


9-23-2014

Guarding the Golden Years: How Public Guardianship for Elders Can Help States Meet the Mandates of *Olmstead*

Eleanor B. Cashmore

Boston College Law School, eleanor.cashmore@bc.edu

Follow this and additional works at: <http://lawdigitalcommons.bc.edu/bclr>

 Part of the [Administrative Law Commons](#), [Disability Law Commons](#), [Elder Law Commons](#), and the [Family Law Commons](#)

Recommended Citation

Eleanor B. Cashmore, *Guarding the Golden Years: How Public Guardianship for Elders Can Help States Meet the Mandates of Olmstead*, 55 B.C.L. Rev. 1217 (2014), <http://lawdigitalcommons.bc.edu/bclr/vol55/iss4/6>

This Notes is brought to you for free and open access by the Law Journals at Digital Commons @ Boston College Law School. It has been accepted for inclusion in Boston College Law Review by an authorized editor of Digital Commons @ Boston College Law School. For more information, please contact nick.szydowski@bc.edu.

GUARDING THE GOLDEN YEARS: HOW PUBLIC GUARDIANSHIP FOR ELDERS CAN HELP STATES MEET THE MANDATES OF *OLMSTEAD*

Abstract: The aging American population will quickly lead to a greater demand for long-term care and services for people who are unable to care for themselves. Some older adults may require other individuals to make informed decisions on their behalf. State guardianship programs must confront the tension of providing protections for people who are incapacitated while respecting their autonomy, particularly when making decisions involving a person’s residence. When elderly adults wish to stay in their communities and are capable of doing so, a lack of proper support may be a violation of the Americans with Disabilities Act of 1990 (“ADA”), as interpreted by the U.S. Supreme Court in 1999 in *Olmstead v. L.C. ex rel. Zimring*. One solution may be found in effective public guardianship programs. This Note explores the effect of *Olmstead* on state funding for long-term care, the implications of the *Olmstead* decision for guardianship, and common models of public guardianship. This Note then argues that existing public guardianship programs, if appropriately funded and held to proper standards, can help states meet the mandates of the ADA and *Olmstead*.

INTRODUCTION

The American population is aging rapidly, with significant implications for policy makers and society.¹ With seventy-five million baby boomers born between 1946 and 1964, approximately one in five Americans is expected to be over sixty-five by the year 2050.² With improvements in medical technologies leading to longer life expectancies, baby boomers are expected to live longer after being diagnosed with a debilitating illness.³ In addition, the rise in

¹ See William G. Gale & Peter R. Orszag, *An Economic Assessment of Tax Policy in the Bush Administration, 2001-2004*, 45 B.C. L. REV. 1157, 1177 (2004) (noting the imminent retirement age of baby boomers); Jon Pynoos et al., *Aging in Place, Housing, and the Law*, 16 ELDER L.J. 77, 79 (2008) (noting that baby boomers will have needs different from previous populations and will have impacts on their communities); LORAINÉ A. WEST ET AL., 65+ IN THE UNITED STATES: 2010, at 5 (U.S. Census Bureau 2014), available at <http://www.census.gov/content/dam/Census/library/publications/2014/demo/p23-212.pdf>, archived at <http://perma.cc/S63C-TKB9> (reporting that the population of Americans aged 65 and older continually grows more rapidly than the population under 65).

² See West et al., *supra* note 1, at 5. This percentage increased from 4.1% in 1900 to 13% in 2010. *Id.*

³ See A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 UTAH L. REV. 1541, 1546 (discussing forecasted increases in the aging and developmental disabilities populations, along with how families are more geographically spread out and are therefore less

the older adult population will result in more people becoming incapacitated by mental illness, including dementia.⁴ Consequently, aging adults who are unable to care for themselves will have a greater need for long-term care and services.⁵ As people live longer with potentially incapacitating conditions, some older adults will require others to make informed decisions on their behalf.⁶

Given the aging population, guardianship programs for elders in the United States must confront this issue.⁷ Guardians and caregivers have long experienced the tension of protecting individuals who are incapacitated, primarily elders and people with disabilities, while respecting their autonomy.⁸ The desire to protect these populations historically led to their placement in nursing homes and other institutions.⁹ Policy makers have begun to reallocate funds to

likely to serve as guardians); Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 195 (2007) (noting the “graying” of the population coinciding with advances in medical technology). In addition to improvements in modern medicine, the National Institutes of Health and other scientific institutions fund research projects to extend life expectancies. JAMES H. SCHULZ & ROBERT H. BINSTOCK, *AGING NATION: THE ECONOMICS AND POLITICS OF GROWING OLDER IN AMERICA* 184 (2006).

⁴ Alzheimer’s Association, *2014 Alzheimer’s Disease: Facts and Figures*, 21 (2014), available at http://www.alz.org/downloads/facts_figures_2014.pdf, archived at <http://perma.cc/SFV8-4BU6> (stating that baby boomers have “begun to reach the age range of elevated risk for Alzheimer’s”).

⁵ Marshall B. Kapp, *Where Will I Live? How Do Housing Choices Get Made for Older Persons?*, 15 NAELA Q. 2, 3 (2002) (stating that someone else might have to make decisions on behalf of care recipients who require long-term care to remain at home but lack the capacity to be autonomous consumers); see Pynoos et al., *supra* note 1, at 86.

⁶ See Naomi Karp et al., *Choosing Home for Someone Else: Guardian Residential Decision-Making*, 2012 UTAH L. REV. 1445, 1445; Linda S. Whitton, *Caring for the Incapacitated—A Case for Nonprofit Surrogate Decision Makers in the Twenty-First Century*, 64 U. CIN. L. REV. 879, 879 (1996) (discussing demographic patterns that would lead to “a rising need for surrogates to make personal and financial decisions for those who have lost the capacity to manage their own affairs”).

⁷ See Winsor C. Schmidt et al., *Development and Trends in the Status of Public Guardianship: Highlights of the 2007 National Public Guardianship Study*, 33 MENTAL & PHYSICAL DISABILITY L. REP. 728, 728 (2009) (describing trends that led to the need for a second national study of public guardianship, including the aging of the population, extended lifespans, and mobility of families).

⁸ See Johns, *supra* note 3, at 1544 (noting that guardianship statutes have been a part of states’ jurisprudence “since their statehood, or territorial organization”); Leslie Salzman, *Guardianship for Persons with Mental Illness—A Legal and Appropriate Alternative?*, 4 ST. LOUIS U. J. HEALTH L. & POL’Y 279, 279 (2011) (stating that guardianship implications pits the individual’s right of autonomy against the state’s interest in protecting people from harm).

⁹ See Pynoos et al., *supra* note 1, at 85. In addition to nursing homes, people with developmental disabilities and mental illness were frequently confined in state-run institutions. See Sylvia B. Caley & Steven D. Caley, *The Olmstead Decision: The Road to Dignity and Freedom*, 26 GA. ST. U. L. REV. 651, 653 (2010); Michael L. Perlin, “What’s Good Is Bad, What’s Bad Is Good, You’ll Find Out When You Reach the Top, You’re on the Bottom”: *Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More Than “Idiot Wind”?*, 45 U. MICH. J.L. REFORM 235, 253 (2002). These institutions often were the subject of case law regarding the mistreatment of individuals with disabilities. Perlin, *supra* at 252–53 (summarizing cases on the issue, including *Wyatt v. Aderholt*, 503 F.2d 1305, 1311 (5th Cir. 1974), where the Fifth Circuit recalled how several patients had died as a result of physical abuse and neglect suffered in institutions).

allow people to remain in the community for as long as possible.¹⁰ Moreover, research shows that the practice of encouraging home and community based options aligns with people's preferences.¹¹ All too often, however, barriers, including lack of funding and proper support, lead to older adults being institutionalized against their will.¹²

The tension between protecting people from harm and respecting their self-autonomy will affect millions of individuals and families in the decades to come.¹³ Given that some elderly adults who are institutionalized arguably could continue to thrive in the community, a lack of proper support for this option may be in violation of the ADA, as interpreted by the U.S. Supreme Court in 1999 in *Olmstead v. L.C. ex rel. Zimring*.¹⁴ One solution may be found in effective public guardianship programs.¹⁵

This Note explores the issue of guardianship for elders in the United States, giving particular attention to the value of and rising need for public guardianship.¹⁶ Part I gives an overview of the history of guardianship in the United States, the ADA, and *Olmstead*.¹⁷ Part II then explores the effect of *Olmstead* on state funding for long-term care, the implications of the *Olmstead* decision for guardianship, and common models of public guardianship.¹⁸ Finally, Part III argues that existing public guardianship programs, if appropriately funded and held to proper standards, can help states meet the mandates of the ADA and *Olmstead*.¹⁹

¹⁰ See West et al., *supra* note 1, at 5 (reporting that Medicaid funds have been shifting away from nursing homes toward funding for home- and community-based services).

¹¹ See Karp et al., *supra* note 6, at 1470 (summarizing empirical data indicating that the overwhelming majority of older people want to age in their own homes); AARP, *Fixing to Stay: A National Survey of Housing and Home Modification Issues*, 24 (2000), available at http://assets.aarp.org/rgcenter/il/home_mod.pdf, archived at <http://perma.cc/X7V2-9KK6> (finding that 80% of people aged forty-five and older hoped to stay in their own homes as they aged).

¹² See Pynoos et al., *supra* note 1, at 87 (explaining that although the ability to choose a home in the community is important, there is a lack of affordable and accessible housing in community-based settings). Even for elders who do not have guardians, the decision to move to a nursing home or assisted living community may not always be voluntary. See Kapp, *supra* note 5, at 5 (stating that although individuals cannot be involuntarily committed to nursing homes, admissions decisions are sometimes made by family members or “voluntarily” by individuals who do not have the capacity to make it).

¹³ David Hardy, *Who Is Guarding the Guardians? A Localized Call for Improved Guardianship Systems and Monitoring*, 4 NAELA J. 1, 4 (2008) (stating guardianship implicates “inverse concepts of state intervention and personal liberty”); see also KATHLEEN MCINNIS-DITTRICH, *SOCIAL WORK WITH OLDER ADULTS* 76–77 (4th ed. 2014) (discussing the importance and difficulty of providing opportunities for older adults while respecting their choices).

¹⁴ See 527 U.S. 581, 587 (1999).

¹⁵ See Teaster et al., *supra* note 3, at 229, 233.

¹⁶ See *infra* notes 20–289 and accompanying text.

¹⁷ See *infra* notes 20–77 and accompanying text.

¹⁸ See *infra* notes 78–151 and accompanying text.

¹⁹ See *infra* notes 152–289 and accompanying text.

I. AN OVERVIEW OF THE ADA, *OLMSTEAD*, AND PUBLIC GUARDIANSHIP

Guardianship laws affect nearly every aspect of an incapacitated person's life: traveling, finances, medical treatment, the ability to vote, opportunities to socialize, and housing and residency.²⁰ Section A of this Part gives a history of long-term care and guardianship in the United States.²¹ Section B provides a brief overview of the genesis and rationale behind the ADA.²² Section C then examines *Olmstead*, which articulated the right of Americans with disabilities to live in the community as long as it is safe for them to do so.²³

A. History of Public Guardianship Statutes

America's guardianship laws date back to at least the feudal English system.²⁴ Following the American Revolution, the United States assumed the general authority to protect Americans unable to care for themselves.²⁵ This authority likely led to the mass institutionalization of people with disabilities, as states used the authority intended to protect people with disabilities to instead protect society from people with disabilities.²⁶ The choices, abilities, and contributions to society of people with disabilities was rarely considered or even acknowledged.²⁷

Although there is growing societal acknowledgment of the importance of respecting individual choice, guardianship is still widely accepted as a necessary mechanism for the protection of vulnerable adults.²⁸ Even though guardi-

²⁰ Winsor C. Schmidt, *Guardianship for Vulnerable Adults in North Dakota: Recommendations Regarding Unmet Needs, Statutory Efficacy, and Cost Effectiveness*, 89 N.D. L. REV. 77, 77 (2013) (stating that guardians address all aspects of a person's life); Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 167 (2010) (giving examples of how guardianship laws affect "decisions that define who we are as human beings," including whether to travel, marry, or accept medical treatment). In some states, persons under guardianship are disenfranchised. Salzman, *supra* note 8, at 289.

²¹ See *infra* notes 24–43 and accompanying text.

²² See *infra* notes 44–60 and accompanying text.

²³ See *infra* notes 61–77 and accompanying text.

²⁴ See Hal Fliegelman & Debora C. Fliegelman, *Giving Guardians the Power to Do Medicaid Planning*, 32 WAKE FOREST L. REV. 341, 343–44 (1997). The King acted under the doctrine of *parens patriae* to protect incompetent persons. See Michael D. Casasanto et al., *A Model Code of Ethics for Guardians*, 11 WHITTIER L. REV. 543, 543 (1989); Fliegelman & Fliegelman, *supra* at 343–44.

²⁵ See Salzman, *supra* note 20, at 164.

²⁶ See *id.* (discussing the history of some states of adopting eugenics policies and isolating individuals with mental impairments in institutions); see also *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 454 (1985) (Stevens, J., concurring) (noting the history of "unfair and often grotesque mistreatment" of people with disabilities) (citation omitted).

²⁷ See Salzman, *supra* note 20, at 165 (calling society's treatment of people with disabilities and mental illness "checkered, at best").

²⁸ See *id.* at 166.

ans are typically family members, lack of data and research on adult guardianship systems make current numbers and demographics of people under guardianship nearly impossible to determine.²⁹

Particular challenges arise when individuals become incapable of making their own decisions but do not have a close friend or relative who can provide informal support or take on the role of legal guardian.³⁰ In these instances, a court can appoint a public official or publicly funded organization to serve as legal guardian.³¹ In the 1970s, public guardianship was a fairly new phenomenon, and practices varied widely.³² Now, public guardianship programs receive most or all of their funding from governmental entities, including state appropriations and Medicaid funding.³³

Historically, courts used fairly relaxed procedures for the appointment of guardians.³⁴ Traditional approaches utilized a medical model, basing a person's need for a guardian primarily on his or her diagnosis.³⁵ When in doubt, courts tended to err on the side of appointing a guardian.³⁶ Judges often made determinations of capacity based solely on written information from families or agencies.³⁷ In recent decades, Congress and many state legislatures have implemented changes to guardianship statutes.³⁸ Reforms have been aimed largely at the integration of people with disabilities into society and the empowerment of people with physical and mental disabilities.³⁹

²⁹ See Johns, *supra* note 3, at 1545 (stating that “no good data regarding guardianship practice is available”); Sally Hurme & Erica Wood, *Third National Guardianship Summit: Standards of Excellence: Introduction*, 2012 UTAH L. REV. 1157, 1162; Brenda K. Uekert & Richard Van Duizend, *Adult Guardianships: A “Best Guess” National Estimate and the Momentum for Reform*, in FUTURE TRENDS IN STATE COURTS 2011: SPECIAL FOCUS ON ACCESS TO JUSTICE 107, 109 (Carol R. Flango et al. eds., 2011).

³⁰ See Schmidt et al., *supra* note 7, at 728.

³¹ *Id.*

³² See Teaster et al., *supra* note 3, at 195.

³³ See *id.* at 201 (listing common funding avenues for public guardianship, including county monies, fees from the ward, or a combination of the above sources).

³⁴ Salzman, *supra* note 20, at 171.

³⁵ See *id.*

³⁶ See Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 742 (2002) (explaining, through a hypothetical family situation, that plenary guardianship is attractive to many judges because it is cost effective, expeditious, and appears to protect vulnerable people).

³⁷ See *id.*

³⁸ Salzman, *supra* note 20, at 165 n.20 (referencing a number of statutes, including the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–796, 791–794 (2006) and the Fair Housing Act, 42 U.S.C. §§ 3601–3631, 3604–3605 (2006)).

³⁹ *Id.* Press coverage in the 1980s effected calls for change to guardianship systems in the United States. See Elizabeth M. Winchell, *If You Want Something Done Right, You've Got to Do It Yourself: Minnesota Guardians, Group Homes, and the Impermissible Delegation After In re Guardianship of Jeffrey Deyoung*, 35 HAMLINE L. REV. 675, 699 (2012). A 1987 report from the Associated Press found that older adults were being “strip[ped] . . . of basic rights” with barely any procedure by judges who heard evidence for only a few minutes. See Fred Bayles & Scott McCartney, *Guardians of the*

In particular, state public guardianship laws have undergone substantial reform in the past few decades.⁴⁰ Along with changes to the adjudication of incapacity, protection of due process, and eligibility for public guardianship, more states have enacted statutes specifically referencing public guardianship and providing for public guardianship programs.⁴¹ As of a 2005 national public guardianship study, forty-one states had statutory provisions for public guardians.⁴² Although the other states did not have statutory provisions, most provided for public guardianship in practice.⁴³

B. The Genesis of the ADA

Care for both elders and younger people with developmental disabilities and mental illnesses historically took place within institutions.⁴⁴ Beginning in

Elderly: An Ailing System, ASSOCIATED PRESS, Sept. 20, 1987, available at <http://www.apnewsarchive.com/1987/Guardians-of-the-Elderly-An-Ailing-System-Part-I-Declared-Legally-Dead-by-a-Troubled-System/id-1198f64bb05d9c1ec690035983c02f9f>, archived at <http://perma.cc/DKQ9-39M3>. The report found that often, mentally or physically disabled elders were failed by the system of guardianship that was intended to protect them. See *id.*; see also Winchell, *supra* at 697 (stating that historically, probate courts considered protection of wards more significant than their rights).

⁴⁰ See Teaster et al., *supra* note 3, at 197–98 (listing marked trends in state guardianship laws put in place after the Associated Press investigation, including enhanced procedural due process in the appointment of a guardian; a shift in focus from medical to functional capacity; more thorough determination of capacity; an emphasis on limited orders of guardianship tailored to specific needs; more court monitoring of guardians; and the development of public guardianship programs); Jennifer L. Wright, *Protecting Who from What, and Why, and How?: A Proposal for an Integrative Approach to Adult Protective Proceedings*, 12 ELDER L.J. 53, 58–59 (2004).

⁴¹ See Schmidt et al., *supra* note 7, at 729.

⁴² Teaster et al., *supra* note 3, at 205–06.

⁴³ *Id.* (stating that of the nine states (and Washington D.C.) that did not have a statutory program for public guardianship, several provided for public guardianship services). Some states might have had additional provisions for public guardianship within their statutes for adult protective services, which were not researched for the study. *Id.* n.74. The national guardianship study distinguished between explicit and implicit public guardianship schemes. *Id.* at 206; see also Schmidt, *supra* note 20, at 102 (identifying North Dakota’s public guardianship scheme as an “implicit” statutory scheme and recommending that North Dakota adopt an explicit scheme, as an increasing number of states have done). Of the states that did have public guardianship programs, some of the state statutes provided services only for older adults with low assets. Teaster, *supra* note 3, at 208; see e.g., N.M. STAT. ANN. § 45-5-407(D)(1)–(3) (2014) (restricting services to persons with financial limitations); CONN. GEN. STAT. § 45-a-651(a)(1) (2014) (restricting services to individuals with assets not exceeding \$1,500).

⁴⁴ See Melody M. Kubo, *Implementing Olmstead v. L.C.: Defining “Effectively Working” Plans for “Reasonably Paced” Wait Lists for Medicaid Home and Community-Based Services Waiver Programs*, 23 U. HAW. L. REV. 731, 732 (2001). Though it references the term, the ADA does not define “institutionalization.” See Kevin M. Cremin, *Challenges to Institutionalization: The Definition of “Institution” and the Future of Olmstead Litigation*, 17 TEX. J. C.L. & C.R. 143, 152 (2012). The U.S. Census, however, defines “institutionalized population” as “persons residing in institutional group quarters such as adult correctional facilities, juvenile facilities, skilled-nursing facilities, and other institutional facilities such as mental (psychiatric) hospitals and in-patient hospice facilities.” U.S. Census Bureau, American FactFinder Help Glossary, available at <https://ask.census.gov/faq.php?id=5000&faqId=6669>, archived at <http://perma.cc/A2M3-XULP> (last visited Sept. 2, 2014).

the 1950s, states worked to help capable individuals with disabilities live in their communities, as opposed to institutions.⁴⁵ In the 1970s, efforts to eliminate the institutionalization of people with developmental disabilities gained traction.⁴⁶ Congress passed measures designed to reduce and diminish discrimination.⁴⁷ In addition, communities increased their efforts to move people with developmental disabilities out of institutions.⁴⁸ Despite the push to reform, however, widespread isolation and segregation remained.⁴⁹

In response to extensive lobbying and demonstrations by the disability population, Congress enacted the ADA in 1990.⁵⁰ With the passage of the ADA, Congress intended “to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”⁵¹ Congress likely endeavored not only to eliminate intentional discrimination against people with disabilities, but also to address the invisibility in society of people who were institutionalized.⁵² In response to this historical isolation, Title II of the ADA included a provision mandating integration.⁵³ Describing the isolation of people with disabilities as a form of discrimination, Congress provided that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”⁵⁴ Thus, Congress sought to eliminate the isolation and segregation of persons with disabilities as a type of discrimination through the enactment of the ADA.⁵⁵

Among the regulations implementing Title II, the Attorney General promulgated the “integration regulation,” requiring public entities to “administer services, programs, and activities in the most integrated setting appropriate” to

⁴⁵ See Kubo, *supra* note 44, at 732.

⁴⁶ See *id.*

⁴⁷ See *id.* at 733. Measures to eliminate discrimination based on disability included the 1975 Developmentally Disabled Assistance and Bill of Rights Act and the Rehabilitation Act of 1973. *Id.*

⁴⁸ See *id.* at 732–33 (explaining that states had some community-based services as early as the 1950s and that many communities joined deinstitutionalization programs in the 1970s).

⁴⁹ See *City of Cleburne*, 473 U.S. at 454 (Stevens, J., concurring).

⁵⁰ See 42 U.S.C. § 12101(b)(1) (2012).

⁵¹ See *id.*

⁵² See Salzman, *supra* note 20, at 184 (citing Senator Paul Simon, commenting that the disabled population “remains substantially hidden. They are hidden in institutions . . . nursing homes . . . [and] the homes of their families Because they are hidden, we too easily ignore the problem and the need for change”). Notably, the opening provisions of the ADA state that society historically tended to isolate and segregate individuals with disabilities. 42 U.S.C. § 12101(a)(2).

⁵³ 42 U.S.C. § 12101(a)(2).

⁵⁴ §§ 12101(a)(2), (5), 12132. Some members of Congress related the segregation of people with disabilities to the historic segregation of African Americans. See H.R. Rep. No. 101-485, pt. 3, at 26 (1990).

⁵⁵ See Salzman, *supra* note 20, at 184.

meet the needs of people with disabilities.⁵⁶ Pursuant to this regulation, public entities must make reasonable modifications to avoid discrimination.⁵⁷ Reasonable accommodations have often included handicapped accessible equipment, assistance in filling out forms, and extra training.⁵⁸ States are not required to make modifications that “would fundamentally alter the nature of the service, program, or activity.”⁵⁹ This provision has been open to interpretation by courts, who have used it to take costs of state programs into consideration.⁶⁰

C. *Olmstead v. L.C. ex rel. Zimring: An Overview*

In 1999, the U.S. Supreme Court addressed the reasonable modifications regulation in *Olmstead v. L.C. ex rel. Zimring*.⁶¹ The Court concluded that Title II of the ADA may require that states take action to place people with disabilities in the community rather than institutions.⁶² In *Olmstead*, two adult women with developmental disabilities and mental illnesses were voluntarily admitted to psychiatric units.⁶³ They remained institutionalized for years, despite their treatment providers’ determinations that they were able to live in Georgia’s community-based settings.⁶⁴ The plaintiffs brought suit against state officials, alleging that the State’s failure to place them in appropriate housing violated Title II of the ADA.⁶⁵ The State argued that there was no discrimination because the women were not denied placement on the basis of their disabilities, nor were they treated differently from other people who were similarly situated.⁶⁶ The U.S. Court of Appeals for the Eleventh Circuit affirmed the district

⁵⁶ 28 C.F.R. § 35.130(d) (1998). The preamble defines the most integrated setting as “a setting that enables individuals with disabilities to interact with nondisabled persons to the fullest extent possible.” *Id.*

⁵⁷ § 35.130(b)(7).

⁵⁸ 42 U.S.C. § 12111(9) (giving examples of what reasonable accommodations may include, such as “acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations”).

⁵⁹ § 35.130(b)(7).

⁶⁰ See Andrew I. Batavia, *A Right to Personal Assistance Services: “Most Integrated Setting Appropriate” Requirements and the Independent Living Model of Long-Term Care*, 27 AM. J.L. & MED. 17, 31–32 (2001) (stating that these provisions of the ADA have “led the courts to consider the costs of state programs in determining whether service for an individual is required in the community”); Lucille D. Wood, *Costs and the Right to Community-Based Treatment*, 16 YALE L. & POL’Y REV. 501, 509 (1998) (discussing *Williams v. Wasserman*, 937 F. Supp. 524 (D. Md. 1996), where the court held that relative costs of institutionalization and community-based treatment needed to be determined to assess whether an undue financial burden was present).

⁶¹ 527 U.S. at 587.

⁶² *Id.*

⁶³ *Id.* at 593.

⁶⁴ *Id.*

⁶⁵ *Id.* at 593–94. The plaintiffs also filed suit under 42 U.S.C. § 1983, claiming their right to due process had been violated. *Id.*

⁶⁶ *Id.*

court's judgment in favor of the plaintiffs, concluding that undue institutionalization qualified as discrimination by reason of disability.⁶⁷

The Supreme Court upheld the judgment of the Eleventh Circuit in part.⁶⁸ Specifically, the Court concurred with the Eleventh Circuit that Congress intended a more comprehensive view of discrimination than the one put forth by the State.⁶⁹ Thus, Georgia's denial of community housing to the plaintiffs constituted discrimination in violation of the ADA.⁷⁰ Accordingly, when state professionals determine that a person can live in the community, and the placement can be reasonably accommodated, states must facilitate the movement of this person out of an institution.⁷¹ The Court went on to explain that unwarranted institutionalization of individuals with disabilities perpetuates stereotypes and assumptions about the disabled and mentally ill populations.⁷²

The Supreme Court disagreed, however, with the lower courts' interpretation of the reasonable-modifications regulation.⁷³ The Eleventh Circuit had determined that institutional placement for the plaintiffs was more expensive for the state than community placement and, therefore, de-institutionalization would be a reasonable modification.⁷⁴ The Supreme Court determined that this interpretation did not sufficiently take into consideration that the state's resources had to provide for a large and diverse population of people with mental disabilities.⁷⁵ The Court instead held that states must have more flexibility to maintain a range of facilities.⁷⁶ Following the *Olmstead* decision, states were

⁶⁷ *Zimring v. Olmstead*, 138 F.3d 893, 905 (11th Cir. 1998).

⁶⁸ *Olmstead*, 527 U.S. at 597.

⁶⁹ *Id.* The majority opinion mentioned that the Department of Justice has consistently advocated that undue institutionalization qualifies as discrimination and that its views warrant respect. *Id.*

⁷⁰ *Id.* at 597–99. Justice Clarence Thomas, joined by Chief Justice William Rehnquist and Justice Antonin Scalia, dissented, stating that the majority opinion used an overly broad concept of discrimination. *See id.* at 625 (Thomas, J., dissenting).

⁷¹ *Id.* at 587 (majority opinion).

⁷² *Id.* at 599 n.10 (comparing the effects of discrimination against disabled people to the stigmatizing effects of racial discrimination). Moreover, people living in institutions had fewer opportunities than those living in the community to participate in family and social activities, employment and educational opportunities, and cultural traditions. *See id.* at 601. Because people with mental disabilities had to give up these opportunities in order to receive medical services, while those without mental disabilities did not, confining people to institutions without justification constituted discrimination. *Id.*

⁷³ *Id.* at 603. Justice Stevens wrote a concurring opinion arguing that this part of the Eleventh Circuit's judgment should also have been affirmed. *Id.* at 607 (Stevens, J., concurring).

⁷⁴ *Zimring*, 138 F.3d at 905.

⁷⁵ *Olmstead*, 527 U.S. at 604. The Court reasoned that the lower courts' construction left the state essentially defenseless against automatically providing community placement for everyone deemed eligible. *Id.* (stating that "sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable").

⁷⁶ *Id.* at 605. As an example, the Court suggested that a reasonably-paced waiting list and effectively working plan for moving people to least restrictive settings would satisfy the reasonable-modifications standard. *Id.* at 605–06.

encouraged to develop programs to allow people with disabilities to live in community housing.⁷⁷

II. IMPLICATIONS OF THE ADA AND *OLMSTEAD* ON HOUSING AND PUBLIC GUARDIANSHIP

This Part discusses long-term care, housing, and guardianship statutes in light of the ADA and the U.S. Supreme Court's 1999 decision in *Olmstead v. L.C. ex rel. Zimring*.⁷⁸ Section A discusses housing and long-term care for elders.⁷⁹ Then, Section B explains how *Olmstead* implicates guardianship statutes and summarizes common models and recent reforms to state guardianship programs.⁸⁰

A. Implications of the ADA on Housing for the Elderly

The *Olmstead* decision made clear that segregated housing and institutions constitute discrimination under the ADA.⁸¹ Congress passed the ADA against the backdrop of severe discrimination against people with both physical and mental disabilities.⁸² One of the ADA's goals was for the public to see people with disabilities as individuals who have lives worth living and who can meaningfully contribute to their communities.⁸³ *Olmstead* extended the equal rights provided by the ADA to community living by making clear that states had an obligation to provide the least restrictive residential setting for citizens with disabilities.⁸⁴

Although *Olmstead* focused on plaintiffs who were members of the younger disabled population, the situation is similar to that of many older adults who find themselves confined to institutional care.⁸⁵ Over the past few decades, academics and social service providers in the gerontological field

⁷⁷ Pynoos et al., *supra* note 1, at 86. Grants were enacted to support the transition. See Wayne L. Anderson et al., U.S. Dep't of Health & Human Servs., Real Choice Systems Change Grant Program 23–61 (2006). These included the Presidential New Freedom Initiative of 2001 and Real Choice System Change grants. See *id.*

⁷⁸ See *infra* notes 81–152 and accompanying text.

⁷⁹ See *infra* notes 81–101 and accompanying text.

⁸⁰ See *infra* notes 102–151 and accompanying text.

⁸¹ See *Olmstead v. L.C.*, 527 U.S. 581, 587 (1999) (holding, in an opinion written by Justice Ginsburg, that state action to place people with mental disabilities in community settings “is in order when the State’s treatment professionals have determined that community placement is appropriate, the transfer . . . is not opposed by the individual, and the placement can be reasonably accommodated”).

⁸² 42 U.S.C. § 12101(a)(2) (2012) (stating that Congress found “discrimination against individuals with disabilities continues to be a serious and pervasive social problem”).

⁸³ *Id.*

⁸⁴ See 527 U.S. at 587.

⁸⁵ See Schmidt et al., *supra* note 7, at 729.

have pushed for policies and programs that will assist older adults with their daily activities and personal and medical needs within their homes.⁸⁶

This focus aligns with the wishes of older adults: a 2000 survey by “AARP” found that over eighty percent of people aged forty-five and above indicated that they wished to live in their current residences for as long as possible.⁸⁷ This phenomenon may be explained by the fact that the majority of older adults lived independently until, and even through, old age.⁸⁸ Having to hand over basic decisions and personal care to another person or institution presents unique challenges.⁸⁹

Trends in long-term care policies have begun to reflect the public’s desire to remain at home in old age.⁹⁰ A number of states have expanded options under Medicaid to allow for more choices for consumers.⁹¹ For example, the Medicaid Home and Community-Based Services Waiver allowed states to offer federal funds to individuals to use for services in the home or community.⁹² Following *Olmstead*, states focused even more on rebalancing Medicaid funds to emphasize home and community care.⁹³ In one rebalancing project, Money

⁸⁶ See Pynoos et al., *supra* note 1, at 78. The “aging in place” phenomenon refers to the desire of older adults to live in their own homes and communities, rather than in nursing and rest homes, for as long as possible. *Id.* Another model reflecting this trend is the independent living model, which allows people with disabilities to determine and dictate the services and providers they receive in their home. See Batavia, *supra* note 60, at 19. Proponents of the independent living model claim that it promotes the goals of the ADA by allowing individuals to remain in their homes and determine their own schedules and desires. See *id.* at 42. Though the independent living model is expected to face resistance from organizations that benefit under the traditional medical model, it is expected to grow in popularity as older adults continue to express their desires to maintain independence. See *id.*

⁸⁷ AARP, *supra* note 11, at 24. One reason for this could be the increase in the number of homeowners. See Felicia Skelton et al., *Determining If an Older Adult Can Make and Execute Decisions to Live Safely at Home: A Capacity Assessment and Intervention Model*, 50 ARCHIVES OF GERONTOLOGY & GERIATRICS 300, 300 (2010) (stating that “[o]lder adults commonly report living safely and independently in their own home as one of their major life goals”); Pynoos et al., *supra* note 1, at 729; see also Eileen E. MaloneBeach & Karen L. Langeland, *Boomers’ Prospective Needs for Senior Centers and Related Services: A Survey of Persons 50-59*, 54 J. GERONTOLOGICAL SOC. WORK 116, 126 (2011) (noting elders were concerned with their ability to stay in their own homes and 43 percent wondered if current housing would remain suitable as they aged).

⁸⁸ MCINNIS-DITTRICH, *supra* note 13, at 7 (explaining that despite having more health problems, the majority of older adults “are not sick, not poor, and not living in nursing homes”).

⁸⁹ See *id.* at 114 (stating that maintaining “a sense of control and mastery over their environments” reduces the risk of depression in older adults); Karp et al., *supra* note 6, at 1445 (calling the responsibility to determine where someone lives “a charge that goes to the core of quality of life”).

⁹⁰ See Batavia, *supra* note 60, at 22.

⁹¹ See *id.*; Karp et al., *supra* note 6, at 1454 (stating that home health care can include nursing, physical therapy, and other clinical services and that states can also offer personal care services under the state plan).

⁹² Kubo, *supra* note 44, at 736.

⁹³ See JON PYNOOS ET AL., *New Challenges and Growing Trends in Senior Housing*, in THE NEW POLITICS OF OLD AGE POLICY 324, 330 (Robert B. Hudson ed., 2d ed. 2010) (observing that states have had more financial responsibility than the federal government for long-term care and, as a result, have been more innovative in their policies).

Follows the Person (MFP), individuals can use the money that would have been spent on their long-term care in assisted living to move back to and live in a community.⁹⁴ The project provides an example of government using already-existing funds to support the choices of older and disabled individuals while promoting inclusion.⁹⁵ In addition, communities are being developed that take into consideration the needs of older and disabled individuals, avoiding the need to make future accommodations.⁹⁶

Despite this progress and the clear preferences of many older adults to remain in their homes, many elderly Americans move into nursing homes and other institutionalized settings when they and their family members are no longer able to provide adequate care.⁹⁷ This may be due in part to the fact that *Olmstead* did not clarify how much states were required to do to place individuals in less restrictive settings.⁹⁸ While the Court made clear that individuals with disabilities have the right to live in the least restrictive environment pos-

⁹⁴ *Id.* at 331.

⁹⁵ See *id.* In addition to accommodations and proper supports within the home, communities themselves should be elder friendly. Dawn Alley et al., *Creating Elder-Friendly Communities: Preparations for an Aging Society*, 49 J. GERONTOLOGICAL SOC. WORK 1, 14 (2007). Elder-friendly communities may have increased senior housing, transportation, safety measures for pedestrians, and other options to meet the needs of older adults living in them. *Id.* Often, communities are built with the needs of younger citizens and families, possibly because elders tend to be left out of the planning process and zoning hearings. *Id.*

⁹⁶ See PYNOS ET AL., *supra* note 93, at 331. The authors argue for the importance of accommodations in all new buildings and communities through the concepts of universal design and visitability. *Id.* at 332. Universal design emphasizes the importance of all homes being accessible to those with disabilities, so that people who purchase a home at a young age will be able to live there as long as they desire and through various medical conditions. *Id.* at 333. Visitability refers only to the aspects of a home that affect visitors, such as the entrance, size of the front door, and bathroom accessibility. *Id.* at 332. Supporters of universal design and visitability argue that if settings are made navigable for those with the least mobility, all people will benefit. *Id.* One example of an accommodation for disabilities that resulted in benefits for the general population is the slanted curve at the end of sidewalks. *Id.* For further detail on the suggested requirements for accommodations, see generally Robin Paul Malloy, *Inclusion by Design: Accessible Housing and Mobility Impairment*, 60 HASTINGS L.J. 699 (2009) (assessing national regulations for building accessibility as well as various local and national mechanisms to promote inclusive housing).

⁹⁷ See Pynos et al., *supra* note 1, at 78 (noting that barriers to aging in place policies often push older people toward more restrictive settings such as nursing homes); see also SCHULZ & BINSTOCK, *supra* note 3, at 173 (stating that a person over age sixty-five has a forty percent chance of spending some time in a nursing home, and one in five people over age eighty-five is in a nursing home); Batavia, *supra* note 60, at 19 (observing that even when living at home, people with disabilities often have little control over their own services, as a result of having to rely on informal support and the medical model); Karp et al., *supra* note 6, at 1450–52 (exploring different types of institutional settings, including medically based assisted living, nursing homes, intermediate care facilities, and mental health institutions).

⁹⁸ See *Olmstead*, 527 U.S. at 604–06 (observing that the State must be given leeway in caring for a large and diverse population of disabled people, and suggesting that an effectively working plan and waiting list could be acceptable); Kubo, *supra* note 44, at 734 (stating that the Supreme Court in *Olmstead* “did not elaborate what constituted a reasonable pace or an effectively working plan”).

sible, and that the states must take action to make this possible, it also indicated that states do not have to take actions that would be overly burdensome, given the high numbers of people with disabilities that might have to be accommodated.⁹⁹ Accordingly, many advocates of aging-in-place policies found troubling the Court's language allowing states to take into account available resources before providing community care for individuals.¹⁰⁰ They feared that the states would use this language as a loophole to avoid providing people with community options.¹⁰¹

B. Guardianship for Elders In Light of *Olmstead*

Guardianship statutes directly affect a state's adherence to the mandates of *Olmstead*, as guardians are often given discretion over a person's residence, accommodations in the home, and the amount of home care received.¹⁰² All of these decisions relate substantially to a ward's level of isolation or inclusion in a community.¹⁰³ The models and statutes used by states to regulate public guardianship thus have an impact on the integration of the disabled population as a whole.¹⁰⁴ Subsection One discusses common models for public guardianship currently used among the states.¹⁰⁵ Subsection Two highlights recent trends in guardianship statute reform, giving a few recent changes as examples.¹⁰⁶

1. Common Models for Public Guardianship

Scholars have classified public guardianship systems into four models, which have been used in national studies of public guardianship programs.¹⁰⁷ These four models include the social service agency model, the court model,

⁹⁹ See *Olmstead*, 527 U.S. at 604–06 (stating that the reasonable-modifications regulation should be construed to “allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities”).

¹⁰⁰ See Batavia, *supra* note 60, at 35–36. Particularly since the recent economic recession, there have been fewer community-based options available. See Karp et al., *supra* note 6, at 1446.

¹⁰¹ See Batavia, *supra* note 60, at 35.

¹⁰² See Karp et al., *supra* note 6, at 1475 (explaining that some states require court approval for a move to an institution because, under *Olmstead*, the decision should be a last resort).

¹⁰³ See *id.* Ward is defined as “A person, usu. a minor, who is under a guardian’s charge or protection.” BLACK’S LAW DICTIONARY 1816 (10th ed. 2011).

¹⁰⁴ See Karp et al., *supra* note 6, at 1458–59 (stating that “[g]uardians can be the linchpin” that makes government programs designed to improve long-term care effective).

¹⁰⁵ See *infra* notes 107–124 and accompanying text.

¹⁰⁶ See *infra* notes 125–151 and accompanying text.

¹⁰⁷ See Schmidt et al., *supra* note 7, at 729.

independent agency model, and county model.¹⁰⁸ Notably, however, many states do not fit exactly into one model.¹⁰⁹

The majority of states have public guardianship programs that are housed within social service agencies.¹¹⁰ In those states, the agency sometimes provides services to the same individuals for whom the agency also is the guardian.¹¹¹ The agencies receive funding from multiple sources, including federal funds, grants, private donations, and estates.¹¹²

Some states follow a court model, where the court system houses the public guardianship office.¹¹³ As of 2005, three states followed this model, establishing the public guardian as an official of the court.¹¹⁴ The chief judge appoints the public guardians, and the court provides a uniform set of rules for the entire state.¹¹⁵ The majority of these programs are funded solely through the state budget.¹¹⁶

Others follow the independent agency model, where a state office provides guardianship, but not direct services, to individuals.¹¹⁷ The public guardian in this model is appointed by and operates as a part of the executive branch of government, which four states appeared to utilize in 2005.¹¹⁸ These programs, which four states appeared to utilize in 2005, received funding through their states.¹¹⁹

Finally, some states locate the public guardianship function at the county level.¹²⁰ Approximately eleven states utilized this scheme as of 2005.¹²¹ Some of these programs are coordinated at the state level but are carried out at the

¹⁰⁸ *See id.*

¹⁰⁹ Teaster et al., *supra* note 3, at 209 (citing Bayles & McCartney, *supra* note 36, whose article noted that only a “few states fit the exact organization described in the models,” and explaining that the same caveat applies to their article); *see, e.g.*, Schmidt, *supra* note 20, at 132–33 (describing North Dakota’s public guardianship program as a “hybrid of the social service agency model and the county model”).

¹¹⁰ *See* Teaster et al., *supra* note 3, at 211 (stating that about twenty-eight of the states, out of forty-one that had public guardianship statutes, utilized the social service agency model, including mental health, disability, or aging services agencies).

¹¹¹ *See id.*

¹¹² *Id.* at 218.

¹¹³ *Id.* at 210.

¹¹⁴ *Id.* (listing Delaware, Hawaii, and Mississippi as the states that utilized the court model at the time of the study).

¹¹⁵ *Id.* at 216 (describing how the chief administrative judge of the state has rulemaking power, resulting in statewide uniformity).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 210, 216.

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 210, 218 (listing Alaska, Illinois, Kansas, and New Mexico as states locating their public guardianship programs in independent state offices).

¹²⁰ *See id.* at 211–12.

¹²¹ *Id.* at 211.

county or regional level.¹²² The public guardian is appointed by the county government, and the offices are regulated by the state attorney general.¹²³ Of these programs, only two received state funds; most were funded by the counties and by client fees.¹²⁴

2. Trends in Guardianship Statute Reform

Guardians frequently make decisions regarding their wards' residences.¹²⁵ Scholars have long advised that institutional placement should happen only as a last resort and with third-party review.¹²⁶ Nonetheless, guardianship still often is associated with being forced to leave one's home against one's wishes.¹²⁷

Despite the multiple responsibilities a guardian assumes on behalf of another, and the tension that can arise when making difficult decisions potentially against a person's wishes, no universally recognized set of standards for guardianship exist.¹²⁸ The United States has at least fifty-one systems of guardianship, and practices of individual courts and guardians vary within each state.¹²⁹ Organizations such as the National Guardianship Association suggest that a universal standard of guardianship would go a long way toward protecting the rights and expectations of older adults and people with disabilities who have become incapacitated.¹³⁰ A national study of public guardianship published in

¹²² *Id.*

¹²³ *Id.* at 217.

¹²⁴ *Id.* at 218.

¹²⁵ See Kapp, *supra* note 5, at 4 (stating that unless a guardianship is explicitly limited, a guardian has the authority to make decisions about where and with whom an incapacitated individual will live).

¹²⁶ See Casasanto et al., *supra* note 24, at 560 (advising, in a Model Code written a decade before the *Olmstead* decision, that "the guardian shall not place the ward in an institution . . . without third-party review . . . even if the ward consents to the actions of the guardian"); Harriet McBryde Johnson & Lesly Bowers, *Civil Rights and Long-term Care: Advocacy in the Wake of Olmstead v. L.C.* ex rel Zimring, 10 ELDER L.J. 453, 460 (2002) (advising that elder law attorneys, in the wake of *Olmstead*, should "work aggressively to prevent unwanted confinement" if an elder does not want to live in a nursing home, and should seek information about the elder's daily life and capability to understand risks).

¹²⁷ See Schmidt et al., *supra* note 7, at 729 (observing that "[n]otwithstanding *Olmstead*, a majority of individuals under public guardianship are institutionalized in most states"); cf. West et al., *supra* note 1, at 5 (reporting that the proportion of the total older adult population residing in nursing homes has declined).

¹²⁸ See Hurme & Wood, *supra* note 29, at 1157. The National Guardianship Association has produced sets of standards, including a Model Code of Ethics for Guardians and standards of practice for guardians and guardianship agencies. *Id.* at 1163. A Commission on National Probate Court Standards included standards for court guardianship in their set of National Probate Court Standards. *Id.* Yet, few courts are aware of these standards. *Id.*

¹²⁹ See *id.* at 1162 (noting that there is considerable variance in guardianship programs between states and even among courts, judges, and guardians within the same state).

¹³⁰ See *id.* at 1163.

2007 made several recommendations for minimum standards of practice.¹³¹ In the time since the recommendations were made, however, not all states have enacted changes to their guardianship programs.¹³² Moreover, some states continue to lack public guardianship systems for older adults.¹³³

Despite the lack of uniform standards, many states have reformed their guardianship programs in recent years.¹³⁴ Reforms have moved toward thorough assessments of individuals' cognitive functioning and ability to receive and evaluate information, rather than focusing simply on diagnoses.¹³⁵ Many states have put into place extensive protections to better ensure that the potentially incapacitated individual is aware of the role of the guardian and what other less restrictive resources may be available.¹³⁶ In 2013, bills in several states addressed the critical issue of capacity assessment.¹³⁷ For example, Colorado put in place professional evaluations by qualified physicians or psychologists for contested guardianship petitions.¹³⁸ Tennessee also made changes to its capacity requirements, now providing that the examiner's report shall

¹³¹ Teaster et al., *supra* note 3, at 237. The recommendations called for a number of reforms to the way guardians are selected, the requirements of the guardians themselves, and minimal standards for ongoing services once a guardianship is put in place. *Id.*

¹³² See Schmidt et al., *supra* note 7, at 728.

¹³³ See *id.*

¹³⁴ See Teaster et al., *supra* note 3, at 205 (noting changes that had taken place since a 1981 national survey of public guardianship).

¹³⁵ See ABA Comm'n on Law & Aging, *Legislative Updates*, <http://www.abanet.org/aging/legislativeupdates/home.html>, archived at <http://perma.cc/43BB-HL9J>; ABA, *Capacity Definition & Initiation of Guardianship Proceedings* (2013), available at http://www.americanbar.org/content/dam/aba/administrative/law_aging/2014_CHARTCapacityandInitiation.authcheckdam.pdf, archived at <http://perma.cc/37PQ-DWBF>; Teaster et al., *supra* note 3, at 198; see, e.g., COLO. REV. STAT. § 15-14-102(5) (2013) (defining lack of functionality as "lack[ing] ability to satisfy essential requirements for physical health, safety, or self-care, even with appropriate and reasonably available technological assistance" and requiring that the person be cognitively "unable to effectively receive or evaluate information or both or make or communication decisions").

¹³⁶ See Teaster et al., *supra* note 3, at 198 (listing enhanced procedural due process and emphasis on limited guardianship as trends in guardianship reform); NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, UNIFORM GUARDIANSHIP AND PROTECTIVE PROCEEDINGS ACT (1998), § 304(b)(8) (1997), available at http://www.uniformlaws.org/shared/docs/guardianship%20and%20protective%20proceedings/ugppa_final_97.pdf, archived at <http://perma.cc/5S94-LS88> (requiring a "reason why limited is inappropriate" when unlimited guardianship is requested); N.Y. MENTAL HYG. LAW § 81.02(b) (McKinney 2014) (specifying that the person must be "unable to provide for personal needs or property management" and that the court must determine "person is likely to suffer harm").

¹³⁷ See generally ABA Comm'n on Law and Aging, *State Adult Guardianship Legislation: Directions of Reform*, at 18–19 (2013) [hereinafter ABA, *Directions of Reform*] (summarizing changes to guardianship laws in Colorado, Nevada, and Tennessee, all addressing the need for a thorough evaluation of a person's decision-making ability).

¹³⁸ See *id.* at 18; S.B. 13-077, 69th Leg., 1st Sess. (Colo. 2013). Nevada and Tennessee made changes to capacity assessment as well. ABA, *Directions of Reform*, *supra* note 137, at 18.

be prima facie evidence of the respondent's disability and need for a conservator, unless the report is "contested and found to be in error."¹³⁹

Some states have reformed statutes further to allow for limited guardianship, enabling people to retain as much autonomy as they are able.¹⁴⁰ Historically, court-appointed guardians were vested with broad and plenary powers.¹⁴¹ After recent reforms, many state laws instead require that guardianship orders be narrowly tailored to meet individuals' needs.¹⁴² Most statutes allow or encourage courts to limit the scope of the guardianship to areas where the individual lacks capacity to make his or her own decisions.¹⁴³ In 2013, at least two states strengthened the wording of their statutes to explicitly state that certain personal rights of the ward should be protected.¹⁴⁴

In addition, states often now require meaningful notice and pleadings standards.¹⁴⁵ The petitions for guardianship must be brief, clear, and specific.¹⁴⁶ In addition to providing notice to the potential wards themselves, states are beginning to expand the list of people who must receive notice, as Nevada did in 2013.¹⁴⁷ Tennessee, another state that clarified its statutes in 2013, now requires that notice be served on the respondent's closest relatives and any per-

¹³⁹ ABA, Directions of Reform, *supra* note 137, at 19; S.B. 555, 108th Leg., 1st Sess. (Tenn. 2013); H.B. 692, 108th Leg., 1st Sess. (Tenn. 2013).

¹⁴⁰ See ABA, Directions of Reform, *supra* note 137, at 16.

¹⁴¹ See Frolik, *supra* note 36, at 739 (discussing concerns that guardianship systems in the past had become too dependent on plenary guardianships).

¹⁴² See ABA, Directions of Reform, *supra* note 137, at 16; *see, e.g.*, WIS. STAT. §§ 54.10(d), 54.25(2)(d)(3), 54.18(1) (2014) (specifying that the guardian "may be granted only those powers necessary to provide . . . in a manner that is appropriate to the ward and constitutes the least restrictive form of intervention" and further clarifying that "[a]ny other right or power is retained by the ward"); OR. REV. STAT. §§ 125.315(a), 125.300(3) (2014) (stating that the design of the guardianship must encourage "maximum self-reliance and independence" and that the guardian has custody of the protected person "except to extent of any limitation under the court of appointment").

¹⁴³ See ABA Comm'n on Law and Aging, Limited Guardianship of the Person, last updated 12/31/08, available at http://www.americanbar.org/content/dam/aba/migrated/aging/legislative_updates/pdfs/chart_limited_authcheckdam.pdf, archived at <http://perma.cc/5M9K-E5PA>; Teaster et al., *supra* note 3, at 212 (noting that virtually all statutes now include language allowing or encouraging limited guardianship); *see, e.g.*, MINN. STAT. § 524.5-310(c) (2014) (granting guardians "only those powers necessitated by ward's limitations and demonstrated needs"); MD. CODE ANN., EST. & TRUSTS § 13-708(a)(1) (2014) (granting guardians "only those powers necessary to provide for the demonstrated need of the disabled person").

¹⁴⁴ See ABA, Directions of Reform, *supra* note 137, at 16; ASSEMB. B. 937 (Ca. 2013) (providing that the control of a conservator shall not extend to personal rights including "the right to receive visitors, telephone calls, and personal mail, unless specifically limited by a court order"); S.B. 555, 108th Leg., 1st Sess. (Tenn. 2013) (requiring that letters of conservatorship must specify the powers that have been removed from the ward, all other powers being retained).

¹⁴⁵ See ABA, Directions of Reform, *supra* note 137, at 2.

¹⁴⁶ *Id.* (stating that "specificity . . . as well as clarity and breadth of the notice, are basic safeguards to protect rights of the respondent").

¹⁴⁷ See *id.* The persons upon whom notice must be served now include the proposed guardian if not the petitioner, the VA if the person receives VA benefits, the Department of Health if the person receives Medicaid, and other care providers. *Id.*

son with whom the individual is living.¹⁴⁸ In sharp contrast to previous policies where judges assigned guardians based simply on medical diagnoses, these changes increase the protections for elders by allowing more people, including the elder, to contribute to the capacity determination.¹⁴⁹

Altogether, these reforms reflect an increase in societal respect for the autonomy of older and disabled individuals, by discouraging others from filing guardianship petitions while the individuals are still mostly able to care for themselves.¹⁵⁰ This trend is consistent with the growing respect for the disabled community that motivated the enactment of the ADA and the Supreme Court's decision in *Olmstead*.¹⁵¹

III. HOW STATES CAN USE PUBLIC GUARDIANSHIP STATUTES TO MEET THE MANDATES OF THE ADA AND *OLMSTEAD*

This Part argues that proper oversight of public guardianship can help a state fulfill the mandates of the ADA and the U.S. Supreme Court's 1999 decision in *Olmstead v. L.C. ex rel. Zimring*.¹⁵² Section A submits that the balance between autonomy and protection sometimes necessitates guardianship and that this is particularly true among those who would qualify for public guardianship.¹⁵³ Section B then argues that, despite its shortcomings, the social service agency model is an appropriate model for fulfilling the need.¹⁵⁴ Finally, Section C provides suggestions for implementing the necessary court oversight and holding public guardians accountable.¹⁵⁵

A. *The Need for Public Guardianship*

Although guardianship removes some aspects of an individual's self-autonomy, the balance between autonomy and protection sometimes requires a guardian.¹⁵⁶ Some scholars, however, argue that *Olmstead* requires no guardianship at all.¹⁵⁷ Instead, they advocate for supported decision making, where

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ Salzman, *supra* note 8, at 294; Salzman, *supra* note 20, at 173.

¹⁵¹ See *Olmstead*, 527 U.S. at 600–01; Mary Crossley, *Becoming Visible: The ADA's Impact on Heath Care for Persons with Disabilities*, 52 ALA. L. REV. 51, 51 (2000).

¹⁵² See *infra* notes 156–289 and accompanying text.

¹⁵³ See *infra* notes 156–182 and accompanying text.

¹⁵⁴ See *infra* notes 183–198 and accompanying text.

¹⁵⁵ See *infra* notes 199–289 and accompanying text.

¹⁵⁶ See Schmidt et al., *supra* note 7, at 728 (discussing the vulnerability of “decisionally incapable” individuals and their need for guardians).

¹⁵⁷ See Salzman, *supra* note 20, at 178 (arguing that guardianships unnecessarily isolate wards from their communities). In another article, the same scholar argues that even in a community setting, guardianship prevents an individual from full participation in society. Salzman, *supra* note 8, at 283. Other alternatives are available as well, if elders are able to plan for their futures before they become

trusted family members or other providers make suggestions to a person with cognitive limitations rather than becoming the guardian for that person.¹⁵⁸ The individual retains the ability to make the final decision.¹⁵⁹

This model, however, works best for adults who retain some mental capacity and who have a trusted friend or family member to be appointed as supported decision maker.¹⁶⁰ The model assumes that a person will be able to advocate in some way and ultimately can express a decision.¹⁶¹ Public guardianship, on the other hand, assumes that a person does not have family to assist or that the family members are abusive or exploiting.¹⁶² Public guardianship thus is necessary to serve those who are most vulnerable.¹⁶³

The process of finding appropriate housing, in particular, often necessitates assistance, especially for individuals in need of public guardians.¹⁶⁴ Guardians can help navigate the housing system on behalf of the individual to obtain or maintain community living.¹⁶⁵ Without assistance, many of these individuals end up moving to or remaining in institutions such as nursing homes.¹⁶⁶

incapacitated, including using powers of attorney and advance mental health directives. *See* Ellen A. Callegary, *Guardianship & Its Alternatives in the 21st Century*, 47 JUN MD. B.J. 18, 24 (2014) (discussing alternatives to guardianship that have improved community support for people with disabilities).

¹⁵⁸ *See* Salzman, *supra* note 20, at 231–32.

¹⁵⁹ *See id.*

¹⁶⁰ *See* Salzman, *supra* note 8, at 306; *see also* Callegary, *supra* note 157, at 20 (noting that “[i]n many cases, guardianship is absolutely necessary” to protect a person,” though a guardian should be appointed only as the least restrictive alternative); Schmidt, *supra* note 20, at 83 (suggesting that for people who are incapacitated, a guardian’s ability to make surrogate decisions allows the person to remain autonomous).

¹⁶¹ *See* Salzman, *supra* note 8, at 306.

¹⁶² *See* Teaster et al., *supra* note 3, at 195–96 (referring to public guardianship wards as “unable to care for themselves and typically poor, alone, or ‘different’”); Mary Twomey et al., *From Behind Closed Doors: Shedding Light on Elder Abuse and Domestic Violence in Late Life*, 6 J. CTR. FAMILIES, CHILD. & CTS. 73, 75 (2005) (noting that the majority of elder abuse is perpetuated by family members, in particular spouses and adult children). Some possible causes of abuse include mental illness or substance abuse of the perpetrator, financial dependency on the victim, and long-term violent relationships that extend into old age. Twomey et al., *supra* at 75–76.

¹⁶³ *See* Schmidt, *supra* note 20, at 83 (observing that people who are incapacitated but do not have family or friends to serve as guardians, and cannot afford professional guardians, are “almost unimaginably helpless”).

¹⁶⁴ *See* Karp et al., *supra* note 6, at 1454 (discussing waiting lists, limited options, and the need for advocacy of guardians); *id.* at 1458 (explaining that guardians are responsible for society’s most at-risk members and are “often . . . the sole line of defense against abuse, neglect, and exploitation”); Teaster et al., *supra* note 3, at 195–96 (describing public guardianship wards as “unable to care for themselves and typically poor, alone, or ‘different’”).

¹⁶⁵ *See generally* Karp et al., *supra* note 6 (discussing ways in which guardians can facilitate residential decisions and often prolong an individual’s ability to stay in the community).

¹⁶⁶ *See* Schmidt, *supra* note 20, at 136 (finding that money was saved in residential costs per client because people under public guardianship were relocated to less restrictive homes); *see also* Robin Fields et al., *Guardians for Profit (Part Four): For Most Vulnerable, a Promise Abandoned*,

Maintaining community housing for those who already have it aligns with the mandates of *Olmstead*, since allowing people to live in their communities with people of all ages and abilities promotes the *Olmstead* goals of inclusion and integration.¹⁶⁷ As the Supreme Court held in *Olmstead*, states are constitutionally mandated to take action to ensure inclusion and integration.¹⁶⁸ Properly functioning public guardianship programs could work alongside existing programs by providing support to help more elders keep their homes.¹⁶⁹ Accordingly, failing to provide assistance to people who are incapacitated could lead to a greater proportion of the disabled and older populations living in institutions.¹⁷⁰ Public guardianship can help states fulfill the mandates of *Olmstead* by allowing those who would otherwise end up institutionalized to remain in their homes with some assistance.¹⁷¹

Staying in one's home, however, can be challenging and require support and advocacy.¹⁷² A number of practical barriers make it difficult for older adults to remain in their own homes, despite the agreement among professionals and elderly citizens that living at home is preferable.¹⁷³ For one, houses are not often built to accommodate older adults as they become frailer.¹⁷⁴ When

L.A. TIMES, Nov. 16, 2005, at A1 (telling the story of an elder who died soon after being placed in a nursing home, after an underfunded public guardianship agency declined to take her case). If the person needing guardianship has mental illness, he or she might have more serious physical ailments as well. Sherry M. Cummings & Nancy P. Kropf, *Aging with a Severe Mental Illness: Challenges and Treatments*, 54 J. GERONTOLOGICAL SOC. WORK 175, 176 (2011) (finding that people with severe mental illness experience increased physical illnesses as they age).

¹⁶⁷ See *Olmstead v. L.C.*, 527 U.S. 581, 600–01 (1999); Pynoos et al., *supra* note 1, at 85. The “aging in place” programs work to put in place systematic protections, in hopes that more elders will be able to stay in their homes. See generally Pynoos et al., *supra* note 1, at 78 (discussing the need for and challenges of providing age-friendly housing and arguing for policies that promote the option to age in place).

¹⁶⁸ See *Olmstead*, 527 U.S. at 587; Teaster et al., *supra* note 3, at 230 (stating that *Olmstead* provides a powerful mandate to fund public guardianship programs).

¹⁶⁹ See Karp et al., *supra* note 6, at 1446 (stating that “guardians are a key piece in the puzzle for policy-makers in designing a workable system for long-term supports and services”); Teaster et al., *supra* note 3, at 233.

¹⁷⁰ See Schmidt, *supra* note 20, at 136; Fields et al., *supra* note 166.

¹⁷¹ Schmidt, *supra* note 20, at 139 (providing examples of people helped by public guardianship, including an eighty-three-year-old woman who suffered malnutrition and severe beatings while living with an abusive son, before a hospital pursued guardianship on her behalf); Karp et al., *supra* note 6, at 1461–62 (providing several case examples of individuals who avoided institutional care due to the interventions of their guardians).

¹⁷² SCHULZ & BINSTOCK, *supra* note 3, at 233; see also Pynoos et al., *supra* note 1, at 81 (finding that older adults may restrict their activities and put themselves at future risk for institutionalization due to the unmet needs for supportive features in their homes). Approximately one million older people have unmet needs, including hand rails, grab bars, and accessible bathrooms. See Pynoos et al., *supra* note 1, at 81; U.S. Dep’t of House. & Urban Dev., U.S. Dep’t of Commerce, *Supplement to the American Housing Survey for the United States* 90 tbl.2-15 (2001).

¹⁷³ See Pynoos et al., *supra* note 1, at 78.

¹⁷⁴ *Id.* at 81. Many older adults require assistance with activities of daily living and have difficulty climbing stairs. *Id.*; see also West et al., *supra* note 1, at 5 (reporting that over thirty-eight percent of

older adults are no longer mobile and functional within their own homes, they become at risk for falls and injuries, and have an overall greater dependence on others.¹⁷⁵ For a number of reasons, older adults are often unable to easily modify their own homes.¹⁷⁶

Furthermore, an individual's health or other considerations may necessitate a move to more restricted living against his or her wishes.¹⁷⁷ This occurs when a person's safety is truly endangered and the person does not have the decision-making capacity to avoid this danger.¹⁷⁸ Occasionally, the person under guardianship agrees with the assessment and makes the choice to move to a more restrictive setting.¹⁷⁹ Even when the ward agrees with the decision, the transition may involve long waiting lists, thorough searches for the appropriate institution, and the selling of a home, among other issues.¹⁸⁰ The various aspects of relocation can be overwhelming, and changes in location can be disturbing for people who have dementia.¹⁸¹ Guardians can play an important role in facilitating the process by handling the situation with care and respect.¹⁸²

adults over 65 had disabilities in 2010 and that the most common difficulties were walking, climbing stairs, and doing errands alone).

¹⁷⁵ Pynoos et al., *supra* note 1, at 81 (stating that falls are often the outcome of home hazards and lack of supportive features). One scholar cites statistics from surveys performed by the Centers for Disease Control and Prevention, finding that approximately one-third of people over age sixty-five living in the community experience a fall each year, and over three-quarters of these falls take place in and around the home. *Id.* at 80; CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., WHAT YOU CAN DO TO PREVENT FALLS 2 (2008), available at http://www.cdc.gov/homeandrecreationalafety/pubs/English/brochure_Eng_desktop-a.pdf, archived at <http://perma.cc/B2CR-UAHD>.

¹⁷⁶ See Pynoos, *supra* note 1, at 82. Reasons include lack of expertise, psychological barriers, and insufficient funding. *Id.*

¹⁷⁷ See Karp et al., *supra* note 6, at 1459. Scholars debate whether guardians should use a "best interest" standard, resembling a parent-child relationship, or a "substituted decision" standard, making the decision the ward would have made before he or she became incapacitated, even if this decision does not appear best to the guardian. See Casasanto et al., *supra* note 24, at 545. Some scholars suggest that in most situations, guardians ethically should defer to the substituted decision standard. *Id.* at 548. The Uniform Guardianship & Protective Proceedings Act uses a hybrid of the best interest and substituted decision standards. See Johns, *supra* note 3, at 1558; NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS, *supra* note 136, § 214(a)-(b).

¹⁷⁸ Karp et al., *supra* note 6, at 1459.

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See *id.*

¹⁸² See *id.* Sometimes, however, guardians assist wards with moving to institutions when the transition is unwanted. See Robin Fields et al., *Guardians for Profit (Part One): When a Family Matter Turns into a Business*, L.A. TIMES, Nov. 13, 2005, at A1 (describing a conservator who moved a 95-year-old woman to a care home without informing the woman's daughter); see, e.g., Jack Leonard et al., *Guardians for Profit (Part Two): Justice Sleeps While Seniors Suffer*, L.A. TIMES, Nov. 14, 2005, at A1 (telling the stories of conservators who arranged to purchase their clients' homes for themselves or allowed their own family members to live with them after moving the elder to a nursing home).

B. The Social Service Agency Model Can Meet the Mandates of Olmstead

Several scholars have observed that the social service agency model of public guardianship contains an inherent conflict of interest, as agencies have an incentive to steer their wards toward services provided by the agency.¹⁸³ These scholars fear that under this model, if a ward is unable to pay or is unwilling to utilize other services offered by the agency, the agency will not zealously advocate for the interests of that individual.¹⁸⁴ Accordingly, these scholars argue that this model is inherently unsuccessful and should be avoided by states.¹⁸⁵

While the conflict of interest is disconcerting, this argument overlooks one reason the social service agency model may be so popular among states: the agencies providing direct services to individuals are often the ones most familiar with the individuals' situations and needs.¹⁸⁶ If an elder has few or no family members or friends, the person who sees him or her the most may be a social worker or volunteer from an agency.¹⁸⁷ The elder's need for assistance

¹⁸³ See Schmidt, *supra* note 20, at 98 (stating that the social service agency model presents a clear conflict of interest); Teaster et al., *supra* note 3, at 230 (expressing concern that the model “presents a grave conflict of interest”); Lou Ann Anderson, *Abusive Guardianships and Their Liberty-looting, Property-poaching Nature (TX)*, ESTATE OF DENIAL: SHINING LIGHT ON THE DARK SIDE OF ESTATE MANAGEMENT (Apr. 3, 2014), <http://www.estateofdenial.com/2014/04/03/abusive-guardianships-and-their-liberty-looting-property-poaching-nature-tx/>, archived at <http://perma.cc/7K89-E29N> (opining that protective services employees often take part in questionable guardianship cases, and agencies often “derive direct or indirect benefit from abusive probate actions”).

¹⁸⁴ See Teaster et al., *supra* note 3, at 230. For example, if a protective service agency served as guardian, the guardian might feel pressured to push a ward toward services provided by the agency or not to advocate for scarce resources within the agency. Lori Stiegel & Ellen Klem, *Explanation of the “Adult Protective Services Agency Authority to Act as Guardian of a Client: Guidance and Provisions from Adult Protective Services Laws, but State” Chart*, at 1 (2007), available at http://www.americanbar.org/content/dam/aba/migrated/aging/about/pdfs/APS_as_Guardian_Explanation.auth.checkdam.pdf, archived at <http://perma.cc/Z5TL-H5LN>. Furthermore, the protective services agency may need to investigate allegations of abuse by a public guardian. *Id.* To minimize this risk, states can prohibit protective service agencies from acting as guardians for their clients or limiting the agency to serving as temporary guardian. *Id.*

¹⁸⁵ See Teaster et al., *supra* note 3, at 236 (expressing concern over a social service agency representative's ability to “effectively and freely advocate for the ward”).

¹⁸⁶ See Winsor C. Schmidt et al., *Study Finds Certified Guardians with Legal Work Experience Are at Greater Risk for Elder Abuse than Certified Guardians with Other Work Experience*, 7 NAELA J. 171, 191–92 (2011) (suggesting that the work of a guardian—often involving social support, activities of daily living, and caregiver support—might more closely resemble that of a social services worker than legal work). See generally Karp et al., *supra* note 6;

¹⁸⁷ See generally Karp et al., *supra* note 6, at 1461–62 (discussing ways in which the needs of individuals can be addressed by the workers of social service agencies, who often provide very basic day-to-day services). *But see* Campbell Killick & Brian J. Taylor, *Professional Decision Making on Elder Abuse: Systematic Narrative Review*, 21 J. ELDER ABUSE & NEGLECT 211, 211 (2009) (reviewing literature finding that practitioners often have little insight or guidance for decision making). Opinions about effectiveness and potential harm to the elder were factors in whether adult protection workers responded to potential abuse. *Id.* at 229. There are complex ethical dilemmas for these service

may not come to the attention of anyone else who would potentially petition for guardianship.¹⁸⁸

Furthermore, employees and administrators of public service agencies are frequently involved in advocating for better services and attend trainings on the needs of the population they serve.¹⁸⁹ Thus, the same individuals who are guardians and regularly visit the wards have been trained in issues that affect elders.¹⁹⁰ For this system of guardianship, there is no need to create an office or new commission, as the guardianship program is set up within agencies that already exist.¹⁹¹

In addition, people who work in social service agencies already undergo training for their jobs and familiarize themselves with current issues regarding guardianship.¹⁹² Many scholars have emphasized that potential guardians should be trained in general psychology as well as elder-specific issues, including depressive symptoms, illnesses common to elders, medications, and suicide risk and capacity.¹⁹³ In addition, guardians, or the volunteers who

providers and possibly inadequate supervision or guidance for them to navigate these issues. *See id.* at 228.

¹⁸⁸ *See generally* Karp et al., *supra* note 6. This is particularly important for elders who have severe mental illness. *See* Cummings & Kropf, *supra* note 166, at 176. If the elders were mentally ill for much of their lives, they might enter older adulthood without children or social supports and with minimal education or access to resources. *See id.* at 177. These factors suggest that this population might be particularly likely to need public guardianship. *See id.*; *see also* Namkee G. Choi & James Mayer, *Elder Abuse, Neglect, and Exploitation: Risk Factors and Prevention Strategies*, J. GERONTOLOGICAL SOC. WORK, Oct. 2000, at 6 (stating that maltreated elders tend to be over eighty years old, frail, and suffering from cognitive and mental impairments).

¹⁸⁹ *See* Regina M. Bures et al., *Strengthening Geriatric Social Work Training: Perspectives from the University at Albany*, 39 J. GERONTOLOGICAL SOC. WORK 111, 118–24 (2003) (describing the Hartford Initiative, which seeks to train social work students, many of whom will go on to work in social service agencies that target elders, on elder-specific issues).

¹⁹⁰ *See* Elisia Gatmen Kupris, *Protection of Our Elderly: A Multidisciplinary Collaborative Solution for Alaska*, 30 ALASKA L. REV. 47, 57 (2013) (suggesting that increased education and training could benefit physicians, other service providers, and non-professionals in recognizing and reporting potential elder abuse). *But see* Kelly Mills-Dick et al., *Evaluation Through Collaboration: A Model Program of Agency-Based Training in Geriatric Social Work*, 50 J. GERONTOLOGICAL SOC. WORK 39, 53 (2007) (arguing that agencies do not have the benefit of cutting-edge research and that continuing education programs frequently do not address the issues of aging).

¹⁹¹ *See* Teaster et al., *supra* note 3, at 210.

¹⁹² *See* Karp et al., *supra* note 6, at 1458 (noting that although the guardian may be a stranger to the ward, he or she may have familiarity with the social service system); Teaster et al., *supra* note 3, at 219 (finding that the independent state office and social service agency models had more mechanisms for staff training and evaluation than the court and county models); *see also* McINNIS-DITTRICH, *supra* note 13, at 353 (describing the purpose and establishment of Area Agencies on Aging and stating that they were designed “to promote good health among older adults so that they . . . could age in place more successfully”).

¹⁹³ *See generally* McINNIS-DITTRICH, *supra* note 13 (addressing biological, physical, and social assessment issues of which geriatric social workers should be aware). Suicide and depression rates in elders are very high, particularly among those who are isolated. *Id.* at 223 (suggesting that older adults who lacked connections to family and friends may feel they would not be missed if they died). De-

spend time face-to-face with the wards, should recognize the differences between true incapacitation and mere confusion.¹⁹⁴ Staff members of social service agencies likely have received much of this training in mandated orientation or ongoing trainings.¹⁹⁵

Thus, the benefits of the social service agency model mitigate its shortcomings.¹⁹⁶ For states that already use this model with some success, steps can be taken to reduce the potential effect of the conflict of interest, rather than avoid the model completely.¹⁹⁷ The social service agency model has the potential to meet the mandates of *Olmstead* and the ADA, if the agencies train the guardians they employ to promote independence and community living, and if proper safeguards, discussed in the following sections, are in place.¹⁹⁸

C. Guarding the Guardians: Ensuring Public Guardianship Programs Help Rather Than Harm

Generally, those who require public guardians are among the most vulnerable in the population.¹⁹⁹ They often have no family members or nearby friends to advocate for them or help them make decisions.²⁰⁰ Furthermore, there is often no one to hold the guardians accountable for their conduct, as the wards themselves have been deemed incompetent.²⁰¹ Thus, the need for over-

pression in older adults is commonly underdiagnosed and undertreated. *Id.* at 111. Adjustment disorder is also prevalent, particularly after life-changing events such as the loss of a partner or retirement. *Id.*

¹⁹⁴ *Id.* at 64 (discussing changes to the brain and memory associated with aging and differentiating between memory loss and merely taking longer to access a memory).

¹⁹⁵ *See id.* at 8–12, 353. *But see* Austin G. Rinker, *Recognition and Perception of Elder Abuse by Prehospital and Hospital-Based Care Providers*, 48 ARCHIVES OF GERONTOLOGY & GERIATRICS 110, 115 (2009) (finding ‘ that there was ambiguity between what is perceived and what is reported by providers). The researchers suggest that a statewide training program is needed to ensure prehospital and hospital care providers are aware of the signs of elder neglect and their duty to report abuse. *Id.*

¹⁹⁶ *See* MCINNIS-DITTRICH, *supra* note 13, at 8–12, 353.

¹⁹⁷ *See* Casasanto et al., *supra* note 24, at 548 (speculating that with a guardian who develops an ongoing relationship with the ward and service providers, and encourages personal growth, an adult with developmental disabilities will be able to benefit from less restrictive settings and function more independently).

¹⁹⁸ *See id.*

¹⁹⁹ *See* Schmidt et al., *supra* note 7, at 728.

²⁰⁰ Jeff Kelly et al., *Courts Strip Elders of Their Independence*, BOS. GLOBE, Jan. 13, 2008, at A1 (referring to elders without relatives or friends to serve as guardians as “unbefriended elders”).

²⁰¹ *Id.* (stating that in cases concerning elders without family or close friends, judges depend on the assertions of petitioners when determining whether a person is incapacitated). Furthermore, the reporters found that after the probate court appointed a guardian, they did not track or monitor the ward to determine if the guardianship continued to be necessary or “even learn whether they are alive or dead.” *Id.* Elder law attorneys surmised that judges spent less time on guardianship cases due to the fact they were unlikely to be adversarial. *Id.* (quoting Laura A. Sanford, an elder law attorney).

sight over public guardianships may be even greater than the need to hold other guardians responsible.²⁰²

This Part proposes important steps that states can take to minimize the risks public guardianships can pose to elders.²⁰³ As has been recommended by national studies of public guardianship, states should have written policies in place, in order to provide consistent rules and practices in offices across the state.²⁰⁴ To the same end, states should develop uniform reporting forms, electronic reporting, and periodic compilation of the information reported to the state.²⁰⁵ All of these improvements would streamline the guardianship offices within the states.²⁰⁶ Furthermore, they would provide data for more funding and for justification of the programs to state legislatures.²⁰⁷

Subsection 1 of this section argues that temporary or partial guardianship is one way to bring statutes in compliance with the ADA, by allowing adults who have capacity to make their own housing decisions whenever possible.²⁰⁸ Subsection 2 then emphasizes the importance of court oversight and guardian accountability.²⁰⁹ Subsection 3 argues that proper funding of guardianship programs also could work to minimize the risk of neglect by public guardians.²¹⁰

1. Limited Guardianship

Public guardianship statutes should emphasize that temporary or partial guardianship is to be awarded whenever possible.²¹¹ Doing so would provide individuals with greater autonomy in areas where they can take care of them-

²⁰² See Casasanto et al., *supra* note 24, at 545 (stating that public guardians and public guardianship organizations may need to adopt standards beyond those included in a model code, due to the particular dangers of public guardianship); see also Fields et al., *supra* note 182 (explaining that conservatorship began as a way to help families protect their relatives from predators and self-neglect, but over the years became a profession that is often corrupt).

²⁰³ See *infra* notes 204–289 and accompanying text.

²⁰⁴ Teaster et al., *supra* note 3, at 237.

²⁰⁵ *Id.* at 237; Kelly et al., *supra* note 200.

²⁰⁶ See Teaster et al., *supra* note 3, at 237.

²⁰⁷ *Id.* Scholars have noted that Virginia was the only state adequately tracking the amount saved by the state through their public guardianship program. *Id.* They recommended that other states use Virginia's tracking system as a model. *Id.*

²⁰⁸ See *infra* notes 211–231 and accompanying text.

²⁰⁹ See *infra* notes 232–275 and accompanying text.

²¹⁰ See *infra* notes 276–289 and accompanying text.

²¹¹ See generally Frolik, *supra* note 36 (exploring possible motivations for judges to prefer plenary over limited guardianships and discussing the benefits of limited guardianship). Several states include these provisions already. See, e.g., ARIZ. REV. STAT. § 14-5303(B)(8) (2014) ("If a general guardianship is requested, the petition must state . . . why limited is not appropriate"); PA. CONS. STAT. § 5512.1(a) (2014) ("The court shall prefer limited guardianship."); VT. STAT. ANN. § 3069(c) (2014) ("The court shall grant powers to the guardian in the least restrictive manner appropriate to the circumstances.").

selves while providing assistance in areas where they need it.²¹² If individuals who were capable of making housing decisions and navigating the system retained the authority to do so, a greater number of older adults who were capable of maintaining community living presumably would choose to remain in the community.²¹³ Greater numbers of older adults in the community would increase the integration of the older adult population.²¹⁴ Thus, statutes providing for limited guardianship would help states fulfill the mandates of *Olmstead*.²¹⁵

Proper use of temporary and partial guardianships could ease the burden of public guardians, as well as increase the autonomy of wards.²¹⁶ Using Tennessee's revised statute as a model, states should require that orders for guardianship or conservatorship explicitly state the rights that have been removed from the individual, with the individual retaining all other rights.²¹⁷ Easing the

²¹² See Frolik, *supra* note 36, at 748–49. People who are unable to make proper medical decisions or properly care for themselves, but are still able to make most decisions including where to reside, should not have these decisions placed in the hands of others. See *id.* Sometimes, even when a person appears to be totally incapacitated, a fine-tuned assessment will show that they have some areas of decision-making capability. See ABA COMM'N ON LAW AND AGING, AMERICAN PSYCHOLOGICAL ASSOC. & NAT'L COLLEGE OF PROBATE JUDGES, JUDICIAL DETERMINATION OF CAPACITY OF OLDER ADULTS IN GUARDIANSHIP PROCEEDINGS: A HANDBOOK FOR JUDGES 2 (2006) [hereinafter ABA, HANDBOOK], available at <http://www.apa.org/pi/aging/resources/guides/judges-diminished.pdf>, archived at <http://perma.cc/XVM9-B4MR>. But see Salzman, *supra* note 20, at 176 (arguing that even with limited guardianship, others may treat the individual as if he or she were fully incapacitated).

²¹³ See AARP, *supra* note 11, at 24 (finding that 80 percent of people aged forty-five and older wished to remain in their homes as long as possible). Sometimes, however, guardians and conservators take advantage of the need for home improvement by making changes that the elder does not truly need or want. See Fields et al., *supra* note 182 (giving an example of a conservator who made expensive changes to an elder's home, including paying her own sister \$1,550 to paint the house, using the elder's money). This emphasizes that it is vital for guardians to communicate with the people they serve and that the guardianship should be limited to those areas that are truly needed. See *id.*

²¹⁴ See AARP, *supra* note 11, at 24. There are many reasons to encourage older adults to stay in their communities, for the benefit of society as well as the elders themselves. See Alley et al., *supra* note 95, at 2 (explaining that older adults contribute to communities in many ways, including devoting time and energy to local issues, participating as volunteers, and giving to charity organizations); Kupris, *supra* note 190, at 47 (stating that Alaskan seniors are employers, employees, volunteers and “the pioneers who developed our state and continue to improve the communities where they live”) (citation omitted). Older adults may feel more committed to their communities than their younger neighbors, as they may have lived in their homes for many years. See Kupris, *supra* note 190, at 47.

²¹⁵ See Frolik, *supra* note 36, at 752.

²¹⁶ See *id.* at 750–51.

²¹⁷ See ABA, Directions of Reform, *supra* note 137, at 2 (reporting that Tennessee SB 555 and HB692 changed the definition of the “conservator” from a focus on supervision and assistance to “the exercise of ‘the decision-making rights and duties . . . in one or more areas in which the person lacks capacity’” and further provides that “the letters of conservatorship must either recite the specific powers removed . . . or have attached the court order specifying the powers removed, all other powers being retained by the individual”); see also ABA, HANDBOOK, *supra* note 212, at 2 (listing examples of rights that may be retained by the individual, including the right to spend small amounts of money, make choices about roommates and leisure activities, and determine participation in religious activities).

burden of public guardians would promote the goals of *Olmstead* by allowing guardians to devote proper amounts of energy to individual wards.²¹⁸ Guardians would be able to devote more time to advocating for individual needs, including home adaptations and placements in communities.²¹⁹

Moreover, temporary or partial guardianship should be granted only when it is truly the least restrictive option.²²⁰ Most guardianship statutes currently include this requirement.²²¹ Statutes also should state explicitly that a judge should seek as many viewpoints as possible, including those of professionals, relatives, and neutral evaluators, and allow the elder him or herself a chance to speak at the hearing or by videotape.²²² Clear guidelines for determining capacity should be stated within the statute, and an independent psychiatric evaluation should be performed whenever possible.²²³ All of these changes would work to ensure that judges award guardianship only when less restrictive options, such as home care, money management, or nursing services, will not meet the needs of the individual.²²⁴ These standards engender respect for an elder's autonomy, make clear that removing decision-making authority should be a last resort, and thus promote the values of *Olmstead*.²²⁵

To minimize the risk of removing more personal autonomy than is appropriate, legal representation should be provided for the elders.²²⁶ For example, elders who are served with petitions for guardianship may not understand the

²¹⁸ See Teaster et al., *supra* note 3, at 212.

²¹⁹ See *id.*

²²⁰ See ABA, Directions of Reform, *supra* note 137, at 16.

²²¹ See, e.g., R.I. GEN. LAWS § 33-15-1 (2014) (intending to “make available least restrictive form of guardianship”); TENN. CODE § 34-1-127 (2014) (stating that the “[c]ourt has affirmative duty to ascertain and impose the least restrictive alternatives”).

²²² See ABA, HANDBOOK, *supra* note 212, at 3. A handbook designed by the ABA gives guidelines for judges who assess capacity in elders. *Id.* The handbook suggests that judges engage in five different steps to determine capacity: screening the case, gathering information, conducting the hearing, making the determination, and ensuring oversight if the guardian is appointed. *Id.* Throughout the five steps, the judge should review six factors: medical condition, cognition level, everyday functioning, values and preferences, risk and level of supervision, and means to enhance capacity. *Id.* But see Fields et al., *supra* note 182 (finding that court oversight was “erratic and superficial” despite requirements in place to ensure oversight).

²²³ See ABA, HANDBOOK, *supra* note 212, at 3. Gerontologic clinicians proposed a model that take multiple domains into consideration when assessing capacity. See Skelton et al., *supra* note 87, at 301. The suggested domains are 1) personal needs and hygiene, 2) the condition of the home environment, 3) activities for independent living, 4) medical self-care, including medication management and illness self-monitoring, and 5) financial affairs. *Id.* Scholars reiterate that guardianship should be considered only as a last resort. *Id.* at 304. They suggest that clinicians should provide capacity assessments to the court that include 1) decision making capacity, 2) capacity to carry out a plan and live independently, 3) dangerous activities resulting from living alone, and 4) activities that may endanger others. *Id.*

²²⁴ See Casasanto et al., *supra* note 24, at 549.

²²⁵ See *id.*

²²⁶ See Salzman, *supra* note 20, at 175–56 (stating that wards often have no enforceable right to participate in the process).

document for a number of reasons, including poor vision, limited reading skills, or simply a lack of understanding of the legal system—none of which limit a person’s ability to make decisions for him or herself.²²⁷ Providing legal representation for elders thus reduces the risk that a person who has the capacity to make decisions will be found in need of guardianship.²²⁸

All of these safeguards would help reduce the risks inherent in the social service agency model while promoting the dignity and integration of older and disabled adults.²²⁹ One concern about the social service agency model, employed by the majority of states, is that the same agency who will serve as guardian has the ability to petition for guardianship.²³⁰ Emphasizing partial and limited guardianships, ensuring that the court hears opinions from a number of service providers and acquaintances, and providing independent legal representation to speak directly with the elder would all work to mitigate this potential conflict of interest in the social service agency model.²³¹

2. Judicial Oversight and Guardian Accountability

The court’s role in maintaining accountability with public guardians remains crucial, given the inability of incapacitated wards to hold them responsible.²³² Scholars have suggested that public guardians should be held to higher standards than known guardians for this reason.²³³ Most states give the same

²²⁷ See MCINNIS-DITTRICH, *supra* note 13, at 38 (explaining that changes in vision are a natural part of aging); see also Linda S. Whitton, *Everything You Ever Needed to Know About Good Lawyering, You Can Learn from Elder Law*, 40 STETSON L. REV. 73, 85–86 (2010) (discussing a spectrum of capacity and explaining that a client should not be considered incapacitated or irrational unless he or she has truly lost the ability to understand the nature and consequences of their decisions); Skelton, et al., *supra* note 87, at 300–01 (explaining that capacity can be viewed as a gradient and that an elder not conforming to social norms should not be confused with having impaired capacity); Joan L. O’Sullivan & Diane E. Hoffman, *The Guardianship Puzzle: Whatever Happened to Due Process?*, 7 MD. J. CONTEMP. LEGAL ISSUES 11, 40–41 (1995) (discussing the importance of judges observing and speaking to allegedly incapacitated persons whenever possible before making a decision, since “[t]here is no bright line dividing the competent from the incompetent”).

²²⁸ See Teaster et al., *supra* note 3, at 238.

²²⁹ See *id.*

²³⁰ See *id.* (recommending that states avoid a social services agency model due to its inherent conflict of interest and expressing concern that guardians under this type of program could not effectively advocate for the ward).

²³¹ See *id.*

²³² See Casasanto et al., *supra* note 24, at 545 (referring to particular dangers presented by public guardianship programs); Leonard et al., *supra* note 182 (stating that elders under guardianship often have no friends or family to advocate for them).

²³³ See Casasanto et al., *supra* note 24, at 545 (suggesting that public guardians may need to adopt standards beyond those expected of other guardians to account for the particular issues associated with public guardianships). A *Los Angeles Times* article noted, for example, serious concerns with guardians moving wards to nursing homes and selling homes to themselves and their family members. See Leonard et al., *supra* note 182. Though these were paid professional guardians, they illustrate the necessity of taking extra precautions when the guardian is previously unknown to the ward, and the

duties and powers to public guardians that are given to other guardians.²³⁴ Despite the extensive administrative work these requirements entail, they are important for the protection of wards.²³⁵

In order to fulfill the mandates of *Olmstead*, people who live in institutions should be regularly evaluated to ensure that institutionalization is still the least restrictive form of housing available to them.²³⁶ Proper evaluation thus requires frequent visits by the guardian to observe the individual within his or her environment.²³⁷ If an individual's public guardian visits rarely or never, the purpose of public guardianship will be frustrated.²³⁸ Thus, public guardianship statutes should include standards for the number of times per year a ward must be visited in person.²³⁹

In addition, to ensure that guardians are fulfilling their duties of visitation, guardians should provide comprehensive reports to the court every year.²⁴⁰ Visits should have specific requirements, including questionnaires and checklists to ensure that guardians are making a concerted effort to make contact with wards.²⁴¹ Moreover, steps should be put in place to ensure that the guardi-

ward has no family or friends to serve as advocate. *See id.* Even when there is an advocate, it can be difficult to remove a court-appointed guardian. *See id.*

²³⁴ *See* Teaster et al., *supra* note 3, at 212. Some statutes, however, provide extra duties for public guardians, including minimum visits to the ward per year, maintaining detailed records, and adhering to individualized service plans. *See id.*

²³⁵ *See id.* at 239. Due to limited resources, courts are sometimes reluctant to adopt monitoring practices that could improve their guardianship programs. *See* U.S. Gov't. Accountability Office, GAO-11-678, *Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvements*, Report to the Chairman, Special Committee on Aging, U.S. Senate 16 (2011) (advocating for the federal government to support evaluation of the feasibility and effectiveness of monitoring practices, so that courts with limited resources would be more willing to invest in them).

²³⁶ *See* Teaster et al., *supra* note 3, at 229 (calling for a "re-evaluation of the high proportion of public guardianship clients who are institutionalized").

²³⁷ *See id.* *See generally* Kelly et al., *supra* note 200 (providing examples of individuals who remained as guardians after failing to visit and document progress).

²³⁸ Kelly et al., *supra* note 200 (reporting one case where the lack of frequent contact might have led to the administration of antipsychotic drugs without a required separate guardianship hearing); *see* Evelyn Larrubia et al., *Guardians for Profit (Part Three): Missing Money, Unpaid Bills and Forgotten Clients*, L.A. TIMES, Nov. 15, 2005, at A1 (describing a court-appointed guardian whose neglect caused people to lose health insurance, receive late rent notices, and miss medical appointments due to not having bus fare).

²³⁹ *See* Schmidt, *supra* note 20, at 87–88 (citing the North Dakota Guardianship Standard 13(V), stating that guardians "shall visit the ward monthly"); Teaster et al., *supra* note 3, at 240 (recommending a minimum of one visit per month); Kelly et al., *supra* note 200 (interviewing wards who were visited only once per year or not at all during a year).

²⁴⁰ *See* Casasanto et al., *supra* note 24, at 549.

²⁴¹ *See* Teaster et al., *supra* note 3, at 239 (recommending uniform computerized forms); Fields et al., *supra* note 166 (noting a particularly egregious case where two years passed between a referral for guardianship and the guardian realizing the client had died, including one visit where the guardian left after being told the ward had gone for a walk and did not check in for three more months).

an takes the time to hear the ward's concerns.²⁴² Questionnaires and summaries of the visits should be filed with the probate court annually.²⁴³ These precautions would promote the goals of *Olmstead* by reducing the potential for isolation of wards in residences that are more restrictive than is appropriate.²⁴⁴

Furthermore, detailed forms, including checklists, provide safeguards to ensure that guardians complete evaluations regarding the necessity of institutionalization, and assess whether a ward desires or is able to return to community living.²⁴⁵ Several states, like Tennessee in 2013, revised their procedures for holding guardians accountable.²⁴⁶ Tennessee further states that reports on the wards' physical and mental conditions may not be excused, waived, or extended even for good cause.²⁴⁷ This requirement, if followed by courts, will allow for much greater protection for individuals.²⁴⁸ It will require that guardians see wards in person and, if used properly, will increase the chances that individuals who no longer require guardianship will be identified and their rights to self-determination reinstated.²⁴⁹

In addition to accountability, court approval for major decisions is essential.²⁵⁰ In some states, guardians are granted authority to make a wide variety of decisions on behalf of the ward, including selling property, making other

²⁴² Kelly et al., *supra* note 200. The ABA's handbook for judges includes a sample form for guardians to submit to the court annually. See ABA, HANDBOOK, *supra* note 212, at 32.

²⁴³ See ABA, Directions of Reform *supra* note 137, at 20.

²⁴⁴ See Hardy, *supra* note 13, at 18.

²⁴⁵ See ABA, HANDBOOK, *supra* note 212, at 32 (providing a Model Annual Report for Guardian of Person and Estate and containing spaces to note the number of times the guardian had contact with the person; the individual's current physical, mental, and cognitive functioning and any changes noted during the past year; therapy, recreation and other activities; and thorough financial accounting); see also Casasanto et al., *supra* note 24, at 553–54 (recommending in a model code that guardians seek out the preferences of the ward even for seemingly minor decisions). A ward's preferences should be overruled by the guardian only when the guardian is "reasonably certain that substantial harm will result" from the ward's choice. Casasanto et al., *supra* note 24, at 553–54. If the ward is unable to communicate his or her preferences, the guardian should look to background information, including any indications of preference that the ward has made in the past. *Id.* The guardian should also seek insight from the ward's caregivers and any other sources of information. *Id.*

²⁴⁶ ABA, Directions of Reform, *supra* note 137, at 20. Tennessee now requires the filing of an accounting six months after the guardian is appointed and annually after that. See *id.* at 2; S.B. 555, 108th Leg., 1st Sess. (Tenn. 2013); H.B. 692, 108th Leg., 1st Sess. (Tenn. 2013). These positive changes, however, will not effect change if they are not enforced. See Larrubia et al., *supra* note 238 (recounting a case where a conservator did not file financial reports but still was appointed conservator for twenty-seven more people).

²⁴⁷ See Tenn. S.B. 555; Tenn. H.B. 692; ABA, Directions of Reform, *supra* note 137, at 20.

²⁴⁸ See Casasanto et al., *supra* note 24, at 549 (stating that the guardian should make decisions on behalf of the ward only after considering all available information about the ward's preferences, including verbal and nonverbal communications).

²⁴⁹ See *Olmstead*, 527 U.S. at 587; Casasanto et al., *supra* note 24, at 549.

²⁵⁰ See generally Leonard et al., *supra* note 182 (giving numerous examples of elders who were taken advantage of by guardians and conservators due to inadequate oversight by the court).

financial decisions, and making end-of-life decisions.²⁵¹ Due to the risk of overburdened public guardians and lack of personal relationships, public guardians should be required to obtain court approval for most major decisions.²⁵² This may be particularly important for public guardians under a social service agency system, due to the inherent conflict of interest in these systems.²⁵³ Requiring court approval for major decisions would greatly reduce this risk.²⁵⁴ Courts should carefully scrutinize, in particular, decisions made by social service agencies with a pecuniary interest.²⁵⁵

In particular, the decision to move a ward to more restrictive housing such as a nursing home should require court approval, as this decision could increase the isolation of the population and arguably work against the mandates of *Olmstead*.²⁵⁶ For example, Nevada made changes to the statutory authority of its guardians in 2013.²⁵⁷ The statute reduces the risk that people under guardianship will be placed in restrictive settings for the purpose of guardian convenience or misinterpretation of a person's needs.²⁵⁸ Furthermore, requiring the filing of the petition promotes the goals of *Olmstead* because it allows courts to ensure that a ward has the opportunity to live in the least restrictive environment for his or her condition.²⁵⁹ Nevada's statute is a positive change that serves to protect the dignity of people under guardianship while adhering to the spirit of *Olmstead* and the ADA.²⁶⁰

Nevada's statute, however, falls short of adequately protecting the interests of wards, as it goes on to state that the petition is not required if the move is "pursuant to a written recommendation by a physician, social worker or Protective Services employee."²⁶¹ This provision compromises the court's ability

²⁵¹ See Teaster et al., *supra* note 3, at 212.

²⁵² See Casasanto et al., *supra* note 24, at 554 (stating in a model guardianship code that guardians may be required to seek court review for particularly significant decisions, including the decision to withhold food and hydration).

²⁵³ See Schmidt, *supra* note 20, at 98; Teaster et al., *supra* note 3, at 216. Scholars fear that agencies will be motivated to use their own programs and resources for their wards, rather than zealously advocating for what is truly in the wards' best interests. See Schmidt, *supra* note 20, at 98; Teaster et al., *supra* note 3, at 216.

²⁵⁴ See Schmidt, *supra* note 20, at 98; Teaster et al., *supra* note 3, at 216.

²⁵⁵ See Anderson, *supra* note 183 (suggesting that agencies serving seniors may benefit from abusive probate actions). This concern is not limited to the social service agency model, however. See Fields et al., *supra* note 166 (discussing a county public guardianship program whose funding was eliminated in 1990, ultimately resulting in the agency giving apparent preference to clients who had the assets to pay fees and those who had been referred from private hospitals who could pay fees).

²⁵⁶ See *Olmstead*, 527 U.S. at 600–01.

²⁵⁷ See ABA, Directions of Reform, *supra* note 137, at 2; S.B. 78, 77th Leg., 1st Sess. (Nev. 2013). Nevada now specifies that a guardian must file a petition with the court before placing an individual in a residential long-term care facility. Nev. S.B. 78.

²⁵⁸ See ABA, Directions of Reform, *supra* note 137, at 2.

²⁵⁹ See *id.*

²⁶⁰ See *id.*

²⁶¹ See *id.*

to have oversight over private and public guardians' decisions to move a ward to a nursing home, as long as another professional agrees with the decision.²⁶² While many social workers, physicians and Protective Service employees are familiar enough with their clients to make this type of decision, that level of familiarity should not be assumed.²⁶³ Public guardians, if not all guardians, should be required to file a petition with the court whenever a more restrictive residential setting is sought.²⁶⁴ Moreover, a more protective statute would require a court to seek multiple opinions before placement in a facility—a placement that is rarely reversed.²⁶⁵

Finally, individual judges must be educated on the importance of the protections.²⁶⁶ Often, even after statutes have been altered to better protect the interests of individuals in guardianship proceedings, individual courts and judges fail to implement the changes.²⁶⁷ This phenomenon can lead to devastating results for elders who are wrongly judged to be incapacitated or who are assigned guardians who fail to live up to their fiduciary duties.²⁶⁸ Scholars have pointed out that unlike in a typical legal dispute, where both sides have the ability to advocate for their interests, the judge in a guardianship case must act as the protector of one of the parties.²⁶⁹ If judges do not enforce the requirements of the statutes, elders under guardianship will continue to face a significant risk of abuse, neglect, and exploitation from guardians.²⁷⁰

²⁶² Kelly et al., *supra* note 200 (reporting on a social worker with seventy wards who was unable to meet proper guardianship standards).

²⁶³ *See id.* Social workers and Protective Service Workers have large caseloads as often as public guardians, and may be no more familiar with the elder than the guardian. *See* Fields et al., *supra* note 166; Kelly et al., *supra* note 200. Thus, the recommendation of another professional should not be presumed sufficient to guarantee the ward's placement in the least restrictive environment. *See* Fields et al., *supra* note 166; Kelly et al., *supra* note 200.

²⁶⁴ *See* Kelly et al., *supra* note 200.

²⁶⁵ *See id.*

²⁶⁶ *See* Winchell, *supra* note 39, at 697. The ABA's handbook for judicial determinations of capacity provides detailed guidelines for judges to consider at each step of the assessment process. *See generally* ABA, HANDBOOK, *supra* note 212 (providing a framework for judges to utilize when making determinations of capacity). The handbook provides the rationale behind common guardianship statutes and warns judges about common pitfalls. *See id.* at 14 (instructing judges to "[b]e sure the emergency guardianship does not become an automatic doorway to permanent guardianship that bypasses procedural safeguards"); *id.* at 16 (advising that if initial reports from people involved in the case do not give a full picture of a person's capacity, the judge should seek more information from informants before making a determination).

²⁶⁷ *See* Hardy, *supra* note 13, at 27 (noting incomplete reports, financial accountings that were not heard by the court, and inconsistent inventories, among other issues, in a review of a county guardianship program); Winchell, *supra* note 39, at 697 (expressing concern that statutory reform may not effect wide change, as little evidence shows that judges have internalized the values inherent in the reforms); Fields et al., *supra* note 182 (telling stories of several elders taken significant advantage of by conservators and guardians after courts failed to implement proper notice and other procedures).

²⁶⁸ *See* Hardy, *supra* note 13, at 27; Fields et al., *supra* note 182; Kelly et al., *supra* note 200.

²⁶⁹ *See* Hardy, *supra* note 13, at 27; Fields et al., *supra* note 182; Kelly et al., *supra* note 200.

²⁷⁰ *See* Hardy, *supra* note 13, at 27; Fields et al., *supra* note 182; Kelly et al., *supra* note 200.

Moreover, in addition to being familiar with the changing statutes and written standards for guardians, judges must be well-informed of the purposes and spirit of the law.²⁷¹ A judge who is familiar with the history of guardianship and reasons for reform, as well as the abuses and exploitation that can take place without proper oversight, may be less likely to grant guardianship without hearing from the elder or allow guardians to miss annual reporting deadlines.²⁷² Some scholars have even recommended assigning specific judges to the oversight and monitoring of guardians.²⁷³ These judges would be specifically trained in the types of issues that affect guardianship proceedings, possibly including dementia, medical diagnoses, complex case management, and family dynamics.²⁷⁴ The ward's inability to self-advocate requires that the judge be mindful of all of these concerns for statutory protections to successfully serve the mandates of *Olmstead*.²⁷⁵

3. State Funding for Public Guardianship Programs

States also must provide sufficient funds for guardianship services.²⁷⁶ States have started altering policies to provide adequate funding for wards to be supported in their homes and communities, but funding for guardianship services must continue.²⁷⁷

Disability rights advocates have argued that state budgets should be reallocated to allow for more home and community-based support, in order to align with *Olmstead*.²⁷⁸ Accordingly, in recent years, many states have taken

²⁷¹ See Hardy, *supra* note 13, at 27; Winchell, *supra* note 39, at 697; Kelly et al., *supra* note 200.

²⁷² See Hardy, *supra* note 13, at 18. See generally Kelly et al., *supra* note 200 (reporting that guardians continued to be assigned wards despite “wholesale indifference to court rules,” such as those requiring guardians to be held accountable for the ward’s assets and finances).

²⁷³ Hardy, *supra* note 13, at 27. Judge Hardy describes systems that utilize judicial specialization in Washoe County and Clark County, Nevada. *Id.*

²⁷⁴ *Id.*

²⁷⁵ See Hardy, *supra* note 13, at 18; Winchell, *supra* note 39, at 697; Kelly et al., *supra* note 200.

²⁷⁶ See Teaster et al., *supra* note 3, at 238 (stating that states should provide a minimum cost per ward).

²⁷⁷ See Johnson & Bowers, *supra* note 126, at 454 (predicting that *Olmstead* could be “ushering in a quiet revolution in long-term care” that could “transform the social response to people with physical or mental disabilities”); Karp et al., *supra* note 6, at 1455 (stating that since *Olmstead*, the federal government has taken steps to strengthen home- and community-based options for older and disabled people); Kathryn E. McDonough & Joan K. Davitt, *It Takes A Village: Community Practice, Social Work, and Aging-in-Place*, 54 J. GERONTOLOGICAL SOC. WORK 528, 529 (2011) (stating that the *Olmstead* case and the aging population have increased pressure on government to make changes); see also ROBERT B. HUDSON, *The Older Americans Act and the Aging Services Network*, in THE NEW POLITICS OF OLD AGE POLICY 307, 315 (Robert B. Hudson ed., 2d ed. 2010).

²⁷⁸ See Batavia, *supra* note 60, at 39; see also Lewis v. N.M. Dep’t of Health, 94 F. Supp. 2d 1217, 1222 (D.N.M. 2000) (denying a motion to dismiss a claim against a governor for acts that led them to be denied waiver services). Some scholars have even suggested that costs should be irrelevant once a court determines that a person’s rights have been violated. See Batavia, *supra* note 60, at 32. *But*

steps to rebalance Medicaid funds.²⁷⁹ For example, programs such as Money Follows the Person (“MFP”) follow the *Olmstead* mandate because they reallocate funds that are spent on nursing homes to instead allow older individuals to transition back to a community.²⁸⁰ Thus, a rebalancing of Medicaid funds promotes the independence and dignity of this population.²⁸¹

Expanding funding could also address a central issue in public guardianship policy: the ratio of staff to wards within guardianship programs.²⁸² In the 2005 national study of public guardianship, researchers found that the majority of public guardianship programs were severely understaffed, leading to a high amount of wards per guardian.²⁸³ This situation arguably violates *Olmstead* because of the guardian’s inability to give sufficient attention to each case.²⁸⁴ High numbers of wards can make it impossible for a guardian to thoroughly assess the appropriate level of housing for each ward.²⁸⁵ Furthermore, though insufficient data exist to determine whether this has occurred, a large number of wards creates a perverse incentive to relocate wards to a place where many can be visited in one trip—such as an assisted living or nursing facility.²⁸⁶

see Rodriguez v. City of New York, 197 F.3d 611, 615 (2d Cir. 1999) (finding that the state Medicaid program was not required to cover an independent living service called “safety monitoring”).

²⁷⁹ PYNOOS ET AL., *supra* note 93, at 330.

²⁸⁰ *See id.* Consumers are then able to use the funds to purchase adaptive equipment for their homes and choose caregivers with whom they are comfortable. *See id.* Although providing home and community services is consistent with *Olmstead* and could improve the well-being of millions, it should also be noted that, like institutional care, it is costly for state budgets. *See* SCHULZ & BINSTOCK, *supra* note 3, at 173. Individuals who pay out of pocket for their services save on in-home care only when that care is provided primarily by family members. *Id.* Round-the-clock care by professionals can be just as costly as a nursing home. *Id.* The costs are expected to grow as fewer younger Americans choose to provide long-term care for relatives in their own homes. *Id.* at 179.

²⁸¹ PYNOOS ET AL., *supra* note 93, at 330.

²⁸² *See* Schmidt, *supra* note 20, at 248–49; Teaster et al., *supra* note 3, at 238; Leonard et al., *supra* note 182; Fields et al., *supra* note 166.

²⁸³ *See* Teaster et al., *supra* note 3, at 219, 232 (reporting that virtually all states reported a lack of funding and staffing; the average ratio of staff to wards was one to thirty-six, with some as high as one to fifty, one to eighty, and one to 173); *see also* Fields et al., *supra* note 166. The authors argue that the public guardian’s inability to adequately serve Los Angeles citizens led to an increase in for-profit conservators, some of whom preyed on wealthy seniors who did not have family advocates. *See* Fields et al., *supra* note 166.

²⁸⁴ *See* Schmidt, *supra* note 20, at 248–49; Teaster et al., *supra* note 3, at 238; Fields et al., *supra* note 166 (noting that the county’s public guardianship office was so “swamped” that they were sometimes unable to provide for clients’ basic needs, including glasses, hearing aids and dentures); Leonard et al., *supra* note 182. Lack of funding can also affect the number of cases that are taken on by a public guardianship program. *See* Fields et al., *supra* note 166. The authors described how the lack of funding from the county caused the public guardianship program to turn away four out of five people who were referred for assistance. *Id.* This had disastrous results for some of the clients, including one who died in a nursing home after not receiving services. *Id.*

²⁸⁵ Fields et al., *supra* note 166; Kelly et al., *supra* note 200; Larrubia et al., *supra* note 238.

²⁸⁶ Fields et al., *supra* note 166; Larrubia et al., *supra* note 238.

Thus, states that do not provide enough funding for a reasonable ratio of staff to wards may be in violation of *Olmstead*.²⁸⁷

One of the main reasons for the ADA's enactment was to curb the mistreatment and isolation of people with disabilities.²⁸⁸ Providing funding for more stringent protections for elders would send an important message that society values the independence, dignity, and value of older adults.²⁸⁹

CONCLUSION

The demographics of the elder population are changing, and with the change comes a need for a public guardianship system better suited for people who will live longer lives with incapacitating conditions. Historically, guardianship across the United States remained unregulated, resulting in a loss of protections for many Americans with disabilities. The rights and autonomy of older Americans were undervalued, and procedures for determining mental capacity lacked proper guidelines. States have made great strides over the past several decades toward protecting the rights of individuals under their care, but the lack of protections in public guardianship systems persist.

The U.S. Supreme Court's 1999 interpretation of the ADA in *Olmstead v. L.C. ex rel. Zimring* provides an important mandate for states to correct the lack of protections. In particular, the social service agency model—the most popular public guardianship model among states—may be inherently problematic due to the risk of conflicts of interest for the agency. Proper statutory guidelines and protections, however, could help to protect wards, particular those who are under the public guardianship of a social service agency. Appropriate standards for accountability, oversight, and funding for public guardians would help bring states into compliance with the mandates of the ADA and *Olmstead*.

ELEANOR B. CASHMORE

²⁸⁷ See *Olmstead*, 527 U.S. at 587; Teaster et al., *supra* note 3, at 238. Furthermore, a staff-to-ward ratio could help to save money in the long run. See Schmidt, *supra* note 20, at 136. A thirty-month study performed by the Washington State Institute for Public Policy found an average decrease in residential costs per client with a 1:20 staff-to-ward ratio, due to moves to less restrictive environments. *Id.*; MASON BURLEY, PUBLIC GUARDIANSHIP IN WASHINGTON STATE: COSTS AND BENEFITS 16 (2011). The study also reported savings from decreased personal care hours for clients with public guardians. See Schmidt, *supra* note 20, at 136; BURLEY, *supra* at 16.

²⁸⁸ 42 U.S.C. § 12101(b)(1) (2012).

²⁸⁹ See *id.*; see also Hardy, *supra* note 13, at 2 (stating that “[w]e may be judged by the way we treat our weaker and more vulnerable citizens” and arguing that the protection of elderly citizens is as important as that of children).

