


Office of Public Guardian



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Legislative Finding and Intent LB 920(2014)

- Current practice of volunteers inadequate when no willing or qualified individual is available
- Office of Public Guardian established to provide services when no private individual is available, priority to serve the needs of ward
- Alternatives to full guardianship should always be explored
- Public guardian or conservator only to those who can not be served through less intrusive means of intervention

Public Guardianship Act

Neb. Rev. Stat. §§30-4101 to 30-4118



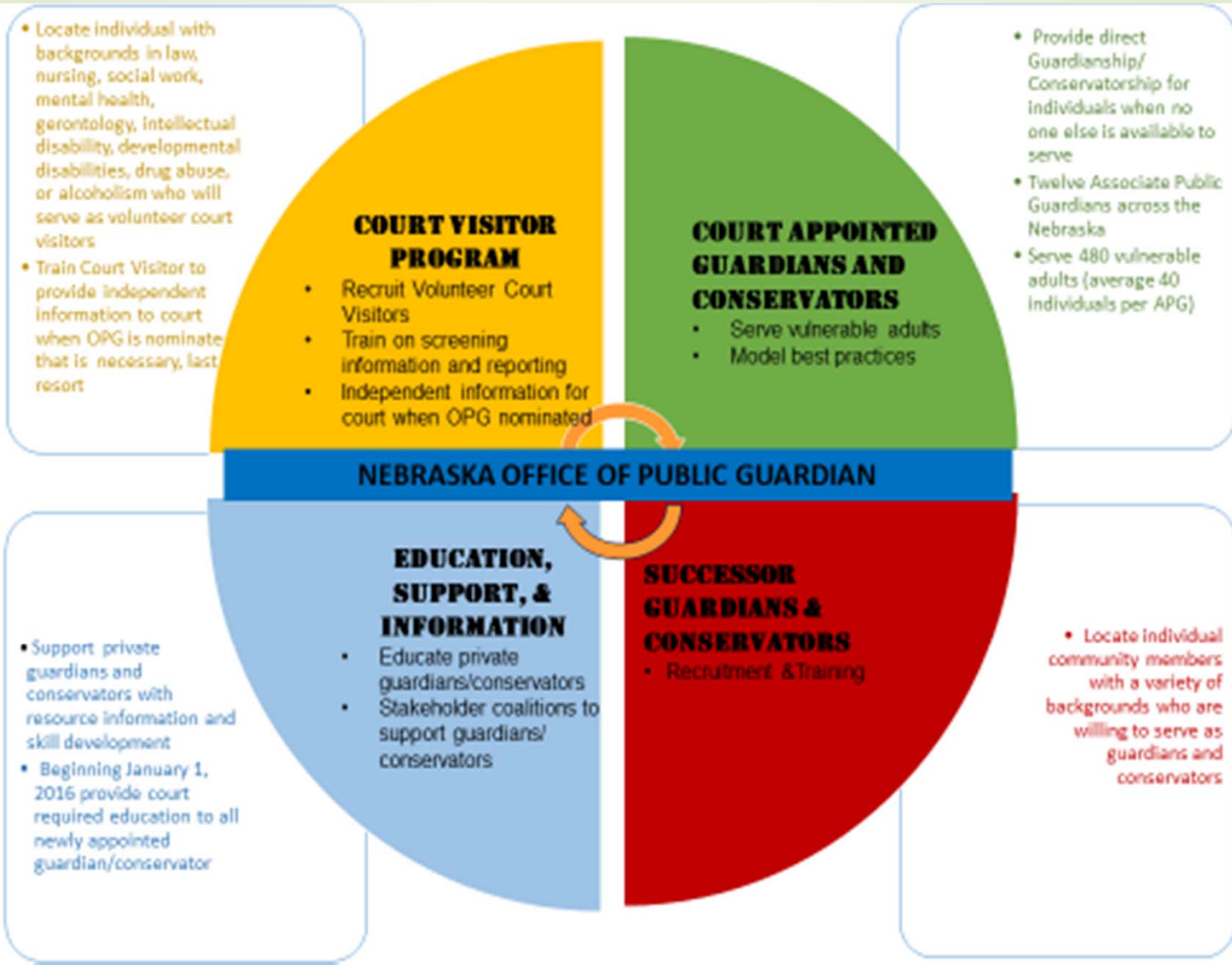
1. Creation of the Office of Public Guardian
 - ▶ In the Administrative Office of the Courts
2. Court Administrator shall appoint a Public Guardian
3. Public Guardian- Twelve Associate Public Guardians, average 40 protected persons/wards
4. Appointment of the Advisory Council on Public Guardianship
 - ▶ Appointed by the Court Administrator
5. Promote public awareness of guardians and conservator
6. Create a yearly report to the Legislature
 - ▶ On or before January 1

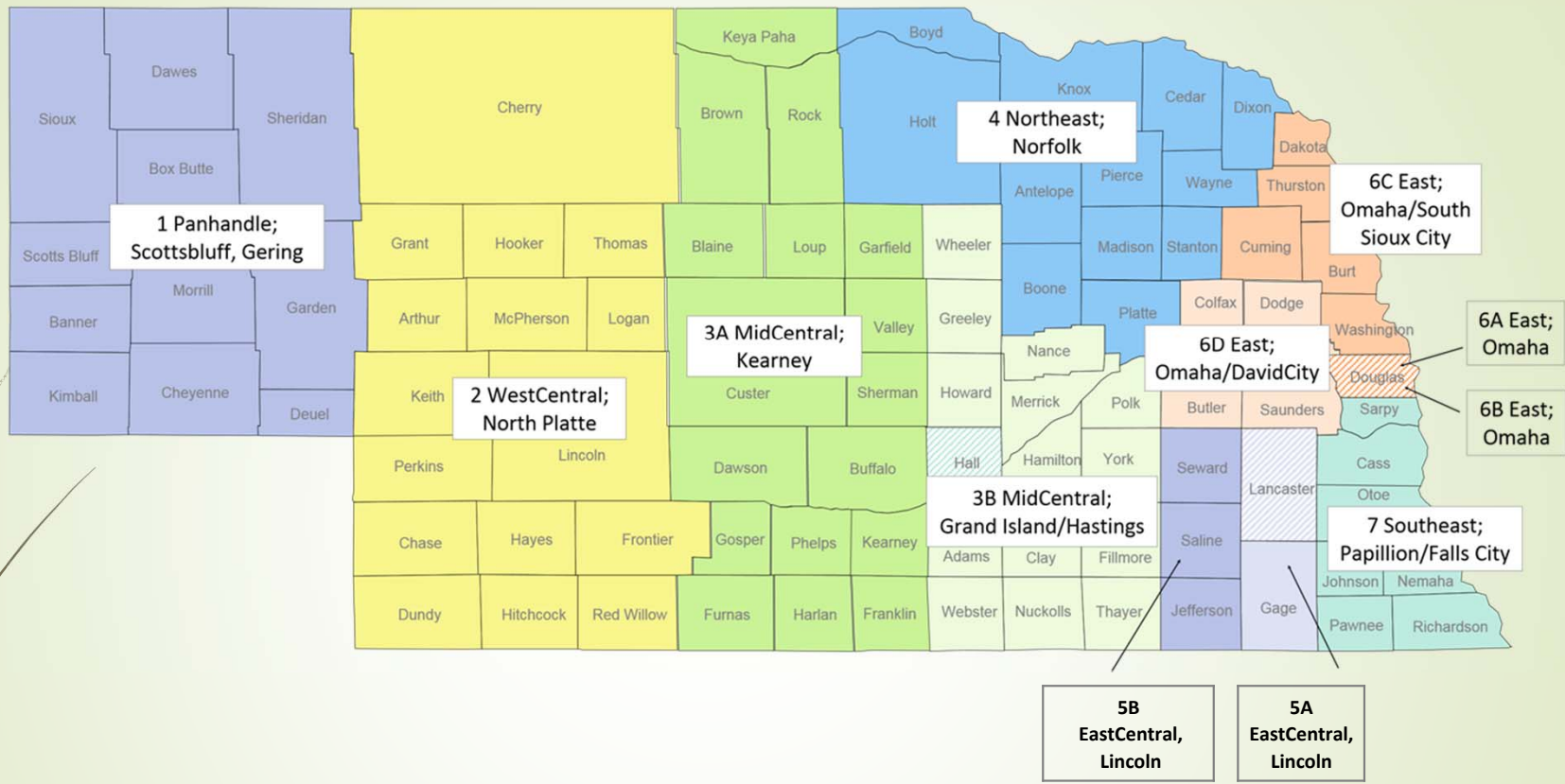



Duties of the Office of Public Guardian

Neb. Rev. Stat. §30-4105, §30-4109, §§30-4114 to 30-4116

1. Act as guardianship/conservatorship of last resort
2. Safeguard the rights of individuals by supporting least restrictive manner
3. Model the highest standard of practice for guardians/conservators to improve performance of all guardians/conservators in state
4. Develop a uniform system of reporting and collecting statistical data regarding guardianship/conservatorship
5. Act as resource to guardians/conservators for information, and support to enhance [guardian/conservator] success
6. Maintain training programs statewide to offer training curricula
7. Recruit member of public and family to serve as guardians or conservators, make reasonable effort to locate a successor guardian/conservator







Court rules and procedure

Criteria for Appointment

- ▶ *“Supreme Court, upon recommendation by the Public Guardian, in consultation with council, shall promulgate rules to carry out Act” (§30-4110)*
- ▶ Office of Public Guardian may provide necessary services (§31-4102)(2)(e))
 - ▶ No one suitable or available
 - ▶ Unwilling, unable, or inappropriate guardians/conservators
 - ▶ Present guardian and conservator does not provide protection or abuses or neglects individual
 - ▶ Alternatives to full guardianship and less intrusive means of intervention explored
 - ▶ Public guardian/conservator only when needs cannot be met through less intrusive means



Court Process of Appointment of Office of Public Guardian

- ▶ Court may order appointment of Public Guardian (§30-4112)
- ▶ Only after notice to Public Guardian and determination that the appointment is necessary (§30-4112) and
- ▶ Will not result in the Public Guardian having more appointments than permitted (average 40 per Associate) (§30-4112)(§30-4115)
- ▶ Upon reaching the maximum the Public Guardian shall not accept appointments and
- ▶ Shall notify the State Court Administrator that the maximum has been reached (§30-4115)
- ▶ Determination of necessary may require the court to ascertain whether there is any other alternative to public guardianship/conservatorship (§30-4112)
- ▶ “Least restrictive” protection protocol (§30-4102)(1), (§30-4105)(7), (§30-4112)

Charge to Office of Public Guardian:

*"Model Practice", "Last Resort", "Least Restrictive",
"Determination of Necessary", "Reports and Data"*

Court Visitor or Limited Guardian ad Litem as Independent Investigator required when Office of Public Guardian is proposed Guardian/Conservator

- ▶ *Model Practice*: National Probate Code Standard 3.3.4 Court Visitor
- ▶ NE. Statute/*Least restrictive*: allows for Guardian ad litem; Visitor for additional information on the person; **Neb. Rev. Stat. §30-2619.01.**
- ▶ *Last resort*: Visitor allows for independent investigation to whether any other potential guardian/conservators are available
- ▶ *Necessary*: Visitor provides a process to gain information for the court on "Determination of necessary" when the court must ascertain whether there is any other alternative to public guardianship
- ▶ Visitor provides standard report process for concrete data for reporting
- ▶ Quantifiable means to provide compliance data and structure to OPG utilization and waiting list process



Court Visitor: Expertise and experience with populations

Neb. Rev. Stat. §30-2624:

- *A visitor shall be trained in law, nursing, social work, mental health, gerontology, or developmental disabilities and shall be an officer, employee, or special appointee of the court with no personal interest in the proceedings.*
- *"The court shall maintain a current list of persons trained in or having demonstrated expertise in the areas of mental health intellectual disability, drug abuse, alcoholism, gerontology, nursing, and social work, for the purpose of appointing a suitable visitor."*

"Court visitors serve as the eyes and ears of probate courts, making an independent assessment of the need for guardianship/conservatorship"

National Probate Code Standard 3.3.4 Court Visitor, Commentary

OPG Volunteer Court Visitor Program Development:

- Recruiting Volunteers
- Processing Applications
- Developing and providing initial on-line and live training opportunities
- Developing a Screening Tool & Report form required to be utilized by OPG rules (**Neb. Ct. R. §6-1433.01(E)**)
- Developing an active Volunteer Court Visitor Registry for County Courts (**Neb. Rev. Stat. §30-2624**)



Develop A Court Visitor/Limited Guardian ad Litem Report Training Program

- A web based tool to deliver on-line education
- An on-line curriculum covers a variety of topics:
 - Introduction to Guardianship
 - Guardianship Authority
 - Surrogate Decision Making
 - Conditions of Potentially Incapacitated Persons or Wards
 - Living Arrangements of Potentially Incapacitated Persons
 - Common Problems
 - Abuse, Neglect, Exploitation
 - The Interview
 - Effective Communication
 - Community Resources
 - Directory of Legal & Medical Terms

Six Hour Face to Face Instruction

- Training on screening tool
- Skills development on completing the Visitor/Limited Guardian ad Litem Report Form

Guardian ad Litem Visitor Report Training

- On-line Modules and Face to Face Component required to complete OPG training for Visitor/Limited GAL Screening tool and Report form
- Training qualifies for MCLE: 5 hours on-line + 6 hours in class = 11 hours total.
- Cost for Screening tool and Report form training- \$175
- Participants who commit to volunteering for an Office of Public Guardian nominated case and complete a "Court Visitor/Limited Guardian ad Litem Report" will have \$150 waived (\$25 cost remains for administration of on line component)
- The Office of Public Guardian will provide the courts with information regarding who has completed the training

Developed a Screening Tool to Gather Information about the Potentially Incapacitated Person

- The Screening Tool Addresses Decision Making, Daily Living areas in accordance with **Neb. Rev. Stat. §30-2619.01**:
 - Mental Status
 - Consistency of Choices with Values, Patterns & preferences
 - Selecting Place of Abode
 - Arranging Medical Care
 - Protecting Personal Effects
 - Giving necessary consents, Approvals or Releases
 - Arranging Appropriate services, training, & education
 - Daily Functional Abilities
 - Applying for Benefit & Instituting Proceedings, Entering into Contracts
 - Receiving Money & Property/ Applying such to Expenses

Nebraska Public Guardian Nomination Process

Forms: <https://supremecourt.nebraska.gov/forms>

Petitioner

- Individual files petition with court
- **Notice of Nomination of Public Guardian** provided to Office of Public Guardian (OPG), court, interested parties (Neb. Ct. R. Sec. 6-1433.01(A)).

Office of Public Guardian

- Files **Acknowledgment of Notice of Nomination - Caseload Capacity Available Pending Hearing or Acknowledgment of Notice of Nomination - Verification of No Caseload Capacity**
- Within 14 judicial days of receiving Notice of Nomination



Court

- **NO OPG CASELOAD CAPACITY:**

- Good cause to deny OPG appointment
- Appearance of OPG will not be required
- Court files *Order Denying the Appointment of the Public Guardian*

- Court may request case be placed on OPG waiting list; "*Request for Waiting List Assignment*"
- If request to be on OPG waiting list, court shall make *Order Appointing Court Visitor or Guardian Ad Litem*, within 10 days of the request to be placed on waiting list.

- **OPG HAS CASELOAD CAPACITY PENDING HEARING:**

- Court appoints a visitor or limited GAL; "*Order Appointing Court Visitor or Guardian Ad Litem*"
- Within 10 judicial days of Verification of Caseload Capacity Pending Hearing

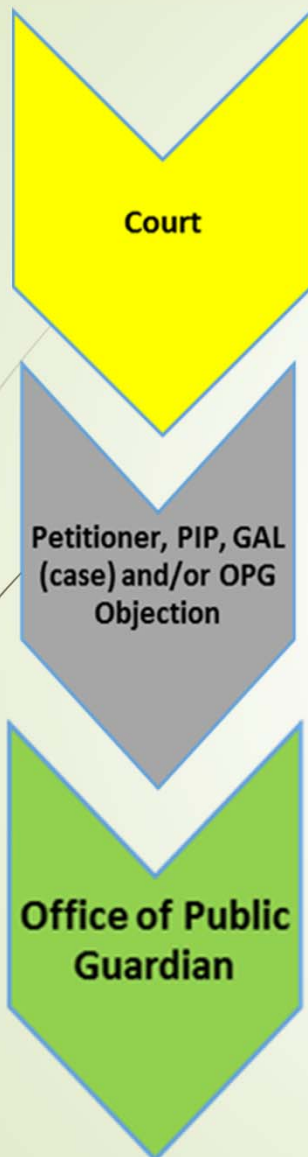


Court Visitor or
Limited Guardian Ad
Litem

- Appointed by court within 10 days of receiving - OPG Verification of Capacity report; or request to be on OPG Waiting List ;
- Interview potential incapacitated person (PIP), petitioner, providers, interested parties and complete screening tool for gathering independent information
- Submits confidential "***Court Visitor or Guardian Ad Litem Report***" to court within 60 days of Petition
- Provide a "***Notice of Availability of the Court Visitor or Guardian Ad Litem Report***" to the OPG, petitioner, GAL (if appointed for potential incapacitated person (PIP) in case), PIP attorney and PIP.

Office of Public
Guardian

- Within 5 judicial days of Notice of the Visitor/Limited GAL Report, OPG will provide to the court a "***Verification of Capacity Subsequent to Court Visitor or Guardian Ad Litem Report***" or "***Verification of No Capacity Subsequent to Court Visitor or Guardian Ad Litem Report***" to determine whether there is caseload capacity



- **NO CASELOAD CAPACITY BY OPG:**

- Good cause to "*Order Denying the Appointment of the Public Guardian*"
- Appearance of OPG will not be required
- Court may request the case to be placed on a waiting list; "*Request for Waiting List Assignment*"
- Court appoints a guardian or conservator (not OPG)

- **CASELOAD CAPACITY AVAILABLE BY OPG:**

- Review Visitor/Limited Guardian Ad Litem Report report for any Objection to information
- If there is an Objection to Report, "*Objection to Court Visitor or Guardian Ad Litem Report*" to be filed with court within 10 judicial days of notice of Visitor or Limited Guardian Ad Litem Report

- **OPG MAY FILE OBJECTION TO APPOINTMENT IF OTHER OPTIONS**



- Review Visitor or Guardian Ad Litem Report to insure OPG is last resort (no other individual available for guardian/conservator), least restrictive and requested OPG services are necessary
- Within 10 judicial days of Notice of the Visitor or Guardian Ad Litem Report
- If OPG determines other options are available file with court "*Objection to the Appointment of the Public Guardian Due to Other Options*"



Court

- **HEARING**

- Scheduled between 70-90 days after petition;
- Court to review:
 - If petition is for initial PIP capacity court will make determination of need for g/c;
 - If petition is for a successor g/c court shall determine appropriateness of g/c;
- Court to determine whether Public Guardian is appropriate:
 - If OPG has no caseload capacity, good cause exists for the denial of OPG appointment; and the appearance of OPG shall no longer be required.
 - If OPG has no caseload capacity, the court may request for PIP to be placed on waiting list;
 - If OPG has caseload capacity (or OPG has no caseload capacity but court request to be placed on waiting list is pending) and OPG Objects to Appointment due to Other Options Available, court is to determine if other options are available and if good cause exists to deny OPG appointment;
 - If OPG has caseload capacity and OPG does not Object to Appointment (or court determines, despite Objection to the Appointment, that the appointment meets statutory and court rule requirements), the court may appoint the Public Guardian as a guardian or conservator. In addition to the statutory requirements, the order of appointment shall provide:
 - 1) Proper notice has been given to the OPG;
 - 2) The petitioner has acted in good faith and due diligence to identify a guardian or conservator who would serve in the best interest of the alleged incapacitated person;
 - 3) The appointment of the Public Guardian is necessary and does not exceed the caseload limitations as set forth by statute;
 - 4) The visitor or guardian ad litem report has provided supporting evidence that no person is available for appointment as guardian or conservator, all options available to support the individual in the least restrictive manner possible has been explored, and guardianship is a last resort; **and**
 - 5) There is no other alternative than to appoint the Office of Public Guardian.



**Office of Public
Guardian**

- **OPG ACTION AT HEARING AFTER ORDER APPOINTING**
 - Provide the court with the "Notice of Designation of Deputy Public Guardian and Associate Public Guardian" form



Paradox of Guardianship – Two Faces

- ▶ Mary Jo Quinn in her book *Guardianships of Adults, Achieving Justice, Autonomy and Safety*.
- ▶ “A key to understanding guardianship and its history is to recognize that it is based on an inherent tension. Guardianship has always had two faces- it is protective yet oppressive, an instrument of beneficence that can at the same time bring a dire loss of rights. Guardianship can be an accommodation, an enabler helping to provide for basic needs and offer essential protections. Without guardianship, vulnerable individuals may languish unnecessarily in situations, suffer from lack of appropriate health care, or be subject to abuse and exploitation. Yet the very same institution of guardianship removes fundamental rights, restricting self-determination, freedom to choose, freedom to risk. It has been said to ‘unperson’ an individual, reducing her to the status of a child. Thus, guardianship can ‘empower’ and it can ‘unpower’.”



Public Guardianship Act Mandates

- Provide equal access and protection for all individuals in need of guardianship or conservatorship services- Neb. Rev. Stat. §30-4105(3)
- Safeguard the rights of individuals by supporting least restrictive manner possible and full guardianship only as last resort- Neb. Rev. Stat. §30-4105(7)
- Model the highest standard of practice for guardians/conservators to improve performance of all guardians/conservators in state-Neb. Rev. Stat. §30-4105(8)
- Guardian and conservator understand disabilities and fiduciary needs of ward/protected person- Neb. Rev. Stat. §30-4109(6)(a)
- Helping a guardian encourage independence by ward as appropriate- Neb. Rev. Stat. §30-4109(6)(b)




Limited Guardianship and Functional Evaluation

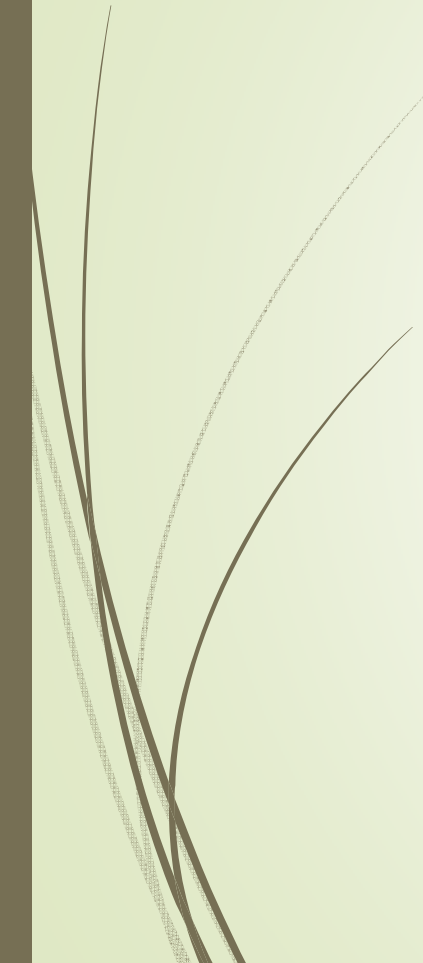
- ▶ Limited Guardianship requires judges to craft orders to match the functional strengths of the individual:
 - ▶ Preserving autonomy in areas of retained capacities and
 - ▶ Delegating to limited guardians those areas of lost capacity
- ▶ Clinical evaluations are increasingly complex and increasingly crucial to preserving the autonomy and rights of vulnerable adults
- ▶ The Uniform Guardianship and Protective Proceedings Act
 - ▶ Model statute for adult guardianship
 - ▶ Recommends “detailed functional evaluation” by physicians, psychologists, or other qualified professionals, but
 - ▶ Does not describe what is meant by “functional evaluation.”

Problems with Clinical Assessment in Guardianship

- ▶ Available research finds significant problems with clinical evidence in guardianship proceedings for older adults.
- ▶ Capacity evaluations for guardianship have been found to be “sketchy” and “substandard,”
- ▶ Written descriptions that provide limited functional data and include conclusory findings
- ▶ Much clinical evidence is incomplete.
- ▶ The mean length of written clinical reports for guardianship of older adults ranges between 83 words in Massachusetts (with two-thirds of the written evidence illegible) and 781 words in Colorado (one to three pages) compared to 24 pages for the mean length of child custody evaluations.
- ▶ Results are Full Guardianship Orders based on Incomplete Information



Capacity

- ▶ The term capacity is used in both clinical and legal settings.
 - ▶ In legal settings:
 - ▶ A lawyer's assessment of a client's ability to conduct legal transactions or
 - ▶ A judicial determination of a person's legal abilities to make decisions or perform certain functions.
 - ▶ In clinical settings, it refers to a clinician's opinion of a person's abilities to make decisions or perform certain functions.
 - ▶ Although a clinical capacity opinion is not a legal finding, it often serves as important evidence in legal proceedings.
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Definition and use of “Capacity” Depends

- ▶ Definition and use of “Capacity” depends on:
 - ▶ Different state statutes
 - ▶ Different legal standard for different
 - ▶ **Capacity status can fluctuate over time.**
 - ▶ Lost capacities (e.g., as a result of a head injury, transient acute psychosis, severe depression that later remits) may be recovered over time.
 - ▶ Dementias such as Alzheimer’s disease will result in fluctuating levels of capacity through the early and mid-stages of the disease.
 - ▶ Cognitive deficiencies that suggest incapacity are often caused by treatable and reversible physical causes, such as overmedication, toxic combinations of medications, poor diet, vitamin deficiencies, infectious diseases, poor eyesight, or other conditions.
 - ▶ Discovering and addressing medically treatable conditions first, capacity issues may be rendered moot or at least decreased.

Capacity (continued)

► Capacity Is Situational

- Capacity assessment should never happen in a vacuum.
- In the context of resources and support available to the individual. The supports may be social, such as a caregiver who can monitor the individual's medication regimen; legal, such as a trust or durable power of attorney that enables appropriate management of one's affairs; technological, such as an emergency help alert transmitter; or any other support.

► Capacity Is Contextual

- Goes beyond the question of resources available to the individual and considers how the individuals interact with those resources and with their social and physical environment.
 - Issues of undue influence, exploitation, or threat can directly affect the autonomy, functioning, and well being of the person with diminished capacity.
 - A home environment that is familiar and comfortable for the individual may enhance capacity,
 - A new and unfamiliar setting may undermine functional capacity.
- Capacity is not "all or nothing"
 - Moved away from either/or to more finely tuned, functional definition
 - Person may lack the capacity to handle financial affairs but still retain the

Clinical examinations are important evidence for judicial determinations of legal incapacity.

The determination of capacity of older adults in guardianship proceedings has received book-length treatment in a collaboration of the American Bar Association Commission on Law and Aging, the American Psychological Association, and the National College of Probate Judges:

- **ABA Commission on Law and Aging, American Psychological Association, & National College of Probate Judges, *Judicial Determination of Capacity of Older Adults in Guardianship Proceedings*, ABA and APA (2006).**
- *See also, e.g.*, National Center for State Courts, *Identifying and Responding to Elder Abuse, Neglect, and Exploitation: A Bench card for Judges*;
- Lori Stiegel, *Recommended Guidelines for State Courts Handling Cases Involving Elder Abuse*, ABA (1996).
- *Cf., e.g.*, ABA Commission on Law and Aging & American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (April 2005);
- G. Melton, J. Pretrial, N. Poythress & C. Slobogin, *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers*, 3rd ed., NY: Guilford Press (2007);
- R. Otto, & K. Douglas (Eds.), *Handbook of Violence Risk Assessment*, NY: Routledge/Taylor & Francis (2010).




Conceptual Model for Capacity Evaluation

- ▶ Six key domains of capacity assessment consistent in legal and clinical sources
 - ▶ Medical diagnosis,
 - ▶ Cognition,
 - ▶ Everyday function,
 - ▶ Values and preferences,
 - ▶ Level of risk and supervision needed, and
 - ▶ Means to enhance capacity



Model Clinical Evaluation Report Form

- Judicial Determination of Capacity of Older Adults in Guardianship Proceedings©American Bar Association Commission on Law and Aging – American Psychological Association.
- Forms **available online** to download for ready use and modification at <http://www.abanet.org/aging> ; <http://www.apa.org/pi/aging> ; and <http://www.ncpj.org>.
- **Model Clinical Evaluation Report**
- **Supplemental Attachment/Links for Clinical Evaluation Report**
- **Clinical Evaluation Report Instructions**



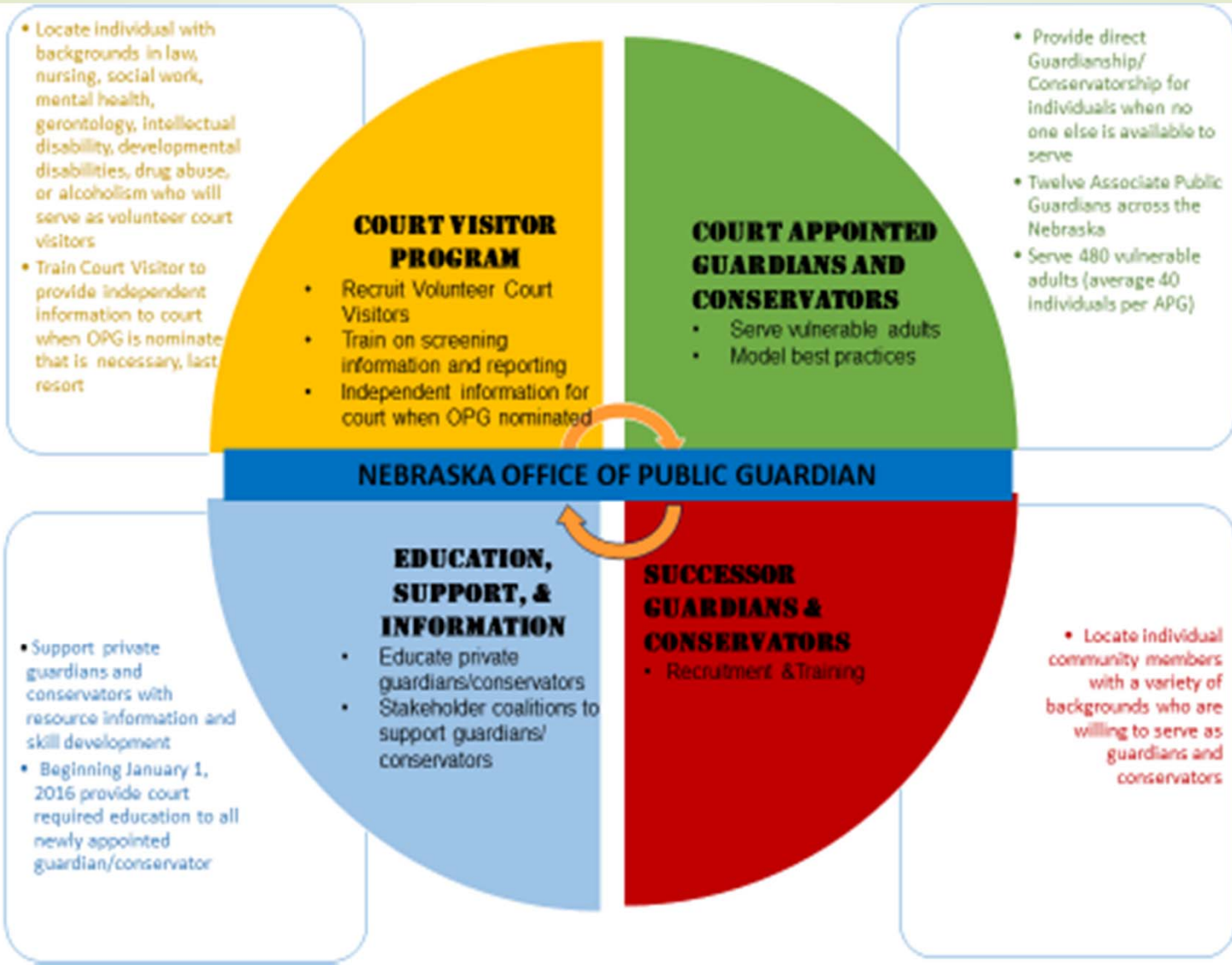
10 Areas Courts May Grant Responsibility to a Guardian (Neb. Rev. Stat. §30-2620)

- 1. Selecting the Ward's place of residence within the state or with permission outside the state;
- 2. Arranging for medical care for the Ward;
- 3. Protecting personal effects of the Ward;
- 4. Giving necessary consents, approvals, or releases
- 5. Arranging for training, education, or other services appropriate for the Ward;



Court Designated Responsibilities (continued)

- ▶ 6. Applying for private or governmental benefits to which the Ward may be entitled;
- ▶ 7. Doing what is necessary to ensure that any person who may be required to help support the Ward does so;
- ▶ 8. Entering into contractual agreements if no conservator has been appointed for the proposed Ward;
- ▶ 9. Receiving money and any other items of value on behalf of the Ward and applying these funds to housing, medical care, personal effects, training, education, and other services;
- ▶ 10. Any other area of inquiry which the court may direct.





Office of Public Guardian Data and Reporting Requirements

- Develop a uniform system of reporting and collecting statistical data regarding guardianships/conservatorship (§30-4109)(1)
- Report to State Court Administrator, Chief Justice, and Legislature on the implementation of the Act on or before January 1 each year (§30-4111)
 - Number and types of guardianships/conservatorships appointed
 - Types: full, limited, temporary
 - Disposition of appointments
 - Fees charged and collected
 - Status of waiting list for services
- File an aggregate report, June 30th and January 1 each year, with the State Court Administrator describing efforts to locate successor guardian/conservator (§30-4114)

Responsibilities to Private Guardians by Office of Public Guardian



- ▶ Education
 - ▶ To all guardians and conservators
 - ▶ Court visitor training
 - ▶ About rights within the process
- ▶ Maintain training programs for private guardians, successor guardians and interested parties to include:
 - ▶ Guardian understand ward disabilities and Conservators to understand fiduciary duties
 - ▶ Help guardian encourage independence of ward as appropriate
 - ▶ Help guardian with plans and reports and conservator accountings
 - ▶ Advise on ways to secure rights, benefits and services for ward and protected persons

Office of Public Guardian Provide Private Guardianship Training

- ▶ Beginning January 1, 2016
- ▶ 2016 Schedule on Office of Public Guardianship website
 - ▶ <http://ne.gov/go/guardianeducation>
- ▶ Associate Public Guardians provide training in each OPG area
- ▶ Three-hour Face to Face Class required
- ▶ Certification of Completion provided after class attendance
- ▶ \$35 per person
- ▶ Registration and payment available
 - ▶ On line <http://ne.gov/go/guardianeducation>
 - ▶ By phone 402.471.2862
- ▶ Payment and registration required one week prior to attending class

Promote Public Awareness of Guardian and Conservatorships



- ▶ Information
 - ▶ About the Office of Public Guardian
 - ▶ About guardianship, conservatorship, and alternatives
- ▶ Support
 - ▶ To all guardians and conservators
- ▶ Recruitment
 - ▶ Successor guardians and conservators
 - ▶ Court visitors
- ▶ Office of Public Guardian will promote:
 - ▶ The awareness of guardianship and conservatorships
 - ▶ The responsibility attached
 - ▶ The need for volunteers to serve as private guardians and conservators



The Office of Public Guardian Contact Information

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