

Public Guardianship After 25 Years: In the Best Interest of Incapacitated People?

**National Study of Public Guardianship
Phase II Report**

Executive Summary

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Executive Summary

Guardianship is a relationship created by state law in which a court gives one person or entity (the guardian) the duty and power to make personal and/or property decisions for another person (the ward or incapacitated person). The appointment of a guardian occurs when a judge decides an individual lacks legal capacity to make decisions on his or her own behalf. Guardians often are family members or willing friends, but sometimes they are attorneys, corporations, government agencies, or even volunteers. For some persons, there is no one to help and a “last resort” situation occurs.

Public guardianship is the appointment and responsibility of a public official or publicly-funded organization to serve as legal guardian in the absence of willing and responsible family members or friends to serve as, or in the absence of resources to employ, a private guardian. Since the 1960s, states and localities have developed a variety of mechanisms to address this “unbefriended” population and serve as “guardian of last resort.”

The only previous study, *Public Guardianship and the Elderly*,¹ was conducted by professor Winsor Schmidt and colleagues. Their project included a statutory and case law analysis, a survey of public guardianship options, and intensive site visits in six states. This study, conducted by researchers from the University of Kentucky, the American Bar Association Commission on Law and Aging, and Washington State University, sought to compare the state of public guardianship in 2007 with the findings of the 1981 Schmidt study.

Methods

The methods for this study included eight steps: (1) securing institutional review board approval to conduct Phase II research; (2) updating and reviewing the public guardianship social science literature since the 2005 report (Phase I)²; (3) legal research of any court cases involving public guardianship programs since the end of Phase I (April 2005); (4) completion of in-depth e-mail surveys and follow-up telephone calls as needed, with key public guardianship program staff in Arizona (Maricopa and Pima counties), California (Los Angeles and San Bernardino counties), Delaware, and Maryland; (5) conducting site visits involving key informant and ward interviews in Arizona (Maricopa and Pima counties), California (Los Angeles and San Bernardino counties), Delaware, Maryland, and Wyoming in order to gain a deeper understanding of each site’s public guardianship program and practices, as well as to replicate the 1981 study; (6) transcribing interviews from each site visit; (7) performing in-depth analysis of data collected from each of the sites; and (8) preparing and distributing a final report.

1. Winsor C. Schmidt, Jr., Kent S. Miller, William G. Bell & B. Elaine New, *Public Guardianship and the Elderly* (Ballinger Publg. 1981).

2. Pamela B. Teaster, Erica F. Wood, Naomi Karp, Susan A. Lawrence, Winsor C. Schmidt, Jr., Marta S. Mendiondo, *Wards of the State: A National Study of Public Guardianship* (2005).

Models of Public Guardianship

Originally proposed by Regan and Springer in 1977,³ used in 1981, and still applicable for this study, models of public guardianship are described as follows:

The **court model** (emphasis added) establishes the public guardian as an official of the court that has jurisdiction over guardianship and conservatorship. The chief judge of this court appoints the public guardian. The chief administrative judge of the state has rulemaking power for the purpose of statewide uniformity.

The **independent state office** (emphasis added) is established in the executive branch of government with the public guardian appointed by the governor. This resembles the public defender model.

Model three establishes the public guardian office within a pre-existing **social service agency** (emphasis added). The public guardian is appointed by the governor. This model may be considered a conflict of interest model. In this situation, an agency is providing services to the same clients for whom they are guardian, thus encouraging use of services that may not be in the best interest of the ward.

The **county model** (emphasis added) establishes a public guardian within each county. The local official may be more sensitive to the needs of the (incapacitated person) in a particular county. The public guardian is appointed by the county government. The state attorney general would regulate these county offices.⁴

Analysis of State Public Guardianship Statutes

As of 2007, a total of 44 states have specific statutory provisions on public guardianship, whereas seven states include no such reference in their code. In 1981, the landmark Schmidt study distinguished between “explicit” statutes that specifically refer to a “public guardian” or “public guardianship program” and implicit schemes that provide for an equivalent mechanism without so denominating it, often naming a state agency or employee as guardian when there is no one else to serve. Schmidt found 14 explicit statutory schemes and 26 implicit schemes. Today, research shows a total of 28 explicit statutory schemes and 18 implicit statutory schemes (with some states having two schemes). States, over time, have clearly shifted toward enactment of explicit public guardianship schemes, frequently providing for an office, budget, and ability to hire staff and contract for services.

Governmental Location. The statutory provisions concerning governmental location of public guardianship are particularly important. In 1981, Schmidt used four models in analyzing public guardianship statutes regarding governmental administrative structure: (1) a court model; (2) an independent state office; (3) a division of a social service agency; and (4) a county agency. This study uses the same classification. While additional states may fit into the classifications programmatically (*see* Chapter 4 of full report), the *statutory findings*, and comparison with a quarter of a century ago, are as follows:

- Court model—In 1981 there were six states with such statutes, in 2007 there were five.

3. John Regan & Georgia Springer, *Protective Services for the Elderly: A Working Paper*, U.S. Senate Special Comm. on Aging 27 (GPO 1977).

4. *Supra* n. 1, at 59-60.

- Independent state offices—There were three states with such statutes in 1981. In 2007 there were four.
- Social service agency—More than half of the states with statutory public guardianship provisions named a social services, mental health, disability, or aging services agency as guardian in 1981, presenting a conflict of interest. That remains true in 2007.
- County level—In 1981 there were 10 states with such statutes. In 2007 approximately 13 of the statutory schemes locate the public guardianship function at the county level, and others have designed programs coordinated at the state level but carried out administratively or by contract at the local or regional level.

Cost and Staffing. While there was little mention in 1981 of funding in statutory schemes, some 31 of the 44 states with statutory provision in 2007 make some mention of cost. At least 10 states include reference to state appropriations, while others target the estate of the incapacitated person or some combination as responsible for costs.

The 1981 study placed great emphasis on the need for required staff-to-client ratios, but at that time there were no statutory provisions for such a ratio. In 2007, seven states reference staffing ratios, either set out in law or in administrative rules or contracts.

Procedural Protections. Because an understanding of public guardianship requires a close look at the state guardianship codes in which it is lodged, the 2007 statutory analysis includes basic elements of state guardianship and conservatorship statutes, as well as the more specific provisions concerning public guardianship. The research assesses statutory provisions on the key parameters originally named by Schmidt:

- eligibility for public guardianship;
- scope of public guardianship services;
- potential petitioners (including the public guardianship program itself);
- procedural due process protections (notice, hearing, presence of alleged incapacitated person, appointment of counsel, standard of proof, right to jury trial, assessment of capacity, rights retained by individual under guardianship);
- who may serve as guardian, powers and duties of guardians (and, specifically, public guardians); and
- provisions for court review, termination, emergency orders, and use of limited orders.

(See statutory charts in Appendix B of full report.)

Site Visits to the States

Los Angeles County, California. This *county model program* serves two target populations: older or dependent persons (probate conservatorships) and persons of all ages with mental illness who are found “gravely disabled” by a court (Lanterman-Petris-Short conservatorships). The annual budget for the office is \$9.9 million, including salaries, benefits, attorney costs, supplies, and other administrative costs. The program includes 90 full-time equivalent professional staff on payroll, including support staff, and has the authority to collect a fee or charge to the incapacitated person for services. The program was serving 3,400 incapacitated persons in March 2004, and, for that year, accepted 700 new incapacitated persons into the pro-

gram. After a *Los Angeles Times* exposé in 2005, changes resulted in California law that addressed all types of guardianship.⁵ A major change to the Los Angeles Public Guardian (LAPG) was that the county board of supervisors approved an additional 32 new positions for the probate conservatorship program, representing an increase of over 100%. The LAPG has computerized records dating back from 1984, allowing an important before and after picture of incapacitated persons over time. Based on a guardian-to-ward ratio of 1:30,⁶ staff-to-client ratios were too high in 1979 (average load of 105 persons per caseworker) and have not declined significantly (84 per deputy public guardian) in over 20 years.

Delaware. A *court model program* established in 1974, the Delaware Office of the Public Guardian (DOPG) is operated statewide with no regional or local public guardianship programs. By statute, the office provides public guardianship, trusteeship, and personal representation of decedents' estates to all citizens in the state who qualify. The DOPG is a state agency under the Delaware judiciary. Staff members consist of the public guardian, deputy public guardian, three full-time senior social worker/case managers, a part-time senior social worker/case manager (vacant), an administrative officer, and a financial case manager. The agency receives 100% of its budget through state of Delaware appropriations, with an FY 2006 budget of \$458,570. Caseloads are reported as approximately 55 incapacitated persons per staff member. The DOPG has the authority to collect an administrative fee approved by the court, but in practice rarely does so. Until 2006, the DOPG had a public guardian with many years of experience and exceptional institutional knowledge. She is not an attorney, but she nonetheless represented the office in court. There is a clear unmet need for public guardian services, especially since the office had issued a moratorium on new cases for four months and had to institute moratoria in the past.

Maryland. This *division of a social service agency program* is a bifurcated system, established in 1977. For all persons deemed incapable of managing their affairs, a guardian of the property, generally an attorney, is appointed. For incapacitated adults age 18-64, guardianship of the person is provided by the Maryland Department of Human Resources, which then follows them as they age. For incapacitated adults age 65+, guardianship of the person is provided by the Maryland Department of Aging. Office directors of the 24 local departments of social services are the named guardian of incapacitated persons aged 18-64 as a last resort, when no other person is available to serve as guardian. The director of the local area agency on aging is the court-appointed named guardian for persons over age 65, but in most cases, a guardian manager provides the services. Maryland law establishes a system of public guardianship review boards for each county, although two or more counties may agree to establish a single multi-county review board. In the few cases where the incapacitated person has the resources, fees are collected for services rendered. The majority of guardianship petitions reportedly originate in hospitals. Based on our recommended guardian-to-ward ratio of 1:20, caseloads are far too high. Attorneys serving as guardian of the property, but also serving as attorney for hospitals and nursing homes in which the incapacitated persons live, are filing petitions for guardianship. This dual role is a conflict of interest.

Maricopa County, Arizona. The *county model* Maricopa County Public Fiduciary (MCPF) is not housed with any other department and has its own county government budget. The MCPF administers decedent estates and is responsible for the county indigent burial program. In 1995,

5. Robin Fields, Evelyn Larrubia & Jack Leonard, *Guardians for Profit* (4-part series) L.A. Times (Nov. 13-16, 2005), retrieved June 4, 2006, from <http://www.latimes.com>.

6. *Supra* n. 1.

the Arizona Supreme Court enacted administrative rules requiring certification of all public and private fiduciaries receiving payment for services. With 36 full-time equivalent staff, the office contained guardian administrators, estate administrators, estate analysts, division managers, and in-house legal coordination. The average caseload was approximately 65 incapacitated persons per guardian administrator. In FY 2003, the cumulative total of incapacitated persons served by the public fiduciary was 550. At the time of the site visit, the MCPF anticipated significant staff attrition. The MCPF has the authority to collect fiduciary fees approved by the court that amount to about \$850,000 *per annum*. Both programs and the staff are certified by the state, something that the Maricopa office regards as positive in that it increases the cumulative knowledge in the office. The major referral source is the probate court. The unmet need for guardians for incapacitated persons is not well understood. The level of professionalism in this office is impressive. A strength of the office is its leadership by an attorney.

Pima County, Arizona. The *county model* Pima County Public Fiduciary (PCPF) is one of 26 departments under the Pima County Board of Supervisors. The PCPF is appointed by the board of supervisors and serves at its will. A general fund allocation is supplemented by fee revenue generation by the PCPF (\$430,000 in FY 2003). For FY 2004, the PCPF received a general fund allocation of approximately \$1.435 million. Caseloads are between 60-65 incapacitated persons per case manager. The office maintains a pooled checking account from which incapacitated persons' monthly bills are paid; excess funds are placed in interest-bearing accounts. Incapacitated persons are reportedly far more dangerous than earlier in the history of the program. Many interviewees believe that resources for the office are limited in relation to the population served and that the county had an unmet need for public guardian service that is exploding. The PCPF has a wealth of institutional knowledge in the people who have worked with the office for many years. The role of the court investigator is especially strong in Pima County, and one court investigator recently served as president of the National Guardianship Association. The office uses a nurse for medical case management.

San Bernardino, California. As a result of political realignment, the *county model* office was moved from its previous location within the coroner's office to the Department of Aging and Adult Services. There are 27 staff persons in the office, including resource management, clerks, and deputies. Approximately 500 incapacitated persons are served. A San Bernardino County court investigator investigates new cases. Lanterman-Petris-Short conservatorships are by far the most common cases that the San Bernardino County Public Guardian serves. The San Bernardino Department of Behavioral Health (DBH) provides the office with \$1.3 million for such services as assuming control of the incapacitated person's property, care of the person, providing services to support treatment and/or placement, establishing treatment plans (which are supported by DBH) and care assessments, and serving as liaison to state, county, and private agencies. The average LPS conservatorship caseload is between 55-70 incapacitated persons per staff member. The probate conservatorship ratio is 55:1. Interviewees think that the office needs more funding and more staff members. The office, due to the shortfall, does not visit clients as much as needed and is not as responsive as needed to other partners in the care collective in the county. The office did not produce answers to relatively simple questions on clients and staff in the office.

Wyoming. After repeal of the state's public guardianship statute in 1998, the Wyoming Guardianship Corporation (WGC), a private nonprofit entity with over 80 volunteer guardians, assumed the cases. The corporation executive director is named individually as guardian in some cases, and the corporation is named in other cases. The Developmental Disabilities Division and

the Wyoming State Hospital fund the corporation. The corporation also receives federal funding as a Social Security Representative Payee and Veterans Affairs Fiduciary, as well as from fees for private guardianship services. In addition, the corporation runs the Mental Health Ombudsman Program and the Wyoming Guardianship Corporation Pooled Trust. A board of directors governs the WGC. While anachronistic then, Wyoming seems to have progressed only to the point of its public service providers contracting with WGC to fulfill a similar, seemingly perfunctory public guardianship role. This public guardianship role may more clearly benefit the third party interests of public service providers than the best interests of incapacitated persons.

Conclusions

Individuals Served

- Public guardianship programs serve a wide variety of individuals.
- Public guardianship programs serve younger individuals with more complex needs than 25 years ago.
- In most states, a majority of individuals under public guardianship are institutionalized.

Program Characteristics

- Public guardianship programs are categorized into four distinct models: court, independent state office, social services agency, and county.
- All states except one have some form of public guardianship, yet major areas remain uncovered and the unmet need is compelling.
- The clear majority of the states use a social services (conflict of interest) model of public guardianship.
- Some governmental entities providing public guardianship services do not perceive that they are doing so.
- A number of states contract for public guardianship services.

Functions of Public Guardianship Programs

- Many public guardianship programs serve as both guardian of the person and property, but some serve more limited roles.
- Public guardianship programs vary in the extent of community education and outreach performed.
- Petitioning for appointment of itself is a problematic role for public guardianship programs.
- Court costs and filing fees are a significant barrier to use of public guardianship.

Funding and Staffing of Programs

- States have significant unmet needs for public guardianship and other surrogate decision-making services, but they frequently cannot quantify the unmet need.
- Education requirements for staff in public guardianship programs vary considerably.
- Staff size and caseload in public guardianship programs show enormous variability.

- Public guardianship programs are frequently significantly understaffed and underfunded.
- Although some public guardianship programs use ratios to cap the number of clients, most serve as guardian of last resort without limits on demand.
- Funding for public guardianship is from a patchwork of sources, none sufficient.
- Data on costs per case are sparse, but estimates are in the range of \$1,850 yearly per case in significantly understaffed environments.
- The Supreme Court *Olmstead* case provides a strong mandate to enhance public guardianship.

Public Guardianship As Part of a State Guardianship System: Due Process Protections and Other Reform Issues

- Very little data exist on public guardianship.
- Courts rarely appoint the public guardian as a limited guardian.
- The guardian *ad litem* system, as currently implemented, is an impediment to effective public guardianship services.
- Oversight and accountability of public guardianship are uneven.

Court Cases Involving Public Guardianship

- Litigation is an important but little used strategy for strengthening public guardianship programs.

Recommendations

Individuals Served

- States should provide adequate funding for home- and community-based care for individuals under public guardianship.

Program Characteristics

- States should consider the characteristics in the Model Public Guardianship Act presented in this study, adopt or adapt the Model Act legislatively, and implement it rigorously.
- States should avoid a social services agency (conflict of interest) model.

Functions of Public Guardianship Programs

- State public guardianship programs should establish standardized forms and reporting instruments.
- Individuals should be accepted into public guardianship programs on a first come, first served basis.
- Public guardianship programs should limit their functions to best serve individuals with the greatest needs.
- Public guardianship programs should adopt minimum standards of practice.
- Public guardianship programs should not petition for their own appointment.

- Public guardianship programs should develop and monitor a written guardianship plan setting forth short-term and long-term goals for meeting the needs of each incapacitated person.
- Public guardianship programs should routinely and periodically perform client reassessment and develop an updated guardianship plan.
- Public guardianship programs should ensure that decision-making staff personally visit clients at least twice a month.
- Public guardianship programs should establish and maintain relationships with key public and private entities to ensure effective guardianship services.
- Public guardianship programs at the local and state level would benefit by regular opportunities to meet and exchange information.
- Public guardianship programs should maintain and regularly analyze key data about clients and cases.
- Public guardianship programs should track cost savings to the state and report the amount regularly to the legislature and the governor.
- Public guardianship programs should undergo regular periodic external evaluation and financial audit.

Funding and Staffing of Programs

- Public guardianship programs should be staffed at a specific staff-to-client ratio. The recommended ratio is 1:20.
- States should provide adequate funding for public guardianship programs.
- The public guardian (or director of the public guardianship program) has a duty to secure adequate funding for the office.

Public Guardianship As Part of a State Guardianship System: Due Process Protections and Other Reform Issues

- State court administrative offices should move toward the collection of uniform, consistent basic data elements on adult guardianship, including public guardianship.
- Courts should exercise increased oversight of public guardianship programs.
- Courts should increase the use of limited orders in public guardianship.
- Courts should waive costs and filing fees for indigent public guardianship clients.

Recommendations for Public Guardianship Research

- The effect of public guardianship services on incapacitated individuals over time merits study.
- Research should examine the role of public guardianship for individuals with mental illness, and the relationship of guardianship to civil commitment.
- Research should analyze the operation, costs, and benefits of review boards or committees for public guardianship programs.

- Research should examine the costs and benefits of allowing public guardianship programs, once adequately staffed and funded, to provide additional surrogate services less restrictive than guardianship.
- Research should explore state approaches to use of Medicaid to fund public guardianship.
- Research should examine the role of guardians *ad litem* and court investigators, especially as they bear on the public guardianship system.

Model Public Guardianship Act

The Model Public Guardianship Act is intended to translate the findings and recommendations of this study into policy and law. Key themes are independence of the public guardianship function, avoidance of conflict of interest, use of the least restrictive form of intervention, emphasis on self-determination and autonomy of incapacitated persons to the greatest extent possible, quality assurance, and public accountability.

The Model Act incorporates not only the findings and recommendations of the Phase I and Phase II studies, but also stands as a distillation and compilation of existing state statutes and a series of earlier model public guardianship statutes. The Model Act uses the Model Public Guardianship Statute from the 1981 public guardianship study as a base. Highlights include:

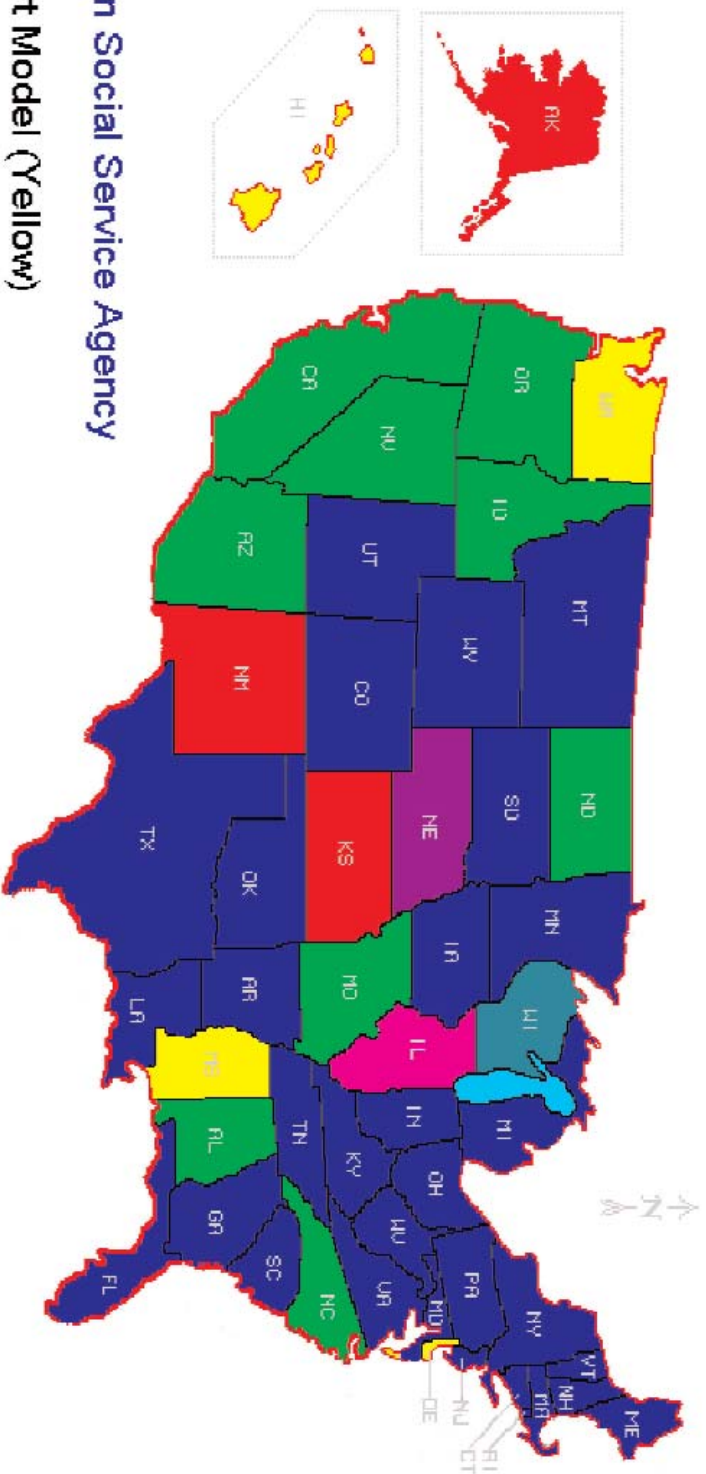
- Location of the public guardianship office at the county level.
- Prohibition of the contracting out of the public guardianship function.
- Provisions for the independence of the public guardianship office from any service providing agencies.
- A required staff-to-client ratio of 1:20.
- A background in law for the public guardian; and in law, social work, or psychology for paid professional staff.
- Specific duties of the public guardianship office regarding: use of substituted judgment; individualized plans and reports; required visitation; prohibition of direct services; and adoption of standards of practice.
- Specific powers of the office regarding: intervening in private guardianship cases in the best interest of an incapacitated person; serving as representative payee for guardianship clients; and making arrangements after the death of the incapacitated person.
- Prohibition of petitioning for appointment of the office as guardian.
- A right to services for public guardianship clients.
- Two alternatives concerning basic procedural protections in the guardianship process, depending on existing protections in state law.
- Functions of the state court administrative office in aiding county offices in training, data collection, and promoting exchange of information.
- Independent external evaluation and financial audit of the office.
- A statewide public guardianship advisory committee.

Public Guardianship Models – 2007⁷

Court Model States	Independent State Office	Within Social Service Agency	County Model	No Public Guardianship
Delaware	Alaska	Arkansas	Alabama	Nebraska
Hawaii (Large)	Illinois (OSG)	Colorado	Arizona	(1 State)
Hawaii (Small)	Kansas	Connecticut	California	
Mississippi	New Mexico	Florida	Idaho	
Washington	(4 States)	Georgia	Illinois (OPG)	
District of Columbia		Indiana	Nevada	
(5 States, 6 programs)		Iowa	North Carolina	
		Kentucky	North Dakota	
		Louisiana	Oregon	
		Maine	Wisconsin	
		Maryland	Missouri	
		Massachusetts	(11 States)	
		Michigan		
		Minnesota		
		Montana		
		New Hampshire		
		New Jersey		
		New York		
		Ohio		
		Oklahoma		
		Pennsylvania		
		Rhode Island		
		South Carolina		
		South Dakota		
		Tennessee		
		Texas		
		Utah		
		Vermont		
		Virginia		
		West Virginia		
		Wisconsin (Volunteer & Corporate Guardian)		
		Wyoming		
		(32 states)		

7. As in the Phase I public guardianship study, the identification of public guardianship continued on a "follow the money" approach. Thus, if the public guardianship function received public funding, the study lists the state as having some form of public guardianship—which exists in 49 states and the District of Columbia. However, that fact by no means implies that those states have statewide coverage of public guardianship, or necessarily have an explicit program. The four basic models are derived from the 1981 study by Schmidt, Miller, Bell & New (*Public Guardianship and the Elderly*, 1981), based on earlier models. While the models provide a useful classification, there are many variations, and few states fit the exact organizations described in the models.

Models of Public Guardianship



- Within Social Service Agency
- Court Model (Yellow)
- County Model
- Independent State Office/County Model
- Independent State Office
- No Public Guardianship
- Within Social Service Agency/County Model