

WHO WANTS THE WARD? THE STATE’S ROLE IN ADULT GUARDIANSHIP PROCEEDINGS

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I. ONE WOMAN’S STORY: THE CURSORY PATH TO GUARDIANSHIP

Loyce Juanita Parker was a survivor.¹ Born in rural Oklahoma in 1919, Loyce’s childhood was colored by the immediate aftermath of World War I.² At the age of eighteen, Loyce survived a devastating train wreck that left her hospitalized and unconscious for six weeks.³ After regaining her health, she married her husband Alvin and began her new life with him on a farm in southern Oklahoma.⁴ Together, Loyce and Alvin raised their five children through the midst of the Great Depression, the Dust Bowl, and another World War.⁵ But it was not until the spring of 2006, when Alvin unexpectedly

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1. See *Obituary of Loyce Juanita Bacon Parker*, DUDLEY FUNERAL HOMES, <http://www.dudleyfuneralhomes.com/loyceparker.html> [perma.cc/LN9U-6NDK] (last visited Feb. 7, 2019).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

passed away after 68 years of marriage, that Loyce's world changed dramatically.⁶

After Alvin's passing, one of the Parkers' daughters, Linda Jones, moved Loyce from the family farmhouse to an assisted living facility in Texas, where Linda resided.⁷ Shortly after, a psychiatrist identified only as "Dr. Dash" evaluated Loyce.⁸ Linda later testified that Dr. Dash had concluded Loyce suffered from a form of dementia, required 24-hour care, and needed a guardian.⁹ Linda then applied in Texas for appointment as permanent guardian of her mother's person and estate.¹⁰ In her application, Linda included a letter from another physician who had examined Loyce after Linda decided to pursue guardianship.¹¹ In his letter, the physician stated that Loyce was "incapacitated," without defining the term.¹² He further opined that Loyce suffered from "dementia or mild dementia," and had "significant cognitive deficits, including poor memory, disorientation, and confusion."¹³

From there, Loyce's situation grew only more complicated.¹⁴ After Linda filed her application for appointment of guardian, Loyce's son, Edward Parker, quietly removed Loyce from her Texas facility and placed her in a new facility in Oklahoma, where Edward resided.¹⁵ Edward then filed a contest of the daughter's guardianship application in Texas and initiated his own proceeding for guardianship in Oklahoma.¹⁶ On multiple occasions, Loyce expressed her strong desire to remain in Oklahoma, where her entire estate and the majority of her friends and family were located, and where she had lived her entire life.¹⁷ Loyce also maintained that she did not need a guardian, but that if she were deemed incapacitated, she preferred Edward be appointed, or if he was unavailable, her other daughter, Polly Ward.¹⁸

Nevertheless, in March 2007, a district court in Texas heard Linda's application for permanent guardianship.¹⁹ Loyce, who refused to leave

6. See generally *In re Guardianship of Parker*, 275 S.W.3d 623, 626 (Tex. App.—Amarillo 2008, pet. denied).

7. *Id.* at 626.

8. *Id.*

9. *Id.* (Dr. Dash neither appeared live or by deposition at trial, nor did he submit a report to the court).

10. See *id.* at 626–27.

11. *Id.*

12. *Id.* at 626.

13. *Id.* (Dr. Dash provided the only expert testimony at trial).

14. See *infra* notes 15–30 and accompanying text.

15. *In re Guardianship of Parker*, 275 S.W.3d at 627.

16. *In re Guardianship of Parker*, 189 P.3d 730, 730 (Okla. Civ. App. 2008).

17. Eric Fish et al., *Guardianship of Loyce Juanita Parker: The Case for Adoption of UAGPJJA in Texas*, South Texas College of Law, 25th Annual Wills and Probate Institute (2010), <https://slideplayer.com/slide/12226372/> [perma.cc/ZUQ7-WE8R].

18. *Id.*

19. *Id.*

Oklahoma, did not appear at the hearing.²⁰ The court ultimately held that Linda, by clear and convincing evidence, proved that Loyce was an “incapacitated person” for the purpose of guardianship, and appointed her as guardian—with full guardianship authority—of both the person and estate of Loyce.²¹ Then, against her mother’s wishes, Linda moved Loyce out of her home state and back to Texas.²²

Nearly three years after her husband’s funeral, Loyce Juanita Parker died on December 22, 2011.²³ She was ninety-two years old.²⁴ The long-running legal dispute over Loyce’s guardianship ended the day she died, but the negative impact it had on her children and her final years could not be undone.²⁵ The entire dispute hinged on who should have been appointed guardian and where Loyce should have resided, and it led to allegations by each of her children that the others were interested only in taking Loyce’s money.²⁶ Meanwhile, her requests were never honored when she died in Texas while still under the guardianship of her daughter.²⁷

Loyce had nine siblings, five children, thirteen grandchildren, and twenty-four great-grandchildren.²⁸ She had financial resources and several different family members who were willing to take her in.²⁹ Yet, despite all of this, the determination of guardianship—and whether it was even appropriate—was highly complicated and faithfully contested.³⁰

Unfortunately, Loyce’s case is not unique.³¹ Guardianship proceedings—even those that involve friends or family members close to the proposed ward—are highly sensitive and multi-faceted.³² This Comment will explore the implications that may arise when a state agency, rather than a close family member, is the proposed guardian, by addressing one particular area for improvement in guardianship law: public guardianship.³³ Part II addresses

20. See *In re Guardianship of Parker*, 275 S.W.3d at 627 (holding that the court had personal jurisdiction over Loyce because at the time the daughter submitted her application for guardianship, Loyce was physically present in Texas and her personal appearance was therefore unnecessary for its decision).

21. *Id.*

22. See Fish et al., *supra* note 17.

23. See *Obituary of Loyce Juanita Bacon Parker*, *supra* note 1.

24. *Id.*

25. See generally *Parker v. Jones*, No. CIV-09-0940-HE, 2009 WL 3698121, *1 (W.D. Okla. Nov. 2, 2009) (describing Loyce’s children’s relationships and their involvement in the dispute).

26. *Id.*

27. See Fish et al., *supra* note 17.

28. See *Obituary of Loyce Juanita Bacon Parker*, *supra* note 1.

29. See *Parker*, 2009 WL 3698121 at *1.

30. See Fish et al., *supra* note 17 (Among other things, the parties disputed jurisdiction, Loyce’s competency, the admissibility of critical evidence, and possible adverse interests of those seeking to be appointed guardian.).

31. See, e.g., *In re Mollie Orshansky*, 804 A.2d 1077 (D.C. Cir. 2002) (describing a similar dispute among family members); see generally Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193 (2007) (describing trends in public guardianship cases across the nation).

32. See Teaster et al., *supra* note 31.

33. See *infra* Parts I–VI.

the impending shift in the nation's demographic that will likely give rise to an increased need for guardianships.³⁴ Part III.A provides a brief general background to guardianship before introducing the statutory concept of public guardianship, or "guardian of last resort," and the problematic practices involved in appointing a state entity as guardian of last resort.³⁵ Part III.B gives a comparative analysis of common public guardianship statutory schemes and addresses major policy concerns prompted by state statutes that implicitly designate one or more state agencies as guardian of last resort.³⁶ Examining these issues through the lens of Texas law, Part IV evaluates the current Texas statutory scheme and its implications.³⁷ Finally, in Part V, this Comment proposes statutory recommendations informed by the policy considerations addressed in Parts II and III and throughout this Comment.³⁸

II. GUARDIANSHIP LAW AND THE AGING POPULATION

The United States population is on the verge of an unprecedented transformation: within decades, the nation's retirement-age population will likely outnumber minors for the first time in history.³⁹ The U.S. Census Bureau estimates that, by 2035, the national population will include 78 million people 65 years of age and older, surpassing the 76.7 million people under the age of 18.⁴⁰ Experts attribute this shift in demographics to the generation of post-World War II "Baby Boomers," or persons born between 1946 and 1964.⁴¹ This wave, or "boom," of child births remained unmatched by subsequent generations, resulting in the current and impending age disparity as Baby Boomers approach retirement.⁴² The population transformation will likely lead to significant changes in the area of guardianship law.⁴³

The aging Baby Boomer population has heightened previously existing concerns about the competency and susceptibility of our elderly.⁴⁴ Occurrences of Alzheimer's disease and related forms of dementia have more than doubled since the early 1980s and will likely continue to grow, affecting

34. See *infra* Part II.

35. See *infra* Section III.A.

36. See *infra* Section III.B.

37. See *infra* Part IV.

38. See *infra* Part V.

39. See Press Release, *Older People Projected to Outnumber Children for the First Time in U.S. History*, U.S. CENSUS BUREAU (Sept. 26, 2018), <https://www.census.gov/newsroom/press-releases/2018/cb18-41-population-projections.html> [perma.cc/99FS-F42N].

40. *Id.*

41. See Janet Stidman Eveleth, *Baby Boomers Retire*, 42-FEB MD. B.J. 4, 5 (2009), Westlaw.

42. See generally Naomi Karp & Erica F. Wood, *Guardianship Monitoring: A National Survey of Court Practices*, 37 STETSON L. REV. 143 (2007) (describing the impending shift in the nation's age demographic).

43. *Id.*

44. *Id.*

between 11.3 and 16 million Americans by 2050.⁴⁵ Meanwhile, incidents of elder abuse are also on the rise.⁴⁶ It is estimated that between 1 to 2 million Americans aged 65 and older have been injured, exploited, or otherwise mistreated by someone who they depended on for care and protection.⁴⁷

Ironically, one form of exploitation may be through the misuse of a legal guardianship arrangement as a means of controlling a ward and his or her assets for personal gain.⁴⁸ As the elderly population increases nationwide, so too will the number of adult guardianships, emphasizing concerns about a variety of areas in guardianship law.⁴⁹ Issues may arise under guardianship because a ward's most basic rights may be seriously restricted, if not wholly restrained.⁵⁰ Procedural or substantive pitfalls in guardianship law have the potential to lead to more egregious human and civil rights violations than almost any other area of law.⁵¹ For example, wards may lose the power to choose where to live, how to spend and invest their own money, and whether to marry or vote.⁵² It follows that the methods for appointing a guardian and the requirements for becoming a guardian are two crucial considerations in ensuring that a proposed ward's rights are protected.⁵³ Unfortunately, these safeguards are susceptible to failure and the fundamental rights of wards often go unprotected.⁵⁴ Nevertheless, guardianship is a vital legal mechanism that far more people are likely to rely upon in coming years.⁵⁵ Improving outdated guardianship laws, practices, and procedures is therefore of utmost importance.⁵⁶

45. See *The Future of Medicare: Recognizing the Need for Chronic Care Coordination: Hearing Before the Special Committee on Aging*, 110th Cong. 1 (2007) (statement of Sen. Hillary Rodham Clinton).

46. See Karp & Wood, *supra* note 42, at 150.

47. See Richard J. Bonnie & Robert B. Wallace, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, NAT'L ACAD. PRESS (2003), <https://www.nap.edu/read/10406/chapter/1> [perma.cc/E9N8-MK6U].

48. See generally Teaster et al., *supra* note 31; see also *In re Mollie Orshansky*, 804 A.2d 1077, 1079, 1104 (D.C. Cir. 2002).

49. See Karp & Wood, *supra* note 42.

50. See generally James Christopher Redding, *Constitutional Deficiencies in Oklahoma Guardianship Law*, 13 TULSA L. REV. 579 (1978) (describing guardianship implications with regards to a ward's basic liberties).

51. See *id.* at 579–81; see also Kelly Hassett, *Money on Hold for 100 Clients of Ex-Guardian*, LANSING ST. J. 1A (Aug. 18, 2005).

52. See Redding, *supra* note 50.

53. See Karp & Wood, *supra* note 42.

54. *Id.*

55. See *infra* Part IV.

56. See Elaine Ryan, *3 Ways to Improve Adult Guardianship and Fight Elder Abuse*, AARP (June 7, 2018), <https://blog.aarp.org/2018/06/07/3-ways-to-improve-adult-guardianship-and-fight-elder-abuse/> [perma.cc/H3AZ-HQ35].

III. AN INTRODUCTION TO ADULT GUARDIANSHIP & GUARDIANSHIP OF LAST RESORT

Guardianship is a relationship created by law whereby the court gives one person or entity (the “guardian”) the duty and power to make personal and property decisions for another (the “ward”).⁵⁷ Guardianships are established by state law and are subject to state court supervision.⁵⁸ In most states, any person or entity may initiate a guardianship proceeding by petitioning to the court that an individual is an “incapacitated person.”⁵⁹ A typical statute defines “incapacitated person” as an individual, either a minor or an adult, who is “substantially unable to: (A) provide food, clothing, or shelter for himself or herself; (B) care for the person’s own physical health; or (C) manage the person’s own financial affairs.”⁶⁰

In most states, the initial application for guardianship requires a medical statement from a physician, mental health specialist, or other healthcare professional, usually based on an evaluation of the ward within the previous six to eight months.⁶¹ The court then notifies the proposed ward of the allegation and initial guardianship hearing.⁶² Depending on the jurisdiction, the court may appoint a court investigator, court visitor, or guardian ad litem to serve as its “eyes and ears,” as the court assesses the overall situation and potential need for guardianship.⁶³

If the guardianship is uncontested, the hearing may be very brief.⁶⁴ If the guardianship is contested, the court will make a finding on the proposed ward’s capacity, usually based on medical evidence from one or two experts and testimony from the ward.⁶⁵ The judge then has wide discretion in determining the extent of the ward’s incapacity and may appoint a plenary or limited guardian, thereby affecting the extent to which the guardian may control the ward and the ward’s property.⁶⁶ If the court finds that an emergency exists—for example, that the proposed ward is in danger of immediate harm—it may appoint a temporary guardian before the hearing on

57. See Karp & Wood, *supra* note 42, at 147.

58. *Id.*

59. *Id.*

60. See, e.g., TEX. EST. CODE ANN. § 1002.017 (Supp.).

61. See Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Proceedings*, 12 ELDER L.J. 53, 94 (2004).

62. See Karp & Wood, *supra* note 42, at 147.

63. Wright, *supra* note 61, at 94.

64. *Id.*; see also *Matter of Janczak*, 634 N.Y.S.2d 1020, 1023 (Sup. Ct. 1995) (defining an uncontested guardianship as “a proceeding in which a respondent consents to the appointment of a guardian”).

65. See Wright, *supra* note 61; see also *In re Guardianship of Barnhart*, 859 N.W.2d 856, 864 (Neb. 2015) (explaining that a guardianship is “contested” when an objector alleges a “true interest or attentiveness to the well-being and protection of the ward” and objects to the proposed guardianship).

66. See Teaster et al., *supra* note 31, at 205.

general guardianship.⁶⁷ A typical statute allows for appointment of permanent guardianship if the court finds, by clear and convincing evidence, that the proposed ward is incapacitated and that all alternatives to guardianship have been considered and deemed infeasible.⁶⁸

If the court grants permanent guardianship, court procedures then seek to ensure guardian accountability.⁶⁹ Certain financial reporting, accounting, and other duties are also imposed on the guardian, typically on an annual basis.⁷⁰ The court at any time may sanction or remove a guardian for failure to follow up with the court or perform other duties.⁷¹ Additionally, the court may decide for any number of reasons that the guardianship, or the scope of the guardian's authority, is no longer appropriate and may modify or terminate the guardianship.⁷²

A. Varying Practices for Appointing Guardians of Last Resort

One important subset of guardianship is *public guardianship*.⁷³ A public guardian is typically a governmental agency that receives most, if not all, of its funding from the state.⁷⁴ Public guardianship programs are funded through state appropriations, Medicaid funds, county funds, fees from the ward, or some combination thereof.⁷⁵ State programs may operate from a single statewide office, have local and regional components, or both.⁷⁶ The program may be entirely staff-based or may operate using paid staff and volunteers.⁷⁷ The latest comprehensive study shows that every state except Nebraska and Wyoming, and the District of Columbia, has some form of public guardianship.⁷⁸

Public guardians are *last resort* guardians to incapacitated persons subject to what is already a last resort legal mechanism (guardianship) when no suitable alternative options are available to address the person's needs.⁷⁹ Public guardianship is designed to be utilized in circumstances when no willing or responsible friend or family member is available to act as guardian of the incapacitated person, or when the proposed ward lacks the resources

67. See Karp & Wood, *supra* note 42, at 147.

68. See, e.g., TEX. EST. CODE ANN. § 1101.101(1) (Supp.); N.Y. MENTAL HYG. LAW § 81.02(a)(2) (McKinney 1992); FLA. STAT. ANN. § 744.331(6) (West 2018).

69. See generally Karp & Wood, *supra* note 42 (describing procedures required after a guardianship is initiated).

70. *Id.*

71. *Id.*

72. See, e.g., EST. § 1202.

73. See Teaster et al., *supra* note 31, at 205.

74. *Id.*

75. *Id.* at 201.

76. *Id.* at 205.

77. *Id.*

78. *Id.* at 230.

79. *Id.* at 205.

to employ a private guardian.⁸⁰ The vast majority of public guardian statutes provide that the state may serve as guardian of both the person and the estate.⁸¹ Forty-four states have enacted statutory provisions authorizing public guardianship, according to the most recent comprehensive national study.⁸² This trend represents a shift in response to the demographic changes discussed in Part II of this Comment and the increased need for surrogate decision makers for our elderly population.⁸³

B. Policy Concerns: A Comparative Analysis of Public Guardianship Statutory Schemes

The statutory scheme a state chooses to implement regarding public guardianship may critically affect the ward subject to that guardianship.⁸⁴ Two major studies of adult guardianship law have been conducted on a national level.⁸⁵ Windsor Schmidt and colleagues conducted the first study in the late 1970s, when public guardianship practices were still highly uncommon.⁸⁶ Pamela Teaster and colleagues conducted and published the second major study in 2005.⁸⁷

Both studies found that statutory provisions for public guardianship are usually included in a state's guardianship code, but such provisions are often also located in (or supplemented by) separate statutory sections, such as services for the aging, adult protective services, mental health services, or services disabled individuals.⁸⁸ Whether through one or multiple statutory sections, states implement either "implicit" or "explicit" statutory schemes.⁸⁹ Explicit statutes specifically refer to a "public guardian," such as a particular governmental agency.⁹⁰ Implicit statutory schemes provide a mechanism for public guardianship, without actually denominating the mechanism as "public guardian."⁹¹ More specifically, while implicit schemes often name a state agency or employee as guardian of last resort, explicit schemes generally provide for an office and the ability to hire staff and contract for services.⁹² This means that explicit statutory schemes are more likely to have

80. *Id.* at 205–06.

81. *Id.* at 205.

82. *Id.*

83. *See* Karp & Wood, *supra* note 42, at 150.

84. *See generally* Teaster et al., *supra* note 31 (describing the negative impacts implicated by a variety of statutory schemes to public guardianship).

85. *Id.* at 195.

86. *Id.*

87. *Id.*

88. *See id.*; *see, e.g.*, FLA. STAT. ANN. §§ 400.148, 744.7021, 415.1051 (West 2007).

89. *See* Teaster et al., *supra* note 31, at 205.

90. *Id.* at 206.

91. *Id.*

92. *Id.*

budgetary appropriations and greater oversight than is required for guardians under an implicit statutory scheme.⁹³

Referencing the Schmidt study, Teaster and her colleagues found that over the years, states have continued to move toward more explicit statutory schemes to public guardianship in an effort to reform guardianship law, but that several important statutory provisions remain either implicit or nonexistent.⁹⁴ Teaster noted that the most successful statutory schemes usually provide for certain provisions, such as: (1) eligibility for public guardianship; (2) scope of services provided by the guardian program; (3) administrative location of the public guardianship function in the state government; (4) duties and powers of the public guardian; (5) costs of the guardianship program; (6) court oversight and program review; and (7) staffing ratios.⁹⁵

Even when a particular state agency is statutorily designated as public guardian, or guardian of last resort, failure to explicitly include one or more of the aforementioned statutory provisions may negatively impact a ward under public guardianship.⁹⁶ Illinois's statutory scheme presents a prime example.⁹⁷ Many important procedures for petitioning for adult guardianship in Illinois are statutory and enumerated in the state's probate code, which is the state's sole statutory act addressing guardianship matters.⁹⁸ The statutory scheme establishes a dual system of public guardianship, designating the role of public guardian to either the Office of State Guardian (OSG), an agency which functions statewide through seven regional offices, or the Office of Public Guardian (OPG), which is a county-by-county program.⁹⁹ The OSG serves wards with estates of less than \$25,000, while the OPG serves wards with estates of more than \$25,000.¹⁰⁰ Additionally, by statute, any non-profit agency deemed suitable by the court may act as public guardian.¹⁰¹

Although centralized in the probate code and explicit in many respects, the Illinois statutory scheme is silent regarding several key provisions that are essential features of a truly explicit statutory scheme.¹⁰² For example, the code fails to specify staffing ratio requirements or the number of wards per

93. *Id.*

94. See generally Teaster et al., *supra* note 31, at 206 (describing statutory provisions states fail to enact).

95. *Id.*

96. See generally Karp & Wood, *supra* note 42 (describing the negative implications implicit statutory schemes have on wards).

97. See Teaster et al., *supra* note 31, at 226–27.

98. See Chapter 11a of the Probate Act of 1975, 755 ILL. COMP STAT. 5/1–1, et seq.

99. See Teaster et al., *supra* note 31, at 226–27; 755 ILL. COMP STAT. 5/13–1, et. seq.; 20 ILL. COMP STAT. 3955/30–33 (1995).

100. 755 ILL. COMP STAT. 5/13–1, et. seq.; 20 ILL. COMP STAT. 3955/30–33 (1995).

101. 755 ILL. COMP STAT. 5/11a–5 (2015).

102. See Teaster et al., *supra* note 31, at 226; 755 ILL. COMP STAT. 5/13–1, et. seq.; 20 ILL. COMP STAT. 3955/30–33 (2015).

staff member either agency must be willing to accept.¹⁰³ This alone has created significant problems within the overall public guardianship system.¹⁰⁴ The Teaster study found that the state's OSG program, in particular, serves approximately 5,500 wards, with one of the highest staff-to-ward ratios at 1 to 132 for guardianships of the person and 1 to 31 for guardianships of the estate.¹⁰⁵

The OSG attempts to mitigate its poor staffing ratio by providing extensive training and requiring Registered Guardian certification for nearly all its staff through the National Guardianship Foundation.¹⁰⁶ However, staff visits to wards occur at best once every three months.¹⁰⁷ Moreover, the focus groups who participated in the Teaster study stressed that the OSG serves far too many wards without proper funding, and that most of the wards receive insufficient personal attention due to the inadequate staffing.¹⁰⁸

Thus, primarily explicit statutory schemes that designate specific amounts and sources of funding to a designated agency are "for all practical purposes" rendered ineffective when the statute also fails to specify caps for staffing ratios.¹⁰⁹ The absence of any staffing provision also implicates the provision expressly permitting the OSG to petition for its own appointment as guardian.¹¹⁰ In effect, the agency is less likely to petition courts for guardianship or pursue outside guardianship abuses when faced with high staffing ratios and insufficient resources—key issues stemming from a statutory scheme which fails to provide important safeguards.¹¹¹

In contrast, Florida—the state with the highest percentage of its population aged 65 years or older—presents a more formative approach to its statutory scheme.¹¹² The Statewide Public Guardianship Office (the Office) is housed under the state's Department of Elder Affairs.¹¹³ As directed by Florida's Guardianship Code, the Office contracts with seventeen local "Offices of Public Guardianship" throughout Florida, which are usually non-profit organizations.¹¹⁴ Since 2016, the program has expanded and is now regulating more than 550 professional guardians statewide, which includes

103. See Teaster et al., *supra* note 31, at 226.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. See Dr. Mary L. Milano et al., *A Practitioner's Guide to Adult Guardianship in Illinois*, ILL. GUARDIANSHIP AND ADVOCACY COMM'N (2007), <https://www2.illinois.gov/sites/gac/OSG/Documents/PRAGUIDE2007.pdf> [perma.cc/LBP6-DFYE].

111. *Id.*

112. See Christine L. Himes, *Which U.S. States Are The 'Oldest'?*, POPULAR REFERENCE BUREAU (April 3, 2003), <https://www.prb.org/whichusstatesaretheoldest/> [perma.cc/8TS6-CBLK].

113. Teaster et al., *supra* note 31.

114. See *Office of Public & Professional Conduct: Who We Are*, DEPT. OF ELDER AFF. ST. OF FLA., <http://elderaffairs.state.fl.us/doca/spgo.php> [perma.cc/4YYX-5RAR] (last visited Nov. 17, 2018).

investigating possible needs for guardianship and, if deemed appropriate, disciplining guardians in violation of law.¹¹⁵ The Teaster study found that, while twelve state laws specifically address ward-to-staff ratios in the statute, Florida is the only state that provides an exact ratio cap in its statute—a one-to-forty staff-to-ward ratio—with the remaining statutes simply providing that a ratio must be administratively determined by the agency responsible for public guardianship.¹¹⁶

While it may seem like a good idea to allow agencies responsible for public guardianship to determine their own staffing ratio, Florida's statutory scheme illustrates why an across-the-board limitation may actually be the most appropriate approach.¹¹⁷ The statutorily capped ratio acts as a limitation, rather than a minimum requirement.¹¹⁸ This capped ratio effectively safeguards wards subject to public guardianship within an agency that: (1) has not properly assessed its ability to handle a certain number of wards; (2) has ulterior motives for taking in more wards; or (3) has knowingly taken on an overwhelming caseload under the mistaken belief that minimal guardianship is still better than no guardianship at all.¹¹⁹ Moreover, given that states generally provide most of the funding to these designated public agencies, it makes sense that the two highly interrelated concerns of budgetary appropriations and staffing ratios remain under the control of state legislatures.¹²⁰

Although there are many important considerations regarding public guardianship, the Teaster study showed that virtually all states reported a lack of funding and staffing as their "greatest weakness and greatest threat."¹²¹ The study identified staff-to-ward ratios as high as 1:50, 1:80 and even 1:173.¹²² Focus groups involved in state public guardianship systems reported "staff burnout," "judges not sympathetic to the high caseload problem," "more labor intensive cases," "not enough time to do proper accounting," "not enough time to see wards often enough," "too few restoration petitions," and "prohibitively high caseloads preventing a focus on individual needs."¹²³ While many states continue to improve their public guardianship systems, the Teaster study makes it clear that there is still room for great improvement across the board.¹²⁴

115. *Id.*

116. Teaster et al., *supra* note 31.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

C. Public Guardianship & Olmstead

The conundrum, in light of the current state of public guardianship law, is that public guardianship was originally contemplated as an essential part of the public safety net.¹²⁵ Public guardianships began as a relatively new phenomenon in the 1970s, with the idea that public guardians could serve as guardians of last resort, often to take in poor and vulnerable citizens with nowhere else to go.¹²⁶ Without proper statutory schemes to support this movement, however, state programs may be stretched to the breaking point and actually create issues by failing to provide any real benefit to the individuals they have committed to serve.¹²⁷

The landmark U.S. Supreme Court case *Olmstead v. L.C. ex rel. Zimring* also provides a strong impetus to supporting improvements in public guardianship law.¹²⁸ Decided in 1999, the *Olmstead* case requires states, under authority of the American Disability Act of 1990, to fully integrate individuals with disabilities into community settings when appropriate, as opposed to institutional placements.¹²⁹ Although *Olmstead* dealt with younger, disabled plaintiffs, the facts and circumstances in *Olmstead* are in many ways analogous to the current dilemma.¹³⁰ Many older adults are confined to state institutional care, although eligible for public guardianship—a service that arguably places such individuals in the “most integrated” setting appropriate to meet the individuals’ needs.¹³¹ The court in *Olmstead* cited the Attorney General’s preamble to the regulations on the ADA, which defines “the most integrated setting appropriate to the needs of qualified individuals with disabilities” as “a setting that enables individuals with disabilities to interact with non-disabled persons to the fullest extent possible.”¹³²

Like the plaintiffs in *Olmstead*, wards under public guardianship require surrogate decision-makers to establish and facilitate community supports.¹³³ And under another regulation, public entities are required to “make reasonable modifications” to public services and programs, which may be necessary to avoid “discrimination on the basis of disability,” unless “the public entity can demonstrate that making the modifications would

125. See Eleanor B. Cashmore, Note, *Guarding the Golden Years: How Public Guardianship for Elders Can Help States Meet the Mandates of Olmstead*, 55 B.C. L. REV. 1217, 1217–22 (2014).

126. *Id.*

127. *Id.*

128. See generally *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581 (1999) (holding that undue institutionalization of persons with mental disabilities qualifies as “discrimination” by reason of disability under public services portion of ADA).

129. *Id.*

130. *Id.*

131. *Id.* at 592.

132. *Id.*; 28 CFR § 35.130(d) (1998).

133. See *Olmstead*, 527 U.S. at 581–82.

fundamentally alter the nature of the service, program, or activity.”¹³⁴ Yet, wards with mental disabilities may, among other challenges, be susceptible to unnecessary confinement in mental hospitals or nursing homes because they lack the assistance of a public guardian due to a state’s flawed statutory scheme.¹³⁵

It follows, then, that *Olmstead* serves as a charge to states, if not a duty, to address unmet needs in the area of public guardianship. By establishing more fully funded public guardianship programs with explicit statutory schemes, states can promote independent living and greater community interaction for wards who might otherwise be institutionalized.¹³⁶

IV. ADULT GUARDIANSHIP LAW IN TEXAS

Academics and social service providers across the nation have increasingly pushed for policies and programs that will better assist the elderly population.¹³⁷ Like many states, Texas guardianship law has undergone significant transformation over the past several decades.¹³⁸ This transformation has largely been sparked by increased public awareness and attention to guardianship abuses and system failures.¹³⁹ Additionally, Texas is no exception to the national demographic trend raising concerns for the elderly population—with the over sixty-five population in Texas expected to double by 2040 from approximately 2.85 million to more than 6 million.¹⁴⁰ Included in this growth is an increase in the percentage of persons age 75 and older, including those living with Alzheimer’s disease and other illnesses typically associated with the elderly population.¹⁴¹

Thus, even as concerns relating to guardianship continue to increase, guardianships continue to be utilized at higher and higher rates.¹⁴² As late as July 2016, nearly \$3 billion in personal wealth was under the control of guardians in Texas.¹⁴³

Guardianship jurisdiction in Texas is spread out across three different court systems: statutory probate courts, county courts at law, and constitutional county courts.¹⁴⁴ Texas currently has eighteen statutory

134. 28 C.F.R. § 35.130(b)(7) (1998).

135. See Cashmore, *supra* note 125.

136. See, e.g., TEX. HUM. RES. CODE ANN. § 161.071 (Supp.).

137. See Cashmore, *supra* note 125.

138. *Id.*

139. See Patrick Michels, *Who Guards the Guardians?*, TEXAS OBSERVER (July 6, 2016, 8:00 AM), <https://www.texasobserver.org/texas-guardianship-abuse/> [perma.cc/WF4P-XLBS].

140. See *A Profile of Older Americans: 2011*, U.S. DEPT. OF HEALTH AND HUM. SERVS. (2011), <http://acl.gov/sites/default/files/aging%20and%20disability%20in%20america/2011profile.pdf> [perma.cc/YSG8-ECH4].

141. *Id.*

142. See Michels, *supra* note 139.

143. *Id.*

144. See TEX. EST. CODE ANN. § 1022 (Supp.).

probate courts in ten counties and 211 constitutional county courts.¹⁴⁵ Notably, only eleven percent of the 254 of the current county judges in Texas were actually licensed to practice law.¹⁴⁶ There are many standards differentiating statutory probate courts from county courts, which were initially designed at a time when the statutory probate courts heard eighty percent or more of all guardianship cases filed in Texas.¹⁴⁷

Today, however, at least forty percent of all guardianship petitions in Texas are filed in the state's county-level courts.¹⁴⁸ Nevertheless, through a variety of key provisions in the Texas Estates Code, statutory probate courts continue to be governed under different, typically higher, standards than county-level courts, and typically have more resources allocated to them.¹⁴⁹ For example, statutory probate courts receive funding for additional staff, such as court investigators, to assist with probate and guardianship-specific tasks.¹⁵⁰ Additionally, when a guardianship petition is filed in statutory probate court, the court must receive a physician's evaluation of the alleged incapacitated person and a court investigator must determine the availability of less restrictive alternatives (LRA) to guardianship.¹⁵¹ The requirement to engage in an LRA determination applies *only* to statutory probate courts.¹⁵² Yet, another important disparity relates to bond allocation.¹⁵³ Statutory probate courts must execute a bond in the amount of \$500,000, conditioned on the faithful performance of the duties of office, while the bond amount for all other court judges is between \$1,000 and \$10,000, with no such duty imposed.¹⁵⁴

At the same time, much of Texas's guardianship law is consistent across the three court systems and comports with national trends in guardianship.¹⁵⁵ For example, regardless of the jurisdiction, the court will hold a hearing to consider evidence of the alleged incapacity of the person who is the subject of the petition.¹⁵⁶ After the hearing, the court will issue an order either granting a full or limited guardianship or denying the guardianship petition

145. *Court Jurisdiction Maps*, TEX. JUDICIAL BRANCH, <http://www.txcourts.gov/judicial-directory/court-jurisdiction-maps/> [perma.cc/A6YZ-5TF7] (last visited Nov. 20, 2018).

146. Laura Upchurch & Wendy J. Yates, Presentation, *Texas Probate Judges Survey*, STATE BAR OF TEXAS 38TH ANNUAL ADVANCED ESTATE PLANNING & PROBATE COURSE (July 2015).

147. See *Emerging Trends in Adult Guardianship: Review of State Practices and Summary of Findings for Texas*, William Wayne Justice Center for Public Interest Law, The University of Texas School of Law (Dec. 2014).

148. *Id.*

149. *Id.*; see EST. § 1022.

150. See *id.* §§ 25.0024, 25.0025, 25.00251.

151. *Id.* §§ 1101.103, 1054.151.

152. *Id.*

153. See generally *id.* ch. 1105 (providing for different bond requirements depending on the jurisdiction).

154. TEX. GOV'T CODE ANN. §§ 25.00231, 25.006, 26.001 (Supp.).

155. See *infra* Part IV.

156. EST. § 1101.051.

altogether.¹⁵⁷ Once created, the person named as guardian may change, but the guardianship itself remains in effect until the individual under guardianship dies or is found by the court to no longer require a guardian's support, also called a "restoration" of rights.¹⁵⁸ If the individual dies, a formal "settlement of guardianship," or a proceeding to formally close the guardianship with the court, is generally required.¹⁵⁹

As is the case in every state, the Texas Estates Code provides for ongoing monitoring of any guardianship, including the filing of annual reports for guardianships of the person and annual accountings for guardianships of the estate.¹⁶⁰ Courts must review all annual reports and exercise "reasonable diligence" to determine whether the guardian is performing all of the required duties and whether the guardianship should be continued, modified, or terminated.¹⁶¹ While statutory probate courts are given specific instructions regarding the review process, county courts "may use any method . . . that is determined appropriate by the court according to the court's caseload and available resources."¹⁶²

A. Texas's Implicit Statutory Scheme to Public Guardianship

Texas law provides for public guardianship through the Estates Code and the Human Resources Code, which together create an implicit statutory scheme.¹⁶³ Guardianship is defined in the Texas Estates Code, which encompasses the majority of laws passed by the Texas Legislature regarding adult wards under guardianship.¹⁶⁴ The Texas Estates Code designates the Department of Aging and Disability Services (the Department) as guardian of last resort, or "successor guardian," of the person, estate, or both.¹⁶⁵ The Texas Human Resources Code contains additional laws relating to procedural and substantive duties applicable to the Department.¹⁶⁶

While both bodies of law provide some guidance in regard to public guardianship, neither provides explicit statutory provisions in regard to funding or staffing ratios.¹⁶⁷ Moreover, several key provisions relating to the

157. *Id.*

158. *Id.* §§ 1101.151, 1101.152, 1101.155.

159. *See, e.g., id.* §§ 1204.001, 1204.002.

160. *See generally id.* ch. 1151 (providing for procedures once guardianship is initiated).

161. *Id.* §§ 1201.001, 1201.002, 1201.052.

162. *Id.* § 1201.053.

163. *See generally A Texas Guide to Adult Guardianship*, TEX. HEALTH & HUM. SERVS. (2016), <https://hhs.texas.gov/sites/default/files/documents/laws-regulations/legal-information/guardianship/pub395-guardianship.pdf> [perma.cc/P26W-VWF8] (explaining relevant statutes pertaining to adult guardianship in Texas).

164. *Id.*

165. *See* EST. § 1203.108.

166. *See A Texas Guide to Adult Guardianship*, *supra* note 163.

167. *See generally* EST. tit. 3 (providing for public guardianship without explicitly providing for funding or staffing ratios); *see* TEX. HUM. RES. CODE § 161.101 (Supp.).

substantive duties and obligations of the Department are missing from each.¹⁶⁸ It is also worth noting that the Department is no longer a formal organization, after being absorbed by the Department of Health and Human Services (HHS) in September 2017.¹⁶⁹

The Texas Human Resources Code imposes an obligation on HHS (or, technically, on the Department) to file an application for appointment of a guardian, depending on the situation.¹⁷⁰ The Code specifically addresses filing obligations for two categories of proposed wards.¹⁷¹ For disabled minors referred to the Department, the Department “shall file” an application for guardianship upon determination “that the minor, because of a mental or physical condition, will be substantially unable to provide for the minor’s own food, clothing, or shelter,” among other things.¹⁷² Additionally, the Texas Human Resources Code provides that, upon appointment by a probate court, the Department “shall serve as the *successor* guardian” of a ward described by section 1203.108(b) of the Texas Estates Code, or as that statute stands, a “ward who has been adjudicated as totally incapacitated.”¹⁷³

The Department’s obligations regarding an “elderly person” are not the same.¹⁷⁴ The Texas Human Resources Code provides that the Department “shall conduct a thorough assessment of the conditions and circumstances of an elderly person or person with a disability referred to the department . . . for guardianship services to determine whether a guardianship is appropriate for the individual or whether a less restrictive alternative is available for the individual.”¹⁷⁵ The Texas Human Resources Code further provides that “in determining whether a guardianship is appropriate, the department may consider the resources and funds available to meet the needs of the elderly person or person with a disability.”¹⁷⁶ If the Department determines guardianship is appropriate, it “shall” either: (1) file an application for appointment as guardians; (2) refer the person to another potential guardian; or (3) if a less restrictive alternative to guardianship is available, pursue that alternative.¹⁷⁷ Notably, there is no provision in the Texas Human Resources Code or the Texas Estates Code relating to judicial review of the Department’s determination or an administrative appeals process.¹⁷⁸

168. See generally EST. tit. 3; HUM. RES. § 161.101; see *infra* Section IV.A.

169. See *Department of Aging and Disability Services and Functions Moved to HHS*, TEX. HEALTH & HUM. SERVS., <https://apps.hhs.texas.gov> [perma.cc/KN2A-EAWT] (last visited Dec. 21, 2018).

170. See HUM. RES. § 161.101.

171. See *id.* §§ 161.101(a)(1), 161.101(b).

172. *Id.* § 161.101(a)(1).

173. *Id.* § 161.101(f) (emphasis added); EST. § 1203.108(b).

174. See HUM. RES. §§ 161.101(b), 48.002 (defining “elderly person” as “a person 65 years of age or older”).

175. *Id.* § 161.101.

176. *Id.*

177. *Id.* § 161.101(c)(1)–(2).

178. See generally HUM. RES. § 161.101 (explaining the available “guardianship services”); EST. tit. 3 (2015).

Section 1203.108(b) of the Texas Estates Code is the only statutory provision expressly permitting a court to require the Department to file an application for guardianship.¹⁷⁹ However, as discussed above, the court may require an application under this section only when appointment of *successor* guardian is being sought for an individual adjudicated as *totally incapacitated*.¹⁸⁰ And, under section 1203.108(b) of the Texas Estates Code, the Department “may not be appointed as *permanent* guardian for any individual” unless it applies for or otherwise consents to the appointment.¹⁸¹ Subsection (c) of that statute provides that the number of appointments is subject to an annual limit of fifty-five.¹⁸² It further provides that under Subsection (b), “[t]he appointments must be distributed equally or as equally as possible among the health and human services regions of this state,” but that “the department, at the department’s discretion, may establish a different distribution scheme to promote the efficient use and administration of resources.”¹⁸³

The most important obligations imposed upon the Department by this statutory scheme effectively hinge on two main factors: the category that the proposed ward falls under (disabled minor or incapacitated adult) and the type of guardianship being sought.¹⁸⁴ Under the Texas Estates Code, there are generally three types of guardianships: (1) “permanent,” (2) “temporary,” and (3) “successor.”¹⁸⁵ A *permanent* guardianship continues indefinitely and includes a requirement that all persons with an interest in the proposed ward be notified of the proceeding.¹⁸⁶ Permanent guardianship also includes the requirement of personal service on both the proposed ward and the person named in the application to be appointed guardian, if that person is not the applicant.¹⁸⁷

A *temporary* guardianship is initiated in the event that the proposed ward “may be an incapacitated person,” or if the court “has probable cause to believe that the person, the person’s estate, or both require the immediate appointment of a guardian.”¹⁸⁸ The proposed temporary guardian must be given notice of the proceeding and has the right to appear at the initial hearing.¹⁸⁹ A *successor* guardianship has similar requirements for a guardian

179. See generally HUM. RES. § 161.101 (providing statutory provisions permitting requirement of the Department to file an application for guardianships); EST. § 1203.108(b).

180. EST. § 1203.108(b).

181. *Id.* § 1203.108(b) (emphasis added).

182. *Id.* § 1203.108.

183. *Id.*

184. See generally HUM. RES. § 161.101 (providing for different requirements depending on whether the ward is a minor or an adult incapacitated person); EST. tit. 3 (2015).

185. EST. §§ 1002.012(a), 1101.001.

186. See *id.* § ch. 1101, 1051.

187. *Id.* § 1051.103(a)(5).

188. See *id.* § 1251.001(a)(1), (2).

189. See *id.* §§ 1251.005(a), 1251.005(b)(2), 1251.009.

who has not initiated the proceeding.¹⁹⁰ A successor guardian is typically an alternate guardian in the event that the first appointed guardian resigns, is removed, or dies.¹⁹¹ The main statutory provisions governing both temporary and successor guardians specifically reference the Department.¹⁹²

The statutory scheme created by the Texas Estates Code and Human Resources Code confuses the obligations and duties of the Department and fails to account for potential issues pertaining to the Department's manpower and resources.¹⁹³ Rather than allow the Department to consider its current caseload from the start, the scheme requires the Department to conduct an investigation into the appropriateness of guardianship, only to then grant the Department wide administrative discretion in determining whether the Department wishes to take on the role of public guardian.¹⁹⁴ Additionally, stricter requirements are imposed upon the Department depending on whether the Department is being sought as *successor* guardian or *permanent* guardian, despite the fact that such distinctions may have nothing to do with the Department's ability to act as a competent public guardian.¹⁹⁵ And, while there is a limit to the number of wards the Department may appoint annually for *permanent* guardianship, there remains no provision providing for a staffing ratio cap.¹⁹⁶ This, coupled with unclear, or at the very least, disproportionate, duties imposed on the Department sets the system up for the same issues discussed above, with regards to public guardianship across the nation.¹⁹⁷ The following section serves as an illustration of public guardianship under this statutory scheme.¹⁹⁸

B. *Implicit Problems: In re the Guardianship of Edwin Wooley*

One obvious concern with public guardianship in Texas is the potential for courts to rely too heavily on government agencies for guardianship.¹⁹⁹ In lieu of upholding the statutory requirement that parties exercise due diligence in finding an alternative guardian, or an alternative to guardianship altogether, courts may be tempted to simply appoint state agencies as a public guardian.²⁰⁰ Moreover, courts may make such an appointment without regard

190. See *id.* § 1203.108(b)(5).

191. See *id.* § 1203.102.

192. See *id.* §§ 1203.108(b)(5), 1251.001, 1251.009.

193. See generally HUM. RES. § 161.101 (providing the guardianship statutory scheme when fails to address future potential issues); EST. tit. 3 (2015).

194. HUM. RES. § 161.101(c)(1), (2).

195. See EST. §§ 1203.108(b)(5), 1251.001, 1251.009.

196. See *id.* § 1203.108; HUM. RES. § 161.101; EST. tit. 3 (2015).

197. See *supra* Sections III.B–C.

198. See *infra* Part VII.

199. See Emmanuel J. Osemota, *National Survey and Evaluation of Public Guardianship Laws Across the Country: A Strategic Plan to Improve the Effectiveness and Efficiency of Statewide Public Guardianship Office in Florida*, Report for the Florida Department of Elder Affairs (July 2015).

200. *Id.*

for whether the agency has the resources to handle additional guardianships, or before the court assesses a person's individual needs to determine if public guardianship is even in the proposed ward's best interest.²⁰¹

Implicit public guardianship statutory schemes like the one in Texas fail to provide the necessary safeguards to address these concerns.²⁰² This was apparent in the 2017 case, *In re the Guardianship of Edwin Wooley*.²⁰³ In *Wooley*, the Tarrant County Probate Court No. 2 appointed the Department as temporary guardian of an alleged incapacitated man named Edwin Wooley.²⁰⁴ The court investigator filed an application for permanent guardianship, nominating "the Department or another person" to be appointed permanent guardian.²⁰⁵ The Department filed a plea to the jurisdiction, arguing that its immunity from suit barred the court investigator's motion because it had not applied to be permanent guardian, nor had it consented to the appointment of public guardian.²⁰⁶ The probate court denied the plea and the Department appealed to the Texas Second Court of Appeals, Fort Worth.²⁰⁷

In a divided opinion, the court of appeals affirmed.²⁰⁸ The lead opinion concluded that sovereign immunity did not apply because uncontested guardianship proceedings are by statute *in rem* proceedings.²⁰⁹ The court reasoned that the Department was therefore considered a party, but not a defendant, to the proceeding in its capacity as temporary guardian and that the administration of the guardianship is a single proceeding over which the probate court has jurisdiction.²¹⁰ That opinion also reasoned that the statute exempting the Department from serving as permanent guardian without its consent at most afforded the Department immunity from *liability*, not an immunity from *suit* that would defeat the probate court's jurisdiction.²¹¹

A concurring opinion emphasized that immunity did not apply because the guardianship proceeding was not a suit brought against the Department.²¹² That opinion also concluded that the Department's statutory exemption from permanent guardianship did not implicate the probate court's subject-matter

201. *Id.*

202. *Id.*

203. See *In re the Guardianship of Edwin Wooley*, No. 02-14-00315-CV, 2016 WL 3179643, at *1 (Tex. App.—Fort Worth June 2, 2016, pet. granted).

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. See *id.* at *1 (emphasis added); see also TEX. EST. CODE ANN. § 1022.002(d) (Supp.) ("from the filing of the application for the appointment of a guardian of the estate or person, or both, until the guardianship is settled and closed under this chapter, the administration of the estate of a minor or other incapacitated person is one proceeding for purposes of jurisdiction and is a proceeding in rem").

210. See *In re the Guardianship of Edwin Wooley*, 2016 WL 3179643, at *4–5.

211. *Id.* at *6.

212. *Id.* at *8.

jurisdiction because the Department had been appointed as successor guardian, or “potential permanent guardian.”²¹³ The dissent, however, reasoned that naming the Department as a potential guardian in the application for permanent guardianship was “tantamount to a lawsuit being brought against the Department” and an effort by the court to control state action by compelling the Department to serve in an unwanted role.²¹⁴ The dissent explained that the probate court could have easily dismissed the guardianship application as to the Department while retaining jurisdiction over the remainder of the proceeding.²¹⁵

The Department appealed for a second time to the Texas Supreme Court, which granted its petition for review.²¹⁶ The case, however, was dismissed on October 6, 2017 after the death of Mr. Wooley and before the court could issue its decision.²¹⁷ Nevertheless, the opinions of the probate court and the court of appeals on interlocutory appeal, as well as the briefs by both parties on appeal to the Texas Supreme Court, highlight the multiple interpretations of public guardianship law in Texas.²¹⁸

Throughout the case, the Department framed the primary issue in terms of the statutory limitations on the probate court’s jurisdiction, focusing on the immunity from suit argument second.²¹⁹ The Department argued that even if it was not immune from suit, together the Texas Estates Code and the Human Resources Code make clear that a court may not exercise jurisdiction over it as a *potential* permanent guardian.²²⁰

In addressing its second argument relating to sovereign immunity, the Department—in line with the dissent on appeal—urged the court that it could seek dismissal of the permanent guardianship application, without forcing the court to dismiss the entire proceeding.²²¹ Although the Texas Estates Code describes a guardianship proceeding as *in rem*, the Department argued that a guardian proceeding is actually *quasi in rem* because it requires potential guardians to have notice and an opportunity to be heard.²²² The Department also challenged whether it even makes sense to characterize its exemption from guardianship as only immunity from liability and not immunity from

213. *Id.*

214. *Id.*

215. *Id.*

216. See Brief for Appellant at 7, *In re the Guardianship of Edwin Wooley*, 2014 WL 6844948 (No. 02-14-00315-CV) (Tex. App.—Fort Worth Nov. 17, 2014).

217. See *In re the Guardianship of Edwin Wooley*, 2016 WL 3179643, at *4–5.

218. See *id.*; Brief for Appellant at 7, *In re the Guardianship of Edwin Wooley*, 2014 WL 6844948 (describing the varying interpretations of the relevant statutory provisions).

219. See *In re the Guardianship of Edwin Wooley*, 2016 WL 3179643, at *4–5; Brief for Appellant at 7, *In re the Guardianship of Edwin Wooley*, 2014 WL 6844948.

220. See Brief for Appellant at 7, *In re the Guardianship of Edwin Wooley*, 2014 WL 6844948 (emphasis added).

221. See *id.*

222. *Id.*

suit.²²³ As was alluded to by the court of appeals, the Department stressed it would be able to object to suit if the application was for permanent guardianship.²²⁴ Because establishing a permanent guardian is the ultimate goal in most guardianship proceedings, the court of appeals' interpretation of the Estates Code wasted time finding a suitable guardian because the Department would ultimately object to permanent guardianship anyways.²²⁵

On the other hand, Wooley's guardian *ad litem* used the court of appeals' immunity analysis and argued that any plea based only on the *potential* appointment of the Department as permanent guardian was premature.²²⁶ Further, Wooley maintained that the Human Resources Code cannot extend immunity to the Department by delegating to the Department the decision on permanent guardianship because that alleged interference with the probate court's authority would violate the Texas Constitution's Separation of Powers provision.²²⁷

Had the Supreme Court reached a decision on the Department's issue regarding its interpretation of the public guardianship statutory scheme, the entire system for public guardianship in Texas could have been significantly implicated.²²⁸ A ruling in favor of Wooley on this issue would have meant that in all future uncontested guardianship cases, the Department would have no choice but to act as "temporary" or "successor" guardian, if appointed by the court.²²⁹ It is also important to note that in interpreting Texas's statutory scheme, the court may have ruled on the issue regarding immunity from suit, affecting the legal theory of sovereign immunity in the context of all *in rem* proceedings, not just public guardianship proceedings.²³⁰

V. POTENTIAL SOLUTION TO THE CURRENT STATUTORY SCHEME IN TEXAS

A. What Texas Can Learn from Other States: General Recommendations

Public guardians are generally subject to the same statutory provisions for guardianship duties, accountability, and monitoring as other types of guardians.²³¹ For example, the vast majority of states require regular

223. *Id.*

224. *Id.*

225. See generally *id.* (noting that the Department repeatedly maintained that it would reject appointment as permanent guardian).

226. See Brief for Appellee at 6–7, *In re the Guardianship of Edwin Wooley*, 2014 WL 7508275 (No. 02-14-00315-CV) (Tex. App.—Fort Worth Dec. 8, 2014) (emphasis added).

227. TEX. CONST. of 1869, art. II, § 1.

228. See Brief for Appellant at 7, *In re the Guardianship of Edwin Wooley*, 2014 WL 6844948.

229. *Id.*

230. *Id.*

231. See Pamela B. Teaster et al., *Public Guardianship After 25 Years: In the Best Interest of Incapacitated People?*, NAT'L STUDY OF PUB. GUARDIANSHIP PHASE II REPORT (2007), https://www.americanbar.org/content/dam/aba/administrative/law_aging/PublicGuardianshipAfter25YearsIntheBestInterestofIncapacitatedPeople.pdf [perma.cc/Y8AV-X6HC].

(typically annual) status reports for all wards under permanent guardianship, including those under public guardianship.²³² Additionally, many states have enacted statutes that establish requirements specific to public guardianship.²³³ Successful public guardianship statutory schemes are explicit and provide for germane provisions, such as provisions on public guardianship program funding and staff-to-ward ratio caps, two problems previously identified.²³⁴

Ideally, such provisions will be located in a specific public guardianship chapter of a statutory code, such as the state's probate code.²³⁵ A designated public guardianship chapter provides convenient clarification to public guardians regarding the duties and obligations specifically assigned to them, while also providing clearer procedural guidelines to courts and practitioners.²³⁶ Moreover, consolidating the most important public guardianship statutes into a single statutory code and chapter is an important safeguard to prevent legislatures from enacting incompatible public guardianship statutes which may result in systematic failures, as in *Wooley*.²³⁷

The 2015 Texas Legislature enacted numerous amendments to the state's guardianship framework.²³⁸ Among these were major changes defining and encouraging alternatives to guardianship proceedings, while also defining and expanding a ward's rights under guardianship.²³⁹ For example, all attorneys representing an applicant for guardianship must now be certified by the State Bar of Texas as having completed a course in guardianship law.²⁴⁰ Under an entirely new section, the legislature laid out seven specific alternatives to guardianship.²⁴¹ Similarly, sections of the Texas Estates Code were added or amended to provide an additional basis for an alternative to guardianship, or termination of an existing guardianship, in the event that sufficient "supports and services" are available to the alleged incapacitated person or ward.²⁴²

Without a separate public guardianship chapter in the Texas Estates Code, there is nothing to suggest that the 2015 amendments do not also apply to public guardianship proceedings.²⁴³ While this may seem like a positive

232. *Id.*

233. *Id.*

234. *See supra* Section III.B.

235. *See infra* Section V.B.

236. *See generally* Teaster et al., *supra* note 231 (describing successful public guardianship statutory schemes).

237. *See infra* Section V.B.

238. *See generally* Amanda Kreshover, *2015 Legislative Update: Texas Guardianship Law*, HOUS. LAW., Sept./Oct. 2015 (explaining the statutory amendments to guardianship law stemming from the 2015 legislative sessions).

239. *Id.*

240. TEX. EST. CODE ANN. § 1054.201 (Supp.).

241. *See id.* § 1002.0015.

242. *See id.* §§ 1002.031; 1202.051; 1202.151(a); 1202.153(c).

243. *See generally* Kreshover, *supra* note 238 (explaining the statutory amendments to guardianship law stemming from the 2015 legislative sessions).

development, specific mandates may actually conflict with administrative procedures implemented by the Department or expressly allowed by the Human Resources Code.²⁴⁴ For example, one amendment enacted by the 2015 Legislature establishes stricter requirements regarding an applicant's burden to prove to the court that alternatives to guardianship were considered but were not feasible.²⁴⁵ At the same time, the Human Resources Code allows for the consideration of alternatives under a much more lenient standard, granting the Department wide discretion not subject to the court's review.²⁴⁶

B. To the Texas Legislature: Proposed Public Guardianship Statutes

This Comment recommends that the Texas legislature enact key substantive and non-substantive amendments in an effort to create a more explicit statutory scheme to public guardianship.²⁴⁷ First, the consolidation of Texas's public guardianship provisions is an important step in the right direction toward improving the state's public guardianship law.²⁴⁸ Title 3 of the Texas Estates Code, "Guardianship and Related Procedures," should be amended to include a chapter specifically addressing public guardianships and the agency responsible for them.²⁴⁹ This chapter should include the public guardianship statutory provisions that are inappropriately located in the Human Resources Code.²⁵⁰ Section 161.071 of the Human Resources Code currently coordinates with the Texas Estates Code by providing that the Department is responsible for "serving as guardian of the person or estate, or both, for an incapacitated individual as provided by Subchapter E of this chapter and Title 3, Estates Code."²⁵¹ The legislature should move Subchapter E of the Human Resources Code, "Guardianship Services," to the Texas Estates Code under the recommended public guardianship chapter.²⁵² Consolidating the main statutes governing public guardianship law will simplify the presentation of the law, which in turn will allow for the reconstruction of ambiguous and incompatible statutory provisions.²⁵³

Additionally, this Comment recommends that the legislature make concurrent substantive changes to existing public guardianship law.²⁵⁴ First,

244. *Id.*

245. *See* EST. § 1101.01.

246. *See* HUM. RES. § 161.101(a).

247. *See infra* Section V.B.

248. *See supra* Section III.B.

249. *See, e.g.,* FLA. STAT. ANN. ch. 744, Part II (West 2007).

250. *See supra* Section IV.A.

251. HUM. RES. § 161.071(10).

252. *See infra* Section V.B.

253. *See* William D. Pargaman, *The Story of the Texas Estates Code*, 6 EST. PLAN. & COMMUNITY PROP. L.J. 323, 328–29 (2014).

254. *See infra* Section V.B.

as a technical matter, the relevant statutes should designate the agency now in charge of public guardianship—the Texas Health and Human Services under the Guardianship Services Program (HHS)—as public guardian.²⁵⁵ More importantly, the legislature should redefine the statutory duties of HHS to prevent the same confusion as was seen in *Wooley*.²⁵⁶ Namely, provisions relating to public guardianship appointment should be amended to allow for wider discretion on behalf of the Program in determining whether to act as public guardian.²⁵⁷ Currently, section 161.101 of the Human Resources Code, which references four different provisions of the Texas Estates Code, is the main statutory provision addressing adult public guardianship appointment.²⁵⁸ Section 161.101 and the sections of the Texas Estates Code referenced therein should be consolidated under a public guardianship chapter of the Texas Estates Code and amended according to the following framework.²⁵⁹

Texas Health and Human Services Guardianship Services Program

Guardianship Services. (a) The Texas Health and Human Services (“HHS”) may file an application under Section 1101.001 or 1251.003 to be appointed guardian of the person, estate, or both of a minor or adult, referred to the Department under Section 48.209(a)(1) of the Human Resources Code for guardianship services if the department determines that:

- (1) in the case of a minor under Section 1002.019, the minor, because of the minor’s mental or physical condition, will be substantially unable to provide for the minor’s own food, clothing, or shelter, to care for the minor’s own physical health, or to manage the minor’s own financial affairs when the minor becomes an adult; or
- (2) in the case of an adult, that the adult is an “incapacitated” person as is defined under Section 1002.017; and
- (3) a less restrictive alternative is not available.

(b) HHS shall conduct a thorough assessment of the conditions and circumstances of an elderly person or person with a disability referred to HHS under Section 48.209(a)(2) of the Human Resources Code²⁶⁰ for guardianship services to determine whether a guardianship is appropriate for the individual

255. See *supra* Section IV.A; see also *What is Guardianship?*, TEX. HEALTH & HUM. SERVS. (2018), <https://hhs.texas.gov/laws-regulations/legal-information/guardianship> [perma.cc/G9TM-3TNQ].

256. See *supra* Section IV.B.

257. *Id.*

258. See TEX. HUM. RES. CODE ANN. §§ 161.101(b)–(f) (Supp.); see also TEX. EST. CODE ANN. §§ 1101.001, 1251.003, 1203.108(b) (Supp.).

259. See *infra* Section V.B.

260. *References to statutory provisions of the Texas Human Resources Code are included as they currently stand for reference. This Comment proposes that the Legislature move such sections to the Texas Estates Code, along with the proposed statute.

or whether a less restrictive alternative is available for the individual. In determining whether a guardianship is appropriate, the department may consider the resources and funds available to meet the needs of the minor or incapacitated adult. The executive commissioner shall adopt rules for the administration of this subsection.

(c) Subject to Subsections (d) and (e), if after conducting an assessment of a minor or alleged incapacitated adult under Subsection (1) HHS determines that:

(1) guardianship is appropriate for the elderly person or person with a disability, the department may:

(A) file an application under Section 1101.001 or 1251.003, to be appointed guardian of the person or estate, or both, of the individual; or

(B) if HHS determines that an alternative person or program described by Section 161.102 of the Human Resources Code is available and better suited to serve as guardian, HHS may refer the individual to that person or program as provided by that section; or

(C) if HHS determines that a less restrictive alternative to guardianship is available for a minor or incapacitated adult, the department may pursue the less restrictive alternative instead of taking an action described by Subsection (a); or

(D) if HHS determines HHS lacks the resources and funds available to meet the needs of the minor or incapacitated adult and serve as guardian, it may submit its findings and recommendations to the Court.

(d) Not later than the 70th day after the date the department receives a referral under Section 48.209(a)(2) for guardianship services, HHS may make the determination required by subsection (c) and, if the HHS determines that guardianship is appropriate and that the department should serve as guardian, may file the application to be appointed as guardian under Section 1101.001 and 1251.003. If the department determines that an alternative person or program described by Section 161.102 of the Human Resources Code is available to serve as guardian, the department may refer the minor or incapacitated adult to that alternative person or program in a manner that would allow the alternative person or program sufficient time to file, not later than the 70th day after the date HHS received referral, an application to be appointed guardian.

(e) With the approval of the Department of Family and Protective Services, HHS may extend, but not more than 30 days, a period prescribed by Subsection (d) if the extension is:

(1) made in good faith, including any extension for a person or program described by Section 161.102 of the Human Resources Code that intends to file an application to be appointed guardian; and

(2) in the best interest of the minor or incapacitated person.

(f) HHS may not be required by a court to file an application for guardianship and HHS may not be appointed as permanent, temporary, or successor guardian for any individual unless HHS files an application to serve or otherwise agrees to serve as the individual's guardian of the person, estate, or both.

Lastly, this Comment recommends that the legislature enact the following additional statutory provisions under the appropriate sections of a public guardianship chapter of the Texas Estates Code.²⁶¹

(1) The executive director of the Health and Humans Services, after consultation with the chief judge and other circuit judges within the judicial circuit and with appropriate advocacy groups and individuals and organizations who are knowledgeable about the needs of incapacitated persons, may establish, within a county in the judicial circuit or within the judicial circuit, one or more offices of public guardian and if so established, shall create a list of persons best qualified to serve as the public guardian. The public guardian must have knowledge of the legal process and knowledge of social services available to meet the needs of incapacitated persons. The public guardian shall maintain a staff or contract with professionally qualified individuals to carry out the guardianship functions, including an attorney who has experience in probate areas and another person who has a master's degree in social work, or a gerontologist, psychologist, registered nurse, or nurse practitioner. A public guardian that is a nonprofit corporate guardian must receive tax-exempt status from the United States Internal Revenue Service.

(2) The executive director shall appoint or contract with a public guardian from the list of candidates described in Subsection (1). A public guardian must meet the qualifications for a guardian as prescribed in the Texas Estates Code. Upon appointment of the public guardian, the executive director shall notify the chief judge of the judicial circuit and the Chief Justice of the Supreme Court of Texas, in writing, of the appointment.

(3) If the needs of the county or circuit do not require a full-time public guardian, a part-time public guardian may be appointed at reduced compensation.

(4) A public guardian, whether full-time or part-time, may not hold any position that would create a conflict of interest.

261. The following provisions are modeled after FLA. STAT. ANN. §§ 744.2001–2111 (West 2016).

(5) The public guardian is to be appointed for a term of 4 years, after which her or his appointment must be reviewed by the executive director of HHS and may be reappointed for a term of up to 4 years. The executive director may suspend a public guardian with or without the request of the chief judge. If a public guardian is suspended, the executive director shall appoint an acting public guardian as soon as possible to serve until such time as a permanent replacement is selected. A public guardian may be removed from office during the term of office only by the executive director who must consult with the chief judge prior to said removal. A recommendation of removal made by the chief judge must be considered by the executive director.

(6) Public guardians who have been previously appointed by a chief judge prior to the effective date of this act pursuant to this section may continue in their positions until the expiration of their term pursuant to their agreement. However, oversight of all public guardians shall transfer to the Office of Public and Professional Guardians upon the effective date of this act. The executive director of the Office of Public and Professional Guardians shall be responsible for all future appointments of public guardians pursuant to this act.

VI. CONCLUSION

State legislatures have been forced to reexamine guardianship laws amid growing public outcry stemming from numerous cases of guardianship abuse.²⁶² While legislatures across the nation have made significant efforts to reform guardianship laws, laws relating to public guardianship are too often excluded from these efforts.²⁶³ Yet, as the elderly population continues to grow, state legislatures may soon be forced to similarly reexamine flawed public guardianship laws.²⁶⁴ It is therefore vital that states address public guardianship now, before our nation's elderly suffer the consequences.²⁶⁵

Public guardianship will likely become an essential legal mechanism to aid state courts faced with the impending shift in demographics.²⁶⁶ Implicit and unconsolidated statutory schemes complicate public guardianship law and administration at the expense of wards under public guardianship.²⁶⁷

State legislatures should address public guardianship by designating respective public guardianship chapters and consolidating all statutory

262. See Faith Hawthorne, *We Need to Get Better at Looking After Those Who Die Alone*, THE GUARDIAN (Jan. 17., 2019, 7:49 PM), <https://www.theguardian.com/commentisfree/2019/jan/18/we-need-to-get-better-at-looking-after-those-who-grow-old-alone> [perma.cc/BQ6H-KDM6].

263. See *supra* Section V.B.

264. See *supra* Part II.

265. See *supra* Parts I–V.

266. See *supra* Parts I–V.

267. See *supra* Parts I–V.

provisions relating to public guardianship.²⁶⁸ Such provisions must explicitly address (among other things) staff-to-ward ratios, budgetary appropriations, and duties and powers of the public guardian. Importantly, public guardianship agencies must not be required to apply for guardianship or be appointed guardian by the court without consent.²⁶⁹

Implementing and consolidating these and other provisions will aid state agencies in handling wards, reduce staff attrition, and encourage courts to seek out lesser restrictive alternatives to guardianship.²⁷⁰ The result will be greater protection for one of the nation's most vulnerable populations: wards with nowhere else to go.²⁷¹

268. *See supra* Parts I–V.

269. *See supra* Parts I–V.

270. *See supra* Parts I–V.

271. *See supra* Parts I–V.