

Written Testimony to the U.S. Senate Special Committee on Aging

**Cathy (Cate) G. Boyko, MPA, Senior Court Research Associate
National Center for State Courts**

I. Introduction

Chair Collins, Ranking Member Casey, and Members of the Senate Special Committee on Aging, thank you for inviting me here to discuss the efforts to overhaul the guardianship and conservatorship process. Many older Americans rely upon these systems to provide for their safety and protect their financial interests when they are no longer able to do so independently. My name is Cate Boyko, and I am a Senior Court Research Associate and the Director of the Center for Elders and the Courts¹ at the National Center for State Courts (“the National Center”). The National Center is a non-profit organization with headquarters in Williamsburg, Virginia, whose mission is to promote the rule of law and to improve the administration of justice in state courts and courts around the world.

My areas of expertise include elder abuse and exploitation, and adult guardianships and conservatorships. Because terminology varies from state to state, the NCSC’s Court Statistics Project uses generalized terms. Guardianships generally refers to those cases in which the court has appointed an individual to handle the medical and well-being issues of an incapacitated person, while conservatorships refer to those cases in which an individual has been appointed by the court to manage the finances of another person.

The National Center works with the highest courts of the states and territories, and their administrative offices to compile and report data across a broad range of general case types, one of which is guardianship and conservatorship. We estimate that there are approximately 1.3 million active adult guardianship or conservatorship cases. We also estimate that our state courts oversee at least \$50 billion of assets under adult conservatorships nationally. Court practices tend to be highly localized and variable,

¹ See www.eldersandcourts.org

sometimes as a matter of practice and sometimes as a matter of the applicable state laws. There are, however, national standards and innovative practices that have implications throughout the United States. The issues that are most relevant for this testimony are:

- Data;
- Modernization and auditing;
- Differentiated case management strategies;
- Training and assistance for nonprofessional conservators; and
- Collaboration.

I will address each of these matters below.

II. Data

The National Center's Court Statistics Project annually collects state court data on a variety of case types, including adult guardianships and conservatorships. However, as noted in a number of publications, the quality of the national data is highly problematic. To determine if the quality of data had improved and to explore challenges in documenting adult conservator exploitation, the NCSC undertook a national survey of administrative offices of the courts in fall 2016.² The project team also collected additional information from some individual states that have been working to reform and improve their guardianship/ conservatorship processes.

For the survey, team members contacted 56 designated state court Guardianship Points of Contacts (POCs) in each state, the District of Columbia, and the territories to assess the extent of data collection efforts. For the most recent year available (2015), each state/territory was asked to report:

- New guardianship and conservatorship cases filed;

² <http://www.eldersandcourts.org/~media/Microsites/Files/cec/OVC%20Briefs/OVC-Brief-7.ashx>

This series of background briefs was produced by the National Center for State Courts and its partners under Grant No. 2015-VF-GX-K019, awarded by the Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice. The opinions, findings, and conclusions or recommendations expressed in this report are those of the contributors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

- Total active guardianship and conservatorship cases;
- Total dollar value for conservatorship cases;
- Cases in which a conservator was removed for cause;
- Cases in which a conservator was criminally charged; and
- Barriers or hurdles to reporting any of the above data elements.

Fifty-one states and territories responded (91%). Of the respondents, four states responded that they do not have administrative control over guardianship cases or do not have an available data expert. Accordingly, these states were not able to provide further information (Kansas, Maine, Oklahoma, Rhode Island). Eight states responded with no data but provided qualitative information regarding reporting barriers. The remaining 39 states (76%) were able to provide some level of data regarding overall guardianship/conservatorship cases. No state was able to fully report all data elements in the detail requested.

The most serious issues raised through the survey and correspondence with court guardianship POCs revealed three themes: local court authority, lack of standardized reporting, and limited technology.

The National Probate Court Standards (2013) noted that 17 states have specialized probate courts in all or a few counties. Often these specialized courts are locally administered and not under the authority of the state court administrative office. In the remaining 33 states, the District of Columbia, and the territories, jurisdiction over probate and related issues lies within courts of general jurisdiction. To confuse matters more, not all probate courts oversee adult guardianships/ conservatorships. Furthermore, not all states require a law-trained judge to oversee these types of cases. For example, in North Carolina elected county clerks handle these cases. In some courts in Texas constitutional judges, who may or may not be law-trained, are responsible for adult guardianship/conservatorship cases. The experiences of individuals and their family members is highly dependent on the judicial officer handling the hearings and the practices embedded in the local court. The variations within and between localities, even within the same state, compound the challenges

associated with tracking and documenting guardianship/ conservatorship cases and help explain the limited data available at the state and national level. Some state-level administrative offices do not have authority to dictate types of data collected by locally funded courts. Local courts may not collect this information, or only have details available in paper files. There is no efficient way to collect state-level data, as each case file would have to be reviewed.

There are states that have taken on reviewing each case and updating records and accompanying data. Texas, Nevada, and New Mexico are reviewing case files to determine if the case should still be open, what records or accountings are missing and needed follow-up. Texas, Indiana and Pennsylvania have all established statewide guardianship/conservatorship registry systems to help them track and monitor these cases.

Determining the open or closed status of a case, although very basic, is an essential step in the process for court reform in guardianship and conservatorship case management and oversight. This should be the starting point for any court that cannot easily identify this status.

III. Modernization and Auditing

Most state laws require conservators to submit an initial inventory and annual accountings. Beyond those requirements, it is up to individual courts to track submissions, review accountings, and take actions when problems arise. At one end of the spectrum, some courts fail to record the receipt of annual accountings, do not follow up when conservators miss submission deadlines, and approve accountings without any examination or audit. This is in stark contrast to higher performing courts that may require electronic submission of individual transactions, schedule “show cause” hearings when conservators miss their accounting deadlines and subject each accounting to a professional audit. To date, the Minnesota Judicial Branch leads the nation in its use of modern tools to improve court oversight of conservatorships.

Minnesota is the only state that requires all conservators to use software to electronically submit transaction level data.³ They have a centralized team of professional auditors to audit those accountings. The National Center worked with the Minnesota Judicial Branch, with funding from the State Justice Institute, on the Conservatorship Accountability Project (CAP). There are two aspects of CAP, the use of predictive analytics to develop a set of risk indicators, and technical assistance to help other states pilot similar types of software. One of the outcomes of the National Center’s work is to examine whether better tools can be developed that help courts predict high risk cases for the purposes of a speedy audit and follow-up court actions to address the problem.

In this context, the National Center analyzed over 1,300 audited accountings from Minnesota. Our goal was to identify specific factors that predicted a level 4 ⁴audit finding—cases in which the auditor has a “concern of loss” (8.3% of the accountings). Examples of issues that arise in level 4 cases include cash withdrawals, missing income, unauthorized purchases of high-end items, loans from the protected person’s funds, fraudulent documentation, and excessive fees. In some cases, there are legitimate reasons or data entry errors that explain the transactions. In other cases, the transactions noted in the level 4 audit are part of larger efforts to exploit or steal the protected person’s assets. For example, checks may have been written to family members to provide services that never transpired, or the protected person’s assets were used to purchase a vehicle for the conservator. For this reason, the National Center research team focused on the subset of level 4 cases. We used a variety of sophisticated statistical tools to ultimately develop ten risk indicators that successfully predicted 80% of the level 4 audits. The indicators are a huge leap from the anecdotal information that has predominated the literature on “red flags” associated with conservatorships. For example, we found that more than 12 separate vehicle expense transactions in a year was a predictor of a level 4 finding. The ten risk indicators were

³ See https://www.aging.senate.gov/imo/media/doc/SCA_Boyko_11_30_16.pdf

⁴ See page 8 for explanation of audit levels:
https://www.aging.senate.gov/imo/media/doc/SCA_Boyko_11_30_16.pdf

programmed into the Minnesota software for the purposes of testing their validity and refining the indicators as needed.

To determine the validity of the risk indicators, the National Center analyzed 13 months of data (November 2016 to October 2017) from Minnesota. The results, unfortunately, were not as promising as we had hoped. Although the risk indicators did provide a dimension of risk between cases, Level 4 cases had more risk indicators than level 3 and level 3 more than level 2 etc., there was not a clear differentiation between level 4 cases and level 1,2, and 3 cases. Level 4 cases, concern of loss or exploitation, were not identified with a substantially higher number of risk indicators.

In the CAP project, the risk was evaluated comparing each accounting to other accountings; case A to case B to case C. The project identified that between cases, consistency and completeness of data can vary. For example, in case A income from Social Security may be entered monthly. However, in Case B, the income from Social Security is entered quarterly, and then in Case C it is entered annually. Establishing comparisons within a case, month-to-month, proved difficult based on the limited data available in this project (13 months). However, these findings led to looking for alternate ways to identify risk in conservatorship cases, such as using existing financial data analytics monitoring. The National Center has received funding for a pilot project to test the concept of the Rapid Response project.

The Rapid Response Project proposes to transform the conservatorship system in the courts⁵. With funding from the Office for Victims of Crime, the National Center will work with two courts to pilot the concept where conservators would be required to sign up with a financial monitoring company that will identify suspicious transactions based on personal financial profiles created through machine learning. The company will send alerts to the court's Rapid Response team. The team will respond to each instance and resolve the issues

⁵See http://www.eldersandcourts.org/~media/Microsites/Files/cec/Rapid-Response-Conservatorship_060818.ashx

through education, removal of exploitative conservators, repayment of assets, and referral to investigative agencies in a very quick timeframe.

The Conservatorship Accountability Project included technical assistance to help other states adopt software similar to Minnesota. To this end, the National Center worked with 5 states—Indiana, Iowa, Nevada, New Mexico, and Texas—to develop pilot programs. Each state court’s information technology division had access to Minnesota’s source code for the goal of adapting the software to meet the needs of their state. This component of the project was hindered by the fact that states have different terminology, laws, business practices, and case management systems, thus creating obstacles for the implementation of the Minnesota software. Additionally, the lack of resources and competing priorities led to a halt in software development and implementation in two of the five states—Iowa and New Mexico. Texas has been the most successful of the pilots and is developing their own automated tool, based on the Minnesota model, to allow guardians and conservators to file their annual reports electronically. Indiana and Nevada continue to work on the possibility of implementing an online system.

Modernization of the process to improve oversight and efficiencies should be the goal. While funding remains the primary challenge, the potential of combining technology with predictive analytics and professional auditing is enormous. Our Center for Elders and the Courts, working with the Conference of Chief Justices and Conference of State Court Administrators, drafted the *Adult Guardianship Initiative*.⁶ The Initiative envisions a national resource center that would help states report basic guardianship and conservatorship data, develop software or adapt the Rapid Response concept, and draft judicial response protocols that emphasize guardian and conservator accountability and the return of assets that have been misappropriated.

IV. Differentiated Case Management Strategies

The National Center has worked with courts nationwide to apply the concept of “differentiated case management” or DCM to a wide variety of case types. The goal of DCM is

⁶ See <http://eldersandcourts.org/~media/Microsites/Files/cec/Guardianship%20Strategic%20Action%20Plan%202016.ashx>.

to implement processes that lead to timely and just decisions consistent with the needs of each case and to optimize the use of court resources. For example, conservatorship petitions that are contested when filed or the subject of repeated family complaints may require additional resources and oversight than uncontested cases. Similarly, accountings that are “flagged” because they include transactions that have been empirically linked to potential exploitation deserve greater scrutiny than accountings without such transactions. DCM may be practiced formally or informally, and in the case of conservatorships, is aimed at preventing exploitation. An example of the informal use of DCM is demonstrated by the Richland County Probate Court in South Carolina, which uses some of the following tools:

- In cases in which the nominated conservator has difficulty securing a bond or has a questionable credit history and there are no other qualified candidates willing or able to serve, the judge may order the conservator to establish a restricted account, which limits or prevents conservators from withdrawing funds;
- The judge may require conservators who appear to have difficulties handling their financial responsibilities to report more frequently to the court, submit monthly bank statements, establish automatic payments to service providers, and prove that the funds were spent appropriately;
- The judge may send a special visitor or guardian ad litem to the residence to verify certain expenditures and to review specific transactions. A full audit of current and past accountings can be ordered;
- When an expenditure is considered inappropriate, the judge may require a hearing to receive testimony on the issue. If funds were misappropriated, the judge may remove the conservator, set up a repayment schedule for the conservator, and hold a conservator in contempt if warranted;
- In cases where assets were misappropriated, in addition to referring the case for prosecution in the most egregious of circumstances, the judge may take several actions to prevent further exploitation and to provide relief to the protected person. For example, the judge may freeze assets, order a deed to be voided if real estate was transferred without permission from the court and to the disadvantage

of the protected person, and order the repayment of funds if a vehicle was transferred without receiving full market value.

The DCM strategies described above are an outcome of an individual judge's leadership and commitment to this issue. But generally, the National Center has found that judges and judicial officers often handle conservatorships as part of a larger caseload and do not have background or training that would allow them to proactively and quickly respond to exploitation. For this reason, the National Center is collaborating with the National College of Probate Judges on a project to develop a guide for judges on responding to evidence of abuse, neglect or exploitation in adult guardianship and conservatorship cases.

The courts' abilities to address exploitation by conservators is the subject of great concern, and federal agencies and state courts have recently begun to grapple with the problem. In 2015, the Office for Victims of Crime entered into a cooperative agreement with the National Center to carry out a study on conservatorship exploitation and convene a national multidisciplinary forum. The National Center worked with the American Bar Association, the Virginia Tech Center for Gerontology, and the Minnesota Judicial Branch to carry out the project. The project included several research components: the collection and assessment of data, the identification of innovative programs, an analysis of judicial responses to level 4 cases in Minnesota, and an exploration of the experiences of victims of conservatorship exploitation. The national forum, which took place in March 2017, resulted in recommendations that address data issues as well as judicial monitoring practices, systemic approaches to detect exploitation, laws and practices to address and prevent further exploitation, and how to safeguard the rights and assets of individuals victimized by conservator exploitation. The final report is under review by the Office for Victims of Crime. Eight briefs created for the project are available⁷ (see Appendix.) The purpose of these eight briefs is to raise awareness of issues in conservatorship cases and promote state legislation and court rules; raise awareness of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act (UGCOPAA) provisions; provide a basis for education and training

⁷ <http://www.eldersandcourts.org/Other-Resources.aspx>

of all stakeholders; focus Working Interdisciplinary Network of Guardianship Stakeholders (WINGS) discussions; and inform programmatic and funding initiatives at state and federal level.

V. Training and Assistance

There are three types of guardians and conservators: public, professional and family/personal. The majority of guardians and conservators are family members, who may or may not have the experience and background to serve as competent guardians and conservators. Most courts provide a basic level of instruction, usually through a written handbook or video. Conservators may also be able to find resources online, such as the free publication from the Consumer Financial Protection Bureau, *Managing Someone Else's Money: Help for Court-Appointed Guardians of Property and Conservators*.⁸ The National Guardianship Association's, *The Fundamentals of Guardianship: What Every Guardian Should Know*,⁹ is a great resource for guardians at minimal cost. Some courts offer in-person training sessions, usually sponsored by members of the probate bar or professional conservators. For example, the District of Columbia Superior Court's Probate Division offers monthly seminars for the public on how to prepare an inventory and offers tips on handling the finances of a vulnerable person and has recently opened a more extensive self-help center providing free legal assistance in adult guardianship and conservatorship cases.

Training opportunities tend to be offered on a court-by-court basis and depend on the resources available in the community. But this is beginning to change as more states implement training programs such as those that emerged from an innovative partnership between the North Dakota Supreme Court and the National Center. The North Dakota Supreme Court determined that one of the challenges in getting people to serve as guardians or conservators was the lack of user-friendly resources on the basic roles and responsibilities required of the position. The North Dakota-National Center partnership resulted in an interactive online course that is free and includes exercises and scenarios that require the

⁸ Available at http://files.consumerfinance.gov/f/201310_cfpb_lay_fiduciary_guides_guardians.pdf.

⁹ <https://www.americanbar.org/products/inv/book/263049081/>

learner to participate in decision making that supports the interests of the protected person.¹⁰ Minnesota¹¹ and Texas¹² have also partnered with the National Center to develop similar courses. These courses can be revisited as frequently as desired and are available around the clock. The courses can be easily modified as statutes or court practices change.

Currently, the National Center, through a contract with the U.S. Department of Justice's Elder Justice Initiative, is developing an online interactive course. The National Center is partnering with the American Bar Association to create and deliver *Enhancing Choice and Fulfilling Duties: National Training Resource on Decision Support and Guardianship*. The interactive course will focus on the range of decision supports, alternatives to guardianship and conservatorship, and best practices in guardianship and conservatorship. While practices vary from state to state, the National Probate Court Standards and National Guardianship Standards provide a template on best practices. Online interactive training based on adult learning instructional design, though dependent on access to the Internet, is highly accessible to the majority of the population.

VI. Collaboration

When discussing guardianship and conservatorship reform, it is imperative to mention Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS). Courts have begun to recognize that to make real change in the guardianship and conservatorship process, they need to collaborate with involved stakeholders. The National Center's High-Performance Court Framework states that courts should "engage in a vigorous campaign to organize and mobilize partners." To date 27 states and territories have created WINGS or WINGS like groups to enhance communication among state entities advance guardianship and conservatorship reform.¹³

¹⁰ The course can be found at <http://ndtraining.org/course/guardianship-training/>.

¹¹ The course can be found at <https://mng.courtlms.org/>

¹² The course can be found at <https://guardianship-txcourts.talentlms.com/catalog/info/id:144>

¹³ Alabama, Alaska, District of Columbia, Florida, Georgia, Guam, Idaho, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, New York, North Carolina, Ohio, Oregon, Pennsylvania, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin and Virginia.

WINGS are multidisciplinary entities for problem-solving that bring together key stakeholders to formulate and act on strategic plans. The Social Security Administration (SSA) has initiated a structured set of contacts with state WINGS groups by appointing a regional “SSA WINGS representative” for each of the 27 states. The intent is to enhance coordination between state courts with guardianship jurisdiction and the SSA representative payment program. SSA sponsors a quarterly or periodic conference call with WINGS state coordinators and SSA representatives. These calls resulted in the development by SSA of a set of judicial training slides called Social Security Representative Payees: Judicial Training Guide, which is currently in the final stages of review. SSA has indicated willingness to appoint additional regional representatives to upcoming new state WINGS under the Elder Justice Innovation Grant program.

VII. Conclusions

The National Center, other non-profit organizations, and individual states and territories are making substantial efforts to reform and improve guardianship and conservatorship processes. The Conference of Chief Justices and the Conference of State Court Administrators support these efforts and have passed a resolution urging Congress to appropriate funds for the Elder Abuse Prevention and Prosecution Act.¹⁴ This testimony mentions some of the current and potential reforms including modernization, differentiated case management, training and collaboration.

Data. Comprehensive case-level data are necessary to document case events and provide even a minimal level of accountability. At the system level, data are necessary to make improvements to the process and to measure effectiveness. For persons subject to guardianship and conservatorship and those who strive to safeguard their assets, reliable and accurate data are the crucial first step to detect late, absent, or irregular accountings that can tip court staff into follow-up inquiries and stop exploitation.

Modernization. The guardianship and conservatorship processes can be vastly improved through modernization. Many of the tools exist or are already in development, but what is

¹⁴ See <https://www.ncsc.org/~/media/Microsites/Files/CCJ/Resolutions/08222018-Congress-Appropriate-Funds-Elder-Abuse.ashx>

lacking are the resources to modernize systems on a grand scale. In terms of monitoring and holding conservators accountable, the necessary ingredients are: development of common data elements and basic case review to determine open and closed cases, use of financial monitoring analytics and rapid response teams or transaction-based accounting software (preferably integrated with court case management systems) coupled with a team of professionals auditing conservatorship accountings; and trained judges who have the tools to prevent exploitation and quickly restore assets when funds are misappropriated. Modernization is not a cheap proposition, but it will bring accountability and efficiencies to the courts and greatly enhance the protection of assets of some of our nation's most vulnerable persons.

Differentiated Case Management. Differentiated case management is a "hands on" approach that recognizes the uniqueness of each case. As such, greater scrutiny of a subset of cases can both prevent exploitation and provide an early warning system when exploitation does occur. By developing different levels of oversight based on the circumstances of the case, competent and honest conservators are not hindered by unnecessary layers of oversight, while those conservators who may have little knowledge of fiduciary practices or have less than honorable intentions are subject to additional and more frequent levels of monitoring.

Training. Technology, especially as it pertains to the development of online courses using adult learning instructional design, is a game changer that has the potential to reach millions of persons. The new technologies incorporate interactive exercises, including scenarios that require learners to make decisions and offer instant feedback as to whether those decisions were the most appropriate given the circumstances.

Collaboration. Courts have increasingly embraced collaborative approaches that introduce multidisciplinary perspectives to specific problems, such as guardianships and conservatorships. The WINGS concept continues to expand to new states and territories and is a driving force of change.