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ABUSE OF POWER: EXPLOITATION OF OLDER AMERICANS BY GUARDIANS AND OTHERS THEY TRUST

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WEDNESDAY, APRIL 18, 2018

U.S. SENATE,
SPECIAL COMMITTEE ON AGING,
Washington, DC.

The Committee met, pursuant to notice, at 9:31 a.m., in room SD–562, Dirksen Senate Office Building, Hon. Susan M. Collins (Chairman of the Committee) presiding.

Present: Senators Collins, Scott, Fischer, Casey, Nelson, Donnelly, Warren, Cortez Masto, and Jones.

OPENING STATEMENT OF SENATOR SUSAN M. COLLINS, CHAIRMAN

The CHAIRMAN. The Committee will come to order. Good morning.

Last fall, the New Yorker magazine published a shocking story about a professional guardian in Nevada named April Parks. On Labor Day weekend in 2013, Ms. Parks allegedly showed up at the house of Rudy North and his wife of more than 50 years and informed them that she had an order from the local court to "remove" them from their home, and that she would be taking them to an assisted living facility. Ms. Parks told them that if they did not comply, she would call the police.

When the North's daughter came to visit later that afternoon, she thought that her parents might be out running errands. She called and stopped by several times over the next few days, even checking with local hospitals and her parents' landlord. It was not until four days later that she found a note on her parents' front door that read, "In case of emergency, contact guardian April Parks."

Despite the fact that the Norths did not know April Parks, she had become their guardian. As such, she now had the authority to manage their assets, to choose where they lived, with whom they associated, and what medical treatment they received. April Parks allegedly sold their belongings and transferred their savings into an account in her own name. Mr. and Mrs. North had lost nearly all of their rights.

After local reporting revealed this case in 2015, the court suspended Ms. Parks as the Norths' guardian. Over the past 12 years, it is estimated that she had become a guardian for more than 400 wards of the court. Last year, a grand jury indicted Ms. Parks on

more than 200 felony charges, including racketeering, theft, exploitation, and perjury. As that state's former Attorney General, our colleague on this Committee, Senator Cortez Masto, worked to improve the guardianship system there, and I very much look forward to hearing about her experience and the reforms that she instituted.

Last Congress, this Committee held a hearing on financial abuse of older Americans by court-appointed guardians. At our hearing the GAO released a report that I had requested, along with former Ranking Member Claire McCaskill, on the prevalence of abuse by guardians.

The report noted a lack of clear data on guardianship cases across the country. It evaluated the progress that several states were making to improve data and to increase oversight. The report also analyzed several recent cases of guardianship abuse.

This updated GAO report built upon a previous study, released in 2010, which had found hundreds of cases of abuse, neglect, and exploitation and identified $5.4 million that had been improperly diverted.

In a recent case in my own state, police charged a pastor in York County, Maine, with exploiting an incapacitated elderly woman. The pastor befriended this woman while he was volunteering at the assisted living community where she lived. According to police, the state determined the woman to be incapacitated and assigned her a guardian and a conservator. The pastor allegedly took the woman to her bank, withdrew money to have the locks changed on her former home, which had been on the market, and took down the "For Sale" sign.

The police say that the pastor told the woman that he would help her return to her home, even though it was not equipped for the wheelchair access she required. He suggested his daughter could live with the woman to care for her. Police said that his goal was to ingratiate himself and have access to this woman's financial accounts and property. Fortunately, in this case the conservator, who was legally responsible for protecting the woman's assets, identified and reported the suspected criminal activity to the police.

Unfortunately, as these cases in Nevada and Maine make crystal clear, financial exploitation by some guardians and conservators remains a real problem.

These cases highlight shocking breaches of trust by people who obtained positions of power or influence over vulnerable seniors. An estimated 1.5 million adults are under the care of guardians, either family members or professionals, who control billions of dollars of assets. Guardianship, conservatorship, and other protective arrangements are designed to protect those with diminished or lost capacity, not to provide the opportunity for deception and financial exploitation.

Ranking Member Casey and I, along with several members of this Committee, cosponsored the Elder Abuse Prevention and Prosecution Act, which became law last year. In addition to directing the Attorney General to develop model legislation for states to adopt, it provides the Department of Justice with greater tools for prosecuting criminals who take advantage of our seniors.

Individuals can lose practically all of their civil rights when a guardian is ordered. It is a legal appointment made by a court, and in many cases it is justified and protects the individual. But we will also learn that in some cases the guardian exploits the vulnerable person, and it is often very difficult to reverse the guardianship. Some people are put into a guardianship arrangement when they should not be or when their guardianship should only be temporary and yet is made permanent.

A study published last year by the American Bar Association found that "an unknown number of adults languish under guardianship" when they no longer need it or never did in the first place. There may be other, less restrictive, forms of protective arrangements that can provide temporary or specific decision-making support, while not eliminating other of the adult's rights. These other arrangements may reduce the likelihood that someone will take advantage of the senior or misuse their assets.

Seniors who need assistance in managing their affairs should never be exploited and left destitute by an individual a court has appointed to protect them. I thank all of our witnesses for their cooperation and appearing before us today. And I now turn to our Ranking Member, Senator Casey, for his opening statement.

OPENING STATEMENT OF SENATOR ROBERT P. CASEY, JR., RANKING MEMBER

Senator CASEY. I want to thank Chairman Collins for holding this important hearing today.

As we know, as the Baby Boomer generation continues to age, guardianship increasingly touches the lives of many individuals and their families. However, guardianship does not only impact older Americans. It can affect adults of all ages, including people with disabilities.

While guardianship is supposed to be protective, and might sometimes be necessary, it can also bring a loss of rights. That is why it is imperative that we get it right.

As Chairman Collins mentioned, in recent years, the media and national organizations have highlighted cases where guardians have abused, neglected, or exploited a person subject to guardianship. We have a sacred responsibility to ensure that no one loses their house or their life savings as a result of a court-appointed guardian.

As we will hear today, some states have taken efforts to improve guardianship, but it is also clear that much more work needs to be done. For instance, we do not even have basic data on guardianship itself. We do not know how many people are subject to guardianship, who their guardians are, if a guardian has been thoroughly vetted, and how many people are possibly being abused or neglected by their guardians. We should be able to agree that finding answers to these questions is the least we can do to protect our loved ones.

And that is why I am pleased that today's hearing will be the first in a two-part series of Committee hearings on this issue and that guardianship will be the subject of the Committee's annual report. I very much look forward to examining this issue and discussing how Congress can do its part to ensure individuals subject

to guardianship are protected and that their well-being is considered first and foremost.

So, again, thank you to Chairman Collins for holding this hearing and thank you to our witnesses for lending both your time and your knowledge and your expertise on this critical issue. Thank you.

The CHAIRMAN. Thank you very much, Senator Casey.

I want to acknowledge Senator Cortez Masto and Senator Jones who are here today, and I know that Senator Fischer is on her way because we both just left a meeting. There are many today. But we hope there will be others who join us. We now turn to our witnesses.

First we will hear from Professor Nina Kohn, the associate dean for research and online education and professor of law at Syracuse University School of Law. Through her research on elder law and her important work with the Uniform Law Commission, Professor Kohn has been a leader in advancing the reform of guardianship law in working to protect our seniors from abuse.

Next we will from Dr. Pamela Teaster, the director of Virginia Tech's Center for Gerontology. Dr. Teaster is recognized nationally as an expert on guardianship and elder abuse, and she has published extensively in these areas.

Our third witness will be David Slayton, the administrative director of the Texas Office of Court Administration, and the executive director of the Texas Judicial Council. He was instrumental in the development of guardianship reform legislation that was enacted by Texas in 2015, and he continues to be directly involved in reform work through his oversight of the state's Guardianship Compliance Pilot Project.

Finally, I will turn to our Ranking Member to introduce our witness from the Commonwealth of Pennsylvania.

Senator CASEY. Thank you, Madam Chair. I am pleased to introduce Denise Flannigan. Denise is from New Stanton, Pennsylvania, which is in Westmoreland County in the southwestern corner of our state. Denise is the Guardianship Unit supervisor for the Westmoreland County Area Agency on Aging, where she has also served as a protective services investigator. Before transitioning to help older Pennsylvanians seven years ago, Denise worked with at-risk youth and with their families. Denise's agency participated in a conversation with my staff last year and expressed concerns about the guardianship system. That conversation served in part as the impetus of the Committee's current work on this issue. I cannot thank Denise and the Westmoreland County Area Agency on Aging enough for bringing this issue to our attention.

I look forward to hearing Denise's experience on the ground in Pennsylvania, so thanks, Denise, for being here, and I thank everyone at the Area Agency on Aging for all of your help and their help. Thank you.

The CHAIRMAN. Thank you very much.

We will start with Professor Kohn.

STATEMENT OF NINA A. KOHN, ASSOCIATE DEAN FOR RESEARCH AND ONLINE EDUCATION, DAVID M. LEVY PROFESSOR OF LAW, SYRACUSE UNIVERSITY COLLEGE OF LAW

Ms. KOHN. Thank you very much, Chairwoman Collins, Ranking Member Casey, and Committee members, for this opportunity to speak with you today. My name is Nina Kohn. I am a law professor at Syracuse University College of Law, where my research focuses on elder law, elder abuse, and decision-making by people with diminished cognitive capacity. My work in this area actually began as a legal aid attorney representing victims of elder abuse, and I now serve as the reporter for the Uniform Guardianship, Conservatorship and Other Protective Arrangements Act.

My testimony today will focus on the primary problems facing the guardianship system, the key reforms needed to curb abuse, and model legislation that has been developed to do just that.

As a general matter, I see four primary problems with the U.S. guardianship system.

First, some people are under guardianship who should not be.

Second, many—indeed, probably most—people subject to guardianship are subject to more restrictive arrangements than they need.

Third, a subset of guardians act in ways that are inconsistent with the rights of those they serve that insult the very humanity of those they serve. Now, sometimes this is intentional and malicious. Sometimes it is negligent. Sometimes it is simply that the guardian does not understand their role.

Finally, existing systems and rules often unintentionally create incentives that exacerbate these problems.

So to address these problems, state-level law reform is needed as guardianship is governed by state law. Fortunately, there are some very straightforward reforms that could have substantial systemic impact.

First, states need to provide very clear guidance to guardians. Most guardians are lay people. To do their best, they need to know what is expected of them, what they are to consider when making decisions on behalf of an individual subject to guardianship. Clear guidance also makes it easier to hold the bad actors accountable. They cannot hide behind vague or confusing language.

Second, states need to create systems that incentivize the use of limited guardianship and alternatives to guardianship. Unfortunately, states often do the opposite. It is easier for petitioners to seek and it is easier for courts to order full guardianships than limited ones.

Third, states need to increase monitoring of guardians. Currently, monitoring is typically anemic, and the ability to monitor is generally limited to under-resourced courts.

Fourth, states must ensure that systems for guardians' fees do not reward bad behavior.

Consistent with this need for reform, as Chairwoman Collins mentioned, the 2017 Elder Abuse Prevention and Prosecution Act requires the Attorney General to publish model legislation relating to guardianship to prevent elder abuse. I am pleased to report today that such model legislation exists now, that the Uniform Law Commission has adopted and finalized the Uniform Guardianship,

Conservatorship and Other Protective Arrangements Act, and that that act addresses each of the challenges I have identified.

The act itself was drafted by a committee of commissioners from ten states and participants from organizations representing divergent interests, including guardians and judges, older adults and people with disabilities, and family members devastated by abuse. Together, this inclusive, nonpartisan, expert-informed group drafted an act that garnered strong support from participants despite their divergent interests.

The act provides clear decision-making standards for guardians. It incentivizes limited guardianships over full ones, including by making it harder to petition for full guardianships than limited ones. It limits the ability of unscrupulous guardians to drain assets by charging unreasonable fees by, for example, requiring the courts to consider the market value of the services actually rendered. And it creates new mechanisms to monitor guardian behavior at minimal cost to the public by leveraging people interested in the welfare of the individual subject to guardianship.

Specifically, absent good cause, courts must require guardians to notify the individual's family and friends of certain suspect actions or major events in the individual's life. This enables family and friends to act as an extra set of eyes and ears for the court. The act also creates workable mechanisms that allow lay people to alert the court to potential abuses.

In addition, the act represents a modern, person-centered approach to guardianship that is sensitive to the rights of people with disabilities and their families. In short, I think it is a smart and fiscally responsible model for the states, and its widespread enactment will bring about the reform necessary to curb abuse.

Thank you so much for your time, and I look forward to your questions.

The CHAIRMAN. Thank you for your testimony.

Dr. Teaster.

STATEMENT OF PAMELA B. TEASTER, PH.D., PROFESSOR AND DIRECTOR, CENTER FOR GERONTOLOGY, VIRGINIA TECH

Dr. TEASTER. Chairman Collins, Ranking Member Casey, and members of the Committee, I am Pamela Teaster, professor and director of the Center for Gerontology at Virginia Tech and proud fellow of the Gerontological Society of America and the Elder Justice Coalition. I am deeply honored to be here today and grateful for the Committee's focus on this serious, ongoing problem of the exploitation of older Americans committed by guardians and others whom they trust.

To frame my remarks, I draw from the analogy of sheep, wolves, and sheepdogs, as discussed by Lieutenant Colonel Dave Grossman. As you know, most people in our society are decent, kind, productive people, and they do not hurt each other except by accident or extreme provocation. Most are unaware or unsuspecting of their vulnerabilities when entrusted to a protector acting in the name of beneficence.

The good guardians, the good agents under powers of attorney, representative payees, and all the good families and friends are the

sheepdogs. The wolves are intentional predatory guardians who exploit vulnerable persons without mercy.

In Florida in 2016, Judy Reich wrote of Elizabeth Savitt, who became a paid professional guardian when the family could not come to a decision about their father's finances. Ms. Savitt liquidated everything from the victim, charged over $65,000 in guardianship fees during a 6-month period, and also during that period did not allow the family to see their father at all.

Fortunately, there are selfless, wonderful guardians, and they are the sheepdogs. They even recognize when an individual needs supported decision-making or that guardianship is not needed at all. The Virginia Public Guardian & Conservator Program became guardian for a patient at a mental hospital and moved him to an assisted living facility. Over time, and visiting, the public guardian realized he was capable of managing his own affairs and incurred a new capacity assessment, including an attorney, to bring a restoration of rights proceeding on his behalf that was successful.

In theory and in practice, an older adult unable to make decisions for herself should be better off with a guardian or an attorney in fact, than without one. But, too frequently, the fate of people under guardianship is poorly monitored in sufficient, meaningful, and diligent ways. This inattention threatens to unperson them, leaving them open to exploitation, abuse, and neglect, and protections already in place, but that are not well implemented, are not useful.

In 1987, the Associated Press published a special report, "Guardians of the Elderly: An Ailing System," for which a team of reporters from around the country documented problems with due process, where, tragically, older people were railroaded into guardianship. Ironically, 30 years later, an article by Rachel Aviv, published in the New Yorker that you talked about, Senator Collins, sounded some of the same themes: guardians ignored the needs of protected persons, warehoused them in facilities providing poor care, charged unreasonably high compensation for services never rendered, and isolated people from their families.

Problems lie in the implementation and incentivization of the laws and in whether they create the right systems to encourage the desired behavior. Despite estimates that some 1.5 million adults are under guardianship, as you said, Senator Casey, in 2018 not one single state in the country can identify its people under guardianship—incomprehensible in the Information Age—and one that makes it impossible to have an appropriate level of accountability. Mechanisms put in place in order to establish it, to document its execution, and to facilitate its revocation are impeded by not knowing the very people it serves.

System reformation can and should take the form of greater clarity and training when persons assume the role of guardian ad litem and of guardians themselves; deeper considerations of appropriateness and scope of appointment; bonding; meaningful insertion of person-centeredness and supported decision-making; limited orders; reasonable, appropriate, and timely monitoring post establishment; constant consideration of the restoration of rights; and zero tolerance for the pockets of collusion and corruption that exist around this country among actors in the system. The courts should insti-

tute restrictions and/or enhanced scrutiny when one guardian has more than 20 protected persons under his or her care. Left unchecked, these problems open the door for abuse, neglect, and exploitation, about which we know very little.

Now is the time for a system that acts in the name of beneficence, non-maleficence, and justice, and preserves autonomy wherever possible to demand and receive adequate resources. As wolf, guardianship undermines and destroys the lives of older adults and their families—for generations. System implementation reforms are prescient and possible. Guardians who abuse, neglect, or exploit older adults should receive enhanced penalties for their crimes. And, again, persons under guardianship should enjoy supported decision-making whenever possible and have their rights restored in part or totally with all deliberate speed.

Should we choose to do otherwise, we are no respecter of persons. We unleash predatory guardians, the wolves, with no mercy on the unsuspecting, on the vulnerable. We negate the actions of the sheepdogs and mechanisms in place to bolster them. When the public continues to permit inadequate guardianship services and oversight, we unperson, we disrespect, and we perpetuate a system that remains a backwater, broken, ailing, and a mess, unconscionable.

Thank you.

The CHAIRMAN. Thank you very much, Professor.

Mr. Slayton.

STATEMENT OF DAVID SLAYTON, ADMINISTRATIVE DIRECTOR, TEXAS OFFICE OF COURT ADMINISTRATION, AND EXECUTIVE DIRECTOR, TEXAS JUDICIAL COUNCIL

Mr. SLAYTON. Good morning, Chairwoman Collins, Ranking Member Casey, and members of the Committee. My name is David Slayton, and I am the administrative director of the courts in Texas.

Let me start with a story. Jeannie was an 84-year-old woman when dementia began to get the best of her. After a successful career, Jeannie had amassed a significant estate, but had no children to assist her in her later years. After she lost mental capacity, a court appointed her a guardian, her nephew, to protect her and her estate. Jeannie's guardian promptly sold her homes and placed her into a nursing home and failed to visit regularly.

Instead, Jeannie's guardian began spending from her estate. First it was small purchases like a new refrigerator or a monthly credit card payment. Then the gifts of $5,000 to $10,000 to family members began, but soon the withdrawal of nearly $90,000 in cash, unexplained, occurred. Shortly, Jeannie's estate was gone.

Such is the plight of far too many individuals who are placed under guardianship. But this is not supposed to happen.

In Texas, as in other states, courts are charged with closely screening guardianship proceedings, beginning at the point where guardianship is sought and lasting throughout the life of the individual under guardianship. The courts do this by requiring regular reports from the guardian about the well-being of the individual, inventories of the assets and the estate at the inception of the

guardianship, and detailed accounting reports about the revenue and expenditures from the estate.

In Texas, there are just over 50,000 active guardianships, some of which were established decades ago. These 50,000 individuals under guardianship have estates that total an estimated $4 to $5 billion. In most of our counties, the cases are handled by non-law-trained judges who are not equipped with specialized staff to assist them in the monitoring process. Without adequate staff, judges are asked to serve in the role of judge, social worker, law enforcement, and accountant. This situation could not have been more dire.

In a review of just over 27,000 cases in our state, our agency found that 43 percent of the cases did not have the required reports, meaning that the court was unaware of the well-being of the individual or how the guardian was managing the finances of the estate. We also found that over 3,100 individuals had died under guardianship without the court's knowledge.

The Texas judiciary has been working diligently to address this issue through resources to courts and through statutory changes. Beginning in 2015, the Texas Judicial Council recommended statutory changes to require attorneys and judges in guardianship cases to ensure that there were no alternatives to guardianship available to avoid the guardianship in the first place; to consider the ability of the ward to make decisions about where they live; to provide for a regular review of the necessity of continuing the guardianship; and to create a new alternative to guardianship called "supported decision-making," the first state in the country to do so.

The Judicial Counsel also sought and obtained pilot funding to provide resources to judges to monitor the guardianship cases. After two years of success with the staffing resources, the judiciary sought to expand the monitoring statewide at a cost of $2.5 million per year. After being widely supported by the legislature, the funding was vetoed by the Governor, who indicated he wanted to give the reforms an opportunity to take hold before funding additional staff. We are hopeful that we can obtain this funding in the next legislative session as the resources are greatly needed.

Also in 2017, the Judicial Council sought legislation to require family members and friends to register as guardians with the state, undergo criminal background checks, and participate in online training about their responsibilities prior to their eligibility to be appointed as guardians. After finding that 98 percent of all issues were in guardianships where family members or friends were the guardian, this request was signed into law and becomes effective on June 1st of this year.

Texas is not alone in its desire to improve monitoring of guardianship cases. The Conference of Chief Justices and the Conference of State Court Administrators have worked collectively to make improvements in this area. However, one of the limitations in making these improvements is the need for funding to provide adequate resources to monitor the cases. That is why the state courts were ecstatic about the passage of the Elder Abuse Prevention and Prosecution Act, which incorporated the Court-Appointed Guardian Accountability and Senior Protection Act. Signed into law by the President on October 18, 2017, this law provides authorization for grants to state courts for guardianship activities. The state courts

urge Congress to appropriate sufficient funds to fully implement the provisions of that act.

We are instructed to "honor our fathers and mothers—and the least of these"; however, some of the practices involved in guardianship neither honor nor protect the elderly and incapacitated. We are working diligently in Texas to correct those practices and look forward to continuing this essential work moving forward.

Thank you for your time today, and I look forward to answering any questions that you might have.

The CHAIRMAN. Thank you, Mr. Slayton.

Ms. Flannigan.

STATEMENT OF DENISE FLANNIGAN, GUARDIANSHIP UNIT SUPERVISOR, WESTMORELAND COUNTY AREA AGENCY ON AGING

Ms. FLANNIGAN. Good morning, Senator Collins, Senator Casey, and members of the United States Special Committee on Aging. Thank you for this opportunity to provide testimony about the very important topic of guardianship of older adults. I am Denise Flannigan, and I am the guardianship supervisor for the Westmoreland County Area Agency on Aging located in western Pennsylvania.

A guardianship often originates through a substantiated protective services investigation where the alleged incapacitated older adult is found to be either the victim of abuse, neglect, financial exploitation, or self-neglect and does not have a responsible caregiver. Our AAA serves as guardian of the person, guardian of the estate, or both when it is necessary to reduce the risk to the older adult. This happens when there are no lesser restrictive measures and no other appropriate family or friends available and willing to serve.

Our Guardianship Unit has the capacity to serve eighty "consumers"—our term for the older adults in our care. Our team has four care managers with a maximum caseload of 20 consumers each. We have two case aides, a fiscal officer, and a nurse. This small caseload is required due to the intensive case services that a guardian provides.

Our team functions as a close-knit group, sharing relevant information regarding all of the consumers in our care, as we are prepared to be informed decision-makers available 24 hours a day. Our main duties, while permitting as much autonomy as possible when serving as the guardian of person, are to be responsible for making decisions regarding health and well-being of the consumer. We make decisions related to health, safety, and quality of life, ranging from where they will get their groceries to end-of-life decisions.

As the guardian of the estate, we are responsible for all financial matters. The range of responsibilities includes managing their income while serving as fiduciary, budgeting, paying all of their bills, as well as responsibly managing their principal assets, including real estate, investments, and savings, while being sure to make prepaid burial arrangements.

The majority of the consumers we serve are over the age of 60. Our consumers reside in a variety of settings throughout the coun-

ty including skilled nursing facilities, personal care homes, community group homes, apartments, and single-dwelling homes. They live in the least restrictive environment based on the consumer's level of care, their financial situation, and their wishes.

As the guardianship supervisor, I also provide guidance and support to others regarding guardianship issues within our county. Often a newly appointed family guardian may have a question regarding reporting requirements or a basic question related to securing benefits on behalf of the consumer. As the point person for guardianship, I have the unique position to learn of actions or lack of actions by others serving as guardian. At times, this information involves allegations of abuse, neglect, or financial exploitation of the consumer by the guardian.

Several years ago, a guardianship agency serving older adults in our county and surrounding counties came to my attention due to allegations of neglect and financial exploitation. Although the investigations could not be substantiated, this agency and their methods of operation remained of concern to me. Over the course of the next year, additional concerns came to my attention. The themes of the allegations centered around lack of responsiveness to making medical decisions and mismanagement or neglect of assets. It was not clear in the beginning, if this was a situation of a new guardianship agency growing too big too fast or if there were designing persons serving in the agency. At the time I had no formal oversight of them and was not privy to their records or anything other than what they had discussed with me.

In 2015, I was approached by a local attorney representing a family member of an older adult who was under the guardianship of this particular guardianship agency. I will refer to the agency as "D." The attorney explained that the family has had numerous issues with "D." He had petitioned the court to remove "D," and he was requesting that our AAA agree to serve as the successor guardian. With my previous issues and concerns related to "D," along with the information that was presented by this attorney, our agency agreed to accept the appointment.

As the successor guardian, we had access to a detailed review of the previous years of activity of the prior guardian. It became very clear that there had been significant mismanagement of assets. Their lack of cooperation and lack of acceptance in responsibility led us to petition the court for an Exceptions to Accounting and a Request for a Surcharge.

Situations like this are able to happen because of a combination of factors. First and foremost, guardianship is a system serving our most vulnerable older adults, those found to be incapacitated by the court, often with a lack of family and friends, who are essentially at the mercy of the guardians appointed to protect and care for them and their assets.

The guardian is appointed to be the No. 1 advocate, the responsible fiduciary, and the substitute medical decisionmaker working in the best interest of the person for whom they are guardian. With our current lack of background checks, training, oversight, and funding, it is possible for the older adult to be neglected or exploited by the very entity appointed to protect them.

Thank you for this opportunity to provide testimony on this very important topic of older adults and guardianship. The Westmoreland County Area Agency on Aging is committed to serving older adults in our community and believes that providing excellent guardianship services should be an expectation, not an exception. We are hopeful that this attention into guardianship issues helps in establishing the additional safeguards needed to protect all older adults under guardianship.

The CHAIRMAN. Thank you very much for your testimony.

A common concern that we have heard expressed at our previous hearing and again today is the lack of accountability and oversight of guardians. An issue, though, that I would like to explore is how people get to be appointed guardians in the first place, because while there may always be a bad apple, unfortunately, it seems to me that there are flaws in the system for appointing guardians in the first place. So I would like to start with Professor Kohn, then Professor Teaster and Mr. Slayton, and I have a different question for you, Ms. Flannigan.

Are the courts doing enough to vet people who are professional guardians? I am not talking about family members in this case.

Ms. KOHN. Thank you for the question, Chairman Collins. Yes and no. Some courts are doing a good job. Some courts are not doing as good a job. Part of the issue is how well do you vet the person. Do you ask how many other people they are serving? Do you require them to disclose, for example, crimes showing dishonesty, crimes showing abuse? If they have gone through bankruptcy, the court should know about that. And in many cases, those basic disclosures are not even required. So before we even get to the issue of whether the state should spend money on background checks—and in many cases that is a best practice—there is some low-hanging fruit here in terms of requiring the guardian to disclose things that we know to be risk factors.

Relatedly, though, the courts need to be very careful about overriding people who actually know the individual and moving too quickly to that professional guardian. As a general matter, people who know the individual, know their preferences, know their values, know what makes them happy, know what makes them tic are going to be better guardians. And, unfortunately, I think courts often see a family feud, throw up their hands, and say, "OK, we are not dealing with these people. Let us just get someone who is professional."

Now, that is understandable, but it is often not in the interest of the individual, who may be best served by having that family member, even if that family member does not get along with someone else.

So there is a lot more to be done, and there is some very low-hanging fruit that we can pick.

The CHAIRMAN. Thank you.

Professor Teaster?

Dr. TEASTER. Thank you for the good question. I think another place—I will tag off what Professor Kohn has said, and I totally agree with what she has said. I think another really important place is the job of the guardian ad litem. This individual acts as the eyes and ears of the court, and that report is central to the de-

cision that is being made. Some of them, again, are absolutely fabulous. They go visit. They do all the right things. They write a wonderful report that the court uses in a substantive way to make the decision. But if that is shirked, if that is not done well, we do not go see the person who may become the protected person, then that is already a real problem in trying to get the guardianship instituted. So that is another way. So important vetting.

Then one other thing I would say is more often other experts make comments about the individual. Some people take that ER seriously—and they should—and others do not. Kentucky, for example, has a very nice system of a multi-team where a social worker, a medical professional, and a psychologist check every individual to suggest that, other states not as much. But that front-end part, as Dr. Kohn said, is absolutely critical to establishing that in the first place. Is it really necessary? Often it is not.

The CHAIRMAN. Thank you.

Mr. Slayton?

Mr. SLAYTON. Madam Chair, it is a great question, and I will tell you a little bit about what we do in Texas, which I think has been working pretty well. We are one of the few states who do this, but we regulate professional guardians. This started in 2007, and there are currently in Texas about 440 certified guardians. They handle about 10 percent of the caseload, 5,000 cases.

In order to become a private professional guardian, which is what we call them in Texas, they have to meet certain age, experience, and education requirements. They also have to pass an examination, and they have to have a criminal background check to prove that they have no disqualifying offenses. This is an ongoing criminal background check that is done via fingerprints so that if they do have a criminal arrest or something comes up, then immediately we are notified and can contact the courts to let them know that that professional guardian has come into contact with law enforcement.

The other thing that we have done which has proven to be very successful is, as part of that regulation, we have enforcement authority. So our office receives complaints about private professional guardians. We investigate those complaints. This is probably one of the largest places we are receiving complaints right, is within the private professional guardian area. So family members who have concerns can complain to us. We investigate those. And our commission which oversees them can levy penalties against them, remove their ability to provide the services as private professional guardians.

And the last thing I would say that has been mentioned already is we require them to report to us annually how many guardians they have under their appointment. So, obviously, if they are appointed in one county by a court to 5 cases, they may not know that the other counties around there have also appointed them to 10, 15, 20 cases. So they are required to annually submit the number of cases they have to the state and let us know exactly where those cases are and who they are overseeing.

So those are some things that we have found to be very effective.

The CHAIRMAN. Thank you all very much. My time has expired, so I will yield to Senator Casey.

Senator CASEY. Thank you, Madam Chair.

Denise, I will start with you with regard to the issue you raised about another agency where the Westmoreland County Area Agency on Aging became the successor guardian. You indicated that this particular guardianship agency serving adults in southwestern Pennsylvania came to your attention after it allegedly neglected and exploited individuals under its care. And, as I mentioned, you indicated your agency became the successor.

You mentioned the one major issue is mismanagement of assets. Tell us more about your experience with that agency, and walk us through the problems if you can.

Ms. FLANNIGAN. Yes, Senator Casey. Actually, when I first came in contact with this guardianship agency, it was in a guardianship hearing where they were appointed as a new guardian agency for an individual under guardianship, and I was quite pleased to know that they were going to be able to operate because we have few guardianship agencies in our county.

So when I first started hearing some unresponsiveness issues that they had to family, the fact that they were not visiting those under their guardianship, and then there were also some issues of nonpayment, I actually reached out to them as part of my job as the guardianship supervisor for the county and was assisting them and attempting to perhaps educate them on what their duties were.

It became clear to me, though, that as they continued to have more difficulties, more issues, I was getting calls from different skilled nursing facilities about nonpayment, different family members, actually even calls from the consumer reporting serious issues, is actually why we agreed to accept the case when it came to us from the attorney to be the successor guardian. And, of course, we saw a lot more after becoming that successor guardian.

We learned that even though our consumer was eligible for veterans' benefits for the 22 months she had been under the guardianship, they had failed to complete the application, costing her approximately $25,000. The personal care home where she initially was residing, where she was happy, where she was doing well, she ended up with a $16,000 negative balance there and was asked to leave. She went into another personal care home where at the time of our appointment, it was $15,000 negative balance.

So, again, we were privy to a lot more information at this point. We learned also that she had had a home where two years prior during the appointment, it had a value that, because of their neglect, because they had not gone in, they did not pay the insurance, it was up for tax sale at the time of our appointment. We believe it cost her approximately $21,000 in depreciation.

And the list goes on and on, and probably one of the most difficult things for us to believe is that they were taking guardianship fees and attorney fees during this time. And the family certainly had a lot of issues that they reported to us as well.

I wanted to say that I approached them—I did not really have authority over them, but I asked them for some understanding as to why they were doing the things that they did. They eventually stopped talking to me and advised me to speak with their attorney, who eventually stopped talking to me, which is why we ended up

petitioning the court, and I am happy to say that they did sign a judgment note. We had quite a bit of information on them, and they have been repaying our consumer. So that is the first part of your question.

Senator CASEY. I will ask another one. Just for clarification, what was the time interval between the time you started learning of some of the problems and the time the petition process was completed and you were named the successor guardian? I just want to get just a general sense of how much time.

Ms. FLANNIGAN. We actually did not petition. The family petitioned.

Senator CASEY. OK.

Ms. FLANNIGAN. And their attorney approached us. I was not aware of the ongoing problems at that point. I thought they were rectified. I had assisted them on some things, and I think that is one of the issues with guardianship, that often there are no family members, there are no advocates, so these things are able to continue, and I am afraid to know how many times this happens in our state and in every state.

Senator CASEY. So it can go on for months before there is any kind of resolution or remedy.

Ms. FLANNIGAN. Certainly.

Senator CASEY. I know we are out of time. The second part was really about a broad question, part of which I think you already answered. But why do you think in this case you had the level of exploitation and neglect?

Ms. FLANNIGAN. Well, I think it goes back to the bigger issue that we do not have safeguards in place. We have our most vulnerable older adults. Their authority we know is very great in a guardianship order, and if you have designing people or even people who lack knowledge or, you know, there are no certifications necessary at this point, and it is a combination of all those factors that really puts our older adults at risk.

Senator CASEY. Thank you very much.

The CHAIRMAN. Thank you, Senator.

Senator Cortez Masto?

Senator CORTEZ MASTO. Thank you. And thank you so much for having this hearing today and for all of you being here and all of the good work you are doing, because we know this abuse occurs, and we need to make sure we are out there fighting for and protecting not just seniors but minors as well, anybody who comes into this protected class that we should be looking at.

I am sure that you all have read or are aware of the New Yorker article about some of the abuses occurring in Nevada prior to 2013. But since that time, the state has drastically overhauled its laws to make sure that these abuses are ended, something that was not reported in the New Yorker article, unfortunately.

So I wanted to talk about this because the overhaul of our guardianship laws began when I initially introduced as AG legislation. As Attorney General in the state of Nevada, you get to introduce legislation, and so before I termed out, I had a bill package ready to go and pre-filed it, and the legislation really was specific about requiring private professional guardians to be licensed and bonded, created oversight of them by the Commissioner of Financial Insti-

tutions, a separate, outside of the court's oversight body, as well as laying out a strict fiduciary duty standard that they must follow. That bill, unfortunately, the Attorney General who came in after me decided he did not want to introduce that bill. Knowing that, I reached out to my colleagues in the legislature, the Speaker of the House at the time and another Assemblyman, and asked them to introduce my bill and they did.

So during our legislation session in 2015, when I was no longer AG, it still went forward, and Assemblyman Mike Sprinkle introduced it as A.B. 325. But during that time, that bill was passed, but along with that we realized more needed to be done in Nevada to address this issue because, as you have heard from the horrific stories, so much was happening.

So on June 8th of 2015, our Supreme Court commissioned a study to study—it was the Commission to Study the Administration of Guardianships in Nevada Courts, and it was created. In September 2016, it issued its final report, right here, and there are 14 recommendations for new court rules and 16 recommendations for legislative changes to the NRS. Those legislative changes were adopted. Those court rules were adopted. And so much of what we have done was an overhaul, a complete overhaul, and everything you are talking about today was what the commission studies and we implemented.

So I applaud you for what you are doing. I welcome you to take a look at the reports and what we have done, either as a model, or tell us additional things that we should be doing.

So let me also talk about the questions here that I have, and let me maybe start with Dr. Kohn. We talked a little bit about this, but how important is oversight of guardianships to making sure that we can prevent some of these abuses from occurring? And by doing that we are not just relying on the court oversight but an independent body, which I have heard today. That seems to be key here, correct?

Ms. KOHN. Absolutely. The court has a tremendously important role in monitoring guardianship. There needs to be an annual report. Guardians should have to do a person-centered plan so that the court can figure out whether what the guardian is doing is consistent with what the guardian said they were going to do. And the courts need to be open to communications from individuals that suggest abuse, even if those communications do not come on a petition format or the right piece of paper. You need ways that informal grievances can be brought to the court. But in order to have those informal grievances, you need people to have notice that they have a right to make that informal grievance.

So it is incredibly important that at the time of the initial order, the individual subject to guardianship and any family or friends who can reasonably serve as that extra eyes and ears of the court not only know that there has been a guardian appointed, but know what powers that guardian has been given and know how they can alert the court to potential abuse, to a change in the person's need, to other problems that may be occurring. And if we can provide that notice, then we can have these additional monitoring abilities without expense to the court and can prevent the guardianship in

part from further isolating the individual subject to guardianship and from further estranging the family.

Senator CORTEZ MASTO. Thank you. And I know my time is running out, but I want to highlight something else and ask you—because one of the things that Nevada did as part of its guardianship reform legislation in 2017—that I do not think has been replicated anywhere else—is that it actually went further than a right to counsel for protected persons to create the requirement of counsel. This means that as soon as a petition for appointment of a guardian is filed, the court is automatically required to appoint them a legal aid attorney specializing in guardianship law unless they already have that attorney. And this is paid for by a fee on recording documents with the court.

What is your opinion on Nevada's requirement of counsel? Do you think that is——

Ms. KOHN. Nevada's requirement is the best practice. All people who are the respondent in a guardianship proceeding should have an attorney there to represent their wishes, and that is critical. It is not just their interests. That is what a guardian ad litem does, their best interests. But each individual who is going through that process deserves and I think is entitled to an attorney who can voice their preferences, whether that be a preference about whether there should be a guardianship, whether that be a preference about what powers should be included in that guardianship, or whether that is a preference about who serves: "I want my daughter Mary, and I do not want my daughter Betsy."

Senator CORTEZ MASTO. Great. Thank you. I know my time is up. Thank you very much.

The CHAIRMAN. Thank you.

Ms. Flannigan, in my opening statement I described an awful case that is pending in the State of Maine where a pastor allegedly took advantage of an incapacitated elderly woman living in an assisted living facility, and you would think—it is understandable why she would trust this individual since he was clergy and you would not expect that someone in that position would exploit someone that vulnerable, but apparently, allegedly, that is what happened in this case.

In this case it was the guardian who acted and alerted police of the suspected criminal activity, and the guardian did exactly what you would want the guardian to do. But there may be other cases where there are not guardians that are involved.

In your work have you identified warning signs that family members or neighbors could look out for if they want to keep their loved ones safe from becoming victims?

Ms. FLANNIGAN. Senator Collins, I think that that is a joint effort between—through our AAA, Area Agencies on Aging, through our Protective Services side, as well as the Guardianship Units. Certainly there are designing people everywhere, and they are quite skilled. And, quite frankly, the more of an estate a person has, certainly the more vulnerable they are to that.

So our county actually reaches out to our community through our Elder Abuse Task Force, and it is a combination of individuals that we meet on a monthly basis. And we have our hospital personnel, we have attorneys, we have people from all walks actually working

with older adults, from skilled nursing or ombudsmen, and we certainly have a group effort to educate people of warning signs. And anybody can make a report at any time to our office, and we are obligated to investigate that.

The CHAIRMAN. Thank you.

Professor Kohn, just last week Maine's State Legislature took steps to enact the Uniform Guardianship legislation that the commission approved last year, and we have heard what Nevada has done. Could you give us an update on how many states have acted to implement this model legislation or substantial parts of it?

Ms. KOHN. Thank you, Chairwoman. So Maine will be, it looks like, most likely the first state to enact the model legislation. Notably, the Uniform Act, you are going to have an amazing guardianship system if your Governor signs because it has now sailed through the House and the Senate in Maine.

The Uniform Act, which I had the honor of serving as reporter for, is really the fourth revision of provisions that were originally in the 1969 Uniform Probate Act. And so this new version really tries to change the incentives. The rules were not that bad, but the incentives were not there. And so really, as Professor Teaster pointed out, the implementation was in large amount the problem.

So this particular act, now it looks like it is going to be introduced in at least four legislatures next session, but it is still really early, so we may get a lot more. There was a partial enactment already in New Mexico, but very minor, and they are going to come back and look at the full act next term, I understand. But Maine is taking the lead, and we are delighted.

The CHAIRMAN. Well, as Maine goes, so goes the Nation, or so we hope in this case.

[Laughter.]

The CHAIRMAN. Thank you.

Senator Casey?

Senator CASEY. I can go to a second or Senator Warren.

The CHAIRMAN. Whichever you would prefer. Senator Warren?

Senator WARREN. Thank you so much. I am sorry to have to run in and out of hearings, but thank you. I am so glad to have a chance to be here, and thank you for holding this hearing, Madam Chairwoman and Ranking Member. And thank you to the witnesses for being here today.

I want to talk about legal guardians for just a minute. A legal guardian is supposed to look out for the best interests of the person they assist, and I am sure the vast majority of guardians do exactly that. But without proper monitoring, there are some guardians who take advantage of their special relationship in order to benefit themselves. I want to focus today on financial exploitation.

Research has found that between 3 and 5 million older Americans are victims of financial abuse each year, costing about $36 billion annually. Guardians make up only a portion of that figure, of course, but with the access they have to accounts and records, they can do serious damage to someone's financial well-being.

So I wondered if I could ask each of you just very briefly to describe the kinds of financial exploitation by guardians that you have seen in your work. And perhaps I could start with you, Professor Kohn.

Ms. KOHN. Thank you, Senator Warren. Financial exploitation runs the gamut from outright theft to unreasonable fees. So I would consider it financial exploitation when an attorney who is serving as guardian charges their hourly rate for non-legal services. As a general matter, you should not be getting your hourly rate to go grocery shopping. And so there is a lot of exploitation out there that may not look like what we think of when we think of theft, but it is just as bad when it comes to draining the estate and leaving the person penniless.

Senator WARREN. That is a very important point. Thank you.

Dr. Teaster?

Dr. TEASTER. Thank you for your good question. I have actually interviewed family members who have had their loved ones exploited by guardians, and sometimes individuals who feel like they have been exploited as well. A hallmark is the isolation of them, and the way that they get exploited in some ways is by driving the fees up in bizarre ways. For example, should anybody call to complain, they drive the fees, and the meter starts running. And they also start charging very, very high rates. I do not know what everybody's hourly rate would be here, but it will be exorbitant. That is one way they do it.

And then because they own the estate—they have the estate, they simply can make charges against it because they have the ability to go into it.

So those are some of the ways they do it. They falsify records, too.

Senator WARREN. Thank you. Thank you. Mr. Slayton?

Mr. SLAYTON. Senator Warren, in my written testimony I included appendices that have some specific examples, but let me just give you a few.

Having reviewed about 27,000 guardianship cases in Texas, you can imagine that on an almost weekly basis we find what would be considered exploitation, and just as the previous witnesses have testified, it is not always outright theft. Sometimes it is things where maybe the family members or friends do not understand that this is not their inheritance. This is money that they are supposed to be using to take care of the individual who is under guardianship. But let me give you a couple examples.

We have seen gifts that were given to family members and friends of between $5,000 and $10,000, not generally a typical amount of a gift probably for an individual. We have seen, you know, unauthorized purchases of pickup trucks. When an individual who is in a nursing home who cannot drive any longer, obviously, that is not for their benefit.

We actually have a missing airplane in Texas from an estate that was in the inventory, and it is no longer around, and we do not know where it is at.

And then probably one of the largest ones is a direct withdrawal in cash of $90,000 from a bank account that was unexplained, and that was actually even disclosed to the court with no explanation.

So these things, it goes from the smallest amounts to huge amounts and huge assets.

Senator WARREN. Thank you very much.

Ms. Flannigan?

Ms. FLANNIGAN. I would have to agree. We have seen some of the same issues. In our level probably what we are seeing the most is the lack of care and maintenance of homes and listing homes and properly liquidating those assets. I think a lot of times we have certainly heard from different individuals under guardianship that they are just missing items, and sometimes these are family heirlooms. These are engagement rings. These are things that have both, obviously, value and personal value to individuals.

Senator WARREN. Thank you. You know, I am glad we are looking into what the Federal Government can do in this area. But financial institutions also have a role to play in stopping this kind of exploitation. It is why I am very proud of the credit unions in Massachusetts for taking it on themselves to try to address this problem. In March they launched a program called the "Credit Union Senior Safeguard," and the program does two things: it requires front-line staff education on how to spot potential signs of senior exploitation; and it invests in serious consumer education efforts so that seniors themselves are better equipped to spot potential exploitation themselves.

I see this as everyone has a role to play in stopping this abuse—the states, the Federal Government, and the financial institutions themselves. And I look forward to working with other members of this Committee to try to put an end to the exploitation of some of our most vulnerable citizens.

Thank you, Madam Chair.

The CHAIRMAN. Thank you very much.

Senator Casey?

Senator CASEY. Thank you, Madam Chair.

I wanted to start with Professor Kohn on the question of restoration of rights, which I know is a terribly difficult problem. Once a person is subject to guardianship, the restoration of rights is, unfortunately, extraordinarily rare. And we all worry that a person who might need a guardian at a specific time in their life may later regain capacity due to a medical recovery or because they have acquired the necessary knowledge or skills to make decisions. But, in that instance, it is almost impossible—and I hope I am not overstating that—to regain their rights.

So, Professor, if you could outline the barriers to the restoration of rights and some of the problems that are connected to that.

Ms. KOHN. Thank you, Senator Casey. A couple of very important barriers to be aware of to restoration of rights.

One is a lack of awareness of the right to pursue restoration or the process for doing so.

Another is lack of access to assistance seeking restoration. This is unfortunately exacerbated to some degree by confusion within the bar and even among some judges as to whether an individual subject to guardianship has a right to an attorney to represent them to seek restoration. Spoiler alert: Both as a matter of ethics and constitutional process, due process, they do. But there is confusion there.

And then a third barrier is opposition of guardians to restoration, you know, and Professor Teaster's work, among other work, suggests that most restorations are occurring with small estates. That makes sense if you think about the incentives guardians may have

to continue the guardianship with a large estate. So in the Uniform Act, we incorporated a number of provisions designed to specifically chip away at these barriers. Those include:

Requiring the person to receive notice and family members to receive notice of rights to restoration and how you pursue those rights, right at the outset, right when they get that order appointing the guardian;

Creating mechanisms for lay people, short of a full petition, to alert the court as to changed needs;

Placing limits on guardians' fees, a guardian's ability to charge fees to oppose restoration, because they may have a very significant conflict of interest there;

Creating triggers for reconsidering the appointment;

Providing a statutory right to counsel for this, even if that counsel may not be paid for by the estate, making it clear that a person does have a right to be represented by an attorney;

And then, of course, it is important to make sure that the standard for getting out from under the guardianship is not somehow higher than the standard for getting the guardianship in the first place.

So the standard should be if you could not impose the guardianship today, then the guardianship should not continue.

Senator CASEY. I wanted to ask you about that question of triggers. How would you envision that working or how has it worked? I am assuming the triggers would be pertinent to the court. A trigger would signal or activate the court to provide a review.

Ms. KOHN. So I think the key there, Senator, is requiring that any communication to the court that gives rise to a reasonable belief that termination may be in order, any such communication should cause the court to consider termination. And where you have seen some problems is courts hiding behind a lack of formality. Well, I do not have to consider that because it did not come on the right piece of paper. So that becomes critical. And it is also important, I think, that as part of guardians' annual reports, they be required to identify whether or not the guardianship should continue, and that the guardian have an affirmative duty to notify the court if there has been a change in the person's condition or maybe their support system that indicates that guardianship may no longer be necessary, or at least a less restrictive form of guardianship may be in order.

Senator CASEY. I know we are almost out of time, but does anyone else on the panel want to comment on these issues?

Dr. TEASTER. I would like to second-seat Professor Kohn and talk just a moment about the annual reports and the mindset. In every annual report, in every assessment that should be done on the guardians—and they ought to be done at least yearly or a change in condition—the question of whether the appropriateness of guardianship should come up. And the review should always be that guardians should be working themselves out of a job. That is one of the things guardians should be doing. They should be supporting that individual and working themselves out of guardianship. That is not a presumption necessarily of what guardians do, but it should be part of what they do. Thank you.

Senator CASEY. Mr. Slayton?

Mr. SLAYTON. Senator Casey, one of the things that our 2015 legislation did that has not been addressed already—because everything that they have said we have done in Texas as well. But one thing that we did a little bit uniquely was we heard about individuals who maybe at the time the guardianship was established, say a full guardianship was appropriate. Let us just say it is a stroke victim who is completely incapacitated at the time. But what we know about stroke victims is that many times their condition improves, sometimes rapidly. And so one of the requirements when the doctor is evaluating their capacity, the doctor is required now by law to state under which timeframe they think they might improve. So, for instance, they may say that within 6 months we expect that they would improve, and what that requires then is for the court to then hold a hearing within 6 months to get them reevaluated and determine whether or not the guardianship in its current form is still necessary. So that is one thing that we added because of that issue.

Senator CASEY. Denise? And then I am out of time—I am over time.

Ms. FLANNIGAN. May I answer?

Senator CASEY. Sure.

Ms. FLANNIGAN. In Pennsylvania——

Senator CASEY. Unless the Chair——

The CHAIRMAN. It is all right.

Ms. FLANNIGAN. I did want to say that through the Administrative Office of Pennsylvania Courts, they have developed a tracking system, a guardianship tracking system that is actually being implemented this year, and I have been party to the development of it. It really does give one county the ability—that judge to be able to see what another county has under guardianship. It will enable everyone to communicate and see. It is something I believe that is going to make a big difference. And our guardianship reports now, the reports of the estate as well as the reports of the person, all have those kinds of questions on it, and the person—how many times have you visited the person under guardianship? Do you believe this should continue? And why should it continue?

Senator CASEY. Thanks very much, thanks for the extra time.

The CHAIRMAN. Certainly.

Senator Nelson?

Senator NELSON. No; go ahead.

The CHAIRMAN. OK. Senator Cortez Masto?

Senator CORTEZ MASTO. Thank you.

As we have heard today as well, many people are in more extensive guardianships than necessary. They are in full guardianships when they should be in limited guardianships, right? And in Nevada, the legislature during its reform in 2017 created a Protected Person's Bill of Rights. It is actually patterned after Texas'. But one of the things they did additionally was create an additional right outside of that, and that is the right of a protected person to age in his or her own surroundings or, if not possible, in the least restrictive environment suitable to his or her unique needs and abilities.

So just a question for the panel. Do you think that by asking the court to consider the least restrictive setting possible for a pro-

tected person to live that this additional right would assist courts in determining an appropriate level of guardianship? And I will just open it up to the panel.

Mr. SLAYTON. Senator, I will take a shot at that first. Absolutely. As you mentioned, one of the things that Texas law requires, we have a Ward's Bill of Rights in Texas. One of the things that was included in the 2015 legislation was a requirement that courts tailor the guardianship with regard to giving as much ability for the individual to determine their residence. You know, prior to that there was nothing specific in law that required that. So now courts are required to do that.

In addition to that, the law in 2015 requires that the attorney who is filing the case, the application for guardianship, has to certify to the court that there are no other appropriate alternatives at all besides either full guardianship, limited guardianship, whatever they are seeking, that they have explored all of them and there are no appropriate alternatives.

Then attorneys ad litem and guardians ad litem who are appointed by the court have to also make findings to the court that they have explored all appropriate alternatives—all alternatives and there are no appropriate alternatives that are least restrictive.

And then, finally, the court has to find by clear and convincing evidence that there are no appropriate alternatives, including looking at the residence issue.

So the goal was to try to make sure that every party to the proceeding is looking at all the alternatives, which there are 11 in Texas, looking to see if there is a more appropriate alternative than a full guardianship.

Senator CORTEZ MASTO. Thank you.

Ms. Kohn?

Ms. KOHN. In addition to having the court consider the residence issue and the least restrictive alternative issue, it is also critical that that be part of the guardian's duties, that the guardian in making decisions for the person subject to guardianship be required to make the decision the person would make if able, unless that decision would cause some undue harm. Only then should you be devolving into a best interest analysis because really what you are trying to do is do what they would have done. And the Uniform Act spells that out, trying to make it a lot easier, you know, frankly for those well-intentioned guardians even, to do what is being asked of them. And it does very much what you are suggesting Nevada does. It provides guardians with very specific guidance as to how to make decisions about residential placement, recognizing that that is a hot-button issue because it has such an important impact on people's experience and what their life is like; but it also a hot-button issue because that is where we have seen some pretty flagrant abuses with cozy relationships between professional guardians and individuals in the real estate industry.

Senator CORTEZ MASTO. Thank you. Thank you very much.

Oh, I am sorry. Ms. Teaster, did you want to comment?

Dr. TEASTER. If I may, thank you. One of the issues I would like to talk about, about the least restrictive alternative, is something that the State of Virginia did in its public programs. They instituted in law that all the public guardians create a values history

on every person under guardianship, and that, too, would do just exactly what you are talking about in Nevada law and some of the rest of you, would drive them into using the wishes of the persons under guardianship and living in their preference from where they would like to live, so they are informed by law by the values of the individuals under guardianship.

Senator CORTEZ MASTO. Thank you. Thank you very much.

The CHAIRMAN. Thank you, Senator.

Senator Nelson?

Senator NELSON. Thank you, Madam Chairman.

I have seen guardianship work exactly as it should where the guardian steps in almost as a family member but someone who is on the outside. And then I have seen the worst. And I thank the Chair for calling this hearing to bring attention to the potential abuse. I think it is going to be incumbent upon our legal community specifically to underscore the ethical necessity of a guardianship. The problem is it is not always a lawyer that is appointed as a guardian. And from any one of you, from your experience, what do you think is the best that we could do other than get the word out about potential abuse? What is the best that we can do to protect the elderly?

Dr. TEASTER. I have two things: Get the data on who these people are, be able to know every person under guardianship and implement monitoring systems once we know who they are. Second, to create the appropriate and right accounting systems so that we can know and move them away from necessarily just the judges, because it is too much for them.

Ms. KOHN. Excellent question. Thank you. I think, you know, the first order of business is making sure at the outset that people are not subject to more restrictive arrangements than they need, because then you do not create the potential to abuse that excessive appointment.

So what does that mean? You have got to change the incentive so it is harder to get that full guardianship than the limited one. You have got to make real alternatives to guardianship. You know, the Uniform Act does that, for example, by creating a whole new option, an Article V, for a court to create a limited order in lieu of guardianship. If the person would otherwise qualify for a guardianship but you could meet their need with a single order without a stripping of rights, without an ongoing arrangement, it creates that option.

I think it is critical that the person who is the respondent in the proceeding be there. The judge needs to see them. They need to be able to talk to them. There should be almost no case where a guardian is appointed for someone who has not been in front of that judge, and it is critical that you have independent assessments of this individual's needs, their functional needs not just their diagnosis, before a guardian is put in place. So that means, you know, a visitor, and in most cases, frankly, that means a professional evaluation by someone with training and experience in whatever the alleged limitation is. So if you have got someone who is alleged to have Alzheimer's, then the person doing the evaluation should have training and experience in assessing people with Alzheimer's.

And if you get it right at the outset, then you have got less potential for abuse down the road.

Mr. SLAYTON. Senator, Ms. Flannigan already mentioned this a little bit, but it is something that we have not talked very much about today, but the use of technology to assist us in this is something important.

One of the things that we are working on in our state, of course, is registering everyone so that we will know who all the individuals under guardianship are, who their guardians are. But further than that, we are implementing technology that will require the annual reports, annual accountings, other documents to be filed electronically with the court so that, No. 1, we will know when the reports are not filed that are supposed to be filed, so we can provide reminders to the family members or friends or guardians, or whoever it may be, that you have got to report due. And then the court will know immediately when the report is not filed on time. That should be a trigger for the court to say, "What is going on here?"

It will also use some automation to be able to review the annual accountings to spot potential fraud. We are not the first—this is not the first industry to look for potential fraud and using algorithms to track those or a place where we can focus our efforts on those. And so I think the role of technology is important in making sure we can implement that in the best way possible, is really something we should be looking at.

The CHAIRMAN. Thank you, Senator Nelson.

I want to note that we had a number of other Senators who stopped by today to hear part of your testimony, including Senator Scott, Senator Donnelly, and Senator Fischer. I just wanted to note that for the record. There is a lot of interest in this.

I want to thank all of our witnesses for your contributions to this important discussion about how we can better protect older Americans from exploitation by those in positions of power and trust. Guardianships, conservatorships, and other protective arrangements are designed to protect those with diminished or lost capacity. They should not provide an opportunity for deception, abuse, and financial exploitation.

We are going to continue to work on this important issue, and you have added so much to our understanding. I am proud that Maine may well be the first state to implement the model law in this regard, and I hope that will inspire other states to look at this issue as well. And I hope our hearings will have that effect, too.

I want to yield to Senator Casey for any closing thoughts.

Senator CASEY. Madam Chair, thank you for the hearing. I want to thank our witnesses. This is obviously both a complicated issue but an issue of great consequence to the people affected. So we are grateful you brought your insight and experience and expertise here, and we need to implement what we learned today and try our best to make it more of the norm rather than the exception that every state has the best possible standard. So we are really grateful for the opportunity to be with you. Thank you.

The CHAIRMAN. Senator Cortez Masto, since you have done so much work in this area, I want to give you the opportunity for any closing thoughts as well.

Senator CORTEZ MASTO. Thank you. Thank you, Madam Chair, and thank you for holding this hearing and to all of you for being here. Clearly, there is still a lot of work that needs to be done, and I think with your voices, your support, and highlighting what is happening here with our older Americans in our communities and the exploitation is that first step in prevention and addressing the issue. So you have got my commitment to continue to work in this area as well, so thank you.

The CHAIRMAN. Thank you.

Committee members will have until Friday, April 27th, to submit questions for the record, so we may be sending additional questions your way.

Again, I want to thank all of our witnesses and Committee members who participate in today's hearing as well as thanking our staff.

This concludes this hearing.

[Whereupon, at 10:57 a.m., the Committee was adjourned.]

APPENDIX

Prepared Witness Statements

Prepared Statement of Nina A. Kohn, Associate Dean for Research and Online Education, David M. Levy Professor of Law, Syracuse University College of Law

Thank you Chairman Collins, Ranking Member Casey, and Committee Members for this opportunity speak with you today. My testimony will summarize the primary problems facing the guardianship system, key reforms needed to curb abuse, and model legislation that has been developed by the Uniform Law Commission to do just that.

As a general matter, I see four fundamental problems with the guardianship system in the U.S.:

- First, some people who are subject to guardianship should not be.
- Second, many—indeed, probably most—people subject to guardianship are subject to more restrictive arrangements than they need.
- Third, a subset of guardians act in ways that violate the rights and insult the humanity of those they serve. Sometimes this is intentional. Sometimes it is negligent. Sometimes it is simply because the guardian does not understand his or her role.
- Finally, existing systems and rules unintentionally create incentives that exacerbate these problems.

To address these problems, state-level law reform is essential as guardianship is governed by state law. Indeed, even the terminology varies by state. Today I will use the term "guardian" to refer to a person appointed by a court to make either financial or personal decisions for another person, but only some states take that approach. Many states, by contrast, use the term "conservator" to refer to a person appointed by a court to make financial decisions for another, and the term "guardian" to refer to a person appointed to make decisions about personal affairs.

Fortunately, there are straight-forward reforms that could have a substantial, systemic impact.

First, states must provide very clear guidance to guardians. Most guardians are lay people. To do their best, they need to understand exactly what they are supposed to consider when making decisions for an individual subject to guardianship. They also deserve clear rules that they can point to when their actions are questioned. Clear guidance also makes it easier to hold guardians responsible for bad behavior. They cannot hide behind vague or confusing language.

Second, states must create systems that incentivize the use of limited guardianship and alternatives to guardianship where these mechanisms provide adequate protection. Currently states often do the opposite. It is easier for petitioners to seek, and courts to order, a full guardianship than a limited one. While all states' laws now recognize limited guardianship, petitioning for a limited guardianship is typically harder than petitioning for a full one. Unless the law requires otherwise, for a full guardianship, the petitioner simply requests all powers available under state law. To petition for a limited guardianship, by contrast, petitioners must spell out exactly what powers they want the court to grant—which can be confusing and difficult, especially for those without lawyers. Similarly, it is typically easier for a court to order a full guardianship than a limited one. Unless the law requires otherwise, to order a full guardianship, the judge simply grants the guardian all powers permitted under state law. For a limited guardianship, by contrast, the judge needs to spell out the specific powers to be granted.

The result is that the incentives align to strip individuals of more rights than is necessary to actually protect their interests.

Third, states must increase monitoring of guardians. Currently, monitoring is typically anemic, and the ability to monitor is generally limited to under-resourced courts.

Fourth, states must ensure that systems for guardians' fees do not reward bad behavior. Guardians should not be allowed to charge fees that are inconsistent with their fiduciary duties.

Consistent with the need for state-level reform, the 2017 Elder Abuse Prevention and Prosecution Act requires the Attorney General to publish "model legislation relating to guardianship proceedings for the purpose of preventing elder abuse."

I am pleased to report that such model legislation now exists, and addresses each of the challenges I have identified. Specifically, the Commission has now adopted and finalized the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA), for which I served as Reporter. The Uniform Law Commission, a non-profit organization founded in 1892, consists of commissioners who are volunteer attorneys appointed by each state, as well as by the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. The Commission creates model legislation for the states on topics where state uniformity is desirable. This particular Act represents a fourth revision of provisions originally included in the Uniform Probate Code in 1969.

The UGCOPAA was drafted over a three-year period by a Committee that included commissioners from 10 states and participants from organizations representing divergent interests, including guardians and judges, persons with disabilities, and family members devastated by abuse. National organizations providing significant input included AARP, The ARC, the American Bar Association, the American College of Trust and Estate Counsel, the National Academy of Elder Law Attorneys, the National Association to Stop Guardianship Abuse, the National College of Probate Judges, the National Center for State Courts, the National Disability Rights Network, and the National Guardianship Association.

Together, this inclusive, non-partisan, expert-informed group drafted an Act that addresses each of the challenges I have discussed, and which garnered strong support from participants despite their diverse interests.

- The Act provides clear decision-making standards for guardians.

- The Act incentivizes limited guardianships over full ones by making it easier to petition for a limited guardianship than a full one (including by providing easy-to-use forms for those who wish to use them) and requiring courts to do more to justify full orders.

- The Act limits the ability of unscrupulous guardians to drain assets by charging unreasonable fees. For example, it requires courts to consider the market value of services provided by guardians before approving fees. After all, attorneys serving as guardians should not generally be paid their hourly rate to do non-legal tasks like grocery shopping.

- The Act creates new mechanisms to monitor guardian behavior at minimal cost to the public by leveraging persons interested in the welfare of the individual subject to guardianship. Specifically, courts must—absent a good cause—require guardians to give notice of certain suspect actions to the individual's family members or friends. These relatives and friends can, in turn, act as the court's eyes and ears to prevent or remedy abuse. Similarly, it creates mechanisms that work for laypeople, including those subject to guardianship, to alert the court to abuses.

In addition, the Act represents a modern, person-centered approach to guardianship that is sensitive to the rights of persons with disabilities and their family members. For example:

- It encourages person-centered planning by requiring guardians to develop an individualized plan for the individual subject to guardianship. The court can then monitor for compliance with the plan. Unless the court specifically orders otherwise, key family members will also receive copies of the plan, and can thus provide additional monitoring.

- It promotes independence and dignity for persons with disabilities. Courts may not impose a guardianship if a less restrictive alternative, such as supported decision-making, would provide adequate protection. It also creates a mechanism for a court to order a protective arrangement instead of guardianship or conservatorship when a person's needs could be met with this less restrictive option.

- It protects fundamental rights. For example, individuals subject to a guardianship must be given notice of certain key rights, including the right to independent legal counsel and the right to have the order modified or terminated when appropriate. In addition, courts may not remove certain fundamental rights without explicit findings as to those particular rights.

- It makes restoration of rights a real possibility when an individual no longer requires a guardian, or no longer requires as extensive a guardianship. It limits guardians' abilities to charge fees to oppose the alteration or termination of orders, and adds new triggers for reconsideration of an appointment. It also clarifies that an individual subject to guardianship has a right to obtain counsel to seek restoration of rights.

- It helps prevent isolation and family estrangement. A guardian may not restrict family members and friends from visiting or communicating with the individual subject to guardianship for more than one week without a court order. Unless the court orders otherwise, the guardian must notify key family members of a significant change in the health of an individual subject to guardianship or a change in the individual's place of residence.

In short, the Act provides a smart, fiscally responsible model for states, and its widespread enactment will bring about the reform necessary to curb guardianship abuse.

Thank you for this opportunity to speak with you. I look forward to your questions.

Prepared Statement of Pamela B. Teaster, Ph.D.
Professor and Director, Center for Gerontology
Virginia Tech

Abuse of Power:
Exploitation of Older Americans
by Guardians and Others They Trust

Before the United States Senate Special
Committee on Aging
April 18, 2018

Chairman Collins, Ranking Member Casey, and Members of the Committee, I am Pamela Teaster, Professor and Director Center for Gerontology at Virginia Tech. I am deeply honored to be here today and grateful for the Committee's focus on the serious and ongoing problem of the exploitation of older Americans committed by guardians and others whom they trust.

To frame my remarks on the abuse of power by those entrusted to protect vulnerable older adults, I draw from the analogy of *Sheep, Wolves and Sheepdogs*, as discussed by Lt. Col. Dave Grossman in his book *On Combat: The Psychology and Physiology of Deadly Conflict in War and in Peace.* To emphasize, there is nothing morally superior about being a sheep or a sheepdog-it is a matter of choice and circumstance.

According to Grossman, most people in our society are decent, kind, productive people incapable of hurting each other except by accident or extreme provocation. I in no way use this analogy to be disrespectful but rather to heighten how vulnerable are people under the power of another. Most are unaware and unsuspecting of their vulnerabilities when their decisional lives are entrusted to a protector acting in the name of beneficence. The protectors, the good guardians, the good agents under powers of attorney, the good representative payees, and all the good friends, families, and agencies acting in this capacity are much like sheepdogs—their job is to protect the individuals for whom they are responsible and confront those who try to take advantage of them. Guardians who act as intentional predators, or wolves, if you may, exploit vulnerable persons without mercy. Some examples from recent press articles are instructive.

An example of a predatory guardian was reported by Judy Reich (02 March 2016). Local 10 News Viewer Claims Guardian Not Acting in Best Interest of Father.
http://www.local10.com/consumer/call-christina/local-10-news-viewer-claims-guardian-not-acting-in-best-interest-of-father

In this story, paid professional guardian Elizabeth Savitt, became guardian over the victim after the victim's family could not come to a decision about their father's finances. Mrs. Savitt, a professional guardian, was able to liquidate everything from the victim and charge over $65,000 in guardianship fees during a six-month period. During this six-month time period, she did not allow the family to see their father at all.

The following is a case of exploitation by another wolf, this time an agent under power of attorney, posted by Lance Hernandez (10 February 2016) of *The Denver Channel.*
https://www.thedenverchannel.com/news/local-news/longmont-nurse-accused-of-stealing-elderly-patients-life-savings-contaminating-his-house-with-meth The Denver.

In this case, occurring in Denver, Colorado, the wolf was registered nurse Shela Wagner, who was taking care of an elderly patient in his home and became agent under power of attorney over the patient. Once appointed as agent under the power of attorney, she was able to transfer money from the elderly victim's account to the accounts of her two sons. While taking care of the elderly victim, she was also making meth inside of his household. The agent under power of attorney often had hallucinations and thought that there were bugs crawling all over the patient's skin and would pick off his skin with tweezers, which lead to skin infections all over his body. In total, it is estimated that she stole $140,000 in cash and property from the victim, along with using his house to cook meth with her two sons.

There are selfless, wonderful guardians; I would not want any person hearing or reading this testimony to think otherwise. These programs and people are the sheepdogs. They protect and support a precious individual. This story was posted on the website of Guardian Services, Inc., the mission of which is to provide guardianship and supports and services for at-risk adults in Tarrant County, Texas. http://www.guardianshipservices.org/guardianship/client-profiles

Shirley was exploited by strangers and drug dealers who took advantage of her confusion. Drug dealers actually moved into her small home. A neighbor, who was hired to clean, stole money and valuables. Shirley gave the neighbor a check for $50 to purchase groceries; all she received in return was a six-pack of soft drinks. Finally, when $1,000 disappeared from a savings account, the bank called Adult Protective Services. Shirley was immediately referred to Guardian Services, Inc. Frances was appointed Shirley's volunteer guardian. She arranged for in-home services, obtained a wheelchair, and made Shirley part of her family. Frances and her family celebrated Shirley's 94th birthday at a restaurant and showered her with gifts. When asked if Shirley was her grandmother, Frances would simply agree. Shirley would just beam.

In 2016, the Virginia Public Guardian & Conservator Program was asked to serve as guardian for a patient at a mental health institute and began visiting him to get to know him in anticipation of becoming his guardian. Upon appointment, he was moved to an assisted living facility. The public guardian program employee had monthly visits with the individual and oversaw his medical treatment and benefits. Through working with him, the public guardian realized that he was capable of managing his own affairs and that he should be restored to capacity. The Program secured a new capacity assessment for the individual, including an attorney to bring a restoration of rights proceeding on his behalf. Less than two years after the appointment of the public guardian, a Virginia Circuit Court judge restored the individual to capacity, remarking that it was the first time that she had ever restored an individual to capacity.

In theory and practice, an older adult unable to make decisions for himself or herself should be better off with a guardian or an attorney-in-fact than without one. For example, a guardian should ensure that a protected person has an acceptable place to live, receives proper nutrition, and has appropriate health care. Unfortunately and too frequently, the fate of people under guardianship (i.e., persons with mental illness, dementia, developmental disabilities, or a combination thereof), is poorly monitored in sufficient, meaningful, and diligent ways. This inattention threatens to unperson them, leaving them open to exploitation, abuse, and neglect. The awesome power over highly vulnerable adults wielded by the guardianship system (at its best, the sheepdog) demands adherence to the accountability protections already in place, but that are not well implemented (e.g., assessments, care plans, annual reports, accountings)—their own kind of sheepdog.

There are four kinds of guardians: family or friend guardians, volunteer guardians, paid professional guardians, and public guardians. Family and friend guardians are the most

common; other guardians have a more attenuated relationship to the protected person. Most guardians are also doing their best for the individuals entrusted to them and for whom they serve as surrogate decision makers. However, the subject of this hearing, the motives and practices of a subset of guardians are extremely troubling. Some paid professional and public guardians have ratios of one to over 100 protected persons, a ratio far too high to afford an individualized and appropriate level of protection and care.

In 1987, the Associated Press published its special report, *Guardians of the Elderly: An Ailing System*, which marshalled a team of reporters from all around the country to report on the guardianship system. Reporters documented significant problems with the system itself, citing problems with due process and finding that, tragically, older adults were railroaded into the guardianship system, far too often, for the mere fact that they were old and female. The article was a wake-up call to the states, and a series of laudable statutory reforms were ushered in.

Ironically, exactly thirty years later, the October 9, 2017 article by Rachel Aviv, *The Takeover: Senior Citizens Are Losing Their Assets and Their Autonomy to a Hidden System,* published in *The New York Yorker,* sounded some of the same themes, but this time, with a focus on exploitation and documenting egregious treatment by some paid professional guardians who took advantage of protected persons under their care. Aviv wrote that guardians ignored the needs of protected persons, warehousing them in facilities providing poor care, charging unreasonably high compensation for services that were never rendered or poorly rendered, and isolating them from their families, including not checking on the protected person, not completing required paperwork, refusing family and friend visits to the protected person.

As Professor Kohn at the Syracuse University College of Law noted in her testimony, while there have been excellent legal reforms, there remain perverse system incentives and a lack of information that are at the heart of the problem, these documented in 2017 by Erica Wood and colleagues of the American Bar Association and the General Accountability Office in 2016. The laws in states are generally quite good, and the new Uniform Guardianship, Conservatorship and Other Protective Arrangements Act of July 2017 is excellent.

The problems lie in the implementation of the laws and in whether they create the right systems to encourage the desired behavior. Despite estimates that some 1.5 million adults are under guardianship, in 2018, not one single state in the country can identify its people under guardianship—an incomprehensible situation in the information age—and one that makes it impossible to have an appropriate level of accountability for each person who has a guardian. This means that mechanisms put in place to investigate its appropriateness, to order its establishment, to document its execution, and to facilitate its revocation are impeded by not knowing the very people served.

System reformation can and should take the form of greater clarity and training when persons assume the role of guardian ad litem the eyes and ears of the court, and of guardians themselves; deeper consideration of appropriateness and scope of appointment; bonding; meaningful insertion of person-centeredness and supported decision making; limited orders; reasonable, appropriate, and timely monitoring post establishment; constant consideration of the restoration of rights; and zero tolerance for the pockets of collusion and corruption that exist around the country among actors in the system. The courts should institute restrictions and/or enhanced scrutiny when one guardian has more than 20 protected persons under his or her care (in 2010, one commentator recommended a 1:20 ratio). Left unchecked, these problems open the door for another and equally insidious problem, the topic of our testimony today—exploitation, as well as abuse and neglect by unscrupulous guardians.

Like the persons in the system, we know very little about the scope of guardian abuse, neglect, and exploitation despite inquiry by scholars and government entities alike. If the scope of mistreatment is unknown, strategies for prevention and remedies for intervention will be difficult at best. Notably, a number of states are instituting better computer monitoring (e.g., Florida, Minnesota, Virginia) and are exploring legislation for an improved system of guardianship for persons who are incapacitated but alone (e.g., New York, Massachusetts). These efforts and others, including reform efforts by the National Guardianship Network, the National Guardianship Association, and state-level Working Interdisciplinary Networks of Guardianship Stakeholders/WINGS (American Bar Association, 2014) must go forward and improve practices in all states in the country.

Now is the time for the powerful and important guardianship system, a system that acts in the name of beneficence, nonmaleficence, and justice, and preserves autonomy whenever possible to demand and receive adequate resources. At its worst, as wolf, guardianship undermines and destroys the lives of older adults and their families—for generations. System implementation reforms are prescient and possible. Guardians who abuse, neglect, or exploit older adults should receive enhanced penalties for their crimes. And, again, persons under guardianship should enjoy supported decision making whenever possible and have their rights restored in part or totally with all deliberate speed.

Should we choose to do otherwise, we are no respecter of persons, and we unleash predatory guardians, the wolves, with no mercy on the unsuspecting, on the vulnerable. We negate the actions of the sheepdogs, the good guardians and all other mechanisms in place to bolster them. When the public continues to permit inadequate guardianship services and oversight, we unperson, we disrespect, and we perpetuate a system that remains a backwater, one that remains broken, ailing, and a mess/unconscionable.

Thank you for giving me the opportunity to present this testimony on this day.

Prepared Statement of David Slayton
Administrative Director, Texas Office of Court Administration,
and Executive Director, Texas Judicial Council

Background on Guardianship in Texas

Guardianship, as it is called in Texas, is a proceeding in which a court appoints an individual to make decisions and oversee the affairs of an individual ("a ward") who has lost mental capacity or the capacity to make decisions independently. When a guardian is appointed, the ward loses the ability to make decisions such as whether she can drive, where she should live, whether she can marry, and how her money is spent. It is the most restrictive form of oversight a court can place on an individual. Guardianship is meant to protect wards from abuse or exploitation due to the limitation in their mental capacity.

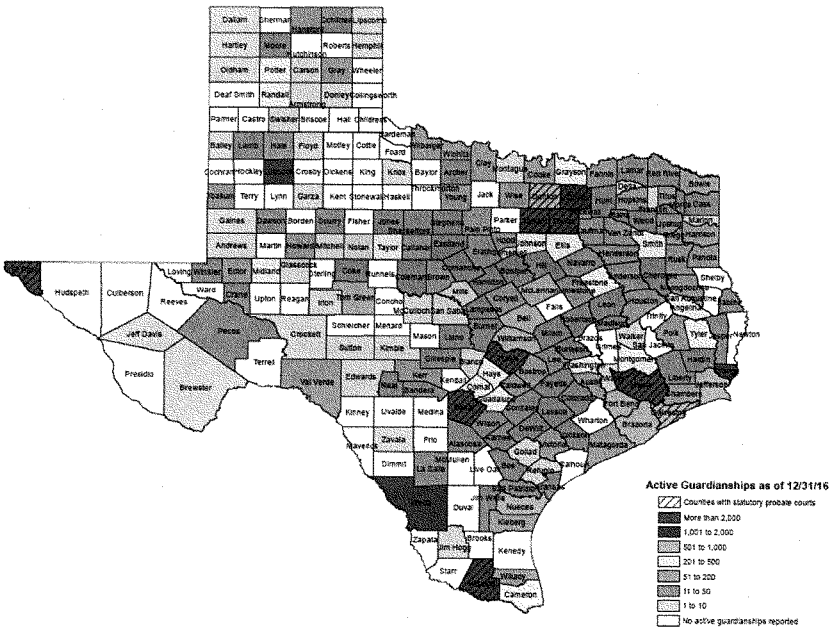
There are two types of guardianship proceedings in Texas. The first is guardianship of the person. In this type of proceeding, a guardian is appointed to manage the affairs of the ward with limited mental capacity but is not appointed as the manager of the finances of the person. Guardianship of the person is typically when the ward has a limited estate or income. The second type of guardianship proceeding is guardianship of the estate, sometimes referred to in other states as conservatorship. In this type of proceeding, a guardian is appointed to manage the ward's financial affairs. A guardian may be appointed as the guardian of the person, guardian of the estate, or guardian of both the person and estate. While the appointed guardian is typically the same person, this is not required.

Texas law provides a list of preference for who should be appointed as a guardian. In particular, the law requires that a preference be given to the person the ward might have designated as a preferred guardian, next to the spouse, and next to the nearest of kin. If no family members are appropriate for appointment, the judge can consider friends or other professionals, including attorneys and certified private professional guardians.

A guardian is responsible for maintaining safeguards for the ward and reporting regularly to the judge on the affairs of the ward. First, a guardian is required to immediately file a **bond** sufficient to cover the value of the liquid assets of the estate and the annual income to the estate. Second, the guardian is required to immediately file an **inventory** of all assets in the estate. Third, a guardian is required to file an **annual report of the person** detailing the condition of the ward each year on the anniversary of the qualification of

the guardian. Lastly, the guardian is required to file an **annual accounting** of the transactions from the estate with sufficient detail and documentation on the anniversary of the qualification of the guardian. The judge is required to review each of the filings, as well as the continuation of the guardianship, and enter an order approving each filing. Reviewing these filings is the method through which judges are able to monitor guardianships to ensure the protection of the individual under guardianship.

In Texas, there are **50,478 active guardianships** (as of August 31, 2017), with 5,186 new guardianship cases filed last fiscal year, a 7% increase over Fiscal Year 2016. Only 2,804 guardianship cases were closed during that period. The number of active guardianships has increased by 37% in the past five years and is one of the fastest growing case types in the state. We estimate that the value of the estates under guardianship in our state to be between **$4-$5 billion**. These cases are overseen primarily by constitutional county judges – judges who are not required to be law-trained and who also oversee the administration of counties. In a few of Texas' 254 counties, the cases are overseen by law-trained specialty probate courts. Almost all of these courts are tasked with monitoring the cases with no additional staff resources.



Regulation of Guardians by the State

In 2007, the Texas Legislature began to require private professional guardians to be certified and continuously regulated by the state to be appointed by a judge as a guardian. The Judicial Branch Certification Commission (JBCC) performs this function, and there are currently 443 certified (373 full certifications and 70 provisional certifications) guardians appointed to just over 5,000 wards. A certified guardian is required to meet certain age, experience, and education requirements along with passage of an examination and no disqualifying offenses on a criminal background check. The criminal background check continuously monitors the private professional guardian and notifies JBCC if the private professional guardian has an event appear on his or her criminal record. The JBCC regularly rejects applications for certification due to disqualifying factors and receives numerous complaints each year about certified guardians. JBCC has revoked and suspended the certification of private professional guardians and has levied significant administrative penalties against the certified guardians where appropriate. When a private professional guardian's certification is revoked or suspended, the judge who appointed the guardian is notified to take appropriate action to remove the guardian from the ward(s).

In May 2017, the 85th Texas Legislature passed SB 1096 requiring a statewide guardianship registration and database to be created by June 1, 2018. The legislation requires all guardians, including family guardians to register with the state, complete an online training course before being appointed, and undergo a criminal background check prior to appointment as a guardian. The mandatory training course will "educate proposed guardians about their responsibilities as guardians, alternatives to guardianships, supports and services available to the proposed ward, and a ward's bill of rights."

Recent Guardianship Reform Efforts in Texas

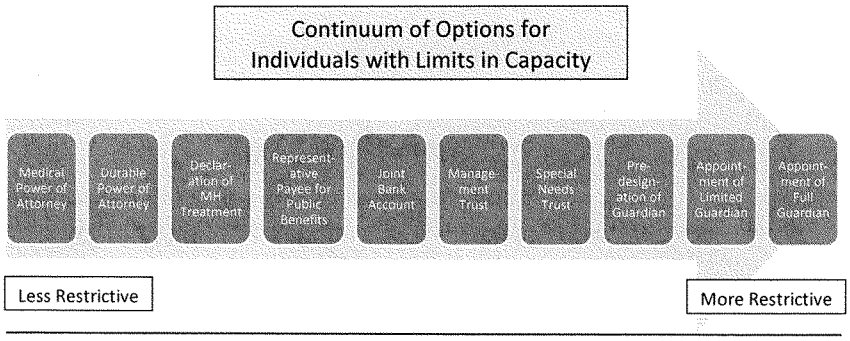
Seeing what he referred to as the "silver tsunami" approaching where the population in Texas over the age of 65 would double in the next twenty years, Supreme Court Chief Justice Nathan Hecht established a Working Interdisciplinary Network of Guardianship Stakeholders (WINGS) and called for the Texas Judicial Council, the policy-making body for the judicial branch, to study issues related to the elderly and incapacitated and the impacts of guardianship and to make recommendations for reform. Working with the WINGS group, the Elders Committee of the Judicial Council made several key recommendations, as follows:

- Ensure that all appropriate alternatives to guardianship were explored;
- Expand the alternatives to guardianship to include Supported Decision-Making Agreements;
- Consider the ability of the ward to make decisions about residence;
- Consider whether the ward's condition will improve to negate the need for a guardian and review as appropriate;
- Require court approval prior to changing the residence of a ward to a more restrictive living facility; and
- Fund a pilot project to assist courts with appropriately monitoring guardianship cases.

The Judicial Council recommendations were filed as House Bill 39 (84th Legislature) and signed into law, effective September 1, 2015. In addition to these reforms, the legislature passed a ward's bill of rights and required a study on establishing a guardianship registry for use when law enforcement encounters a ward.

Alternatives to Guardianship

Since September 1, 2015, the law has required the applicant for guardianship to certify to the court that all alternatives to guardianship have been explored. Ad litem attorneys appointed to the case must also explore all alternatives and certify to the court that none are appropriate. Finally, before appointing a guardian for a ward, the judge must find by clear and convincing evidence that alternatives to guardianship have been explored and none are feasible.



Texas became the first state in the nation to authorize an additional alternative to guardianship, the supported decision-making agreement. A supported decision-making agreement is an agreement between an adult with a disability and another adult that enables the adult with a disability to make life decisions with the assistance of the supporter adult. This type of agreement has been promoted and used as an appropriate alternative to guardianship for minors with developmental or other disabilities who are reaching the age of majority and other adults with disabilities. Since Texas' passage of this alternative, several other state have also enacted a supported decision-making agreement law and other states are considering it as well.

The Guardianship Compliance Pilot Project

As mentioned above, at the request of the Texas Judicial Council, the legislature funded a pilot project at the Office of Court Administration (OCA) to assist courts in adequately monitoring guardianship cases. The project provided expert staff resources to review the cases to determine whether or not the guardians were in compliance with reporting requirements and to determine whether there were irregularities in the financial dealing of the estate. This $250,000 per year project with three authorized employees began in November 2015. Since that time, the project has reviewed over 27,000 guardianship cases in 27 counties.

The project has made disturbing discoveries. As mentioned above, guardians are required to file four basic items with the judge upon appointment or annually: 1) a bond; 2) an inventory of the assets in the estate; 3) an annual report of the person; and 4) an annual accounting of the transactions from the estate. Overall, 43% of cases were found to be out of compliance with reporting requirements. The vast majority of the cases out of compliance were cases where the guardian was a family member or friend. While the numbers tell a disturbing story, the findings from reviews of filed accounting and reports tell a more disturbing story. The project regularly found unauthorized withdrawals from accounts; unauthorized gifts to family members and friends; unsubstantiated and unauthorized expenses; and the lack of backup data to substantiate the accountings.

Guardianship Compliance Project Performance as of April 13, 2018	
41/27	Courts and Counties involved in the guardianship compliance project
27,257	Guardianship cases reviewed by the guardianship compliance project
17,345	Guardianship cases recommended for closure with 3,114 deceased
9,912	Active guardianship cases
1955*	Guardianship cases found to be out of compliance with statutorily required reporting
32%*	Percentage of cases with missing reports of the person
41%*	Percentage of cases with missing initial inventories
44%*	Percentage of cases with missing annual accountings

. * Note: These statistics are reported for the 23 counties in which the initial review process has been completed. The number of active guardianships in those 23 counties totaled 4949. With 1,955 cases out of compliance with required reporting, the percentage of cases out of compliance is 40%.

When lack of compliance was found, the project worked with judges to contact the guardian seeking to restore compliance. Most of the guardians responded and reestablished compliance. However, many have not been responsive.

In addition to the physical review of guardianship files, the project is developing an automated tool that will allow guardianship filings to be electronically audited through fraud detection. This will enable the project to focus its efforts on potential abuse and exploitation.

The OCA, which oversees the program, requested expansion of the project to allow it to cover the entire state and review all guardianship cases regularly. This request was passed in SB 667 during the 85th Legislature and funding was provided in OCA's budget of just under $3 million annually for expansion. Texas Governor Greg Abbott, line item vetoed the budget and legislation for the project's expansion saying in his veto proclamation for SB 667, "We should give the new statutory reforms a chance to work, and we should continue to look for cost-effective ways to address this challenge. The creation of a new state bureaucracy should be a last resort." OCA was able to maintain the pilot program's staff and continue the project in the interim. The Texas Judicial Council will likely once again recommend expansion and further funding for the program to the 86th Texas Legislature, which convenes again beginning in January 2019.

The State Courts Need For Funding

Texas is not alone in its desire to improve monitoring of guardianship cases. The Conference of Chief Justices and Conference of State Court Administrators have worked collectively to make improvements in this area. However, one of the limitations in making these improvements is the need for funding to provide adequate resources to monitor the cases. That is why the state courts were ecstatic about the passage of S. 178, the Elder Abuse Prevention and Prosecution Act, which incorporates S. 182, the Court-Appointed Guardian Accountability and Senior Protection Act. Signed into law by the President on October 18, 2017, this law provides authorization for grants to the state courts for guardianship activities. The state courts urge Congress to appropriate sufficient funds to fully implement the provisions of that Act.

Conclusion

We are instructed to "honor our fathers and mothers...and the least of these;" however, some of the practices involved in guardianship neither honor nor protect the elderly and incapacitated. We are working diligently in Texas to correct those practices and look forward to continuing this essential work moving forward.

Appendix A: Specific Examples of Findings from Guardianship Compliance Project

- Unauthorized ATM withdrawals totaling $20,000+ and $40,000 in "gifts" to grandkids.
- Unauthorized purchase of Ford pick-up truck, $7,000.
- Checks written to cash $2,000 and guardian's credit card account paid $18,000+.
- $89,378.81withdrawal with no court approval or additional information.
- $400,000 transferred out of account. Forged checks. Additional $500,000 allegedly hidden and unaccounted for. Case currently in District Court.
- Guardian of Person withdrew $44,683.35 in Ward's funds.
- ATM expenditures of $16,390.66 in 2014. In 2015, there were ATM withdrawals over $21,000 including charges to Victoria's Secret and Bath and Body Works.
- Aircraft missing from estate.
- Guardian was reimbursed over $25,000 for clothing/accessory costs and over $4,000 for a birthday party from the ward's trust.
- Order Authorizing Sale of Real Estate totaling $543,140 was granted. No Report of Sale filed with the court. No follow-up.
- Estate dwindled by $422,274 with no explanation.
- Ward's Estate value of $1,263,077.25. Appointing authorizes guardian to draw down an additional $32,000 annually with no oversight.
- $4,000 unauthorized monthly transfers to guardian's account. Multiple $200 ATM withdrawals from ward's account.
- Ward awarded settlement and received $108,983. No information as to how $108,983 would be managed or guardian of estate appointed.
- $1,500,000 trust for the ward. No Initial Inventory or Annual Accountings ever filed.

- Certified guardian failed to file an Inventory, Annual Report, or Annual Accounting. Estate value in application listed as over $500,000. Another ward's personal funds were used by the certified guardian to pay the bond premium for this case.

- Certified guardian failed to respond to notice from Bastrop County that the ward had delinquent taxes due. Certified guardian failed to notify the court. Ward's property went to foreclosure and was sold on the courthouse steps. Property valued at $153,808.

- Guardian ordered to place $103,176.64 into safekeeping account and did not do so. $18,711.39 in unauthorized withdrawals. Guardian sold a used refrigerator to the ward for $529. Guardian has not visited ward since May 2012.

- Ward died due to neglect in a facility. Letter from Adult Protective Services in the file on 1/21/15 states ward's death was caused by facility staff neglecting him. Ward moved into the facility 10/15/2013, which was the last time the guardian saw him in person. No Annual Report filed for that year.

- Proposed guardian never qualified (never paid bond) and has moved onto his father's land. Guardian investigated by Adult Protective Services for exploiting his father's finances. Guardian never filed Initial Inventory or Annual Accountings.

Prepared Statement of Denise Flannigan, Guardianship Unit Supervisor, Westmoreland County Area Agency on Aging

Good morning Senator Collins, Senator Casey and the members of the United States Special Committee on Aging. Thank you for this opportunity to provide testimony about the very important topic of guardianships of older adults. I am Denise Flannigan and I am the Guardianship Supervisor for the Westmoreland County Area Agency on Aging which is located in Western Pennsylvania. There are 52 AAA service areas within the 67 counties in the state. Currently, 19 of the 52 AAAs have a designated guardianship program while the remainder of the AAAs refer older adults in need of guardianship services to outside guardianship agencies.

A guardianship often originates through a substantiated AAA protective services investigation where the alleged incapacitated older adult is found to be either a victim of abuse, neglect, financial exploitation or self-neglect and does not have a responsible caregiver. Through our county solicitor, our Protective Services Investigator petitions to have our AAA serve as Guardian of the Person, Guardian of the Estate, or both when it is necessary to reduce the risk to the older adult. This happens when there are no lesser restrictive measures and when there are no other appropriate family or friends available and willing to serve.

Our Guardianship Unit has the capacity to serve eighty Consumers (our term for the older adults in our care.) We serve as either Power of Attorney or Guardian, based on the Consumer's capacity at the time of the need for intervention. Our team has four Aging Care Managers with a maximum caseload of twenty Consumers each; we have two Case Aides, a Fiscal Officer and a Nurse who is shared with our Protective Services Unit. We also have an Off Hours Coordinator at our AAA who is able to provide decisions outside of the normal business hours of our agency. This small caseload is required due to the intensive case services that a guardian provides.

Our main duties while permitting as much autonomy as possible when serving as the Guardian of the Person, are to be responsible for making decisions regarding the health and well-being of the Consumer. The range of personal/health care responsibilities include making decisions about personal care, living arrangements, medical treatment and other day-to-day matters related to health, safety and quality of life. We make decisions ranging from where they will get their groceries to end of life decisions including burial arrangements.

As the Guardian of the Estate, we are responsible for all financial matters. The range of responsibilities include managing their income while serving as fiduciary, budgeting, paying all of their bills, as well as, responsibly managing their principal assets including real estate, investments, and savings while making pre-paid arrangements for burial.

Our team functions as a close-knit group, which includes attendance in our mandatory weekly team meeting. We also interact closely on a daily basis sharing relevant information, changes and updates regarding the finances, health and well-bring of all of the Consumers in our care. This Guardianship Unit Team Philosophy is necessary, as we are required to be informed decision makers available 24 hours a day to make decisions on behalf of our Consumers served within the Guardianship Unit. All team members must be up to date on the status of each Consumer in order to respond appropriately during their workday to any need that should arise in the care of the Consumer and his or her estate. The Off-Hours Coordinator is prepared to make appropriate decisions on behalf of Consumers requiring emergency medical treatment outside of regular business hours.

The majority of Consumers we serve are over the age of 60; however, we do occasionally serve as Guardian for Consumers under the age of 60. Our Consumers reside in a variety of settings throughout the county including skilled nursing facilities, personal care homes, community group homes, Torrance State Hospital, apartments and single dwelling homes. They live in the least restrictive environment based on the Consumer's level of care, their financial situation and their wishes.

In addition to being the Guardianship Supervisor, I often provide guidance and support to individuals, family members and agencies regarding guardianship issues within the county. Often, a newly appointed family guardian may have a question regarding reporting requirements or a basic question related to securing benefits on behalf of the Consumer. As the point person for guardianship, I have the unique position to learn of actions or lack of actions by others serving as the guardian. At times, this information comes to light through a Protective Services investigation where the allegations involve abuse, neglect or financial exploitation of the Consumer by the guardian.

Several years ago, a guardianship agency serving older adults in our county and several surrounding counties came to my attention due to allegations of neglect and financial exploitation. Although the investigations could not be substantiated, this agency and their methods of operation remained of concern to me. Over the course of the next year, additional concerns continued to come to my attention. The themes of the allegations centered on the lack of responsiveness to making medical decisions and mismanagement or neglect of assets. It was not clear in the beginning, if this was a situation of a new guardianship agency growing too big too fast or if there were designing persons serving in the guardianship agency. I had multiple interactions with this particular agency in an attempt to educate them in their responsibilities. At the time, I had no formal oversight of them and was not privy to their records or anything other than what they discussed with me.

In 2015, I was approached by a local attorney representing a family member of an older adult who was under the guardianship of this particular guardianship agency. I will refer to the guardianship agency as "D." The attorney explained that the family had had numerous issues with "D." He had petitioned the court to remove "D" and he was requesting that our AAA agree to serve as the successor guardian. With my previous issues and concerns relating to "D", along with the information that was presented by this attorney, our agency agreed to accept the appointment.

As the successor guardian, we had access to a detailed review of the previous years of activity of the prior guardian and it became very clear that there had been significant mismanagement of assets. "D" failed to properly inventory, secure, insure, maintain or liquidate the Consumer's home. This home depreciation resulted in a loss of nearly $21,000. "D" also neglected to properly complete the application for veteran's benefits due the older adult. The loss of income over the 22-month period was over $25,000. The Consumer was evicted from one personal care home due to non-payment in the amount of $16,000 and there was a negative balance of $15,000 at the personal care home where the Consumer resided upon our appointment. "D" stopped paying the life insurance premiums resulting in principal being used to cover them. During this time, they continued to take their guardianship fees and attorney fees. As I continued to uncover their mismanagement and the negligence became clear, we worked closely with our county solicitor to have them compensate our Consumer. Their lack of cooperation and lack of acceptance in responsibility, led us to petition the court for an Exceptions to Accounting and Request for Surcharge. Eventually, we did come to an agreement and "D" signed a judgement note to make payments to our Consumer.

Though our local court will no longer appoint to this particular agency, this guardianship agency continues to be in operation. I am aware of other successful petitions to remove this agency on other guardianship appointments. I have offered support and guidance to the family members who have become successor guardians who continue to have a lack of cooperation from "D".

Situations like these are able to happen because of a combination of factors. First and foremost, guardianship is a system serving our most vulnerable older adults, those found to be incapacitated by the court, often with a lack of family or friends, who are essentially at the mercy of the guardians appointed to protect and care for them and their assets.

Our system also has a lack of checks and balances to monitor the activity of the guardian. We have guardianship agencies being appointed with no mandatory background checks, or minimum training requirements to qualify someone to be a guardian. There are a lack of regulatory guidelines and supervising entities, and with exception of court required inventories and annual reports, very little oversight.

There is significant risk potential to an older adult when a family or friend is appointed to serve as a guardian; however, this risk grows exponentially with a professional guardianship agency who serves multiple older adults under guardianship. There are no restrictions on the number of incapacitated persons for whom an agency can serve.

There is also the issue that it is often difficult to find individuals or agencies willing to serve as the guardian. The guardianship responsibilities are significant and require time, resources and expertise to be done properly. Often, there is minimal compensation for the services provided by the guardian.

The guardian is appointed to be the number one advocate, the responsible fiduciary and the substitute medical decision maker working in the best interest of the person for whom they are guardian. With our current lack of background requirements, training, oversight, and funding it is possible for the older adult to be neglected or exploited by the very entity appointed to protect them.

Thank you for this opportunity to provide testimony on this very important topic of older adults and guardianship. The Westmoreland County Area Agency on Aging is committed to serving the older adults in our community and believes that providing excellent guardianship services should be an expectation not an exception. We are hopeful that this attention into guardianship issues helps in establishing the additional safeguards needed to protect all older adults under guardianship.

Additional Statements for the Record

National Council on Disability

An independent federal agency making recommendations to the President and Congress to enhance the quality of life for all Americans with disabilities and their families.

April 27, 2018

Chairman Susan Collins
31 Dirksen Senate Office Building
Washington, DC 20510

Ranking Member Bob Casey
628 Hart Senate Office Building
Washington, DC 20510

Dear Chairman Collins and Ranking Member Casey:

I write on behalf of the National Council on Disability (NCD) to commend you for focusing the work of the committee on the important issue of guardianship. NCD recently released a comprehensive report, *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination*[1]. In the report, NCD examines whether guardianship is protecting seniors and people with disabilities from financial exploitation or making them vulnerable to it, but also explores whether guardianship is compatible with the Americans with Disabilities Act and other national policies that encourage people with disabilities to exercise self-determination and encourage community integration. The report concludes that many of the roughly 1.5 million people currently subject to guardianship would likely benefit from greater access to alternatives that allow them to remain in control of their own lives.

Guardianship is a deeply problematic answer to genuinely difficult questions with which families, social service agencies and courts are all struggling. In our research, we found that:

- Guardianships are often sought without examining whether less-restrictive alternatives are available;
- The due process procedures used are woefully insufficient given the deprivation of rights that results;
- The process for determining whether an individual can make decisions is deeply flawed and often lacks a sufficient legal and scientific basis as evidence;
- Individuals subject to guardianship are too often abused, neglected and exploited by their guardians and that evidence of good outcomes stemming from guardianship is limited; and
- Courts often fail to monitor guardians or to ensure that individuals are able to have their rights restored at the earliest possible opportunity, either because

[1] Available from: https://www.ncd.gov/publications/2018/beyond-guardianship-toward-alternatives

they've regained capacity or an alternative has become available that alleviates the need for guardianship.

Unfortunately, these problems are neither new nor newly discovered. Congress noted many of these same issues congressional hearing more than 30 years ago[2] Since then, almost every state states revised their guardianship statutes in response to news reports of abuse, neglect and financial exploitation by guardians as well as calls for improved due process, more evidence-based capacity determinations and improvements in court monitoring. As Chairman Collins noted in her opening statement ongoing reform efforts continue at the state level, and the Elder Abuse Prevention and Prosecution Act represents a significant effort on the part of the Federal Government to work towards solutions to some of the problems in guardianship. However, NCD's research indicates that it is time to consider a paradigm shift in how we address the need for decision making assistance rather than trying to "fix" guardianship.

Supported decision making (SDM) is emerging as a promising alternative to guardianship that has the potential for better outcomes for individuals with disabilities, and which aligns better with the principles of the Americans with Disabilities Act (ADA). SDM generally occurs when people with disabilities use friends, family members, and professionals to help them understand the everyday situations they face and choices they must make, allowing them to make their own decisions without the need for a substitute decision maker, such as a guardian. SDM works in the same way that most adults make daily decisions—by seeking advice, input, and information from others who are knowledgeable and whom the adult trusts.

Pilot programs funded by the Administration on Community Living (ACL) at the U.S. Department of Health and Human Services have shown that SDM can lead to positive outcomes for participants, including greater community inclusion, improved decision making skills, increased social and support networks, and increased self-confidence, happiness, and willingness to try new experiences. Finally, because SDM allows the individual to retain control while putting in place a group of people to support the person rather than giving complete authority to a single guardian, it may be that SDM is less likely to lead to the kinds of financial exploitation that the Government Accountability Office found and which was described by witnesses at this hearing.[3]

In addition to recommending expanding the use of SDM as a promising alternative to guardianship, NCD puts forward a variety of specific findings and recommendations that we believe will lead to improved outcomes for individuals who need decision making assistance, including ways to expand the use of SDM. I respectfully submit to the Committee's consideration the findings and recommendations from the report as an

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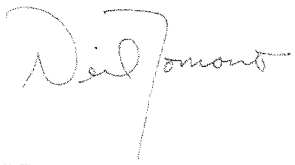
[2] U.S. Congress, 1987, Abuses in Guardianship of the Elderly and Infirm: A National Disgrace: Hearings Before the Subcommittee on Health and Long-Term Care of the Select Committee on Aging, 100th cong., 1st sess., 5-10, 8 accessed January 24, 2018, http://files.eric.ed.gov/fulltext/ED297241.pdf.

[3] United States Government Accountability Office, Elder Abuse: The Extent of Abuse by Guardians Is Unknown, but Some Measures Exist to Help Protect Older Adults, November 2016, accessed January 24, 2018, https:// www.gao.gov/assets/690/681088.pdf.

attachment to this letter. NCD is planning to continue with additional research into guardianship and decision making assistance in the coming year and we look forward to working with this Committee and serving as a resource to you and your staff who are engaged in working on this critical civil rights issue.

Respectfully,



Neil Romano,
Chairman

ATTACHMENT

Findings and Recommendations from NCD's *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination for People with Disabilities*

Full report at: https://ncd.gov/publications/2018/beyond-guardianship-toward-alternatives

Finding 1: There is a lack of data on existing guardianships and newly filed guardianships.

Most states do not track on a statewide basis how many individuals are subject to guardianship, much less describe those guardianships in terms of basic demographic information, whether the guardian is a professional or family guardian, the extent of the guardian's authority, the assets involved, and other basic questions that would help policymakers and stakeholders make determinations about what reforms may be needed in guardianships or where resources should be directed to improve guardianship outcomes for people with disabilities.

Recommendations:

NCD recommends that Congress and the Administration develop initiatives to produce effective and comprehensive data on guardianship. There are two ways production of this data should be approached:

- Federal agencies such as the SSA, the CMS, the VA, SAMHSA, and other relevant agencies should collect data on whether or not individuals they serve are subject to guardianship.
- States should be offered incentives and technical assistance with developing electronic filing and reporting systems that collect basic information about guardianships from the moment a petition is filed. A searchable, computerized system for aggregating information on adult guardianship cases would not only yield better usable data on guardianships, but would also improve that ability of courts to monitor and audit individual guardianships. Systems such as the "My Minnesota Conservator" reporting and data project are already in use in a few states and could

be adopted across the country. Data collected must be detailed enough to allow for drawing conclusions and should include demographics, type of guardianship (limited vs. plenary, guardian over property vs. person, etc.), type of guardian (public guardians, private professional guardian, family guardian), age at which the person was subject to guardianship, court audits, timeliness of reports, amount of funds/property in the estate, and the involvement of the person in federal programs (Social Security benefits, SSI, Medicaid, Medicare, VA benefits, etc.). The data should also include whether the initial petition was contested, whether there is any time limitation to the guardianship, and whether there is any periodic review of the continued need for guardianship.

Finding 2: People with disabilities are widely (and erroneously) seen as less capable of making autonomous decisions than other adults regardless of the actual impact of their disability on their cognitive or decision making abilities. This can lead to guardianship petitions being filed when it is not appropriate and to guardianship being imposed when it is not warranted by the facts and circumstances.

Recommendations:

- The DOJ, in collaboration with the HHS, should issue guidance to states (specifically Adult Protective Services [APS] agencies and probate courts) on their legal obligations pursuant to the ADA. Such guidance should address NCD's position that: 1) the ADA is applicable to guardianship proceedings; 2) the need for assistance with activities of daily living or even with making decisions does not give rise to a presumption of incapacity; and 3) guardianship should be a last resort that is imposed only after less restrictive alternatives have been determined to be inappropriate or ineffective.

- In January 2017, the U.S. Department of Education Office of Special Education and Rehabilitative Services (OSERS) issued school-to-adult transition-related guidance that recognized alternatives to guardianship, including the use of supported decision making and powers of attorney for adult students with disabilities. While this policy development is promising, OSERS needs to do more to ensure consistent

implementation of this guidance across state and local educational agencies—for example, the creation of model supported decision making and powers-of-attorney forms geared toward transition-age youth. School transition teams must inform parents/caregivers and students of less-restrictive decision making support options for adults, rather than promoting the overuse of guardianship or involuntary educational representatives.

- The Department of Education Office of Special Education Programs (OSEP) should instruct Parent Training and Information Centers to prioritize and provide meaningful training on school-to-adult transition and alternatives to guardianship.

- HHS should issue guidance regarding the responsibility of medical professionals and hospitals to accommodate the needs of individuals who may need assistance making medical decisions and to adequately explain procedures and draft documents provided to patients in plain language.

- Although the Federal Government generally leaves the content of medical school training to the accrediting bodies, federal advisory group recommendations and federal grants from CMS, HHS, and other federal agencies can influence the content of medical training and curriculum. Educating medical professionals about the ADA and the need to accommodate people with disabilities, including those with intellectual disabilities and cognitive impairments, should be prioritized as a part of medical training.

- The National Home and Community-Based Services Quality Enterprise (NQE) should include decision making assistance and use of alternatives to guardianship such as supported decision making in their priorities and include best practices as part of its resources, training, and technical assistance.

- The Administration for Community Living (ACL) has funded numerous projects that are geared toward expanding alternatives to guardianship, such as supported decision making. The agency also provides state grants to enhance adult protective services. Such funding should be allocated specifically to assist state adult protective services systems to develop greater awareness of ways to enhance the

self-determination of adults considered vulnerable or in need of services, as well as the availability and use of alternatives to guardianship.

- The Developmental Disabilities Councils, University Centers for Excellence in Developmental Disabilities (UCEDDs), and the Protection and Advocacy (P&A) organizations should link work that has been done on advancing the self-determination of people with ID/DD with avoiding guardianship. There needs to be recognition that the appointment of guardians is not necessarily the preferred outcome for people with disabilities. Such appointments instead can be the result of systems failing to fully recognize people's right to direct their own life and to support them in developing self-determination and communication skills, use and build natural support networks, and have access to less-restrictive alternatives. . UCEDDs in particular have a role in educating physicians, medical professionals, and parents of people with ID/DD on self-determination, SDM, and other alternatives to guardianship.

Finding 3: People with disabilities are often denied due process in guardianship proceedings.

Guardianship is viewed as a benevolent measure that is sought in the best interest of people with disabilities and/or older adults who are seen as needing protection. Guardianship cases are often dispensed with as quickly as possible with little concern for due process or protecting the civil rights of individuals facing guardianship.

Recommendations:

- The Elder Abuse Prevention and Prosecution Act (P.L. 115-70) calls upon the Attorney General to publish best practices for improving guardianship proceedings and model legislation relating to guardianship proceedings for the purpose of preventing elder abuse. The Attorney General's model legislation should incorporate the UGCOPAA, including its provisions for preventing unnecessary guardianships.

- To ensure that due process requirements are met, it is especially important that alleged incapacitated individuals facing guardianship have qualified, independent legal representation that will advocate for the individual's desired outcome, especially if that person expresses a desire to avoid guardianship or objects to the proposed guardian. However, many courts lack sufficient resources to fund this type of representation and families often find that such representation is cost-prohibitive. Federal grant money should be made available to help promote the availability of counsel.

- A state guardianship court improvement program should be funded to assist courts with developing and implementing best practices in guardianship, including training of judges and court personnel on due process rights and less-restrictive alternatives.

- The degree of due process provided in a guardianship matter should not be contingent on the type of disability that is the alleged cause of an individual's incapacity or inability to make and carry out decisions. The DOJ should take the position that such practices are discriminatory on the basis of the ADA.

Finding 4: Capacity determinations often lack a sufficient scientific or evidentiary basis. Courts rely too heavily on physicians who lack the training, knowledge, and information needed to make an accurate determination.

Recommendations:

- National Institute on Disability, Independent Living, and Rehabilitation Research (NIDILRR), National Institutes of Health, and other agencies that fund scientific research should provide grants to researchers who are trying to develop a better understanding of how people make decisions and how a variety of conditions—such as dementia, intellectual disabilities, brain injuries, and other disabilities—impact the ability of individuals to make and implement informed decisions.
- *Capacity* is a social and legal construct that is not necessarily provable or disprovable through scientific methods. Resources also should be geared toward developing functional approaches to capacity assessments that take into account the possibility that someone may need decision making assistance but not necessarily a surrogate or substitute decision maker.

Finding 5: Guardianship is considered protective, but courts often fail to protect individuals.

In some cases, guardians use their position to financially exploit people or subject them to physical neglect and abuse. Courts lack adequate resources, technical infrastructure, and training to monitor guardianships effectively and to hold guardians accountable for the timely and accurate submission of required plans, accountings, and other reports, as well as for conforming to standards of practice for guardians.

Recommendations:

- The court improvement program proposed earlier could also enhance the ability of courts to monitor guardianships and should include the adoption of programs such as My MNConservator, which requires guardians to file reports electronically, allows for the flagging potential problems in filed accountings, and facilitates the periodic audit of guardianship files.

- Although professional and family guardians can both be the perpetrators of abuse in guardianship, there have been several high-profile cases of abuse by professional guardians. In most states, these professionals operate with minimal oversight except by the court. States should be provided with incentives to establish statewide boards that can provide for the accreditation and oversight of professional guardians.
- States should require family guardians to undergo training to ensure they understand their ongoing responsibilities to the person subject to the guardianship and to the court.

Finding 6: Most state statutes require consideration of less-restrictive alternatives, but courts and others in the guardianship system often pay lip service to this requirement.

Courts often find that no suitable alternative exists when, in fact, supported decision making or another alternative might be appropriate.

Recommendations:

- ACL currently funds the National Resource Center for Supported Decision making and several demonstration projects at the state and local levels. These grants should be expanded to be able to fund more geographically- and demographically-diverse projects and pilots that specifically test SDM models and use SDM and the court systems to restore people's rights as a matter of law, particularly for people who are older adults with cognitive decline, people with psychosocial disabilities, and people with severe intellectual disabilities.
- The DOJ should make funding available to train judges in the availability of alternatives to guardianship including, but not limited to, supported decision making. This training should also include information about the home and community-based–services system and the workforce development system so that judges understand the context in which decisions are being made by and for people with disabilities. See Finding 3.

- It's important that states adopt provisions of the UGCOPAA that recognize alternatives to guardianship can be used in place of guardianship even when it is determined that the individual meets the definition of incapacity. DOJ should develop guidance to this effect.

Finding 7: Every state has a process for restoration, but this process is rarely used and can be complex, confusing, and cost-prohibitive.

Data on restorations is seriously lacking, making it impossible to tell how many individuals are in unnecessary guardianship or whether individuals who would like to try to have their rights restored have access to information about their right to restoration, receive an appropriate response to their request for restoration, or have access to resources and representation to assist them in that effort.

Recommendations:

- As a part of the effort to improve data collection and monitoring, electronic filing and auditing systems ought to include data about restoration, including whether the individual was given information about restoration and whether the continued need for guardianship was reviewed by the court.
- The state court improvement program referenced throughout these recommendations should include improvements to the restoration process. DOJ should publish guidance regarding the right to restoration and best practices.
- A grant should be given to the Protection and Advocacy system to provide legal assistance to individuals who are trying to have their rights restored or avoid guardianship.

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