



Summary Report
Second Colloquium: Voluntary Public Guardianship Programs

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To: Registrants and Subscribers to the Colloquium Series

Date: June 30, 2016

I. Introduction

The Colloquium on Volunteer Guardianship Programs, the second event in the Institute's Colloquium Series, was held on June 13, 2016, at the Metro Meeting Center, 101 Federal Street in Boston. There were two substantive components: first, a review of guardianship needs and advocacy in Massachusetts, including a report of where we stand today in the effort to provide a public guardian; and second, a featured presentation of the volunteer-based Kansas Guardianship Program, which is considered by many to be the most successful program of its kind in the nation.

The Colloquium was oversubscribed. 39 persons registered, 43 attended, and a total of 47 persons (including presenters) were at the event. About half of that number stayed for lunch and the afternoon Q-&-A session about the Kansas program.

Persons affiliated with the following organizations¹ attended the Colloquium:

Public Agencies:

Massachusetts Department of Developmental Services
Massachusetts Department of Mental Health
Massachusetts Developmental Disability Council
Massachusetts Office of the Attorney General
Massachusetts Probate Court Office of Administration
Massachusetts Protective Services (Executive Office of Elder Affairs)
Veterans Administration–Boston Healthcare System

Non-Profit Agencies:

American Association of Retired Persons, Massachusetts Chapter
Beth Israel Deaconess Medical Center
Boston Center for Independent Living
Boston Medical Center

¹ Unless otherwise footnoted, no organization listed herein has endorsed officially the Colloquium, its sponsors, its views, the contents of this Report, or any other product of the Colloquium, nor was anyone affiliated with any listed organization present as an official representative thereof. The list is provided for the benefit of interested parties and stakeholders, as an indication of the breadth of interest in guardianship reform in Massachusetts.

(Non-Profit Agencies, continued)

Boston VA Research Institute (BVARI)
EXC Legal Services
FriendshipWorks
Greater Boston Legal Services²
Guardian Community Trust²
Institute for Community Inclusion (U. Mass. Boston)
Massachusetts General Hospital
Massachusetts Guardianship Association
Mental Health Legal Advisors Committee
Mount Pleasant Home
Northeast Justice Center²
North Shore Elder Services
Vera Institute Guardianship Project, New York

Private Law Firms and Other Organizations:

Casner & Edwards, LLC
Bioethics Graduate Program, Harvard Medical School
Law Office of James Downes
Legal Planning for Special Needs (Law Office of Barbara Jackins, Esq.)
Spano & Dawicki, LLC
Zalkin Law Firm, PC

For those who were unable to attend, the materials are available on PDF, either by contacting the Institute, or by logging in at the Institute's website (www.guardianship.institute).

II. Massachusetts Update

The Colloquium series is part of a public advocacy campaign for guardianship reform in Massachusetts, focusing on our longstanding need for a Public Guardian. Toward this end, Institute members gave two presentations on Massachusetts as part of the Colloquium.

A. *The Need for a Public Guardian*

Copies of the report, *Examining the Need for a Public Guardian in Massachusetts: Phase I*, by Jennifer Moye, Ph.D., Director of the Geriatric Psychology Department for the Boston VA Healthcare System and Associate Professor of Psychiatry at Harvard Medical School, et al., were distributed at the Colloquium. Highlights of the report were presented to start the program, including her estimate that between 2,849 and 3,855 persons may need a Public Guardian in Massachusetts. This estimate is based upon data that shows the ratio of persons

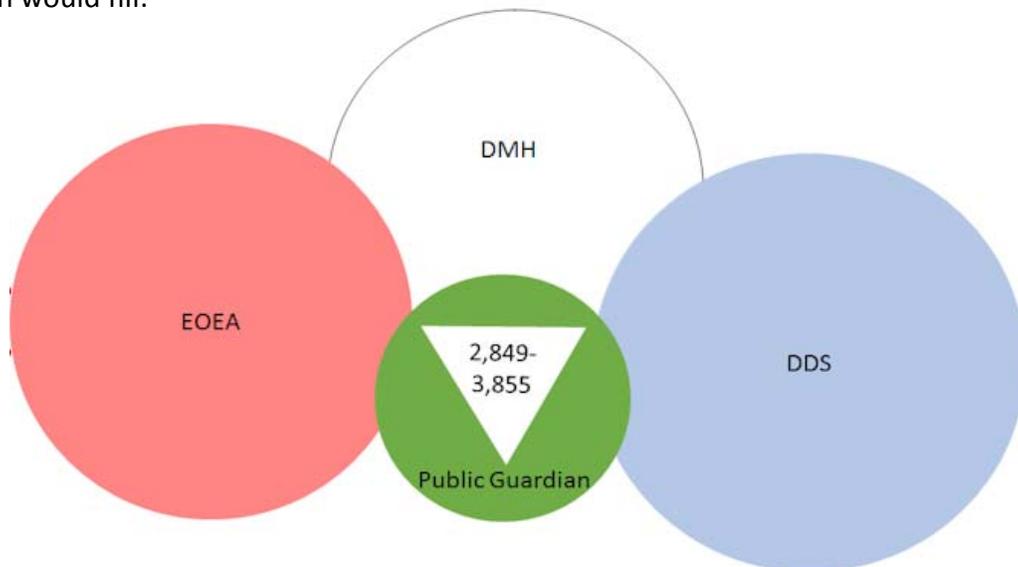
² Colloquium sponsors.

under guardianship to total population in other states around the country that have public guardianship programs, selected for the size and longevity of those programs:

State	No. of Clients	State Population	Ratio	Massachusetts Population	Estimate of Need
AK	800	736,732	0.0010859		
IL	5,383	12,880,580	0.0004179		
KY	2,652	4,413,457	0.0006009		
KS	1,507	2,904,021	0.0005189		
ME	1,500	1,330,089	0.0011277		
MN	3,400	5,457,173	0.0006230		
NH	950	1,326,813	0.0007160		
NM	1,183	2,085,572	0.0005672		
Average		Weighted	0.0005581	6,745,408	3,765 persons
		Unweighted	0.0007072	6,745,408	4,771 persons

After taking account of those who receive guardianship services through existing Massachusetts agencies (currently totaling about 916³), the figures presented by Dr. Moye indicate that between 2,849 and 3,855 persons are in need of a Public Guardian in Massachusetts.

The apparent reason that Massachusetts has such a large underserved population is that our existing agency-based guardianship programs are able to serve only those who meet the general eligibility criteria of at least one agency, such as age or diagnosis. For those who do not meet the criteria of any of these agencies, there is no program. This is the gap that a Public Guardian would fill:



³ The figures reported by Dr. Moye were: Executive Office of Elder Affairs: 170
 Department of Mental Health: 20
 Department of Developmental Services: 726
 TOTAL: 916

Many attendees at the Colloquium felt that, while the numbers shown in the research are significant, the actual need is substantially greater. If that is so, the true figure may be somewhere between 5,000 and 10,000 persons in the Commonwealth who are in need of a Public Guardian.

B. *Statute for a Public Guardian*

Wynn Gerhard, Esq., chairs the Statutory Drafting Advisory Committee, which has been meeting since January of this year to define issues that need to be addressed in a law to create a Public Guardian. Wynn presented issues that the Committee is considering, many of which elude quick or easy answers:

1. *Governmental Structure.* Where should the Public Guardian be placed within government? There are examples in other states for each branch – judicial, executive and legislative. Issues that weigh upon this choice include (a) the need for independence from other state agencies that provide services for which the Public Guardian must advocate; (b) the need for independence from the courts who appoint the guardian; and (c) access to stable funding from the Legislature.

2. *Petitioning.* Who should petition for appointment of the Public Guardian? If the agency can petition for its own appointment, a potential conflict of interest would arise by reason of the agency's ability to "cherry pick" cases that either use fewer resources, or offer more ability to recover costs from the assets of the protected individual. Should the court itself be allowed to petition? If the Public Guardian were located in the court, this would create a severe conflict of interest, where the court would be adjudicating its own petition. These and other issues – including question about the ability to act quickly in emergencies – arise with many other options, such as other state agencies, volunteers or private agencies, and even the Attorney General.

3. *Type of Fiduciary Authority.* Should the Public Guardian also serve as Public Conservator? The costs of managing conservatorships can be considerably higher than the cost of guardianship, but – for the same reason – the need for such services also can be severe in low-income and low-resources cases.

4. *Financing.* Should the Public Guardian be allowed to charge for services? If it can charge fees, the agency would compete with private practitioners, many of whom already do an excellent job at reasonable costs. The ability to charge fees also would give rise to a risk of bias toward fee-generating cases. On the other hand, funding pressures might be greatly reduced if the agency were able to charge fees for service.

5. *Flexible vs. Inflexible Mandate.* Does being the guardian of last resort mean that the Public Guardian could not decline cases that it feels exceed its capacities? If it cannot say "no," how will the costs of the agency be contained, for example, in

cases that involve warring family members? If it can decline cases, on the other hand, an underserved population will continue to exist in Massachusetts, despite the Public Guardian. This issue revisits the classic dilemma of unfunded public mandates.

6. Indirect Services. How much responsibility should the Public Guardian have for supporting guardianship services generally throughout the Commonwealth? Potentially it could promulgate standards, develop training materials, investigate cases, strengthen referral networks, and provide other support to help maintain high-quality services for all of those with decisional support needs in Massachusetts.

7. Staffing Criteria. Does the director of the Public Guardian need to be an attorney? What qualifications should be required for direct-service staff? If volunteers are part of the program, what educational or experience qualifications, if any, should volunteers have?

8. Accountability. To whom should the Public Guardian report, and by whom should it be audited? Few organizations are able to evaluate themselves effectively, and the Public Guardian would not be an exception. Models from other states will help to answer this question.

9. Liability. Should the Public Guardian and its employees be liable for their actions as fiduciaries? As a rule, exposure to legal claims for mistakes is inversely related to a guardian's willingness to allow the protected person to make decisions that have significant health or financial consequences. If we value limited guardianships and maximum autonomy, the Public Guardian will need to be insulated from most kinds of liability. On the other hand, protection from all liability may create an atmosphere of unaccountability, and may discourage the reporting of neglect or abuse.

10. Quality vs. Resources. How will the Public Guardian reconcile its drive for quality of services against the ever-present reality of budget limitations? If caseloads are limited in order to ensure quality of services, fewer persons will be served. If standards for frequency and time of contact between guardians and protected persons are high, the costs of the program also will be high. Should the Public Guardian be allowed to stop taking cases when its budget is fully deployed? Using volunteers may alleviate some of these pressures, but the need for more information is acute.

11. Funding. How much funding should the Public Guardian expect? Given what we know about the extent of need, and the cost of high-quality guardianship services, a \$20M budget would not be excessive. One of the Institute's highest research priorities is a study of cost savings that guardianship may produce, through shorter hospital stays, better preventive health care, protection of financial resources, and other important advantages that are achieved when appropriate decisional support is made available to those who cannot protect themselves.

These and other important questions are being addressed in the ongoing work of the Statutory Drafting Advisory Committee. In her presentation to the Colloquium, Wynn invited attendees to begin thinking about these issues, and she welcomed anyone interested in working with the Committee to get in touch and join her in this task.

C. *Family and Volunteer Guardian Support*

John Ford, Esq., chairs the Family and Volunteer Support /Advisory Committee, which has been identifying resources and services that will improve support for relatives and friends who serve as guardian or conservator for their loved ones. John identified a number of initiatives to achieve this:

1. We must find better ways to compensate family/friend guardians. A prime area where corrections are needed is revisiting the regulations issued by MassHealth in response to the Rudow case in 1999. Current regulations provide no compensation in a large number of nursing home cases. Even when they do apply, payments under Rudow are grossly inadequate in all but the least-complicated cases.
2. Any public guardianship entity should be empowered to develop resources, preferably lists of suitable guardians, perhaps comprised of persons certified by the national Guardianship Certification Program and further enabled by training developed by MCLE or CPCS or like programs that will assist even volunteer guardians to meet their fiduciary obligations effectively.
3. The public guardian also should be proactive in educating the public to ways to avoid the need for guardianships, and to foster alternatives to guardianship proceedings. Any incapacitated person is better served by a fiduciary who is familiar with his or her values and wishes, with respect to medical treatment or any other aspect of life and the process for making decisions impacting that life. We have identified efforts to recruit volunteer health care proxy agents as well as guardians for un-befriended and indigent persons with incapacity.
4. The Institute may recommend legislation to authorize “Supported Decision Making” (SDM), such as has been enacted in Texas. An SDM statute would give legitimacy to the supporters who assist persons of incapacity in decision making, and provide a measure of comfort to medical providers, landlords, bankers and others who want to recognize the self-determination of an incapacitated person, but are constrained by questions of their ability to manage the decision.
5. We will be strongly recommending a statute to authorize default surrogates who can provide consent for medical treatment when there is no Health Care Proxy and no guardianship in place. This statute alone could drastically reduce the number of guardianship cases that must be filed. As is true with SDM, however, there remain significant questions of due process and protection of substantive rights for individuals whose care could be managed this way.

6. We will be recommending methods to assist the court system in responding more effectively to the needs of persons with incapacity, including specialty guardian or fiduciary courts, and perhaps special proceedings for developmentally disabled individuals and their families who suddenly must address issues of legal capacity when the individual turns age 18 or 22, with its often staggering financial and emotional costs.

Recommendations of the Institute in all of these matters will include proposed changes in statutory, administrative agency and court rules and procedures to bring about as many of the above reforms as can be achieved, and to foster the development of resources for persons of good will to assist the neediest of those who require decisional help.

III. The Kansas Guardianship Program

The centerpiece of the Colloquium was the in-depth discussion of the Kansas Guardianship Program (KGP), led by its Executive Director, Jean Krahn, and one of its most experienced Regional Recruiter/Facilitators, Laura Dickinson. Jean and Laura provided an overview of the agency in the morning, and then were available for a two-hour Q-&-A session in the afternoon, the combination of which provided a very full picture of this remarkable program.

Both Jean and Laura spoke passionately, knowledgeably and engagingly about KGP. The morning's overview revealed that there are ten paid staff members at KGP, including Jean, two administrators and seven Regional Recruiter/Facilitators. The Recruiter/Facilitators supervise over 800 volunteers, who in turn provide guardianship and conservatorship services for over 1,400 persons with decisional needs. The afternoon was a chance to "drill down" on specific questions about parts of the program, like exactly how KGP gets involved in the petitioning process, or what happens when volunteers need help with reports.

A. What's Not to Like?

The history of KGP's successes – both past and present – speaks for itself. But several points stood out about the KGP model that caught our attention, as things we'd like to see in Massachusetts:

1. *It is relationship-based.* The volunteers who sign up have chosen to help in this role, and it shows in the statistics. Volunteers report that they spend, on average, ten hours per month with their person. 49% of volunteers stay with their person for ten years or longer.
2. *It is cost-effective.* The average cost to provide a guardian through KGP is about \$850 per year for each person served. Public guardianship programs in other states report much higher costs, from \$1,500 per person served in Illinois to \$7,000 per person served in Oregon.

3. *It is flexible.* KGP manages volunteers at all levels of experience and expertise. Most cases are routine and relatively low-maintenance. But KGP also provides a core staff of highly-trained, experienced facilitators who can guide volunteers in dealing with complex cases and crises.
4. *It is supervised.* Core staff who are experienced as guardians and conservators meet with volunteers periodically, depending upon the experience level of the guardians, and/or the needs of the case. Oversight is maintained through monthly reports and other structured communication between KGP staff and the volunteers.
5. *It works as a team.* KGP cooperates with state agencies that are responsible for the vulnerable populations who need guardianship services. Referrals are made exclusively through the Kansas Department for Children and Families Adult Protective Services, but relationships have developed with other agencies that help to provide access to KGP services where they are most needed.
6. *It is independent.* KGP is a free-standing, quasi-public agency that is not under any other governmental unit or agency, but is accountable to a Board of Directors that is appointed by the Governor and the Chief Justice, one of whom must be a volunteer in the program. This structure ensures that KGP guardians do not have conflicts of interest that might stop them from advocating for services and benefits from other public agencies on behalf of the persons they protect.
7. *It has a robust community presence.* Nearly 70% of the persons for whom KGP is guardian or conservator live in the community – that is, they are not institutionalized. This statistic is noteworthy in light of the low cost of services that KGP offers, given that guardianship services in the community typically are more expensive than services for persons in nursing homes or other institutions.
8. *It provides built-in outreach.* Many of the volunteers that KGP supports are friends or members of the community of the protected person. Some of these volunteers go on to take other cases, either during or after the lifetime of the original case. In addition, volunteers often are empowered by their experience to advocate for other vulnerable adults with whom they interact, either in their guardianship work or in other spheres of their lives.

B. But There's No Panacea . . .

One of the many wise perspectives that Jean and Laura offered was the view that, because Massachusetts has no public guardian as such, we have an opportunity to build upon the successes of other programs when designing our own. If we hope to achieve that, we will have to solve some issues that continue to challenge KGP:

1. *It is not a true “last resort” guardian.* KGP, like programs in many other states, has the option to say “no” to cases that it does not feel equipped to handle. This may limit its reach, leaving some persons in need without a public option. Another limitation is that KGP can accept only persons who are Medicaid eligible. While entirely reasonable and appropriate, this restriction may tend to leave some persons who are not, for any number of reasons, eligible for Medicaid, also without a public guardian.
2. *Public support remains a problem.* Despite its extraordinary quality, commitment and cost effectiveness, KGP suffers from the same chronic underfunding that social service agencies of all kinds and in all states (including Massachusetts) face today. They have not completely solved the problem of how to ensure the availability of adequate state financial support for the politically invisible populations that they serve.
3. *Appointments are not readily transferrable.* KGP itself does not serve as guardian or conservator, but instead supports volunteers to serve in those capacities. We wonder whether such a program could work equally well if the agency were the named guardian or conservator, and the volunteer were authorized as a sub-agent to act for the public guardian. The advantage of such a structure is that, if the volunteer were to withdraw from the program, an informal change of sub-agent would suffice to transfer the case to a successor, in place of the often-expensive judicial processes of resignation and appointment of a new fiduciary. Alternatively, KGP felt that having an attorney on staff would help with these issues, but it has not been able to afford one under current budget constraints.

IV. Looking Ahead

Meeting Jean and Laura, and learning about the KGP program, was fascinating and inspirational for all who attended. Much work remains to be done in order to see whether a volunteer-based model may work in Massachusetts. This work will be moving into high gear as the year advances, with a target date of November, 2016 for those involved in drafting proposed legislation for a Public Guardian.

Please let us know your thoughts, comments, concerns and ideas, whether in response to this Summary Report, or in any other context. The website at www.guardianship.institute now is available as a communication nexus for stakeholders and others who wish to support the Institute in its advocacy for guardianship reform and the creation of a Public Guardian in Massachusetts.