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ADULT GUARDIANSHIPS IN WISCONSIN: HOW IS THE SYSTEM WORKING?*

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I. INTRODUCTION

As the population in the United States ages, the number of adults requiring that another person make major financial, personal, and health decisions on their behalf increases. One way another person secures the authority for decisions is by appointment as a guardian. State law details when a guardianship is required and how a guardianship is established.¹ But does the guardianship process operate in the manner envisioned in the statutes and the relevant case law? Does the system serve the needs and protect the interests of those for whom it was designed? Little is known about the daily operation of the system.

The purpose of this Article is to provide an empirically based picture of Wisconsin's adult guardianship system in operation. To do this, we have examined guardianship files in eleven Wisconsin counties.² These counties were selected to be representative of the state, but the operation in any county may differ in important ways from the overall portrait we provide.

With the information provided in this Article, practitioners and policy-makers will be better able to:

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1. See *infra* notes 3-61 and accompanying text for a discussion of these provisions in Wisconsin.

2. Details of our selection of counties and cases, along with other aspects of our research design, can be found in the Methodological Appendix of this Article.

- assist the courts in planning for future needs resulting from an aging population;
- produce training programs and resource materials to ensure better trained guardians, Registers-in-Probate, guardians ad litem, and judges;
- produce standardized benchtools to assist courts in protecting due process rights of potential wards; and
- develop resource materials to educate the public about the role of the courts in the guardianship system.

This Article begins by detailing the formal guardianship process provided by the Wisconsin statutes. The substance of the analysis follows. The results of the research are described in three sections:

- initiation of guardianship petitions;
- nature of the guardianship process; and
- outcomes of the guardianship process.

As part of the analysis, we examined four specific factors that might influence the guardianship process: size of the county, gender of the proposed ward, residence of the proposed ward, and allegation of "Infirmities of Aging" on the petition as a justification for appointing a guardian.

II. THE FORMAL GUARDIANSHIP PROCESS

The formal guardianship process in Wisconsin begins when a relative, public official, or other interested party files a petition.³ The petition must set forth certain information about the proposed ward, including the ward's name, address, and date of birth; the nature of the incapacity;⁴ the approximate value of the estate, including income; the name and address of the proposed guardian; the name and address of the spouse and all presumptive heirs; the name and address of the institution having care and custody of the proposed ward, if applicable; the interest of the petitioner; and the authority of the petitioner to act.⁵ The petition may also include an application for protective services, or placement, or both.⁶ The petition may be for

3. WIS. STAT. § 880.07(1) (1991-92).

4. WIS. STAT. § 880.07(1)(a)-(j).

5. WIS. STAT. § 880.07(1m). If the petition for guardianship includes a request for a finding that the proposed ward is not competent to refuse psychotropic medications, then the petition must set forth information showing that (1) the person is likely to respond positively to psychotropic medication; (2) as a result of the person's failure to take medication, the person is unable to provide for his or her own care in the community; (3) unless protective services that include medication are provided, the person will incur a substantial risk of physical harm or deterioration, or will present a substantial risk of physical harm to others; and (4) the proposed ward is at least eighteen years of age. *Id.*

6. WIS. STAT. § 880.07(2).

temporary or permanent guardianship, and for a limited guardianship of the person, the estate, or both.⁷

Once the petition is filed, the court reviews it and gives notice of the time and place of hearing.⁸ Notice must be given to the proposed ward and any existing guardians by personal service at least ten days before the hearing.⁹ Notice must also be given to all interested parties, including the spouse, any presumptive heirs, the proposed ward's guardian ad litem, petitioner's attorney, defense counsel, persons having legal or physical custody, and providers of service.¹⁰ A copy of the petition and the names of all people petitioning for guardianship must be included with the notice.¹¹

When the court signs the notice of hearing, the court also appoints a guardian ad litem (GAL).¹² The GAL has none of the rights or duties of the general guardian; rather, the GAL is an attorney appointed by the court to advocate the best interests of the proposed ward.¹³ Under Section 880.331(4) of the Wisconsin Statutes, the GAL owes a duty to:

- (a) Interview the proposed ward or alleged incompetent and explain the hearing procedure, the right to counsel, and the right to request or continue a limited guardianship.
- (b) Advise the proposed ward or alleged incompetent, both orally and in writing, of that person's right, to a jury trial, to an appeal, to counsel, and to an independent medical or psychological examination on the issue of competency, at county expense if the person is indigent.
- (c) Request that the court order additional medical, psychological, or other evaluation, if necessary.
- (d) If applicable, inform the court that the proposed ward or alleged incompetent objects to a finding of incompetence, to the present or proposed placement or recommendations of the guardian ad litem as to the proposed ward's or alleged incompetent's best interests, or that the proposed ward's or alleged incompetent's position on these matters is ambiguous.
- (e) Present evidence concerning the best interests of the proposed ward or alleged incompetent, if necessary.
- (f) Report to the court on any other relevant matter that the court requests.¹⁴

7. WIS. STAT. §§ 880.15(1), 880.33(3), 880.37(1) (1991-92).

8. WIS. STAT. § 880.08(1) (1991-92).

9. *Id.*

10. *Id.*

11. *Id.*

12. WIS. STAT. § 880.33(2)(a).

13. WIS. STAT. § 880.33(3).

14. WIS. STAT. § 880.331(4) (1991-92).

Defense counsel for the proposed ward may get involved at the request of the proposed ward or the GAL, if the judge believes that the interests of justice require such counsel. Defense counsel is required if there is a refusal-of-medication issue in the petition.¹⁵

There is no time limit within which the hearing must be held¹⁶ unless the petition deals with the right to refuse psychotropic medication, in which case the hearing must be held within thirty days of filing.¹⁷ The proposed ward has a right to a jury trial, which may be requested by the proposed ward, defense counsel, or the GAL.¹⁸ By statute, the hearings are to be open to the public unless the ward, or the ward's attorney acting with consent, requests that they be closed. In practice, most hearings are closed.¹⁹

The proposed ward, if able, is expected to be present at the hearing.²⁰ The proposed ward is presumed able to attend unless the GAL certifies in writing, after a personal interview with the proposed ward, specific reasons why the proposed ward cannot attend.²¹ If the reason for not attending is the court's physical inaccessibility or a lack of transportation, the court upon request must move the hearing so that the proposed ward can attend.²²

A written statement by a licensed physician or psychologist on the proposed ward's mental condition must be obtained before the hearing. This report must be based on an examination of the proposed ward, which may be ordered by the court if necessary; it may *not* be based solely on the proposed ward's medical records.²³ The written report must be provided to the proposed ward, the GAL, and defense counsel at least ninety-six hours before the hearing.²⁴ The proposed ward has the right to secure an independent medical or psychological examination.²⁵

15. WIS. STAT. §§ 880.07(1m), 880.33(2)(a)(1).

16. WIS. STAT. § 880.33.

17. WIS. STAT. § 880.33(2)(d).

18. A six-person jury is used unless a larger jury is requested by the petitioner or the ward, or by the court on its own motion. WIS. STAT. §§ 756.096(3)(b) (1991-92), 880.33(2)(a)(1).

19. WIS. STAT. § 880.33(2)(e).

20. WIS. STAT. § 880.08(1).

21. *Id.*

22. *Id.*

23. WIS. STAT. § 880.33(1).

24. WIS. STAT. § 880.33(1), (2)(a). In contested cases, the report is not accepted as evidence unless the examiner testifies and is subject to cross examination. *See R.S. v. Milwaukee County*, 162 Wis. 2d 197, 207, 470 N.W.2d 260, 264 (1991).

25. WIS. STAT. § 880.33(2)(b).

At the hearing, key elements must be established by clear and convincing evidence.²⁶ It must be shown that a person is "substantially incapable of managing his or her property, or caring for him or herself."²⁷ This incapacity must result from "developmental disabilities," "the infirmities of aging," or "other like incapacities." These terms are defined by statute.²⁸ The essence of competence under Wisconsin law is the ability to make rational decisions.²⁹ Physical disability without mental incapacity is not incompetence.³⁰

Incompetence has two components: functional incapacity and the disorder or disability causing the functional incapacity.³¹ Thus, at the hearing, petitioners have a two-fold burden. They must show that the proposed wards are incapable of caring for themselves and that the incapacity is a product of a mental disability.³² Evidence may consist of expert testimony, past self-sufficiency or lack thereof, bizarre behavior, impaired memory, or impaired judgments in business, social, or personal conduct. The complexity of the estate and the amount of judgment needed to manage it may also be considered.³³

In addition to a finding of incompetence, a finding must be made on the suitability of the proposed guardian. A guardian may be disqualified for conflict of interest—including employment, claims against the proposed ward, joint holdings with the proposed ward, or indebtedness to the proposed ward.³⁴ Opinions of the proposed ward and members of the proposed ward's family are considered, but the best interest of the proposed ward supposedly controls.³⁵ When determining incompetence, the court may appoint a limited guardian and rule on any continued authority of a previously executed power of attorney for health care.³⁶ The court may appoint separate guardians of the estate and of the person. The court may also

26. WIS. STAT. § 880.33(4); *see also* Olson v. Olson, 236 Wis. 301, 304-05, 295 N.W. 24, 25 (1940).

27. WIS. STAT. § 880.01(4) (1991-92).

28. WIS. STAT. § 880.01(2), (5), (8).

29. Shaw v. County of Eau Claire, 87 Wis. 2d 503, 513, 275 N.W.2d 143, 148-49 (Ct. App. 1979).

30. WIS. STAT. § 880.01(4).

31. R.S. v. Milwaukee County, 162 Wis. 2d 197, 203, 470 N.W.2d 260, 262 (1991).

32. *Id.*

33. Mills v. Neubert, 250 Wis. 401, 405, 27 N.W.2d 375, 377 (1947).

34. WIS. STAT. § 880.33(5).

35. *Id.*

36. WIS. STAT. § 880.33(8)(b).

appoint a standby (alternate) guardian.³⁷ The court determines if a bond is necessary and, if so, in what amount.³⁸

After appointment, the guardian of the estate must file an inventory within six months of appointment³⁹ and an annual account.⁴⁰ The guardian of the estate may not sell real property without court approval.⁴¹

If a protective placement request is made when the guardianship petition is filed, then several other elements are added to the procedure described above.⁴² Alone, the appointment of a guardian and a finding of incompetence are not grounds for involuntary protective placement.⁴³ The petition must assert that: (1) the subject of the protective placement request has "a primary need for residential care and custody"; (2) "[a]s a result of developmental disabilities, infirmities of aging, chronic mental illness or like incapacities, [the subject] is so totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to [himself or herself] or others"; and (3) this mental disability is "permanent or likely to be permanent."⁴⁴ No protective placement may be considered unless a guardian has already been appointed or is being appointed at the same hearing.⁴⁵ The need for a guardian must precede the protective placement decision.⁴⁶ A court should not accept a petition for guardianship, only, however, where the proposed ward is being admitted to, or already resides in, a nursing home.⁴⁷

The notice requirements for guardianship and protective placement are the same and can be done simultaneously.⁴⁸ In addition to the medical and psychological examinations described previously, a comprehensive evaluation of the proposed ward must be made to recommend placement consistent with the least restrictive environment necessary for the proposed ward's or other's well-being. This report must be made available to the proposed ward, the proposed guardian, the GAL, and the proposed ward's

37. WIS. STAT. § 880.36 (1991-92).

38. WIS. STAT. § 880.13 (1991-92).

39. WIS. STAT. § 880.18 (1991-92).

40. WIS. STAT. § 880.25(1) (1991-92).

41. WIS. STAT. § 880.19(4), (5) (1991-92).

42. WIS. STAT. § 55.06(1) (1991-92).

43. WIS. STAT. § 880.33(7).

44. WIS. STAT. § 55.06(2).

45. WIS. STAT. § 55.06(2)(b).

46. WIS. STAT. § 55.06(4).

47. *In re* Guardianship of Agnes T., 179 Wis. 2d 363, 507 N.W.2d 373 (Ct. App. 1993).

48. WIS. STAT. § 55.06(6). A guardian ad litem is appointed with the same duties as in a guardianship, and the proposed ward has the same right to counsel as in a guardianship proceeding. *Id.*

attorney at least ninety-six hours before the hearing.⁴⁹ If the placement request is to a center for the developmentally disabled, a report must be made by the county stating whether the placement is appropriate for the proposed ward's needs and is consistent with the purpose of the center.⁵⁰ The proposed ward has a right to secure relevant independent medical or psychological testimony.⁵¹

The hearing requirements parallel those discussed above in the guardianship proceedings. The proposed ward must first be found incompetent at the same hearing or by a court proceeding within the twelve months preceding the protective placement hearing.⁵² Once that finding is made, the court must find that the ward has "a primary need for residential care and custody," that the ward is so "totally incapable of providing for his or her own care or custody as to create a substantial risk of serious harm to [himself or herself] or others," and that the disability is "permanent or likely to be permanent."⁵³ These findings must be based on clear and convincing evidence.⁵⁴ In addition to ordering protective placement, the court may also order "protective services,"⁵⁵ such as visiting nurses, homemaker services, home health aides, and adult day care.

If protective placement is ordered, the placement must be in the "least restrictive environment" consistent with the ward's needs, regardless of the availability of county, state, or federal funds.⁵⁶ In ordering the placement, the court should consider the ward's needs for "health, social or rehabilitative services and the level of supervision needed."⁵⁷ Placement may be made through the board designated by Wisconsin Statutes section 55.02 or through the designated agency.⁵⁸ The ward may not be placed in a unit for the acute mentally ill.⁵⁹ Nor may the ward be placed in a locked unit unless the court finds a need to do so.⁶⁰

49. WIS. STAT. § 55.06(8).

50. *Id.*

51. WIS. STAT. § 55.06(6).

52. WIS. STAT. § 55.06(4).

53. WIS. STAT. § 55.06(2), (7).

54. WIS. STAT. § 55.06(7).

55. WIS. STAT. § 55.06(9)(a).

56. *Id.*; *D.E.R. v. La Crosse County*, 155 Wis. 2d 240, 253-55, 455 N.W.2d 239, 245-46 (1990); *Fond du Lac County v. J.G.S., Jr.*, 159 Wis. 2d 685, 692, 465 N.W.2d 227, 230 (Ct. App. 1990).

57. WIS. STAT. § 55.06(9)(a).

58. *Id.*

59. *Id.*

60. *Id.*

If a ward is protectively placed, an annual review of the placement should be made. These reviews are referred to as *Watts* reviews.⁶¹ The department or agency conducting the annual review is required to file with the court a report that includes an evaluation of the physical, mental, and social conditions of the ward and any recommendations for discharge or placement in a less restrictive environment.⁶² A copy of this report should be sent to the guardian.⁶³

As part of the *Watts* review, a GAL is appointed. The GAL must meet the ward and report independently to the court.⁶⁴ Based on the GAL's report, the court determines whether adversarial counsel needs to be appointed and whether a full due process hearing should be held.⁶⁵ A hearing is held when the GAL's report indicates that: (1) the ward no longer meets the standards for protective placement; (2) the current placement is not the least restrictive environment; or (3) the ward objects to the placement. A full due process hearing must follow the same procedures as set forth above for a protective placement hearing.⁶⁶ Guardianships and protective placement can be terminated by petition to the court and a showing that they are no longer necessary.⁶⁷

III. INITIATING THE GUARDIANSHIP PROCESS

As discussed above, guardianship petitions may be for guardianship of the person, guardianship of the estate, or guardianship of both person and estate. Petitions may also be for appointment of either a temporary or permanent guardian. In our sample, approximately 90% of the cases involve petitions for permanent guardians⁶⁸ and 87% of these petitions are for guardianship of both person and estate, indicating that few proposed wards are destitute.⁶⁹ Almost no petitions (2%) are for guardianship of the estate only. Of the 111 petitions for guardianship of the person only, 92 (83%)

61. See *State ex rel. Watts v. Combined Community Servs.*, 122 Wis. 2d 65, 362 N.W.2d 104 (1985).

62. WIS. STAT. § 55.06(10)(a).

63. *Id.*

64. *Watts*, 122 Wis. 2d at 84, 362 N.W.2d at 113.

65. *Id.* at 85, 362 N.W.2d at 114.

66. *Id.*

67. WIS. STAT. §§ 55.06(18), 880.26 (1991-92).

68. In about 5% of the cases where a permanent guardianship was requested, there was either an existing temporary guardianship or a request for one. In our coding of the data in the field, when both types were included, we coded the information associated with the petition for the permanent guardianship.

69. A guardianship of the estate assumes an asset base of at least \$10,000. See WIS. STAT. § 880.04(2) (1991-92).

occurred in Milwaukee County.⁷⁰ Also, when the petition was for guardianship of the person only, infirmities of aging was cited in only 37% of the petitions as compared with 71% of the petitions when guardianship of both person and estate was sought.

About two-thirds (66%) of the proposed wards resided in medical institutions, 13% resided in their own homes, and 9% resided in the home of a family member. If persons with developmental disabilities are excluded, the percent in medical institutions rises to 73%, suggesting that the medical community's need for a legally recognized decision maker may be the most common factor precipitating the filing of a guardianship petition. That most petitions (90%) are for permanent rather than temporary guardianships suggests that medical professionals in acute care settings are content to rely upon a previously executed consent for treatment or on the decisions of family members acting without formal legal authority.⁷¹ Otherwise, one would expect to see many more petitions for temporary guardianships, reflecting the hope that, while a guardian is needed to make immediate emergency decisions, the medical treatment will lead to a recovery sufficient to make the guardianship no longer necessary. The dominance of petitions for permanent guardianships probably reflects the needs of long-term care facilities, such as nursing homes, perhaps as part of an admissions procedure. It may also be that families, social service agencies, and health care facilities do not invoke the formal process unless forced to do so by the refusal of someone to accept their informal authority.

The petition for guardianship was accompanied by a request for protective placement in 57% of the cases. In the three smaller groups of counties, those with less than 160 petitions per year, 75% of petitions requested protective placement, compared with 43% of petitions in the larger counties. More protective placement requests were made if the proposed ward was residing in a nursing home or hospital (65% versus 43%) or if "infirmities of aging" was cited as a justification for the petition (66% versus 42%).

There may be an underutilization of the protective placement statute, perhaps reflecting concerns about the public costs of getting the protective

70. This is an unweighted figure. If sample weights are applied, 64% of the petitions for guardianship of the person only come from Milwaukee County. For a discussion of sample weighting, see the Methodological Appendix of this Article.

71. It may also be the case that the guardianship process is too slow to deal with the demands of the acute care situation, and that by the time a temporary guardianship could be established the crisis is past and either no guardian is required (due to death or recovery) or it is clear that something more long term is needed.

placement order⁷² and of continuing the placement, which involves an annual *Watts* review and the recurring costs of a GAL.⁷³ Several people involved in the system believe that *Watts* reviews are important only for people with developmental disabilities and chronic mental illness and that once an elderly person has been found incompetent, improvement in the person's condition is unlikely. Accordingly, several people—in various parts of the system and in several counties, all of whom declined to be quoted—expressed the view that *Watts* reviews, and protective placement in general, for residents of nursing homes are an expensive and inefficient use of a county's limited resources. This view might be the motivation for not bringing protective placement petitions, although county petitioners were actually more likely to request protective placement (66%) than were family petitioners (41%). Also, it is important to note that in the cases involving a nursing home resident and a petition for guardianship only, with no petition for protective placement, we did not find a single example of a judge initiating a protective placement proceeding because a nursing home resident was involved. Because the statutes do not allow a guardian to consent to a nursing home placement without a court order, however, these situations require a court-ordered protective placement as well.⁷⁴

Surprisingly, a member of the proposed ward's family initiated only 41% of the petitions in our sample;⁷⁵ most commonly, the petitioner was a social service agency (54%). Interestingly, public social service agencies are most prominent in the smaller counties, initiating 66% of the petitions as compared with 30% by family members. Only in the middle-sized counties (Dane and Racine) do family members initiate more petitions (54%) than public social service agencies (39%).⁷⁶ Milwaukee County has a fairly even split between family member and public social service agency petitioners (44% versus 47%). Not surprisingly, public agencies are more likely to initiate petitions when the proposed ward is residing in a medical institution (59%) than when the proposed ward resides somewhere else (40%). The reverse is true for family members, who are more likely to initiate petitions for proposed wards outside of medical institutions (53%) than for those in

72. Counties are required to complete a comprehensive evaluation as part of a protective placement proceeding.

73. See *supra* notes 61-67 and accompanying text.

74. See *supra* note 47.

75. In our discussion, we include within the definition of "family" our coding category of "friend or neighbor," since many persons in this latter category are live-in companions.

76. Our "other" category, which ranges between 4% and 9% of the initiators, includes attorneys, medical institution staff persons, private social service agencies, and "others" not otherwise identified.

such institutions (35%).⁷⁷ Of the family initiators, 14% are spouses, 34% are children, 16% are parents, 15% are siblings, and the remaining 21% are other family members, friends, or neighbors.

Although family members are not initiators in the majority of cases, they are deeply involved. At least 77% of the proposed guardians are family members. "At least" is used because in another 14% of the cases, the relationship between the proposed ward and the person named in the petition as the proposed guardian is not clear. We estimate that about 85% of the proposed guardians are family members. Of the identifiable family members, 44% are children of the proposed ward, 10% are spouses, 14% are parents, 16% are siblings or siblings-in-law, and 8% are nephews or nieces.

What are the reasons given for seeking guardianships or protective placement orders? The standard form petition lists four reasons: infirmities of aging, chronic mental illness, developmental disability, and "other like incapacities." Six standard reasons are shown for protective placement,⁷⁸ with no "other" option provided. Petitioners may check one or more of the standard reasons. For protective placement, multiple reasons were commonly given (a total of 867 reasons for 362 petitions). However, multiple reasons were much less common with the guardianship request (642 reasons for 615 petitions). Table 1 shows the distribution of the standard reasons. Note that the table shows both the percent of cases for which a reason was given and the percent of all reasons falling into a particular category. These values should be similar with respect to reasons for guardianship because of the small number of multiple reasons given, but quite different with respect to reasons for protective placement.

The figures in Table 1 are not surprising, except perhaps for the large number of cases in the "other" category.⁷⁹ In the smaller counties, "infirmities of aging" is clearly the dominant reason for seeking guardianships (76% of the petitions cite this justification). In the larger counties, fewer, but still a majority, of the petitions cite infirmities of aging (55%).

More striking is the relationship of gender to the reason for seeking guardianships or protective placement. Infirmities of aging is cited for 74%

77. If the petition includes a request for a protective placement order, it is more likely that the initiator is a social service agency (63%). If there is no protective placement request, a family member is more likely to be the petitioner (54%). This pattern holds true even after controlling for the size of the county.

78. See Table 1.

79. For a list of the specific justifications given under the "other" category, see Herbert M. Kritzer, *Adult Guardianships in Wisconsin: An Empirical Assessment*, app. B 30-32 (Jan. 1992) (unpublished report, available at the Center for Public Representation, Madison, Wis.).

TABLE 1
JUSTIFICATIONS FOR PETITIONS

(a) Guardianship			
Reason cited	Count	Percent of Responses	Percent of Cases
Infirmities of aging	405	63	66
Chronic mental illness	47	7	8
Developmental disability	90	14	15
Other like incapacities	96	15	16
No reason given for guardianship	4	1	1
Total responses	642	100	106
Total cases	615		

(b) Protective Placement			
Reason cited	Count	Percent of Responses	Percent of Cases
Infirmities of aging	268	31	74
Chronic mental illness	31	4	9
Developmental disability	42	5	12
Unable to care for self	355	41	98
Danger to self	137	16	38
Danger to others	34	4	9
Total responses	867	100	240
Total cases	362		

of the female proposed wards, but only 53% of the male proposed wards. Overall, 59% of the proposed wards are female.⁸⁰ None of the other standard reasons stands out for males, but all of them (chronic mental illness, developmental disabilities, other like disabilities) are more likely to be cited for males than for females. *This is the only strong gender relationship that we found in our analysis* other than the obviously connected age of the proposed ward. Because women are more likely to reach an age when infirmities of aging will require appointment of a guardian, one might presume that this difference in reasons for seeking guardianships for men and women largely reflects the life expectancy differences of men and women. However, this accounts for only part of the difference because when we adjust

80. This is based on unweighted data. If weighted figures are used, the percentage of proposed wards who are female is 58%. For a discussion of sample weighting, see the Methodological Appendix of this Article.

for life expectancy, we still find that infirmities of aging is more likely to be cited for female proposed wards than for male proposed wards. This may reflect the higher percentage of females in nursing homes, and a greater likelihood that elderly men are cared for in the home by wives, daughters, and daughters-in-law; it may also reflect a bias among petitioners that women are more likely to be incompetent or more in "need [of] protection" than men.

Finally, what about the age of the proposed ward? Table 2 shows cumulative distributions for all proposed wards, proposed wards for whom infirmities of aging was cited as the reason for appointing a guardian, and proposed wards for whom developmental disabilities was cited. These cumulative distributions show the percentage of proposed wards younger than each cut point in the table. The only surprising aspect of this table is that only about one-third of those for whom developmental disabilities is cited as justification have guardianship proceedings initiated around the time they reached the age of majority.⁸¹ We can only speculate that this may reflect a pattern of parents of developmentally disabled adult children not seeking to establish a formal adult guardianship; only when the parents themselves die or cease to be able to function as de facto guardians are legal proceedings initiated.

TABLE 2
AGE OF PROPOSED WARDS
(cumulative distributions)

	All wards	Infirmities of aging	Developmental disabilities
under 25	7%	0%	35%
under 50	19%	< 1%	79%
under 65	27%	4%	88%
under 75	40%	16%	97%
under 80	52%	31%	97%
under 85	69%	55%	99%
under 90	85%	79%	99%
under 95	96%	93%	100%
under 100	99%	99%	100%
(n)	(591)	(390)	(94)

81. About a quarter of those for whom developmental disabilities is cited have proceedings initiated before they reach the age of 22.

IV. PROCESSING GUARDIANSHIP PETITIONS

Wisconsin makes full due process statutorily available to proposed wards and prides itself on being one of the more advanced states in the area of the rights of proposed wards. The actual practices in this area, which demonstrate a high degree of consistency, lead to a classic choice of conclusions: Is the "due process glass" half-full or half-empty? A number of factual findings illustrate the problem:

- Orders appointing a GAL were in the files of 90% of the cases. In 10% of the cases no GAL was appointed, despite clear statutory mandate,⁸² or the order appointing the GAL was not placed in the file or was misfiled.⁸³
- Eighty-seven percent of the files contain a GAL affidavit or report (and 75% of those files specify that the proposed ward should not be required to attend the hearing);⁸⁴ 13% contain no GAL report or affidavit.
- In only 2% of the cases the GAL clearly was not present for the hearing; the GAL clearly was present in 81%.
- Ninety-four percent of the files contained a notice of hearing.
- Eighty-three percent of all petitions include a list of the proposed ward's assets; 17% do not.
- One or more hearings were held in 92% of the cases; more than one hearing was held in 14% of the cases.
- Ninety-eight percent of the hearings occurred at the courthouse, even though the statute instructs the court to hold hearings at the location of the ward if the ward could not otherwise attend.⁸⁵
- In at least 81% of the cases, one or more family members was notified of the hearing; in 6%, it was not clear whether the persons notified were or were not family members.

82. WIS. STAT. § 880.331.

83. Only 20 petitions (3%) in our sample were dismissed, and only three of these dismissals were due to the death of the proposed ward. Thus, one cannot explain the absence of orders appointing a GAL on the basis of proposed wards dying before the order appointing the GAL could be issued.

84. The proposed ward did not attend in 61% of the cases, with the remaining percentage split fairly evenly between cases where the proposed ward clearly did attend at least one hearing (22%) and where it was not clear from the file whether the ward was there (16%). Proposed wards were more likely to be present for one or more hearings in developmental disability cases (33%), and even more likely to be present in chronic mental illness cases (45%). Also, there was substantial variation among the counties. The file indicated that the proposed ward attended one or more hearings in 10% or fewer of the sampled cases in Burnett, Milwaukee, Monroe, Oneida, Polk, Sauk, Sawyer, and Taylor Counties. In Dunn and Lincoln Counties, the ward was present at one or more hearings in about 50% of the cases sampled.

85. WIS. STAT. § 880.08(1).

- In only 13% of the cases were there petitions to dispose of or to preserve assets.
- In only 6% of the cases were there orders for payment of guardian fees.
- In only 9% of the cases was there any indication of the petition being contested. This was usually indicated by the appointment of counsel for the proposed ward.⁸⁶
- In only 4% of the cases was there clear evidence of a pre-existing durable power of attorney; in 84% of the cases there was no power of attorney.
- When comprehensive evaluations were conducted by a social service agency, required when a petition included a request for protective placement,⁸⁷ 99% of the time the evaluation recommended granting the protective placement order.
- A statement or report from a physician was in 86% of the files, although, as described below, the source of the information varied significantly depending on locale; in 14% of the cases, this information was not in the case file.
- Physicians do not usually appear at the hearing. In only 8% of the cases did the file indicate that a physician was present; 74% indicated that no physician attended.⁸⁸

Of course, while there is a great deal of consistency, there are some significant variations as well. The median case takes thirty-three days across the state; if one drops out the cases where the petition is contested (about 10% of the petitions), this median falls to thirty-one days.⁸⁹ Looking separately at the three groups of counties, Milwaukee, Dane and Racine, and the remainder in the sample, there is little variation in the medians 32, 35, and 32 days, respectively. If one looks at the "tail" of the distribution, one finds that 75% of the petitions are disposed of within 51 days, 90% within 83 days, and 95% within 141 days.

A second area of variation deals with the source of medical information used in the proceedings. In 71% of the cases, there is a report from a physi-

86. Contested petitions are more likely in cases involving chronic mental illness (38% of 47 cases) and in cases involving the administration of medication or other treatment (50% of 18 cases). In some cases, the contest is not over the need for the guardianship, but rather reflects conflict among family members as to who should be the guardian.

87. *See* WIS. STAT. § 55.06(8). As will be discussed below, these supposedly mandatory evaluations were completed in only about 66% of the cases where protective placement was requested—at least this appears to be the case from the court records.

88. Physicians were more likely to be present for one or more hearings when there was some indication of a medication or treatment issue (28%). Also, Racine County was more likely to have a physician present than other counties (at one or more hearings in 30% of cases). The next highest were Monroe County (18% or 3 of 17 cases) and Taylor County (15% or 2 of 13 cases).

89. The median processing time for contested petitions, 57 days, is considerably longer.

cian who has been treating the proposed ward before the initiation of the guardianship proceedings.⁹⁰ In Milwaukee County, only 30% of the cases have such a report, compared with 78% in the other counties in the sample.⁹¹ Milwaukee County appears to rely on other sources for information on the proposed ward's medical condition: 60% of the Milwaukee County files contained statements from physicians other than a personal or treating physician, compared with 27% of the files in Dane and Racine Counties and 4% of files in the smaller counties.⁹²

Under state law, a comprehensive evaluation, usually by a social service agency, must be completed before a protective placement order is issued.⁹³ However, we found such an evaluation in only 63% of the cases where protective placement was requested. The file in another 6% of the cases indicated that such an evaluation may have been completed but the information is ambiguous. Here again there are significant variations by locale: whereas 86% of Dane County and Racine County files and 70% of the Milwaukee County files indicated that such an evaluation had been completed, only 49% of the smaller county files showed that a comprehensive evaluation had been completed, although almost all of the ambiguous cases were in the smaller counties where 10% of the files were ambiguous.⁹⁴

There were also some variations or gaps on financial issues. First, as noted previously, a small but significant proportion of petitions (17%) did not include a list of the proposed assets. One possible explanation is that when the petition was for guardianship of the person only, the asset list was omitted as irrelevant. However, this explanation does not hold up: The proportion of petitions omitting the list of assets is essentially the same (16%) when we limit the analysis to only petitions that included a request for guardianship of the estate. Only 6% of the petitions in Milwaukee County omitted the list, compared with 17% in the other counties.⁹⁵

90. It is not clear whether these represent long-standing doctor-patient relationships. Information on how long the proposed ward had been under the physician's care was available for only 36% of the cases, and in only one-third of these cases (based on unweighted data) had the proposed ward been under the physician's care for three or more years.

91. Petitions citing infirmities of aging are more likely to be accompanied by a statement from a personal physician than petitions citing other reasons (70% versus 54%).

92. Taking the two sources of medical information together, 90% of files in Dane and Racine Counties had at least one physician's report or statement, compared with 84% in Milwaukee County and 82% in the smaller counties.

93. WIS. STAT. § 55.06(8).

94. Stated in the negative, there was no evaluation in 41% of the protective placement requests in small counties, compared to 27% in Milwaukee County and 14% in Dane County and Racine County.

95. These figures are based only on petitions that included a request for guardianship of the estate.

We found guardianship inventories missing in 30% of the cases. When we limited our analysis to cases requesting guardianship of the estate, this figure fell slightly to 28%. Comparing the guardianship of the estate cases across counties, we found the inventories missing only 19% of the time in Dane and Racine Counties, compared with 33% in the smaller counties and 39% in Milwaukee County.

Finally, what about the expenses involved in the guardianship process? There is little information in the files concerning fees paid by petitioners to their privately retained attorneys. Only 11% of the cases involved payment of fees to attorneys appointed by the court to represent wards⁹⁶ and only 6% involved payments to guardians. Thus, there were too few cases to carry out meaningful analysis.⁹⁷ In contrast, there is ample information on fees paid to GALs. GAL fees are usually modest: statewide, 27% were \$100 or less; 55% were \$150 or less;⁹⁸ 75% were \$250 or less; and 11% were greater than \$500. There were some variations by size of county. The smallest median fee was in the smaller counties (\$90), 75% of which were under \$150. The highest median fee was in Dane County and Racine County (\$187), followed closely by Milwaukee County (\$150). Fifty-seven percent of the GAL fees in Milwaukee County were \$150.⁹⁹

V. RESULTS OF GUARDIANSHIP PETITIONS

In this section we examine several variables describing the outcome of petitions for guardianship. Almost no petitions are formally denied (less than 1% in our sample), and relatively few (about 3%) are withdrawn (not counting about 2% that become moot due to the death of the proposed ward while the petition is pending). The vast majority (82%) are granted as requested, and another 9% are granted with modifications. The nature of

96. Only one case in the smaller counties provided information on fees paid to court appointed attorneys. We found no case, in any county, of a requested fee being reduced by the court.

97. We found the following cumulative distributions, based on unweighted data, for guardian fees and attorney fees:

	Guardian fees	Attorney fees
up to \$ 1000	31%	48%
up to \$ 2500	56%	87%
up to \$ 5000	84%	98%
up to \$10000	93%	99%
median	\$1949	\$1138

98. The most frequent fee was \$150.

99. There were no systematic differences between infirmities of aging and other types of cases. Cases involving only guardianship of the person had essentially the same median fee (\$150) as cases involving guardianship of the estate (\$156).

the modifications varies¹⁰⁰ and typically concerns the guardian, the scope of the guardianship, and whether protective placement was granted.¹⁰¹

Given these figures, it is not surprising that the pattern of guardianships ordered was very similar to the pattern of requests: 85% were both person and estate, 19% were person only, 2% were estate only, and the remaining were either not clearly specified or involved a unique aspect, such as guardianship only for the purpose of administration of medication or medical decisions.¹⁰² The distribution of justifications cited in the orders (see Table 3) was again similar to those cited in the petition, with the largest number involving infirmities of aging.

TABLE 3
JUSTIFICATIONS FOR GUARDIANSHIP CITED IN ORDER

Justifications	Count	Percent of Responses	Percent of Cases
Infirmities of age	375	65	68
Developmental disability	81	14	15
Chronic mental illness	39	7	7
Spendthrift	4	1	1
Other (incl. "like incapacities")	74	13	13
Total responses	573	100	104
Total cases	552		

Most of the time (92%), the person nominated to be guardian is appointed as guardian, and usually that person is a family member. Non-family members are appointed as guardians in 24% of the granted petitions.¹⁰³ When nonfamily members are appointed, the case is more likely to involve something other than infirmities of aging (18% nonfamily members in infirmities of aging cases, compared with 35% nonfamily members in other kinds of cases). With respect to who is appointed as guardian, there is no variation by county size, gender of the ward, or current residence (medical facility versus other type of residence) of the ward.

100. In recording the data, the coder made a judgment about whether the modification was minimal, moderate, or major. The cases where modifications were made were divided fairly evenly across these three categories, with a slight tip toward "moderate."

101. For a complete list of the modifications that we found, see Kritzer, *supra* note 79, at app. C. That Appendix also lists our notes with regard to why petitions were withdrawn in a few cases.

102. About 9% of the guardianships were temporary.

103. The petitioner is named as guardian in 34% of the orders.

When guardianship of the estate is involved, only 32% of the guardians are required to post a bond.¹⁰⁴ Whether the guardian is a family member does not affect bond requirements: 31% of family member guardians had to post a bond, compared with 35% of nonfamily member guardians. Requiring a bond appears to be a matter of local practice. Using the three categories of counties that we have discussed throughout this Article, bonds are very common in Milwaukee County, where 76% of the guardians of estates post a bond, but much less common in the other counties, where only 29% of the guardians must post a bond.¹⁰⁵ These differences remain when we control for whether the guardian is a family member. Statewide, the median bond amount was \$27,000. The median was highest in Dane County and Racine County (\$40,000) and lowest in the smaller counties (\$20,000). Bonds also tended to be lower when the ward was not suffering from infirmities of aging (\$7000 versus \$40,000), but this probably reflects differences in the size of the estates.

Several other points are worth noting about the guardians and the guardianship orders:

- (1) In only 2% of the orders were the powers of the guardian limited in any way.¹⁰⁶
- (2) Only 7% of the wards were deemed competent to exercise any rights. The most commonly retained rights were to vote, to marry, and to testify in judicial proceedings. The least commonly retained rights were to enter into contracts, to obtain state licenses (including a driver's license), and to hold or convey property.
- (3) In only 9% of the orders was a standby successor guardian named.
- (4) Only 59% of the files contained both guardian accounts and guardian reports; an additional 7% contained an account only and 12% a report only.¹⁰⁷

104. When only guardianship of the person is ordered, posting of a bond is almost never required.

105. When we look at individual counties, where the number of cases in our sample is often very small, we see that the variation is clearly a result of local practice rather than size of county. Some of the smallest counties required bonds in 60% or more of the guardianship of estate orders. One county, Taylor, required bonds in 89% of such orders. At the other extreme, Oneida and Sauk Counties required bonds in only 5% to 6% of such orders.

106. The largest number of limitations restricted the guardian to making medically related decisions, although there were a small number of financial restrictions of various types, such as power limited to access to a safety deposit box.

107. In Milwaukee County, neither an account nor a report was found in 48% of the files; both were found in only 3% of the files. This probably reflects the fact that Milwaukee County does not have a system for reminding guardians to file reports and accounts.

- (5) Thirty-seven percent of the guardianship orders were terminated between the time they were put in place and the date the data were collected. The most common reason for termination (79%) was death of the ward. The second most common reason was that the order expired because the guardianship was temporary.

Over half (57%) of the orders appointing guardians included protective placement orders.¹⁰⁸ Only 33% of the orders in Milwaukee County included protective placement,¹⁰⁹ compared with 43% in Dane County and Racine County combined, and 76% in the smaller counties. Looking at individual counties, the pattern is related to size: The smaller counties ranged between 56% and 92% (the lower limit is 68% if the lowest county in this group, Oneida, is dropped), compared with 56% in Dane County and 30% in Racine County.

The standard form order included only four alternative justifications: developmental disability, infirmities of aging, chronic mental illness, and other like incapacities. Seventy-two percent of the orders noted infirmities of aging, with 5% to 10% noting each of the others. Only 6% of the wards were ordered to be placed in a locked unit. The most commonly ordered facility was a nursing home (74%). Very few wards (1% to 4%) were placed in a group home, a foster home, or a community residential facility, and almost all of those were in Dane or Racine County (16 of 18).¹¹⁰ Most of the remaining 14% are from Milwaukee, and were committed to a facility to be determined by the Combined Community Services Board (CCSB), a unit of the county social service system.¹¹¹ In fact, almost all (87%) of the protective placements in Milwaukee County were determined by the CCSB. Thus, in Milwaukee County it is the CCSB, not the court, that determines the "least restrictive environment." Moreover, the Board can move people among group homes, nursing homes, or locked and unlocked units without any restriction or review. Because we did not collect any information on the actual practices of the Board, we do not know how the Board exercises its delegated power.

108. Not surprisingly, orders were more likely in infirmities of aging petitions (66% versus 34%).

109. Milwaukee's low percentage may be attributed to Milwaukee County's position, at the time of the study, that a guardianship-only petition was permissible for individuals being admitted to or currently residing in nursing homes. This position has been held to violate Sections 55.05(5)(b) and 55.60(1)(d) of the Wisconsin Statutes. *In re Guardianship of Agnes T.*, 179 Wis. 2d 363, 507 N.W.2d 373 (Ct. App. 1993).

110. Of the remaining two, one was in Oneida County, and one was in Taylor County.

111. Most of the "others" not committed to the Combined Community Services Board were placed in a specific named facility that our coders could not categorize.

VI. CONCLUSION

The empirical data we have assembled portray a guardianship system that is essentially administrative in nature. There is a substantial degree of consistency in many aspects of the process, though a proceduralist can legitimately question whether that degree of consistency is adequate.¹¹² The process appears to be essentially nonadversarial.¹¹³ If one believes that the legal process is effective only through the vigorous exercise of an adversary process, this probably is an alarming conclusion. Nonetheless, we found little, if any, evidence of abuse within the system, *at least for those for whom guardianship petitions were filed.*

The appearance that the courts provide little screening and review could mean two very different things. First, it could be that the courts simply act as a rubber stamp and thereby fail to ensure adherence to the due process protections provided by the guardianship statutes, resulting in little or no participation by the proposed ward, his or her representative, or the GAL appointed by the court to protect the interests of the proposed ward. Alternatively, the absence of apparent review by the courts may mean that the courts have little review to perform because questionable cases are screened out before the petition is ever filed. This is the intent of any formal system of review: to create a set of expectations so that a self-censorship process takes place and the formal reviewers seldom need to undertake a rigorous review.

In either situation, is there some minimum level of oversight that one might demand from the court? We believe that there is. The first and simplest step that a judge could take to protect the proposed ward's rights is to observe and question the proposed ward directly and thus personally assess the functioning of the proposed ward. The easiest way to accomplish this would be to adhere to the statutory presumption that the proposed ward will attend the hearing, except when the proposed ward is comatose or in some similar extraordinary situation, either by bringing the proposed ward to the courthouse or by convening the hearing at a location convenient to

112. For example, does the finding that 83% of the petitions include a list of the proposed ward's assets indicate that the system is working well? Or, does the complementary finding that 17% of the petitions fail to list the proposed wards' assets indicate that the system is failing in a substantial percentage of cases? *See supra* part IV.

113. A substantial body of research shows that the judicial process in other types of cases is much more consensual than envisioned by the adversary model. *See generally* HERBERT M. KRITZER, *LET'S MAKE A DEAL: UNDERSTANDING THE NEGOTIATION PROCESS IN ORDINARY LITIGATION* (1991); PETER F. NARDULLI ET AL., *THE TENOR OF JUSTICE: CRIMINAL COURTS AND THE GUILTY PLEA PROCESS* (1988); PAMELA J. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* (1978).

the proposed ward.¹¹⁴ Second, there should be a meaningful judicial review of the medical information. This involves several elements, including clear standards for what must be in the medical report, clear expectations that the report will be available, and a system for assessing whether any medications are affecting the proposed ward's mental status.¹¹⁵

One issue that our study was not able to directly address is the possibility that there may be many cases not coming to the formal guardianship process that, by law, should be in the system. Our data show some evidence of this occurring. Wisconsin law requires a protective placement for persons residing in an institutional setting, such as a nursing home or group home. Nevertheless, even for individuals for whom a guardian has already been appointed, we found numerous examples where this requirement was not met. Some of these petitions were certainly intended to bring the situation into compliance with the law. Similarly, the lack of use of protective placements to settings other than nursing homes suggests either that persons who should be protectively placed in such environments are not coming into the system or that the courts make little effort to ascertain what constitutes the "least restrictive environment."¹¹⁶ An even clearer example is found in the data concerning when a guardianship order is sought for an adult with developmental disabilities. Under the law, one would expect such actions to be initiated around the time the potential ward reaches legal adulthood; however, as Table 2 shows, almost two-thirds of the petitions in such cases are not initiated until sometime after the developmentally disabled person has reached the age of twenty-five.¹¹⁷

Our study was not designed to determine whether, and under what circumstances, the guardianship process was not invoked when it should have been. There is a need for such research. It may be that the core problems in the guardianship system are not in the courts, but in what is not in the

114. The statutory mandate to go to the ward if requested is clear. WIS. STAT. § 880.08(1).

115. This last point would require that judges or GALs receive training in how to evaluate the impact of common medications or that specialized personnel capable of evaluating the impact of the medications be available on a systematic and independent basis.

116. To determine whether the latter is occurring would have required us to undertake independent reviews of a sample of cases, something that was well beyond the scope of our research. While we did not specifically code for noninstitutional "protective services," such as various forms of home-based care or adult day care, we found little indication of such services being ordered as part of protective placements. Furthermore, it was unclear from the materials that we did examine whether alternatives to nursing homes were seriously considered on a regular basis, even though the statute speaks of the "least restrictive environment." See WIS. STAT. § 55.06(8)(c). Certainly, the statutory reference to a primary need for residential care and custody was not intended to mean "institutional care and custody." See WIS. STAT. § 55.06(2)(a).

117. We speculate that such petitions were probably filed at the time that the parents of the potential ward were no longer able to care for their disabled adult child.

courts. If this is the case, educational efforts need to reach the families of developmentally disabled persons, the officials of institutions in which persons needing protective placement orders or guardianships reside, and the public and private social service agencies that assist individuals and families who probably need to utilize the guardianship system.

Finally, other issues need to be examined because of their potential for creating problems. The first issue pertains to the evaluation of potential guardians. While we found no evidence linking guardians with elder abuse, as our society becomes increasingly sensitive to the elder abuse problem, we need to consider how the guardianship process might be used to head off problems in this area. This could be done by including material on elder abuse in training programs for judges and GALs. In addition, GALs might be expected to at least contact elder abuse agencies or relevant social work agencies to find out if there is any history of family problems.

The second issue pertains to the inadequate training given to guardians, as evidenced by their low level of compliance with reporting requirements. Counties need to have training available, and judges should consider requiring some specified amount of training as a condition of appointment.¹¹⁸

The third issue concerns the disincentives, created by the current system, to using the protective placement statute. As a result, once a protective placement is ordered, the county social service agency is expected to perform annual re-evaluations that are potentially quite costly. If the initial evaluation is also conducted by the county agency that will have to bear future costs, the agency has an incentive to avoid recommending a protective placement. While we did not find any examples of county social service agencies making negative recommendations on protective placement petitions, some actors in the system are sensitive to the problem of such public conflicts of interest. For example, a county that recommends institutional placement may be passing the costs of care to the state and federal governments, whereas maintaining a person in the community with community support services draws upon county resources. Consequently, the option of having comprehensive evaluations conducted by independent, private, non-profit agencies should be explored. While existing statutes are quite sensitive to private conflicts of interest, building safeguards into the system to avoid potential public conflicts of interest may be warranted.

118. Given that most guardians are family members not compensated for serving as guardians, it may be difficult to enforce a training requirement.

VII. METHODOLOGICAL APPENDIX

A. Sampling

For purposes of data collection, we drew a sample of guardianship and protective placement cases that were disposed of by courts throughout Wisconsin during calendar year 1989. We selected this year because this was the latest year for which the office of the State Court Administrator was able to provide us with a list of cases.

Ideally, one would take a simple random sample of guardianship cases from around the state for a defined time period. Because case records are held at individual county courthouses, this was not a practical approach. The cost of sending research staff to many counties to obtain data for one or two cases exceeded the resources in the project budget, and the time required exceeded that available within the project timetable. Furthermore, the effort of senior staff to obtain many court orders, at least one for each county with one or more cases in the sample, would have been an inefficient use of a costly resource.

The alternative approach focused data collection in a few counties. We used a two-stage probability sample: At the first stage, a stratified sample of twelve counties was selected, and at the second stage a simple random sample of cases was selected from each county sampled at stage one. The resulting sample has the properties of a probability cluster sample. The stratification at the first stage was based on the total number of guardianship and protective placement cases in each county. This stratification ensured that the sample was not dominated by cases from the smaller counties. We stratified into five levels. Table 4 shows the definition of each strata and the number of counties that fall into each strata.¹¹⁹ Table 4 also shows the target size of each county sample for each strata and the list of counties actually sampled, along with the number of cases coded in each of those counties. This sample was intended to be self-weighting so that it would not be necessary to devise a complex weighing scheme to reflect the relative contribution of each county to the statewide guardianship and protective placement caseload in order to arrive at statewide estimates. However, because we did not have information on the caseload in Milwaukee when the sample was designed, we substantially oversampled cases from

119. Wisconsin has 72 counties. The numbers in Table 4 add up to only 69: Two counties reported no dispositions of guardianship or protective placement cases, and another county was excluded because it reported only two dispositions. One of the counties with no reported dispositions has an estimated population of only 4000 persons, and the absence of any guardianship cases is very possible; the other county has an estimated population of 17,000, and the absence of data is most likely due to a lapse in reporting.

TABLE 4
SAMPLE STRATIFICATION DESIGN

Strata number	Definition (caseload ^a)	Number of counties in strata	Percent of caseload ^c	Number of counties in sample	Size of sample for strata (number)	Percent of of total sample
1	Under 40	22 ^b Lincoln (13) Sawyer (13) Taylor (13)	7.6	3	13	6.2 (7.8) ^d
2	40-79	17 Dunn (22) Monroe (17) Polk (22)	12.2	3	22	9.7 (12.1)
3	80-159	18 Burnett (45) Oneida (45) Sauk (40)	26.5	3	45	20.7 (25.9)
4	160-400	11 Dane (100) Racine (100)	40.0	2	100	31.8 (39.5)
5	more than 400	1 Milwaukee (199)	14.8	1	200	31.6 (14.5)
Total		69	100	12	640 ^e	100 ^f

^a Calendar year 1989.

^b Excludes two counties with no reported cases and one county with only two reported cases.

^c Percentages obtained from Wisconsin Director of State Courts Office, based on 7612 cases.

All percentages were rounded.

^d The figures in parentheses in this column show the percent of the sample after applying the weights discussed in the text.

^e This figure is equal to the sum of the number of counties sampled for each strata times the size of the sample for the strata ($3 \times 13 + 3 \times 22 + 3 \times 45 + 2 \times 100 + 1 \times 200$).

^f The final actual sample size was 629.

Milwaukee.¹²⁰ To adjust for this, it was necessary to apply a weighing scheme in order to get appropriate statewide estimates.¹²¹ In this Article, the figures reported are after incorporating the sample weights unless otherwise indicated.¹²²

120. Using population figures, it appears that Milwaukee County's proportion of the total statewide guardianship caseload is somewhat lower than its proportion of statewide population; however, even adjusting for this, our sample greatly overrepresents Milwaukee County.

121. Cases from Milwaukee County were given a weight of .46, whereas cases from other counties were given a weight of 1.25.

122. Because the weights were based on county, the weights make no difference when figures within counties are reported.

B. Procedures in the Field

Data collection was done using a laptop computer in the field.¹²³ The strategy can be best understood as a "file interview." Project staff used information from the court file to complete a questionnaire administered by the laptop computer using a Computer Assisted Telephone Interviewing system (CATI). Because of the organization of the files, CATI was supplemented by a preliminary form on which a variety of information was recorded.

The bulk of the information came from several standard forms used by most counties around the state, such as the Petition for Guardianship/Protective Placement (GN-1109), the Determination and Order for Appointing Guardian/Protective Placement (GN-1110), and the Guardianship Court Record (GS-1100). Milwaukee County had its own equivalent forms.¹²⁴

The interview model was designed to provide more reliable information by focusing on relatively small "bits" rather than asking field staff to reach general conclusions based on the file. Furthermore, the CATI system allowed us to build into the data collection immediate range checking, which avoided many potential errors in the field.¹²⁵

C. Reliability Analysis

In order to assess the reliability of the coding of data in the field, nineteen cases (ten from Sauk County and nine from Dane County) were coded twice, once by each of the coders. There are several ways that a reliability score could be computed, depending upon how one counts "missing data," which refers to items that were skipped over in the coding process because they were deemed to be "not applicable." The more conservative approach, the approach that yields the lowest reliability score, is to omit entirely these "missing" items. Using this method, we found that the coders agreed entirely on 86.1% of the data items. This level of reliability is reasonable, although it is not as high as we had hoped.

123. Actual collection of data in the field was done by a law student, Diane Hermann, and by coauthor Helen Marks Dicks.

124. Copies of these forms are found in Kritzer, *supra* note 79, at app. E. For the questionnaire and frequencies for most items, see *id.* at app. D. Those frequencies are based on the weighted data.

125. Cost considerations precluded a full cross-check of the data. Inevitably some keying errors did occur, but we presume that they are essentially random, and hence should have no impact on the basic results from the research. Some data cleaning, such as returning to the field to obtain information that was clearly incorrect, was skipped because the effects on the results would have been too small to justify the expense in staff time.

Examination of the inconsistencies in the coding shows that the differences reflected a variety of factors. For example, there were many minor differences in the "date of the petition," which reflects inconsistencies between the date typed on the petition and the date stamped on the petition by the court. Inconsistencies also arose because of ambiguous items. For example, in coding whether a previously executed durable power of attorney existed, options included "yes," "definitely not," "probably not," and "unclear." Because we did not formally define criteria for choosing between "definitely not" and "probably not," that choice was somewhat arbitrary.

