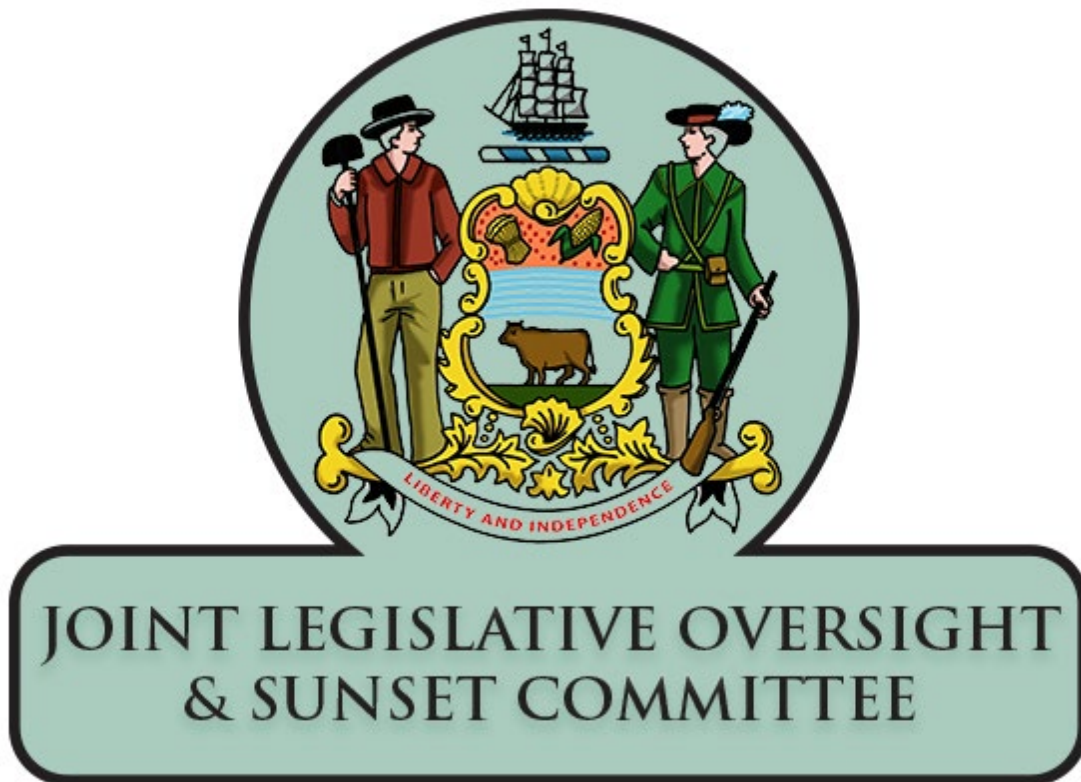


Staff Findings and Recommendations Report Delaware Guardianship Commission

152nd General Assembly, 1st session



*Respectfully submitted to the
Joint Legislative Oversight and Sunset Committee
March 2023*

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The Joint Legislative Oversight & Sunset Committee (“JLOSC” or “Committee”) is a bipartisan 10-member legislative body which performs periodic legislative review of boards or commissions. The purpose of the oversight and sunset review is to decide genuine public need and if the entity is effectively performing. The Division of Research is a nonpartisan and confidential reference bureau for the General Assembly and supplies many services including staff support for JLOSC.

Special thanks: We appreciate the aid provided by Delaware Guardianship Commission members and staff in conducting this review.

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ABOUT THIS REPORT

This is a staff findings and recommendations report (“staff report”) drafted by Division of Research staff on the sunset and oversight review (“review”) of the Delaware Guardianship Commission. This report includes staff recommendations for JLOSC review and discussion. Recommendations are not final until discussed and adopted by JLOSC with an affirmative vote by 7 members.

The review’s purpose is to find the public need for the entity and whether the entity is effectively performing to meet the need. The goal of the review is to supply strength and support to entities that are supplying a State recognized need.

JLOSC performs its duties with support provided by the Division of Research’s dedicated and nonpartisan staff in the form of two JLOSC research analysts with supplemental assistance from a legislative attorney, legislative fellow, and administrative assistant. JLOSC staff completes a performance evaluation of the entity under review and gives a staff report to JLOSC which includes research, analysis, key findings, and recommendations. During the review process, the following is not assumed:

- There is a genuine public need for the entity under review.
- That the entity is satisfactorily and effectively meeting a public need.

Rather, the entity under review has the burden of showing, through the statutory criteria for review included in their self-report and analyst requested supplemental documentation, that there is a genuine public need, and that the entity is meeting that need.

JLOSC selected the Delaware Guardianship Commission for review on March 21, 2022. During the review process the Delaware Guardianship Commission supplied information by completing a self-report which included a performance review questionnaire.¹

Division of Research staff compiled the following findings and recommendations after completion of a performance evaluation which included thorough research and analysis outlined in the Objectives, Scope, and Methodology section of this report. Division of Research staff used national auditing and evaluation standards while conducting the performance evaluation. Those standards require that we plan and perform the evaluation to obtain sufficient evidence to supply a reasonable basis for our findings and conclusions based on our evaluation objectives. We believe that the evidence obtained supplies a reasonable basis for our findings and conclusions based on our evaluation objectives. The Objectives, Scope, and Methodology section discusses the fieldwork procedures used while developing the findings and recommendations presented in this report.

The recommendations contained in this report are not final until adopted by JLOSC by affirmative vote of 7 members. Under §10213(a), Title 29, the Committee must first decide whether there is a genuine public need for an entity under review. To meet this requirement, the Committee may select to continue or terminate the entity under review.

¹ Self-reports available on the Committee’s website, <https://legis.delaware.gov/Committee/Sunset>

JLOSC meets publicly to review and discuss its staff's findings and recommendations, and the Committee is free to change, reject, or create brand new recommendations.

The JLOSC statute authorizes the Committee to recommend 1 or more of the following:

- Continuation of the entity as is.
- Termination of the entity.
- Termination of any program within the entity.
- Consolidation, merger, or transfer of the entity or the entity's functions to another entity.
- Termination of the entity unless certain conditions are met or modifications are made, by legislation or otherwise within a specified period.
- Budget appropriation limits for the entity.
- Legislation which the Committee considers necessary to carry out its decision to continue or terminate the entity.

The information contained in this report, along with the previously published self-report², which includes background information from the entity under review, help the Committee in conducting a review of the entity and meeting its statutory requirements under Chapter 102, Title 29. The "Staff Findings" section of this report has information to support the following staff recommendations.

Next Steps

After the release of this report, JLOSC will hold a public hearing in early 2023 for each entity under review to present to the Committee and accept public comment on the scope of the review.³

The Committee will review all information received, including the findings and recommendations presented in this staff report. Recommendations are adopted after review, discussion, and an affirmative vote of 7 JLOSC members. Committee members are not bound by recommendations presented by staff and are free to change, reject, or create new recommendations. Once JLOSC adopts recommendations, the review moves to the implementation phase which may include drafting legislation.

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² Self-Report is accessible on the Committee's website, <https://legis.delaware.gov/Committee/Sunset>

³ Public meeting notices found on the Committee's website and the State of Delaware's Public Meeting Calendar.

OBJECTIVE, SCOPE, AND METHODOLOGY

Objective

A performance evaluation conducted as required under JLOSC statute and based on the following criteria⁴:

1. If the agency is a licensing agency, the extent to which the agency has permitted qualified applicants to be licensed.
2. The extent to which the agency has served the public interests.
3. The extent to which the agency has recommended statutory changes, and whether those changes directly benefit the public or whether those changes primarily benefit the agency or other entities and are of only indirect benefit to the public.
4. Review the implementation of recommendations contained in the final reports presented to the General Assembly and the Governor during previous legislative sessions.

Scope

This review covers a 5-year performance period except where noted.

JLOSC Statutory Criteria #1

If the agency is a licensing agency, the extent to which the agency has allowed qualified applicants to be licensed.

Methodology for JLOSC Statutory Criteria #1

The Delaware Guardianship Commission is not a licensing agency, statutory criteria #1 is not applicable to this review.

JLOSC Statutory Criteria #2

The extent to which the agency has served the public interests.

Methodology for JLOSC Statutory Criteria #2

The State of Delaware established the Guardianship Commission to advocate for the welfare of individuals who are incapacitated and serve the Office of the Public Guardian in an advisory capacity.⁵ As described in the fieldwork section of this report, this review explored the main duties and responsibilities listed in statute:

1. Act in an advisory capacity to the Office of the Public Guardian, aiding the Public Guardian in establishing administrative policies and procedures in the Office of the Public Guardian, and assisting in developing case acceptance priorities for the Office of the Public Guardian.
2. Examine and evaluate the policies, procedures and effectiveness of the guardianship system, and make recommendations for changes therein, including

⁴ 29 Del. C. § 10209.

⁵ 12 Del. C. § 3992.

establishing statewide standards and regulation of public and private guardianships.

3. Conduct an annual statewide needs assessment relating to the number of individuals currently and predicted to be in need of a decision maker due to incapacity, the resources available or needed to meet that need, and the processes utilized to meet the need.
4. Advocate for legislation and make legislative recommendations to the Governor and the General Assembly.
5. Develop public and professional education programs on issues relating to guardianship, alternatives to guardianship, and concerns relating to the abuse, neglect, and exploitation of individuals who are incapacitated.
6. Provide an annual summary of the work and recommendations of the Guardianship Commission, including the work of the Office of the Public Guardian to the Governor, the General Assembly, and the Court.

JLOSC Statutory Criteria #3

The extent to which the agency has recommended statutory changes, and whether those changes directly benefit the public or primarily benefit the agency or other entities and are of only indirect benefit to the public.

Methodology for JLOSC Statutory Criteria #3

The Delaware Guardianship Commission has not recommended statutory changes during the 5-year performance period, statutory criteria #3 is not applicable to this review.

JLOSC Statutory Criteria #4

Review the implementation of recommendations contained in the final reports presented to the General Assembly and the Governor during earlier legislative sessions.

Methodology for JLOSC Statutory Criteria #4

This is the first JLOSC review of the Delaware Guardianship Commission, statutory criteria #4 is not applicable to this review.

Fieldwork completed

During this review, JLOSC staff reviewed the following:

- All information supplied by Commission staff.
 - Self-Report.
 - Meeting minutes.
 - Current Board membership.
 - Commission bylaws.
- All available public documents such as available news articles, websites, and Court of Chancery rules.
- Current statute.
- Commission's overall performance as it relates to current statute.
- Commission's compliance with Freedom of Information Act.
 - Public meeting calendar: Commission meeting notices, agendas, minutes.

- Commission member size, quorum trends, and composition.
- Commission member training opportunities.
- Research on topic of adult guardianship on a national and state level.

JLOSC staff held a virtual meeting with Commission staff to discuss the review and answer questions.

Review Background

This is the first review of the Delaware Guardianship Commission by JLOSC. This review began in April of 2022. Entity's support staff completed and returned a self-report in June of 2022. JLOSC staff conducted research and drafted this findings and recommendations report.

Background Research Synopsis

The 2011 reform of the Office of the Public Guardian created the Delaware Guardianship Commission to serve as an advisory group to the Office of the Public Guardian. The Public Guardian serves as the Executive Director and chair of the Commission. By statute, the Commission meets quarterly. Recent legislative changes to the Commission include implementing a fee collection schedule and adding a member from the Elder Law Section of the Delaware Bar Association. The Commission stated in their self-report that they currently struggle with membership, public outreach, and lack of direct Commission staff support.

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STAFF FINDINGS

Finding #1

The Delaware Guardianship Commission has engaged in topics concerning adult guardianship and formed subcommittees to facilitate discussions. Commission meetings do not include any consistent reporting from the Office.

The 2011 reform of the Office of the Public Guardian (“Office”) created the Delaware Guardianship Commission (“Commission”) to serve as an advisory group to the Office. During this review, JLOSC staff requested all meeting minutes dating back to the first Commission meetings in 2012 to gain a historical perspective of topics discussed.

The Commission held its first meeting on January 30, 2012 and formed several subcommittees over the first several years to discuss topics such as a volunteer attorney program, care transitions (guardians and decision makers assisting with hospital discharges), standards for professional guardians (later included private guardians), development of guardianship resources, and development of supported decision-making legislation. Meeting minutes for subcommittees are unavailable online and updates in Commission minutes ended in 2015. Therefore, it is unknown if the subcommittees continued to meet. The next mention of a subcommittee occurred in 2021 culminating with the Commission creating an ad-hoc committee to work on defining “sufficient income” for the purposes of fee collection in June 2022.

Fee collection became a topic of focus for the Commission since legislation passed in July 2021 allowing the Public Guardian to collect fees for services.⁶ This legislation charged the Commission with setting fee collection standards for Court approval.⁷ At its February 28, 2022 meeting, the Commission agreed on adopting a structure consistent with the Court of Chancery’s current Rule 132-A to allow the Office of the Public Guardian to collect fees on a monthly basis.⁸ The Commission also agreed on a spending plan (to be reviewed on an annual basis) for fees collected:

- Education Services – 30%
- Contractual Services – 20%
- Indigent Services – 30%
- Subsidized Fee-for-Service (“FFS”) Services – 20%

The Court’s website has not been updated to reflect either of these proposals. To date, the Court approved the Commission’s fee collection standards for Medicaid qualified individuals residing in nursing facilities on July 27, 2022.⁹

There have been no updates provided to the Commission from the Office on the status and amounts of any fees collected under this court approved standard. While reading through past meeting minutes, JLOSC staff noticed an absence of other routine data points shared with Commission members from the Office. It is typical of advisory boards to receive certain non-identifying data sets and information required in providing advice. Commission members did receive data on the number of guardianship cases handled by the Office when requested, but this information has not been consistently provided.

⁶ [Senate Bill 85](#), 151st General Assembly.

⁷ 12 *Del. C.* § 3986.

⁸ Court of Chancery Rules available online: <https://courts.delaware.gov/rules>

⁹ [Court of Chancery Standing Order No. 10](#).

Moving forward, it would be helpful for Commission members to regularly receive non-identifying data from the Office. It is important to note that the Office handles sensitive, protected information and is under the Court of Chancery. Unlike the Commission, Delaware courts are not public bodies as defined by Delaware's Freedom of Information Act and have their own rules regarding court records.¹⁰ Therefore all data and information provided by the Office must be non-identifying data suitable for public distribution. The following are examples of non-identifying data sets the Office could provide the Commission:

- Number of referrals received by the Office of the Public Guardian ("OPG").
- Number of referrals accepted by OPG for public guardianship.
- Number of current guardianships under OPG.
- Number of Guardianship Monitoring Program ("GMP") appointments.
- Number of GMP audits completed and forwarded to Court of Chancery.
- Number of OPG and GMP legal filings.
- Number of reports filed.
- Number of accountings prepared.
- Number of inventories performed.
- Number of current OPG appointments as guardian of property.
- Dollar amount of resources managed by OPG.
- Dollar amount of income managed by OPG.
- Dollar amount of all fees collected by OPG per adopted Commission standards and Court rules.

Finding #2

The Commission performs half of their statutory duties, has met the statutory requirement to meet quarterly for all but 3 years. Annual reports not completed by the Office or Commission.

The Commission's statute outlines the following 6 statutory duties¹¹ and JLOSC staff made the following observations:

1. Act in an advisory capacity to the Office of the Public Guardian, aiding the Public Guardian in establishing administrative policies and procedures in the Office of the Public Guardian, and assistance in developing case acceptance priorities for the Office of the Public Guardian.
 - Meeting discussion cannot be found pertaining to establishing the policies and procedures described in statute. Additionally, information was not found showing evidence that the Office reviewed administrative policies and procedures and case acceptance priorities with the Commission.
2. Examine and evaluate the policies, procedures, and effectiveness of the guardianship system, and make recommendations for changes therein, including establishing statewide standards and regulation of public and private guardianships.
 - At least 1 subcommittee met between 2012 and 2015 discussing public and private guardianships as described in this statutory requirement. Detailed

¹⁰ 29 Del. C. § 10002.

¹¹ 12 Del. C. § 3992.

information from the subcommittee is not available and evidence of establishing statewide standards and regulation cannot be found.

3. Conduct an annual statewide needs assessment relating to the number of individuals currently and predicted to need a decision maker due to incapacity, the resources available or needed to meet that need, and to the processes utilized to meet the need.
 - In discussion with JLOSC staff, Commission staff explained that conducting an annual statewide needs assessment never came to fruition due to a lack of resources. Additionally, funding was not provided to assist with this requirement. In comparing this Commission to similar groups nationally, this is not a common function performed.
4. Advocate for legislation and make legislative recommendations to the Governor and the General Assembly.
 - While the Commission has not officially made specific legislative recommendations, legislation pertaining to adult guardianship has been discussed. As a spokesperson for the Commission, the Public Guardian has advocated for legislation pertaining to the Office and adult guardian topics.
5. Develop public and professional education programs on issues relating to guardianship, alternatives to guardianship, and concerns relating to the abuse, neglect, and exploitation of individuals who are incapacitated.
 - While the work is not complete, the Commission has discussed education programs and coordinating with the Court to combine efforts. Additionally, the Commission's proposed spending plan for service fees collected allots 30% to educational efforts.
6. Provide an annual summary of the work and recommendations of the Guardianship Commission, including the work of the Office of the Public Guardian to the Governor, the General Assembly, and the court.
 - It is documented throughout meeting minutes that annual reporting was never completed, and the Office and Commission both acknowledged this as a statutory requirement. Annual reporting was likely not completed due to a lack of staff resources. Commission staff noted in the self-report that the Office's small staff size and large, complex case load has limited the amount of direct staff support provided to the Commission. Annual reporting is a standard requirement of offices and commissions both in-state and nationally and should be completed moving forward.

Lastly, the Commission is statutorily required to meet on a quarterly basis.¹² JLOSC staff noted the Commission met quarterly without quorum issues for several years, from January 2012 until January 2015. The Commission began experiencing quorum issues in 2015 and still held meetings without quorum to discuss adult guardianship topics. Overall, in 10 full years of existence, the Commission only missed meeting requirements during a 3-year period, 2018-2020.

¹² 12 Del. C. § 3992.

The Commission had a period of meeting cancellations in 2018 and 2019, holding half of the required meetings. Cancellation reasons were not always provided; however, quorum issues were cited as the reason for at least 1 cancellation and quorum issues were documented in the subsequent meetings held. Quorum issues improved in 2020, but the Commission fell short of the required quarterly meetings as 1 meeting was cancelled due to the Covid-19 pandemic. The Commission held all required meetings in 2021 and 2022 and a quorum was present for all but 1 meeting.¹³ In late 2020, meetings transitioned to Zoom due to the Covid-19 pandemic, which may have assisted the Commission in reaching quorum. The Commission currently has quarterly meetings scheduled through January 2024.

Finding #3

This review observed Freedom of Information Act (“FOIA”) compliance issues, however recent improvements detected.

The Commission and its subcommittees are public bodies as defined by FOIA.¹⁴ During the course of this review JLOSC staff reviewed meetings held January 2020 through January 2023 and checked for FOIA compliance on meeting notice, agendas, and minutes.¹⁵ Using FOIA open meeting requirements¹⁶ the *FOIA Scorecard* below notes the following FOIA compliance items:

- Every meeting must be open to the public, except for valid exception under FOIA.
 - Executive session closed to the public for FOIA named purposes.
- Public notice of regular meetings posted at least 7 days in advance of the meeting.
 - Includes agenda if determined.
 - Posted within 6 hours in advance of the meeting with reason for posting delay included.
 - Posted in public location accessible to the public, including electronic posting on designated State of Delaware website.¹⁷
 - Includes date, time, and place of meeting.
 - Indicates intent to hold executive session (if applicable).
- Agenda is subject to change, changes may include:
 - Added items, including executive session.
 - Deletion of items, including executive session.
- Minutes recorded and made available for public inspection and copying as a public record. Minutes must include the following:
 - Record of members present.
 - Record by individual members of each vote taken and action agreed on.
- Final minutes posted within 5 working days of final approval.
 - Draft minutes posted within 20 working days of meeting conclusion for public bodies who meet 4 or fewer times per year.

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¹³ Minutes are missing for 1 meeting held in April 2021, quorum is unknown for this meeting.

¹⁴ 29 Del. C. § 10002.

¹⁵ This finding, which explores FOIA compliance, is meant to be an educational tool.

¹⁶ 29 Del. C. § 10004.

¹⁷ Designated website is the Public Meeting Calendar: <https://publicmeetings.delaware.gov>

FOIA Scorecard for January 2020 – January 2023	
Total Commission Meetings Held	13
Properly Noticed Meetings	2
Properly Posted Agendas	2
Properly Posted Meeting Minutes (draft)	0
Properly Posted Meeting Minutes (final)	1
Missing Meeting Notice	11
Missing Agendas	11
Missing Minutes	12
Number of Executive Sessions Held	0
Minutes Contain Required Information	no
Agendas Contain Required Information	yes

Commission started using the Public Meeting Calendar on October 13, 2022.

JLOSC staff reviewed Delaware’s Public Meeting Calendar for all meetings held by the Commission during the review period (January 2020 – January 2023). The Public Meeting Calendar keeps a record of all administrative actions for a meeting date including announcement creation date and posting dates for agendas and minutes. During the review period, the Commission properly noticed 2 out of 13 public meetings held, 11 meeting announcements were missing. Agendas were properly posted for the 2 meetings posted on the Public Meeting Calendar.

Since the Commission meets 4 times per year or less, draft meeting minutes should be posted within 20 working days of a meeting.¹⁸ Zero meetings held during the review period properly posted draft meeting minutes and only 1 meeting announcement included properly posted final meeting minutes. The meeting announcement for January 23, 2023 indicates draft minutes posted, however the posted draft minutes are from the October 24, 2022 meeting. Minutes for the January 23, 2023 meeting are scheduled for review and approval at the next scheduled Commission meeting on April 24, 2023.

Meeting minutes reviewed by JLOSC staff do not contain the required FOIA information of recording votes of individual members and actions agreed on. Additionally, meeting minutes do not clarify which individuals present are voting Commission members.¹⁹

JLOSC staff did not locate meeting announcements, agendas, or minutes for any subcommittee or ad-hoc committee formed by the Commission on either the Public Guardian’s website or the Public Meeting Calendar.

Prior to this review, the Commission did not have a listing on the Public Meeting Calendar.²⁰ In late September 2022, JLOSC staff worked with the Government Information Center to create a listing for the Commission. The Commission began using the Public Meeting Calendar on October 13, 2022 and has posted notices for future meetings scheduled through January 2024. The Commission also posted agendas and minutes for their October 2022 and January 2023 meetings. The Commission stated in

¹⁸ 29 Del. C. § 10004.

¹⁹ Commission included non-voting “Clause B” members throughout its meeting history.

²⁰ JLOSC staff noted confusion with FOIA since the Commission and its subcommittees are considered public bodies under FOIA, while Delaware courts are not.

the self-report that it currently struggles with public outreach. Creating the Public Meeting Calendar listing and using it consistently may help the public successfully participate in the Commission's meetings.

Prior to using the Public Meeting Calendar, Commission meetings were posted on the Public Guardian's website but not attended by the public.²¹ Using internet archives, JLOSC staff could verify consistent posting of meeting dates; however, agendas were not always included, and meeting minutes were rarely available. Additionally, there is no archive of past meeting minutes on the Public Guardian's website.

Finding #4

Bylaws are outdated. Current Commission structure not ideal to facilitate broad discussions on adult guardianship.

According to statute, the Commission is composed of 13 members:²²

- One member from the Court of Chancery, designated by the Chancellor.
- One representative from the Department of Justice, designated by the Attorney General.
- The Director of the Guardianship Monitoring Program, or the Director's designee.
- One member of the House of Representatives, designated by the Speaker of the House.
- One member of the Senate, designated by the President Pro Tempore of the Senate.
- The Director of the Division of Services for Aging and Adults with Physical Disabilities, or the Director's designee.
- The Director of the Division of Substance Abuse and Mental Health, or the Director's designee.
- The Director of the Division of Developmental Disabilities Services, or the Director's designee.
- The Secretary of the Department of Health and Social Services, or the Secretary's designee.
- A representative from the Disability Community, designated by the Secretary of Health and Social Services.
- A representative from the Senior Citizen Community, designated by the Secretary of Health and Social Services.
- A representative from the hospital community, designated by the Delaware Healthcare Association.
- The Chair of the Elder Law Section of the Delaware State Bar Association, or the Chair's designee.

The Chair of the Elder Law Section of the Delaware State Bar Association is the newest member of the Commission, added by legislation in 2022.²³ There are 2 current vacancies on the Commission due to staff turnover, the representatives from the Department of Justice and the Division of Developmental Disabilities Services.

Six members of the Commission serve by virtue of position and there are no Governor appointed members. There is an appointing authority conflict with the Delaware Healthcare Association designating the hospital community representative. The Delaware

²¹ <https://courts.delaware.gov/publicguardian/dgc.aspx>

²² 12 Del. C. § 3991.

²³ [House Bill 369](#), 151st General Assembly.

Healthcare Association is a non-governmental organization that represents hospital and healthcare organizations. Regarding public boards and commissions established by Delaware law, private entities may not make direct appointments. To correct this conflict, JLOSC staff has mechanisms in place to ensure stakeholder input remains intact.

Statute does not define quorum or officer positions; however, definitions exist in the Commission's bylaws.²⁴ The Commission adopted bylaws at its first meeting but have not made revisions though changes have been made to Commission composition and FOIA regulations regarding virtual meetings.²⁵

The Commission's adopted bylaws define quorum as 40% of voting members and define the duties of chair, vice chair, secretary, and Executive Committee.²⁶ Bylaws state that the Commission can elect a vice chair, secretary, and Executive Committee members from its voting members. Additionally, the bylaws dictate that the Commission's Executive Director (defined in statute as the Public Guardian) serves as its chair despite the Public Guardian not being one of the 13 voting members.²⁷

A review of historical meeting minutes indicates an election for vice chair, secretary, and Executive Committee members occurred at the first meeting on January 30, 2012. The Commission recently included an officer election on its agenda, but the topic was tabled at the October 24, 2022 and January 23, 2023 meetings. No meeting notices, minutes, or agendas exist for an Executive Committee, and it is unclear if any meetings were held or if its existence is needed.

From reviewing meeting minutes and comparing this Commission to other advisory boards in Delaware, the dynamic of the Commission chair and Executive Director being the same director of the office being advised may not foster an environment for the development of genuine feedback and ideas. This is not a typical arrangement seen with advisory boards statewide or nationally.

Finding #5

Adult guardianship support and advocacy is not specific to the Office of the Public Guardian. With issues surrounding adult guardianship, a national approach and network exists to find collaborative solutions. Because adult guardianship cases and issues will continue to rise, JLOSC should consider modifying this Commission to incorporate additional stakeholders, advocacy topics.

Adult guardianship support and advocacy is not specific to the Office of the Public Guardian and national issue groups are not focused on a single office. While the scope of this report was on the Commission's performance, JLOSC staff performed additional research into guardianship issues on a national level and identified existing support. The following information is provided with the intent to support efforts in transforming the existing Commission into a more inclusive entity, focusing on a broad range of guardianship issues.

²⁴ Bylaws available in Appendix B.

²⁵ Additional member added to the Commission in 2022 by [House Bill 369](#). FOIA statute updated in 2021 by [Senate Bill 94](#) to include virtual meeting provisions.

²⁶ Quorum is typically defined as the majority of voting membership by Roberts Rules of Order and Mason's Manual of Legislative Procedure.

²⁷ 12 *Del. C.* § 3991.

To summarize, adult guardianship is the legal process that appoints a guardian for an individual found to lack the capacity to make their own decisions. Adult guardianship removes an individual's fundamental rights, considered to be the highest level of intervention available, and can be placed on an individual, their property, or both. Experts project cases of guardianship will continue to rise as the population ages. Education and advocacy efforts are becoming more critical, especially as public policy shifts focus to assist adults with aging issues.

On a national level, many high-profile cases have hit the news regarding guardianship and even conservatorship such as Britney Spears and Casey Kasem. A 2020 film, *I Care a Lot*, added some additional exposure. While the film dramatized guardianship abuse, real cases exist,²⁸ including the one which served as inspiration for the film.²⁹

In addition to national headlines, the U.S. Government Accountability Office ("GAO") released the following 6 reports over the past 2 decades highlighting guardianship issues:

- [July 2004](#) – Guardianships: Collaboration Needed to Protect Incapacitated Elderly People.
- [September 2006](#) – Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People.
- [September 2010](#) – Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors.
- [July 2011](#) – Incapacitated Adults: Oversight of Federal Fiduciaries and Court Appointed Guardians Needs Improvement.
- [November 2012](#) – Elder Justice: National Strategy to Effectively Combat Elder Financial Exploitation
- [November 2016](#) – Elder Abuse: The Extent of Abuse by Guardians is Unknown, but Some Measures Exist to Help Protect Older Adults.

To help states inspire reform, associations such as the National Guardianship Association ("NGA") provide education, research, and host annual summits. The NGA also adopts guardianship standards and ethical principles.³⁰ NGA also encourages and supports all guardians to obtain certification through the Center for Guardianship Certification.³¹

To further encourage reform with a legislative focus, the Uniform Law Commission partnered with experienced guardianship judges and reform advocates to draft the *Guardianship, Conservatorship, and Other Protective Arrangements Act*.³² Released in 2017, this legislative reform makes person-centered planning and least-restrictive measures a priority. The model legislation received approval by the American Bar

²⁸ [Who Guards the Guardians? Texas Abandons Elderly to Broken System](#) (Texas Observer, July 2016), [How the Elderly Lose Their Rights](#) (The New Yorker, October 2017), [Guardian for Elderly Arrested on Abuse, Neglect Charges](#) (Associated Press, February 2020).

²⁹ Phyllis Funke: ['I'm Petitioning ... for the Return of My Life'](#) (The New York Times, 2018).

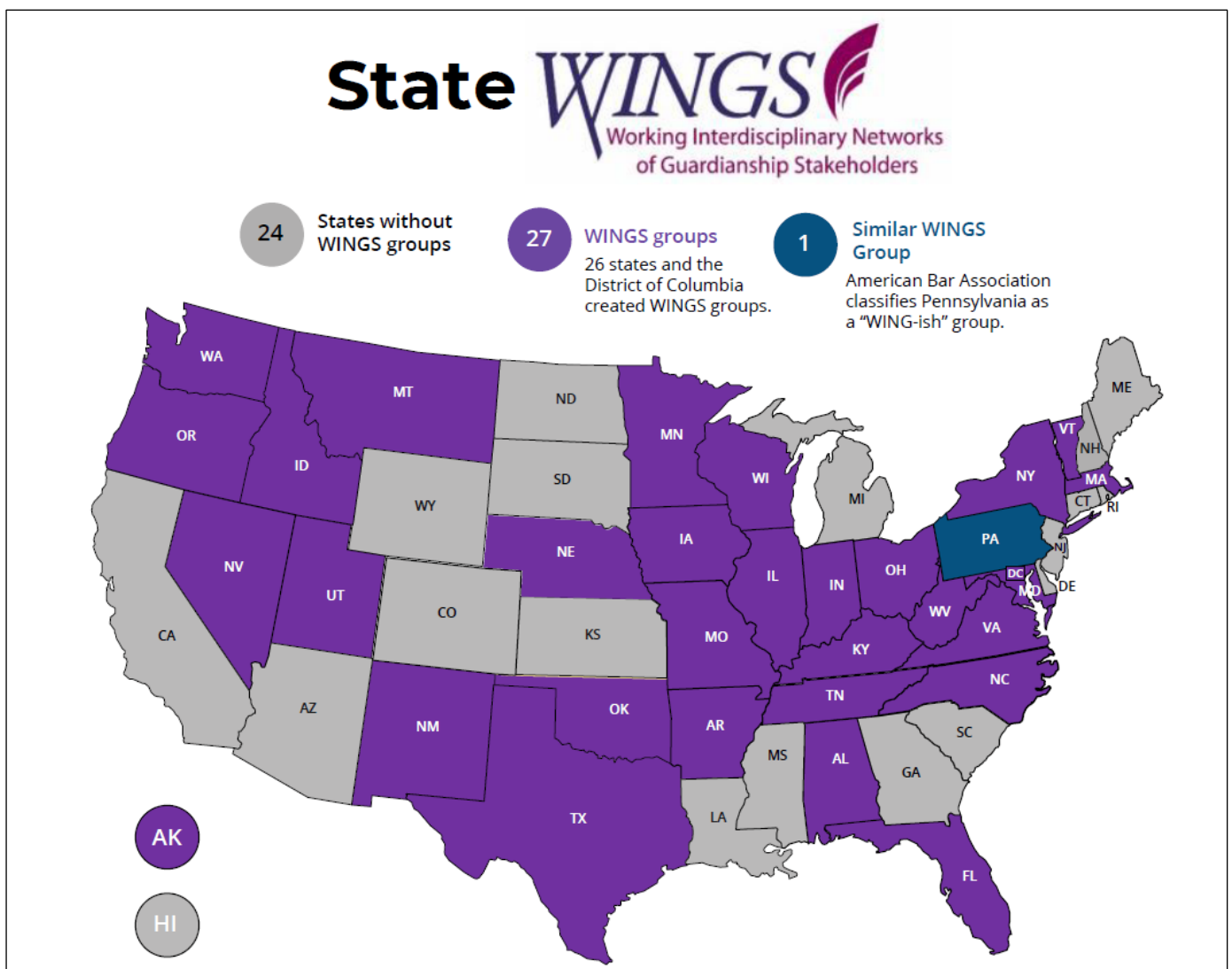
³⁰ NGA Standards available online: <https://www.guardianship.org/standards>

³¹ Center for Guardianship Certification information available online: <https://guardianshipcert.org>

³² Guardianship, Conservatorship, and Other Protective Arrangements Act, enactment kit, legislative bill tracking, and documents available on the Uniform Law Commission [website](#).

Association in 2018 and an endorsement from the NGA. So far 2 states, Maine and Washington, enacted this model in 2018 and 2019 respectively. In January 2023, Hawaii became the most recent state to introduce this updated legislation. The previous version, released by the Uniform Law Commission in 2007, was enacted by 46 states (including Delaware), the District of Columbia, Puerto Rico, and US Virgin Islands.³³

Another national approach and reform support system exists with the American Bar Association (“ABA”) Commission on Law and Aging. The ABA developed a national network called Working Interdisciplinary Networks of Guardianship Stakeholders known as the acronym “WINGS” for short. WINGS groups have formed across the country and are part of a national effort to bring together stakeholder partnerships to affect change within guardianship policies and practices. While there are no current funding sources available to support WINGS efforts, the State Justice Institute (“SJI”) and Administration for Community Living (“ACL”) previously offered grants. The existing Delaware Guardianship Commission has functioned since 2012 without funding. The chart below illustrates which states have created WINGS groups since 2013.



JLOSC staff created this chart using May 2022 [data](#) from the American Bar Association.

³³ [Adult Guardianship and Protective Proceedings Jurisdiction Act](#), Delaware enacted in 2008 with [Senate Bill 281](#).

The Delaware Guardianship Commission discussed WINGS groups in 2015 and again in 2022. In 2015, the Commission lacked Court support and stopped pursuing grant funding to create a WINGS group in Delaware. In earlier WINGS groups, Court support and participation were a requirement. Today, WINGS groups form in a variety of different ways, and some have been established outside of the judiciary. For example, North Carolina formed its WINGS group with a college as the organizing stakeholder.³⁴ Massachusetts created a Guardianship Policy Institute and has recently launched a new nonprofit initiative to address urgent and growing guardianship issues.³⁵

Through the assistance of a grant from the U.S. Department of Health and Human Services and ACL, the ABA released a WINGS state replication guide and a Final WINGS Assessment report in 2019.³⁶

Because adult guardianship cases and issues will continue to rise, transitioning to a WINGS format could assist Delaware in addressing 3 categories identified by the ABA as areas of focus:³⁷

- Lack of data.
- Unnecessary and overly broad guardianships.
- Guardian abuse.

There are a variety of state and organizational resources to assist with converting the existing Delaware Guardianship Commission to a WINGS group. Delaware is not immune to the rise of adult guardianship cases and issues, as evident by a recent legislative task force on non-acute patient medical guardianship.³⁸ JLOSC should consider modifying this Commission to incorporate additional stakeholders and advocacy topics that mirror WINGS groups across the country.

The current Commission makeup is not consistent with a WINGS group as the primary focus is providing advocacy and support to a single office. National WINGS groups bring together a multitude of stakeholders to collaborate and find solutions on a broad range of adult guardianship issues. Since the Office of the Public Guardian is an important aspect of guardianship in Delaware and houses the Guardianship Monitoring Program (which is designed to combat guardian abuse), it will continue to be an important stakeholder in a reorganized Commission and will be relied on to provide data to facilitate the new group's efforts. Additionally, as outlined in this report, current statute tasks the existing Commission to advise the Office and these duties would be transferred to a reorganized group.

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³⁴ Jordan Institute for Families within the School of Social Work at the University of North Carolina, Chapel Hill.

³⁵ [Who will be guardians for legions of 'unbefriended' elders? A new initiative tries to address an urgent and growing problem in Mass](#) (The Boston Globe, 2023).

³⁶ 2019 WINGS replication guide and assessment report available online: [WINGS Court-Stakeholder Partnerships \(americanbar.org\)](#)

³⁷ [WINGS - An Innovative and Collaborative Approach to Reform](#) (ABA, 2020).

³⁸ Senate Concurrent Resolution 30, Non-Acute Patient Medical Guardianship Task Force, 2019-2021, information available on the General Assembly [website](#).

STAFF RECOMMENDATIONS

Recommendation #1, Option 1 – Continue the Delaware Guardianship Commission

After review and analysis, JLOSC staff recommends option 1, continue the Delaware Guardianship Commission, subject to any further recommendations that JLOSC adopts.

Continue or Terminate (standard JLOSC recommendation).

Option 1: The Delaware Guardianship Commission shall continue, subject to any further recommendations that JLOSC adopts.

- OR -

Option 2: The Delaware Guardianship Commission is terminated, and the Committee will sponsor legislation to implement this recommendation.

Recommendation #2 – Statute Revisions

JLOSC should consider sponsoring a bill to apply technical corrections to the governing statute of the Delaware Guardianship Commission, Chapter 39, Title 12, and using this review as a guide, applying revisions to sections covering topics such as:

- Consider a name update to “Delaware Adult Guardianship Commission.”
- Update Commission composition.³⁹
 - Update membership consistent with national WINGS groups.
 - Define quorum.
 - Update Commission staffing resources.
- Update Commission duties.⁴⁰
 - Incorporate duties consistent with national WINGS groups.
 - Receive non-identifying data from the Office of the Public Guardian.⁴¹
- Update Commission references in Subchapter VI. Public Guardian.⁴²
 - Remove Public Guardian as Executive Director the Commission.

JLOSC and Delaware Guardianship Commission staff will work together to develop statutory revisions. JLOSC staff will engage stakeholders as appropriate. While statutory revisions are developed, the Commission will continue working on developing the standards for fee collection as prescribed in 12 *Del. C.* § 3986.

Recommendation #3 – Update Bylaws.

The Delaware Guardianship Commission shall consider revising their bylaws.

- Update quorum to accepted standards.
- Apply updated FOIA provisions pertaining to virtual meetings.
- Remove Public Guardian as Commission chair, allow Commission to vote for all officer positions from the voting membership.
- Update duties of the Office of the Public Guardian to present non-identifying data at Commission meetings at a frequency requested by Commission members.⁴³

³⁹ 12 *Del. C.* § 3991.

⁴⁰ 12 *Del. C.* § 3992.

⁴¹ Examples listed under Finding #1 of Staff Report.

⁴² 12 *Del. C.* § 3981 and 12 *Del. C.* § 3983.

⁴³ Examples listed under Finding #1 of Staff Report.

Recommendation #4 – Release from Review.

Release the Delaware Guardianship Commission from review upon enactment of legislation applying technical corrections and other changes listed under Recommendations 2.

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March 24, 2023

Joint Legislative Oversight and Sunset Committee
152nd General Assembly, 1st Session

Written Comments to:
Staff Findings and Recommendations Report
Delaware Guardianship Commission

Respectfully submitted by:
The Office of the Public Guardian
Alexandra McFassel, Esq. Public Guardian

The Delaware Guardianship Commission was created in 2011 as part of amendments made to 12 Del.C. Sec. 3981 et. seq. The goal of its creation was to create an entity which met the need for ongoing review of the guardianship process in the State of Delaware, with the ongoing goal of advocating for the best process and protections for individuals subject to guardianship proceedings.

As noted in the Staff Findings and Recommendations Report, the guardianship process, and the appointment of a guardian for an individual with disabilities is a significant interference with the individual rights of an individual. In Delaware, it is viewed as the most significant deprivation of the right to self-determination a court can impose. (In re J.T.M. Ct. of Chancery, VCG, December 31, 2014, Attached). The Court of Chancery is empowered by 12 Del. C. §3901(a)

to appoint guardians of the person or property, or both, of any person with a disability, “person with a disability” being defined as one who by reason of mental or physical disability is unable to manage or care for their own person or property. (Id. At 3). The Court of Chancery requires proof by clear and convincing evidence to establish a guardianship over an individual purported to be in need, and this requirement is established by caselaw in Delaware.

This evidentiary requirement, established by caselaw in 2014, is an example of the ongoing work done by the Court of Chancery in the guardianship arena to protect the rights of individuals in this state. It is itself evidence that there is an ongoing need for an entity whose stated mission is to examine and evaluate the policies, procedures, and effectiveness of the guardianship system, and make recommendations for changes therein, including statewide standards and regulation of public and private guardianships.

The Delaware Guardianship Commission has worked for over a decade to make improvements in the process and procedure of guardianship. Prior to the issuance of the above cited opinion raising the evidentiary standard, then Chancellor Andre Bouchard met with the Public Guardian, as Chair of the Commission, and Vice Chancellor Glasscock, to discuss proposals to the Court drafted by the Delaware Guardianship Commission. These proposals included:

- The Volunteer Attorney Program, proposing a program utilizing Delaware Volunteer Legal Services to provide attorneys to advocate for individuals over whom a guardianship was sought where the individuals opposed the guardianship.
- Standards for Guardians and Proposed Care Plan, where the Commission had drafted proposed standards for private and professional guardians and proposed requiring a care plan.

- Suggested statutory changes to Title 12, including 1) addressing the evidentiary standard necessary to impose a guardianship by adopting the “clear and convincing” evidentiary standard, 2) requiring that guardians follow the doctrine of substituted judgment, 3) developing more substantial guidance on “emergency” or “interim” guardianships granted to enable immediate urgent health or end-of-life decisions, and 4) developing statutory authority for limited guardianships or requirements that less intrusive alternatives be exhausted.

While the Court of Chancery did not directly respond to the Commission on these issues, in the intervening years the Court has developed a program providing for the representation of individuals opposing guardianship, has raised the evidentiary standard, and is addressing proper process for emergency or interim guardianships. A statutory change specifically enabling limited guardianship has been enacted since this presentation with the assistance of the Office of the Public guardian.

The purpose of pointing out this specific example of the work the Commission has done is to demonstrate that a public need exists for the Commission, and to establish that the Commission has been effective. The Commissions assessed the needs of the process and took those needs and suggested solutions directly to the Court of Chancery. There is no other entity that was or is taking steps to bring these issues directly to the Court of Chancery, to provide support and suggestions of change that ultimately benefits the citizens of Delaware, no other place to give voice to these concerns that isn't the Court itself.

Second, whether it is directly acknowledged, it is clear from actions taken by the Court that the concerns of the Commission were heard in 2014 and continues to be heard. The Commission members have also assisted the Court in revising the

Physician's Affidavit, in conjunction with other groups. In the past few years the Physician's Affidavit, a necessary part of the petitioning process that informs the Court of the individual's disability and needs, has undergone significant change. The Commission is effective in its mission.

Finding #1 Comment:

A. The Staff findings indicate that the Commission Meetings do not include any consistent reporting from the Office of the Public Guardian (OPG).

The Office of the Public Guardian would be happy to provide consistent reporting to the Commission, recognizing that all information in the Office of the Public Guardian is related directly to active matters in the Court of Chancery and is maintained pursuant to the appointment of OPG as guardian for the person and property of individuals. Guardianship matters are confidential within the Court of Chancery and any identifying information in the Office of the Public Guardian should also be construed as confidential as well.

The examples provided in the Staff Findings and Recommendations Report are good examples of non-identifying data the office could provide. Given the resources necessary to gain and maintain selected data sets, annual reporting would be preferred.

B. The Staff Findings indicate the Court's website was not updated to reflect the proposal regarding the collection of fees, or the use of fees collected, and that there have been no updates on the status and amounts of fees collected under the approved standard.

There is confusion on what to post and where that does need clarity. Information regarding specific information related to the business of the Office of the Public Guardian and the Court of Chancery is not normally posted on the Court's website. The Court posted "Standing Order No. 10" approving pay

compensation for services related to guardianship or representative payee duties. In response to the finding, it would be beneficial to have a discussion as to the release of information from the Office of the Public Guardian, as OPG does not normally publicize information related to the individuals it serves. Generally, no fees have, as yet, been collected. Once fees are collected, it would be useful to have guidance as to how to report the collection given the confidential nature of guardianship matters. It would be beneficial if the DGC had its own website, as do WINGS groups across the nation.

Finding #2 – Comment:

1. It is accurate the Commission has rarely, if ever, engaged in discussion of case acceptance priorities for the Office of the Public Guardian. Due to resource limitations, priority is given to cases from Adult Protective Services, Hospitals, the Court of Chancery, and the Division of Developmental Disabilities, i.e., those individuals in the most vulnerable populations.
2. The Commission definitely has examined and evaluated the policies, procedures, and effectiveness of the guardianship system in Delaware, and assisted in strides forward. (See above.)
3. The Commission has not conducted a Statewide needs assessment due to the lack of resources and the difficult nature of doing so.
4. The Commission has participated in discussion of legislation pertaining to adult guardianship.
5. Education programs have been discussed and are a priority, but resources are lacking.

6. It is accurate the Chair has failed to meet the Annual Reporting Requirement of the Commission. It is suggested that specific objectives should be set for reporting annually, and that this effort should not fall solely on the Chair.

Finding #3 – Comment

“This Review observed Freedom of Information Act (“FOIA”) compliance issues...”

There is significant confusion related to FOIA compliance due to the absence of a FOIA Coordinator, a FOIA Handbook, and general lack of information related to FOIA compliance. Efforts were made to comply with the FOIA requirements, and going forward compliance will be a priority. The Commission should seek the means for access to a FOIA Coordinator, and utilize the handbook for assistance. Efforts regarding compliance should not fall solely on the Chair.

Finding #4 – Comment

“Bylaws are outdated. Current Commission Structure not ideal to facilitate broad discussions on adult guardianship”.

The composition of the Commission has been designed since inception to include all of the State Agencies with clients whose lives may be impacted by guardianship, an Office providing guardianship, the Courts, the guardianship monitoring program, a representative from the senior community and a representative from the disabilities community. The original members were all State Actors intentionally due to lack of budget support to reimburse costs. Originally, all of the members were appointed by the Governor, and that made it difficult to fill vacancies. In the past year, the Chair was informed by the

Governor's Office that these positions were not Governor appointed, and the appointing authority could makes the selection.

It would improve the composition if there was a seat for either a guardian or individual under guardianship, a seat for a representative from Community Legal Aid Society, Inc., and a seat for a representative of the senior community or AARP, and a specific seat for the Fee-for-Service guardianship services. Aside from these additions, the current Commission Members are well-suited to have broad discussions on guardianship. What may be missing is family guardian participation. Both CLASI and the FFS Organizations have participated since the beginning, as has the private bar.

If the Commission Membership is expanded or otherwise re-focused, re-evaluation of 12 Del.C. §3993 should be re-evaluated as the Office of the Public Guardian does not have the funds to any expense of Commission Members at this time.

Finding #5 – Comment

The WINGS groups were the original inspiration for the Delaware Guardianship Commission. At the time the DGC was created, there were very few WINGS groups and there was a lack of enthusiasm in the Courts administration to fully develop one. At the time, the WINGS groups were largely Court-led. Information specific to WINGS may be found on the American Bar Association website.¹ The Staff Findings contain a lot of good information regarding WINGS and the National Guardianship Association. The DGC sought to become an official WINGS group again in 2015, and apply to receive up to \$25,000 in grant money, but this application was not supported by the Chief Justice at that time, and that support was essential in order to receive grant funding.

¹ https://www.americanbar.org/groups/law_aging/resources/wings-court-stakeholder-partnerships0/guardianship-reform-wings-background/

The Staff Findings covers the benefits and reasons for a WINGS group well. Creation of a WINGS group would bring opportunities for grant funding and more resources to support education and reform in the Delaware Guardianship system. OPG fully supports a transition to a WINGS group. This Agency has worked hard to advocate for and bring about positive changes in adult guardianship matters, and it will continue to advocate for best practices and participate in the Commission in whatever form the General Assembly deems most appropriate.

COMMENT ON STAFF RECOMMENDATIONS:

There is a public need for an entity which addresses the policies, procedures, and needs of affected individuals in the Adult Guardianship System in Delaware. The Commission has been effective in meeting this need but there is room for improvement and growth. Transforming the Delaware Guardianship Commission to a WINGS group as recommended in Recommendation #2 would benefit the citizens of Delaware, and bring Delaware into the national forum and discussions on guardianship, as well as potentially opening up federal grant funding.

Recommendation #1: (Comment) While the Commission has been effectively meeting a public need, the current iteration is limited by the resources of the Office of the Public Guardian. The Commission should continue with reforms.

Recommendation #2: (Comment) The Office of the Public Guardian supports this recommendation. Creating a group more consistent with the National WINGS groups would be a great step forward. The new group would be able to connect with these groups and raise the Commission to a higher level.

The Public Guardian has no objection to being removed, but it should be noted that it has not been possible to obtain nominations for a Vice-Chair or

Secretary, so research should be done to find an ongoing enthusiastic Chair. There should also be a search for resources to support the group, and well as a plan for funds to support membership and goals. It is presumed that removal of the Public Guardian as Chair removes the responsibility of this Office to initiate meetings, produce minutes, and circulate materials, so staffing and resources should be considered. The Public Guardian will work with the Commission in whatever form the General Assembly deems most appropriate.

Recommendation #3: (Comment) The Office of the Public Guardian agrees with this recommendation but notes the following:

- The Commission has tabled motions twice to elect a Vice-Chair and a Secretary, and this raises concerns that it would find an interested party for the Chair.
- The Office of the Public Guardian will provide non-indentifying data at a frequency requested by the Commission.

Recommendation #4 – Comment: Agree.

Thank you for this opportunity to comment on the Staff Findings and Recommendations Report on the Delaware Guardianship Commission. I look forward to seeing how this evolves and hope the DGC continues with the enthusiasm it started with.

Respectfully,
Alexandra McFassel, Esq.
National Certified Guardian
Public Guardian

The Public Guardian shall post bond as required by the court upon the appointment of the office. The Office of the Public Guardian shall apply for and maintain bond sufficient to insure the assets managed by the office.

(59 Del. Laws, c. 579, § 9; 60 Del. Laws, c. 511, § 50; 60 Del. Laws, c. 570, § 9; 60 Del. Laws, c. 722, § 3; 69 Del. Laws, c. 109, § 2; 70 Del. Laws, c. 186,, § 1; 78 Del. Laws, c. 40, § 1.)

§ 3989 [Reserved]

Subchapter VII

Delaware Guardianship Commission

§ 3991 The Guardianship Commission.

(a) The Delaware Guardianship Commission is hereby established, and shall be known as the "Guardianship Commission." The Commission shall consist of 12 members and shall be staffed by the Office of the Public Guardian. The Guardianship Commission shall be comprised of the following:

- (1) One member from the Court of Chancery, designated by the Chancellor;
- (2) A representative from the Department of Justice, designated by the Attorney General;
- (3) The Director of the Guardianship Monitoring Program, or the Director's designee;
- (4) One member of the House of Representatives, designated by the Speaker of the House;
- (5) One member of the Senate, designated by the President Pro Tempore of the Senate;
- (6) The Director of the Division of Services for Aging and Adults with Physical Disabilities, or the Director's designee;
- (7) The Director of the Division of Substance Abuse and Mental Health, or the Director's designee;
- (8) The Director of the Division of Developmental Disabilities Services, or the Director's designee;
- (9) The Secretary of the Department of Health and Social Services, or the Secretary's designee.
- (10) A representative from the Disability Community, designated by the Secretary of Health and Social Services;
- (11) A representative from the Senior Citizen Community, designated by the Secretary of Health and Social Services;
- (12) A representative from the hospital community, designated by the Delaware Healthcare Association.

(b) The Public Guardian shall serve as the Executive Director of the Commission to effectuate its purposes. The Public Guardian may, with the concurrence of the members, invite other individuals to participate in the Commission to advance its work.

(78 Del. Laws, c. 40, § 2.)

§ 3992 Duties of the Commission.

The Commission shall advocate for the welfare of individuals who are incapacitated; shall work with advocacy groups and state agencies to promote systemic reform; recommend changes in the law, procedure and policy necessary to enhance the provision of guardianship services and the protection of those unable to protect themselves; and act as an informational resource for the public. To that end, the Commission shall meet on a quarterly basis and shall:

- (1) Act in an advisory capacity to the Office of the Public Guardian, providing assistance to the Public Guardian in establishing administrative policies and procedures in the Office of the Public Guardian, and assistance in developing case acceptance priorities for the Office of the Public Guardian;
- (2) Examine and evaluate the policies, procedures and effectiveness of the guardianship system, and make recommendations for changes therein, including establishing statewide standards and regulation of public and private guardianships;
- (3) Conduct an annual statewide needs assessment relating to the number of individuals currently and predicted to be in need of a decision maker due to incapacity, the resources available or needed to meet that need, and to the processes utilized to meet the need;
- (4) Advocate for legislation and make legislative recommendations to the Governor and the General Assembly;
- (5) Develop public and professional education programs on issues relating to guardianship, alternatives to guardianship, and concerns relating to the abuse, neglect, and exploitation of individuals who are incapacitated; and
- (6) Provide an annual summary of the work and recommendations of the Guardianship Commission, including the work of the Office of the Public Guardian to the Governor, the General Assembly, and the court.

(78 Del. Laws, c. 40, § 2; 78 Del. Laws, c. 179, §§ 121-123.)

§ 3993 Compensation.

Members of the Commission shall serve without compensation; however, they may be reimbursed, upon request, for reasonable and necessary expenses incident to their duties as members of the Commission to the extent funds are available through the Office of the Public Guardian. Members may be removed at the discretion of their appointing authority.

(78 Del. Laws, c. 40, § 2.)

§§ 3956, 3957. [Repealed].

Subchapter V

Investment by Court of Chancery of Fund of Minors

§ 3971. Investment power of Court of Chancery; general requirements.

(a) The Court of Chancery shall have control of money paid into the Court to the credit of any minor who cannot be located, and may invest such money in bank deposits as the Court shall approve, and may change, renew, extend, call in or collect any such investment.

(b) The investment shall be in the name of the minor or minors entitled to the money, either personally or by designation as children, legatees, heirs or representatives of another and the Court may, at any time, apportion and divide the same among them.

(c) At such time as the minor for whom money is held or invested under this subchapter is located, the Court may direct the evidence of such investments to be delivered to the former minor, the guardian of the property of the minor, or in case of death of the minor, to the minor's executors or administrators and may by order direct the bank to pay to the person entitled or to the person's agent or representative the evidences of ownership of the money. Such order shall vest in such person full power over such investment or all unpaid interest which may have accrued thereon.

(Code 1852, §§ 1980-1984; 16 Del. Laws, c. 136, § 1; Code 1915, § 3928; Code 1935, § 4435; 12 Del. C. 1953, § 3971; 57 Del. Laws, c. 402, §§ 3, 5; 69 Del. Laws, c. 109, § 2; 70 Del. Laws, c. 186, § 1.)

§§ 3972-3975. [Repealed].

Subchapter VI

Public Guardian

§ 3981. Office established; appointment.

(a) There is established an Office of the Public Guardian, with a Public Guardian who shall serve as follows:

(1) The guardian of last resort for the citizens of Delaware who have been determined to lack capacity to make decisions regarding their persons, their property, or both.

(2) The representative payee of last resort for Social Security benefits.

(3) The VA fiduciary of last resort for Department of Veterans Affairs benefits.

(b) The Public Guardian shall advocate and provide services under subsection (a) of this section, work with advocacy groups and state agencies to promote systemic reform and recommend changes in the law, procedure and policy necessary to enhance the provision of services for substituted and supported decision-making, and act as an informational resource for the public. The Public Guardian shall serve as Executive Director of the Delaware Guardianship Commission and promote the purposes of the Commission, and shall represent the Office of the Public Guardian in matters in which the appointment of the Public Guardian is sought.

(c) To bring about these goals, the Public Guardian must be an attorney duly licensed to practice law in Delaware, selected by the Governor, and shall serve for a term of 6 years from the date of swearing in.

(59 Del. Laws, c. 579, § 9; 60 Del. Laws, c. 511, § 50; 60 Del. Laws, c. 570, § 9; 60 Del. Laws, c. 722, § 3; 69 Del. Laws, c. 109, § 2; 70 Del. Laws, c. 186, § 1; 78 Del. Laws, c. 40, § 1; 78 Del. Laws, c. 179, §§ 121-123; 80 Del. Laws, c. 302, § 1; 82 Del. Laws, c. 90, § 3; 83 Del. Laws, c. 37, § 14.)

§ 3982. Definitions.

For the purposes of this chapter:

(1) "Court" means the Court of Chancery or the court which has jurisdiction for the appointment of guardians for the person, or property, or both, pursuant to this chapter.

(2) "Guardian" means a court-appointed guardian.

(3) "Guardianship Commission" means the Delaware Guardianship Commission.

(4) The term "last resort" includes any of the following:

a. Circumstances in which there is no other suitable person related to the individual willing or able to serve as surrogate decision maker guardian, representative payee, or VA fiduciary.

b. Circumstances in which a person willing or able to serve, or already serving, as a validly appointed agent of a durable power of attorney, a surrogate decision maker, representative payee, VA fiduciary, or a guardian, is available but sufficient cause has been found by the court that the individual available or so acting is not suitable to serve and that the appointment of the Public Guardian is in the best interest of the person who is incapacitated.

c. Exceptional circumstances have been found by the court to establish that appointment of the Public Guardian is in the best interest of the person who is incapacitated.

(5) "Person who is incapacitated" means a "person with a disability" as that term is defined under § 3901(a)(2) of this title.

(6) "Representative payee" means a person appointed by the Social Security Administration to receive Social Security or SSI benefits for an individual who cannot manage or direct the management of the individual's Social Security or SSI benefits.

(7) "VA fiduciary" means a person appointed by the Department of Veterans Affairs (VA) to receive VA benefits for an individual who is unable to manage the individual's VA benefits.

(78 Del. Laws, c. 40, § 1; 78 Del. Laws, c. 179, §§ 121-123; 82 Del. Laws, c. 90, § 4.)

§ 3983. Duties of the Public Guardian.

The Public Guardian:

(1) Shall establish case acceptance priorities and other administrative policies and procedures in consultation with the Guardianship Commission.

(2) Shall receive referrals and recommendations regarding individuals who may be in need of services under § 3981(a) of this title and independently evaluate the referral to make a determination as to the physical, social, and financial conditions of the individual, whether there are alternatives to public services under § 3981(a) of this title, and whether the individual is at risk of abuse, neglect, or exploitation.

(3) After evaluation of the conditions of the individual and in consideration of the established case acceptance priorities, may do any of the following:

a. Make a recommendation as to a suitable individual who is available and willing to serve as guardian or surrogate decision maker or refer to an appropriate private, nonprofit, or other entity willing to serve as guardian, representative payee, or VA fiduciary.

b. File a petition for its own appointment as guardian, or file for the appointment of any other individual as guardian where it is determined that the filing of a petition on behalf of another may avoid the need for public guardianship.

c. Consent to serve as guardian where another entity or individual files a petition for the appointment of the Public Guardian.

d. Consent to appointment as representative payee or VA fiduciary for an individual in an acute care setting or who is a client of the Department of Health and Social Services.

(4) When appointed as guardian by court order, shall serve as guardian of last resort, either plenary or limited; temporary guardian; or successor guardian; of the person or property, or both, of persons who are determined to be incapacitated for reasons other than minority. The Public Guardian shall have the same powers and duties as a private guardian as set out by this chapter and as defined by the court upon appointment.

(5) Shall acquire recognized certification as a guardian where available in a timely manner upon appointment and maintain certification while acting as Public Guardian, and promote and act in accordance with nationally recognized standards of guardianship and those developed in cooperation with the Delaware Guardianship Commission.

(6) a. May offer advice and guidance, without court appointment as guardian, to persons who request assistance or to those on whose behalf such assistance is requested for the purpose of encouraging maximum self-reliance and independence and avoiding the need for appointment of a guardian.

b. May take all necessary action, including programs of public education and legislative advocacy, to secure and ensure the legal, civil, and special rights of those determined by the court to be incapacitated.

(7) Shall submit an annual report on the efforts of the Office that shall be provided to the Guardianship Commission and included in the annual report of the Guardianship Commission.

(8) May coordinate volunteer legal representation for wards of the Office to assist with needed representation before administrative agencies and courts to pursue the legal rights and remedies of the ward and a volunteer legal community outreach program to assist the Office of the Public Guardian in educating the community about guardianship and alternatives to guardianship.

(9) May apply for and accept grants, gifts and bequests of funds from other state, federal and interstate agencies, as well as private firms, individuals and foundations, for the purpose of carrying out the lawful responsibilities of the Office of the Public Guardian and the Guardianship Commission. The funds must be deposited with the State Treasurer in a restricted receipt account established to permit funds to be expended in accordance with the provision of the grant, gift, or bequest.

(10) Shall take whatever actions are necessary to help the Guardianship Commission accomplish its goals.

(59 Del. Laws, c. 579, § 9; 60 Del. Laws, c. 511, § 50; 60 Del. Laws, c. 570, § 9; 60 Del. Laws, c. 722, § 3; 69 Del. Laws, c. 109, § 2; 78 Del. Laws, c. 40, § 1; 82 Del. Laws, c. 90, § 5.)

§ 3984. Staff; budgeting; finance.

The Public Guardian may appoint subordinates and delegate the appointed authority to subordinates to assist in carrying out the purposes of this subchapter. Subordinates may include such nonprofit organizations as the Public Guardian shall deem to be qualified in carrying out the duties as a subordinate guardian. The Public Guardian shall prepare an annual fiscal budget for the operation of the Office of the Public Guardian.

The General Assembly may annually appropriate such sums as it may deem necessary for the payment of the salary of the Public Guardian, the staff, and for the payment of actual expenses incurred by the Office of the Public Guardian. The Office of the Public Guardian shall be operated within limitation of the annual appropriation and any other funds appropriated by the General Assembly or designated for that purpose from the estate of the person with a disability by the court.

Special funds may be used in accordance with approved programs, grants, and appropriations.

(59 Del. Laws, c. 579, § 9; 60 Del. Laws, c. 511, § 50; 60 Del. Laws, c. 570, § 9; 60 Del. Laws, c. 722, § 3; 69 Del. Laws, c. 109, § 2; 78 Del. Laws, c. 40, § 1; 78 Del. Laws, c. 179, §§ 121-123.)

§ 3985. Court costs and allocation of costs.

In any proceeding for appointment of the Office of the Public Guardian, or in any proceeding involving the estate of a person with a disability for whom the Public Guardian has been appointed guardian of the person or of the property, the court may waive any court costs or filing fees.

If the Public Guardian has been appointed guardian of the person or of the property, administrative costs and all costs incurred in the appointment procedure shall not be charged against the income or estate of the person. If at any time the court determines that the income or the estate of the person can support the payment of any part of these costs, the court may enter an order charging that part of the payment of cost against the income or estate.

(59 Del. Laws, c. 579, § 9; 60 Del. Laws, c. 511, § 50; 60 Del. Laws, c. 570, § 9; 60 Del. Laws, c. 722, § 3; 69 Del. Laws, c. 109, § 2; 78 Del. Laws, c. 40, § 1; 78 Del. Laws, c. 179, §§ 121-123.)

§ 3986. Collection of guardianship fees

(a) The Public Guardian may collect fees for the provision of its services from the income or resources of any person for which it has been appointed guardian of the person or property or for whom it acts as representative payee.

(b) A person receiving services from the Office of the Public Guardian whose financial resources are deemed sufficient, pursuant to standards to be established by the Guardianship Commission and to be approved by the Court, shall be required to pay compensation for services related to guardianship or representative payee duties in accordance with such established standards. The Court may, in its discretion, alter or amend any financial obligation imposed under this section.

(c) Fees collected shall not go into the General Fund but shall be held in a special fund to be expended by the Office of the Public Guardian in furtherance of its purpose and to support the Guardianship Commission.

(83 Del. Laws, c. 95, § 1.)

§ 3987. Indemnification from liability.

No attorney, director, investigator, social worker, or other person employed by, contracted by, or volunteering for the Office of the Public Guardian shall be subject to suit directly, derivatively, or by way of contribution or indemnification for any civil damages under the laws of Delaware resulting from any act or omission performed during or in connection with the discharge of his or her duties with the Office within the scope of his or her appointment or employment, unless the act or omission was done with gross or wanton negligence, or maliciously, or in bad faith.

(78 Del. Laws, c. 40, § 1; 70 Del. Laws, c. 186, § 1.)

§ 3988. Bond.

The Public Guardian shall post bond as required by the court upon the appointment of the office. The Office of the Public Guardian shall apply for and maintain bond sufficient to insure the assets managed by the office.

(59 Del. Laws, c. 579, § 9; 60 Del. Laws, c. 511, § 50; 60 Del. Laws, c. 570, § 9; 60 Del. Laws, c. 722, § 3; 69 Del. Laws, c. 109, § 2; 70 Del. Laws, c. 186, § 1; 78 Del. Laws, c. 40, § 1.)

§ 3989. [Reserved].

Subchapter VII

Delaware Guardianship Commission

§ 3991. The Guardianship Commission.

(a) The Delaware Guardianship Commission is hereby established, and shall be known as the "Guardianship Commission." The Commission shall consist of 12 members and shall be staffed by the Office of the Public Guardian. The Guardianship Commission shall be comprised of the following:

- (1) One member from the Court of Chancery, designated by the Chancellor;
- (2) A representative from the Department of Justice, designated by the Attorney General;
- (3) The Director of the Guardianship Monitoring Program, or the Director's designee;

**DELAWARE GUARDIANSHIP COMMISSION
BYLAWS**

Article I – MISSION

Section 1.1 Mission Statement - The Delaware Guardianship Commission exists to identify and address through advocacy and reform the issues and challenges presented to the State, to care providers, to families, and to the person themselves when a person is unable to manage or make decisions about their own care or finances and needs a decision maker to help and protect them.

Section 1.2 Guiding Principles - In pursuing this mission, the Delaware Guardianship Commission is guided by the following principles:

- a) That people unable to make their own decisions who are appointed to the care of guardians and fiduciaries deserve quality services and that every person should be provided respect, due process, rights, and dignity in guardianship and substituted decision-making.
- b) An understanding that while all individuals are entitled to autonomy and personal rights that there are those who need assistance in developing their abilities and capabilities.
- c) A mindfulness that assistance to persons unable to make their own decisions through appointment guardians or fiduciaries should acknowledge that guardianship of an individual is the greatest diminution of autonomy and personal rights that the State may impose under civil law, and that exploration of and advocacy for less-restrictive alternatives to guardianship is a priority of their care.
- d) That a collaboration of elected officials, the medical community, the legal community, the providers of care and advocacy for the citizens of this State who are elderly or have a disability, provides a critical resource to creating a system of service for the citizens of Delaware which meets their needs for both independence and decision making.

Article II - DUTIES OF THE COMMISSION

Section 2.1 Duties of the Commission - Duties of the Commission are established by statute at 12 Del.C. §3992, and include:

- A. Act in an advisory capacity to the Office of the Public Guardian, and assist in developing priorities for the Office as to those individuals most in need of public guardianship services.

- B. Examine and evaluate systems of public and private guardianship and decision-making services and guardians and decision-makers in the State, and make recommendations for change, including establishment of statewide standards, regulation, and certification of guardianship, guardians and other legal established methods of decision-making.
- C. Advocate for and assist in developing law and resources to meet the needs of the citizens of Delaware for individuals who may act as their decision-makers for health, welfare, and financial decisions. Develop and implement a strategic plan for meeting the guardianship and decision-making needs of the population of Delaware.
- D. Initiate and advocate for legislation and legislative changes to accomplish reform.
- E. Develop public and professional education programs on issues relating to guardianship, alternatives to guardianship, and concerns relating to the abuse, neglect, and exploitation of incapacitated individuals.

Article III - MEMBERSHIP

Section 3.1 Commission Voting Members and Officers

The Commission Membership is defined at 12 Del.C. §3991(a) and consists of twelve specific members who are voting members. The Commission may elect a Vice-Chair and a Secretary from among its members.

Commission Membership may be extended to additional individuals pursuant to 12 Del.C. §3991(b) by invitation of the Public Guardian with concurrence of the Commission Voting Membership. These members shall be non-voting members of the Commission.

The Public Guardian shall serve as the Executive Director and the Chair of the Commission. The Public Guardian may vote when required to break a tie among the voting commission members.

Section 3.2 Terms and Vacancies

A. Except as provided in Section 3.5 of this section, each member shall serve a term of 3 years, and will be eligible for 2 additional terms. Any person appointed to fill a vacancy among the members of the Commission shall be filled for the remainder of the unexpired term of the former member and such member will be eligible for 2 additional terms. Each term of office shall expire on the date specified in the appointment; however, the Commission member may continue to serve as an active voting member until notified by the Governor.

B. A person, who has never served on the Commission, may be appointed to the Commission for 3 consecutive terms; but no such person shall thereafter be eligible for 3 consecutive appointments. No person, who has twice been appointed to the Commission or who has served on the Commission for 9 years within any 12 year period, shall again be appointed to the Commission until an interim period of at least 1 term has expired since such person last served.

C. Members of the Commission who participate by virtue of invitation of the Public Guardian through 12 Del.C. §3991(b) shall serve a term of 6 months, which may be renewed by the Public Guardian with the concurrence of the Commission Voting Membership.

Section 3.3 Resignation and Removal

A. It is recommended that a Commission member, if resigning at any time, give written notice to the Office of the Governor and copy the Executive Director of the Commission.

B. A member of the Commission shall be suspended or removed by the Governor for misfeasance, nonfeasance, malfeasance, misconduct, incompetency, or neglect of duty. The Executive Committee may recommend removals to the Governor.

Article IV – OFFICERS

Section 4.1 Commission Officers - Commission officers shall consist of a Chair, a Vice-Chair, and a Secretary. The Executive Director shall serve as the Chair. The Vice-Chair and the Secretary shall be chosen from the voting members designated by statute in 12 Del.C. 3991(a).

Section 4.2 Chair - The Chair shall have general charge of the business of the Commission. The Chair may delegate his/her powers to the Vice-Chair or to other Commission Members. The Chair shall preside over the Executive Committee and be a member of all other committees. In the absence of the Chair, the Chair shall designate the Vice Chair to preside over a meeting.

Section 4.3 Vice-Chair

A. In the absence of the Chair, the Vice Chair shall perform the duties of the Chair, and when so acting, shall have all the powers of and be subject to all the restrictions upon the chairperson.

B. In the absence of the Vice-Chair he or she will designate a member to preside over a scheduled meeting when needed.

C. Upon the resignation of the Vice Chair the Commission will elect another.

Section 4.4 Secretary - The Secretary shall ensure that the minutes are recorded of proceedings of all Commission and Executive Committee meetings. Minutes shall be

provided promptly to the Executive Director following Commission Meetings. The Secretary shall perform such other duties as the Commission may from time to time prescribe.

Section 4.5 Executive Director

- A. Pursuant to 12 Del.C. 3991(b)§ the Public Guardian is the Executive Director of the Commission. The Executive Director shall be responsible for the active direction and management of the business and affairs of the Commission and shall perform such duties as may be assigned to him/her from time to time by the Commission.
- B. The duties of the Executive Director include: Compiling the annual report of the work and recommendations of the Delaware Guardianship Commission, including the work of the Office of the Public Guardian; providing staff support to the Commission and to the committees of the Commission; The Executive Director shall have the authority to represent the Commission and manage day-to day business of the Commission. The Executive Director may delegate these duties to other staff members.

Section 4.6 Officer Terms - The officers shall be elected to serve for one year from the date of their election, but shall serve no more than two consecutive terms unless no successor has been found. The officer in this case may serve until a successor has been elected.

Section 4.8 Nominations of Officers - Nominations may be made from the floor subject to approval by the nominated person.

Article V – COMMISSION BUSINESS

Section 5.1 Meetings - Business of the Commission shall be conducted by Commission members at regularly scheduled meetings (which includes special meetings). The Commission shall meet at least four times a year. A quorum is required to conduct business of the Commission.

Section 5.2 Quorum - A quorum shall exist when forty percent of the voting members of the Commission are present. Phone, electronic and paper proxies count towards the determination of a quorum.

Section 5.3 Special Meetings - Special meetings may be called between regularly scheduled meetings by the Chair or at the written request of three Commission members. Five days notice is required for special meetings.

Section 5.4 Conference Call - A Commission Member attending via telephone connection shall be counted in attendance and shall be able to conduct business as if he or she were in the room.

Article VI – COMMITTEES

Section 6.1 Committees

- a) The Commission shall establish committees as necessary to carry out business and the responsibilities specified in Article II. Chairs of all committees must be Commission Members but non-commission members may be members of committees when their presence adds diversity, breadth, and expertise to the committee. Committee chairs shall be selected and approved by the Executive Committee.
- b) A vice-chair, selected by the committee chair, and approved by the Executive Committee shall serve, and vote, at Executive Committee meetings in the absence of the committee chair.

Section 6.2 Executive Committee - The Executive Committee shall consist of the Officers of the Commission and two voting Commission Members selected by nomination and election of the Commission. The Executive Committee shall have general supervision of the affairs of the Commission between meetings. Should emergencies arise and immediate action be required, the Executive Committee may act on behalf of the Commission. The Executive Committee shall be subject to the orders of the Commission and none of its acts shall conflict with action taken by the Commission.

Section 6.3 Special (Ad Hoc) Committees - The Chair may designate such committees as from time to time who are deemed appropriate to conduct specific assignments. Each special (ad hoc) committee shall be considered temporary and disbanded on acceptance of its report or when discharged by the Chair.

Article VII AMENDMENTS

Section 7.1 By-Law Amendments - These by-laws may be amended by a two-thirds vote of the voting membership of the Commission.

Article VIII RULES OF ORDER

Section 8.1 Rules of Order - The rules contained in the current edition of Roberts Rules of Order Newly Revised shall govern the Commission in all cases to which they are applicable and in which they are not inconsistent with these by-laws and any special rules of order that the Commission may adopt.

By-Laws written January 20, 2012

Approved: _____

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE FEE COLLECTION BY)
THE OFFICE OF PUBLIC GUARDIAN)

**STANDING ORDER NO. 10
APPROVING PAY COMPENSATION FOR SERVICES RELATED
TO GUARDIANSHIP OR REPRESENTATIVE PAYEE DUTIES**

WHEREAS:

A. Under 12 *Del. C.* § 3986(a), “[t]he Public Guardian may collect fees for the provision of its services from the income or resources of any person for which it has been appointed guardian of the person or property or for whom it acts as representative payee.”

B. Under 12 *Del. C.* § 3986(b), “[a] person receiving services from the Office of the Public Guardian whose financial resources are deemed sufficient, pursuant to standards to be established by the Guardianship Commission and to be approved by the Court, shall be required to pay compensation for services related to guardianship or representative payee duties in accordance with such established standards.”

C. The Guardianship Commission has established the standards for fee collection, has sought the Court’s approval of such standards, and has advised that it will request Court approval for any additional pay compensation standards established in the future.

IT IS SO ORDERED, this 27th day of July, 2022:

1. The following standards established by the Guardianship Commission are hereby approved, subject to the additional qualifications established in this Order.

a. Fee: If the person's financial resources are deemed sufficient, the Office of the Public Guardian may collect a monthly fee equivalent to the fee allowable by the Social Security Administration in cases where they are appointed as guardian of the property. Where the Office of the Public Guardian seeks compensation for services related to guardianship duties in excess of the allowable representative payee fee, the Office of the Public Guardian shall petition the Court. On a petition for additional compensation, the Court may consider: the amount and character of the guardianship property, the extent of the risk and responsibility of the guardian, the character of services rendered, the degree of difficulty in administering the guardianship, the skill and success of the administration, and any other relevant and material circumstances.

b. Financial sufficiency: The Guardianship Commission approved a staged approach for collecting fees based on financial sufficiency, starting with individuals residing in nursing facilities who qualify for long-term Medicaid. A resident of a nursing facility, for whom the Office of the Public Guardian is appointed guardian by this Court, shall be deemed to have sufficient financial resources for fee collection by the Office of the Public Guardian if the individual qualifies for Medicaid, and the fee falls within the parameters of the allowable monthly guardianship fee as established under Medicaid guidelines.

2. The Office of the Public Guardian may collect a monthly fee equivalent to the fee allowable by the Social Security Administration from a resident of a nursing facility for whom the Office of the Public Guardian is appointed guardian by this Court, if (i) the

individual qualifies for Medicaid, and (ii) prior to collecting fees, the Office of the Public Guardian files a notice of collection on the guardianship docket notifying the Court that the Office of the Public Guardian is initiating fee collection in the guardianship, and identifying the monthly amount to be collected. Additional notices must be filed by the Office of the Public Guardian on the guardianship docket if the fee amount being collected changes, or if there are other changes related to fee collection in the guardianship.

3. If the Office of the Public Guardian seeks fees above the fee allowable by the Social Security Administration for a nursing home resident on Medicaid for whom it is a guardian, it must first file a petition for approval with the Court, and receive the Court's approval, before collecting any additional fee.

4. At this time, the Office of the Public Guardian may not collect fees for persons with a disability who do not fall within the first collection category identified in Paragraph 2 of this Order.

5. The Office of the Public Guardian shall display this Order prominently on its website to provide notice to the public regarding the fee collection standards.

FOR THE COURT:

/s/ Kathaleen St. J. McCormick
Chancellor Kathaleen St. J. McCormick

FOR IMMEDIATE RELEASE

July 28, 2022

Fee Collection by the Office of the Public Guardian Under 12 *Del. C.* § 3986

The Court of Chancery has issued Standing Order No. 10, approving standards for limited fee collection by the Office of the Public Guardian (the “OPG”) in adult guardianship cases. These standards were established by the Delaware Guardianship Commission under 12 *Del. C.* § 3986. As explained in Standing Order No. 10, the OPG may collect a monthly fee equivalent to the fee allowable by the Social Security Administration from a resident of a nursing facility for whom the OPG is appointed guardian by this Court, if (i) the individual qualifies for Medicaid, and (ii) prior to collecting fees, the OPG files a notice of collection on the guardianship docket. Any requests from the OPG seeking additional fees for such individuals would need to be reviewed by the Court on a case-by-case basis.

At this time, the OPG may not collect fees for persons who do not fall within the category of individuals identified above. The Court understands, however, that the Delaware Guardianship Commission is considering how to expand to other fee collection areas and will make additional proposals to the Court.