

**THE CASE FOR A GUARDIANSHIP COURT
IMPROVEMENT PROGRAM:
FEDERAL FUNDING TO STATE COURTS COULD
IMPROVE GUARDIANSHIP SYSTEMS & THE LIVES
OF MILLIONS OF OLDER ADULTS & PEOPLE WITH
DISABILITIES**

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TABLE OF CONTENTS

INTRODUCTION	496
I. THE EVOLUTION OF GUARDIANSHIP AS A STATE-BASED INSTITUTION	501
A. <i>Guardianship Law is State Law</i>	501
B. <i>Advocates Take on Guardianship Laws</i>	503
II. THE HISTORY OF GUARDIANSHIP REFORM	505
A. <i>Expanding Reform Beyond Statutory Amendments</i>	505
B. <i>1987: A Call to Action</i>	506
C. <i>Advocates Focus on Interdisciplinary Efforts</i>	507
D. <i>Challenges to Reform: Lack of Data</i>	510
E. <i>WINGS: Moving Closer Toward Reform Goals but Sustained Support is Still Lacking</i>	512
III. THE CHILD WELFARE COURT IMPROVEMENT PROGRAM: A MODEL FOR A SUCCESSFUL GCIP	516
A. <i>Evolution of the Court Improvement Program in Child Welfare Cases</i>	516
B. <i>CWCIP: 30 Years of Lessons Learned for a New GCIP</i>	518
C. <i>Federal Funding Supports Child Welfare State Courts & Could Support Adult Guardianship Court Without Violating Principles of Federalism</i>	525
D. <i>Developing a Community of Practice</i>	528
IV. A VISION OF A GUARDIANSHIP COURT IMPROVEMENT PROGRAM (“GCIP”)	530
A. <i>Choosing Guardianship Reform Priorities</i>	531

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B. *Federal Infrastructure* 532
C. *State Court Infrastructure* 533
D. *Technical Assistance and Capacity Building* 533
V. CONCLUSION 534
A. *Recommendations* 535

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.¹ 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 for courts to 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,

1. 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.”

2022] **The Case for a Guardianship Ct. Improvement Program** 497

exacerbating the strain on state courts.² 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.³ As the population of individuals sixty-five and older, and in particular individuals eighty-five and older, rapidly expands in the next few decades,⁴ so too will the number of people living with Alzheimer's and other dementias.⁵ 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.⁶

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.⁷ 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

2. CONF. OF CHIEF JUSTS. & CONF. OF STATE CT. ADM'RS., RESOLUTION 14: ENCOURAGING COLLECTION OF DATA ON ADULT GUARDIANSHIP, ADULT CONSERVATORSHIP, AND ELDER ABUSE CASES BY ALL STATES (2009), https://www.eldersandcourts.org/__data/assets/pdf_file/0016/23704/08012009-encouraging-collection-of-data-on-adult-guardianship-adult-conservatorship.pdf.

3. NAT'L. COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 37, 44 (2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf (“People under adult guardianship – even those who are in the aging population – are people with disabilities by definition . . .”).

4. ADMIN. FOR CMTY. LIVING, 2019 PROFILE OF OLDER AMERICANS 3–4 (2019), https://acl.gov/sites/default/files/Profile%20of%20OA/2020ProfileOlderAmericans_RevisedFinal.pdf.

5. ALZHEIMER'S ASS'N, 2020 ALZHEIMER'S DISEASE FACTS AND FIGURES 18 (2020), https://www.alz.org/media/Documents/alzheimers-facts-and-figures_1.pdf.

6. NAT'L. COUNCIL ON DISABILITY, *supra* note 3, at 66.

7. BRENDA K UEKERT & RICHARD VAN DUIZEND, NAT'L CTR. FOR STATE COURTS, ADULT GUARDIANSHIPS: A “BEST GUESS” NATIONAL ESTIMATE AND THE MOMENTUM FOR REFORM 109 (2011), <https://ncsc.contentdm.oclc.org/digital/collection/ctadmin/id/1846>.

for limited guardianship,⁸ but anecdotal data suggests most guardians are appointed with plenary powers.⁹

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 1987.¹⁰ 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.”¹¹ In the last two decades, the U.S. Government Accountability Office profiled numerous cases of guardians who financially exploited or neglected older adults.¹²

8. Ellie Crosby Lanier, *Understanding the Gap Between Law and Practice: Barriers and Alternatives to Tailoring Adult Guardianship Orders*, 36 BUFF. PUB. INT. L. J. 155, 156 (2019).

9. See AM. BAR ASS’N COMM. ON L. & AGING, LESS RESTRICTIVE ALTERNATIVE REFERENCES IN STATE GUARDIANSHIP STATUTES (2018), https://www.americanbar.org/content/dam/aba/administrative/law_aging/06-23-2018-lra-chart-final.pdf; see also AM. BAR ASS’N COMM. ON L. & AGING, LIMITED GUARDIANSHIP OF THE PERSON AND PROPERTY (2017), https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartlimitedguardianshipofthepersonandproperty.pdf; see also AM. BAR ASS’N COMM. ON DISABILITY RTS., RES. 113, at 2 (2017), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2017/2017-am-113.pdf>; see also UNIF. GUARDIANSHIP, CONSERVATORSHIP AND OTHER PROTECTIVE ARRANGEMENTS ACT § 301(a)(1) (UNIF. L. COMM’N 2017).

10. Bridget Balch, *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; Monivette Cordeiro, *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>; Rachel Aviv, *How the Elderly Lose Their Rights*, THE NEW YORKER (Oct. 2, 2017), <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>; Colleen Heild, *Who Guards the Guardians? Ayudando was a Family Affair*, ALBUQUERQUE J. (Jul. 29, 2017), <https://www.abqjournal.com/1040519/ayudando-guardian-firm-was-a-family-affair.html>.

11. U.S. SENATE SPECIAL COMM. ON AGING, ENSURING TRUST: STRENGTHENING STATE EFFORTS TO OVERHAUL THE GUARDIANSHIP PROCESS AND PROTECT OLDER AMERICANS 5 (2018), https://www.aging.senate.gov/imo/media/doc/Guardianship_Report_2018_gloss_compre ss.pdf.

12. U.S. GOV’T. ACCOUNTABILITY OFF., GAO-17-33, ELDER ABUSE: THE EXTENT OF ABUSE BY GUARDIANS IS UNKNOWN, BUT SOME MEASURES EXIST TO HELP PROTECT

2022] **The Case for a Guardianship Ct. Improvement Program** 499

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.¹³ 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 guardianships.¹⁴ 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

OLDER ADULTS 3 (2016), <https://www.gao.gov/assets/690/681088.pdf> (acknowledging "the extent of elder abuse by guardians nationally is unknown due to limited data.").

13. AM. BAR ASS'N COMM'N ON LAW & AGING, WINGS BRIEFING PAPER: ADVANCING GUARDIANSHIP REFORM AND PROMOTING LESS RESTRICTIVE OPTIONS 16 (2020), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-wings-briefing-paper.pdf, [hereinafter WINGS BRIEFING PAPER], ("[T]he extent of elder abuse by guardians nationally is unknown due to limited data.").

14. U.S. SENATE SPECIAL COMM. ON AGING, *supra* note 11, at 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).

workers.¹⁵ 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 1993.¹⁶ 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.¹⁷

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 Delegates, and the National Council on Disability have expressed support for a GCIP.¹⁸ Just as it did with the CWCIP, Congress can

15. Memorandum from the Director, Dep't. Health & Hum. Servs. Ctr. for Medicare & Medicaid Servs., to State Survey Agency Dirs. (Sept. 17, 2020), <https://www.cms.gov/files/document/qso-20-39-nh.pdf>.

16. See *infra* Section IV; see also *Court Improvement Program*, DEP'T. HEALTH & HUM. SERVS.: ADMIN. FOR CHILD. & FAMILIES (May 17, 2012), <https://www.acf.hhs.gov/cb/grant-funding/court-improvement-program>.

17. CONF. OF STATE CT. ADM'RS, THE DEMOGRAPHIC IMPERATIVE: GUARDIANSHIPS AND CONSERVATORSHIPS 17 (2010), https://cosca.ncsc.org/data/assets/pdf_file/0009/6030/cosca-white-paper-2010.pdf.

18. CONF. OF CHIEF JUSTS. & CONF. OF STATE CT. ADM'RS, RES. 3: IN SUPPORT OF THE GUARDIANSHIP ACCOUNTABILITY AND SENIOR PROTECTION ACT, at 2 (adopted Feb. 1, 2012), https://ccj.ncsc.org/_data/assets/pdf_file/0024/23649/02012012-in-support-of-the-guardian-accountability-and-senior-protection-act.pdf; AM. BAR ASS'N, RES. 105, at 1, (adopted Aug. 3-4, 2020), <https://www.americanbar.org/content/dam/aba/directories/policy/annual-2020/105->

2022] **The Case for a Guardianship Ct. Improvement Program** 501

fund such a program without encroaching on the independence of state courts.

In the next Section (I) we will describe the origins of American guardianship as a state-run institution, with virtually no federal influence or support. Section II 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 III 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 IV lays out a theoretical blueprint for a GCIP. This paper concludes with specific recommendations for a new Guardianship Court Improvement Program.

I. THE EVOLUTION OF GUARDIANSHIP AS A STATE-BASED INSTITUTION

A. *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.¹⁹ This prerogative did not extend to providing a social safety net for individuals with disabilities who needed support and protection from harm.²⁰

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.²¹ 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

annual-2020.pdf [hereinafter AM. BAR ASS’N, RES. 105]; NAT’L COUNCIL ON DISABILITY, *supra* note 3, at 22; Amanda Robert, *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>.

19. Annina M. Mitchell, *The Objects of Our Wisdom and Our Coercion: Involuntary Guardianship for Incompetents*, 52 S. CAL. L. REV. 1405, 1409 (1978).

20. See Charles P. Sabatino & Suzanna L. Basinger, *Competency: Reforming Our Legal Fictions*, 6 J. MENTAL HEALTH & AGING 119, 122 (2000).

21. See NAT’L COUNCIL ON DISABILITY, *supra* note 3, at 54 (citing *Parens Patriae*, BLACK’S LAW DICTIONARY (11th ed. 2019)).

individuals who need assistance.²² *Parens patriae* traversed the Atlantic with the early British colonists, allowing states to protect those unable to protect themselves.²³ For example, a 1702 Connecticut law charged the 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.²⁵ 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."²⁶ The 1845 case *In re Oakes* drew attention to the questionable choice of committing an elderly man because he was engaged to a "young woman of unsavory character."²⁷ 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.²⁸

By the mid-twentieth century, state statutory law bifurcated courts' jurisdiction into two protective processes for people deemed "incompetent" or "incapacitated."²⁹ 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.³⁰ Alternatively, courts could appoint a guardian to manage the property and, eventually, the personal affairs of those who could not protect themselves.³¹

Consistent with *parens patriae*, early state guardianship laws were designed to protect property, with minimal acknowledgment of

22. Erica Wood, *History of Guardianship*, in *GUARDIANSHIPS OF ADULTS: ACHIEVING JUSTICE, AUTONOMY, AND SAFETY* 17, 19 (Helvi Gold & Brian Black eds., 2005).

23. *Id.*

24. NAT'L COUNCIL ON DISABILITY, *supra* note 3, at 54.

25. *Id.*

26. Wood, *supra* note 22, at 19 (stating that the first mental hospital was founded in Williamsburg, VA in 1753).

27. *Id.* at 19–20; *see also In re Oakes*, 1845 Mass. LEXIS 193 at *10–11 (Mass. 1845).

28. Wood, *supra* note 22, at 20; *see also* NAT'L COUNCIL ON DISABILITY, *supra* note 3, at 55.

29. *See* Wood, *supra* note 22, at 20.

30. *See* NAT'L COUNCIL ON DISABILITY, *supra* note 3, at 55.

31. *See* Wood, *supra* note 22, at 20.

2022] **The Case for a Guardianship Ct. Improvement Program** 503

individual rights and due process protections.³² Bluntly stated: “Informality is the hallmark of incompetency [guardianship] proceedings.”³³ Unlike the essential protections guaranteed to criminal defendants, such as court appointed counsel and notice,³⁴ 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.³⁵ Guardianship proceedings were relaxed and untethered to rules of evidence and procedure, due to their allegedly “non-adversarial” nature, with all parties purportedly sharing a common goal to protect the individual’s best interests.³⁶

B. 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.³⁷

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.”³⁸ 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

32. See Sabatino & Basinger, *supra* note 20, at 122.

33. John J. Regan, *Protective Services for the Elderly: Commitment, Guardianship, and Alternatives*, 13 WM. & MARY L. REV. 569, 605 (1972).

34. Mitchell, *supra* note 19, at 1412.

35. *Id.* at 1415.

36. See NAT’L COUNCIL ON DISABILITY, *supra* note 3, at 54–55.

37. *See id.*

38. *Id.* at 55.

implemented, due process requires that it not be invoked indiscriminately.³⁹

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.⁴⁰ 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.⁴¹ At least one scholar predicted that this increase in guardianship would lead to guardianship statutes becoming “a 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.”⁴²

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-or-nothing character of the control over the ward ... is too sweeping.”⁴³ 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.⁴⁴ 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.⁴⁵ 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

39. *O’Connor v. Donaldson*, 422 U.S. 563, 583 (1975) (Burger, C.J., concurring).

40. *See Mitchell*, *supra* note 19, at 1413.

41. *See NAT’L COUNCIL ON DISABILITY*, *supra* note 3, at 44–45.

42. *Mitchell*, *supra* note 19, at 1413.

43. *Regan*, *supra* note 33, at 608.

44. *See NAT’L COUNCIL ON DISABILITY*, *supra* note 3, at 47 (outlining a timeline of major legislative and policy initiatives for guardianship law from 1975–2017).

45. *Id.* at 53.

2022] **The Case for a Guardianship Ct. Improvement Program** 505

(UGCOPAA).⁴⁶ As of the publication of this article, only Maine and Washington have adopted the full UGCOPAA.⁴⁷

II. THE HISTORY OF GUARDIANSHIP REFORM

A. *Expanding Reform Beyond Statutory Amendments*

Until the late 1980s, statutory amendments were the primary demonstration of efforts towards reform, with a few notable exceptions.⁴⁸ 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.⁴⁹ 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 need to maximize autonomy of the elderly ward, using the least restrictive alternative for his/her particular needs.⁵⁰

46. *Id.*; see *About Us*, UNIF. L. COMM'N, <https://www.uniformlaws.org/aboutulc/overview> (last visited Feb. 9, 2022); see also UNIF. GUARDIANSHIP, CONSERVATORSHIP AND OTHER PROTECTIVE ARRANGEMENTS ACT (UNIF. L. COMM'N 2017).

47. See *2017 Enactment Map: Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c> (last visited Feb. 9, 2022).

48. See Sally Hurme & Erica Wood, *Introduction: Third National Guardianship Summit: Standards of Excellence*, 2012 UTAH L. REV. 1157, 1158 (2012) (“[T]here were some important early stirrings of reform . . . it was not until 1987 that things began to speed up. Like a shaft of light came the massive Associated Press report . . .”).

49. Wood, *supra* note 22, at 21.

50. *Id.* at 22 (quoting *Statement of Recommended Judicial Practices*, AM. BAR ASS'N COMM'N ON LEGAL PROBLEMS OF THE ELDERLY & NAT'L JUD. COLL. (1986)).

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.⁵¹ Regional discrepancies between and within states continue today.⁵² 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.

B. 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 fifty states and the District of Columbia, titled "*Guardians of the Elderly: An Ailing System.*"⁵³ Dozens of AP journalists reviewed 2,200 randomly selected guardianship court files, finding widespread failure to monitor guardianships post appointment.⁵⁴ In what remains one of the few efforts to collect national statistics,⁵⁵ 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.⁵⁶

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."⁵⁷ Judges rationed judicial review to address budgetary constraints.⁵⁸ A Phoenix, Arizona probate

51. See Wood, *supra* note 22, at 20.

52. See *id.*

53. See Fred Bayles & Scott McCartney, *Part I: Declared "Legally Dead" by a Troubled System*, in *Guardians of the Elderly: An Ailing System*, AP SPECIAL REPORT, in *ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE*, H.R. COMM. PRINT 100-639, at 13 (1987). (The Associated Press published a six-part series detailing its findings.)

54. *Id.*

55. ERICA F. WOOD, AM. BAR ASS'N COMM'N ON L. AND AGING, STATE LEVEL ADULT GUARDIANSHIP DATA: AN EXPLORATORY SURVEY 11 (2006), <https://ncea.acl.gov/NCEA/media/docs/archive/State-Level-Guardianship-Data-2006.pdf> [hereinafter STATE LEVEL ADULT GUARDIANSHIP DATA].

56. Bayles & McCartney, *supra* note 53, at 13, 32.

57. *Id.* at 13.

58. *Id.* at 33.

2022] The Case for a Guardianship Ct. Improvement Program 507

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.”⁵⁹ 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.”⁶⁰ A probate judge in Rhode Island spoke frankly: “I don’t know where the wards are, who’s caring for them, what 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.”⁶¹

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.”⁶² 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; eighty-four 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.⁶³

C. 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.”⁶⁴ 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.”⁶⁵

Across the country, advocates and stakeholders became increasingly connected and committed to working together towards reform. In 1988 guardian programs, advocates, attorneys, and other

59. *Id.* at 32.

60. *Id.*

61. Bayles & McCartney, *supra* note 53, at 14.

62. *Id.* at 15.

63. *Id.* at 3, 24–25.

64. Hurme & Wood, *supra* note 48, at 1160.

65. *Id.*

experts formed the National Guardianship Association (NGA).⁶⁶ 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).⁶⁷ In 2002, a collaborative group of national organizations dedicated to effective adult guardianship law and practice convened the National Guardianship Network (NGN).⁶⁸

In 1988,⁶⁹ 2001, and 2011, guardianship reform advocates convened major conferences and laid the foundation for a national guardianship reform agenda that remains current today.⁷⁰ 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.⁷¹

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

66. *Ethical Principles*, NAT'L GUARDIANSHIP ASS'N, <https://www.guardianship.org/education/publications/ethical-principles/> (last visited Jan. 29, 2022) [hereinafter *Ethical Principles*].

67. *Who We Are*, NAT'L GUARDIANSHIP ASS'N, <https://www.guardianship.org/about-us/who-we-are/> (last visited Jan. 29, 2022) [hereinafter *Who We Are*]; *Ethical Principles*, *supra* note 66.

68. See *Who We Are*, *supra* note 67.

69. See Am. Bar Ass'n, *Guardianship: An Agenda for Reform: Recommendations of the National Guardianship Symposium*, 13 MENTAL & PHYSICAL DISABILITY L. REP. 271, 274 (1989).

70. See *Guardianship Summits*, NAT'L GUARDIANSHIP NETWORK, https://www.naela.org/NGN_PUBLIC/Summits/NGN_PUBLIC/Summits.aspx?hkey=7570beee-1b84-4e09-90c7-7146dada6a9a (last visited Feb. 8, 2022) (for an overview of national guardianship reform conferences from 1989 through 2011).

71. WINGS BRIEFING PAPER, *supra* note 13, at 7.

2022] **The Case for a Guardianship Ct. Improvement Program** 509

entities.⁷² The concept gained support from national organizations,⁷³ culminating in a fervent push for the formation of Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) at the 2011 Third National Guardianship Summit.⁷⁴ Since the 2011 Summit, around half of states across the nation have formed a WINGS or similar group.⁷⁵ 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.”⁷⁶ The 2011 recommendations provided several possible roles for WINGS, including encouraging and supporting the collection of data.⁷⁷

In addition to supporting WINGS, national organizations have documented support for a GCIP in the last decade.⁷⁸ 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);⁷⁹
- National Council on Disability, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* (2018);⁸⁰
- American Bar Association, *In Support of The Guardian Accountability and Senior Protection Act*, ABA Resolution 105, adopted August 3 – 4, 2020;⁸¹

72. See Hurme & Wood, *supra* note 48, at 1188.

73. See *id.* (noting that 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).

74. WINGS BRIEFING PAPER, *supra* note 13, at 9–10.

75. *Id.* at 10.

76. See John Kania & Mark Kramer, *Collective Impact*, STAN. SOC. INNOVATION REV. 36 (Winter 2011) (introducing and defining the term “collective impact”); see also WINGS BRIEFING PAPER, *supra* note 13, at 16–17.

77. *Third National Guardianship Summit Standards and Recommendations*, 2012 UTAH L. REV. 1191, 1204.

78. CONF. OF CHIEF JUSTS. & CONF. OF STATE CT. ADM’RS, *supra* note 18.

79. See generally *id.*

80. See generally NAT’L COUNCIL ON DISABILITY, *supra* note 3.

81. See generally AM. BAR ASS’N, RES. 105, *supra* note 18.

- American Bar Association Commission on Law and Aging, WINGS Briefing Paper: Advancing Guardianship Reform and Promoting Less Restrictive Options (2020);⁸²
- The Fourth National Guardianship Summit which took place virtually in May 2021.⁸³

D. 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.⁸⁴ Courts need a major investment in court technology, training, and standardized management to improve collection practices.⁸⁵

82. See generally WINGS BRIEFING PAPER, *supra* note 13.

83. Symposium, *Fourth National Guardianship Summit Standards & Recommendations*, 72 SYRACUSE L. REV. 29, 29–40 (2022). Delegates to the Summit approved recommendations urging Congress to create and fund a guardianship court improvement program, specifically:

“Recommendation 6.1: Congress should establish a Guardianship Court Improvement Program modelled on the successful Child Welfare Court Improvement Program, and provide funding directly to the highest court in each participating state in order to enhance the rights and well-being of adults subject to, or potentially subject to, guardianship by:

- Effectuating consistent and meaningful data collection.
- Improving oversight and accountability.
- Avoiding unnecessary or overbroad guardianship.
- Enhancing collaboration and education among courts, agencies, and organizations that have an impact on adults subject to, or potentially subject to, guardianship.

Recommendation 6.2: The Guardianship Court Improvement Program should include:

- Inter-agency and multi-disciplinary collaboration among guardianship stakeholders, building upon groups such as Working Interdisciplinary Networks of Guardianship Stakeholders.
- Funding authorized at a level similar to the \$30 million per year currently authorized for the Child Welfare Court Improvement Program and allocated on a formula basis.
- Wide latitude given to participating courts to set priorities and create implementation plans after an initial assessment and planning period.

Recommendation 6.3: The Guardianship Court Improvement Program legislation should include creation of a national, non-profit capacity-building and/or resource center with appropriate expertise to provide training, technical assistance, and collaborative learning opportunities to participating courts and to coordinate national efforts.” *Id.* at 39–40.

84. STATE LEVEL ADULT GUARDIANSHIP DATA, *supra* note 55, at 6.

85. *Id.* at 7; BRENDA K. UEKERT, ADULT GUARDIANSHIP COURT DATA AND ISSUES: RESULTS FROM AN ONLINE SURVEY 8 (2010),

2022] **The Case for a Guardianship Ct. Improvement Program** 511

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.⁸⁶

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 research.”⁸⁷ States simply could not collect and analyze data.⁸⁸ 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.⁸⁹

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.”⁹⁰

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

<https://www.flcourts.org/content/download/404559/file/Adult-Guardianship-Court-Data-and-Issues-Results-from-an-Online-Survey-2010.pdf>.

86. Brenda K. Uekert & Richard Y. Schauffler, *Caseload Highlights: The Need for Improved Guardianship Data*, 15 CT. STAT. PROJECT, 1 (2008), http://www.courtstatistics.org/_data/assets/pdf_file/0021/23970/15_2_adult_guardianship_data.pdf.

87. A. Frank Johns & Charlie P. Sabatino, *Wingspan—The Second National Guardianship Conference: Introduction*, 31 STETSON L. REV. 573, 593 (2002).

88. See STATE LEVEL ADULT GUARDIANSHIP DATA, *supra* note 55, at 11 (providing a survey of the few attempts to collect data between 1987 and 2003).

89. U.S. GOV'T ACCOUNTABILITY OFF., GAO-04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE 31 (2004).

90. Hurme & Wood, *supra* note 48, at 1162.

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 Resource Center on Guardianship to serve as a central clearinghouse for guardianship data and research.⁹¹ The Report's recommendations were supported by the Conference of State Court Administrators in 2012.⁹²

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."⁹³ Without data on guardianships, the NCD report noted, there is no way to confirm whether guardianships are increasing or decreasing, providing little ammunition for advocates to urge policymakers to address problems.⁹⁴

E. WINGS: Moving Closer Toward 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.⁹⁵ 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

91. CONF. OF STATE CT. ADM'RS, *supra* note 17, at 15–16 (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).

92. *See generally* CONF. OF CHIEF JUSTS. & CONF. OF STATE CT. ADM'RS, *supra* note 18.

93. NAT'L COUNCIL ON DISABILITY, *supra* note 4, at 65.

94. *Id.* at 66.

95. *Elder Justice Innovation Grants*, ADMIN. FOR CMTY. LIVING (Sept. 12, 2018), <https://acl.gov/programs/elder-justice/elder-justice-innovation-grants-0>; *What is NAMRS?*, NAT'L ADULT MALTREATMENT REPORTING SYS., <http://namrs.acl.gov> (last visited Feb. 10, 2022); *Managing Someone Else's Money*, CONSUMER FIN. PROT. BUREAU, <https://www.consumerfinance.gov/consumer-tools/managing-someone-elses-money/> (last visited Feb. 10, 2022).

2022] **The Case for a Guardianship Ct. Improvement Program** 513

guardianship, including supported decision-making.⁹⁶ 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).⁹⁷ 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.⁹⁸

More directly, federal monies have supported state-based guardianship reform efforts by funding a limited number of Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS).⁹⁹ 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.¹⁰⁰ 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.¹⁰¹

WINGS are ongoing court-stakeholder partnerships that drive guardianship reform by bringing together representation from a wide range of perspectives to problem solve systemic issues.¹⁰² Most WINGS are organized at the state level and are hosted or supported by the state's highest court, although there are some promising examples of local WINGS at the county level.¹⁰³ WINGS stakeholders include, but are not limited to court and judicial leaders, state agencies on aging, protection & advocacy agencies representing people with disabilities, development disability agencies, adult protective services,

96. *Supported Decision Making Program*, ADMIN. FOR CMTY. LIVING, <https://acl.gov/programs/consumer-control/supported-decision-making-program> (last modified July 2, 2021).

97. *Id.*

98. *About*, NAT'L RES. CTR. FOR SUPPORTED DECISION-MAKING, <http://www.supporteddecisionmaking.org/about> (last visited Feb. 10, 2022).

99. *See About the ACL Grant*, AM. BAR ASS'N (May 27, 2020), https://www.americanbar.org/groups/law_aging/resources/wings-court-stakeholder-partnerships0/about-the-grant/.

100. *State WINGS*, AM. BAR ASS'N (Dec. 23, 2021), https://www.americanbar.org/groups/law_aging/resources/wings-court-stakeholder-partnerships0/state-wings/ [hereinafter *State Wings*] (SJI funded pilot WINGS in New York, Oregon, Texas, Utah, District of Columbia, Indiana, Minnesota, and Washington).

101. WINGS BRIEFING PAPER, *supra* note 13, at 4.

102. *WINGS Court-Stakeholder Partnerships*, AM. BAR ASS'N, https://www.americanbar.org/groups/law_aging/resources/wings-court-stakeholder-partnerships0/court-stakeholder-partnerships/ (last visited Feb. 10, 2022).

103. WINGS BRIEFING PAPER, *supra* note 13, at 14.

attorneys, bar associations, legal services programs, health, long-term care, and behavioral services agencies, Social Security representatives, professional and family guardians, and self-advocates.¹⁰⁴

The Commission on Law and Aging's work on WINGS from 2016–2020 marks a pivotal period in guardianship reform, supporting several states to expand or create their own programs under a common framework—to 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.¹⁰⁵

Under the grant, seven state courts were awarded modest, one-time amounts of \$20,000 to \$30,000 for their pilot WINGS programs.¹⁰⁶ 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.¹⁰⁷

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.¹⁰⁸

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.¹⁰⁹ Through regular calls and

104. *WINGS Brochure*, AM. BAR ASS'N, https://www.americanbar.org/content/dam/aba/administrative/law_aging/final-wings-brochure.pdf (last visited Feb. 10, 2022).

105. *About the ACL Grant*, *supra* note 99.

106. WINGS BRIEFING PAPER, *supra* note 13, at 10. The seven pilot programs were in Alabama, Alaska, Florida, Idaho, Indiana, Oregon, and Utah.

107. *Id.* at 11.

108. *Id.* at 14–15.

109. *Id.* at 11.

2022] The Case for a Guardianship Ct. Improvement Program 515

intensive forums, WINGS leaders eagerly shared feedback on state specific issues and discussed national guardianship reform.¹¹⁰

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.¹¹¹ 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.¹¹²

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

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.¹¹³

Ultimately, discretionary funding will never be enough for systemic guardianship reform.¹¹⁴ 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.¹¹⁵ Some of the earliest WINGS, founded with monies from the original SJI grants, have not

110. *Id.*

111. WINGS BRIEFING PAPER, *supra* note 13, at 23.

112. *Id.* at 21.

113. *Id.* at 4–5.

114. *See id.* at 19.

115. *See State WINGS*, *supra* note 100.

survived.¹¹⁶ Other WINGS rely exclusively on the volunteered time and resources of stakeholders.¹¹⁷

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.”¹¹⁸

III. THE CHILD WELFARE COURT IMPROVEMENT PROGRAM: A MODEL FOR A SUCCESSFUL GCIP

A. 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 1993.¹¹⁹ 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.

The CWCIP was enacted in the Omnibus Budget Reconciliation Act of 1993.¹²⁰ 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.¹²¹

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

116. *Id.*

117. WINGS BRIEFING PAPER, *supra* note 13, at 19.

118. *Id.* at 4–5.

119. CONG. RSCH. SERV., RL33350, CHILD WELFARE: THE COURT IMPROVEMENT PROGRAM 1 (2006), https://www.everycrsreport.com/files/20060406_RL33350_38f37db65282261f0e55ccf44361df7cb6a9819d.pdf [hereinafter CHILD WELFARE: THE COURT IMPROVEMENT PROGRAM].

120. Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66 §103, 107 Stat. 312 (1993).

121. *Id.* at §13712.

2022] **The Case for a Guardianship Ct. Improvement Program** 517

Puerto Rico.¹²² 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.¹²³ At the time the law was enacted, the number of children in foster care was rapidly increasing.¹²⁴

The Adoption Assistance and Child Welfare Act of 1980¹²⁵ 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.¹²⁶ 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.¹²⁷ 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.¹²⁸

The CWCIP’s entitlement funding is distributed according to an allocation formula based on a state’s child population as opposed to a discretionary grant program.¹²⁹ Congress provided \$5 million in the first year of funding as states came on board and conducted self-

122. 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. *See Tribal Court Improvement Program (TCIP) and State Court Improvement Programs (CIP)*, NAT’L CHILD WELFARE RES. CTR. FOR TRIBES, <http://www.nrc4tribes.org/Tribal-Court-Improvement-Program.cfm> (last visited Feb. 12, 2022).

123. CHILD WELFARE: THE COURT IMPROVEMENT PROGRAM, *supra* note 119, at 6.

124. The number of children in out of home care rose from approximately 400,000 in 1990 to 567,000 in 1999. *See, Foster Care*, CHILD TRENDS (May 24, 2018), <https://www.childtrends.org/indicators/fostercare>.

125. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272 §103, 94 Stat. 500 (1980).

126. *Id.* at § 471.

127. *Id.* at § 475.

128. *See generally*, J. LEONARD EDWARDS, REASONABLE EFFORTS: A JUDICIAL PERSPECTIVE 198 (2014).

129. With the exception that \$1 Million of the total appropriation for CIP is set aside to fund competitive tribal CIP grants. *See, EMILIE STOLTZFUS*, CONG. RSCH. SERV., CHILD WELFARE: FUNDING FOR CHILD AND FAMILY SERVICES AUTHORIZED UNDER TITLE IV-B OF THE SOCIAL SECURITY ACT 28 (2012).

assessments.¹³⁰ Subsequent years were funded at \$10 million as states engaged in implementation activities.¹³¹

Congress showed its confidence in the CWCIP framework by considerably expanding the program beginning in 2006. The Deficit Reduction Act of 2005¹³² 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).¹³³ The new grants became known as the Data grant and the Training grant.¹³⁴ The Data grant addressed the need for courts to better understand their dependency caseloads and case flow in order to continue improving outcomes.¹³⁵ 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.”¹³⁶ 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.”¹³⁷ Congress has renewed funding for each of the CWCIP grants, totaling \$30 million, ever since.¹³⁸

B. 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

130. CHILD WELFARE: THE COURT IMPROVEMENT PROGRAM, *supra* note 119, at 1.

131. *Id.*

132. Deficit Reduction Act of 2005, Pub. L. No. 109-171 § 202, 120 Stat. 4 (2006).

133. CHILD WELFARE: THE COURT IMPROVEMENT PROGRAM *supra* note 119, at 1–3.

134. See Program Instruction, ACYF-CB-PI-20-12, U.S. Dep’t. of Health & Hum. Servs., Admin. for Child. and Fams., <https://www.acf.hhs.gov/sites/default/files/documents/cb/pi2012.pdf>.

135. Deficit Reduction Act, *supra*, note 132, §7401.

136. *Id.*

137. *Id.*

138. Program Instruction, *supra*, note 134, app. F. Note that the \$1 Million “carve-out” for the Tribal CIP (*supra*, note 129) is in a separate program instruction. Congress provided a one-time \$10 Million augmentation of the CIP budget in the FY 2021 budget “... to address needs stemming from the COVID-19 public health emergency, which may include technology investments, training for judges, and programs to help families address the case plan...” See Program Instruction, ACYF-CB-IM-21-05, U.S. Dep’t. of Health & Hum. Servs., Admin. for Child. and Fams., <https://www.acf.hhs.gov/sites/default/files/documents/cb/im-21-05.pdf>.

2022] **The Case for a Guardianship Ct. Improvement Program** 519

and state sides of government.¹³⁹ 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.¹⁴⁰ 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 tribes.¹⁴¹ 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.¹⁴²

139. See Mark Hardin, *Court Improvement for Child Abuse and Neglect Litigation: What Next?*, 22 CHILD L. PRAC. 85, 90 (2003).

140. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE 1 (2004).

141. NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, *ENHANCED RESOURCE GUIDELINES: IMPROVING COURT PRACTICE IN CHILD ABUSE AND NEGLECT CASES* 11 (2016), <https://www.ncjfcj.org/wp-content/uploads/2016/05/NCJFCJ-Enhanced-Resource-Guidelines-05-2016.pdf>.

142. Hardin, *supra* note 139, at 90–92; NAT'L COUNCIL OF JUV. AND FAM. CT. JUDGES, *SUMMARIES OF TWENTY-FIVE COURT IMPROVEMENT ASSESSMENT REPORTS* 13–

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.¹⁴³

Both juvenile dependency and guardianship cases involve immense potential intrusions on liberty interests.¹⁴⁴ 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.¹⁴⁵ 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.¹⁴⁶ 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

14, 23 (1998), <https://www.ncjrs.gov/pdffiles1/Digitization/170380NCJRS.pdf> [hereinafter SUMMARIES].

143. *About the Center for Courts*, CHILDREN'S BUREAU, <https://capacity.childwelfare.gov/courts/about-courts/> (last visited Feb. 14, 2022).

144. 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." Roger D. R. v. Dina L. M. (*In re* Q.L.R.), 54 P.3d 56, 58 (Nev. 2002); see Sydney J. Sell, *A Potential Civil Death: Guardianship of Persons with Disabilities in Utah*, 2019 UTAH L. REV. 215, 215 (noting that legal scholars have described the appointment of a guardian as a "civil death").

145. AM. BAR ASS'N, JUDICIAL EXCELLENCE IN CHILD ABUSE AND NEGLECT PROCEEDINGS: PRINCIPLES AND STANDARDS FOR COURT ORGANIZATION, JUDICIAL SELECTION AND ASSIGNMENT, JUDICIAL ADMINISTRATION AND JUDICIAL EDUCATION 15 (Aug. 9, 2010), [https://www.americanbar.org/content/dam/aba/administrative/cchild_law/Judicial%20Excellence%20Standards%20Abuse-Neglect%20ABA%20Approved%20\(3\).pdf](https://www.americanbar.org/content/dam/aba/administrative/cchild_law/Judicial%20Excellence%20Standards%20Abuse-Neglect%20ABA%20Approved%20(3).pdf) [hereinafter JUDICIAL EXCELLENCE].

146. See generally Hardin, *supra* note 139 (demonstrating how the CIP grant program has prompted states to improve child abuse and neglect litigation).

2022] **The Case for a Guardianship Ct. Improvement Program** 521

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.¹⁴⁷ 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.

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.¹⁴⁸ 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, "[n]o child enters or leaves foster care without the approval of the court."¹⁴⁹

Similarly, continued court oversight of guardianships and annual reviews are required in most, but not all states.¹⁵⁰ Some commentators have argued that a lack of periodic court review is a violation of due process.¹⁵¹ A 2006 report notes that "[w]ithout 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."¹⁵²

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

147. See JUDICIAL EXCELLENCE, *supra* note 145, at 8, 21, 38.

148. See CHILD.'S BUREAU, UNDERSTANDING CHILD WELFARE AND THE COURTS 3 (Oct. 2016), <https://www.childwelfare.gov/pubPDFs/cwandcourts.pdf> (explaining court process for child welfare cases).

149. PEW COMM'N ON CHILD. IN FOSTER CARE, FOSTERING THE FUTURE: SAFETY, PERMANENCE AND WELL-BEING FOR CHILDREN IN FOSTER CARE 34 (May 2004), https://www.pewtrusts.org/-/media/legacy/uploadedfiles/phg/content_level_pages/reports/0012pdf.pdf.

150. See SALLY BALCH HURME, AM. BAR ASS'N COMM'N ON L. & AGING, MONITORING FOLLOWING GUARDIANSHIP PROCEEDINGS, 3–18 (Aug. 2020), https://www.americanbar.org/content/dam/aba/administrative/law_aging/chartmonitoring.pdf.

151. See, e.g., Mark D. Andrews, *The Elderly in Guardianship: A Crisis of Constitutional Proportions*, 5 ELDER L. J. 75, 110 (1997).

152. NAOMI KARP & ERICA WOOD, GUARDIANSHIP MONITORING: A NATIONAL SURVEY OF COURT PRACTICES 31 (AARP 2006), https://assets.aarp.org/rgcenter/consume/2006_14_guardianship.pdf.

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.¹⁵³

The CWCIP assessments showed that data and case management deficiencies in child welfare courts were widespread. A study of twenty-five 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.¹⁵⁴ By the time Congress 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.¹⁵⁵

The similarity of the need for better data in guardianship cases is unmistakable. As noted above, lack of data is the greatest challenge to

153. As noted in Section II(D), court data on guardianship cases is similarly deficient.

154. SUMMARIES, *supra* note 142, at 17.

155. 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 generally* Mark Hardin & Susan Koenig, *Court Performance Measures in Child Abuse and Neglect Cases: Technical Guide*, U.S. DEP'T JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, (2d. ed. 2009), <https://www.ojp.gov/pdffiles1/ojjdp/223570.pdf>; *See generally* Sophia I. Gatowski & Lisa Portune, *Court Performance Measures in Child Abuse and Neglect Cases: Implementation Guide*, U.S. DEP'T JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, (2d. ed. 2009), <https://www.ojp.gov/pdffiles1/ojjdp/223568.pdf>; *See generally* Sophia I. Gatowski & Shirley Dobbin, *Court Performance Measures in Child Abuse and Neglect Cases: User's Guide to Nonautomated Data Collection*, U.S. DEP'T JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, (2d. ed. 2009), <https://www.ojp.gov/pdffiles1/ojjdp/223569.pdf>; *See generally* Mark Hardin et al., *Court Performance Measures in Child Abuse and Neglect Cases: Guide to Judicial Workload Assessment*, U.S. DEP'T JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, (2d. ed. 2009), <https://www.ojp.gov/pdffiles1/ojjdp/223571.pdf>; *See generally* Victor E. Flango & Neal Kauder, *Court Performance Measures in Child Abuse and Neglect Cases: Key Measures*, U.S. DEP'T JUST., OFF. OF JUV. JUST. & DELINQ. PREVENTION, (2d. ed. 2009), <https://www.ojp.gov/pdffiles1/ojjdp/223567.pdf>

2022] **The Case for a Guardianship Ct. Improvement Program** 523

reform.¹⁵⁶ 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.¹⁵⁷ 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).¹⁵⁸ All were children in need of protection and guidance under *parens patriae*.¹⁵⁹ In 1967, however, the United States Supreme Court decided the landmark case of *In Re Gault*. *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.¹⁶⁰

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. Additionally, 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,¹⁶¹ and sharing best practices. The recent history of adult guardianships strongly suggests the need for a similar federal program.

156. STATE LEVEL ADULT GUARDIANSHIP DATA, *supra* note 55, at 5.

157. Marvin Ventrell, *Evolution of the Dependency Component of the Juvenile Court*, 49 JUV. & FAM. CT. J. 17, 23 (1998).

158. *Id.* at 18, 27.

159. *Id.* at 27.

160. 387 U.S. 1, 36–37, 55, 57, 34 (1967).

161. 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 Memorandum from U.S. Dep’t of Health & Hum. Servs., Admin on Child. Youth & Fams. on Utilizing Title IV-E Funding to Support High Quality Legal Representation for Children and Youth Who Are in Foster Care to State, Tribal, and Territorial Agencies Administering or Supervising the Admin. of Title IV-E and IV-B of the Social Security Act, Indian Tribes and Indian Tribal Orgs., State

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) 2018, the federal government spent \$2.6 billion on the foster care portion of child welfare services pursuant to Title IV-E of the Social Security Act.¹⁶² 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.¹⁶³ 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, 2021¹⁶⁴ 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.¹⁶⁵

Cts., and State and Tribal Ct. Improvement Programs 10–11 (Jan. 14, 2021), <https://www.acf.hhs.gov/sites/default/files/documents/cb/im2106.pdf>.

162. See KRISTINA ROSINSKY ET AL., CHILD WELFARE FINANCING SFY 2018: A SURVEY OF FEDERAL, STATE, AND LOCAL EXPENDITURES 19 (Mar. 2021), https://www.childtrends.org/wp-content/uploads/2021/05/ChildWelfareFinancing_ChildTrends_March2021.pdf.

163. *Id.* at 1.

164. See Consolidated Appropriations Act of 2021, Pub. L. No. 116–260, 184 Stat. 1182.

165. Consolidated Appropriations Act § 7(c) at 1233.

2022] **The Case for a Guardianship Ct. Improvement Program** 525

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.

C. Federal Funding Supports Child Welfare State Courts & 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 Tenth Amendment¹⁶⁶ Federalism concerns about the CWCIP legislation were expressed prior to its enactment.¹⁶⁷ 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.¹⁶⁸

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.¹⁶⁹ 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.¹⁷⁰ 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

166. States vary considerably in their approach to the funding and structure of the court system. *See* GEOFFREY MCGOVERN & MICHAEL D. GREENBERG, WHO PAYS FOR JUSTICE? PERSPECTIVES ON STATE COURT SYSTEM FINANCING AND GOVERNANCE xii–xiii (2014), https://www.rand.org/content/dam/rand/pubs/research_reports/RR400/RR486/RA_ND_RR486.pdf.

167. E-mail from Mark Hardin, Former Dir. Child Welfare, Am. Bar Ass’n Ctr. on Child. & L., to author (Dec. 28, 2020) (on file with *Syracuse Law Review*). Mr. Hardin testified before Congress for the original CWCIP legislation. *Id.*

168. *Id.*

169. *See* Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. §§ 5101, 5119 (2012); *see also* Social Security Act Title IV-B, 42 U.S.C. §§ 620, 629 (2012).

170. *See* Program Instruction, *supra*, note 134, app. F.

self-assessment with the initial grant funds.¹⁷¹ Then, once the assessment was completed and received by the Children's Bureau, courts were entitled to ongoing funding to implement the assessment recommendations.¹⁷² 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.¹⁷³ 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.¹⁷⁴

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.¹⁷⁵ None of these bills were enacted.¹⁷⁶ Subsequent reflections concluded that the bills' approaches favoring punitive measures over incentives for state participation doomed them to failure.¹⁷⁷ 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.¹⁷⁸

171. E-mail from Mark Hardin, *supra* note 167.

172. *Id.*

173. *Id.*

174. 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 Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?* 41 U. MICH. J. L. REFORM 281, 287 (2007).

175. AM. BAR ASS'N, 111A RECOMMENDATION 4 (Feb. 16, 2009), https://www.americanbar.org/content/dam/aba/directories/policy/2009_my_111a.pdf.

176. *Id.*

177. Wood, *supra* note 22, at 26.

178. *Roundtable Discussion on Guardianship: Workshop Before the Special Comm. on Aging U.S. S.*, 102nd Cong. 35, 41-42 (1992).

2022] **The Case for a Guardianship Ct. Improvement Program** 527

In the Congressional hearings following the 1987 Associated Press series,¹⁷⁹ 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.”¹⁸⁰ 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.¹⁸¹

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.¹⁸² Regan shared accounts of state agencies, acting under authority or responsibility conferred by the Older Americans Act, obtaining expedient and almost secret guardianship.¹⁸³ 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.¹⁸⁴

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.¹⁸⁵ (2) Requiring counsel for

179. *Abuses in Guardianship of the Elderly and Infirm: A National Disgrace. A Briefing by the Chairman of the Subcommittee on Health and Long-Term Care of the Select Committee on Aging H.R.*, 100th Cong. 29 (1987) [hereinafter *Abuses in Guardianship of the Elderly and Infirm*]

180. *Id.* at 9.

181. *Id.* at 7.

182. *Id.*

183. *Abuses in Guardianship of the Elderly and Infirm*, *supra* note 179, at 61–62.

184. *Id.*

185. *Id.* at 68.

individuals alleged to need a guardianship, at least when the petition is initiated by a public agency utilizing federal funds.¹⁸⁶ (3) Requiring state plans for SSI and Medicaid participation to give assurances that state guardianship and protective proceedings will provide adequate protection of civil rights.¹⁸⁷

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.¹⁸⁸ First proposed in 2011, 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.¹⁸⁹ A 2015 version removed the reference to the collection of data.¹⁹⁰ 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.¹⁹¹ 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.¹⁹²

D. 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.”¹⁹³ For many states, the CWCIP process gave child welfare

186. *Id.*

187. *Id.*

188. Guardian Accountability and Senior Protection Act, S. 1744, 112th Cong. § 101 (2011) (as introduced and referred to S. Comm. on the Judiciary, Oct. 20, 2011).

189. *Id.*

190. Court-Appointed Guardian Accountability and Senior Protection Act, S. 1614, 114th Cong. (2015) (as introduced and referred to S. Comm. on the Judiciary, June 18, 2015).

191. Elder Abuse Prevention and Prosecution Act, S. 178, 115th Cong. § 201, 501 (2017).

192. Lori Stiegel, *Elder Abuse Then and Now*, 41 BIFOCAL J. AM. BAR ASS'N COMM'N ON L. & AGING 175, 175 (2019).

193. See Etienne & Beverly Wenger-Trayner, *Communities of Practice: A Brief Introduction*, WENGER-TRAYNER, <https://wenger-trayner.com/introduction-to->

2022] **The Case for a Guardianship Ct. Improvement Program** 529

cases new prominence and priority within the state Supreme Court and state court administration.¹⁹⁴ 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.¹⁹⁵

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.¹⁹⁶ In addition to providing training and other assistance to programs, the Resource Center facilitated communication among the CWCIPs and coordinated periodic national convenings to share information and best practices.¹⁹⁷ 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.¹⁹⁸

communities-of-practice/ (last updated Apr. 15, 2015) (using the term “community of practice” to describe collaborative interaction among individuals and organizations in a domain of activity is a relatively recent term).

194. *Court Improvement Program*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/topics/systemwide/courts/reform/cip/> (last visited Feb. 16, 2022).

195. *Child Welfare Capacity Building Collaborative: About the Center for Courts*, CHILD WELFARE CHILD.’S BUREAU, <https://capacity.childwelfare.gov/courts/about-courts/> (last visited Feb. 16, 2022).

196. *National Resource Center on Legal and Judicial Issues*, YOUTH.GOV, <https://youth.gov/federal-links/national-resource-center-legal-and-judicial-issues> (last visited Feb. 18, 2022). In recent years, the Children’s Bureau has reorganized its child welfare technical assistance providers into a trio of Capacity Building Centers (“CBC”). 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 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 *The Children’s Bureau’s Child Welfare Capacity Building Collaborative*, CHILD WELFARE CHILD.’S BUREAU, <https://capacity.childwelfare.gov> (last visited Feb. 16, 2022).

197. CHILD WELFARE CHILD.’S BUREAU, *supra* note 195.

198. See PEW COMM’N ON CHILD. IN FOSTER CARE, *supra* note 149. 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. 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

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.¹⁹⁹ 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.²⁰⁰ 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.²⁰¹ Such a high-level summit was made possible partly through the groundwork for collaboration laid by the CWCIP.²⁰²

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.²⁰³

IV. 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 broad discretion to determine

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* NAT’L CTR. FOR STATE CTS., SUMMIT IV ON CHILD WELFARE: SUMMIT PRINCIPLES 1 (2019), https://www.ncsc.org/__data/assets/pdf_file/0022/19174/summit-iv-principles-vision.pdf.

199. NAT’L CTR. FOR STATE CTS., JUSTICE FOR CHILDREN: CHANGING LIVES BY CHANGING SYSTEMS, A NATIONAL CALL TO ACTION 2 (2005).

200. *Id.* at 4.

201. *Id.*

202. *See id.* at 5. Subsequent multidisciplinary national judicial leadership summits were held in 2007, 2009, and 2019.

203. *Id.* at 11. For a classic work on the expansive role of the juvenile court judge see J. Leonard P. Edwards, *The Juvenile Court and the Role of the Juvenile Court Judge*, 43 JUV. & FAM. CT. J. 1 (1992).

2022] The Case for a Guardianship Ct. Improvement Program 531

priorities areas for improvement.²⁰⁴ 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.

A. 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.²⁰⁵

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

204. CHILD WELFARE INFO. GATEWAY, *supra* note 194.

205. WINGS BRIEFING PAPER, *supra* note 13, at 7.

systems change, especially in targeting guardianship abuse and financial exploitation through steps to improve monitoring.”²⁰⁶

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 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.”²⁰⁷ 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 the availability or use of less restrictive options and decision supports highly.²⁰⁸ Four WINGS used their pilot program funding to develop initiatives to support the use of supported decision-making.²⁰⁹

B. 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.”²¹⁰ And, the CWCIP is administered by another agency within the Department of Health and Human Services, the Children’s Bureau.²¹¹

206. *Id.* at 16.

207. AM. BAR ASS’N COMM. ON DISABILITY RTS., RES. 113, at 5, (2017).

208. WINGS BRIEFING PAPER, *supra* note 13, at 12.

209. *Id.*

210. *See Advancing Independence, Integration, and Inclusion Throughout Life*, ADMIN. FOR CMTY. LIVING, <https://acl.gov> (last visited Feb. 19, 2022).

211. *See Resources from the Children’s Bureau*, CHILD WELFARE INFO. GATEWAY, <https://www.childwelfare.gov/more-tools-resources/resources-from-childrens-bureau/> (last visited Feb. 19, 2022).

2022] **The Case for a Guardianship Ct. Improvement Program** 533

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.”²¹² SJI administers grants to state courts and supporting agencies in many subject areas.²¹³ It is governed by a bipartisan Board of Directors appointed by the President with the advice and consent of the Senate.²¹⁴

C. 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.²¹⁵ And, child welfare court improvement program staff often work with or serve as the WINGS coordinator.²¹⁶

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.²¹⁷ However, there are notable exceptions of successful WINGS that exist outside the state court and enjoy more autonomy.²¹⁸ Regardless of whether a WINGS is located within or outside a court, these groups can provide a springboard for interagency/court collaboration.

D. 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

212. 42 U.S.C. §10702(a) (2020).

213. *Project Grants*, STATE JUST. INST., <https://www.sji.gov/grants/project-grants/> (last visited Feb. 20, 2022).

214. *About SJI*, STATE JUST. INST., <https://www.sji.gov/about-sji/> (last visited Feb. 20, 2022).

215. DEP’T HEALTH & HUM. SERVS., IMPROVING CHILD WELFARE OUTCOMES THROUGH SYSTEMS OF CARE:BUILDING THE INFRASTRUCTURE 52 (2007).

216. *See* AM. BAR ASS’N, RES. 105 *supra* note 18, at 7.

217. *See* WINGS BRIEFING PAPER, *supra* note 13, at 13.

218. *See id.*

opportunity to examine their projects and activities to ensure efficient and effective use of resources and successful interventions.²¹⁹

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.

V. 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

219. See *State Court Improvement Program*, STATE OF CONN. JUD. BRANCH https://www.jud.ct.gov/scip/SCIP_PerformanceOutcome.html (last visited Feb. 19, 2022).

2022] The Case for a Guardianship Ct. Improvement Program 535

no time to waste for Congress to authorize and fund a Guardianship Court Improvement Program.

A. 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 at least comparable 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.