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Help! I've Fallen and I Can't Get a Guardian: Rethinking South Carolina's Need for a Public Guardianship Program

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HELP! I'VE FALLEN AND I CAN'T GET A GUARDIAN: RETHINKING SOUTH CAROLINA'S NEED FOR A PUBLIC GUARDIANSHIP PROGRAM

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I. INTRODUCTION

This Note analyzes South Carolina's paramount need for an office of public guardianship. Guardianship is the "fiduciary relationship between a guardian[1] and a ward[2] or other incapacitated person, whereby the guardian assumes the power to make decisions about the ward's person or property."[3] Public guardianship denotes this same relationship when public officials govern and the state funds it.[4] Without public guardianship programs, already high-risk individuals would suffer the heightened prospects of losing their fundamental rights,[5] being taken advantage of,[6] and experiencing the anguish of untreated physical and mental disabilities,[7] among other tragic consequences. Thus, a state deprived of public guardianship programs necessarily lacks the ability to protect its most vulnerable indigent and incapacitated citizens. In demonstrating how this affects the residents of South Carolina, this Note utilizes a typical scenario (premised on the idea that a lack of publicly-funded aid can have severe and lasting effects on individuals in need) to contrast the state's inadequate resources to those of North Carolina, which constitute a thorough, robust, and comprehensive system of care.

Jane Doe was like any other thirty-year-old.[8] She lived in Charlotte, North Carolina, with her roommate and their cat. She drove to her job as an English teacher every morning and often spent her evenings experimenting with new recipes or watching sitcoms with friends. Her future had every potential; she wanted to be a poet. Unfortunately, Jane's plans were interrupted when her car ran off the road and flipped onto its side after swerving to avoid a stray dog. She woke up in the hospital three days later, only to be informed that she was suffering from a traumatic brain injury as a result of the accident. Traumatic Brain Injury (TBI), which is caused by a bump or jolt to the head, disrupts the normal function of the brain and is a leading cause of death and

1. A guardian is "[s]omeone who has the legal authority and duty to care for another's person or property, [especially] because of the other's infancy, incapacity, or disability." *Guardian*, BLACK'S LAW DICTIONARY (11th ed. 2019).

2. By definition, a ward is "[a] person . . . who is under a guardian's charge or protection." *Ward*, BLACK'S LAW DICTIONARY, *supra* note 1.

3. *Guardianship*, BLACK'S LAW DICTIONARY, *supra* note 1.

4. William G. Bell et al., *Public Guardianship and the Elderly: Findings from a National Study*, 21 GERONTOLOGIST 194, 194 (1981).

5. *See* discussion *infra* Section II.B.

6. DANA SHILLING, LEGAL ISSUES OF DEPENDENT AND INCAPACITATED PEOPLE, ¶ 8.13, at 8-43 (2007); *see also infra* text accompanying note 52.

7. *See infra* Part III.

8. This is a hypothetical case. The majority of guardianship cases have sealed records due to their sensitive content and the privacy of those involved. For the purposes of this Note, I am using Jane Doe's hypothetical situation as an example of cases that arise every day.

disability in the United States.[9] Due to the severity of her injury, Jane is expected to have difficulty concentrating, remembering new information, thinking clearly, and making informed decisions for the rest of her life.[10]

As a vulnerable adult who struggles to give informed consent or make important personal decisions regarding her medical and financial affairs, Jane filed for guardianship with the North Carolina Clerk of Superior Court in Mecklenburg County. The process was a straightforward one. After being appointed an attorney to represent her,[11] Jane went through the process of determining incapacity. In North Carolina, incapacity is found when an adult "lacks [the] sufficient capacity to manage [her] own affairs or to make or communicate important decisions concerning [her] person, family, or property whether the lack of capacity is due to mental illness, intellectual disability, epilepsy, cerebral palsy, autism, inebriety, senility, disease, injury, or similar cause or condition."[12] The court quickly found by clear, cogent, and convincing evidence[13] that Jane was unable to function or manage her own affairs due to the severity of her TBI. After this finding, however, Jane met a new struggle—the cost.

Although having a guardian would make all the difference in the world, being eligible for full-time help does not necessarily mean that every individual in need will actually receive the help she deserves. Generally, the estate of an incapacitated individual seeking assistance pays for the care of a guardian.[14] Unfortunately, due to her condition, Jane has not been able to keep her job. She has very little savings and her parents did not leave her any inheritance when they passed away, making her indigent[15] in the eyes of the law in North Carolina. This is the point in Jane's story where, if she lived only ten miles away in South Carolina, there could be a drastic turn of events.

Jane is lucky that there is an extensive series of well-funded public guardianship programs in North Carolina for incapacitated adults who

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9. *TBI: Get the Facts*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/traumaticbraininjury/get_the_facts.html [https://perma.cc/Y35P-QU8V].

10. *Symptoms of Traumatic Brain Injury (TBI)*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/traumaticbraininjury/symptoms.html [https://perma.cc/W8A6-62WG].

11. N.C. GEN. STAT. ANN. § 35A-1107 (2019).

12. *Id.* § 35A-1101(7) (West 2018).

13. *Id.* § 35A-1112(d).

14. *See* SHILLING, *supra* note 6, at 8-42; *see also* UNIF. GUARDIANSHIP, CONSERVATORSHIP, & OTHER PROTECTIVE ARRANGEMENTS ACT § 120 cmt. (UNIF. LAW COMM'N 2017) [hereinafter UGCOPAA].

15. Under North Carolina's guardianship statute, "indigent" is defined as "[u]nable to pay for legal representation and other necessary expenses of a proceeding." N.C. GEN. STAT. ANN. § 35A-1101(9) (West 2018).

struggle to afford the help that they need.[16] The clerk waived any reasonable fees and expenses of Jane's appointed counsel because she was found both incapacitated and indigent,[17] and North Carolina's Department of Health and Human Services assumed the cost of her personal capacity evaluation.[18] Following her hearing, Jane was able to receive funding from the state to help her pay for the guardianship she needed to survive.[19] She has, with the help of her guardian, learned how to live and cope with TBI and its continued limitations.

If Jane had been seeking assistance in South Carolina, just miles across the state's border, her story would be a very different one. She would have proceeded through a similar system of filing with the clerk of court and being determined mentally incapable of meeting the essential requirements to communicate and care for herself.[20] The difference lies in the fact that Jane's search for help would have likely ended upon the court's discovery that she could not afford a guardian.

South Carolina has no publicly funded guardianship programs for incapacitated adults,[21] which means that any individual looking for lifetime assistance is expected to pay for it out of her own pocket. When a person in Jane's situation needs help, her ability to be appointed a guardian may depend entirely on where she resides. This gap in South Carolina's healthcare system (1) fails American citizens whose physical and mental health issues are likely to worsen without proper treatment—causing withdrawal, disorientation, and mental disturbance, among other symptoms[22]—(2) deprives people of their fundamental human rights,[23] and (3) likely contributes to premature death among impoverished populations.

A growing number of people end up in guardianship programs every year.[24] While some of these cases may be anticipated and prepared for,

16. *See Guardianship*, N.C. JUDICIAL BRANCH, https://www.nccourts.gov/help-topics/guardianship/guardianship [https://perma.cc/U69S-ZTQH].

17. N.C. GEN. STAT. ANN. § 35A-1116(a)(2) (West 2009).

18. *Id.* § 35A-1116(b)(2).

19. It is impossible to determine how many incapacitated individuals will end up in guardianships each year because there is no universal system across the state that tracks or monitors the number of people who apply for and receive help. One of the first steps in establishing a new program within the state should be to address the widespread problems regarding data collection. *See* discussion *infra* Part IV.

20. S.C. CODE ANN. § 62-5-101(13) (2019).

21. S.C. JUDICIAL BRANCH, GUARDIANSHIP IN SOUTH CAROLINA: FREQUENTLY ASKED QUESTIONS FROM A CAREGIVER OR POTENTIAL GUARDIAN 10 (2013) [hereinafter GUARDIANSHIP IN SOUTH CAROLINA], https://www.sccourts.org/selfhelp/FAQsFromACaregiver.pdf [https://perma.cc/37V8-RGXD].

22. *See* discussion *infra* Section III.A.

23. *See* discussion *infra* Section II.B.

24. *See* discussion *infra* Section IV.A.

others—like Jane's—may occur unexpectedly. For this reason, variations in state law can have a catastrophic effect on the implementation of guardianship programs across the country. As more guardianship cases arise in South Carolina, this Note provides guidance for legislators and lawyers to jointly analyze this issue and implement the necessary programs to help incapacitated individuals receive the help to which they are entitled as American citizens, even when they cannot afford it.

Part I of this Note serves as an instruction to the issue at hand. Part II highlights the background information relevant to building a comprehensive understanding of guardianships in the United States, how they function, and why they are important. In doing so, section II.A discusses the importance of and every individual's right to self-determination; section II.B examines what happens when an individual is found to be incapacitated and can no longer exercise this right; section II.C analyzes guardianships as the legal structure that steps in when an incapacitated individual needs support in making important personal decisions and providing informed consent; section II.D highlights the extensive cost of private guardianship, ranging from initial proceedings to the daily cost of support once a guardian has been appointed; finally, section II.E addresses the use of public funds to help the nation's most vulnerable population afford guardians (in the form of public guardianship) when they would otherwise be unattainable.

Part III addresses the individual and social costs of neglect, highlighting the fact that current policies leave room only for private guardianship or institutional care. When there are little or no publicly subsidized programs available, the options for affordable assistance become severely limited, and in turn, this subjects vulnerable adults to potential neglect. Section IV.A follows this discussion with relevant disability statistics and an explanation of the scope of this problem (namely, South Carolina's lack of public adult guardianship programs), and section IV.B explores what happens when public funds are not available, emphasizing the draconian effects of this problem on residents of the state.

Part V outlines the four most common models of public guardianship programs across the country, with the individual sections analyzing each—the court model, the independent state office model, the social service model, and the county model, respectively—on an individual level. Part VI further analyzes these models and offers recommendations as to which aspects of each would be the most applicable to the state of South Carolina. Finally, Part VII concludes this Note.

II. BACKGROUND: THE LEGAL STRUCTURE OF GUARDIANSHIPS

A. The Human Right to Self-Determination

The evolution of human rights dialogue has played a central role in establishing the indiscriminate rights of autonomy and self-determination. Following the end of World War II, the world's leading nations came together to form the United Nations in 1945[25] and, shortly thereafter, adopted the Universal Declaration of Human Rights (UDHR) in 1948.[26] The UDHR's principles enumerate that the rights of all individuals include the right to legal capacity.[27] In recognizing that some individuals are more vulnerable than others, the United Nations also enacted the UN Convention on the Rights of Persons with Disabilities (CRPD).[28] The United Nations designed this 2007 treaty to guarantee the extension of this right—"to make [her] own decisions and have those decisions legally recognized"[29]—to individuals whose "long-term physical, mental, intellectual[,] or sensory impairments . . . may hinder their full and effective participation in society on an equal basis with others."[30] In its efforts, the United Nations has demonstrated to the world the importance of every individual's right to self-determination, regardless of her physical or mental limitations.

Although it was not recognized on the world stage until 2007, this right has been deeply rooted in the U.S. Constitution since the ratification of the Fourteenth Amendment in 1868.[31] The Amendment, which provides that no state shall "deprive any person of life, liberty, or property, without due process of law,"[32] functions as a strong reminder that depriving an individual's personal autonomy or decision-making power is not only improper but also wholly unconstitutional.[33] Over time, the U.S. Supreme Court has routinely

25. Kristin Booth Glen, *Supported Decision-Making and the Human Right of Legal Capacity*, 3 INCLUSION 2, 4 (2015); *see also History of the United Nations*, UNITED NATIONS, https://www.un.org/en/sections/history/history-united-nations/ [https://perma.cc/WH2G-A29J].

26. Glen, *supra* note 25. *See generally* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

27. Glen, *supra* note 25, at 5. *See generally* UDHR, *supra* note 26.

28. Glen, *supra* note 25, at 5. *See generally* G.A. Res. 61/106, annex 1, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

29. Glen, *supra* note 25, at 2.

30. G.A. Res. 61/106, *supra* note 28, at 4 ("The purpose of the . . . Convention is to promote, protect[,] and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.").

31. *See* U.S. CONST. amend. XIV (ratified 1868).

32. U.S. CONST. amend. XIV, § 1.

33. Tony Apolloni & Noreen Vincent, *Guardianship Reconsidered*, *in* A NEW LOOK AT GUARDIANSHIP: PROTECTIVE SERVICES THAT SUPPORT PERSONALIZED LIVING 3 (Tony Apolloni & Thomas P. Cooke eds., 1984) [hereinafter A NEW LOOK AT GUARDIANSHIP]; *see also* U.S. CONST. amend. XIV, § 1.

found that a competent individual has the constitutionally protected right to make important personal decisions regarding her health, including the right to consent to or refuse medical treatment.[34] The caveat is that, in some situations, an intellectually disabled person may be unable to make important personal decisions or give informed consent, and her need for protection may substantially outweigh her need to exercise this right.[35]

B. Incapacity and the Loss of Self-Determination

Physical and mental impairments can hinder an individual's ability to care for herself so severely that she may *always* need help in order to maintain a respectable quality of life.[36] When the need for help is more important for an individual's welfare than the right to make crucial personal decisions, the individual can surrender the latter to a guardian.[37] The law of guardianship, therefore:

> reflects an attempt to strike a balance between preserving and protecting the legal rights, freedom, and personal autonomy of adults and the duty of the State (acting as *parens patrie*) to protect individuals who lack sufficient mental capacity to make decisions regarding themselves or their property, to act in their own best interests, or to protect themselves or their property from harm, injury, or exploitation.[38]

To determine if and when guardianship is necessary, a court must find that the individual allegedly in need is incapacitated physically, mentally, or both.[39]

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34. *See, e.g.*, Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 278 (1990).

35. Apolloni & Vincent, *supra* note 33.

36. *Id.*

37. *Id.*

38. JOHN L. SAXON, NORTH CAROLINA GUARDIANSHIP MANUAL 8 (John Rubin ed., 2008).

39. WINSOR C. SCHMIDT, JR., GUARDIANSHIP: COURT OF LAST RESORT FOR THE ELDERLY AND DISABLED 124 (Carolina Acad. Press 1995) ("The court has ultimate responsibility to assess the medical evidence and determine incompetence."). For the purpose of this Note, I will use the definition of "incapacity" that is consistent with the South Carolina Code:

> "Incapacity" means the inability to effectively receive, evaluate, and respond to information or make or communicate decisions such that a person, even with appropriate, reasonably available support and assistance cannot: (a) meet the essential requirements for [her] physical health, safety, or self-care, necessitating the need for a guardian; or (b) manage [her] property or financial affairs or provide for [her] support or for the support of [her] legal dependents, necessitating the need for a protective order.

S.C. CODE ANN. § 62-5-101(13) (2019).

The deciding factor in this analysis is her decision-making ability.[40]

In assessing mental capacity, the court must determine whether the individual is able to give informed consent or make rational decisions based on a reasonable comprehension of reality.[41] Capacity is situational.[42] This means that "the degree of mental capacity required to meet the legal standard depends on the proposed act" or, in other words, it may be contingent on "how well the individual can function in [any] particular setting."[43] Someone who is unconscious will have no capacity, and a court will thus deem them unable to give consent. A less extreme example is one where an individual is capable of making some decisions (i.e., to receive or refuse medical treatment) but is mentally incapable of completing other tasks (i.e., managing her financial affairs). Ultimately, the determination rests on weighing the level of comprehension necessary for the average person to make a particular decision against the level of comprehension a developmentally disabled person is actually capable of providing in the same context.[44]

A finding of incapacity is the most important step in the guardianship process because it not only determines whether an individual will receive the assistance she (or her family) believes she needs, but it also involves serious legal consequences that a court should not take lightly. "However benevolent a guardianship may be in intent or design, the resulting loss by the ward of the right to make fundamental decisions . . . is, in constitutional terms, a devastating deprivation of civil rights."[45] Consequently, courts are often hesitant to find incapacity.[46] In addition to surrendering financial and medical treatment decisions to a guardian, a ward may also be stripped of significant personal rights, such as the right to enter into contracts; purchase, sell, mortgage, or rent property; marry or divorce; have and raise children; travel; lend or borrow money; serve on a jury; vote in elections; or operate a vehicle.[47] While the loss of any individual right is tragic, losing these rights collectively would have the legal impact of "reduc[ing] the status of an individual to that of a child, or a nonperson."[48] This process of "legal

40. Apolloni & Vincent, *supra* note 33.

41. LAWRENCE A. FROLIK & RICHARD L. KAPLAN, ELDER LAW IN A NUTSHELL 24–25 (6th ed. 2014).

42. *Id.* at 24.

43. *Id.*

44. *See id.* at 25 (stating that the question of whether an individual possesses the ability to communicate important decisions regarding her medical care is "whether [her] level of comprehension is sufficient to participate in the proposed medical treatment decision.").

45. Louise Monaco & Jerry Smilowitz, *Legal Consideration Affecting Guardianship Relationships*, *in* A NEW LOOK AT GUARDIANSHIP, *supra* note 33, at 49.

46. *Guardianship*, TRAUMATICBRAININJURY.COM, https://www.traumaticbraininjury.com/guardianship/ [https://perma.cc/V3W6-G4RN].

47. Monaco & Smilowitz, *supra* note 45, at 49; SCHMIDT, *supra* note 39, at 5–6.

48. SCHMIDT, *supra* note 39, at 6.

infantilization"[49] risks stripping a developmentally disabled adult from her inherent personhood.[50]

C. *Guardianships: A Lifesaving Supplement*

Adult guardianships were developed to protect vulnerable adults and to provide for their individualized needs, but at the same time, they also stipulated that a ward relinquish her most fundamental rights to the control of her guardian.[51] Although they have faced increased scrutiny over issues of improper monitoring and poor guardian accountability in the past,[52] guardianships generally function as legal supplements when a ward

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49. *Id.*

50. *See* UGCOPAA § 102(13), (16) (UNIF. LAW COMM'N 2017) (stating that less restrictive alternatives and limited guardianships "[restrict] fewer rights of the individual than would the appointment of a guardian," thereby implying that the appointment of a guardian will undoubtedly strip a developmentally disabled individual from these rights that are guaranteed to all other legal persons). This risk has an underpinning in bioethics and is well-known in the field of disability rights. Because losing these rights can have such devastating, long-term effects on a person, a disabled individual should first pursue other options and consider guardianships as a last resort. Even when guardianship is necessary for a disabled individual, there are less restrictive alternatives for situations where an individual may need assistance but does not need to surrender the majority of her civil rights as a consequence. This, however, is outside the scope of this Note. For an analysis of personhood as it pertains to bioethics and legal capacity, see Michael L. Perlin, *"Striking for the Guardians and Protectors of the Mind": The Convention on the Rights of Persons with Mental Disabilities and the Future of Guardianship Law*, 117 PENN. ST. L. REV. 1159 (2013). For a full discussion on limited guardianships and other, less restrictive alternatives, see Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735 (2002).

51. Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 196 (2008).

52. Early studies found that, in a growing number of cases, as a result of well-meaning but ultimately ineffective care, the benefit to third parties substantially outweighed the benefit to the ward. *Id.* at 196. In 1982, for example, a Florida grand jury found that the state permitted a severe lack of monitoring that, in turn, led to a disturbing increase of vulnerable adults being unnecessarily stripped of their fundamental rights. *Id.*; *see also* Dade Co. Grand Jury, *Final Report of the Grand Jury* 36 (Off. St. Atty., Miami, Fla. 1982), http://www.miamisao.com/publications/grand_jury/1980s/gj1982s4.pdf [https://perma.cc/8P35-RVG6]. The U.S. House Select Committee on Aging responded to this finding with a hearing to discuss the plethora of concerns newly revealed on the issue. Teaster et al., *supra* note 51, at 197. Although the potential pitfalls of guardianship are of great significance to any discussion on the topic, these problems and the nation's response to them—culminating in recommendations for legal and procedural reform, capacity assessment, increased monitoring and reporting, and guardian accountability—fall outside the scope of this Note. *See id* at 196–98; *see also* Fred Bayles & Scott McCartney, *Guardians of the Elderly: An Ailing System*, ASSOCIATED PRESS, Sept. 19, 1987, https://apnews.com/1198f64bb05d9c1ec690035983c02f9f (providing a comprehensive discussion on the issue of guardianship in this area). For further information, see CLAUDE PEPPER, ABUSES IN GUARDIANSHIP OF THE ELDERLY AND INFIRM: A NATIONAL DISGRACE, H.R. DOC. NO. 100-641 (1987).

relinquishes her right to self-determination, voluntarily or involuntarily.[53] When an incapacitated person is unable to give informed consent or make the reasonable decision to exercise a right, "[s]uch a 'right' must be exercised for her, . . . by some sort of surrogate."[54] Guardians provide this service for their wards.[55] In addition to preserving the welfare of and maintaining the quality of life for those in need, guardians protect incapacitated individuals from the state potentially labeling them as children or nonpersons.[56]

Because guardianships can have such significant legal and moral effects, it is extremely important that every state have an exhaustive system of legitimate, comprehensive, and fair guardianship programs. The problem is that these programs are often limited in their scope as a result of deficient structuring or, more critically, insufficient funding.

D. The Costs Associated with Private Guardianship

The process of appointing a guardian can be expensive. Filing the initial petition can cost up to $400 in standard court filing fees, certified copies, and service of process alone.[57] Although some states may choose to waive the initial fees for an individual who is deemed unable to pay,[58] not all states provide, or can afford to provide, this option.[59] In addition, court-appointed attorney[60] fees can cost anywhere from $1,000 to $5,000 and are likely to increase if a party contests the case or asks a medical professional to testify.[61] Finally, during the court proceedings, a potential ward is also expected to pay

53. Teaster et al., *supra* note 51, at 196 (stating that when incapacitated adults can no longer function on their own, guardians are legally appointed to have "the duty and power to make personal [or] property decisions" for those individuals, thus functioning as decision-making supplements).

54. Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 280 (1990).

55. *See* UGCOPAA § 102(9).

56. SCHMIDT, *supra* note 39, at 6.

57. Robert Fleming, *How Much Does it Cost to Get a Guardian and/or Conservator Appointed?*, FLEMING & CURTI, PLC (Oct. 21, 2012), https://elder-law.com/how-much-does-it-cost-to-get-a-guardian-andor-conservator-appointed/ [https://perma.cc/UNZ4-477M].

58. *Id.*; *see, e.g.*, N.C. GEN. STAT. ANN. § 35A-1116(a)(2) (West 2003) (North Carolina is one example of a state that will waive any reasonable fees and expenses of the initial guardianship petition if the court finds an alleged incapacitated individual to be indigent).

59. *See* LAWHELP.ORG, COURT FEES AND GETTING COURT FEES PAID 2 (stating "[e]ach court has different rules" regarding the waiver of fees).

60. Because the subject of any guardianship petition has the right to representation, the court will appoint an attorney to represent the potential ward in cases where she cannot retain her own counsel, for any number of reasons. LEGAL COUNSEL FOR THE ELDERLY, DECISION-MAKING, INCAPACITY, AND THE ELDERLY: A PROTECTIVE SERVICES PRACTICE MANUAL 70 (1987). That said, however, the potential ward always has the right to select and retain counsel if she or a family member already has an attorney, although this is likely to be much more expensive. *Id.*; *see also* Fleming, *supra* note 57.

61. FROLIK & KAPLAN, *supra* note 41, at 250.

for her examination of incapacity or any additional reports from a medical provider (although some states may also waive this).[62]

Even after an incapacitated individual appoints a guardian, the ward's estate generally pays the fees and expenses associated with continued support.[63] While the cost of care can be minimal if a trusted friend or family member has been appointed to serve as a guardian, it may be substantial in alternative situations. Because guardians are not expected to pay for any of the expenses associated with the ward or her care,[64] the ward is required to afford both her own personal living expenses as well as the private, individualized care her guardian provides. More specifically, guardians are entitled to "reasonable compensation from their wards" and "reimbursement for expenses made on their wards' behalf."[65] Whenever possible, guardians should also use their wards' income to cover any and all of her expenses.[66] Because of this requirement, a vulnerable person with no trusted relatives or friends and a poverty-level income would find it nearly impossible to obtain (and retain) a guardian from the private sector.[67] In this light, some may view guardianships as elitist, catering only to the people who can afford them.

E. Public Guardianship

Public guardianship bridges the gap between the privileged and the destitute by supplementing the cost of care with public funds, thereby eliminating the need to "qualify" for care based solely on financial status. In the best-case scenario, a caring and involved family will support an incapacitated individual, and there will be at least one willing, able, and qualified individual to step into the role as guardian; her need for guardianship will not be contested, and nobody will oppose the individual entrusted with her ongoing care.[68] Noted above, the worst-case scenario occurs when an individual in need has no suitable guardian, no assets or ability to pay for court-appointed guardianship, and a case that initiates extensive conflict or controversy.[69] As these worst-case scenarios have become more prevalent, an important subset of guardianship, deemed public guardianship, has emerged.[70]

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62. Fleming, *supra* note 57.

63. SHILLING, *supra* note 6, at 8-42; *see also* UGCOPAA § 120 cmt. (UNIF. LAW COMM'N 2017) (stating public funds may be used to pay guardians).

64. UGCOPAA § 120(d).

65. *Guardian*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/guardian [https://perma.cc/WH3K-C3T9].

66. *Id.*

67. SHILLING, *supra* note 6.

68. *Id.* at 8-42.

69. *Id.* at 8-42, -43.

70. *Id.* at 8-42.

Public guardianship is the "legal mechanism whereby a designated public official is invested with the power and responsibility to assume control over the property [or] the person of another individual adjudicated by the courts to be incompetent to manage [her] own affairs."[71] In other words, these programs serve low-income, at-risk adults who have no qualified contacts or relatives willing and able to lend support.[72] States typically provide the funding for these programs and operate them under the cooperation of both staff and volunteers.[73] In an effort to address the changing landscape of guardianship law—including the emerging need for public guardianships—advocates of guardianship reform introduced the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) in 2017 to advocate for guardianship reform across the country.[74]

The UGCOPAA functions as guidance for the states to promote individualized planning in guardianship preferences and values, and also to provide less-restrictive forms of protection for vulnerable citizens.[75] Additionally, and most importantly to this discussion, it recognizes that obtaining a guardian can become an issue when the ward's personal financial situation makes it unattainable for her to pay for the care she needs. A comment to the UGCOPPA states that "[a]lthough compensation may come from the funds of the individual subject to guardianship . . . it need not be so. For example, public funds may be used to pay guardians . . . if the individual subject to guardianship . . . does not have sufficient resources."[76]

Public funds open the door to public guardianship programs and, thus, provide several benefits:

> [Public funds] offer the advantages of decreased dependence on extended family ties, the involvement of full-time professional guardians, the capability of providing services throughout the life of the ward, less likelihood of family-oriented conflicts of interest (as when a family member overly conserves a ward's estate in hopes of inheriting the remainder), and the authority and stability of a government-operated organization.[77]

71. Bell et al., *supra* note 4, at 194.
72. Teaster et al., *supra* note 51, at 201.
73. *Id.*
74. *See generally* UGCOPAA (UNIF. LAW COMM'N 2017).
75. *Guardianship, Conservatorship, and Other Protective Arrangements Act*, UNIF. LAW COMM'N (2017) [hereinafter UNIF. LAW COMM'N], https://www.uniformlaws.org/committees/community-home?CommunityKey=2eba8654-8871-4905-ad38-aabbd573911c [https://perma.cc/EYT9-M6LW].
76. UGCOPAA § 120 cmt.
77. Apolloni & Vincent, *supra* note 33, at 5.

The problem with public funds, however, is that they are available only to residents of states that actually have these funds available. Individual states govern their own laws of guardianship (as opposed to the federal government),[78] and unfortunately, not all state governments choose to leave room for public guardianship programs in their financial plans.[79]

Some states have statutes dedicated explicitly to establishing public guardianship programs and appropriating funds for them.[80] Other states authorize their court systems or local governments to take responsibility for their development, execution, and financing.[81] Still, others merge their social services and adult protection agencies with this duty or choose instead to delegate the implementation of these programs to professional guardians.[82] While the UGCOPAA provides model or "uniform" laws that states can choose to adopt and modify,[83] each state ultimately has the privilege to develop its own individualized system that best fits the available support, financial capacity, and particular needs of each community's residents. This may include having no public system at all. North Carolina, for example, has a robust system of publicly funded guardianship programs for incapacitated adults,[84] whereas South Carolina does not.[85]

The most crucial aspect of a guardianship is to replace the ward's decision-making authority regarding her personal affairs, her financial affairs, or both, with that of a guardian in circumstances where she lacks the adequate capacity to make those decisions herself.[86] Public guardianships in particular are essential to communities because they provide this service to those who are less fortunate, in effect ensuring that any vulnerable adult, regardless of her financial or familial situation, can maintain the quality of life she deserves. Because guardianships play such a major role in the welfare of both individuals (by providing continued care and protecting the most basic of civil rights) and communities (by preventing increased homelessness and

78. Glen, *supra* note 25, at 3.

79. One obvious example here is the state of South Carolina. *See* GUARDIANSHIP IN SOUTH CAROLINA, *supra* note 21.

80. SHILLING, *supra* note 6; *see also infra* Section V.B.

81. SHILLING, *supra* note 6; *see also infra* Sections V.A., V.D.

82. SHILLING, *supra* note 6; *see also infra* Section V.C.

83. *Guardianship Uniform Laws*, NAT'L ACAD. OF ELDER LAW ATT'YS, https://www.naela.org/NGN_PUBLIC/Guardianship_Reform_Tagged/reformuniform.aspx [https://perma.cc/XZ5U-49TD].

84. *See generally* N.C. GEN. STAT. ANN. § 35A (2019) (codifying the majority of North Carolina's guardianship law); SAXON, *supra* note 38, at ix (stating the manual acts as a "training and reference resource for attorneys who are appointed to represent incapacitated adults in guardianship proceedings" in North Carolina).

85. GUARDIANSHIP IN SOUTH CAROLINA, *supra* note 21.

86. SAXON, *supra* note 38, at 7.

premature death), the absence of public adult guardianship programs in South Carolina is incredibly damaging to the state.

III. THE INDIVIDUAL AND SOCIAL COST OF NEGLECT

If society neglects any of its members, such neglect affects all individuals. By default, a state-wide lack of publicly funded alternatives to private guardianship generates situations where individuals whose untreated illnesses and disabilities risk limiting their enjoyment and length of life. Additionally, it creates circumstances in which people with incapacitated friends and family become obligated to invest their own time, energy, and money toward providing care.

Although some communities offer guardianship programs and similar resources for the elderly and disabled, an early study of protective services—known as the Regan Study[87]—found that communities have generally been slow in their responses to these needs.[88] The study found that "[t]his tardiness [of delivering resources to vulnerable individuals] has exacted a terrible price in human tragedy, not to mention the exorbitant economic loss to the individual and society."[89] Sadly, the costs both to the individual and to society become noticeable when society deprives people in need of even the most basic resources necessary to survive.

A. The Human Cost

The Regan Study found that the cost of neglect to the individual surfaces in the most horrifying conditions of the victims.[90] When an incapacitated person is neglected, for any one of many possible reasons, this can lead to withdrawal, disorientation, mental disturbance, physical deterioration, and an increased risk of injury from assault or by accident.[91] The study also found that an elderly individual is likely at a higher risk of injury or death if she is the beneficiary of social services and residing in a nursing home, hospital, or equivalent.[92] Placement in an institution not only often leads to a loss of self-

87. John J. Regan & Georgia Springer, *Protective Services for the Elderly: A Working Paper* (U.S. Sen. Spec. Comm. on Aging 1997). The Regan Study looks to the various forms of protective services (namely, guardianship, conservatorship, social services, and others) and analyzes how the personal decisions to utilize one or more of these services can impact both the individual in need, her family and friends, and her surrounding community. *Id.*

88. *Id.* at 7.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

confidence, freedom, and potential usefulness but also likely curtails both the individual's enjoyment and length of life.[93]

Sadly, the individual is not the only one who feels the effects of care, or lack thereof. The burden of caring for an elderly or disabled family member can be both financially and emotionally exhausting.[94] On the financial front, it is very common that seniors and similarly-situated disabled individuals are unable cover their long-term healthcare costs.[95] This, in turn, means that it has become increasingly more common for family members to step forward and provide unpaid guardianship services or other monetary contributions.[96] Most family caregivers are vastly unprepared to cover the costs of care.[97] In fact, a recent survey concluded that approximately 63% of caregivers have "no plan as to how they will pay for their parents' care over the next five years."[98] Financially, stakes are high for individuals who care (by choice or by default) for their aging and incapacitated loved ones; this is especially true considering the exorbitant average costs of professional in-home care ($4,004/month), assisted living ($4,000/month), and semi-private rooms in a senior living facility ($7,441/month) across the nation.[99]

Moreover, on the emotional front, it is as painful to see a loved one decline as it is exhausting to care for them. On average, about half of caregivers devote forty or more hours to caring for their wards, and this time is pledged in addition to their careers and other personal responsibilities.[100] The time requirement alone is staggering. But what is perhaps even more heartbreaking is committing an individual in need to an institution.[101] Over time, the emotional, financial, and mental stresses of caring for an incapacitated individual (or even the pressure of frequently visiting that person in an institution) can drain a caregiver's ability to balance both caring for the person in need and attending to his own personal and family obligations.[102]

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93. *Id.*
94. *Id.*
95. Marlo Sollitto, *Family Caregivers Bear the Burden of High Elder Care Costs*, AGINGCARE, https://www.agingcare.com/articles/cost-of-caring-for-elderly-parents-could-be-next-financial-crisis-133369.htm [https://perma.cc/F49T-EE3Y].
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. Regan & Springer, *supra* note 87, at 7.
102. *Id.*

B. The Social Cost

In addition to the cost to the individual, current public policies that rely solely on institutional care and offer no alternative options cause irrevocable damage to society.[103] This is most evident in three primary respects: (1) involuntary commitment, (2) infrequent rehabilitation, and (3) financial burden.[104] First, the public policies most commonly in place disregard the opinions and perspectives of incapacitated adults when they rely too heavily on institutional care.[105] Due to an impending number of related court orders (as well as a general lack of alternative resources or avenues to pursue for treatment and care), those who are in need of help are entering institutions unwillingly and begrudgingly.[106] Although the legality of unwanted institutionalization has been challenged,[107] it remains a concern for those whose lives are at stake.

Second, public policies that restrict care options to institutions alone are detrimental to society because they rarely lead to rehabilitation.[108] "Too seldom are patients restored to function at a level appropriate to the patient's needs. Rather, as noted earlier, institutional care often accelerates deterioration and death, usually by passive indifference and occasionally by deliberate intent."[109] Third, and likely the point that carries the most weight for those who struggle financially, is the reality that, for a process so often ineffective and potentially also unconstitutional, institutional care is extraordinarily expensive.[110] Surely there are more cost-friendly systems for providing care and protection.

The importance of noting the varying costs and consequences of neglect becomes evident when considering how many disadvantages arise from policies that offer only limited options for care. When private guardianship,

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103. *Id.*

104. *Id.* at 7–8.

105. *See id.* at 7. Policies that place patients in institutions unwillingly are clearly doing so without considering the opinions or perspectives of those patients.

106. *Id.*

107. In *Lake v. Cameron*, 364 F.2d 657 (D.C. Cir. 1966), the U.S. Court of Appeals for the District of Columbia ordered, in a habeas corpus action, that a lower court "seek less restrictive alternatives for treatment for a nondangerous old woman confined [to a] mental hospital." Regan & Springer, *supra* note 87, at 8. Further, in the more recent case of *O'Conner v. Donaldson*, the Supreme Court held that "a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends." 422 U.S. 563, 576 (1975). In both cases and in others, courts have found it unconstitutional to deprive elder and disabled individuals to legal processes where the only option for care is institutional treatment and where this care is unwanted. Regan & Springer, *supra* note 87, at 8.

108. *See* Regan & Springer, *supra* note 87, at 7.

109. *Id.*

110. *Id.* at 8.

by way of either a private professional guardian or a family-subsidized in-home caregiver, is the only truly available alternative to institutional care, the people who need help but cannot afford it suffer from these effects the most. What's more, the number of incapacitated individuals across the country is rising.[111]

IV. THE SCOPE AND EFFECT OF THE PROBLEM IN SOUTH CAROLINA

A. Disability Statistics in the United States and South Carolina

Data regarding disability and incapacity across the nation are grim. In 2016, 24.6% of adults in the United States—about 62,588,135 people—reported living with a disability.[112] By the end of 2017, both this percentage[113] and the country's total population had increased steadily, raising the new number of adults with reported disabilities to approximately 65,373,639.[114] While the vast majority of these 65 million people will not need lifelong guardians, some will. And this number is growing as well.[115]

Over time, guardianship cases have shifted from catering primarily to the elderly with disabilities to include a broader range of younger vulnerable adults, such as those with serious head injuries, developmental disorders and conditions, substance abuse problems, and mental illnesses.[116] That said, however, one 1979 study of six states found that on average, only one-tenth of one percent of the nation's population initiates guardianship petitions.[117] While this number may seem negligible, 0.1% of the country's total

111. *See* discussion *infra* Part IV; *see also infra* note 115.

112. *Disability and Health Data System*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://dhds.cdc.gov [https://perma.cc/2S3D-BPUG] (choose "Data & Statistics" from dropdown; then choose "Disability and Health Data System"; then choose "Disability Estimates"; then choose "2016" year).

113. The reported percentage of adults living with a disability in the United States grew to 25.6% by the end of 2017. *Disability and Health Data System*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://dhds.cdc.gov [https://perma.cc/FGG5-K9JG] (choose "Data & Statistics" from dropdown; then choose "Disability and Health Data System"; then choose "Disability Estimates"; then choose "2017" year).

114. *Id.*

115. SCHMIDT, *supra* note 39, at xiii ("As the national population ages, and the lifespan increases, more people are potentially subject to being adjudicated incompetent in court and appointed a guardian as a substitute decisionmaker.").

116. SHILLING, *supra* note 6; SCOTT K. SUMMERS, GUARDIANSHIP & CONSERVATORSHIP: A HANDBOOK FOR LAWYERS 24 (1996).

117. SCHMIDT, *supra* note 39, at 80 (citing MELVIN T. AXILBUND, AM. BAR ASSOC. ON THE MENTALLY DISABLED, EXERCISING JUDGMENT FOR THE DISABLED: REPORT OF AN INQUIRY INTO LIMITED GUARDIANSHIP, PUBLIC GUARDIANSHIP, AND ADULT PROTECTIVE SERVICES IN SIX STATES 21 (1979)). The states included in the study were Delaware, Minnesota, North Carolina, Ohio, Washington, and Wisconsin. *Id.*

population as of December 31, 2017 (approximately 325,923,198 people),[118] was still an alarming 325,923 adults *per year* with disabilities so severe that they actively sought guardianship assistance.[119]

Perhaps even more frightening than the growing number of vulnerable adults in need of long-term care is the number of these individuals who, potential guardianship needs aside, struggle to afford even the most basic healthcare needs. According to the Centers for Disease Control and Prevention (CDCP), one in three adults with disabilities does not have a regular healthcare provider; one in three adults with disabilities has, in the past year, failed to meet a healthcare need due to the cost of the consultation, treatment, or both; and one in four adults with disabilities did not schedule a routine check-up with her doctor in the past year.[120] Because "the percentage of people living with disabilities is highest in the South,"[121] it would be reasonable to presume that these statistics are similar, if not even more discouraging, in South Carolina.

The U.S. Census Bureau estimated the population of South Carolina to be just over 5 million people in 2017.[122] In that year, 26.3% of adults in the state—which calculates to roughly 1,315,000 people—reported living with a documented disability.[123] This percentage was moderately higher than the year's national average of 25.6%.[124] Moreover, assuming that the process to retain a guardian was initiated for 0.1% of the state's population,[125] a rough estimate would suggest that 1,300 incapacitated adults in South Carolina began the process in 2017. These figures are paramount to the discussion on public guardianships because they provide a comprehensive overview of how many South Carolinians could benefit from public guardianship programs and who are unquestionably disadvantaged as a result of their absence.

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118. *U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/popclock/ [https://perma.cc/S7GJ-FDVB].

119. Guardianship records are not public and therefore an exact number of petitions filed each year cannot be accurately determined. This is an estimate based on general trends across the country.

120. NAT'L CTR. ON BIRTH DEFECTS & DEVELOPMENTAL DISABILITIES, CTRS. FOR DISEASE CONTROL & PREVENTION, DISABILITY IMPACTS ALL OF US (2017), https://www.cdc.gov/ncbddd/disabilityandhealth/documents/disabilities_impacts_all_of_us.pdf [https://perma.cc/A2AG-P8R6].

121. *Id.*

122. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018*, U.S. CENSUS BUREAU, https://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk [https://perma.cc/PH6M-HJY9] (displaying population information for South Carolina).

123. NAT'L CTR. ON BIRTH DEFECTS & DEVELOPMENTAL DISABILITIES, *supra* note 120.

124. *Id.*

125. SCHMIDT, *supra* note 39, at 80 (citing AXILBUND, *supra* note 117, at 21).

It is important to note, however, that "little data exist on the need for public guardianship and on the operation of public guardianship programs."[126] The numbers highlighted above, although precise percentages and calculations, are based entirely on generalized estimates rooted only in Census data and the aforementioned (and severely outdated) reporting averages of six states across the country.[127] While these states, together, may be a strong representative of the nation's population and needs, they are not wholly determinative. In fact, these approximations are based only on *reported* petitions for guardianships in those individual states.[128] These reported figures are likely much lower than the actual number of individuals with disabilities in need of full-time help, due to a lack of petitions in areas that do not have public funds available or where incapacitated adults are unaware of the resources available to guide and support them. This may also be due to inaccurate and inconsistent reporting of guardianship data as a whole across the country; still today, very few people have generated empirical studies of guardianship.[129]

If nothing else, the roughly calculated 1,300 incapacitated adults in the state expected to initiate guardianship proceedings each year exhibits that there is a real need for public programs in South Carolina. Without true data, however, it is impossible to project how many people might die, suffer, or be taken advantage of if these programs are not established. This not only demonstrates the severe insecurities to which vulnerable adults are often subject but also makes assessing the true extent of this issue unattainable. Lacking reliable data as to the scope of the problem means also lacking a comprehensive understanding of the problem's draconian effects on the citizens of South Carolina. Inconsistent reporting of severe disability and guardianship data is a serious issue that the state (and the country) should address.

B. The Impact of This Problem in South Carolina

Despite the existence of very little data, it is indisputable that there is an alarming need for public programs for incapacitated adults in South Carolina. Before the state can award public funds, however, it must first develop the programs in question. South Carolina is in dire need of a series of comprehensive public guardianship programs that can set forth uniform

126. Teaster et al., *supra* note 51, at 201.

127. *See* SCHMIDT, *supra* note 39, at 80 (citing AXILBUND, *supra* note 117, at 21).

128. SCHMIDT, *supra* note 39, at 80 (explaining that "petitions for guardianship are a poor index of need" because they may not be initiated, and thus not reported, or any number of reasons).

129. Teaster et al., *supra* note 51, at 198.

standards across the state. The UGCOPPA functions as Congress intended—to provide guidance for states in adopting their own guardianship statutes;[130] however, it does not require implementing any specific language or demand making public funds available.[131] As a result, some states have chosen, either intentionally or by default (due to a lack of resources, information, or organization), not to institute public guardianship programs.[132]

This also means that, as a "decided trend towards [the] adoption of state public guardianship laws [becomes] evident,"[133] an absence of clear standards is "likely to encourage the development of [state and] institution-specific practices."[134] Thus, even when states create programs and allocate funds, inconsistently executing these programs can have serious effects on the wards they were developed to protect. Guardians, as surrogate decision-makers, are often confronted with complex ethical concerns regarding the dignity and individual personal, financial, and medical interests of their wards.[135] A lack of universal standards gives rise to inconsistent and incomplete laws, both across the country and within the borders of each individual state, sometimes at great personal cost to vulnerable adults.[136] South Carolina is one of the more disadvantaged states in this respect; it lacks public programs that other states, including those as close as Georgia[137] and North Carolina,[138] have fully established.

130. *See generally* UGCOPAA (UNIF. LAW COMM'N 2017).

131. UNIF. LAW COMM'N, *supra* note 75.

132. Again, an indisputable example here is the state of South Carolina which has not, at this time and for any number of reasons, established an office of public guardianship. *See* GUARDIANSHIP IN SOUTH CAROLINA, *supra* note 21.

133. Bell et al., *supra* note 4, at 197.

134. Andrew B. Cohen et al., *Guardianship and End-of-Life Decision Making*, 175 JAMA INTERNAL MED. 1687, 1689 (2015).

135. *Id.* (citing RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 179–242 (Vintage Books 1994) (1993)).

136. A lack of uniformity across and within the states is a major problem for vulnerable adults across the country. This is especially true for wards attempting to relocate to states in which they were not originally granted guardianship and/or, more importantly, from which they were granted public funding. This is also true for incapacitated individuals who might be facing end-of-life decisions. When there is no uniformity, it becomes exceedingly difficult for guardians and physicians make complex decisions about life-sustaining treatment in what should be a multidisciplinary effort to provide appropriate care for patients in a clinical setting. *Id.* at 1690.

137. *Public Guardianship Office*, DIV. OF AGING SERVS., https://aging.georgia.gov/public-guardianship-office-pgo [https://perma.cc/SGS3-QHDJ].

138. N.C. GEN. STAT. ANN. §§ 35A-1270 to -1273 (West 2003).

V. FOUR MODELS FOR CONSIDERATION[139]

The framework of public guardianship programs is of notable concern to attorneys and policymakers alike.[140] If South Carolina aims to develop a space for public guardianship, the legislature should first look to other successful programs. These vary primarily by administrative location. After choosing which model would translate the most smoothly to the state, South Carolina can then modify it to fit the individualized needs of its citizens. Of the currently established public programs across the country, the Regan Study found that almost all fit into one of four specific models: (A) the court model, (B) the independent state office model, (C) the social service model, and (D) the county model.[141]

A. The Court Model

In the court model, the public guardian is "an official of the court which has jurisdiction over the creation of guardianship[s] . . . ."[142] This means that the chief judge appoints a qualified individual as a public guardian.[143] This not only takes rulemaking power away from local public guardians, giving it instead to the chief administrative judge of the state, but also "allow[s] the courts to achieve whatever degree of statewide uniformity in the administration of the public guardian's office they believe to be necessary."[144]

B. The Independent State Office Model

The independent state office model places the office of public guardianship under the executive branch of the state government.[145] It creates an independent office directly under the governor that has the power to develop and fund guardianships as well as appoint qualified guardians.[146] This model is notable because it takes authority from the judiciary and places it solely in the hands of the executive branch.

139. The following Section relies heavily on Regan & Springer, *supra* note 87.
140. Teaster et al., *supra* note 51, at 216.
141. *Id.* at 216–17.
142. Regan & Springer, *supra* note 87, at 114.
143. *Id.*
144. *Id.*
145. Teaster et al., *supra* note 51, at 216 (citing Regan & Springer, *supra* note 87, at 114).
146. Regan & Springer, *supra* note 87, at 114.

C. *The Social Service Model*

The social service model, much like the previous independent state office model, places the office of public guardianship under government control at the state level.[147] Under this structure, however, the state establishes the office under a preexisting social services agency.[148] Moreover, the governor appoints the guardian.[149] The caveat to this model, however, is the conflict of interest it creates. Here, whichever social services agency takes control of the guardianship office is then "providing services to the same clients for whom they are guardian," thereby promoting the use of social services that "may not be in the best interests of the ward."[150] While this system makes guardianship services more accessible to wards in general (because it utilizes the same agency to provide a variety of services), it does so at the expense of the guardians' client-oriented responsibilities that are present in other models.[151]

D. *The County Model*

Finally, the county model makes the public guardian a local official within each county.[152] This is a unique setup because it carries with it the apparent advantage of having an official that is more aware of the specific needs of the community's elderly and disabled than any other individual would be.[153] Under this model, the county government appoints the guardian and the state attorney general regulates the county offices for the purpose, similar to that of the court model, of attaining state-wide uniformity within the administration.[154]

VI. ANALYSIS OF THE MODELS AND PROPOSAL FOR SOUTH CAROLINA

This Note argues that South Carolina would benefit from the implementation of a public guardianship program. In doing so, proposed legislation should include a public guardianship program that aligns primarily with the independent state office model. However, as it is currently structured across the nation, this model generally lacks a number of benefits that other

147. *Id.*

148. Teaster et al., *supra* note 51, at 216; *see also* Regan & Springer, *supra* note 87, at 114.

149. Teaster et al., *supra* note 51, at 216; *see also* Regan & Springer, *supra* note 87, at 114.

150. Teaster et al., *supra* note 51, at 216; *see also* Regan & Springer, *supra* note 87, at 114–15.

151. Teaster et al., *supra* note 51, at 216; *see also* Regan & Springer, *supra* note 87, at 114–15.

152. Teaster et al., *supra* note 51, at 217; *see also* Regan & Springer, *supra* note 87, at 115.

153. Teaster et al., *supra* note 51, at 217.

154. Regan & Springer, *supra* note 87, at 115.

models have incorporated. Thus, when South Carolina plans to establish a public guardianship program, this Note advises that the state should format its program primarily after the independent state office model but also incorporate particular aspects of each of the aforementioned models. The goal should be to create a mélange of the various guardianship systems so as to create one that is best suited for South Carolina.

The independent state office model is the most fitting because it places the development, control, and appointment of guardians in the hands of the governor. In a state with a medium-sized population, South Carolina's governor is more closely connected with and aware of the needs of the state's citizens than is likely to be the case in larger, more populated states. The official 2010 census found South Carolina's population to be the twenty-fourth largest within the United States.[155] Although it is growing in population, the state is doing so only slightly.[156] While this seems like a large number, it places South Carolina almost exactly in the middle of the fifty states by population. The independent state office model may not be applicable to larger states because governors of those communities are responsible for greater populations and, thus, greater quantities and varieties of their corresponding needs. That said, it is likely to translate well to medium-sized states where governors, by default, have more control of less people. For this reason, the independent state office model would be most suitable in South Carolina.

On the other end of the spectrum falls the court model. The smallest states (which do not include South Carolina) function well under this model because it gives the power to the judiciary, which is more closely connected to the smaller communities within the states. This model is important because it puts individuals who are well-versed in the law and the legal repercussions of guardianship in charge of the system. When the chief judge has the power to appoint a qualified individual as a public guardian, she is doing so with the mindset of finding the person best suited to make the ward's difficult personal, financial, and legal decisions with no conflicts of interest and with a full

155. *Annual Estimates of the Resident Population: April 1, 2010 to July 1, 2018*, *supra* note 122.

156. *Id.* The U.S. Census estimated the 2017 and 2018 state populations would place South Carolina in the twenty-third spot, raising it slightly from twenty-fourth in 2010. *Id.* Yet we cannot fully determine where the state's population falls in comparison with that of other states until the Census Bureau releases the 2020 Census. Even if the state's population were to grow slightly every year, so too does the population of almost every state, as the world's population, as a whole, increases at a steady pace.

understanding of the law and the effects of the ward's diminished rights. The small states of Delaware[157] and Hawaii[158] have both adopted this framework.

While this seems like the best model for the individuals in need from a *legal* perspective, it may not be so from an *altruistic* perspective. Often, the courts are slow to function. As such, when the individuals making decisions are closely linked with the courts, it is not unreasonable to conclude that delays may extend beyond the judicial system and into the public guardianship programs as well. This is less likely to happen in smaller states, which is primarily why it would not translate well to the more sizeable state of South Carolina. Larger populations often give rise to a greater number of people in need and a smaller number of people available to provide care and assistance.

Like the other models, however, there are aspects of the court model that can benefit the state as it develops its own program. Linking the public guardian with the judiciary is critical because it puts wards in the hands of guardians who have a thorough knowledge of the law and the legal repercussions of guardianship. If South Carolina plans to develop its own public guardianship program, it should do so with the intention of placing the judiciary in a position of some authority. South Carolina can do this by establishing an office under the state consistent with the independent state office model that appointees of both the judiciary and the state can jointly regulate.

Moreover, it is evident that the social service model falls short in many ways. Most importantly, the conflict of interest it generates would leave room for major pitfalls within the plan, should the state adopt a similar model. South Carolina would not benefit from a program that negligently links guardianship with those institutions that promote social services. This would not only put the care of vulnerable adults in the hands of agencies that will inevitably place higher value on promoting their own services than on the wellbeing of their wards, but it will also stretch the agencies' resources and capabilities for oversight thin.

The benefits of the social service model, however, should not go unmentioned. Since the mid-1950s, social services agencies have received funds in the form of Social Services Block Grants (SSBGs) from the federal government.[159] The yearly SSBG is a "critical source of funding for services

157. Delaware has established a "Guardianship Commission" that operates as an arm of the court and is staffed by twelve members, each of which are selected by the Office of the Public Guardian. *See* DEL. CODE. ANN. tit. 12, § 3991 (West 2011).

158. In the state of Hawaii, "[t]here is established the office of the public guardian in the judiciary. The chief justice shall appoint the public guardian, who shall serve at the chief justice's pleasure." HAW. REV. STAT. § 551A-1 (2019).

159. S.C. DEP'T OF SOC. SERVS., SOUTH CAROLINA SOCIAL SERVICES BLOCK GRANT PROGRAM PLAN FOR FEDERAL FISCAL YEAR 2020, at i (2019).

needed by South Carolina's most vulnerable citizens."[160] This proves particularly true for South Carolina, which has yet to establish a state office for public guardianship, and, therefore, receives no state funds at all. With the guarantee of federal funds every year, these agencies are rarely without the ability to provide some form of help and care. Although the state, like every other, has its own Department of Social Services (DSS),[161] it carries with it this conflict of interest. A program that can utilize guaranteed DSS federal funds and resources without being inhibited by the seemingly inevitable caveat that remains attached would best serve the state of South Carolina.

The county model is unique in that it makes the public guardian a local official within each county.[162] As mentioned before, it carries with it the apparent advantage of having an official that is acutely aware of the specific needs of the community's elderly and disabled members.[163] This is significant because it means that those in need of care are more likely to connect with someone who is willing and able to arrange for it. While this may work for a state such as South Carolina (again, because of its size), there are obvious hazards here as well. This model leaves room for inconsistency among counties. This Note previously stated that incomplete laws and inconsistent execution of guardianship programs across the nation can have serious effects on wards, especially if they hope to travel or relocate.[164] The same can be said for inconsistency within state boarders.

If South Carolina were to extract any portion of this model as it builds its own, it should aim to establish officials within each county that can tend to the individual needs of their respective communities without leaving room for inconsistent implementation. This may be possible if South Carolina established an office under the state—as in the independent state office model—that could monitor each county official to ensure consistency

160. Michael Leach, *Introductory Letter* to S.C. DEP'T OF SOC. SERVS., SOUTH CAROLINA SOCIAL SERVICES BLOCK GRANT PROGRAM PLAN FOR FEDERAL FISCAL YEAR 2020 (2019).

161. Even within South Carolina's Department of Social Services there exist serious deficiencies. It claims to "serve South Carolina by promoting the safety, permanency, and well-being of children and vulnerable adults, helping individuals achieve stability and strengthening families." *About DSS*, S.C. DEP'T OF SOC. SERVS., https://dss.sc.gov/about/ [https://perma.cc/TB66-NCBC]. However, it appears that South Carolina DSS focuses almost entirely on the needs of children. The deficiency of Adult Protective Services in South Carolina, which falls under the small and severely limited Adult Advocacy Division, is of significant concern but falls outside the scope of this Note. *What is Adult Advocacy?*, S.C. DEP'T OF SOC. SERVS., https://dss.sc.gov/abuseneglect/adult-protective-services/what-is-adult-advocacy/ [https://perma.cc/4RML-M895]. Perhaps in the same effort to build an Office of Public Guardianship in South Carolina, the state can also restructure the DSS so that it is better equipped to manage the needs of the elderly and incapacitated adults across the state.

162. Teaster et al., *supra* note 51, at 217; Regan & Springer, *supra* note 87, at 115; *see supra* Section V.D.

163. *See supra* Section V.D.

164. *See supra* Section IV.B.

throughout the state. The county officials would be required to report periodically to the state office as well as communicate regularly among themselves when they find a procedure particularly effective or ineffective. This would provide citizens in need with easier access to informed people within their respective counties, while at the same time preserving intrastate consistency and oversight.

VII. CONCLUSION

A public guardianship program in the state of South Carolina is absolutely imperative for protecting the state's indigent and incapacitated adult citizens. Although the U.S. Supreme Court has found that competent individuals have the constitutionally protected right to make important personal decisions regarding healthcare and treatment,[165] those individuals deemed incompetent may be incapable of exercising this right. In these situations, the individual's physical or mental impairments may hinder her ability to care for herself, meaning that her need for protection may actually outweigh her need to exercise her right to self-determination.[166] Adult guardianships function as a supplement in this respect. But while they are developed to protect vulnerable adults who cannot protect themselves, guardianships also stipulate that wards relinquish some or all of their fundamental rights to their guardians.[167]

Lifelong care and assistance come at a high price. In addition to the devastating cost of losing these rights, a ward must also be able to afford the monetary cost of her guardian's continuous care and support. Because the estate of the ward pays the fees and expenses associated with guardianship in private guardianships, only those who can afford help in South Carolina can receive it. This is a harsh reality for the state's most vulnerable citizens. A state-funded public guardianship program that caters to underserved communities would be instrumental in saving and improving lives across South Carolina.

Unfortunately, record keeping has been inconsistent and inaccurate; very little data exist as to the true nature of this need throughout the state. Nonetheless, the growing number of severely disabled and incapacitated adults within the state's border demonstrates the need for public programs.[168] Lacking reliable data as to the scope of this problem by default also means lacking an appreciation for the true impact on South Carolina as a whole. Thus, one of the most important steps legislators should take in establishing a public guardianship program is ensuring accountability among those who are

165. *See, e.g.*, Cruzan v. Mo. Dep't of Health, 497 U.S. 261, 278 (1990).
166. Apolloni & Vincent, *supra* note 33.
167. Teaster et al., *supra* note 51.
168. *See supra* Section IV.A.

involved in guardianship hearings and procedures. The state would certainly benefit from a system that can keep track of (1) how many citizens are deemed incapacitated and in need of lifelong care and (2) how many of those individuals would not be able to receive the care they are entitled to if a public program did not exist to supplement the cost.

In building room for the state's most vulnerable citizens, legislators and attorneys should first develop an independent state office for adult public guardianship. This office should be located in the state's capital, the City of Columbia, and an appointee of the governor and an appointee of the judiciary should jointly run the office. It is important that the officials who govern the office be from both the executive and judicial branches of South Carolina's government because they can bring alternative perspectives and material expertise to guardianship cases.

The next step should be to work proactively to inhibit inconsistent implementation across the state by appointing officials within each county that can tend to the individual needs of their respective communities. These officials should communicate regularly among themselves and implement a system in which they report directly to the office of public guardianship in Columbia. This will not only promote communication and consistency but should also ensure accurate record keeping and data so that the office can develop and improve over time to best serve future generations. Moreover, while determining the source and amount of funding for this office falls outside the scope of this Note, it holds true that South Carolina would benefit from a program that can utilize DSS resources and funds without generating the same conflicts of interest they often carry.

Finally, this Note is not meant to discredit the South Carolina Department of Social Services or current private guardianship programs across the state. Rather, it is intended to encourage the state legislature to adopt a supplemental public program that can target incapacitated adults who lack both the ability to afford the lifelong care they need and any trusted family members to provide additional in-home care. This problem is persistent throughout the state, but it can be addressed swiftly with the enactment of an acutely structured public program tailored to the individual needs of South Carolina's citizens.

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