# Elder and Vulnerable Adult Task Force
# Report to Governor

## January 20, 2017

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## I. Executive Summary

The population of Wyoming is aging and will continue to age for the foreseeable future. State agencies, courts, law enforcement and prosecutors, and private care facilities are faced with increasing challenges to prevent and address issues of physical abuse, neglect, and financial exploitation of elder and vulnerable adults. While Wyoming has a number of resources[1] to assist elder and vulnerable adults, critical improvements need to be made, beginning with a greater awareness of the issues associated with this population.

Based upon its review of Wyoming's current laws and resources, the Elder and Vulnerable Adult Task Force (EVA Task Force) makes the following recommendations:

1. The public needs to be better educated regarding elder abuse, neglect, and exploitation, what can be done to prevent it, and the resources that currently exist for our elder and vulnerable adult population. Vulnerable adults' rights and resources should be posted on a user-friendly State website.
2. Law enforcement, Department of Family Services (DFS) employees, and health care providers need training to better identify needs of the vulnerable adult population and to understand the resources available to them to best respond to those needs.
3. A pilot project should be established so the Attorney General (AG) and Division of Criminal Investigation (DCI) can assist prosecuting attorneys and law enforcement in developing and successfully pursuing cases of abuse, neglect, and exploitation, based in part on the successful Park County model.
4. Inter-agency communication must be improved to promote efficiency and effectiveness in providing services to the vulnerable adult population. Specifically communication will be improved with:
    a. more effective use of the Adult Protective Services (APS) Community Teams, put in place pursuant to W.S. 35-20-104(a)(iv) (requiring DFS to provide appropriate training to all investigative agencies and personnel);
    b. reporting of alleged abuse between DFS and law enforcement;
    c. sharing appropriate information with the Wyoming Department of Health (DOH); and
    d. providing the DOH with access to Wyoming's prescription drug monitoring program.

[1] *See* Appendix 1, Existing Laws and Resources.

5. Wyoming should adopt the Uniform Power of Attorney Act.
6. The statutory definition of "vulnerable adult" should be amended to recognize that age, physical frailness, isolation, and mild cognitive impairment render a person susceptible to abuse, neglect, and exploitation.
7. Guardianships and conservatorships should be more effectively utilized by:
   a. providing better education, training, and supervision of court-appointed guardians and conservators;
   b. providing more guardians and conservators to indigents who need them, including persons for whom the courts appoint a *guardian ad litem* (GAL) following a petition for emergency services; and
   c. creating a guardian and conservatorship registry which law enforcement and medical providers can quickly access to determine who has authority to make decisions concerning an abused or vulnerable adult.

## II. Formation of the EVA Task Force and its Mission

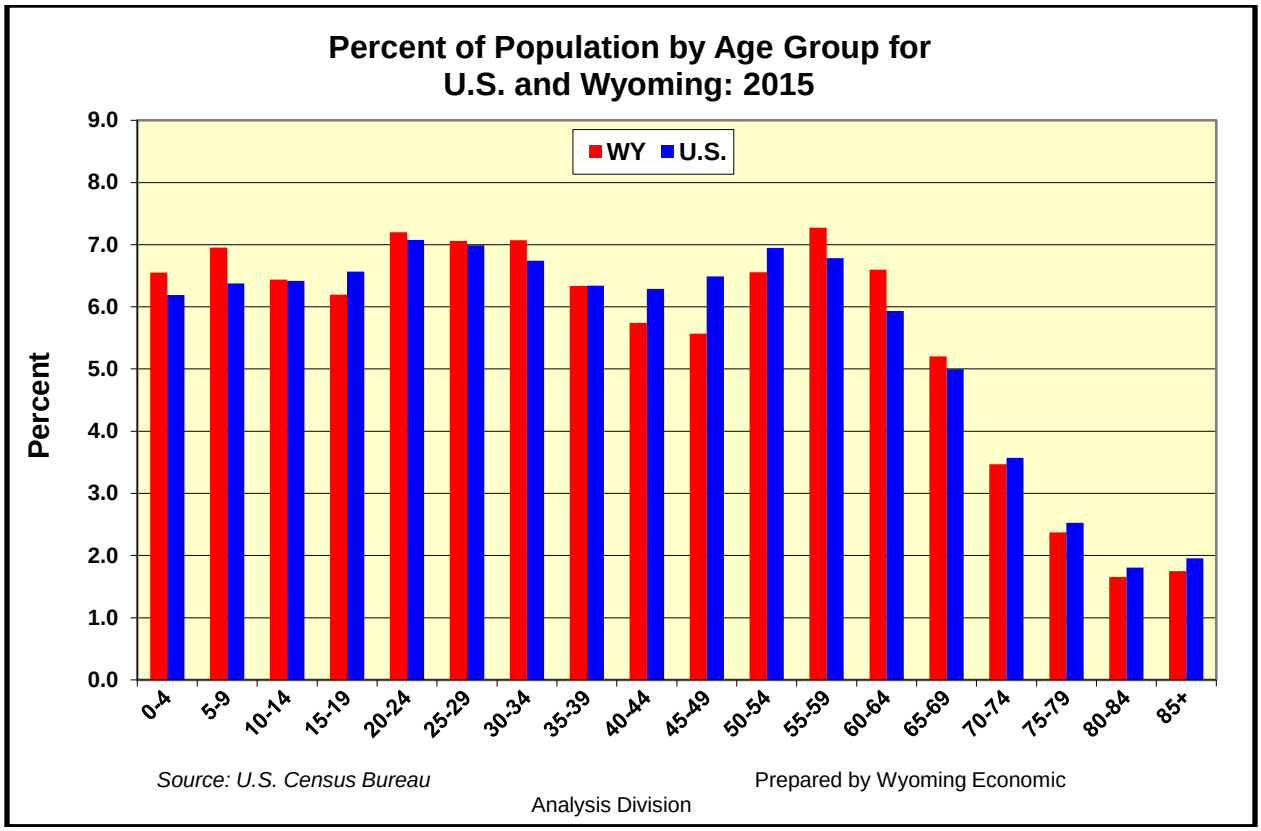
In response to a request from Wyoming Supreme Court Chief Justice Burke, on February 17, 2016, Governor Mead signed Executive Order 2016-1, Elder and Vulnerable Adult Task Force (Appendix 2). That Executive Order stated that the mission of the EVA Task Force was to compile data and identify areas of concern; identify existing laws and resources that could assist vulnerable adults; propose changes to Wyoming's laws and policies relating to vulnerable adults; make recommendations for increasing awareness of current resources; increase public awareness of issues facing our vulnerable adult population; and examine and make recommendations specifically in regard to the state's current laws relating to guardianships, conservatorships, powers of attorney, and financial exploitation, as well as abuse and neglect of vulnerable adults. The order directed that the EVA Task Force summarize its findings and recommendations in a report to the governor. A list of EVA Task Force members is attached to Appendix 2. What follows are the EVA Task Force's findings and recommendations.

## III. What is the Problem?

According to the American Community Survey (ACS)[2], about 20% of Wyoming's population was aged 60 or older in 2014, including about 2% aged 85 and older. The elder population is growing and is expected to continue growing beyond 2030, as the generation of baby boomers (born between 1946 and 1964) reach retirement age. The fastest growing age group will be those aged 85 and older—a group most likely to experience disabilities and impairments that often require specialized programs and services.

[2] http://www.census.gov/programs-surveys/acs/

Although Wyoming shares this demographic trend with other states, its sparse population and the distribution of that population make it unique. Cities and towns are widely dispersed across the state's 97,093 square miles; and long distances between communities are the norm. According to ACS estimates, there were fewer than 600,000 Wyoming residents in 2014, equating to only about 5.8 persons per square mile (compared to 87.4 persons per square mile, nationally).




Facts regarding Wyoming's aging population:

- Wyoming's population over 60 is growing.
- Wyoming's population under 60 is shrinking.
- 20.4% of Wyoming's population was over 60 in 2012.
- 31% of Wyoming's population will be over age 60 by the year 2030.
- By 2030, Wyoming will be the 4th oldest state in the country.

With the population of older adults increasing, there will inevitably be an accompanying increase in abuse, neglect, and exploitation of vulnerable adults in Wyoming. Studies on elder abuse, neglect, and exploitation reveal some alarming statistics.

1. An estimated 1 in 10 seniors over the age of 60 is abused (not including financial abuse) each year.
    - https://www.justice.gov/elderjustice/research/ (last accessed on January 18, 2017)
2. Some estimates range as high as 5 million elders who are abused each year. One study estimated that only 1 in 14 cases of abuse are reported to authorities. Another study estimated that only 1 in 25 cases are reported.
    - https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/ (last accessed on January 18, 2017)
    - https://ncea.acl.gov/whatwedo/research/statistics.html#perpetrators (last accessed on January 18, 2017)

3 Abusers are both women and men. In almost 60% of elder abuse and neglect incidents, the perpetrator is a family member. Two thirds of perpetrators are adult children or spouses.

- https://www.ncoa.org/public-policy-action/elder-justice/elder-abuse-facts/ (last accessed on January 18, 2017)

4 The majority of elder abuse victims are women living in the community, rather than nursing homes or other senior living facilities.

- https://www.justice.gov/elderjustice/research/ (last accessed on January 18, 2017)

According to the National Center on Elder Abuse (NCEA), two studies have found that the typical victim of elder abuse, neglect, and exploitation is a female, age 78 or older, who has some physically limiting condition or a mental health condition, or who is isolated, thereby making her vulnerable.[3] A 2011 study conducted by MetLife Mature Market Institute found that the typical victims have some mild cognitive impairment, meaning that they may need some assistance in paying bills, but are not generally so demented as to obviously be in need of a caregiver.[4]

The NCEA studies find that the perpetrators of abuse are most often adult male children or spouses who have a history of substance abuse and trouble with the police, are socially isolated, unemployed or have financial problems, and are experiencing major stress.[5] A study by Allianz Life Insurance Company reports that the average cost of financial

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[3] Regan, J., Morgan, R., and English, D., *Tax, Estate & Financial Planning for the Elder*, ch. 11.03 [1], LexisNexis (2016).

[4] National Committee for the Prevention of Elder Abuse, Virginia Tech, Metlife Mature Market Institute, *The MetLife Study of Elder Financial Abuse: Crimes of Occasion, Desperation, and Predation Against America's Elders* (2011).

[5] Lachs, M., and Pillemer, K., *Elder Abuse*, New England Journal of Medicine, 373; 1947-56. DOI: 10.1056/NEJMra1404688 (2015).

exploitation is $30,000, but that for 10% of the victims the loss exceeds $100,000.[6] The cost of abuse is not just borne by the victim. EVA Task Force member and retired APS Program Analyst Dorothy Thomas prepared a report in 2014 for DFS using Wyoming data. In it, Ms. Thomas found that the average cost of exploitation experienced by the Division of Health Care Financing (Medicaid) was $22,103 (2011), $22,217 (2012), and $22,688 (2013), for an annual total of $381,545 (2011), $266,060 (2012), and $431,072 (2013).[7] This does not include lawfully conducted Medicaid planning which may involve the transfer of assets.

The causes of elder abuse are complex and difficult to precisely determine but generally involve a combination of psychological, social, and economic factors filtered through the mental and physical conditions of both the victim and the perpetrator.[8] Some factors are seen more frequently than others, including caregiver stress, physical and mental impairment, learned violence, personal problems of the abuser, society's negative attitude towards the elder, isolation, and the characteristics of nursing home staff and facilities.[9] It is also important to consider society's attitude toward elder abuse which may be reflected in a 1990 report by the House Select Committee on Aging, which states elder abuse often goes unreported. While 1 in 3 cases of child abuse are reported,[10] it is estimated that today only 1 in 14, or fewer, cases of elder abuse are reported to the authorities.[11]

**Wyoming**

All the available data regarding the abuse and exploitation of vulnerable adults supports the conclusion that a problem exists. The EVA Task Force identified the following problems specific to Wyoming:

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[6] Allianz Life Insurance Company, *Safeguarding Our Seniors* (2014), www.allianzlife.com/about/community-outreach/preventing-elder-financial-abuse (last accessed on January 18, 2017), cited in Margolis, H., *How to Protect Clients from Financial Abuse*, The Elder Law Report, vol. XXVII, No. 4 (2015).

[7] Thomas, D., *The Wyoming Cost of Financial Exploitation 2011, 2012 and 2013*, Wyoming Department of Family Services (2014).

[8] Office of Justice Programs, National Institute of Justice, *Causes and Characteristics of Elder Abuse*, https://nij.gov/topics/crime/elder-abuse/pages/understanding-causes.aspx (last accessed on January 18, 2017).

[9] Begley, T., and Jeffreys, J., *Representing the Elder Client, Law and Practice*, Wolters Kluwer, ch. 14.03 (2016).

[10] House Subcommittee, Elder Abuse: A Decade of Shame and Inaction, Comm. Pub. No. 752, 101st Cong., 2d Sess. (Apr. 1990).

[11] Office of Justice Programs, National Institute of Justice, *Causes and Characteristics of Elder Abuse*, https://nij.gov/topics/crime/elder-abuse/pages/understanding-causes.aspx (last accessed on January 18, 2017).

DFS/Adult Protective Services

The DFS reports that for the approximate two-year period between January 1, 2015 and December 1, 2016, APS received 3,706 cases, with 2,140 of those resulting in an open case. Of those cases, 174 were opened as an investigative case and 49 were substantiated by the DFS. A recent study evaluating states elder-abuse protections ranked Wyoming as 50th (though it ranked 26th in resources).[12]

There was no shortage of stories related by EVA Task Force members in which APS or law enforcement failed to accept an incident report or investigate a complaint of elder abuse, neglect, or exploitation. A typical story might consist of a report of abuse, neglect, or exploitation being made to APS or law enforcement by a family member, a neighbor, or a professional, with the response being that a civil judgment should be obtained first, then the complaint might be pursued. Often this assessment is incorrect and there are criminal laws applicable to the situation. Further, the obvious problems with this approach is that the person making the report may lack standing to maintain a lawsuit, the victim may not have sufficient capacity to prosecute their claim in court, and the amounts involved, while significant to the victim, may not be sufficient to cover the costs and legal fees of litigation. The result ends up being that, in spite of the clear intent of the statute, nothing is done to protect or restore the victim.

Since 2007, DFS has had 16 APS Community Teams in place to cover 23 counties. With the exceptions of Natrona and Park Counties, the effectiveness of these teams seems mixed and uneven. The track record of some APS Community Team members in recognizing or even acknowledging there is a problem with the abuse, neglect, and exploitation of elder and vulnerable adults, or in doing anything to address it, does not instill confidence. Regular meetings with the stakeholders do not appear to be held, there seems to be no accountability, and training seems to lack commitment. It is reported that in some cases APS Community Team members have refused to accept intakes or process complaints about elder or vulnerable adult abuse, neglect, and exploitation, saying that they only deal with child abuse or that the victim does not meet the criteria of a "vulnerable adult" without ever conducting an evaluation. Part of the problem is that, in many of the smaller counties, caseworkers cover APS in addition to other types of cases.

By statute, APS is required to maintain a central registry of substantiated adult protection cases that identifies and locates prior reports of abuse, neglect, exploitation, intimidation, or abandonment.[13] Information contained in the central registry is available to individuals and certain types of entities for the purpose of screening prospective

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[12] 2016's States with the Best Elder-Abuse Protections, https://wallethub.com/edu/states-with-best-elder-abuse-protection/28754/ (last accessed on January 18, 2017).

[13] W.S. 35-20-115, *et seq*.

employees and volunteers.[14] The general public, however, who might be looking to hire a private caregiver, is generally ignorant of the central registry. The impact of this valuable resource in preventing abuse, neglect, and exploitation could be greatly enhanced if the general public was more aware of its existence.

Much of the general public is unaware of the existence of the APS central registry. Persons for whom there are substantiated reports of abuse, neglect, and exploitation can still find private employment as caregivers for vulnerable adults because no one knows to check the central registry. Offenders from out-of-state appear not to be identified in the Wyoming central registry. Perpetrators who enter into plea agreements for deferred sentences under the provisions of W.S. 7-13-301 may not be reported to and identified in the central registry because technically they have not been convicted.

Law enforcement/prosecutors

When reports of elder abuse, neglect, or exploitation are accepted, it often seems that nothing further is done. Few perpetrators are charged or prosecuted. When law enforcement officers have been questioned about the seeming lack of follow up or investigation, a reoccurring pattern of response appears. Officers have related "off the record" that if they spend significant time on an investigation, prepare, and then file a report with their district or prosecuting attorney, the matter is often placed in the "deep file." With a few exceptions, while district attorneys seem ready and willing to prosecute cases of child abuse, there appears to be a lack of either the resources or the desire to prosecute cases involving abuse, neglect, and exploitation of elders and vulnerable adults. As a consequence, the law enforcement officers do not aggressively pursue their investigations. When prosecutors have been candidly asked about the situation, some have attributed the problem to a perceived difficulty in proving their case, including the current statutory definition of "vulnerable adult," setting the evidentiary bar for conviction too high.[15]

There appears to be the lack of "buy-in" by APS Community Team members and law enforcement, which may be a reflection of their training, sense of urgency, or accountability, but it may also be symptomatic of low morale attributed to a perceived disinterest on the part of supervisors, management, and/or prosecutors in the enforcement of the law in past cases involving elder abuse, neglect, and exploitation. Stated simply, people need to feel that their efforts matter.

There is a perceived general failure of APS and law enforcement to pursue, and failure of prosecutors to prosecute elder abuse, neglect, and exploitation.

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[14] W.S. 35-20-116.

[15] W.S. 35-20-102(a)(xviii).

Guardianship/conservatorship

Formal guardianship and conservatorship proceedings have the advantage of imposing fiduciary duties on the guardian/conservator, along with court supervision. However, the degree of court attention is variable across the state, and often guardians and conservators are unaware of the responsibilities of their positions.

Although it is cheaper to keep an indigent ward living in the community rather than having them institutionalized, often there is no suitable person to act as guardian or conservator for vulnerable adults. Wyoming Guardianship Corporation (WGC), a 501(c)(3) non-profit corporation, can serve as the guardian or conservator of last resort for Wyoming's indigent elder and vulnerable adult populations, but its resources are extremely limited. WGC currently receives $113,244 per year from the DOH to provide guardianship services. Of that amount, $60,000 is earmarked for the severely mentally ill and residents at the state hospital. The balance of $53,244 is allocated for wards under the Developmental Disability (DD) Waiver program. (These numbers do not include residents at the Life Resource Center in Lander.) It costs WGC $105 per person per month or $1,260 a year, per ward. That limits the number of severely mentally ill/state hospital residents WGC can serve to less than 48 individuals a year (47.62), with only about 42 (42.26) persons annually under the DD Waiver. There are currently 13 indigent mentally ill/state hospital and DD Waiver persons on the waiting list for guardianship services from WGC. Other than these funds for mentally ill/state hospital and DD Waiver individuals, the State of Wyoming provides no guardianship funds to WGC for any category of ward (like elders having no fit/proper persons to serve).

There is no funding provided for guardianship of people who have age-related disabilities, Alzheimer and other dementias, or people who live in nursing homes. WGC currently has a waiting list of 24 individuals for Guardianship (private pay guardianship services have no waiting list).

The problem of suitable guardians is a critical issue in cases of Petitions for Emergency Services to assist vulnerable adults who are mentally ill, critically ill, and/or elder, resulting in the creation of an emergency guardianship. Time is of the essence in these situations, and while the current emergency provisions may work well in Laramie County, codifying a state-wide uniform system would simplify the process. Attorneys who petition on behalf of a vulnerable adult are challenged by lack of resources. Some courts may require the appointment of a GAL, which in turn may become the financial responsibility of the county. (Only in rare cases does a wealthy person require a court-appointed guardian.) Attorneys relate that they often have either no or insufficient funds to pay a guardian, which sometimes results in criticism from the bench concerning the substandard performance of the GAL—the concern justifiably being an infringement on civil rights without representation.

## IV. Issues and Recommendations

The EVA Task Force has identified areas where it believes changes could be implemented so as to better serve and protect the vulnerable adult population of the state.

### *A. Education of the General Public/Awareness of Existing Resources*

The majority of the general public of the state may not know what vulnerable adult abuse or neglect is, or that it is a problem, or what to do if they become aware of a possible case of abuse, neglect, or exploitation. Few people are aware of the obligation for mandatory reporting of a suspected case of abuse or who to report it to. The public should have the same understanding of the issues surrounding vulnerable adult abuse as they do of child abuse or general domestic violence.

#### 1. Preparing for being elder

Age and its disabilities can be anticipated and for many people, plans can be made while they still have the capacity. Such plans can include estate planning, selection of a guardian or trustee, and advance medical directives. Healthcare professionals, financial advisors, attorneys, and relatives can all play a part in encouraging such preparation. Many people find such planning distasteful, but with education, they may understand that it is preferable to becoming an "orphan adult."

#### 2. An accessible website

While DFS offers many educational and training materials online regarding elder abuse, locating them on the website can be daunting for members of the general public, particularly the elder and vulnerable. It is recommended that the links to these materials be displayed more prominently on the website to make it easier for the target population to navigate. There is a wide selection of YouTube videos available online on the topics of recognizing and preventing elder abuse, neglect, and exploitation. Links to these resources could be posted on the DFS website.

#### 3. A focused ad campaign

As the population of Wyoming ages, the prevention of elder abuse, neglect, and exploitation needs to be elevated to a critical priority. In addition to the measures outlined above, a series of public service announcements should be recorded to make people aware of what constitutes abuse, how to recognize it, and what can be done to prevent it. The scope of each announcement does not need to be broad. It can be focused on a single tip or issue. See for an example, the "Top Ten Tips" PowerPoint slides by San Diego District Attorney Paul Greenwood.[16]

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[16] *See Be Wise, Be Aware: Prevent Elder Financial Abuse*, https://www.youtube.com/watch?v=zaWxXZU1P6w (last accessed on January 18, 201; *see also* the Paul

**4. Wider distribution of information**
DFS/APS currently has a brochure that is distributed statewide at conferences, health fairs, etc. Local offices could distribute it more widely.

A new brochure focusing on the recognition and prevention of elder abuse specific to Wyoming could be developed and made available for display in public places (law offices, bank lobbies, accountants' offices, doctors' offices, senior centers, libraries, etc.). Funding to develop, print, and support this project might be from grants from the federal government or from the stakeholder groups and professional associations like the Wyoming Bar Association, the Wyoming Bankers Association, the Wyoming Medical Society, the Better Business Bureau, AARP, etc.

### *B. Training and Education of Responsible Persons*

Prosecutors, law enforcement, DFS/APS, and healthcare providers all would benefit from greater training regarding the unique issues associated with the elder and vulnerable adult population. The DOH is often in a position to detect or address issues of vulnerable adult neglect or abuse, but is often left out of the communication loop between DFS and law enforcement.

The EVA Task Force recommends the following enhanced training for those groups:

**1. Law enforcement/prosecutors**
Currently law enforcement training at the Wyoming Law Enforcement Academy consists of a brief review of both child abuse and adult protective services topics. The EVA Task Force recommends that an online continuing Police Officer Standing Training (POST) training credit course be developed and made available to law enforcement officers statewide on a continuing education basis to cover more in-depth procedural, as well as substantive issues that arise in the context of vulnerable adults. For example, law enforcement and prosecutors must have a clear understanding of what issues are criminal versus civil and what warning signs and risk factors to be aware of. DFS/APS personnel are also available (and statutorily mandated, W.S. 35-20-104(a)(iv)) to provide training to all investigative agency personnel.

The greatest success rate in recognizing, investigating, and prosecuting abuse, neglect, and exploitation of elders and vulnerable adults occurs in Park and Natrona counties. Laramie and Uinta counties have begun to show some progress in this area. The low rate of prosecution in the remaining counties may be attributed to there being few reported

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Greenwood series, *Tips for Preventing Elder Abuse*, https://www.youtube.com/watch?v=Z0EqLbKI4NI (last accessed on January 18, 2017).

cases, but the cause may also be attributed to a lack of experience or resources in developing cases for prosecution.

Park County has an excellent APS Community Team with proper support from all necessary authorities and stakeholders (i.e., DFS, Police, DA, etc.). Lessons learned from this group should be shared to improve the performance of groups in other counties. Focus should be placed on the better utilization of the APS Community Teams in the worst counties first. Training, coupled with recognition and reward for improved performance and success, can be used to motivate APS Community Teams and their members.

A pilot project should be established so the AG and DCI can assist prosecuting attorneys and law enforcement in developing and successfully pursuing cases involving abuse, neglect, and exploitation, similar to what is done in drug enforcement.

**2. Department of Family Services and Adult Protective Services**

DFS/APS has recently modified its training programs. New workers receive 2 days of APS training, and existing workers are required to have annual APS training of at least 6 hours. Training is coordinated by the Adult Protection Program Services Analyst, and has been augmented to include the Wyoming Practice Model which is a solution focused practice model. This training includes monthly staffing calls with DFS caseworkers to discuss/staff difficult cases and quarterly conference call meetings with DFS caseworkers to address DFS policy, rules, and APS statutes. In addition, local training on the various agencies occurs during monthly adult protection team meetings in each county. The services analyst will also develop a Continued Quality Improvement (CQI) tool to review APS files in each county.

The EVA Task Force recommends that this training continue and that in conjunction all DFS workers be trained on Adult Protective Services matters, not just APS staff.

**3. Healthcare providers**

The DOH has recently initiated its ECHO project to educate community service providers to vulnerable adult issues. This program is proving to be very popular and successful. It is hoped that this program will raise the standards of care for elder and vulnerable adults statewide. The EVA Task Force recommends that this program continue.

### *C. Inter-agency Communication*

The EVA Task Force recognizes that any individual vulnerable adult may encounter a number of different agencies, including their own healthcare providers, the DOH, DFS/APS, and law enforcement. Enhanced communication between agencies would go a

long way to better serve the needs of the elder and would assist those who are there to provide services to the elder population.

One mechanism already in place which should be better utilized is the APS team meetings hosted by the DFS in each county. Better attendance by other agencies would greatly enhance inter-agency communication.

To that end, the DOH has engaged Navigant, a national consultant, to recommend changes regarding communications between the DOH, APS, law enforcement, and others. The Navigant report is attached as Appendix 3.

In addition, an APS representative has begun attending the DOH Quality Assurance meetings, where APS can gain insight into issues encountered by clinicians. This type of information sharing is beneficial to all involved.

The EVA Task Force identified three areas where communication between agencies would be beneficial. First, while DFS is mandated to cross-report to law enforcement, there is no required exchange of information going from law enforcement to DFS. Currently a law enforcement officer must make a determination that abuse or neglect is occurring before they are required to make a report to DFS, yet DFS is required to notify law enforcement merely after receipt of a report. The EVA Task Force recommends adding statutory language mandating cross-reporting upon an initial report of abuse or neglect being made to either DFS or law enforcement.

Second, statutory changes allowing for cross-sharing information between the DOH and other agencies could improve the effectiveness of the involved agencies. The DOH funds primary care givers, nurses, and case workers who often identify cases of abuse or neglect of the elder. These individuals have the clinical expertise that would aid in the drafting plans of correction and in monitoring. Once DOH nurses or case managers have identified a particular concern, the DOH needs to be able to have two-way communication with appropriate agencies. Many cases do not require prosecution, but rather education, additional support, or resources and guidance, which could potentially be provided by the DOH. The DOH can provide a valuable service to law enforcement and DFS when the DOH is made aware of a potential abuse or neglect situation. The EVA Task Force recommends adding statutory language allowing DFS and law enforcement to report abuse or neglect and communicate regarding the status of individual cases, as needed, and when any particular case might warrant involvement of the DOH.

Third, the DOH is often hampered in its investigation of deaths that may have occurred as a result of abuse of neglect related to narcotic use, but it is unable to access prescription information. The DOH should have access to the WORX system, Wyoming's

prescription drug monitoring program, in order to provide effective services. The EVA Task Force recommends adding statutory language allowing this access.

### *D. Legislation*

The governor's charge to the EVA Task Force included specifically examining Wyoming's existing laws regarding guardianships, conservatorships, powers of attorney, financial exploitation, and abuse and neglect, and determining what specific changes should be made to those laws so as to better serve and protect the vulnerable adult population of the state. The EVA Task Force's recommendations follow.

#### 1. Wyoming should adopt the Uniform Power of Attorney Act

The durable general power of attorney (DGPOA) has evolved into an alternative for court-established guardian and conservatorships. It can be a valuable tool in the right hands. As stated by University of Wyoming, Department of Family and Consumer Sciences Professor Virginia Vincenti, "POA documents can help elders remain autonomous, avoid guardianships, and limit costs at a vulnerable stage of life."[17] But as Dr. Vincenti's research reveals, when the DGPOA is misused, it "offers vast potential for abuse."[18] With the development of online legal service programs, "check-the-box" and "fill-in-the-blank" legal documents prepared by non-lawyers off the internet have mushroomed. This growth has not been accompanied by an increase in public awareness regarding the requirements for executing a DGPOA and the fiduciary duties imposed upon the attorney-in-fact/agent. These readily available online DGPOA forms are frequently the tool of choice used by perpetrators to abuse and exploit elders and vulnerable adults. A strong DGPOA statute with clear definitions, one that sets out the duties of the agent, would help in preventing abuse and exploitation. Unfortunately, Wyoming's statutes on DGPOAs are both sparse and vague.

The EVA Task Force notes the following DGPOA problem areas:

- Wyoming's current Durable Power of Attorney Act generates confusion by failing to give clear guidance regarding the language contained within and the appropriate use of a DGPOA. Our current Act is silent about what limitations apply to the agent's authority, or even that the agent has a fiduciary duty towards the principal.[19] Without guidance in the statute to which they can

[17] Vincenti, V., *Researchers Study Elder Financial Exploitation*, Reflections Magazine, University of Wyoming, College of Agriculture and Natural Resources, Laramie, Wyoming, pp. 15-17 (2015); *see* http://www.wyomingextension.org/emagazine/reflections2015/index.html (last accessed on January 18, 2017).
[18] *Id.*
[19] *Id.*

refer, the principal, the agent, the general public, and law enforcement are left guessing as to the meaning of the DGPOA and how it should be applied. This fosters a common misconception that the agent under a DGPOA is free to engage in any activity he chooses with the frequent outcome being financial abuse, neglect, and exploitation, whether reckless or intentional.

- Cheap and readily available online "check-the-box/fill-in-the-blank" DGPOA form documents increase the opportunity for abuse, neglect, and exploitation.
- Without adequate guidance and training, agents are often unaware of their fiduciary duties.
- Many people do not understand that any authority under a DGPOA must be granted by a principal having the legal capacity to act, rather than being something they can just "get off the Internet" and have the principal sign. This confusion, coupled with readily available online documents, increases the risk of abuse, neglect, and exploitation.
- People will often name multiple agents to serve simultaneously without specifying how to resolve disagreements or the refusal of third-parties to honor the document.
- One way of preventing exploitation is to have more than one set of eyes review banking and financial transactions, but under Wyoming's current laws, it can be difficult for non-agent family members to obtain an accounting.
- Even though the issue is addressed under the Wyoming Rules of Professional Conduct, many attorneys are unfamiliar about working with diminished capacity clients and using DGPOAs.
- Traditionally, contingent or "springing" DGPOAs are triggered by having doctors make the determination as to whether the principal lacks the capacity to handle their financial affairs. Recently, doctors in Wyoming have begun refusing to provide such opinions on capacity, saying that is a legal determination that must be made by lawyers and judges. Even though conducting and scoring a Mini Mental Status Evaluation (MMSE) to determine whether an individual suffers from a cognitive impairment is a rather straightforward and self-explanatory process, it is frowned upon to have anyone other than a doctor or psychiatrist perform it. This makes triggering a DGPOA more difficult to achieve and thwarts the desire of avoiding having a court declare a person incompetent to have bills paid.
- Without being adjudicated incompetent, a non-compliant principal with diminished capacity can still legally revoke their DGPOA, thereby necessitating the filing of a guardian/conservatorship proceeding.
- While a DGPOA can be made a public document by recording it with the office of the county clerk, not all DGPOAs get recorded. There are private companies that will scan a Health Care Power of Attorney (HCPOA) and make it retrievable online, but they generally charge an annual fee for their services and the means of alerting emergency personnel to check the company's records

can be rather hit and miss. Currently there is no central registry of DGPOAs or HCPOAs in Wyoming, making it difficult in emergency situations to determine if there is an agent authorized to act on a person's behalf.

**Recommendations**

Adopt the Uniform Power of Attorney Act

1. The Joint Editorial Board for Uniform Trust and Estate Acts, composed of members of the Uniform Law Commission, the American Bar Association (ABA), and the American College of Trust and Estate Counsel (ACTEC), surveyed the leadership of the ABA Real Property, Probate and Trust Law Section, the fellows of ACTEC, and members of the National Academy of Elder Law Attorneys (NAELA), to determine whether there was actual divergence of opinion about default rules for powers of attorney or only the lack of a detailed uniform model. As reported by the Uniform Law Commission in the Prefatory Notes to the Uniform Power of Attorney Act (UPOAA), the survey found a consensus of opinion in excess of 70% that a power of attorney statute should:

   (1) provide for confirmation that contingent powers are activated;
   (2) revoke a spouse-agent's authority upon the dissolution or annulment of the marriage to the principal;
   (3) include a portability provision;
   (4) require gift making authority to be expressly stated in the grant of authority;
   (5) provide a default standard for fiduciary duties;
   (6) permit the principal to alter the default fiduciary standard;
   (7) require notice by an agent when the agent is no longer willing or able to act;
   (8) include safeguards against abuse by the agent;
   (9) include remedies and sanctions for abuse by the agent;
   (10) protect the reliance of other persons on a power of attorney; and
   (11) include remedies and sanctions for refusal of other persons to honor a power of attorney.[20]

   Incorporating these survey results, along with input from the ABA Commission on Law and Aging, the National Conference of Lawyers and Corporate Fiduciaries,

[20] *See* Uniform Power of Attorney Act text and comments at: http://www.uniformlaws.org/shared/docs/power%20of%20attorney/UPOAA_2011_Final%20Act_2016aug1.pdf (last accessed on January 18, 2017).

the American Bankers Association, AARP, and other professional groups, the Uniform Law Commission developed the UPOAA, which codifies both legislative trends and best practices, striking a balance between the need for flexibility and acceptance of an agent's authority and the need to prevent and redress financial abuse.

2. The adoption of the UPOAA in Wyoming would address numerous problem areas on which our current durable power of attorney statute[21] is silent, including the authority of multiple agents, the authority of later-appointed guardians, the impact of the dissolution of the principal's marriage to the agent, and arbitrary refusals to honor powers of attorney by banks, brokerage houses, and insurance companies. The UPOAA provides clear statutory guidelines for agent conduct, thereby helping to deter the use of the power of attorney as a tool for financial abuse by imposing mandatory and default fiduciary duties on the agent, the imposition of liability for agent misconduct, broad provisions for judicial review of the agent's conduct, and the requirement of express language to grant certain powers that could be used to dissipate the principal's property or alter the principal's estate plan. Responding to concerns within the medical community regarding the triggering of "springing" DGPOAs, the UPOAA addresses how and by whom the determination of incapacity can be made. Such provisions render it easier to educate both the general public, professionals, and law enforcement regarding the scope, nature, and use of DGPOAs. Currently adopted by or introduced in all the states surrounding Wyoming, this Task Force views the adoption of the UPOAA as a critical step in preventing abuse and exploitation of elders and vulnerable adults in Wyoming.[22]

3. Past discussions regarding the merit of model legislation which contains standardized, "check-the-box" document forms, like Article 3 of the UPOAA, have been met with resistance from some sectors of the state bar. In part, this discord has been driven by concerns that making "one-size-fits-all" documents readily available opens the door to misuse by untrained and unscrupulous persons to the disadvantage of elders and vulnerable adults. With the increase in popularity of online "do-it-yourself" legal documents without the counterbalancing guidance of clear statutory language, those fears have become a reality. With a little educational effort as to the scope and advantages of the UPOAA, utilizing existing resources like the Wyoming Bar Association publication, *The Wyoming Lawyer*, these concerns can be addressed proactively

[21] W.S. 3-5-101 thru 3-5-103.

[22] For information on the Uniform Power of Attorney Act, visit the Uniform Law Commission website at: http://uniformlaws.org/Act.aspx?title=Power%20of%20Attorney(last accessed on January 18, 2017).

and opposition softened. For example, the UPOAA incorporates restrictive definitions for certain critical "hot powers" like the making of gifts whereas neither the current Wyoming Durable Power of Attorney Act nor online form documents provide guidance. These hot power restrictions can be modified for purposes like Medicaid or estate planning by customized attorney drafting.

4. In emergency situations, law enforcement and medical providers can have a hard time determining who has authority to make decisions. Wyoming currently allows persons voluntarily to register their "next of kin" when applying for or renewing their driver's license. The same mechanism might be used to identify the agent appointed under a HCPOA.

**2. Improve effectiveness of guardianships and conservatorships**

The traditional mechanism used to prevent abuse, neglect, or exploitation of an incompetent person is the court-appointed guardian or conservator. In practice, the effectiveness of Wyoming's statutory guardian/conservatorship scheme in protecting elders and vulnerable adults has some loop holes. Current guardian/conservatorship problem areas:

- The needs of vulnerable adults and children under a guardian or conservatorship are substantially different, but the guardianship and conservatorship laws do not differentiate between them.
- Courts often appoint both guardians and conservators upon being petitioned, without any vetting process beyond the bare allegation that the petitioner is a "fit and proper person" to serve. For example, there is no prohibition on the petitioner having previously been convicted of a felony involving moral turpitude or any requirement that the petitioner possess the knowledge, training, or experience to understand their fiduciary duties. Merely requiring the posting of a bond may not adequately address these concerns. Bonds can be waived, and today many people who would otherwise make good fiduciaries are unable to obtain a surety bond.
- Courts are not always vigilant about the timeliness and completeness of guardian and conservator reporting.
- There is no requirement of a background check for a guardian/conservator.
- Unlike for children, there is no program or training for GALs to serve in cases involving elders or vulnerable adults in Wyoming.
- Guardians/conservators often fail to understand their fiduciary duty or lack the skill or resolution to timely file reports with the court. Unlike in other jurisdictions, there is no licensing requirement or training program in Wyoming to address this concern.
- Guardians and conservators who fail to submit their reports to the court in a timely manner, and as a result, have their appointments terminated, often

continue to act in the capacity of guardian or conservator for years without being questioned by third-parties about their authority.

- There is no system in Wyoming for law enforcement, medical providers, or other third-parties in an emergency situation to quickly identify whether an individual is under guardian/conservatorship and who has been appointed to serve in that capacity.
- Often there is no suitable person to act as guardian or conservator for vulnerable adults. The WGC, a 501(c)(3) non-profit corporation, can serve as the guardian or conservator of last resort for Wyoming's indigent elder and vulnerable adult populations.

**Recommendations**

1. Develop standardized reporting forms, available through The Wyoming Supreme Court website, which guardians and conservators can use in preparing their reports to the courts. Courts in other jurisdictions post such forms online.[23]

2. Orders and letters appointing guardians and conservators should contain an expiration date so third-parties to whom such documents are presented can easily determine whether the authority purportedly being granted under such documents has expired or is still in effect. When the guardian or conservator submits their report in a timely fashion, the court could issue a new order reflecting a new expiration date when it approves the report.

3. Judicial guidelines should be established for determining the fitness of a proposed guardian or conservator to serve, including different licensure and training requirements for family and non-family fiduciaries. Courts should demand timely reporting by guardian and conservator and carefully scrutinize the reports.

4. Training is available for GALs for children. GALs for elder and vulnerable adult should also receive training to better inquire into the fitness to serve of proposed guardians and conservators, including running background checks and inquiring into appropriate training and licensure. At a very minimum, a training or information page could be posted on the Supreme Court or State Bar website.

5. Family member guardians and conservators should receive instruction or training into the nature and scope of their fiduciary duties. WGC offers a guardian training

[23] For an example, *see* the Idaho Supreme Court's Guardianship & Conservatorship web page at: https://isc.idaho.gov/guardianship/current_guardianship-conservatorship/forms (last accessed on January 18, 2017); *see also* Colorado Judicial Branch web page at: https://www.courts.state.co.us/Forms/SubCategory.cfm?Category=Guardian (last accessed on January 18, 2017).

program to the public for a fee. Training modules could be posted on the Supreme Court website as has been done in other states.[24]

6. In emergency situations, law enforcement and medical providers can have a hard time determining who has authority to make decisions. A central state registry of guardian/conservatorships should be established on the Supreme Court website for third-parties to check for this information.[25]

7. Even though Wyoming is experiencing a period of budget cuts, the DOH should still allocate more resources to fund grants to entities like WGC to provide guardianship services for indigent persons.

**3. Mandate cross-reporting between DFS and law enforcement**

(See discussion at Inter-agency Communication above)

W.S. 35-20-103 (c) and (d) should be amended for complete cross-sharing of information between law enforcement and DFS. This is a simple fix that would simply mandate cross-reporting upon the initial report being made to either DFS or law enforcement. The current statute should be amended as follows:

> (c) After receipt of a report that a vulnerable adult is suspected of being or has been abused, neglected, exploited, intimidated or abandoned or is committing self-neglect, the department shall notify law enforcement and may request assistance from appropriate health or mental health agencies.
>
> (d) If a law enforcement officer ~~determines~~ receives a report that a vulnerable adult is abused, neglected, exploited, intimidated or abandoned, or is committing self-neglect, he shall notify the department concerning the potential need of the vulnerable adult for protective services.

[24] For an example, *see* the Idaho Supreme Court's Guardianship & Conservatorship web page and the Prospective Guardian and Conservator Online Training Module at: http://www.isc.idaho.gov/guardianship/guardianship-conservatorship (last accessed on January 18, 2017); *see also* Minnesota Judicial Branch's Guardianship and Conservatorship web page at:http://www.mncourts.gov/Help-Topics/Guardianship-and-Conservatorship.aspx (last accessed on January 18, 2017).

[25] For an example, *see* the Minnesota Judicial Branch's Guardian/Conservator Registry at: http://www.mncourts.gov/Help-Topics/Guardianship-and-Conservatorship.aspx (last accessed on January 18, 2017).

### 4. Strengthen adult protective services

The Wyoming Adult Protective Services Act[26] generally is a "solid piece of legislation" although it does contain certain weaknesses that render it difficult to enforce in some situations and therefore of limited value in preventing elder abuse, neglect, and exploitation. One of the biggest problems lies in the definition of "vulnerable adult." To be afforded protection under the Wyoming Adult Protective Services Act, a person must be "unable to manage and take care of himself or his money, assets, or property without assistance."[27] But according to the Metlife study cited above, the typical victim of elder abuse, neglect, and exploitation may only suffer some "mild cognitive impairment" and may not be so demented as to obviously need a caregiver. "Mild cognitive impairment" includes a decline in one's financial ability which often accompanies the progressive loss of cognition. It is characterized by a difficulty in managing bank statements, paying bills, and in financial judgement.[28] A person can become vulnerable due to isolation, age, or disability and yet not be sufficiently incompetent to meet the APS definition of vulnerable adult. This disjuncture between the statutory definition of vulnerable adult and the clinical reality of the typical victim is one of the greatest problems faced in enforcing the Wyoming Adult Protective Services Act and preventing abuse. It should be addressed through amendment of the statute.

**<u>Recommendation</u>**

Amend the statutory definition of "vulnerable adult" under the Wyoming Adult Protective Services Act to include the population that studies have found to be most typically the victims, those who may only have some "mild cognitive impairment" but are not so demented as to need a caregiver. "Mild cognitive impairment" refers to a decline in financial ability accompanying the progressive loss of cognition and is characterized by a difficulty in managing bank statements, paying bills, and making good financial decisions.[29] This victim group also includes those who, through age or disability, are isolated. For an excellent discussion on elder abuse, see the interview of Deputy San Diego County District Attorney Paul Greenwood that is posted on the AARP website.[30] Recommended amended language might read:

> "Vulnerable adult" means any person eighteen (18) years of age or older who is unable to protect himself from abuse, neglect, exploitation, intimidation, abandonment, or self

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[26] W.S. 35-20-101 *et seq*.
[27] W.S. 35-20-102(a)(xviii).
[28] Price, T., *Clinical Assessment of Financial Decision Making Capacity*, appearing in Factora, R., *Aging and Money, Reducing the Risk of Financial Exploitation*, Springer Science + Business Media, New York (2014), cited in *The ElderLaw Report*, Vol. XXVII, Issue 4.
[29] Price, T., *Clinical Assessment of Financial Decision Making Capacity*, *supra*.
[30] *See* http://www.aarp.org/politics-society/advocacy/info-02-2010/ending_elder_abuse.html (last accessed on January 18, 2017).

neglect, as those terms are defined under this section, or who lacks the capacity to consent, or is unable to provide for his own care, due to:

(A) Diminished physical or mental abilities because of the infirmities of aging, limitations in hearing, vision, mobility, or the ability to perform the activities of daily living, or cognitive impairment;
(B) Mental, emotional, physical, or developmental disability or dysfunction, or brain damage;
(C) The effects of illness, injury, or accident; or
(D) Residency in a long-term care facility, nursing home, or similar care facility or institution.

While the current definition of "vulnerable adult" closely resembles the definition of "incompetent person" under Title 3 of the Wyoming Statutes governing guardianships by focusing on a person's inability to take care of himself or manage his property without assistance,[31] this proposed amendment recognizes that the typical victim of abuse, neglect or exploitation often is not so cognitively or physically impaired so as to need assistance in managing their affairs, but may still be "unable to protect himself from abuse, neglect, exploitation, intimidation, abandonment, or self neglect." The new subparagraph (A) is intended to identify that group of persons struggling with diminished abilities due to infirmities of aging, limitations in hearing, vision, mobility, the inability to perform ADLs or those with cognitive impairment but who are not so bad off as to be "incompetent" or "disabled." Those persons who fall into the traditional "incompetent" or "disabled" categories are included under subparagraph (B). Under a new subparagraph (C), those individuals suffering the effects of an illness, injury, or accident which may temporarily render them unable to protect themselves has been included. Persons residing in long-term care facilities are automatically deemed vulnerable in subparagraph (D).

### 5. Adopt a civil cause of action for vulnerable adult abuse

The unfortunate reality for many abused and exploited adults is that when someone reaches out to report, the response of APS and law enforcement often is to advise the reporting party to call back when a civil judgment has been obtained. The cost of obtaining such a judgment is a practical impossibility when the reporter lacks standing to raise a cause of action, the victim suffers from a cognitive impairment, or limited resources prohibit the victim from retaining an attorney. Legislation should be adopted to

[31] Compare "unable unassisted to properly manage and take care of himself or his property" (W.S. 3-1-101(a)(ix), with "unable to manage and take care of himself or his money, assets or property without assistance" (W.S. 35-20-102(a)(xviii)).

create a new civil cause of action which would allow elders, vulnerable adults, and interested third-parties to bring suit to recoup their losses, providing for treble damages and attorney fees. This is an approach recently recommended by the South Dakota Elder Abuse Task Force Report following the lead of Arizona and Florida.[32]

**6. Extend time for emergency protective services**

The 72 hour timeframe in W.S. 35-20-107(c) should be amended to cover the reality that emergency services cannot reasonably be expected to occur in such a short time frame. Currently multiple extensions are required before the emergency can be removed. It is recommended that the seventy-two hour timeframe be extended to 14 days with allowance for extensions. The statute should be amended to read:

> The order for emergency protective services shall remain in effect for a period not to exceed ~~seventy-two (72) hours~~14 days. The order may be extended for an additional ~~seventy (72) hour~~ 14-day period if the court finds that the extension is necessary to remove the emergency. The vulnerable adult, his agent, his court appointed representative, or the department, through the attorney general or the district attorney, may petition the court to set aside or modify the order at any time.

**7. Improve process and resources for emergency guardianships**

Often, hearings on petitions for emergency services to assist vulnerable adults who are mentally ill, critically ill, and/or elder result in the creation of an emergency guardianship. Time is of the essence in these situations, and codifying a state-wide uniform system would simplify the process. Attorneys who petition on behalf of a vulnerable adult face issues which include:

- Lack of resources: some courts may require the appointment of a GAL, which in turn may become the financial responsibility of the county. (Only in rare cases does a wealthy person require a court-appointed guardian.) Attorneys relate that they often have either no or insufficient funds to pay a guardian, which sometimes results in criticism from the bench concerning the substandard performance of the GAL—the concern justifiably being an infringement on civil rights without representation.
- Access to the medical/mental health records: medical records are important in determining incompetency; however, there is no mechanism to obtain these

[31] *See* http://www.eldersandcourts.org/~/media/Microsites/Files/cec/South%20Dakota%20Elder%20Abuse%20Task%20Force%20ReportFinal%202015.ashx, at p. 48 (last accessed on January 18, 2017).

> records until a GAL is appointed. Having these records available before a GAL is appointed would not only reduce the burden on the GAL, it would serve to defray costs in the long run. Judges will ask if the GAL has reviewed the medical records, talked to the doctors, etc. However, access to those records is difficult, expensive, and time consuming, requiring releases, discovery, subpoenas, etc.

The EVA Task Force recommends a statutory change providing that medical/mental health records shall be immediately released to the GAL; and the GAL is authorized to confer with treating physicians. This would avoid the cost of subpoenas and releases, refusals by medical personnel to participate in fear of liability, and reduce the time and cost involved in issuing discovery or subpoenas.

A statute for the admissibility of records similar to W.S. 16-3-108 would serve to facilitate the above suggestions resulting in a streamlined process. Frequently in the administrative hearing context, records are admissible if relevant and commonly relied upon by reasonably prudent men and that would simplify matters. We recommend language similar to W.S. 16-3-108:

> In guardianship/conservatorship matters irrelevant, immaterial or unduly repetitious evidence shall be excluded and no sanction shall be imposed or order issued except upon consideration of the whole record or such portion thereof as may be cited by any party and unless supported by the type of evidence commonly relied upon by reasonably prudent men in the conduct of their serious affairs.

Finally, perhaps an appointment of a guardian/conservator commission/hearing officer would then allow these matters to be treated similar to other statewide administrative processes, i.e., hearings conducted for the Medical Commission, Division of Worker's Safety and Compensation, and the Department of Labor. Those hearings are statewide. Video hearings are available at all sites and now Google dropbox.

## V. Conclusion

Wyoming has in place many of the processes and laws necessary to address the growing problems of vulnerable adult abuse, neglect, and financial exploitation. This report contains recommendations for specific changes that the EVA Task Force believes would enhance the effectiveness of those processes and laws, so that the state is in a better position to address the important issues relating to its aging population.