

OFFICE OF PUBLIC GUARDIANSHIP
JUDICIAL BRANCH
FY 2019-20 JOINT BUDGET COMMITTEE HEARING

Tuesday, December 18, 2018
4:45 pm – 5:00 pm

Main Presenters:

- Shari Caton, Chair of the Office of Public Guardianship Commission

Supporting Presenters:

- Dr. Deb Bennett-Woods, Vice-Chair of the Office of Public Guardianship
- Marco Chayet, Commissioner of the Office of Public Guardianship
- Kelsey Lesco, Commissioner of the Office of Public Guardianship
- Karen Kelley, Commissioner of the Office of Public Guardianship

INTRODUCTIONS AND OPENING COMMENTS

HB 17-1087 is the enabling legislation that directs the establishment and conduct of a pilot project within the Judicial Department to evaluate the feasibility, scope and funding of a permanent Office of Public Guardianship (OPG) for the State of Colorado. The enabling legislation created a five-member Commission, whose responsibility it is to raise monies from gifts, grants, and donations, and hire the Executive Director for the OPG Office.

The pilot project is supported by four expert reports. In 2012, the final report of the Elder Abuse Task Force included a recommendation to create an office of public guardianship. In 2014, the Public Guardianship Advisory Committee (OPGAC) was established by the Chief Justice and produced two reports affirming the need for an OPG, recommending the most viable model, and proposing a pilot project to gather data needed to support the establishment of an OPG. No action was taken on the initial reports; however, the 2016 Strategic Action Plan on Aging, released by the Strategic Action Planning Group on Aging, again called for implementation of the key recommendations from the OPGAC, including the establishment of a state OPG to help ensure that older adults are free from abuse, neglect and exploitation.

HB 17-1087 was introduced with the original intent of funding the project with general appropriations; however, the final version of the bill was amended to include no appropriation, and instead required that the pilot be funded with gifts, grants and donations. The Interim Report of the Colorado Office of Public Guardianship Commission (September 7, 2018) details the extensive efforts and subsequent inability of Commissioners to secure external funding.

JBC members are referred to the following documents for more detailed information.

- Elder Abuse Task Force Report (November 2012), available at <https://www.colorado.gov/pacific/sites/default/files/Elder%20Abuse%20TYF%20Final%20Report.pdf>
- Office of Public Guardianship Advisory Committee Recommendations (2014), available at [https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Public_Guardian/2014_OfficeofPublicGuardianship-FinalReport\(2\).pdf](https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Public_Guardian/2014_OfficeofPublicGuardianship-FinalReport(2).pdf)
- Office of Public Guardianship Advisory Committee Recommendations for Pilot Program (July 2014), available at https://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Committees/Public_Guardian/OfficeofPublicGuardianshipFinalReportandRecommendationsJuly312.pdf
- SAPGA Strategic Action Plan on Aging (November 2016), available at <https://www.colorado.gov/pacific/sites/default/files/SAPGA-Nov-2016-Strategic-Plan.pdf>
- 2018 Interim Report of the OPG Commission (September 2018), available at <https://www.courts.state.co.us/userfiles/file/Media/OPG%20Commission/2018%20INTERIM%20REPORT%20FINAL%20-%20FULLY%20EXECUTED%20-%209-7-2018.pdf>

As an initial matter, guardianship laws for an adult are found at §§ 15-14-301-319, C.R.S. Definitions for guardianship matters can be found at § 15-14-102, C.R.S. Under § 15-14-311, C.R.S., a guardian for an adult can only be ordered after the court has found by clear and convincing evidence that the respondent is an incapacitated person and the respondent's needs cannot be met by less restrictive means, including use of appropriate and reasonably available technological assistance.

An incapacitated person for purposes of an adult guardianship in Colorado “means an individual, other than a minor, who is unable to effectively receive or evaluate information or both or make or communicate decisions to such an extent that the individual lacks the ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance.” § 15-14-102(5), C.R.S. Therefore, in the context of guardianship, we refer to the respondent or ward as an incapacitated person, not “incompetent.”

A person's incapacity may have different causes, such as a primary diagnosis of mental illness, intellectual or developmental disabilities, complications from Alzheimer's disease, dementia or traumatic brain injury. Many individuals who are incapacitated, isolated, indigent and without a guardian are maintained in inappropriate settings which are not the least restrictive, such as a hospital intensive care unit or other inpatient acute care setting, a care facility rather than a community setting or in a county jail. Some incapacitated, isolated and indigent individuals who need a guardian are homeless, as they are unable to successfully apply for services which would assist them to obtain housing, food and medical services.

QUESTIONS FOR THE OFFICE OF PUBLIC GUARDIANSHIP

OPG Question 1. Who does the guardianship work now for incompetent people who lack the resources to pay for a guardian and lack friends or family who can serve as guardians?

Currently, there are no consistent, reliable or funded options for those persons in need of a guardian throughout Colorado who lack resources, friends or family.

The target population for these services is characterized by Colorado's lack of sufficient systems to protect *incapacitated* adults who are *isolated* and do not have appropriate family or friends available to act as guardian, and who are indigent and do not have the financial resources to hire a professional fiduciary. The need for a guardian arises when a qualified local source identifies a person who may be in need of guardianship services. For those types of individuals, the State relies on a patchwork system of private and volunteer guardians to provide guardianship services for adults with no other appropriate guardian available. The local source may include but not be limited to an adult care facility, Adult Protective Service units within the County Departments of Human Services ("APS"), a hospital, or any other organization that supports individuals who work with indigent and incapacitated people.

As reported in S.B. 12-078 Elder Abuse Task Force Policy Decisions, the State of Colorado does not have a public guardianship program for persons in need of guardianship and who do not have appropriate family or friends available to act as the guardian. Additionally, the state does not have the resources available to provide a private guardian to these individuals.

Guardianships are the most restrictive interventions used in APS. For APS clients with adequate resources, a private guardian can be appointed as there are assets available to pay the guardian fees. But for many APS clients there are not adequate resources to cover the costs of a private guardian. Some counties do have a public

administrator available to take on the role of conservator for finances. In these situations, APS will generally file the petition for conservatorship with a recommendation to appoint the public administrator.

The Denver metro area and the Colorado Springs metro area have a volunteer guardianship organization that may be utilized for some clients, but this type of organization is not available in other areas of the state. Additionally, volunteer guardianship programs have limitations, particularly in the type of client they can serve and the overall number of clients they can serve. Volunteer organizations generally do not provide services to manage difficult individuals.

County APS units are the guardian of last resort and county APS units are not required by Colorado law to take guardianship. *See In re Estate of Sarah Morgan*, 160 P.3d 356 (Colo. App. 2007) (Despite a court's finding of incapacity, a court does not have statutory authority to require a public agency to assist an incapacitated person who needs a guardian). As a result, wards are left to their own devices and may linger in institutional settings, such as a jail or hospital, without a guardian or may become homeless.

OPG Question 2. Are there state or local offices that provides these services?

As noted in Question 1, Colorado relies on an informal system of volunteer guardians and APS staff to provide guardianship services to indigent and incapacitated adults who have no other appropriate person to serve as guardian. These resources, however, are insufficient and the State of Colorado does not have a public guardianship program that can assume guardianship.

As for state or local offices that currently handle these types of services, APS provides guardianship services in certain instances. § 26-3.1-104, C.R.S. This statute provides for protective services for at-risk adults, both with and without consent. In the event that an at-risk adult appears to lack capacity and does not consent to protective services and if no other appropriate person is able or willing, the county department of human services director is urged, but not required, to petition the court for an order authorizing the provision of specific protective services and the appointment of a guardian.

Between one-third to one-half of APS county departments are appointed guardian for at least one person. As of December 10, 2018, 28 counties hold at least one guardianship and county departments hold 336 guardianships statewide.¹ Quite

¹ Email from Peg Rogers, Manager Adult Protective Servs., CO Dept. of Hum. Servs., to Kelsey Lesco, Off. of Pub. Guardianship Commr., Guardianship Services Question (Dec. 10, 2018, 07:24 MST).

simply, though, there are not enough guardians and county social/human services department do not have enough funding to provide all guardianship services. Therefore, counties restrict the number guardianship cases they accept or may not provide guardianship services at all.

In addition to lack of resources, there are at least two issues. First, APS routinely gets calls from health care providers and long-term care facilities requesting that APS take guardianship in order to make healthcare and end of life decisions for patients or residents with no advanced directive and with no one available to assist with these decisions. But APS is prohibited from petitioning for guardianship to make health care decisions, as these highly personal and sensitive decisions are outside the statutory authority and ethical scope of the APS program.

Second, OPGAC determined that APS units have an inherent conflict of interest in acting as public guardians. Many argue that APS should not be acting as public guardians as well, if they make the initial determination of incapacity. APS caseworkers receive reports of suspected elder abuse, self-neglect and exploitation, and then investigate those reports.

OPG Question 3. How many people are estimated to need these services?

The current number of Coloradoans estimated to need public guardianship services is presently unknown.

Although the current number is unknown, in February 2014, the Public Guardianship Advisory Committee (“PGAC”) utilized a population-based extrapolation model and estimated that 5,792 individuals, statewide, may need public guardianship services. [*PGAC Feb. 2014, Report, p. 18-20*]

The Office of Public Guardianship pilot project is intended to collect the requested data, quantify the unmet need, and ultimately provide a report to the General Assembly with these figures.

OPG Question 4. Could this be partly or fully funded through probate fees? What level of fee would be required?

The program could be funded with an increase in probate filing fees, although it would require a change in statute. The current filing fee on probate cases totals \$164 and in 2018 there were 16,738 case filings. To raise sufficient revenue to fund the OPG pilot it would require raising the filing fee by approximately \$105 per case (64% increase), although it may need to exceed that amount as many probate case fees are waived due to indigency. Further, there may be TABOR implications.

OPG Question 5. Could the pilot project be contracted out to the private sector rather than using state employees? Could a pilot with private contractors answer the important questions that need to be answer?

Contracting the pilot program to the private sector diverges from the intent and specific requirements of the enabling legislation. The pilot program, as legislated, was proposed by the Office of Public Guardianship Advisory Committee (OPGAC) in the follow-up report to their original recommendations report, both issued in 2014. The OPGAC examined four models for the creation of public guardianship services in Colorado. Those models included: (1) court model; (2) independent agency model; (3) social agency model; and (4) private sector model. Of the four models, the private sector model was determined to be the least viable. No other state was found to be using a private model, and there is no evidence that there are enough incentives to create a market condition that would support a subsidized private model for this growing and indigent population. [*OPGAC Feb 2014, Report, p. 9-10*]. The OPG Commission, of which some members are attorneys expert in the issues of guardianship, agree that there are not enough private guardians in Colorado to meet the anticipated need for the pilot program or eventual roll out on a statewide basis.