

Overprotected and Underrepresented

An Analysis of Adult Guardianship in Maine



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ABOUT DISABILITY RIGHTS MAINE

Disability Rights Maine (DRM) is Maine's designated Protection and Advocacy (P&A) agency, a 501(c)3 nonprofit organization authorized and mandated to protect and advocate for the rights of Maine people with disabilities. DRM's mission is to advance justice and equality by enforcing rights and expanding opportunities for people with disabilities in Maine.

DRM represents individuals whose rights have been violated or who have faced discrimination based on their disability. Additionally, DRM offers training on rights and self-advocacy, while actively advocating for reform in public policies.

DRM believes that people with disabilities must:

- Be treated with respect and be free from abuse;
- Control the decisions that affect their lives;
- Receive the services and supports necessary to live independently;
- Have the opportunity to work and contribute to society;
- Have equal access to the same opportunities afforded all other members of society; and
- Fully participate in all aspects of society, including education, work, and community.

DRM is part of a nationwide network of disability rights organizations established by Congress to protect the rights of all individuals with disabilities.

EXECUTIVE SUMMARY

Adult guardianship—the legal process through which the authority of a person to make their own decision is removed and given to another person—is one of the most restrictive legal arrangements short of incarceration. Guardians can control most aspects of another person’s life, including decisions about medical care, housing, finances, and employment. Despite the fundamental rights that guardianship removes, it is not something many people consider. Aside from high profile news stories involving Britney Spears, or, more recently, Michael Oher from the book and movie *The Blind Side*, we don’t hear a lot about adult guardianship.¹ This is reflected in a general lack of data concerning the topic.

Disability Rights Maine undertook this study, the first of its kind in Maine, to gather data on adult guardianship. DRM collected data on all adult guardianship cases statewide over the years 2019, 2020, and 2021. We collected information on the rate that people for whom guardianship is sought (called Respondents) are represented by attorneys, the rate at which guardianships are granted, the rate at which those guardianships are full versus limited, and the difference in outcomes between cases when Respondents had attorneys compared with when they lacked representation.

The data showed the rate at which Respondents are represented by attorneys is very low. Over the three years studied, about 75% of people went through the guardianship process without a lawyer. Most cases, over 77% overall, resulted in the appointment of a guardian, and of those appointments, over 90% were full guardianships. For individuals with developmental disabilities, the rates were even more extreme. Over 90% went without legal representation, and over 90% of cases resulted in appointments of guardians.

One of the most compelling results DRM found was in comparing outcomes between cases in which Respondents had attorneys and cases in which they didn’t. In cases where the Respondents had attorneys, the outcomes were far less restrictive: rates at which guardians were appointed went down, and when they were appointed, the rate at which they were limited went up.

This report presents an overview of the guardianship system as it exists in Maine, as well as a discussion of the shortage nationwide on data regarding guardianships. It will discuss our method of data collection using the probate court online search. Then, we present our key findings of the data collected, as well as conclusions drawn. DRM’s hope is that this report can serve as a model for further data collection and assessment in order to drive policy change on guardianship reform.

¹ In some states, guardianship is called “conservatorship.” In Maine, these are two different concepts. Put most simply, guardianship involves making decisions concerning another person, while conservatorship involves making decisions concerning another person’s property and financial affairs. 18-C M.R.S. §§ 5-102(6), (10).

INTRODUCTION

DECISION-MAKING AS A FUNDAMENTAL RIGHT

Self-determination—the process by which a person determines the course of their own life—is one of the most fundamental rights inherent to being human. Many decisions are small, for instance, what to have for breakfast, whether to wear a jacket on a chilly day, or how to style our hair. Some decisions are much more important, like choosing a career, deciding whether to move, or deciding who to spend our time with. Some decisions we make on our own, and some we make by consulting with others, such as family, a friend, or a medical provider.

Most people take the ability to make their own decisions for granted. When most people are deciding, for instance, whether to buy a new winter coat, they might consider the cost of a coat, but they don't ordinarily think too much about *whose* decision this is. Most people assume that the right to make decisions about their own lives belongs to them.

Of course, the freedom to make decisions isn't limitless for anyone. We are all constrained by circumstance. Our choices are restricted by things like finances, availability of services, employment and familial obligations, the laws of physics, etc. But for people under guardianship, decisions are constrained on a more fundamental level. It is not only the range of choices that is limited, but rather, the very ability to make choices at all.

Adult guardianship takes the notion of an inherent right to self-determination and turns it on its head. It forces us to think not just about whether, and under what circumstances, another person should be in charge of making decisions for an individual, but also, on a deeper level, it forces us to think about *why* decision-making is such a fundamental right in the first place. Who we are is the result of the decisions we make. So many of the ways in which we identify—nurse, husband, Patriots fan, knitter, foodie, Disney fanatic—are the result of a series of decisions. In this way, the ability to make our own decisions very closely equates to who we are, how we see ourselves, and how others see us.

ADULT GUARDIANSHIP AND THE PROBATE COURT SYSTEM

Adult guardianship is a legal process through which the ability to make decisions is removed from one person and given to another. This occurs when a court decides that a person cannot make decisions for themselves that can keep them safe and healthy, even with support. To reach this conclusion, the court must find that the person is unable to “receive and evaluate information or make or communicate decisions” to “meet essential requirements for physical health, safety or self-care,” even with assistance such as assistive technology or other support.² What this means is that if there is anything or anyone that can support a person with making their own decisions, the person should not be placed under guardianship.

Guardianship is almost always used when the person in question has a disability, whether that be

² 18-C M.R.S. § 5-301(1).

a developmental disability, a mental health label, an acquired brain injury, or a medical condition that may affect their ability to make decisions (or appear to affect it). Some medical conditions, such as a diagnosis of dementia or a stroke, may be more likely to afflict people as they age.

In Maine, the probate courts exclusively decide cases involving adult guardianship. Unlike the district courts, superior courts, and the state supreme court, which are part of the state’s Judicial Branch, probate courts are county-run courts. There are sixteen probate courts, one for each county in Maine. Unlike judges in the state Judicial Branch, who are appointed by the Governor and confirmed by the Senate to serve seven-years terms, probate judges are elected, as are registers of probate, who manage the probate courts. Registers of probate are full-time employees, while judges serve part-time. Many probate court judges are also practicing attorneys. Probate courts are funded by the county in which they exist.

THE IMPORTANCE OF THE ATTORNEY

A person is often entitled to an attorney when fundamental rights are implicated, whether they can afford one or not. The most common example is the constitutional requirement that a person accused of a crime is entitled to a court-appointed attorney if their freedom is at risk. A parent is entitled to an attorney if their child is taken into foster care, because parenting is a fundamental right. When the state seeks to involuntarily commit a person to a hospital due to an alleged mental illness, that person is entitled to an attorney, because that person’s liberty is at stake.

Because guardianship also implicates fundamental rights, a person for whom guardianship is sought is entitled to court-appointed counsel. However, unlike the earlier examples, the appointment of an attorney in guardianship cases is not automatic. A guardianship case begins when someone (called the Petitioner), or in some instances the state (via the Department of Health and Human Services), files a petition in probate court asking to be appointed as a guardian for a person (called the Respondent). The court must appoint an attorney for the Respondent only if the Respondent requests it, if it is recommended by the court-appointed visitor, if the court determines the Respondent should have an attorney, or if the court learns that the Respondent wants to contest or limit the guardianship.³

Given the fundamental rights that guardianship removes, it is difficult to conceive of a situation where the Respondent should not have their own independent advocate to advise and help them navigate the process. Nevertheless, Respondents are overwhelmingly without such advocacy.

A common justification for the absence of an attorney for a Respondent is that a person is “too disabled” to be able to work with an attorney. This justification is most often rooted in presumptions and biases about people with disabilities. It is also legally problematic, because in a guardianship proceeding, a person must be presumed to have capacity until proven otherwise. To assume incapacity at the beginning of a case deprives the Respondent of due process and shifts the burden to them to prove they “deserve” legal representation.

Another reason often used to justify a deprivation of counsel is that the Respondent doesn’t wish

³ 18-C M.R.S. § 5-305(1).

to contest the guardianship, and so there is no reason for them to have an attorney, which could make the process unnecessarily adversarial. This reasoning fails to understand the role of an attorney. Attorneys need not make a process more difficult than it should be; they are tasked with ensuring their client understands the process and their full legal rights, and with advocating for what they want. There is a certain irony when a court concludes that a person lacks capacity so as to need a guardian while simultaneously accepting that person’s consent, without legal representation, to surrender most of their civil rights.⁴

It has also been suggested that an attorney for the Respondent is not necessary because the court-appointed visitor is adequate.⁵ But the visitor’s role is very different from the role of the attorney, and the two roles should not be conflated. A court-appointed visitor, unlike an attorney, is not tasked with advocating for the wishes of the Respondent. A visitor is meant to conduct an investigation of sorts, interviewing the Respondent, the potential guardian, and other records as appropriate, and reporting to the court whether the visitor believes a guardianship is appropriate. The visitor’s recommendation does not need to reflect the Respondent’s wishes—a visitor can recommend guardianship regardless of the view of the Respondent, and in opposition to what the Respondent wants. In addition, a visitor is not always an attorney, yet they are tasked with explaining the petition and its legal implications to the Respondent.

One final reason that has been given for the failure to appoint attorneys for Respondents in guardianship matters is the lack of attorneys willing to take cases, and budget concerns, as the counties are responsible for reimbursing court-appointed attorneys. Such concerns can never be justification for depriving a person of their fundamental rights. Maine must consider ways to fulfill its obligation to ensure Respondents have legal representation. The law requires it.

THE NEW MAINE PROBATE CODE

Maine is at the forefront of guardianship reform. In 2018, Maine became the first state in the nation to enact a law based upon the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA).⁶ This is a model law created by the Uniform Law Commission, which drafts laws on which states may base their own laws. The UGCOPAA was

⁴ It is also worth noting that the Maine Rules of Professional Conduct, the ethical rules to which all lawyers are bound, also gives guidance to attorneys working with clients with “diminished capacity,” highlighting that a lawyer should maintain a “normal client-lawyer relationship” to the extent possible. M.R. Prof. Conduct 1.14.

⁵ A court-appointed visitor, unlike an attorney, is required in all guardianship cases, and must have “training or experience in the type of abilities, limitations and needs alleged in the petition.” 18-C M.R.S. § 5-304(1). The visitor is tasked with interviewing people involved and, among other things, explaining the petition and implications to the Respondent, obtaining their views, informing them of their right to an attorney, and offering recommendations to the court of the appropriateness of a guardianship. 18-C M.R.S. §§ 5-304(2)-(4). There are no legally mandated training requirements for visitors; whether they have the “training or experience” required in statute is at the discretion of the court without further guidance. For a more in-depth discussion on the role of court-appointed visitors in Maine, see Lisa Kay Rosenthal, *Revisiting the Visitor: Maine’s New Uniform Probate Code & the Evolving Role of the Court-Appointed Visitor in Adult Guardianship Reform*, 74 Me. L. Rev. 141 (2022).

⁶ Uniform Law Commission, *2017 Guardianship, Conservatorship, and Other Protective Arrangements Act*, <https://www.uniformlaws.org/committees/community-home?communitykey=2eba8654-8871-4905-ad38-aabbd573911c>.

drafted over many years with input from stakeholders across the country, including probate court judges, attorneys, the National Disability Rights Network, and the National Academy of Elder Law Attorneys. Maine’s law went into effect in September of 2019 and replaced the state’s entire Probate Code as it pertains to guardianship. Since that time, Washington state became the second state to enact a law based on the UGCOPAA. Currently, four other states are considering following this lead.

The new Probate Code does a number of things that clarify and memorialize the rights of Respondents in guardianship matters. It emphasizes, first and foremost, the notion that guardianship is a means of last resort, and explicitly prioritizes the use of less restrictive alternatives, such as Supported Decision-Making, assistive technology, powers of attorney, and use of representative payees, in lieu of full guardianship. The statute also mandates that a court may not order a full guardianship if a less restrictive alternative, including a limited guardianship, will meet the needs of the Respondent.

The new Probate Code offers enhanced legal protections for individuals subject to, or at risk of becoming subject to, guardianship, including prioritizing less restrictive alternatives, ensuring the clear right of Respondents to have an attorney, and retaining the right to retain an attorney even if a guardian is appointed.

The drafters of the UGCOPAA, upon which the Maine statute is based, envisioned that attorneys would be appointed for Respondents in most cases:

It is expected that courts . . . will appoint counsel in virtually all cases in which the respondent would otherwise be unrepresented. . . . [C]ourts should err on the side of protecting the respondent’s rights by finding, absent a compelling reason otherwise, that the respondent needs representation. A guardianship proceeding can involve complex legal issues and can strip the adult of many of the most basic rights. It should be the rare case in which the court does not find that an unrepresented respondent is in need of representation. Visitors in such jurisdictions should also be sensitive to the fact that the respondent may lack the ability to knowingly waive appointment of counsel.⁷

LACK OF DATA ON ADULT GUARDIANSHIP

As with many other areas of life, making informed decisions on policy requires good information. Policy-makers must have reliable data in order to identify issues with and make improvements to the system of guardianship. Yet, there is no reliable or consistent source of data upon which to base such policy decisions. This lack of data is not confined to Maine, but exists nationwide. In 2018, the United States Senate Special Committee on Aging issued a report identifying the need for better data as one of its key findings. The Committee, at the time chaired by Maine Senator Susan Collins, stated:

There is general consensus among stakeholders and advocates that data on the

⁷ UGCOPAA § 305 cmt. (2017).

guardianship system at both the state and national level are severely lacking. While states have oversight over the guardianship system, most do not keep extensive records regarding guardianship. Few states appear able to track the total number of individuals subject to guardianship, let alone record demographic information, the types of guardianship being utilized, or the extent of a guardian's authority. The lack of broad state and national data makes it very difficult to identify trends in guardianship, leaving advocates and policymakers in the dark when trying to enact reform.⁸

Maine, like the rest of the country, is lacking in guardianship data. As noted above, the probate courts are independent courts run by each county, each with their own record-keeping procedures. Many courts reported, in a survey conducted in 2023 by the Maine Monitor, that they do not track the number of guardianships in their counties, and do not even have data on whether individuals subject to guardianship are living or deceased.⁹ This is problematic, given that courts must oversee the guardianships they order, including annual reporting requirements of guardians. In addition to not knowing the number of guardianships, courts do not track the demographics of guardianship cases, such as age, race, socioeconomic status, disability, and gender of people under guardianship. Because of this lack of data, policy-making regarding guardianship has been largely based on anecdotal data that may or may not be indicative of larger, systemic issues.

One of the best sources of data on guardianship is the National Core Indicators (NCI), but even this has significant limitations. The primary purpose of NCI is to utilize a standard set of performance and outcome measures to gather information about services delivered to people with developmental disabilities. The data is collected via surveys that states administer; the data is then made available on the NCI website and is searchable by metrics such as gender, race/ethnicity, age, diagnosis, guardianship status, etc. NCI reports that in Maine, in 2018-2019, 60% of individuals with a developmental disability who receive some state service are under full guardianship. This is double the national rate of 30%.¹⁰ However, this data does not give a complete picture. Because NCI administers, through the participating states, surveys only to adults with developmental disabilities (and/or their families or providers) who receive at least one paid state service, it leaves out large sections of the population overall, including individuals with conditions other than developmental disabilities, people with developmental disabilities who don't receive state services, and any individual residing in a state that does not participate in NCI surveys. In Maine in 2018-2019 (the most recent report for which data is available), this

⁸ U.S. Senate Special Committee on Aging, *Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans*, 25 (Nov. 2018).

⁹ Samantha Hogan, *Calls to overhaul Maine probate courts have stalled for half a century. The most vulnerable people may be at risk.*, The Maine Monitor (June 4, 2023) (“Some probate courts say they don’t know how many adults are in guardianships or whether they’re still alive.”).

¹⁰ National Core Indicators, *2018-19 Maine In-Person Survey State Report*, at Table 27, p. 19, https://legacy.nationalcoreindicators.org/upload/core-indicators/ME_IPS_state_508.pdf.

percentage was based on 399 surveys¹¹ out of approximately 7,434 individuals¹² with developmental disabilities who were receiving state services during that time. While useful, NCI data is extremely limited in scope, particularly with regard to adult guardianship. It tracks whether a guardianship exists for a small percentage of people, and whether it is a full guardianship or limited guardianship. This limited data shows the rates at which 399 people with developmental disabilities receiving state services are subject to guardianship. It does not show the circumstances that the guardianship came to be or the demographics of the individuals subject to guardianship. The data does not provide a robust picture of guardianship in Maine (nor was it intended to).

Against this backdrop, Disability Rights Maine endeavored to collect data in order to better understand guardianship and how it functions in courts. DRM sought to collect information on how many adult guardianships were requested in a given year, the rate at which Respondents had legal representation, the rate at which guardianships were granted (and how many were full versus limited guardianships), the ages of Respondents, and the reasons for which guardianship was sought. DRM was particularly interested in how the presence or absence of an attorney for the Respondent correlated with guardianships being ordered.

Our hope is for this report to serve as a starting point to uncover areas in which further data collection will be helpful, and to inform the public, policy-makers, and other stakeholders so that policy can be improved.

DATA COLLECTION METHOD

Disability Rights Maine collected information for every adult guardianship case that was initiated in the state of Maine in the years 2019, 2020, and 2021. Overall, we collected information on 2,334 guardianship cases. DRM accomplished this by using the probate courts' online web portal at www.maineprobate.net. The web portal allows the public to access all probate court cases, including full dockets as well as images of many court filings. Every court case is assigned a docket number that begins with the year the case originated in that court. For example, if a petition to appoint a guardian is filed in a probate court in 2019, it will be assigned a docket number beginning with "2019-" followed by a four-digit number to identify the specific case. If a case was transferred from a probate court in another county, as sometimes occurs when people move, the receiving court will assign the case a new docket number, beginning with the year the case was transferred.

Using the search function on www.maineprobate.net, DRM searched "2019-" and used the filter

¹¹ *Id.*

¹² Maine Dept. of Health and Human Services, Office of Aging and Disability Services, *Quarterly Update: Supporting Adults with Developmental Disabilities and Brain Injury in their Homes and Communities*, <https://www.maine.gov/tools/whatsnew/index.php?topic=DHHS-OES-Updates&id=1614698&v=details-2020>. The number 7,434 is derived from adding the number of people receiving and waitlisted for Section 21 and Section 29 services, which are services for individuals with developmental disabilities. The number of waitlisted individuals was included in the calculation because those individuals are likely receiving case management services, which is included as a state service by NCI.

for “Guardian/conservator” to bring up a list of all guardianship and conservator cases that originated in 2019. We looked only at adult guardianship cases and excluded all cases involving guardianship of minors or solely conservatorships. We also disregarded cases that had originated in earlier years but had been given a “2019-” docket number because they had been transferred from another county. Thus, the scope of the data collected was every new adult guardianship case in 2019, 2020, and 2021 for every county in Maine.

Once the scope of the study was identified, information from every case was collected by viewing court filings. The information collected included the birth year of the Respondent, whether the Respondent had an attorney, whether the Respondent attended the hearing, whether a guardianship was ordered (and, if so, whether it was full or limited, and whether the guardian was private or public), whether the Respondent was identified as having a developmental disability,¹³ and the identified basis for guardianship.

SIGNIFICANCE OF YEARS STUDIED

There is significance to the years selected by DRM for data collection. DRM selected years that were recent, but far enough past that the cases were likely resolved with a final court order. As noted above, 2019 is significant because in September, Maine’s entire Probate Code, including that pertaining to adult guardianship, was repealed and replaced. DRM was interested in whether the updated law had an effect on the rates of representation by attorneys, and rates at which full guardianships were ordered in the years immediately following the promulgation of the new Probate Code. It is also worth noting that mere months after the Probate Code went into effect, in March of 2020, the Covid-19 pandemic caused enormous disruptions across the globe, including to legal systems. It may be impossible to draw apart the effects of the new Probate Code from the effects of the pandemic, but it is important to keep in mind while looking at the data.

FOCUS ON INDIVIDUALS WITH DEVELOPMENTAL DISABILITIES

This report analyzes all adult guardianship cases, regardless of the reason that the guardianship was sought. However, as part of its data collection, DRM tracked whether petitions for guardianship identified the Respondent as a person with a developmental disability in order to compare those cases with cases overall. There are a number of reasons why we focused on this subset. First, as noted above, the National Core Indicators, the most robust source of information on guardianship, is limited to individuals with developmental disabilities. By also carving out this subset, DRM’s data may supplement existing NCI data. Additionally, people with

¹³ “Developmental disability” is a general term used to describe a chronic condition of mental or physical impairment that arises before adulthood (“the developmental period”) that substantially limits certain areas of life, such as self-care, language, learning, mobility, and capacity for independent living. Common examples of developmental disabilities include Intellectual Disability and Autism Spectrum Disorder. The “developmental period” may be defined as prior to age 22 (as in federal law) or prior to age 19 (as in Maine statute). For the purposes of this paper, the nuanced differences in how “developmental disability” is defined are not relevant. The guardianship petitions that described the individual as having a developmental disability are taken at face value for identification purposes only; they are not and were not intended as formal diagnoses.

developmental disabilities have been found to be at higher risk of coming under guardianship than other adults.¹⁴

The National Council on Disability, an independent federal agency that advises on national disability policy, reported that this increased risk is due to “widely held stereotypes about [the] ability [of people with developmental disabilities] to make decisions and function as adults,” as well as the existence of the school-to-guardianship pipeline, with “schools actively encouraging guardianship to the exclusion of less-restrictive alternatives, and not providing families and students in special education with sufficient information about the availability of a full continuum of decisionmaking supports.”¹⁵

For these reasons, DRM’s data analysis included a focus on guardianship of individuals with developmental disabilities, in addition to its data collection on adult guardianship in general.

KEY FINDINGS

In 2019, **817 petitions** for the appointment of a guardian of an adult were filed. In 2020, **668 petitions** were filed. In 2021, **849 petitions** were filed.

REPRESENTATION BY ATTORNEYS

Given the deprivation of rights involved in guardianship, and the fact that the model law upon which the Maine statute was based imagines that counsel will be appointed in “virtually all” cases, DRM was particularly interested in the rate at which Respondents were represented by attorneys. As noted above, Respondents have a statutory right to be represented by an attorney in certain circumstances, including when the Respondent requests one, if appointment is recommended by the visitor, if the court determines the Respondent should have an attorney, or if the court learns that the Respondent wants to contest or limit the guardianship. In practice, we found that in an overwhelming number of cases, Respondents had no attorney.

2019

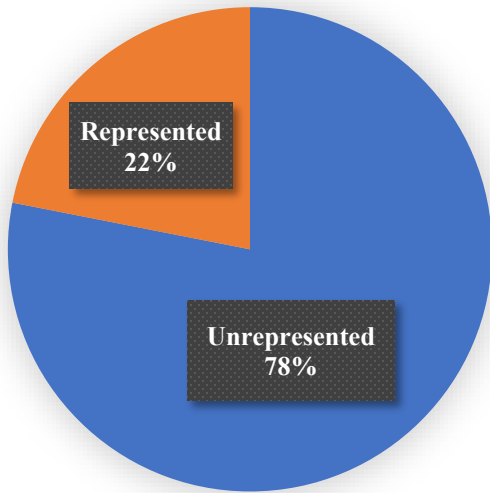
Overall, **78% (638) of Respondents had no attorney.**

31% of the total 817 petitions filed specified that the Respondent had a developmental disability. Of those, the rate of Respondents who had no attorney rose even further, from 78% **without an attorney to 90%.**

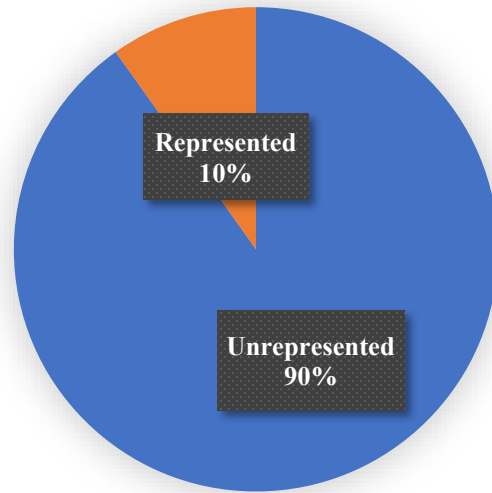
¹⁴ National Council on Disability, *Turning Rights Into Reality: How Guardianship and Alternatives Impact the Autonomy of People with Intellectual and Developmental Disabilities* (June 10, 2019), <https://www.ncd.gov/report/turning-rights-into-reality-how-guardianship-and-alternatives-impact-the-autonomy-of-people-with-intellectual-and-developmental-disabilities-1/>.

¹⁵ *Id.*

Representation of All Respondents - 2019



Representation of Respondents w/ DD - 2019

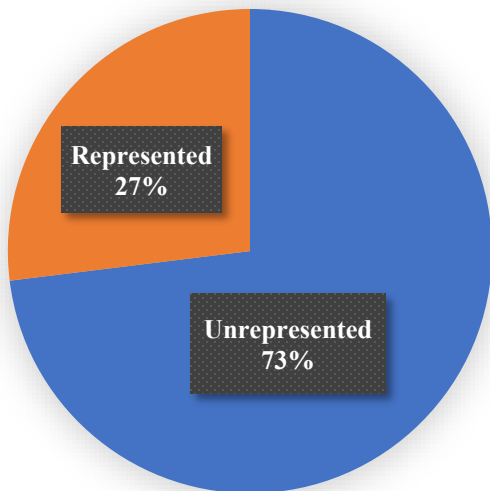


2020

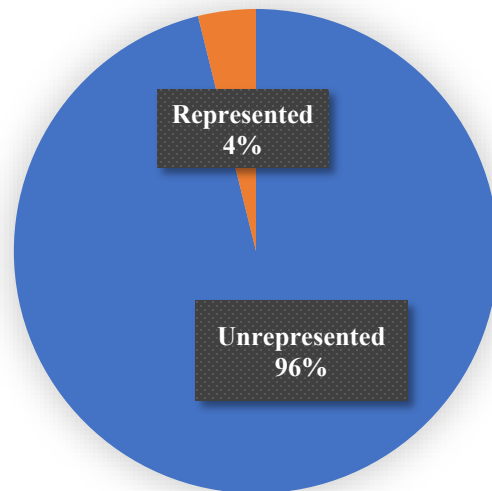
Overall, **73% (488) of Respondents had no attorney.**

23% of the total 668 petitions filed specified that the Respondent had a developmental disability. Of those, the rate of Respondents who had no attorney rose even further, from 73% **without an attorney to 96%.**

Representation of All Respondents - 2020



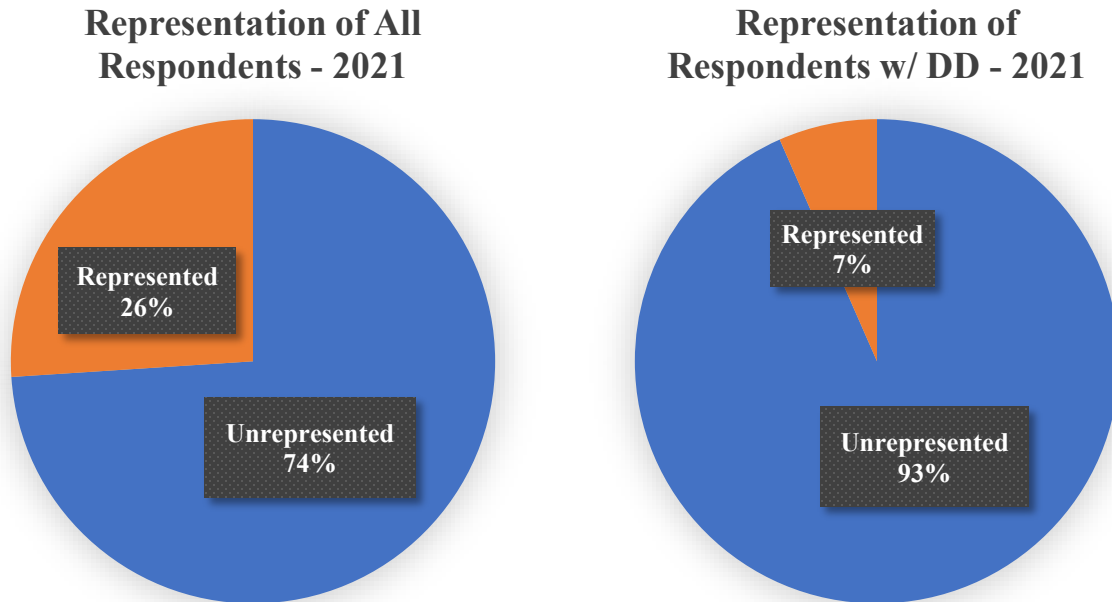
Representation of Respondents w/ DD - 2020



2021

Overall, **74% (628) of Respondents had no attorney.**

27% of the total 849 petitions filed specified that the Respondent had a developmental disability. Of those, the rate of Respondents who had no attorney rose even further, from 74% **without an attorney to 93%.**



RATE OF APPOINTMENT OF GUARDIAN

DRM tracked how many of the petitions filed resulted in the appointment of a guardian. Where guardians were appointed, DRM tracked how many of those appointments were full guardianships vs. limited and how many were private guardianships vs. public.

As above, DRM compared the rates of appointment of guardians for Respondents with developmental disabilities with the overall rates.

2019

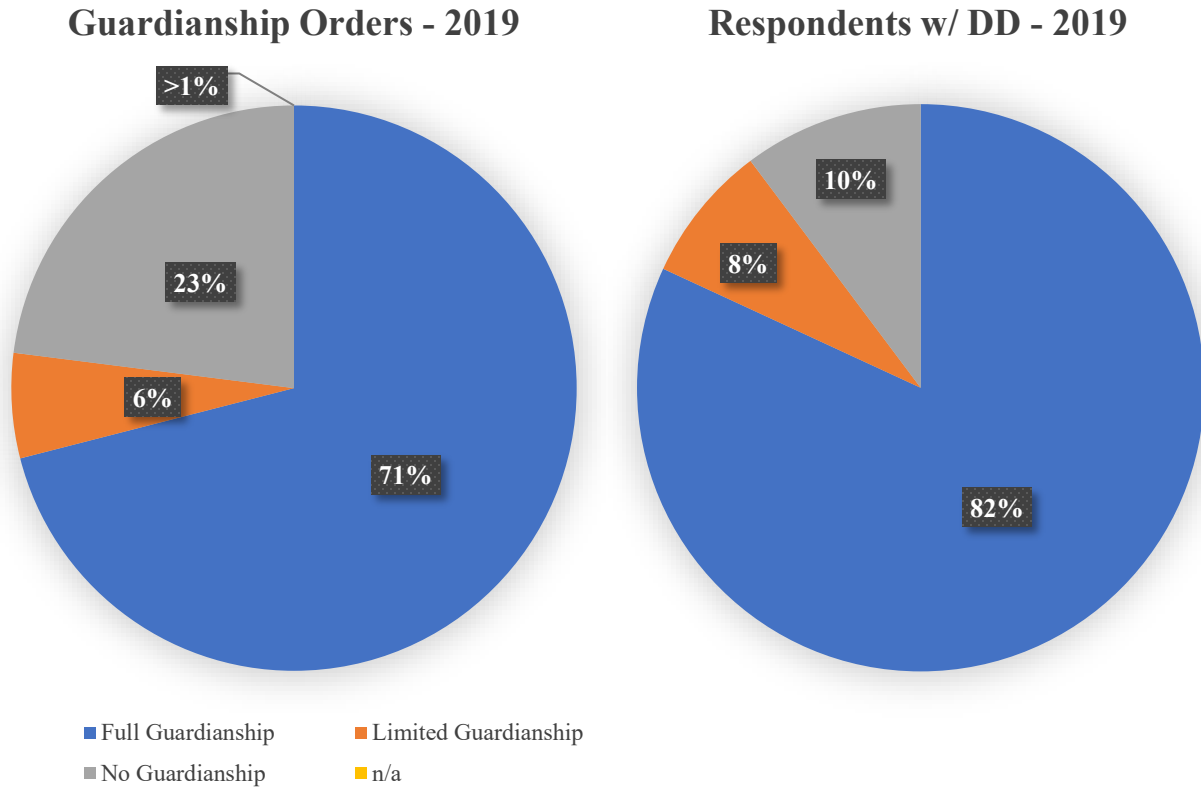
Of the 817 petitions for guardianship filed, **guardianship was ordered in 77% (625) of the cases.**¹⁶ Of the 625 guardianship orders:

- 93% (580) were full guardianships;
- 7% (45) were limited guardianships;

¹⁶ A small number of cases we recorded as “n/a.” These were cases that did not result in a final order on the petition to appoint a guardian, often due to the death of the Respondent prior to a final outcome. In 2019, seven cases had no final order. In 2020, ten cases had no final order. In 2021, there were no cases lacking a final order.

- 87% (544) were appointed private guardians;
- 13% (81) were appointed public/state guardians.

Of the 254 cases involving Respondents with developmental disabilities, the rate of appointment of a guardian rose from 77% overall to 90% (228). 91% of guardianship orders for people with developmental disabilities were for full guardianships.



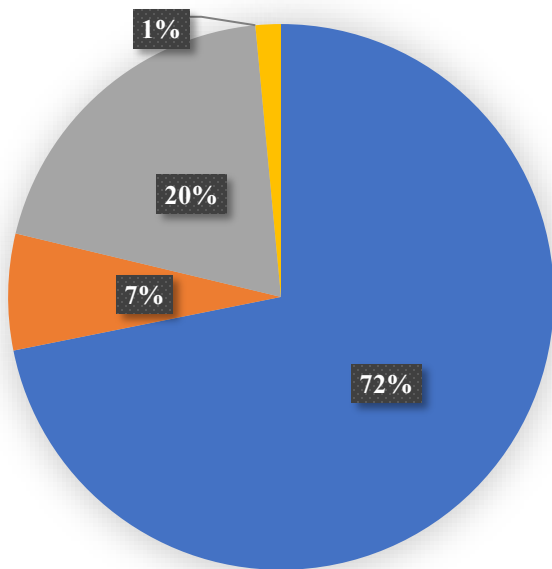
2020

Of the 668 petitions for guardianship filed, **guardianship was ordered in 79% (526) of the cases.** Of the 526 guardianship orders:

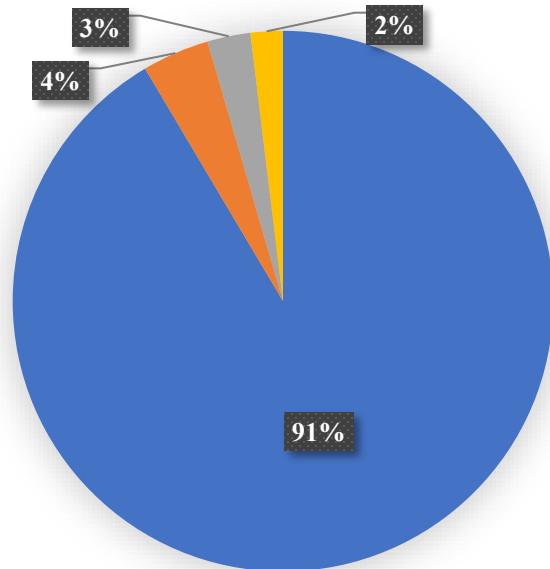
- 91% (480) were full guardianships;
- 9% (46) were limited guardianships;
- 85% (445) were appointed private guardians;
- 15% (81) were appointed public/state guardians.

Of the 156 cases involving Respondents with DD, the rate of appointment of a guardian rose from 79% overall to 95% (149). 95% of guardianship orders for people with developmental disabilities were full guardianships.

Guardianship Orders - 2020



Respondents w/ DD - 2020



■ Full Guardianship ■ Limited Guardianship
■ No Guardianship ■ n/a

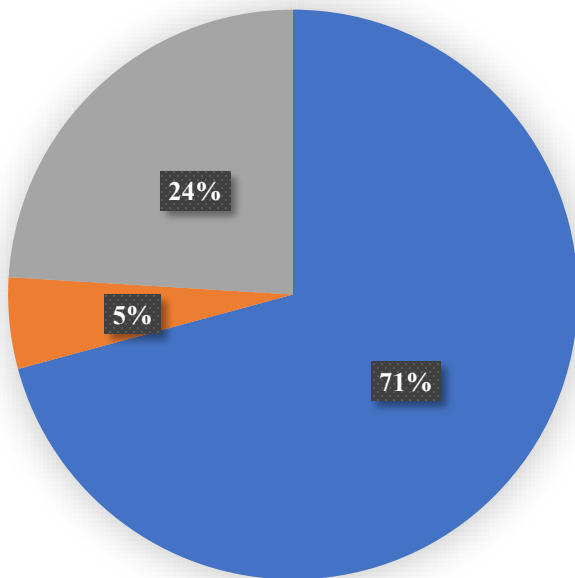
2021

Of the 849 petitions for guardianship filed, **guardianship was ordered in 76% (645) of the cases**. Of the 645 guardianship orders:

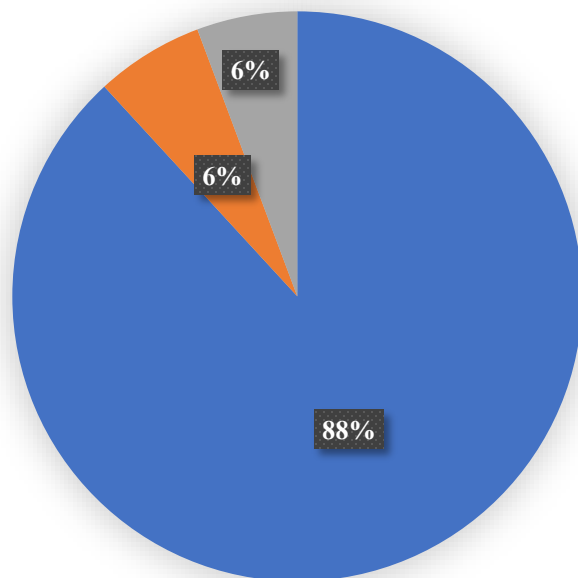
- 93% (601) were full guardianships;
- 7% (44) were limited guardianships;
- 82% (532) were appointed private guardians;
- 18% (113) were appointed public/state guardians.

Of the 228 cases involving Respondents with DD, the rate of appointment of a guardian rose from 76% overall to 94%. 93% of guardianship orders for people with developmental disabilities were full guardianships.

Guardianship Orders - 2021



Respondents w/ DD - 2021



■ Full Guardianship ■ Limited Guardianship
■ No Guardianship

CORRELATION BETWEEN APPOINTMENT OF GUARDIAN AND ATTORNEY FOR RESPONDENT

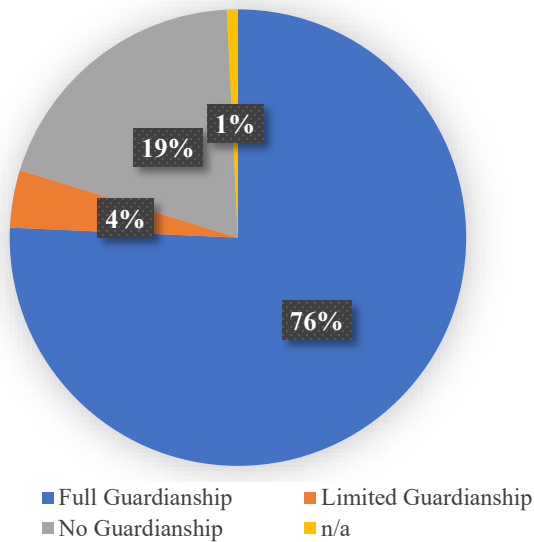
Across the three years studied, the presence or absence of an attorney for the Respondent correlated strongly with whether a guardianship was ordered and what kind of guardianship was ordered (full vs. limited). When the Respondent had an attorney, guardianships were ordered far less often, and when a guardianship was ordered, the likelihood that it was a limited guardianship rose.

2019

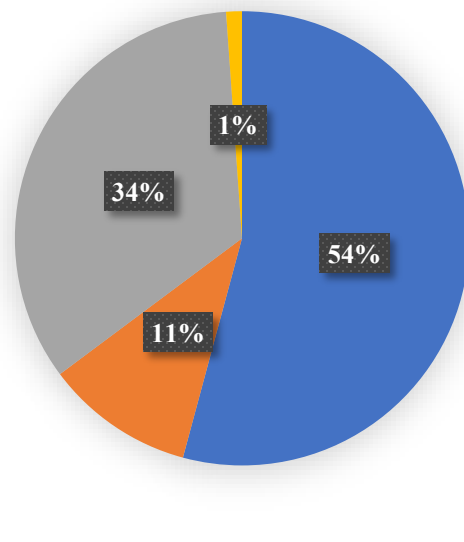
When there was no attorney, guardianships were ordered 80% of the time. **When the Respondent had an attorney, the rate dropped to 65%.**

With no attorney, 95% of guardianships ordered were full, compared with 84% of cases when the Respondent had an attorney.

Unrepresented Respondent - 2019



Represented Respondent - 2019

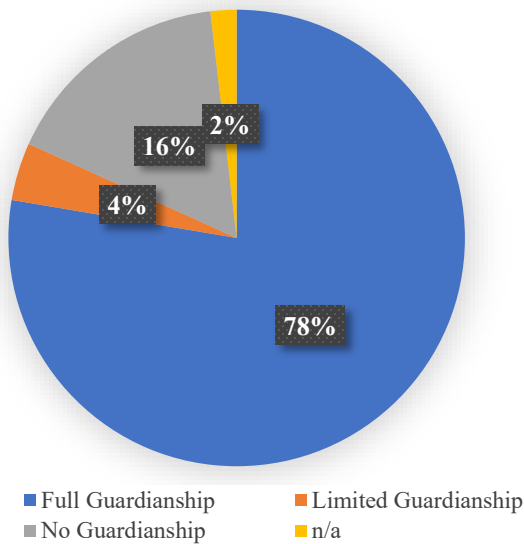


2020

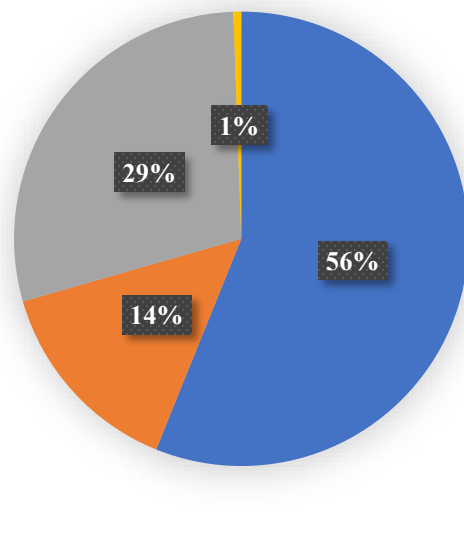
When there was no attorney, guardianships were ordered 82% of the time. **When the Respondent had an attorney, the rate dropped to 70%.**

With no attorney, 95% of guardianships ordered were full, compared with 80% of cases when the Respondent had an attorney.

Unrepresented Respondent - 2020



Represented Respondent - 2020

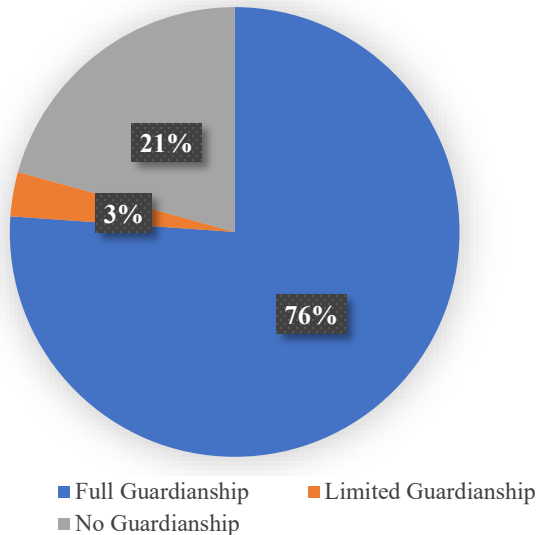


2021

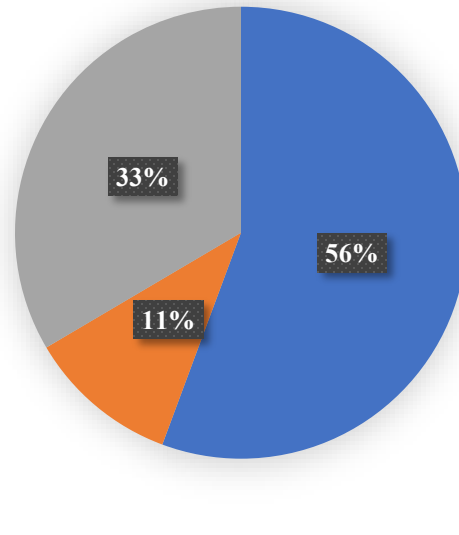
When there was no attorney, guardianships were ordered 79% of the time. **When the Respondent had an attorney, the rate dropped to 67%.**

With no attorney, 96% of guardianships ordered were full, compared with 84% of cases when the Respondent had an attorney.

Unrepresented Respondent - 2021



Represented Respondent - 2021

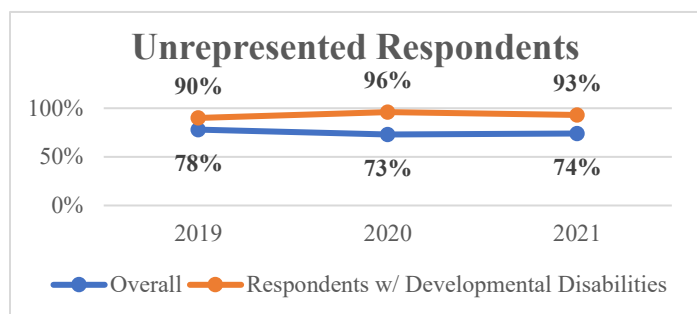


COMPARISON ACROSS YEARS 2019-2021

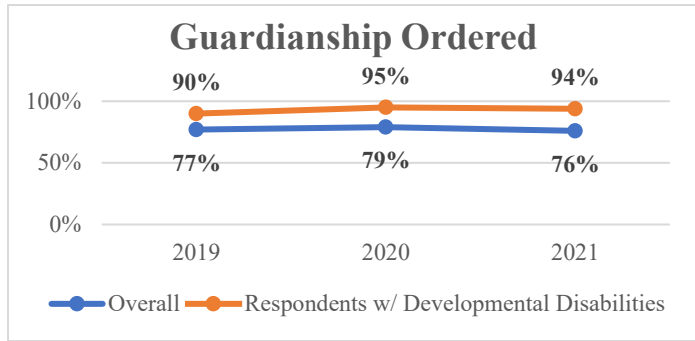
The data tracked by DRM did not change drastically across the three years, even with the implementation of the new Probate Code in September of 2019, with its renewed emphasis on less restrictive alternatives to guardianship, such as Supported Decision-Making.

The age distribution across the three years tracked remained fairly consistent, with approximately one-quarter of Respondents age 25 or younger (26-27%), one-quarter of Respondents age 26-65 (23-24%) and one-half of Respondents age 66 or older (48-51%). In all three years, by far, the largest single age of Respondents for whom guardianship was sought were for Respondents turning 18 years old (16-17% of all petitions filed).

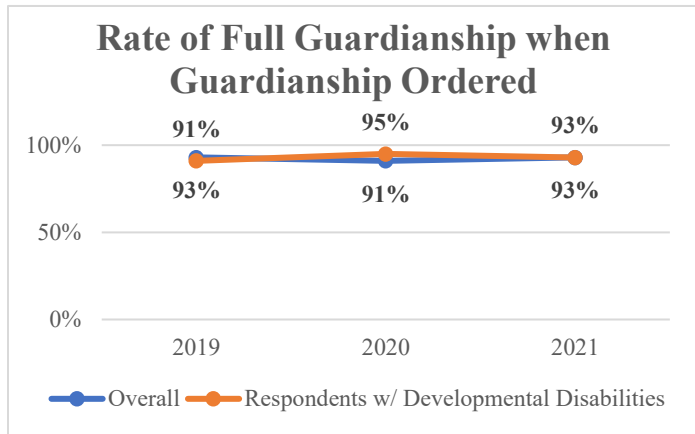
The rate of unrepresented Respondents in 2019, 2020, and 2021, was 78%, 73%, and 74%, respectively. For Respondents with developmental disabilities, the rate of unrepresented Respondents across the three years was 90%, 96%, and 93%.



Likewise, the percentage of cases which resulted in guardianships being ordered remained similar across the time span at 76%, 79%, and 76%. The significantly higher rates at which Respondents with developmental disabilities were subjected to guardianship also remained steady across the years at 90%, 95%, and 94%.



Of the guardianships that were ordered, full guardianships were overwhelmingly the norm, with rates of 93%, 91%, and 93% across the years overall, and 91%, 95%, and 93% for Respondents with developmental disabilities. This is notwithstanding the fact that the amendments to the Probate Code in 2019 include a provision that “[t]he court may not establish a full guardianship if a limited guardianship, protective arrangement instead of guardianship or other less restrictive alternatives would meet the needs of and provide adequate protection for the respondent.”¹⁷



DISTRIBUTION BY AGE OF RESPONDENT

2019

The age distribution of Respondents in 2019 was from 16 to 102 years of age. By far, the largest birth year of Respondents were those born in 2001 (about 18 years old). They comprised 16% of total petitions filed. The second largest birth year was 2000 (about 19 years old), which comprised less than 3% of total petitions filed. The third largest age group was those born in 1939 (about 80 years old), which comprised almost 3%.

2020

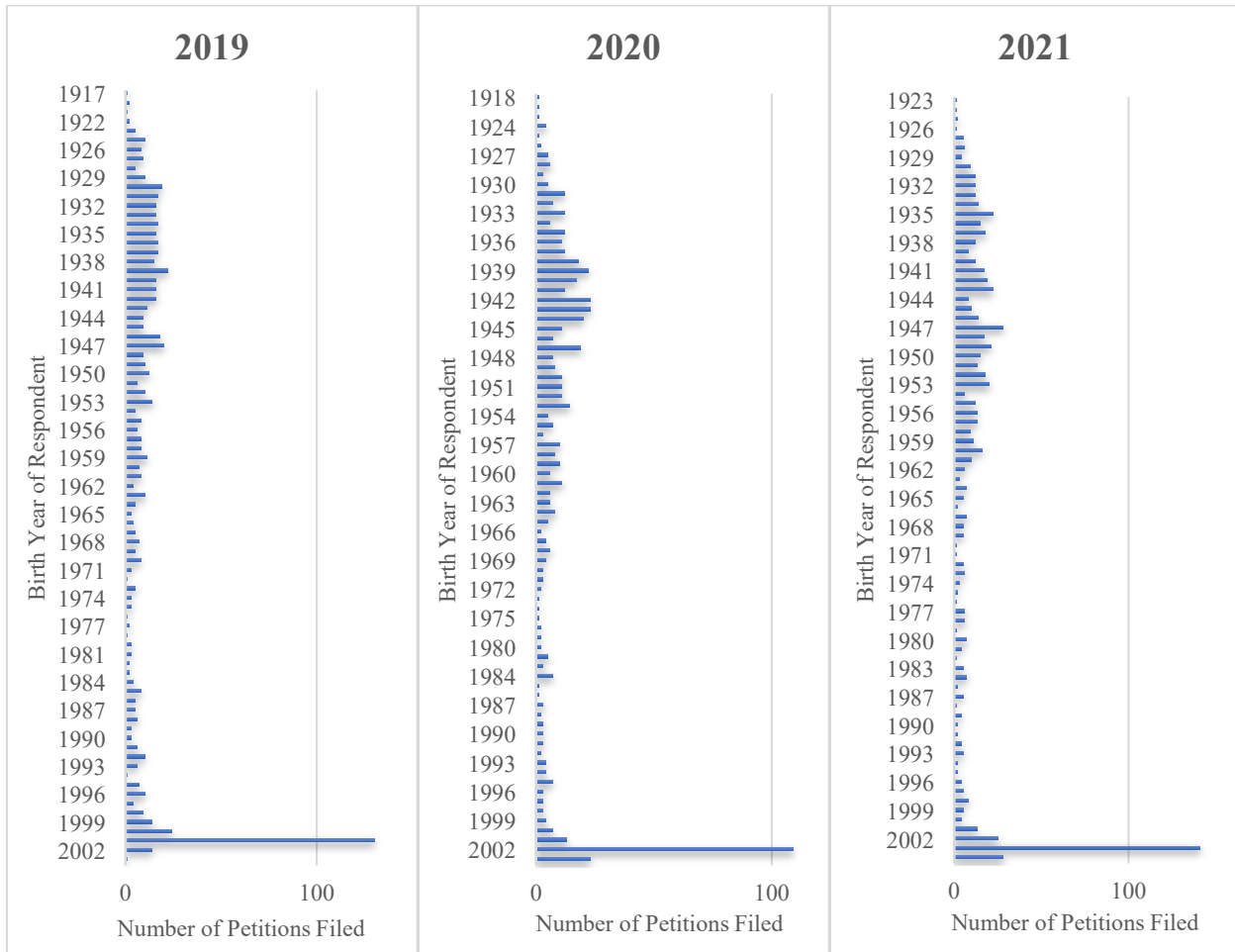
The age distribution of Respondents in 2020 was from 17 to 102 years of age. By far, the largest birth year of Respondents were those born in 2002 (about 18 years old). They comprised over 16% of total petitions filed. The second largest birth years were 2003 (about 17 years old), 1943 (about 77 years old), and 1942 (about 78 years old), each of which comprised 3.5% of total petitions filed. The third largest age group was those born in 1939 (about 80 years old), which comprised 3.3%.

¹⁷ 18-C M.R.S. § 5-301(2).

2021

The age distribution of Respondents in 2021 was from 17 to 98 years of age. By far, the largest birth year of Respondents were those born in 2003 (about 18 years old). They comprised 17% of total petitions filed. The second largest birth years were 2004 (about 17 years old) and 1947 (about 74 years old), each of which comprised 3.3% of total petitions filed. The third largest age group was those born in 2002 (about 19 years old), which comprised 2.9%.

Across all three years studied, transition-age youth (those turning 18) and older adults (over 70 years of age) are at the highest risk of coming under guardianship.



AGE, REPRESENTATION BY ATTORNEY, AND RATE OF APPOINTMENT OF GUARDIAN

DRM looked at the age of the Respondent and how it correlated with both the rate of appointment of an attorney and the rate at which guardianship was ordered.

In 2019, for Respondents:

- **age 21 and under (b. 1998 or later), 92% were not represented by an attorney;**
- **age 22-64 (b. 1997-1955), 77% had no attorney;**
- **age 65 and older (b. 1954 or earlier), 72% had no attorney;**

- age 80 and older (b. 1939 or earlier), 73% had no attorney.

In 2019, for Respondents:

- **age 21 and under (b. 1998 or later), 91% were placed under guardianship;**
- age 22-64 (b. 1997-1955), 67% were placed under guardianship;
- age 65 and older (b. 1954 or earlier), 75% were placed under guardianship;
- age 80 and older (b. 1939 or earlier), 76% were placed under guardianship.

In 2020, for Respondents:

- **age 21 and under (b. 1999 or later), 96% were not represented by an attorney;**
- age 22-64 (b. 1998-1956), 69% had no attorney;
- age 65 and older (b. 1955 or earlier), 65% had no attorney;
- age 80 and older (b. 1940 or earlier), 63% had no attorney.

In 2020, for Respondents:

- **age 21 and under (b. 1999 or later), 96% were placed under guardianship;**
- age 22-64 (b. 1998-1956), 67% were placed under guardianship;
- age 65 and older (b. 1955 or earlier), 77% were placed under guardianship;
- age 80 and older (b. 1940 or earlier), 77% were placed under guardianship.

In 2021, for Respondents:

- **age 21 and under (b. 2000 or later), 93% were not represented by an attorney;**
- age 22-64 (b. 1999-1957), 68% had no attorney;
- age 65 and older (b. 1956 or earlier), 67% had no attorney;
- age 80 and older (b. 1941 or earlier), 68% had no attorney.

In 2021, for Respondents:

- **age 21 and under (b. 2000 or later), 92% were placed under guardianship;**
- age 22-64 (b. 1999-1957), 69% were placed under guardianship;
- age 65 and older (b. 1956 or earlier), 71% were placed under guardianship;
- age 80 and older (b. 1941 or earlier), 75% were placed under guardianship.

CONCLUSIONS

Guardianship is one of the most restrictive arrangements that a person can experience; it involves the removal of almost all of a person’s civil and legal rights. **Across the three years studied, about 75% of Respondents in guardianship proceedings had no legal representation.** There is no other legal process that affects such fundamental rights that does not also guarantee the appointment of an attorney. Adult guardianship is unique in removing basic rights of people who overwhelmingly do not have the benefit of counsel. An attorney plays a unique role in this

process. No one except the attorney for the Respondent is specifically tasked with advocating for the Respondent’s wishes.

The decision to accept a person’s consent to guardianship without the aid of counsel is paradoxical. On the one hand, in appointing a guardian, the court accepts the premise that the person lacks capacity to make their own decisions. On the other hand, in declining to appoint counsel, the court also accepts that the person has capacity to make the most important decision of all: to surrender most of their basic rights.

Respondents who had developmental disabilities were far more likely to be unrepresented than Respondents overall. 75% of all of Respondents were unrepresented overall, while **at least 90% of Respondents with developmental disabilities went without lawyers.** (In 2020, 96% had no attorney.) In other words, only 25% of Respondents had attorneys in general, but only 10% of Respondents with labels of DD had an attorney to represent their interests. The National Council on Disability attributed this to “widely held stereotypes about [the] ability [of people with developmental disabilities] to make decisions and function as adults,” as well as the existence of the school-to-guardianship pipeline. This study does not speak to the reasons why this is the case, but it is an area worth exploring further.

Despite the Probate Code’s recognition of the extremity of guardianship and its mandate to grant guardianship only when no less restrictive options are available, **77% of cases resulted in a guardian being appointed** across the three years studied. And of the guardianships that were ordered, **over 90% were full guardianships** across all three years. The Probate Code favors the minimal removal of rights over full guardianship: “The court may not establish a full guardianship if a limited guardianship, protective arrangement instead of guardianship or other less restrictive alternatives would meet the needs of and provide adequate protection for the respondent.”¹⁸ The rate of appointment of guardians, including full guardianship, did not drop in the two years after the Probate Code adopted this language.

Individuals with developmental disabilities were placed under guardianship at far higher rates than the average. **More than 90% of cases in which the Respondent had a developmental disability resulted in the appointment of a guardian.** (In 2020, guardians were appointed in 95% of cases.)

Respondents age 21 and younger had by far the highest rates of appointments of guardians and the lowest rates of appointments of attorneys. This is likely due to the fact that this younger age group correlated highly with the existence of a developmental disability, which, as noted, experience much more restrictive outcomes.

Other age groups had higher rates of representation and lower rates of appointment of guardians. Individuals age 80 and older had a slightly higher rate of representation than overall. A possible reason for this is that adults who have lived all of their lives without a guardian may be more likely to contest the removal of their rights when it is sought, thus triggering the appointment of an attorney. That aside, even at rates similar to Respondents overall, the vast majority of Respondents had no attorney. The rates at which guardians were appointed for individuals age

¹⁸ 18-C M.R.S. § 5-301(2).

80 and older were also similar to rates of appointment of guardianship for Respondents generally (75-77% of cases).

One data point that DRM was unable to collect was the rate in which Respondents attended the hearing on the petition for appointment of guardian. The law requires that the Respondent be present at the hearing unless the court finds by clear and convincing evidence that either the Respondent has repeatedly refused to attend or that “[t]here is no practicable way for the respondent to attend and participate in the hearing even with appropriate supportive services and technological assistance.”¹⁹ The statute also guarantees the Respondent’s right to support services or technological assistance in order to participate in the hearing. The court form ordering guardianship does not indicate who attended the hearing or factual findings on whether there was evidence to conclude the Respondent’s presence was not necessary. It is worth considering whether these forms should be updated to include such findings in order to comply with the statute.

The rates of representation, the rates at which guardians were appointed, and the rates at which those appointments were full guardianships did not change drastically over the three years studied. As noted above, the Probate Code was changed in September of 2019 with a preference for less restrictive alternatives. Unfortunately, this does not appear to have resulted in vastly different outcomes in the years immediately following its implementation.

The most striking finding in this data analysis is that attorneys make a significant difference in outcomes across all years and across all cases. **When the Respondent had an attorney, guardianships were far less likely to be ordered, and when they were ordered, they were far more likely to be limited in nature.** In 2021, for example, when the Respondent had an attorney, the rate of appointment of a full guardianship dropped 20 percentage points, from 76% to only 56%. When the Respondent had an attorney, 33% of cases resulted in no guardianship at all, compared with 21% when there was no attorney. And, when guardianships were ordered, the rate at which they were full guardianships went from almost 96% down to 84% when there was an attorney. These drastic differences are comparable to 2019 and 2020.

The results are difficult to discount: less restrictive alternatives to full guardianship were far more likely to be implemented when the Respondent had an attorney. No other person is tasked with advocating for the wishes of the Respondent. The role of the court-appointed visitor includes ascertaining the wishes of the Respondent, but not advocating for their wishes. In fact, the visitor will make a recommendation as to the “appropriateness” of a guardianship. They can, and often do, recommend guardianship against the wishes of the Respondent. Nor is the judge meant to be an advocate for the Respondent. To the contrary, due process requires that the judge be a neutral decisionmaker, hearing evidence from all sides before deciding whether a petitioner has met the burden of proof required for a guardianship to be ordered. While it may be incumbent on the judge to decide if less restrictive alternatives are more appropriate, it is not up to the judge to craft them.

The model law upon which Maine’s law is based envisioned that attorneys would be appointed

¹⁹ 18-C M.R.S. § 5-307(1)-(2).

in nearly every case, yet, the reality is starkly different. It is for the attorney to inquire what alternatives there are, consult with their client, and argue that there are more appropriate alternatives to guardianship consistent with their client's wishes. It is also for the attorney to negotiate less restrictive alternatives with the other party in order to resolve the case consistent with their client's wishes. If there were no defense attorneys in criminal matters, there would be less justice.

And so it is for adult guardianship. Without attorneys for people at risk of having their civil rights removed, the system is unbalanced. The law is only truly effective when there are attorneys to argue for its implementation. Anyone who had the honor of being a law school student in Professor Melvyn Zarr's class at Maine Law is familiar with the edict, "Law is a lawyer-driven process." This was a cornerstone of his message that "how a case turns out depends vitally on how lawyers drive (or fail to drive) the legal process."²⁰ Without lawyers to drive this legal process, the outcomes change, and as a result, the rights of Respondents are curtailed at far higher rates. The updated Probate Code, with its recognition of guardianship as an extreme measure of last resort, is necessary to uphold the rights of people with disabilities, but it is not enough to drive the change that was intended. Lawyers are needed who can utilize the law to help it recognize the full personhood and inherent rights of people in the guardianship system.

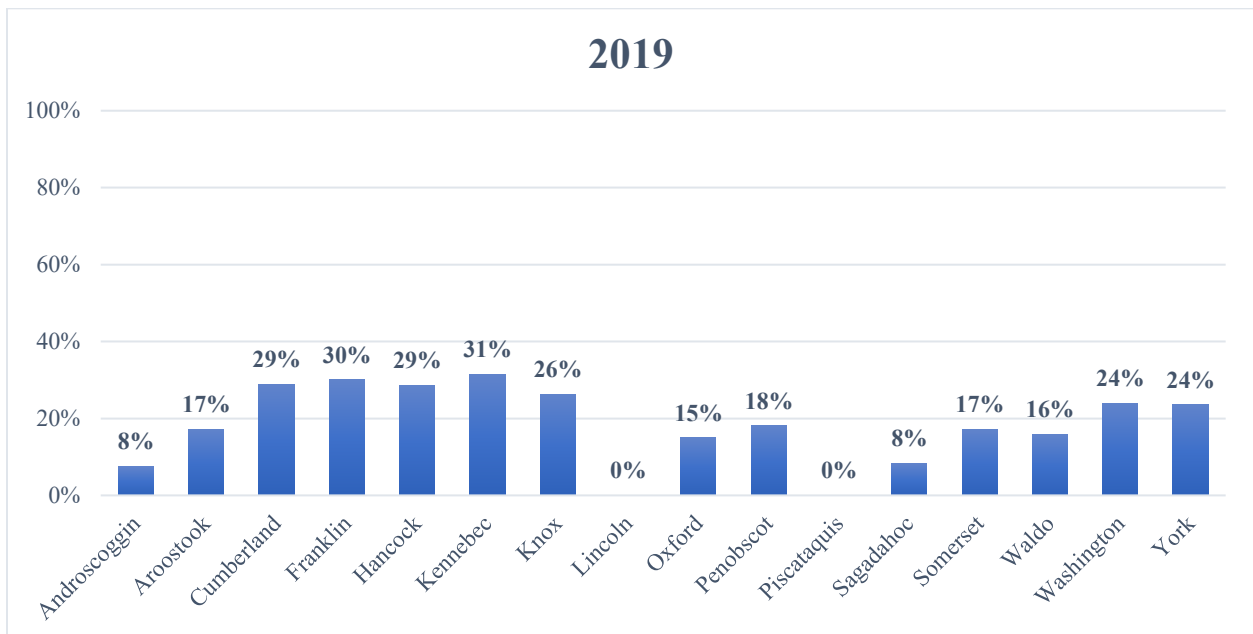
²⁰ See Melvyn Zarr, *Recollections of My Time in the Civil Rights Movement*, 61 Me. L. Rev. 366, 369 n.9 (2009) ("'LLDP' is one of the corny aphorisms that I use in class, knowing that it will provoke snickers, but also secure in the knowledge that students will not forget it.").

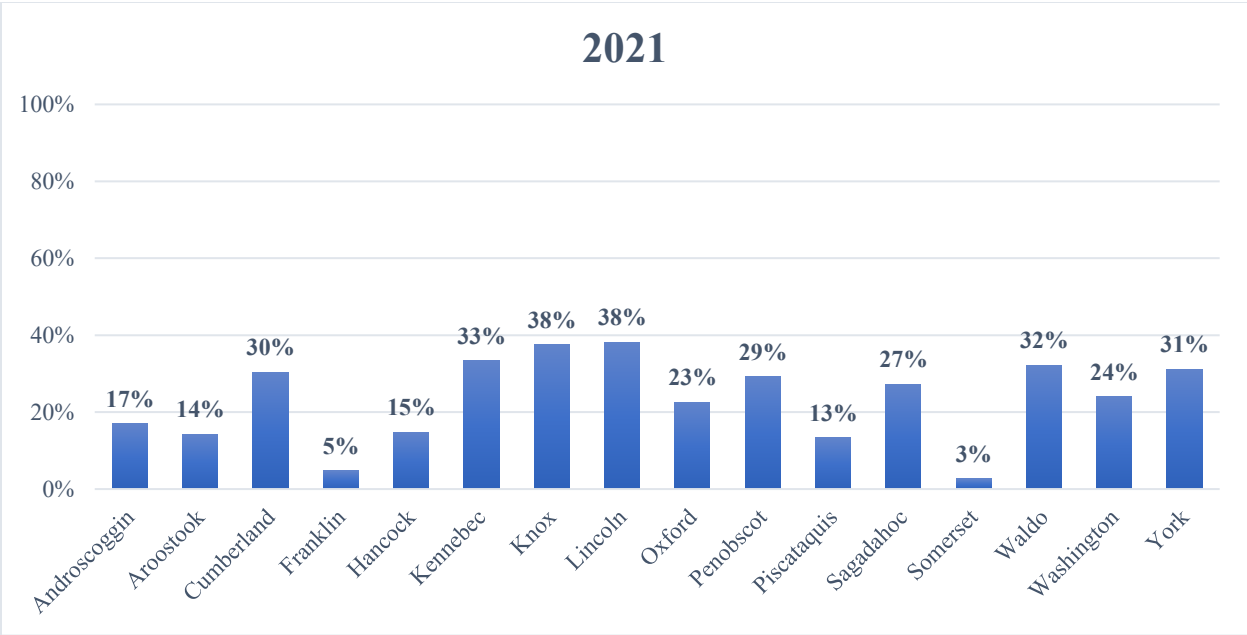
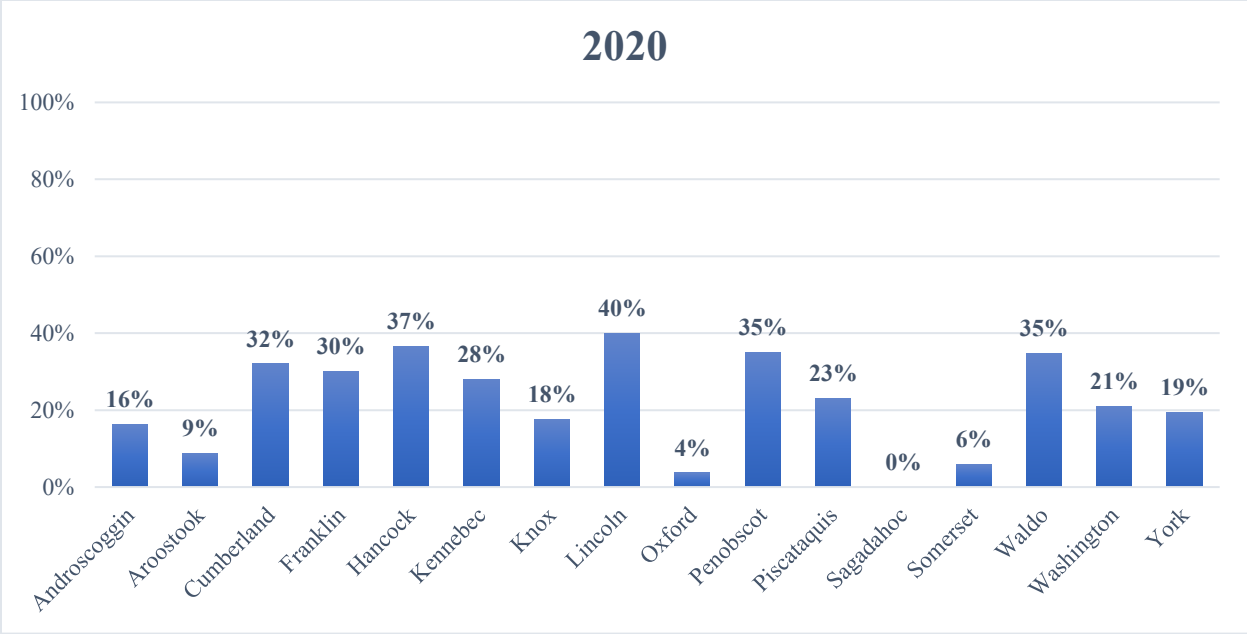
APPENDIX

NUMBER OF PETITIONS FILED PER COUNTY

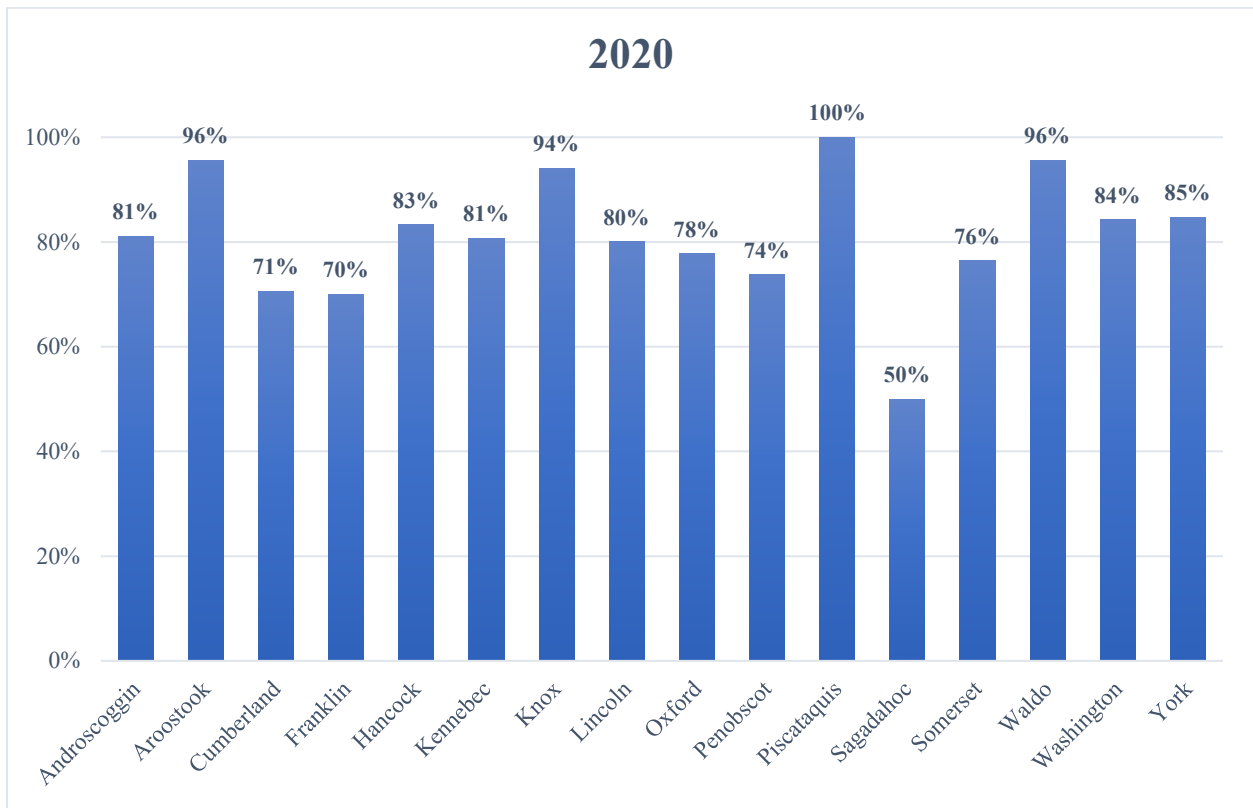
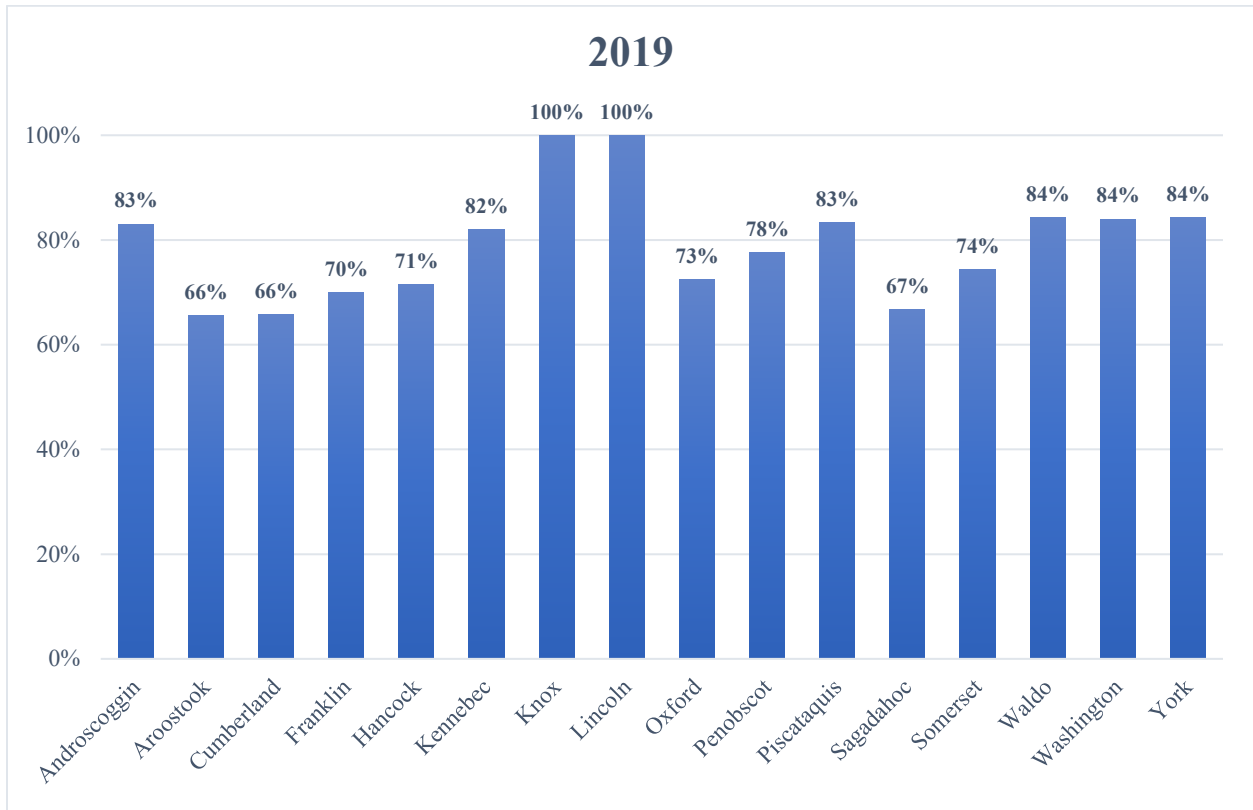
	2019	2020	2021
Androscoggin	53	37	53
Aroostook	29	23	42
Cumberland	184	153	191
Franklin	10	10	21
Hancock	35	30	27
Kennebec	89	57	75
Knox	19	17	16
Lincoln	9	20	21
Oxford	40	27	40
Penobscot	138	146	154
Piscataquis	18	13	15
Sagadahoc	12	4	11
Somerset	35	17	37
Waldo	19	23	28
Washington	25	19	25
York	102	72	93
Total	817	668	849

PERCENTAGE OF REPRESENTED RESPONDENTS BY COUNTY





GUARDIANSHIP PETITIONS THAT RESULTED IN GUARDIANSHIPS BY COUNTY



2021

