¹

In addition to a lack of court oversight and management, courts could not adequately protect the due process rights of litigants: "For whatever reason the guardianship petition is brought, it moves speedily through overtaxed courts that often sidestep the civil rights safeguards so zealously protected in other types of courtrooms."⁵² The AP reporters found that in forty-four percent of cases, the individual alleged to need a guardian was not represented by an attorney; three out of ten files contained no medical evidence; forty-nine percent of people were not present at their own guardianship hearings; twenty-five percent of the files contained no indication hearings had ever been held.⁵³

3. Advocates focus on interdisciplinary efforts.

The AP report galvanized a turning point for guardianship reform. In statehouses across the nation, the "backwater" topic of guardianship was finally gaining visibility. State legislatures amended their guardianship statutes to ensure improved due process, a more functional determination of capacity not based on labels or age, use of less restrictive alternatives, limited orders, and greater guardian accountability.⁵⁴

Across the country, advocates and stakeholders became increasingly connected and committed to working together towards reform. In 1988, guardian programs, advocates, attorneys, and other experts formed the National Guardianship Association (NGA). Identifying a need for national standards for guardians, NGA adopted a *Code of Ethics for Guardians* (1991), *Standards of Practice* (2000), *Standards of Practice for Agencies and Programs Providing Guardianship Services* (2007), and *Ethical Principles* (2016).⁵⁵ In 2002, a collaborative group of national organizations dedicated to effective adult guardianship law and practice convened the National Guardianship Network (NGN).⁵⁶

In 1988,⁵⁷ 2001, and 2011, guardianship reform advocates convened major conferences and laid the foundation for a national guardianship reform agenda that remains current

⁵¹ Id 1.

⁵² Id.

⁵³ Id.

⁵⁴ Hurme, Sally, and Wood, Erica, Introduction: Symposium Third National Guardianship Summit: Standards of Excellence, 2012 Utah L. Rev. 1157, 1159 (2012).

⁵⁵ National Guardianship Association, "Our History," <https://www.guardianship.org/about-us/who-we-are/>; "Ethical Principles," <https://www.guardianship.org/education/publications/ethical-principles/>.

⁵⁶ National Guardianship Network, "Who We Are," <https://www.naela.org/NGNNew/Intro.aspx>.

⁵⁷ American Bar Association, Guardianship An Agenda for Reform: Recommendations of the National Guardianship Symposium, Preface, 1989, <https://spectruminstitute.org/attorney-proposals/ADA-advocacy-standards/exhibits/exhibit-13.pdf>.

today.⁵⁸ Major tenets for reform include: (1) An emphasis on less restrictive options prior to the appointment of a guardian, allowing the individual to continue to make his or her own decisions and maintain autonomy; (2) procedural due process safeguards including the right to and appointment of counsel; (3) a functional determination of an adult’s abilities and need for support rather than a determination based primarily on diagnosis; (4) use of judicial orders of appointment that limit the guardian’s authority to only what is necessary; (5) solid court oversight and imposition of sanctions on guardians who violate the law and breach their fiduciary duties; (6) collection and maintenance of adult guardianship data; and (7) strong standards for guardian practice and training.⁵⁹

The above agenda supports a vision for institutional change, moving away from addressing individual cases of guardian abuse to recognizing and addressing systemic failures. To implement this vision, advocates urged the formation of state-based interdisciplinary entities.⁶⁰ The concept gained support from national organizations,⁶¹ culminating in a fervent push for the formation of Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) at the 2011 Third National Guardianship Summit.⁶² Since the 2011 Summit, around half of states across the nation have formed a WINGS or similar group. While every state WINGS is different, generally a WINGS is a court-stakeholder partnership, working towards improvement in guardianship policy and practice through “collective impact.”⁶³ The 2011 recommendations provided several possible roles for WINGS, including encouraging and supporting the collection of data.⁶⁴

⁵⁸ For an overview of national guardianship reform conferences from 1989 through 2011, see National Guardianship Network, Summits, https://www.nationalguardianshipnetwork.org/NGN_PUBLIC/Summits/NGN_PUBLIC/Summits.aspx?hkey=7570bee-1b84-4e09-90c7-7146dada6a9a.

⁵⁹ American Bar Association Commission on Law and Aging, WINGS Briefing Paper: Advancing Guardianship Reform and Promoting Less Restrictive Options (2020), p. 7, https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-wings-briefing-paper.pdf.

⁶⁰ Hurme, Sally, and Wood, Erica, Introduction: Symposium Third National Guardianship Summit: Standards of Excellence, 2012 Utah L. Rev. 1157, 1188 (2012).

⁶¹ See Hurme, Sally, and Wood, Erica, Introduction: Symposium Third National Guardianship Summit: Standards of Excellence, 2012 Utah L. Rev. 1157, 1188 (2012), noting by 2004, the National Guardianship Network and the National College of Probate Judges worked to obtain a resolution from the national Conference of Chief Justices that each state should have an interdisciplinary guardianship committee; National Conference of State Court Administrators resolution recommending the establishment of state guardianship task forces (2010).

⁶² American Bar Association Commission on Law and Aging, WINGS Briefing Paper: Advancing Guardianship Reform and Promoting Less Restrictive Options (2020), p. 9-10, https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-wings-briefing-paper.pdf.

⁶³ Kania J. & Kramer, M., “Collective Impact,” Stanford Social Innovation Review, Winter 2011; WINGS Briefing Paper, pp. 16-17 (2020), [2020-wings-briefing-paper.pdf \(americanbar.org\)](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-wings-briefing-paper.pdf).

⁶⁴ Third National Guardianship Summit Standards and Recommendations (2011), p. 1204, [2011 Third National Guardianship Summit Standards and Recommendations.pdf \(americanbar.org\)](https://www.americanbar.org/content/dam/aba/administrative/law_aging/2011-third-national-guardianship-summit-standards-and-recommendations.pdf).

In addition to supporting WINGS, national organizations have documented support for a GCIP in the last decade. Unfortunately, these resolutions have not yet succeeded in convincing Congress to fund a national program. They include:

- Conference of Chief Justices and Conference of State Court Administrators, Resolution 3 in Support of the Guardianship Accountability and Senior Protection Act (adopted February 1, 2012);⁶⁵
- National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* (2018);⁶⁶
- American Bar Association, *In Support of The Guardian Accountability and Senior Protection Act*, ABA Resolution 105, adopted August 3 – 4, 2020;⁶⁷
- American Bar Association Commission on Law and Aging, *WINGS Briefing Paper: Advancing Guardianship Reform and Promoting Less Restrictive Options* (2020);⁶⁸

4. Challenges to Reform: Lack of Data

As the guardianship reform movement grew in membership and vision, the lack of available data posed a major challenge to advancing reforms. In many states, available data is limited to filings and dispositions, information that is not helpful to improving case processing, and strengthening guardian oversight. Courts need a major investment in court technology, training, and standardized management to improve collection practices.⁶⁹ “The starting point of any major reform is an accurate picture of the reality the policy intends to reform; in this case, that means at a minimum that states are able to count the number of incoming and outgoing adult guardianships in their courts. Unfortunately, the current caseload data on these cases is woefully deficient.”⁷⁰

Without success, advocates for reform have consistently called for national data studies of guardianship. As early as 2002, reformers recognized it was impossible to assess the results of their efforts or to determine how to move forward with little available data and a “paucity of

⁶⁵ Available at https://ccj.ncsc.org/data/assets/pdf_file/0024/23649/02012012-in-support-of-the-guardian-accountability-and-senior-protection-act.pdf.

⁶⁶ See f.n. 7, *supra*.

⁶⁷ See f.n. 19, *supra*.

⁶⁸ Available at https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-wings-briefing-paper.pdf.

⁶⁹ Wood, Erica F., *State Level Adult Guardianship Data: An Exploratory Survey*, American Bar Association Commission on Law and Aging for the National Center on Elder Abuse (2006), p. 7 [Microsoft Word - gd data report final 8-06_2_.doc \(acl.gov\)](#); National Center for State Courts, *Adult Guardianship Court Data and Issues Results from an Online Survey* (2010), [Adult Guardianship Court Data and Issues Results from an Online Survey \(flcourts.org\)](#) p. 8.

⁷⁰ Court Statistics Project, *Caseload Highlights: The Need for Improved Guardianship Data*, p. Vol. 15: 2 (2008), [15_2_adult_guardianship_data.pdf \(courtstatistics.org\)](#).

research.”⁷¹ States simply could not collect and analyze data.⁷² The U.S. Government Accountability Office, one of the few federal agencies that have studied guardianship, has reported that neither states nor the federal government collected data on the incidence of abuse of people with guardianship or the number of elderly people with guardians: “Without better statistical data concerning the size of the incapacitated population or how effectively it is being served, it will be difficult to determine precisely what kinds of efforts may be appropriate to better protect incapacitated elderly people from exploitation, abuse, and neglect.”⁷³ At the Third National Guardianship Summit in 2011, organizers grimly surmised: “we as a nation are essentially working in the dark when describing adult guardianship practice. Data and research are scant to nonexistent.”⁷⁴

Recognizing such an investment was unlikely or impossible on a state level, in 2010, the Conference of State Court Administrators urged Congress to fund a guardianship court improvement program, and data collection by funding (1) a National Guardianship Study that would document the number of guardianships, identify current practices and innovative programs, and provide the basis for the development of court improvement efforts, (2) the development of state and local courts in designing and implementing guardianship databases, and (3) a Guardianship Resource Center to serve as a central clearinghouse for guardianship data and research.⁷⁵ The Report’s recommendations were supported by the Conference of State Court Administrators in 2012.⁷⁶

Despite repeated calls for better practices, guardianship data remains scarce. In 2018, a landmark report from the National Council on Disability (NCD) reiterated previous concerns: “the lack of data on who is under guardianship or what happens to adults under guardians is a constant source of frustration for anyone attempting to understand guardianship, much less those urging policymakers that there is an immediate need for resources to address problems arising from it.”⁷⁷ Without data on guardianships, the NCD report noted, there is no way to

⁷¹ Johns, A. Frank and Sabatino, Charlie P., Introduction: Wingspan –The Second National Guardianship Conference, 31 Stetson Law Rev, No. 3 Spring 2002, pp. 592-593.

⁷² See Wood, Erica F., State Level Adult Guardianship Data: An Exploratory Survey, American Bar Association Commission on Law and Aging for the National Center on Elder Abuse (2006), p. 11 [Microsoft Word - gd data report final 8-06_2 .doc \(acl.gov\)](#) for a survey of the few attempts to collect data between 1987 and 2003.

⁷³ U.S. Government Accountability Office, Guardianship: Collaboration needed to protect incapacitated elderly people (GAO-04-655)(2004), [GAO-04-655 Guardianships: Collaboration Needed to Protect Incapacitated Elderly People](#).

⁷⁴ Hurme, Sally, and Wood, Erica, Introduction: Symposium Third National Guardianship Summit: Standards of Excellence, 2012 Utah L. Rev. 1157, 1160 (2012).

⁷⁵ Identifying Possible sources of federal funding from the Department of Health and Human Services Administration on Aging, the Department of Justice Bureau of Justice Statistics, or the State Justice Institute. Conference of State Court Administrators, The Demographic Imperative: Guardianships and Conservatorships (2010), [cosca-white-paper-2010.pdf \(ncsc.org\)](#).

⁷⁶ [In Support of The Guardian Accountability and Senior Protection Act \(ncsc.org\)](#).

⁷⁷ [Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination \(ncd.gov\)](#), p. 65.

confirm whether guardianships are increasing or decreasing, providing little ammunition for advocates to urge policymakers to address problems.⁷⁸

5. WINGS: moving closer towards reform goals but sustained support is still lacking

In the last decade, federal agencies have allocated discretionary funding for guardianship reform, providing grants to states to improve guardian oversight, guides for fiduciaries and financial institutions engaging in transactions involving guardianship arrangements, and creating a national reporting system for elder abuse.⁷⁹ Federal agencies have also supported initiatives seeking to divert individuals from unnecessary guardians and provide individuals who may need decision-making assistance with less restrictive options than guardianship, including supported decision-making. In 2014, the Administration for Community Living (ACL) of the U.S. Department of Health and Human Services funded the National Resource Center for Supported Decision Making (NRCSDM). The NRCSDM brings together a diverse group of partners and nationally recognized expertise to promote the use of SDM as a valid, less restrictive alternative to guardianship.⁸⁰

More directly, federal monies have supported state-based guardianship reform efforts by funding a limited number of Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS).⁸¹ In 2013 and 2015, the State Justice Institute, a federally authorized source of grant funding for state courts, awarded funding for the first pilot WINGS in selected states.⁸² In 2016 ACL awarded a grant to the American Bar Association’s Commission on Law and Aging (Commission on Law and Aging) to test whether WINGS is an approach that can advance guardianship reform.⁸³

The Commission on Law and Aging’s work on WINGS from 2016 - 2020 marks a pivotal period in guardianship reform, developing a model for state-based reform in which states have the discretion to create their own programs under a common principles framework – to

⁷⁸ Id.

⁷⁹ U.S. Administration for Community Living; “Elder justice Innovation Grants,” Sept. 12, 2018, at <https://www.acl.gov/programs/elderjustice/elder-justice-innovation-grants-0>. 33 U.S. Administration for Community Living, National Adult Maltreatment Reporting System; “What is NAMRS?” at <https://namrs.acl.gov/>. Consumer Financial Protection Bureau, Managing Someone Else’s Money Guides,” [Guides for managing someone else’s money | Consumer Financial Protection Bureau \(consumerfinance.gov\)](https://www.consumerfinance.gov/guides/managing-someone-elses-money/).

⁸⁰ National Resource Center for Supported Decision-Making, <http://www.supporteddecisionmaking.org/about>.

⁸¹ See American Bar Association Commission on Law and Aging’s WINGS website, [WINGS Court-Stakeholder Partnerships \(americanbar.org\)](https://www.americanbar.org/groups/aging_law/working_interdisciplinary_networks_of_guardianship_stakeholders/).

⁸² SJI funded pilot WINGS in New York, Oregon, Texas, Utah, District of Columbia, Indiana, Minnesota, Mississippi, and Washington, American Bar Association, Commission on Law and Aging, “State WINGS Pilots,” [Guardianship Reform/WINGS Background \(americanbar.org\)](https://www.americanbar.org/groups/aging_law/state_wings_pilots/).

⁸³ WINGS Briefing Paper, p. 4, [2020-wings-briefing-paper.pdf \(americanbar.org\)](https://www.americanbar.org/groups/aging_law/wings_briefing_paper/).

develop protections less restrictive than guardianship, advance guardian reforms, and address abuse - with the opportunity to engage with each other and learn from national experts.⁸⁴

Under the grant, seven state courts were awarded modest, one-time amounts of \$20,000 - \$30,000 for their pilot WINGS programs.⁸⁵ Each program was unique, working within the framework of individual state courts with widely differing approaches and resources to guardianship. Yet all WINGS shared common goals of opening paths of communication among stakeholders, working towards practice and policy reforms in their state, and raising awareness of the need for statewide reform.⁸⁶

Over the two-year pilot period, the WINGS produced tangible results: providing and engaging in training, creating resources with a focus on less restrictive options, and addressing court oversight of guardianship cases. Key examples of WINGS projects include producing guardianship training curriculum for judges and attorneys, developing a guardian accounting app, assessing the availability of less restrictive options statewide to identify gaps in service, conducting training on supported decision-making, and piloting a local compliance manager position to review annual guardian reports.⁸⁷

In addition to providing individualized technical assistance and a national set of WINGS project tools, the Commission on Law and Aging created a national network for state WINGS coordinators and representatives from state with WINGS-like initiatives to share information and learn from each other.⁸⁸ Through regular calls and intensive forums, WINGS leaders eagerly shared feedback on state specific issues and discussed national guardianship reform.

As the Commission on Law and Aging supported individual WINGS in enhancing and expanding their programs, it also studied their progress, determining whether WINGS could serve as a national model for guardianship reform. The Commission also studied the CWCIP, consulting in depth with colleagues at the ABA Center for Children and the Law, a major player in the founding and success of the CWCIP.⁸⁹

After providing direct funding and support to pilot programs for two years, the Commission on Law and Aging concluded that the WINGS can achieve short-term accomplishments, but struggle to initiate long-term, more challenging systemic efforts:

⁸⁴ See American Bar Association Commission on Law and Aging, "Mission & Goals," https://www.americanbar.org/groups/law_aging/resources/wings-court-stakeholder-partnerships0/about-the-grant/.

⁸⁵ The seven pilot programs were in Alabama, Alaska, Florida, Idaho, Indiana, Oregon, and Utah. American Bar Association, Commission on Law and Aging, "State WINGS Pilots," [Guardianship Reform/WINGS Background \(americanbar.org\)](#).

⁸⁶ WINGS Briefing Paper, p. 11, [2020-wings-briefing-paper.pdf \(americanbar.org\)](#)

⁸⁷ Id. 14-15.

⁸⁸ Id. 11.

⁸⁹ Id. 21.

While the project WINGS, and indeed all state WINGS, have advanced adult guardianship reform, their modestly funded efforts are not enough to significantly improve outcomes for adults subject to, or potentially subject to, guardianship. With this grant’s funding and support, the project WINGS could begin to build a foundation of knowledge and best practices, prioritizing “low hanging fruit” changes they perceived as attainable within the scope of the project. However, they could not undertake more costly and intensive efforts such as court data management and monitoring of guardians to prevent and address financial exploitation and abuse. Moreover, while the WINGS engaged in short-term process and outcome evaluation, they were less adept at long-term impact evaluation to measure the effects of their efforts on the lives of individuals. WINGS require ongoing support and technical assistance to realize their potential for creating long lasting systemic change.⁹⁰

Ultimately, discretionary funding will never be enough for systemic guardianship reform.⁹¹ Without institutional support and infrastructure, state-based programs are at the whim of legislative budgets and changes in court administration. Currently, less than half of states have a WINGS or similar entity. Some of the earliest WINGS, founded with monies from the original SJI grants, have not survived. Other WINGS rely exclusively on the volunteered time and resources of stakeholders.

To take WINGS to the next level, these programs “...should exist in every state under a national infrastructure with consistent, ongoing technical assistance and support. Such a model, called the State Court Improvement Program (CIP), has existed for child welfare cases since 1993, with marked advances in court processes for children and families.”⁹²

IV. The Child Welfare Court Improvement Program: A Model for a Successful GCIP

1. Evolution of the Court Improvement Program in Child Welfare Cases

Congress has provided targeted funding to state courts through the child welfare Court Improvement Program (CWCIP) since 1993. As the only sustained federal program providing funding directly to state courts, CWCIP offers a model from which to build a successful GCIP that will improve safety, well-being, and fairness outcomes for people who are the subject of guardianship proceedings.

⁹⁰ Id. 4-5.

⁹¹ Id 19.

⁹² Id. 4-5.

The CWCIP was enacted in the Omnibus Budget Reconciliation Act of 1993.⁹³ The statutory purpose of the program was to enable courts to:

1. Conduct assessments...of the role, responsibilities, and effectiveness of State courts in carrying out State laws....in child cases, and
2. Implement changes deemed necessary as a result of the assessments.⁹⁴

The CWCIP grants are administered by the Children's Bureau of the Department of Health and Human Services and are made directly to the highest court in each state plus the District of Columbia and Puerto Rico.⁹⁵ The program recognizes the central oversight role the courts play in child welfare, especially the most serious cases involving governmental intrusion into family life which often includes removal of children into foster care. At the time the law was enacted, the number of children in foster care was rapidly increasing.⁹⁶

The Adoption Assistance and Child Welfare Act of 1980⁹⁷ and subsequent child welfare legislation define the key oversight role of the courts. Notably, under the 1980 Act, in order for a case to qualify for federal foster care funding, the court must find that the child welfare agency made "reasonable efforts" to prevent or eliminate the need to remove the child from his or her parents or guardians. The Act also requires periodic court findings that the agency is making reasonable efforts to reunify the family in order for the case to continue to qualify for federal funding. It is thus important that the courts and executive branch child welfare agencies have a mutual understanding of the prevention and reunification services for families that must be available in the community, since the court will hold the agency accountable for providing those services in the form of the reasonable efforts finding.⁹⁸

The CWCIP is entitlement funding distributed according to an allocation formula based on a state's child population as opposed to a discretionary grant program.⁹⁹ Congress provided \$5 million in the first year of funding as states came on board and conducted self-assessments. Subsequent years were funded at \$10 million as states engaged in implementation activities.

⁹³ P.L. 103-66.

⁹⁴ Ibid.

⁹⁵ A separate CWCIP for tribes began in 2012 using funds that were "carved out" of the CWCIP appropriation. The tribal program uses a competitive application process. For more information on tribal CWCIP see the [Capacity Building Center for Tribes website](#).

⁹⁶ The number of children in out of home care rose from approximately 400,000 in 1990 to 567,000 in 1999. See Child Trends, *Foster Care: Trends in Foster Care* at [https://www.childtrends.org/indicators/foster-care#:~:text=The%20number%20of%20children%20in%20foster%20care%20increased%20during%20the,in%202017%20\(preliminary%20estimate\)..](https://www.childtrends.org/indicators/foster-care#:~:text=The%20number%20of%20children%20in%20foster%20care%20increased%20during%20the,in%202017%20(preliminary%20estimate)..)

⁹⁷ P.L. 96-272

⁹⁸ See generally, Edwards, L., *Reasonable Efforts: a Judicial Perspective* (2014), available at <https://judgeedwards.wordpress.com/category/publications/>.

⁹⁹ With the exception that \$1 Million of the total appropriation for CIP is set aside to fund competitive tribal CIP grants.

Congress showed its confidence in the CWCIP framework by considerably expanding the program beginning in 2006. The Deficit Reduction Act of 2005¹⁰⁰ appropriated an additional \$10 million for each of two new CWCIP grants (distributed pursuant to the same allocation formula as the original grant, now called the "Basic" CWCIP grant). The new grants became known as the Data grant and the Training grant. The Data grant addressed the need for courts to better understand their dependency caseloads and caseflow in order to continue improving outcomes. The statutory purpose of the Data grant was "to ensure that the safety, permanence, and well-being needs of children are met in a timely and complete manner."¹⁰¹ The Training grant recognized the need for specialized and multidisciplinary training in complex juvenile dependency matters and provided funding "for the training of judges, attorneys and other legal personnel in child welfare cases."¹⁰² Congress has renewed funding for each of the CWCIP grants totaling, \$30 million, ever since.

2. CWCIP: 30 Years of Lessons Learned for a New GCIP

The CWCIP has supported improvements and collaboration in state courts' handling of child abuse and neglect cases for almost thirty years. The infusion of a modest amount of federal funding directly to the state courts has been productive and popular on both the federal and state sides of government. This paper argues that the field of adult guardianships, including less restrictive alternatives, presents a similar legal landscape for federal investment.

The federal government has a substantial interest in improving guardianship oversight. As noted in the introduction, populations subject to guardianship are the beneficiaries of a number of federal assistance programs.¹⁰³ A Guardianship Court Improvement Program (GCIP) would not be used to fund core court operations. Rather, like the CWCIP, it ideally would:

- be a limited investment in helping courts plan and implement long-term improvements in cases involving vulnerable populations;
- provide a needed boost to filling in enormous gaps in the data necessary to identify many important trends;
- stimulate judicial leadership to engage the community to improve services; and
- help to create a "community of practice" among the state courts to spread best practices.

Since its inception, the CWCIP has achieved significant results, including: developing court projects that have improved court processes, playing a leadership role in broad child welfare system improvement efforts throughout the country, establishing close collaboration and data sharing between courts and child welfare agencies, and increasing collaboration with

¹⁰⁰ P.L. 109-171

¹⁰¹ *Id.* at sec. 7401

¹⁰² *Ibid.*

¹⁰³ Fn. 8, *supra*.

tribes.¹⁰⁴ While every state program sets its own unique priorities, typical State Court Improvement Program activities include development of mediation programs, joint agency-court training, automated docketing and case tracking, linked agency-court data systems, one judge/one family models, time-specific docketing, formalized relationships with the child welfare agency, improvement of representation for children and families, and legislative changes.

Prior to and after the inception of the CWCIP, the American Bar Association Center on Children and the Law has played an instrumental role in its success. As a partner in the Capacity Building Center for the Courts, the Center on Children and the Law engages State Court Improvement Programs in system improvement work, including developing continuous quality improvement processes, providing direct support to state programs, and creating learning opportunities and resources to elevate legal and judicial practices.

Both juvenile dependency and guardianship cases involve immense potential intrusions on liberty interests.¹⁰⁵ Yet, the juvenile courts and the probate courts that hear guardianship cases are often treated as a low priority in the court hierarchy and may receive less administrative attention and resources compared to higher-profile civil and criminal divisions. The CWCIP has ameliorated that situation for juvenile dependency courts in many jurisdictions by focusing national attention on the issues and prompting new state investments in juvenile courts to implement improvement plans. Thus, the federal CWCIP not only provided direct funding for its intended goals such as judicial training and data collection and analysis; it also helped to leverage major state investments to implement CWCIP plans for improvements such as new judgeships to reduce caseloads, court-appointed counsel for parents and children, court case management systems, and alternative dispute resolution programs.

Guardianship cases, which by definition require an intrusion into the autonomy and liberty interest of an adult, are also often regarded as family matters that take up the court's time. Hopefully, these cases are taken more seriously now than they were in early state guardianship laws and practices, with minimal due process protections and lax processes, but they are often similarly considered a low priority in the court hierarchy. Like the CWCIP, a CGIP could elevate the status and regard for the serious nature of guardianship cases and encourage additional state contributions to improving the guardianship system.

¹⁰⁴ Hardin, M., *Court Improvement for Child Abuse and Neglect Litigation: What Next?*, (ABA 2001). [http://nc.casaforchildren.org/files/public/community/judges/March_2011/Hardinarticle\[1\].pdf](http://nc.casaforchildren.org/files/public/community/judges/March_2011/Hardinarticle[1].pdf).

¹⁰⁵ Commentators have referred to both guardianship and terminations of parental rights in child welfare (a frequent result in dependency cases) as a "civil death penalty." See Sell, S., *A Potential Civil Death: Guardianships of Persons with Disabilities in Utah*, 1 Utah LR 215 (2019); *In re Parental Rights to Q.L.R.* (118 Nev. 602, 608, 54 P.3d 56, 60 (2002)). See also f.n. 2, supra.

In the vast majority of cases filed in court, after a verdict or disposition is rendered, the case is over in the trial court. In juvenile dependency cases, however, court oversight often continues for many months or years until permanency objectives for a child in the court's jurisdiction are achieved.¹⁰⁶ State courts have significant oversight responsibilities over children in out-of-home care. As the national Pew Commission on Children in Foster Care pointed out, "no child enters or leaves foster care without the approval of the court."¹⁰⁷

Similarly, continued court oversight of guardianships and annual reviews are required in most, but not all states.¹⁰⁸ Some commentators have argued that a lack of periodic court review is a violation of due process.¹⁰⁹ A 2006 report notes that, "Without monitoring, the court cannot be assured of the welfare of society's most vulnerable members. Indeed, monitoring is at the very core of the court's *parens patriae* responsibility."¹¹⁰

In one author's experience as a participant in the initial CWCIP assessment in California, the ongoing nature of child protection cases post-disposition raised an immense challenge to gathering even rudimentary data about juvenile dependency cases statewide. For annual court caseload statistics, trial courts were asked only to report the number of new cases filed and the number of dispositions during the year. For most case types, filing and disposition data offer a good picture of caseload and whether caseload trends are increasing or decreasing. In juvenile dependency cases, those figures are virtually useless in determining overall caseload since a case remains on the court's docket until it is dismissed, usually after a permanency outcome (reunification, adoption, guardianship, or the child "ages out") is achieved. As a result, few local courts were able to definitively determine the number of open dependency cases.¹¹¹

The CWCIP assessments showed that data and case management deficiencies in child welfare courts was widespread. A study of 25 of the initial CWCIP state assessments found that all of them cited the need to improve case management systems to collect data in order to establish and improve timelines for processing cases to permanency.¹¹² By the time Congress

¹⁰⁶ See generally, Child Welfare Information Gateway. (2016). *Understanding child welfare and the courts*. Washington, DC: U.S. Department of Health and Human Services, Children's Bureau at <https://www.childwelfare.gov/pubs/factsheets/cwandcourts/>

¹⁰⁷ Pew Commission on Children in Foster Care, *Fostering the Future: Safety, Permanency, and Well-Being for Children in Foster Care*, (2004), p. 34. https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/0012pdf.pdf.

¹⁰⁸ See Chart: Monitoring Following Guardianship Proceedings (American Bar Association Commission on Law and Aging). https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartmonitoring.pdf.

¹⁰⁹ See, e.g., Andrews, M., *The Elderly in Guardianship: A Crisis of Constitutional Proportions*" 5 Elder L.J. 75 (1997).

¹¹⁰ Karp, N., Wood, E. *Guardianship Monitoring: a National Survey of Court Practices*, (AARP, 2006). https://assets.aarp.org/rgcenter/consume/2006_14_guardianship.pdf.

¹¹¹ As noted in sec. III(iii), *supra*, court data on guardianship cases is similarly deficient.

¹¹² National Council of Juvenile and Family Court Judges, *Technical Assistance Bulletin: Summaries of Twenty-five Court Improvement Program Assessment Reports* (1998). <https://www.ncjrs.gov/pdffiles1/Digitization/170380NCJRS.pdf>.

authorized a new CWCIP grant focused exclusively on data, as noted above, analyzing data in order to improve case timeliness had become an integral and ongoing national effort.¹¹³

The similarity of the need for better data in guardianship cases is unmistakable. As noted above, lack of data is "the greatest challenge to reform."¹¹⁴ States must have the technology and resources to be able to count and track guardianship cases in order to assess and improve performance. The inevitable coming caseload increases, especially for the aging population, intensifies that urgency. The need for a nationally coordinated focus on data for guardianship cases is already apparent.

Child welfare cases and guardianships also bear a strong similarity in the need for due process protections in an historically "informal" court. Juvenile courts, like guardianships, were founded on a *parens patriae* theory of state responsibility.¹¹⁵ For most of their history, juvenile courts did not distinguish between children who came before the court for delinquency (criminal behavior) or dependency (abuse, neglect or abandonment). All were children in need of protection and guidance under *parens patriae*.¹¹⁶ In 1967, however, the United States Supreme Court decided the landmark case of *In Re Gault*.¹¹⁷ *Gault* for the first time enumerated due process rights for children facing loss of liberty, including the right to counsel, the right to remain silent, the right to confront his or her accusers, and the right to a full hearing on the merits.

Although *Gault* was not a dependency case and, in fact, represents the separation of delinquency and dependency cases within the juvenile court, it opened the door to due process concepts in juvenile court. And it has shaped the framework for the debate over what rights should be available to parents and children when the government has authoritatively intervened in families due to alleged abuse or neglect. Although state legislatures and courts ultimately decide how to resolve most of those issues, the CWCIP provides a forum for national discussion, potential federal partnership,¹¹⁸ and sharing best practices. The recent history of adult guardianships strongly suggests the need for a similar federal program.

¹¹³ A prime example of the national focus on using data in the service of improving court processes to achieve timely permanency was the development of a series of publications comprising a court performance "toolkit" by a consortium of public and private agencies, including the Department of Health and Human Services and the Office of Juvenile Justice and Delinquency Prevention in the Department of Justice. See *Toolkit for Court Performance Measures in Child Abuse and Neglect Cases* at <https://ojjdp.ojp.gov/library/toolkit-for-court-performance-measures-in-child-abuse-and-neglect-cases>.

¹¹⁴ Sec. III(iii), *supra*.

¹¹⁵ Ventrell, Marvin, *Evolution of the Dependency Component of the Juvenile Court*, 49 *Juvenile & Family Court Journal*, no.4 (1998).

¹¹⁶ *Id.*

¹¹⁷ 387 U.S. 1 (1967).

¹¹⁸ For example, the Children's Bureau recently reversed long-standing policy to make available federal funding to support the legal representation for parents and children in juvenile dependency cases. See Children's Bureau, *Utilizing Title IV-E Funding to Support High Quality Legal Representation for Children and Youth who are in*

An important rationale for the federal government to fund the CWCIP was (and continues to be) to help ensure that the much larger federal investment in state-administered child welfare services achieves its intended goals for the safety, permanency, and well-being of children under court jurisdiction. In federal Fiscal Year (FY) 2016, the federal government spent \$2.7 billion on the foster care portion of child welfare services pursuant to Title IV-E of the Social Security Act.¹¹⁹ The CWCIP can thus be seen as a modest federal investment in the judicial branch of state government that oversees a significant portion of the much larger federal investment in child welfare services.

There is no direct analogy to the federal government's expenditures on adult guardianship. While every state has a designated child welfare agency that is the recipient of federal funds, there is no one state agency that has responsibility for outcomes of adult guardianship cases. Still, state agencies that receive federal funding, such as state units on aging, health and human services, adult protective service, disability services, may all deal with guardians or even provide public guardianship services, pay for court appointed counsel in guardianship cases, and/or offer trainings for guardians and manage certification.

During the COVID-19 public health emergency, the CWCIP has served as the framework for targeted federal COVID relief for juvenile courts. The Consolidated Appropriations Act, 2021¹²⁰ provided \$10 million in one-time funding to state courts through the CWCIP (using the same allocation formula as the ongoing grants) in order to provide for: (1) technology investments (for example, to enable child welfare cases to continue to be heard remotely); (2) training on holding effective virtual hearings; and (3) programs to help families avoid delays in legal proceedings that have resulted from COVID-19; or (4) other purposes to assist courts, court personnel, or staff related to the public health emergency.¹²¹

As discussed in the Introduction, the COVID-19 pandemic has exposed many failures of federal and state government to meet the need of older adults and people with disabilities. A GCIP could provide a framework for federal COVID relief for state guardianship courts and a mechanism for guidance for guardians.

3. Federal Funding Supports Child Welfare State Courts and Could Support Adult Guardianship Court without Violating Principles of Federalism

State courts, unlike the federal courts, are courts of general jurisdiction. Responsibility for their funding and administration is therefore reserved to the states under the 10th

Foster Care, Candidates for Foster Care and their Parents and to Promote Child and Family Well-being, (ACYF-CB-IM-21-06, January 14, 2021). <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf>.

¹¹⁹ Child Trends, *Title IV-E Spending by Child Welfare Agencies*, 2018, available at https://www.childtrends.org/wp-content/uploads/2018/12/TitleIVESFY2016_ChildTrends_December2018.pdf.

¹²⁰ P.L. 116-260

¹²¹ *Id.* Div. X, Sec. 7.

Amendment¹²² Federalism concerns about the CWCIP legislation were expressed prior to its enactment.¹²³ In addition to apprehensions about potential federal influence on state government activities, the independence of the judiciary as a separate branch of government was at issue.

Several factors have mitigated those concerns during the life of the CWCIP. As noted above, the federal government had already imposed a highly structured framework for child welfare through its funding authority; most notably, through Title IV-E funding, but also through other child welfare programs.¹²⁴ A state court could decide not to apply for the federal funding if it did not wish to abide by the restrictions, but none do. Apparently, courts perceive that the benefits of the funding outweigh any burdens resulting from participation.

In addition, the CWCIP imposed few restrictions on courts receiving the funding. They were required to design and conduct a self-assessment with the initial grant funds. Then, once the assessment was completed and received by the Children's Bureau, courts were entitled to ongoing funding to implement the assessment recommendations. The open-ended nature of the grants helped to secure the endorsement of influential court organizations, such as the American Bar Association, the Conference of Chief Justices, and the Conference of State Court Administrators for the CWCIP legislation.¹²⁵ Subsequent reauthorizations and funding legislation (such as the recent emergency pandemic relief) have included additional guidelines, but none have been onerous enough to lead an eligible state or territory to decline the relatively modest funding contained in any of the individual CWCIP grants.¹²⁶

Similarly, Congress could fund a GCIP with few restrictions on courts. Previous Congressional attempts may have failed because they were overly restrictive on states. In 1988, 1989, and 1991, both the House and Senate proposed bills setting forth national guardianship standards for states. None of these bills were enacted. Subsequent reflections concluded that the bills' approaches favoring punitive measures over incentives for state participation doomed

¹²² . States vary considerably in their approach to the funding and structure of the court system. See, e.g., McGovern, G. and Greenberg, M., *Who Pays for Justice? Perspectives on State Court Funding and Governance* (Rand Corporation, 2014), available at https://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR486/RAND_RR486.pdf.

¹²³ Email from Mark Hardin, former Director, Child Welfare, American Bar Association Center on Children and the Law, available from the authors. Mr. Hardin testified before Congress for the original CWCIP legislation.

¹²⁴ Including the Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. chap. 67, and Title IV-B of the Social Security Act (which includes the CWCIP).

¹²⁵ Hardin, *supra*, f.n.15.

¹²⁶ One commentator suggests that federal "micromanagement" in state child welfare activities has led to the unintended consequence of stifling necessary innovation. In contrast, the permissive CWCIP framework (but with relatively minuscule funding) encourages reform and innovation in the court system. See Sankaran, V., *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?* 41 U. Mich. J.L. Reform 281 (2007).

them to failure.¹²⁷ In 1992, the Senate Special Committee on Aging held a Roundtable Discussion on Guardianships, leading to a consensus among experts that a federal approach could not coerce participation or reform, but federal support to aid states in data collection and offer financial support to test innovative approaches could be successful.¹²⁸

In the Congressional hearings following the 1987 Associated Press series¹²⁹ Chairman Claude Pepper called on the federal government to recognize adult guardianship as an issue that it had to address: “The Federal Government should not continue to sit idly by, but rather, should take whatever steps necessary to ensure that the States will not abridge the rights of those least able to protect themselves.”¹³⁰ Pepper recognized the executive branch’s seeming apathy to the topic, admonishing the Department of Justice, which declined an invitation to attend the hearing, claiming the subject was not under the agency’s jurisdiction: “The American Bar Association has shown a keen interest in this matter, and I am hoping the Department of Justice will change its attitude...I hope they will realize it’s a matter of concern to the government of this country, and to the courts of this country, and to the justice system of our Nation.”¹³¹

John Regan, a pioneering elder rights scholar, testified at the hearings about the impact of the work of state agencies funded by federal statutes on guardianship. In a mismanaged cycle of federal and state funded systems, adult protective services and other intervention services relied on the guardianship system to protect the individuals who may have been abused. .¹³² Regan shared accounts of state agencies, acting under authority or responsibility conferred by the Older Americans Act, obtaining expedient and almost secret guardianship. The federal government, Regan argued, had a duty to ensure that the programs it funded did not lead to further or additional abuse and infringement of individuals’ civil rights.

Regan suggested avenues for Congress to appropriate funding for state-based guardianship reform that remain applicable today, including (1) Amending the Older Americans Act to require states to protect the rights of individuals in guardianship proceedings as a condition to receiving federal funding. (2) Requiring counsel for individuals alleged to need a guardianship, at least when the petition is initiated by a public agency utilizing federal funds. (3)

¹²⁷ Wood, Erica, History of Guardianship. In Quinn, Mary Joy (Ed.) Guardianship of Adults: Achieving Justice, Autonomy, and Safety (pp. 17-47)(Springer 2005).

¹²⁸ U.S. Senate Committee on Aging, Guardianship Roundtable Discussion, June 2, 1992, <https://www.aging.senate.gov/imo/media/doc/publications/621992.pdf>.

¹²⁹ F.n. 45, *supra*.

¹³⁰ Abuses in Guardianship of the Elderly and Infirm: A National Disgrace, A Briefing by The Chairman of the Subcommittee on Aging House of Representatives, Comm. Pub. No. 100-64, p 9 (September 25, 1987).

¹³¹ *Id.*, p. 7 (September 25, 1987).

¹³² Regan’s testimony, Abuses in Guardianship of the Elderly and Infirm: A National Disgrace, A Briefing by The Chairman of the Subcommittee on Aging House of Representatives, Comm. Pub. No. 100-64, pp. 58-62 (September 25, 1987).

Requiring state plans for SSI and Medicaid participation to give assurances that state guardianship and protective proceedings will provide adequate protection of civil rights.¹³³

Other advocates and legislators have called for an amendment to the Older Americans Act. Senator Amy Klobuchar (D-MN) and her Senate colleagues have repeatedly proposed doing so in the Court-Appointed Guardian Accountability and Senior Protection Act to fund reform initiatives. First proposed in 2012, the original bill authorized funding for state Supreme Courts to (1) assess various aspects of guardianship proceedings and (2) implement changes based on those assessments, and (3) collect data regarding those proceedings and the impact of the changes.¹³⁴ A 2015 version removed the reference to the collection of data. Finally, in 2017, Senator Klobuchar and Senator John Cornyn (R-TX) were successful in pushing a version of the bill through Congress as a part of the Elder Abuse Prevention and Prosecution Act (EAPPA), providing for similar assessments.¹³⁵ The legislative history signifies the potential for progress in securing federal funding for sustained guardianship reform, but relevant funding for EAPPA has never been appropriated.¹³⁶

4. Developing a Community of Practice

An important reason for the continued unanimous participation in the CWCIP is that the state programs evolved into a "community of practice,"¹³⁷ For many states, the CWCIP process gave child welfare cases new prominence and priority within the state Supreme Court and state court administration. National organizations, such as the American Bar Association, the National Center for State Courts, the National Council of Juvenile and Family Court Judges, the National Association of Counsel for Children, and private foundations, along with the Children's Bureau, became involved in providing various forms of training and technical assistance to the state CWCIPs.

The ABA Center on Children and the Law, with funding from the Children's Bureau, led national technical assistance efforts to the CWCIPs as the lead agency in the National Resource Center on Legal and Judicial Issues.¹³⁸ In addition to providing training and other assistance to

¹³³ Id.

¹³⁴ S. 1744, July 12, 2012, <https://www.congress.gov/112/bills/s1744/BILLS-112s1744rs.pdf>.

¹³⁵ Elder Abuse Prevention and Prosecution Act, Sec. V. P.L. 115-70-Oct. 18, 2017.
<https://www.congress.gov/115/plaws/publ70/PLAW-115publ70.pdf>.

¹³⁶ Elder Abuse Then and Now (1979-2019), Bifocal 41:2 (Nov-Dec 2019),
https://www.americanbar.org/groups/law_aging/publications/bifocal/vol-41/volume-41-issue-2/elder-abuse-then-and-now--1979-2019-/.

¹³⁷ The term "community of practice" to describe collaborative interaction among individuals and organizations in a domain of activity is a relatively recent term. See, e.g., content and resources at <https://wenger-trayner.com/introduction-to-communities-of-practice/>.

¹³⁸ In recent years, the Children's Bureau has reorganized its child welfare technical assistance providers into a trio of Capacity Building Centers (CBCs). The ABA Center on Children and the Law continues to provide assistance to CWCIPs as the lead agency of the Capacity Building Center for Courts. The other two CBCs are the

programs, the Resource Center facilitated communication among the CWCIPs and coordinated periodic national convenings to share information and best practices. These and other national activities helped to create a sense of shared purpose among CWCIPs and raised the profile of juvenile dependency courts as important components of both the court and child welfare systems.¹³⁹

In 2005, an historic national conference, “Justice for Children: Changing Lives by Changing Systems—A National Judicial Leadership Summit on the Protection of Children” took place in Minnesota. The Summit brought together teams from nearly every state and several U.S. territories. Most teams were led by their state’s Chief Justice or a judge from the state’s highest court and included the state’s director of child welfare services in addition to other key child welfare stakeholders. The Summit’s collaborative effort, focusing exclusively on children in foster care at such a high level of state authority, was unprecedented. The teams shared information and began to create collaborative state action plans for reform. Such a high-level summit was made possible partly through the groundwork for collaboration laid by the CWCIP.¹⁴⁰

The national emphasis on the court's leadership role in child welfare recognizes that the court is an integral part of the child welfare system and that achieving optimal outcomes for children and families requires collaboration between the court and child welfare agency, within professional and ethical boundaries.¹⁴¹

V. A Vision of a Guardianship Court Improvement Program (GCIP)

This “Vision” of a GCIP is not intended to provide a definitive blueprint. The CWCIP’s approach provides a natural model, but not a proscriptive template, for a GCIP. The origins of the CWCIP set a precedent for flexibility and variation among state programs: the initial funding model for a CWCIP solely required states to conduct a self-assessment, allowing the courts

Capacity Building Center for Tribes and the Capacity Building Center for States (the largest CBC, serving child welfare agencies). For more information on the CBCs, see: <https://capacity.childwelfare.gov/>.

¹³⁹ Notable national events during this time included the 2004 report of the Pew Commission on Children in Foster Care, which recommended that leaders in the judicial branch bolster the juvenile courts’ oversight of child welfare cases (see f.n. 6, supra). In the wake of the Pew Commission report, a series of National Judicial Leadership Summit meetings took place. Nearly every state sent multidisciplinary teams, often led by state chief justices, to develop and refine state action plans to improve child welfare courts. The most recent Summit took place in 2019 after a 10-year pause. See <https://www.ncsc.org/services-and-experts/areas-of-expertise/children-and-families/child-welfare-summit-2019>.

¹⁴⁰ See report: Justice for Children, Changing Lives by Changing Systems: A National Call to Action (National Center for State Courts, 2005).

https://www.ncsc.org/_data/assets/pdf_file/0022/17833/calltoactioninside.pdf. Subsequent multidisciplinary national judicial leadership summits were held in 2007, 2009, and 2019.

¹⁴¹ A classic work on the expansive role of the juvenile court judge is Edwards, L., The Juvenile Court and the Role of the Juvenile Court Judge, 43 *Juvenile & Family Court Journal* 1 (1992) available at <http://www.judgeleonardwards.com/docs/1-ROLEOFTHEJUVENILECOURTJUDGEBOOK.pdf>.

broad discretion to determine priorities areas for improvement. Just as the CWCIP grew from an initial grant to a nationwide program, evolving to meet the needs of child welfare systems, the path for a national GCIP in all U.S. states and jurisdictions would be somewhat unpredictable and driven by state efforts.

1. Choosing guardianship reform priorities

Following the compelling example of the early state CWCIP initiatives, GCIPs would first have to identify the most pressing areas in need of reform, or those which would have the greatest impact. As described in Section III, an existing well-established list of reform priorities can serve as a strong foundation for state GCIPs as they set their own agendas tailored to the particular needs of their state guardianship systems.

The agenda includes: (1) an emphasis on less restrictive options prior to the appointment of a guardian, allowing the individual to continue to make his or her own decisions and maintain autonomy; (2) procedural due process safeguards including the right to and appointment of counsel; (3) a functional determination of an adult's abilities and need for support rather than a determination based primarily on diagnosis; (4) use of judicial orders of appointment that limit the guardian's authority to only what is necessary; (5) solid court oversight and imposition of sanctions on guardians who violate the law and breach their fiduciary duties; (6) collection and maintenance of adult guardianship data; and (7) strong standards for guardian practice and training.¹⁴²

Whatever paths states might choose, given the guardianship reform movement's resounding and repeated call for data collection, it is essential to incorporate funding and technical assistance for data collection and analysis into the first building blocks of a GCIP.

In addition to data collection, courts will likely prioritize funding and technical assistance for expanding and improving their oversight and monitoring practices. The experience of many state WINGS is instructive: "The WINGS accomplishments were substantial, yet time and resource limitations precluded greater achievements. WINGS need continuing financial and technical assistance support to generate systems change, especially in targeting guardianship abuse and financial exploitation through steps to improve monitoring."¹⁴³

Finally, many early GCIPs would also seek funding to implement less restrictive options than guardianship, including supported decision-making. In the last decade, advocates, interest groups, state and federal law and policy, and the policies of national organizations like the American Bar Association and National Center for State Courts have recognized and urged

¹⁴² ABA Commission on Law and Aging, WINGS Briefing Paper: Advancing Guardianship Reform and Promoting Less Restrictive Options (2020), p. 7, https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-wings-briefing-paper.pdf.

¹⁴³ *Id.* 16.

implementation of “supported decision-making.” According to ABA policy, “Guardianship practice involves a third party, the guardian, making decisions *for* the individual subject to guardianship, using a variety of standards. By contrast, supported decision-making focuses on *supporting* the individual’s own decisions.”¹⁴⁴ Supported decision-making is an essential tool in ensuring guardianships are only appointed when there is no alternative. When setting priorities for their pilot projects, six out of seven WINGS programs rated highly the availability or use of less restrictive options and decision supports. Four WINGS used their pilot program funding to develop initiatives to support the use of supported decision-making.¹⁴⁵

2. Federal infrastructure

Authorizing legislation should designate a federal agency to supervise and distribute funds for a national GCIP. The Administration for Community Living of the U.S. Department of Health and Human Services is a likely option, given its role in funding services and supports to ensure older adults and people of all ages with disabilities should be able to live where they choose, with the people they choose, and with the ability to participate fully in their communities.¹⁴⁶ And, the CWCIP is administered by another agency within the Department of Health and Human Services, the Children’s Bureau.¹⁴⁷

Another possibility is the State Justice Institute (SJI), a nonprofit corporation created by Congress in 1984 to “further the development and adoption of improved judicial administration in State courts in the United States.”¹⁴⁸ SJI administers grants to state courts and supporting agencies in many subject areas. It is governed by a bipartisan Board of Directors appointed by the President with the advice and consent of the Senate.¹⁴⁹

3. State court infrastructure

Many, if not all, state courts already have an existing infrastructure to host a GCIP. Every state court has a designated child welfare court improvement program staff coordinator familiar with the court improvement model and accustomed to interagency collaboration and accessing national capacity building resources. And, child welfare court improvement program staff often work with or serve as the WINGS coordinator.

¹⁴⁴ American Bar Association, Resolution 113 (2017),

https://www.americanbar.org/content/dam/aba/administrative/law_aging/2017_SDM_%20Resolution_Final.pdf.

¹⁴⁵ ABA Commission on Law and Aging, WINGS Briefing Paper: Advancing Guardianship Reform and Promoting Less Restrictive Options (2020), p. 12,

https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-wings-briefing-paper.pdf.

¹⁴⁶ [Home Page | ACL Administration for Community Living](#) (last visited January 14, 2021).

¹⁴⁷ [Court Improvement Program - Child Welfare Information Gateway](#) (last visited January 14, 2021).

¹⁴⁸ 42 USC 10702(a).

¹⁴⁹ See the SJI web site at <https://www.sji.gov/>.

States with existing WINGS and similar groups may be starting at an advantage as compared with initial CWCIPs. Most WINGS are administered by the state's highest court, cementing the court's buy-in and support. However, there are notable exceptions of successful WINGS that exist outside the state court and enjoy more autonomy. Regardless of whether a WINGS is located within or outside a court, these groups can provide a springboard for interagency/court collaboration.

4. Technical Assistance and Capacity Building

To assist courts with self-assessments and, ultimately, to address the identified issues, the CWCIP's Continuous Quality Improvement (CQI) process provides an excellent model to monitor and report progress. CQI is a major component of state court improvement programs for child welfare courts, providing courts with an opportunity to examine their projects and activities to ensure efficient and effective use of resources and successful interventions.¹⁵⁰

As this paper has shown, the urgent national needs for practice reforms, improved data, collaboration between courts, agencies, and community stakeholders, and multidisciplinary training in how the courts handle guardianship cases closely parallel the purposes of the CWCIP. Congress should therefore consider appropriating funding at a level similar to the \$30 million currently authorized for the CWCIP. The allocation formula for the CWCIP, which is based on the child population in each state, could simply be adjusted to incorporate the adult population instead. Each population represents the class of potential subjects of litigation in the respective case type. The rationale for carving out a portion of the funding for competitive tribal grants, as is done in the CWCIP, also exists in guardianships.

A court capacity-building or national resource center would serve as a clearinghouse for resources and experts on best practices for courts. The center would maintain contact with all state program directors and provide guidance for each requirement and step in the program. Such a center could also help to unify disparate guardianship systems' approaches to best practices and identify and implement training gaps and needs across the nation.

As demonstrated by the CWCIP, there is great value in establishing a network of state courts and agencies across the country for information sharing. Currently, there is no nationally coordinated effort to provide a forum for state guardianship systems or courts to interact. The ABA Commission on Law and Aging has provided such a forum for the approximately twenty-five states with a WINGS or similar group. Through in-person meetings (when funding was available) to video conference calls, WINGS coordinators eagerly participate and appreciate the opportunity to share valuable information and resources.

¹⁵⁰ See, e.g., [State of Connecticut Judicial Branch, State Court Improvement Program, Continuous Quality Improvement](#) (last visited, February 1, 2021).

VI. Conclusion

Given the demographic trends for the vulnerable populations served, and the complex, interdisciplinary nature of the systems involved in guardianship cases, and the need for courts and stakeholders to plan and implement long-term improvements, there is no time to waste for Congress to authorize and fund a Guardianship Court Improvement Program.

1. Recommendations

In summary, we make the following recommendations for ensuring a significant and successful GCIP:

1. Congress should provide funding directly to the highest court in each participating state or territory in a Guardianship Court Improvement Program (GCIP) modelled on the existing Child Welfare Court Improvement Program (CWCIP). Since the urgent national needs for practice reforms including court oversight and implementation of less restrictive options, improved data collection, collaboration between courts, agencies, and community stakeholders, and multidisciplinary training in how the courts handle guardianship cases closely parallels the purposes of the CWCIP, Congress should consider appropriating funding at a level similar to the \$30 Million currently authorized for the CWCIP.
2. Respecting principles of federalism and the diverse needs of the state courts, the GCIP should give wide latitude to the state courts to set priorities and create implementation plans. Congress should consider the efficacy of incorporating an initial planning grant into the GCIP framework.
3. Funding for the GCIP should be made available to all states and territories that agree to participate pursuant to a formula based on the adult population of the jurisdiction. Funding should also be made available to tribes with courts that exercise jurisdiction over guardianships or a similar process through a competitive grant process.
4. Courts receiving GCIP funds should consider at least the following elements in analyzing their needs and formulating improvement plans:
 - a. An emphasis on less restrictive options, including supported decision-making, prior to the appointment of a guardian, allowing the individual to continue to make his or her own decisions and maintain autonomy;
 - b. Procedural due process safeguards including the right to and appointment of counsel;
 - c. Utilizing a functional determination of an adult's abilities and need for support rather than a determination based primarily on diagnosis;
 - d. Use of judicial orders of appointment that limit the guardian's authority to only what is necessary;

- e. Solid court oversight and imposition of sanctions on guardians who violate the law and breach their fiduciary duties;
 - f. Collection and maintenance of adult guardianship data; and
 - g. Strong standards for guardian practice and training
5. Authorizing legislation for a GCIP should designate a federal agency, such as the Administration on Community Living or the State Justice Institute to supervise and distribute funds to state courts.
 6. GCIP legislation should create a national capacity building or resource center to provide training and technical assistance to state programs and to coordinate national efforts.