

Brief No. 1

EXAMPLES OF CONSERVATOR EXPLOITATION: AN OVERVIEW

This is the first in a series of eight Background Briefs produced by the National Center for State Courts and its partners under a project funded by the U.S. Department of Justice Office for Victims of Crime to assess the scope of conservator exploitation and explore its impact on victims.

One objective of the OVC Conservator Exploitation Project was to “determine the consequences of conservatorship abuse.”

SUMMARY OF FINDINGS

One objective of the OVC Conservator Exploitation Project was to “determine the consequences of conservatorship abuse.” The Virginia Tech Center for Gerontology (VTCfG) led this component of the project, compiling descriptions of recent conservator exploitation cases that received media attention and analyzing nine individual cases that presented the dynamics, processes, and impacts of conservator exploitation on victims and their families.

Key Findings:

1. There was more attention by the media to exploitation by professional conservators than to exploitation by family member conservators, perhaps because professional exploitation cases usually involved multiple people under the conservator’s care and the aggregated dollar amount was typically high.
2. In many cases of exploitation, the estate was plundered prior to detection of the problem itself or before authorities with the power to intervene were notified.
3. Family members affected by their relative’s exploitation were often aggrieved, resulting in the mobilization of families advocating for systemic change.

NATIONWIDE MEDIA SEARCH FOR CASES

While media attention to exploitation by guardians continues to appear in news accounts, the investigation by the VTCfG was a systematic search of national media outlets for reports of conservator exploitation cases that appeared in online media outlets from the period of July 1, 2015 through December 31, 2016. Case information is derived from the media reports, and is not representative of all conservatorship cases.

Who is Being Exploited

The project team identified twenty-two conservatorship exploitation media articles that represented twenty-seven different cases of conservator exploitation. Additional cases that occurred prior to 2015 were identified to illustrate specific types of conservator exploitation and that were ongoing prior to the commencement of the study period. Cases involved mostly older individuals (average age of 82 years old); most of the victims were women, and one-half of the victims lived in care facilities.

Who is Exploiting

Twenty-six unique conservator perpetrators were identified from 22 conservatorship articles. The perpetrators were mostly males with an average age of 52 years. Eighteen perpetrators were non-family conservators, six were family members, and two were appointed as fiduciaries.

Mechanism of Exploitation

Analyses revealed pockets of conflict of interest that created the occasion for exploitation. Some conservators worked off a profile of older adults and their families for whom conservatorship was relatively easy to obtain and whose estate was relatively easy to exploit.

Disposition

The media reported that criminal charges were filed against the conservator in nine of the twenty-seven cases.

Of these nine cases, three conservators were formally convicted.

CASE HIGHLIGHTS

Virginia: The Roanoke Times (July 7, 2016), Family member conservator, embezzlement charge

Medical doctors deemed Bill Lee (victim) incapacitated and recommended the appointment of a conservator. One of his daughters was appointed a conservator to help with his finances. Mr. Lee believed that this action was unwarranted and went to court to restore his rights. The judge ruled that the conservatorship was necessary, and the order remained in place. Mr. Lee, a veteran, resides in a retirement facility and is not allowed on the property of his businesses because the courts agreed to bar him from the properties per his daughter's request. At the time of interview, Mr. Lee's daughter was charged with embezzlement and exploitation and was awaiting trial.

Texas: Texas Observer (July 6, 2016), A professional conservator and the largest fine ever issued by the Guardianship Commission

Eric Watts, a professional conservator and owner of West Texas Peace of Mind, a guardianship company, was appointed the conservator of an older woman in Scurry County. Mr. Watts began selling off pieces of her property, ostensibly to put cash into her estate. Instead, he kept proceeds from the sale of the estate for himself. Over the course of the conservatorship, Mr. Watts stopped visiting the client and paying her nursing home bills. The ombudswoman at the nursing facility contacted the Guardianship Certification Board and voiced these complaints. The board placed Mr. Watts on probation and ordered him to pay \$17,500 in past due bills and to visit the individual subject to guardianship more often. Mr. Watts eventually lost his guardianship license because the nursing home bills went unpaid.

All the cases that Mr. Watts controlled were ultimately transferred to Sarah Watts, his wife and professional conservator, and her business, Caprock Eldercare. The state received complaints from family members that Ms. Watts withheld money from accounts and was not visiting individuals for whom she was responsible. Some individuals lost their Medicaid and Social Security

benefits because she failed to submit the paperwork for them. Family members and Adult Protective Services attempted to contact Lubbock County Judge Tom Head with complaints, but nothing was done. Ms. Watts' guardianship license eventually expired, and the Guardianship Commission declared her ineligible for license renewal. The Guardianship Commission levied a \$25,500 (\$500 for each of fifty-one clients) fine against her.

Florida: Palm Beach Post (November 11, 2016), Professional conservator, multiple system reforms
Judge Martin Collin married professional conservator Elizabeth Savitt. Judge Collin did not adjudicate cases involving his wife but was well connected to other probate judges who did. Over time, Ms. Savitt took money from the estates of individuals for whom she was the conservator, double billing accounts. In one case, Ms. Savitt was accused of stealing over \$400,000 from one of her older clients. Judge Collin was removed as a probate judge and as one of two coordinators of the Eldercaring Coordination Pilot Program by Chief Circuit Judge Jeffrey Colbath after a Palm Beach Post investigation revealed that money from individuals subject to conservatorship flowed into his household via Ms. Savitt. At the time of the interview, families were still attempting to regain assets taken by Ms. Savitt. This case was the impetus for:

1. a rotation of judges hearing conservatorship cases,
2. in-house training for probate judges and court staff,
3. the establishment of a guardianship wheel to provide random assignment of professional guardians to cases, and,
4. standardization of billing practices for guardians and attorneys.

Ohio: The Columbus Dispatch (November 29, 2015), Professional conservator, tipping point for mandatory training for all conservators

Paul Kormanik served as a professional conservator for over 400 individuals in Ohio. The courts found that Mr. Kormanik stole over \$40,000 from four individuals subject to guardianship. One of the victim's family members stated, "In the entire time he was my mother's guardian, he never once met her." Another victim lacked

proper medical care at the end of his life because Mr. Kormanik failed to submit the proper forms for Medicaid. An investigation by The Columbus Dispatch reporters uncovered Mr. Kormanik's actions and large caseload of individuals subject to guardianship, which were voiced to the Ohio Supreme Court as early as 2007. Mr. Kormanik pled guilty to 10 counts of the theft of elderly or disabled persons and tampering with records. Mr. Kormanik committed suicide prior to his sentencing date. After the 400 individuals subject to guardianship were removed from his care, the court systems encountered problems finding new conservators because of the high demand for guardians in Ohio (there is no public guardian program in the state). At the time of the media report, family members affected by Mr. Kormanik's actions were still in turmoil after his apparent suicide: some families had exhausted personal funds to sue Mr. Kormanik's estate in an attempt to regain lost assets.

Nebraska: Omaha World Herald (October 15, 2014), Professional conservator conviction, creation of the Nebraska Office of the Public Guardian

Judith Widener was a court-appointed conservator and owner of Safe Haven, a guardianship company. During an audit of the Assistance to the Aged, Blind, and Disabled Program in 2013, state auditors discovered issues pertaining to unfiled annual reports on accounts and condition of clients. State auditors contacted the Scotts Bluff County Attorney about the claims, who then suspended bank accounts for Ms. Widener's business. The county attorney's office discovered that Ms. Widener had stolen over \$25,000 from individuals for whom she was the conservator. She was sentenced to 180 days in jail, payment of \$25,000 in restitution, removal as conservator in all cases, and mandated to write apology letters to all the individuals she exploited. Information was unavailable about the effects of her actions on her clients; however, this case prompted the development of the Nebraska Office of the Public Guardian.

California: Court document found in media search (August 4, 2014), Family member conservator, court ruling

Thelma Gums had various medical problems, and doctors determined that she was unable to provide for her own food, shelter, clothing, and medical needs. The court

appointed her daughter, Karen Gums, as conservator. Other family members petitioned the court after they discovered that Ms. Karen Gums had signed over her mother's residential property to herself. Ms. Thelma Gums refuted this claim and stated that she would never give her residential property to one daughter and exclude her other two daughters. The court removed Ms. Karen Gums as conservator after a court determined that she was financially exploiting her mother. The court appointed the Alameda County Public Guardian as conservator; the residential property was returned to the estate of Ms. Thelma Gums.

Oregon: The Oregonian (February 25, 2012), Professional conservator, promotion of Peter Falk Bill in Washington State

Benjamin Alfano was an Air Force veteran and former FBI Agent who was diagnosed with multiple sclerosis in the 1970s. Mr. Alfano moved into an assisted living facility (ALF) and received help from his youngest daughter, Kristina Plagmann. Soon after his move, Ms. Plagmann attempted to gain conservatorship of her father, but disagreements within the family led the court to appoint the Oregon Department of Veteran Affairs (ODVA) as Mr. Alfano's conservator. Later that year, Mr. Alfano was struck by a vehicle and suffered major injuries, resulting in amputation of his lower left leg. Mr. Alfano was awarded a \$527,000 settlement.

Because of the extent of his injuries, his family became more involved with his care. They noticed their father's vulnerability after multiple exploitive attempts by individuals working for the ALF and requested the transfer of temporary guardianship from ODVA to his oldest son, Steven Alfano, because the ODVA was not doing enough to protect his father. ODVA fought back and recommended the appointment of professional conservator, Chris Farley, as Mr. Alfano's permanent conservator. In December 2010, a Washington County Circuit Judge appointed Mr. Farley as Mr. Alfano's permanent conservator. In the middle of the night, Mr. Farley removed Mr. Alfano from the ALF in which he lived and took him to another ALF far from his family. Mr. Farley further isolated Mr. Alfano from his family and drained his funds. Mary Alfano Lupton, Mr. Alfano's youngest daughter, spent all her assets for legal fees in

an unsuccessful attempt to become his conservator. Mr. Alfano died in 2011; Mr. Farley was not charged with any crimes.

Nevada: Las Vegas Review Journal (May 28, 2014), Professional conservator, multiple system reform efforts

Jared Shafer was a professional conservator and owner of Professional Fiduciary Services, an organization with employees who helped him manage guardianships and conservatorships. One of his employees, Patience Bristol, exploited persons whom she served, stealing over \$200,000 from clients. Ms. Bristol was found guilty of a single charge of the exploitation of a vulnerable adult, sentenced three to eight years in prison, and ordered to pay back \$160,000 in restitution to individuals whom she exploited. The reporter and family members assert that Mr. Shafer was the mastermind behind the exploitation, which caused enormous harm to victims and their family members alike, although no criminal charges have been brought against Mr. Shafer.

The Bristol case was the impetus for reform efforts in the Nevada guardianship system, including the creation of a Supreme Court Commission on Guardianship that proposed policy changes before the 2017 Nevada Legislature that include:

1. giving all individuals subject to guardianship the right to an attorney;
2. providing independent investigators and accountants to help detect and prevent fraud and abuse in conservatorship cases;
3. reining in fees charged by private conservators;
4. prohibiting conservators from selling the assets of an individual subject to guardianship without prior court approval from a judge; and
5. implementing a conservatorship Bill of Rights for individuals subject to conservatorship.

Minnesota: Star Tribune (July 13, 2015), Professional guardian, federal case involving conviction

Stephan Grisham was a professional guardian and president of Alternate Decision Makers, Inc. As early as 2012, Mr. Grisham began stealing from his clients to help finance his gambling addiction. In 2013, the Department

of Veterans Affairs began investigating Mr. Grisham because of his mishandling of a veteran's finances. During the investigation, he resigned as president of Alternate Decision Makers, Inc., and gave up his caseload of individuals subject to guardianship. Lawyers and employees of Alternate Decision Makers, Inc. confronted Mr. Grisham with evidence of wrongdoing and turned him in to law enforcement. During proceedings in Federal court, Mr. Grisham confessed to stealing \$120,000 from an unknown number of persons subject to guardianship over a two-year period. Mr. Grisham pled guilty to one count of misappropriation by a fiduciary and was sentenced to a year in prison. Information pertaining to victims from the case was unavailable.

INTERVIEWS WITH FAMILY MEMBERS AND REPORTERS

Some family members of victims who experienced conservator exploitation were unwilling to discuss their engagement with the conservatorship system. Conversely, other families were eager to share their experiences, hoping to right wrongs suffered by their relatives and themselves and to ensure that such situations never happen again. The nine interviews with reporters and five interviews with family members associated with cases, as well as a review of the media articles, revealed similarities across cases:

1. Along with financial exploitation, persons under conservatorship were isolated from their families, neglected, and placed in living conditions to which they were unaccustomed.
2. Family members with relatives who were exploited by professional conservators were truly aggrieved and some have mobilized. By the time family members brought suit against the conservator (using their own money), the estate was usually drained. In addition, the conservator would use money from the estate of an individual to escalate family turmoil as well as to fight the suit brought on by family members (and then charge the estate).
3. A small number of professional conservators worked off a profile of vulnerable adults and their families that they used to target and exploit individuals under conservatorship. These

conservators amassed high caseloads and targeted vulnerable adults with valuable estates and dysfunction within their families.

4. Lack of oversight in conservatorship cases created “a perfect storm” for people who sought to exploit vulnerable adults using the modus operandi of conservatorship or for current conservators to take advantage of an opportunity to exploit.
5. In most cases reported in the media, conservators were not prosecuted with criminal charges.

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Brief No. 2

CONSERVATOR EXPLOITATION IN MINNESOTA - AN ANALYSIS OF JUDICIAL RESPONSE -

This is the second in a series of eight Background Briefs produced by the National Center for State Courts and its partners under a project funded by the U.S. Department of Justice Office for Victims of Crime to assess the scope of conservator exploitation and explore its impact on victims.

Judicial discretion is likely a key factor in determining what constitutes exploitation. The most common judicial responses to exploitation were the removal of conservators and the issuance of orders to repay the estate of the protected person.

BACKGROUND

Minnesota is the only state in the country that mandates that conservators record and submit all financial transactions through its software application (MyMNConservator). This innovation is coupled with a centralized professional auditing team—the Conservator Account Auditing Program (CAAP)—which is located in the Minnesota Judicial Branch. The CAAP team audits the first and every fourth annual accounting and audits additional cases upon the request of District Courts. Audits are extensive reviews of the accounting and supporting third party documentation, which makes the program inherently superior to cursory court reviews that are more typical throughout the United States.

CAAP uses a four-point scale to summarize audit findings. A level 1 finding concludes that there are no issues with the accounting, whereas a level 4 finding denotes a “concern of loss.” A “concern of loss” includes a variety of issues, such as loans given by the individual subject to conservatorship, comingling of funds, large and/or unusual expenditures made without court approval, and expenditures that are not in the individual’s

best interest. In these cases, the auditor may recommend that the court order repayment of funds to the individual and/or the removal of the conservator. The CAAP auditors also take into account additional factors, such as the lack of supporting documentation and conservator failure to respond to multiple requests in a timely manner. The auditors file the audit reports with the court that has jurisdiction over the case and they are made available to the conservator and judges.

The project team reviewed and coded court documents associated with level 4 audits to determine court responses. This Background Brief focuses on 139 adult conservatorship cases with recorded court outcomes audited between June 2012 and November 2015. The project team addressed two issues before the data were analyzed:

1. What actions do judges take when auditors find a “concern of loss”?
2. How is “exploitation” defined and measured?

Judicial Actions

Minnesota has 87 county District Courts—only Hennepin and Ramsey counties have specialized probate judges and judicial officers (referees) who handle adult guardianship and conservatorship cases. Outside of these two counties, judges handle conservatorship cases as part of a general jurisdiction docket that may consist of a variety of criminal, civil, probate and family matters. In this study, there were 61 different judges who held outcome hearings concerning the 139 level 4 audit reports.

Minnesota Court Administration Process states that Court Administration will set a hearing to address the issues in the audit report, as recommended by the CAAP team. If a hearing is held, there are a variety of actions the judge may take:

- Referring the case to prosecution for consideration of criminal charges
- Removing the conservator from the conservatorship
- Ordering repayment to the estate of the individual, including:
 - Bond reimbursement (the bond company reimburses the individual’s estate and then recoups its expenditure from the conservator) and,
 - Direct repayment from the conservator
- Requiring the conservator to obtain court permission before taking some financial action or actions on behalf of the individual
- Requiring the filing of an amended or adjusted account to resolve discrepancies
- Compelling the conservator to obtain a bond, if the conservator has not already been bonded
- Requiring the conservator to submit documentation to support claims made on the account
- Requiring that the conservator receive fiduciary advice from the judge or other appropriate person.

In some cases, the conservator may respond to the audit report on his or her own volition and repay any monetary loss without the need for a hearing.

Defining Exploitation

Under Minnesota statute, the crime of “financial exploitation” includes the “unauthorized expenditure of funds entrusted to the actor by the vulnerable adult which results or is likely to result in detriment to the vulnerable adult” (Minnesota Stat. 2016 §626.5572 subd. 9(a)(1)). Of the 139 cases included in the sample, only one professional conservator was charged and convicted of violating the Minnesota statute on financial exploitation. By examining only official crimes, financial exploitation would appear to be a rare occurrence in conservatorships. The reluctance to criminally charge conservators, many of whom are family members, requires a more expansive definition of exploitation.

This study was limited to level 4 audit findings, and in a number of cases, findings may be legitimately explained at a court hearing as honest mistakes or poor record keeping. However, the activities cited in the audit report may also meet the Minnesota definition of exploitation, even if criminal charges were not filed. In each instance, judges are responsible for following up to better understand the details of the case and to determine a course of action. For the purposes of this project, the project team focused on judicial responses that documented the loss and sanctioned the conservator. Exploitation was defined as any combination of the following:

1. Filing of criminal charges against the conservator
2. A judicial finding of monetary loss
3. A judicial order for repayment to the individual
4. Repayment made to the individual with or without a court hearing (e.g., through mediation or settlement).

Using these criteria, 31 of the 139 audit level 4 cases were classified as exploitation. It is important to note that the 108 remaining cases may contain elements of exploitation, but there is no documented occurrence of one of the four criteria listed above. For example, in 22 cases, the individual had died before the post-audit hearings or shortly thereafter, and the case was closed without a finding of loss. In 11 cases, a hearing was never scheduled, even though the individual was still living. When hearings did occur, the incidents cited in the audit report may not have been egregious enough for the judge to make a finding of loss or order repayment. Judicial discretion may be the key factor in determining how exploitation is evaluated and addressed.

WHO IS EXPLOITED?

About one out of every five of the “concern of loss” cases resulted in a judicial determination of “exploitation”—31 of the 139 cases. Two findings from the initial analysis of exploitation cases are particularly notable.

Gender

About half of the “concern of loss” cases included in the sample involved female individuals subject to conservatorship. Yet an examination of the 31 cases of

exploitation showed a disproportionate percentage of women victims—22 women (70% of the 31 victims).

Age

The age status of persons who are exploited is not a significant factor. Findings show that half of the 31 victims were under age 65, while the other half were over 65. Ages of the victims ranged from age 18 to 97 at the start of the conservatorship. Most exploited persons were living in a skilled nursing facility or memory care facility (45%) or an assisted living facility (19%), regardless of their age.

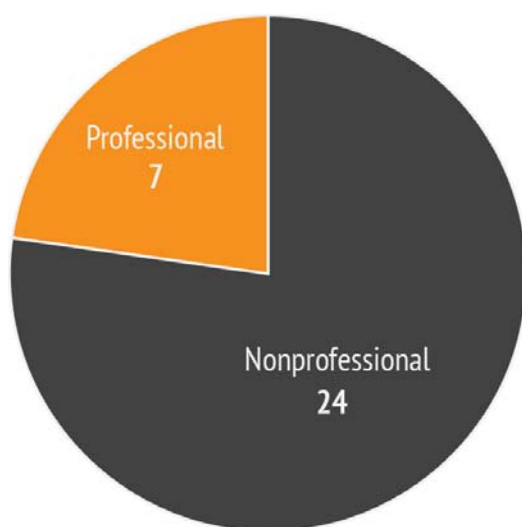
WHO IS EXPLOITING?

Preliminary analysis focused on the relationship between the conservator and the victim and whether the conservator was bonded. Findings show that the majority of conservators who engaged in exploitation were family members, and that more than half were not bonded.

Relationship

In Minnesota, professional conservators are defined as those who are appointed for three or more non-related individual subject to conservatorship. The state does not have a certification or licensure program, and professional conservators may be either individuals or organizations. The vast majority of conservators are family members - 71% of the 139 cases had family conservators. When examining the 31 cases of exploitation, 24 cases involved a family member, and 7 involved a professional

Figure 1 Exploitation Cases: Type of Conservator



conservator (1 professional conservator accounted for 4 of the exploitation cases). A closer analysis of family relationships showed that the greatest number of victims were exploited by their own children, followed by siblings, and then other close relatives.

Bonding

Minnesota statute requires bonding if the individual's assets exceed \$10,000, or that alternatives, such as restricted accounts, be used in conservatorships. Bonding is a highly recommended practice, as it acts as an insurance policy aimed at safeguarding the individual from the financial effects of mismanagement by the conservator. Furthermore, the failure to acquire a bond may be reflective of a poor credit history and/or bankruptcies, which suggest that additional safeguards may be appropriate. Despite the emphasis on bonding, fewer than half of the conservators in the exploitation cases were bonded (14 of 31). The lack of bonding also was evident in the larger sample of "concern of loss" cases.

OUTCOMES IN CASES OF EXPLOITATION

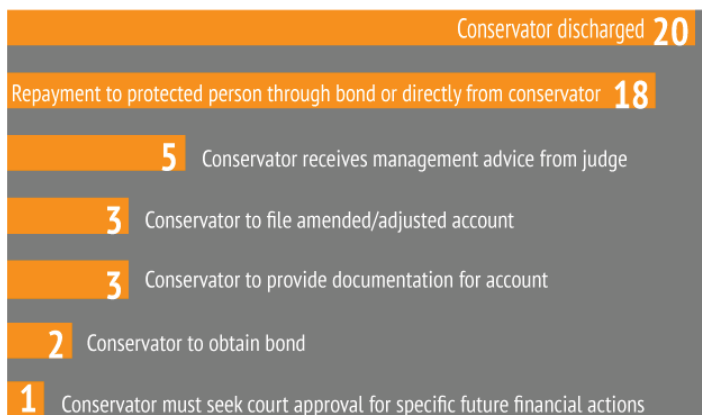
The project team reviewed and coded court orders to document judicial actions following level 4 audits. Three of the 31 exploitation cases did not involve a court order; two were cases in which the individual was deceased and a third case involved a professional conservatorship organization that discovered an employee was stealing funds from a individual. In fact, this employee was the only person charged under the Minnesota exploitation statute, while another professional conservator faced federal charges due to his role as a fiduciary for the Department of Veterans Affairs. In these instances, the CAAP team carried out an audit and confirmed the losses to which the employee confessed and cooperated in the cases arising from the Department of Veterans Affairs. Because the criminal charges in those cases did not originate from the audit process, these charges are not included in the outcome summary below.

Judicial Actions

Of 28 cases in which judges took action as a result of the audit report and subsequent hearing(s), the most common response was removing the conservator (20 cases) and ordering repayment of funds (18 cases). It was common for judges to require more than one action.

For example, a conservator may have been ordered to repay funds, obtain a bond, and receive management advice (e.g., establishing a separate bank account for the conservatorship, entering individual transactions). It is important to note that repayment from the conservator could either be made directly to the victim or come from a bond reimbursement.

Figure 2 Actions Required by Conservator in Exploitation Cases



Repayment

Repayment occurred in the aftermath of a judicial order requiring repayment (14 cases) or a mediation settlement (4 cases). Either type of repayment method can involve reimbursement from the bond. Five of the 18 repayment actions involved a bond reimbursement. In total, \$555,952.35 was required to be repaid to the individual’s estate, with bond reimbursements accounting for \$275,279.00 (about 50%) of that amount. At the time of data collection, 61% of the total owed had been repaid.

JUDICIAL DECISION MAKING

In Minnesota, most of the conservatorship cases are heard by general jurisdiction judges—the 31 cases of exploitation included in this study were overseen by 24 judges or specialist referees (judicial officers with probate specialization). To explore factors that go into judicial decision making in such cases, the research team interviewed six judges (including specialist referees). The Minnesota statute offers little guidance in terms of judicial actions when there is evidence of misappropriation or exploitation of funds in conservatorship cases.

Most prominently, judges differed in their interpretations of the court’s authority as allowed by statute. The

referee who specialized in probate matters stated that the statute grants the court any and all authority needed to take whatever action necessary to ensure the protection of funds. This interpretation varied from general jurisdiction judges, some who claimed that their authority was limited and required an attorney or outside party bringing actions before the court. Judges cited a number of challenges in handling conservatorship cases in which exploitation was alleged, such as time constraints, the lack of resources, cost and availability of lawyers, and often tense family dynamics. However, in cases where repayment was required, judges determined that the exploitation was “egregious” and “very apparent,” and they were confident in their action. Judges stated that although a centralized auditing team is a key component, it is not enough to ensure the protection of assets. Training and specialization for judges/judicial officers, conservators, and court staff who review files between audits is critical as well as clear statutes and rules.

Minnesota Stat. 2016 §524.5-410 addresses powers of the court. Under this statute, “After hearing and upon determining that a basis for a conservatorship or other protective order exists, the court has the following powers, which may be exercised directly or through a conservator for the benefit of the protected person and individuals who are in fact dependent on the protected person for support, all the powers over the estate and business affairs of the protected person which the protected person could exercise if an adult, present, and not under conservatorship or other protective order.”

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Brief No. 3

DETECTING EXPLOITATION BY CONSERVATORS
- COURT MONITORING -

This is the third in a series of eight Background Briefs produced by the National Center for State Courts and its partners under a project funded by the U.S. Department of Justice Office for Victims of Crime to assess the scope of conservator exploitation and explore its impact on victims.

STATEMENT OF ISSUE

Financial exploitation by conservators often goes unchecked by courts. Judicial monitoring practices could enable judges and court staff to spot exploitation. Specifically:

- What state and local court actions would increase timely and accurate conservator filings (inventories, accountings and financial plans)?
- What national, state and court actions would improve the ability of courts to review, examine, and audit conservator accountings, and to identify and target those that may involve exploitation?
- What can courts do to ensure fees are reasonable and appropriate and will not unnecessarily drain the estate?

TERMINOLOGY

- **Monitoring** is an expansive term that includes court actions such as tracking the submission of accountings, requesting supplemental information, examining accountings, and ordering repayment when appropriate.
- This brief distinguishes between reviews, examinations and audits. At the most basic level, the court conducts **reviews** to find out if the conservator has submitted accountings and other required documents and whether they are on time.
- An **examination** is a cursory look at the filed documents to see if they are complete, accurate and reasonable.

- An **audit** involves a professional level of scrutiny by a skilled auditor/accountant, who analyzes and reconciles the accounting with third party documentation, such as statements and invoices. Auditors may determine if expenditures benefited the person subject to conservatorship and write a report based on audit findings.

Financial exploitation by conservators often goes unchecked by courts. What judicial monitoring practices enable courts to spot exploitation?

BACKGROUND

Several key monitoring steps equip courts with information to detect exploitation:

1. requiring timely and accurate conservator filings of accountings and related documents;
2. thorough court examination and audit of those documents;
3. procedures to flag especially high risk cases;
4. methods to identify fee abuse;
5. use of conservator background checks;
6. solid complaint procedures (not addressed in this Brief, see Supporting Victims Brief).

Underlying each of these steps is the need for effective court data systems (see Data Quality Brief).

REQUIRING FILING OF INVENTORIES, ACCOUNTINGS AND FINANCIAL PLAN

Laws and Guidelines

Without regular, timely filings by conservators, courts are in the dark, unable to detect exploitation. Statutory and other guidance sets out filing requirements for the following key documents:

1. An **inventory** is a list of all income and property, and their value, as well as any debts and legal claims.
2. An **accounting** shows the assets under the conservator's control, the income received, expenses made, and an updated balance for the estate within a given time period, usually a year, often on a court form.
3. A **financial plan** is a report to the court showing how the conservator intends to protect, manage and expend the assets. It is a forward-looking document, a blueprint for action.

The **Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA)**, a model act approved by the Uniform Law Commission in 2017 for adoption by state legislatures, requires conservators to file an inventory of the estate and a financial management plan within 60 days of appointment; and to file annual accountings unless the court directs otherwise. Also, the UGCOPAA requires that a conservator file “to the extent feasible, a copy of the most recent reasonably available financial statements” and other supplemental documentation.

Thirty-nine state statutes specify conservator accountings annually unless the court directs otherwise.

The **National Probate Court Standards (NPCS)** direct courts to require conservators to file an inventory with appraisal, as well as an asset management plan within 60 days of appointment; and annual accountings and updates thereafter. The NPCS suggests “an amended asset management plan” when there is a significant change.

Most **state guardianship statutes** have similar requirements. Thirty-nine state statutes specify conservator accountings annually unless the court directs otherwise. Four states require biennial accountings; others leave the frequency to the courts. Some states require the first accounting earlier than annually, to see if the conservator is completing the accounting correctly. A growing number of states require financial management plans.

The **National Guardianship Association Standards of Practice (NGA Standards)** direct a conservator to submit required inventories and appraisals no less often than annually; to submit accountings at least annually describing “all significant transactions;” and to develop a financial plan and budget “that corresponds with the care plan for the person.”

Where We Stand in Practice

Implementation of these state statutory requirements and aspirational standards in practice is uneven and often woefully insufficient. Many courts lack the staff, technology, investigative and case management protocols to encourage and ensure that inventories, accountings and financial plans are timely and consistently submitted. Many courts lack documentation of the receipt and timing of conservator filing -- a subset of the poor quality of local court data generally (see Data Quality Brief). Court practices to encourage timely and complete filings might include:

- Require conservators to use a uniform accounting form, and make the form readily available on the internet and at court, with plain language instructions. Provide samples of correct accountings. Where possible, require transaction-level data.
- Require submission of supporting bank statements, brokerage statements, invoices, and receipts.
- Have designated court staff for tracking receipt of conservatorship filings.
- Have specialized state or regional staff to support local courts in tracking conservatorship filings, such as the Colorado Court's “Protective Proceedings Auditors” at the state level (see Innovative Programs Brief).
- Have court staff explain the accounting requirements, especially to family conservators. Use trained volunteer auditors or visitors to give technical assistance. A New York Guardianship Assistance Network helps family members with accountings; and in the District of Columbia, the Superior Court's Guardianship Assistance Program offers support for guardians/conservators in submitting filings.

- Use an automated court case management system/software to identify when accountings are coming due or overdue. Send out automated reminders.
- Use court software to encourage or require conservators to file accountings online, as exemplified by Minnesota’s MyMNConservator. Florida’s 17th Judicial Circuit also has demonstrated use of “smart form” e-filing.
- Develop a suggested judicial response protocol that includes actions such as sending notice of a show cause or compliance hearing after a specified past due period, and enforcing sanctions for late filings.

EXAMINING AND AUDITING INVENTORIES, ACCOUNTINGS AND FINANCIAL PLANS

Filings serve little more than a possible deterrent purpose if the court does not examine and audit them.

Laws and Guidelines

The UGCOPAA, the NPCS and state law offer guidance on examining and auditing conservator filings.

- The UGCOPAA requires the court to “establish procedures for monitoring a [conservator’s] report and review each report at least annually. . . .” The conservator’s report includes an accounting, list of services provided, most recently approved plan and statement of any deviations from the plan, supplemental documentation and other key information. Additionally, the UGCOPAA requires the court to identify persons entitled to notice of the filing of such key documents.
- The NPCS states that courts should “[review] promptly the contents of all plans, reports, inventories, and accountings.”
- More than 20 states statutorily require at least some form of court review of filings, and a few (for example Texas) specify that the accounting is not final until the court approves it.

Where We Stand in Practice

The statutes and guidance do not distinguish between reviews, examinations and audits. While there is little research on the frequency or thoroughness of judicial review in practice, few courts have specialized examiners

or auditors. Notably, some courts consider the case “closed” once the conservator is appointed and thus may fail to track and monitor accountings. In some courts, the judge or court staff review the filings– but those charged with “reviewing” may have little or no accounting background or training. Some courts are increasingly overwhelmed with cases, and conservator accountings go unexamined. In a 2010 NCSC survey, judges and court staff agreed that “specialized court staff are essential to raise . . . monitoring standards.” Examples of promising practices include:

- Require that appraisals, inventories and accountings be shared with family members, where appropriate, to confirm assets, as provided in the UGCOPAA. This can reinforce and inform court review.
- Once the conservator is appointed, treat the case as “set for review,” with a review date noted in the case management system.
- Use professional auditors, financial fraud specialists, and specially trained staff where possible. In Palm Beach County Florida, a Guardianship Fraud Unit of the Clerk & Comptroller’s Office performs enhanced audits and advises the court of its findings. In Colorado and Minnesota, a central auditing team audits accountings statewide (see Innovative Programs Brief).
- Designate specialized staff for the conservatorship process and train them in basic examination procedures. In California by statute court investigators examine accounts as well as visit the individual.
- Consider using trained volunteers with accounting backgrounds as “eyes and ears” of the court to detect exploitation. In New Jersey, Utah and a growing number of localities, trained volunteers conduct audits for the court. The ABA Commission on Law and Aging has an online court handbook on developing volunteer monitoring programs, which could include training volunteer auditors.
- Use solid examination practices – develop an examination checklist; require supporting documentation; use the financial management plan as a benchmark for accounting examinations; and compare the accounting with any guardian status report or care plan.

- Develop auditing programs or resources that can be tapped to carry out professional audits in at least a subset of cases (e.g., first annual accountings, cases referred by judges or clerk, high asset cases, contested cases). Each auditor should use the same criteria to categorize findings, and should use a template to draft reports to the courts. Auditors can be an important resource for judges and staff with questions.

FLAGGING HIGH RISK CASES

One approach to discovering conservator exploitation is to use risk indicators to target cases where it is most likely to be found.

Laws and Guidelines

There are few regulatory requirements and little guidance for courts on concentrating monitoring efforts on high risk cases.

Where We Stand in Practice

Some courts have used a list of “red flags” to determine monitoring levels. However, those “flags” have been based on anecdotal information rather than empirical evidence. For example, the Maricopa County Superior Court of Arizona used a list of “red flags” to create an evaluation tool to sort cases into different risk categories and assign varying levels of monitoring—a concept known as “differentiated case management.” The Idaho Supreme Court has implemented and is evaluating such a differentiated case management tool. Generally, the “red flags” used are a reflection of poor accounting practices, such as unpaid bills, cash withdrawals, and large expenditures, which are not necessarily indicative of exploitation. NCSC, with the Minnesota Judicial Branch, has spearheaded a more promising approach in the Conservatorship Accountability Project. The Project piloted a set of risk indicators that were directly based on the state court’s cases of concern including exploitation. Some local courts may consider the qualifications and history of the proposed conservator to informally use aspects of differentiated case management. For instance, the South Carolina Richland County Probate Court may use additional safeguards, such as requiring more frequent accountings and using restricted accounts if the conservator has a poor credit rating or difficulty with financial management.

FINDING FEE ABUSE

Fees charged by conservators, attorneys and accountants are most often paid from the estate of the person subject to conservatorship. Payment of excessive fees from the estate can aggravate - or be a form of - conservator exploitation; and court examination of fees is critical.

Laws and Guidelines

Consistent standards for conservator fees do not exist; and there is little mention of attorney and other professional fees in statutes and guidelines.

- The UGCOPAA specifies that “subject to court approval, a conservator is entitled to reasonable compensation for services and reimbursement for appropriate expenses” from the estate or other sources. The Act lists factors in determining reasonableness— for instances the necessity and quality of services provided, the experience and training of the conservator, the difficulty of the tasks performed, and the consistency with the conservator or guardian’s plan.
- Many state statutes provide for “reasonable compensation” as well. A few states set fee schedules or guidelines by statute or court rule, but states seeking to set such schedules may encounter opposition from the professional conservator and legal communities.
- The NPCA allows “fair compensation for the time, effort and expertise” provided. Courts “should consider establishing fee guidelines or schedules.”
- The NGA Standards allow conservators “reasonable compensation” and state the responsibility to conserve the estate when determining the fee charged. Fees should be documented by billings and time records, and approved by the court. Conservators must document “the basis for the fee” at their first appearance in the case; and must disclose a projection of annual fees. Finally, the conservator must report to the court “any likelihood that funds will be exhausted” and “may not abandon the person when the funds are exhausted.” The NGA Agency Standards provide that “the agency/program shall have a written fee structure for services to individuals.”

Where We Stand in Practice

There is scant information on conservatorship fee practices. Press exposés have documented egregious cases. Fees are based on various methods of calculation – differing lists of “reasonable compensation;” allowance of a commission based on the person’s income, assets or a combination; or use of a variety of fee schedule protocols with a range of permissible fees. Factors concerning the detection of fee exploitation and the existence of fee disputes include:

- The court usually reviews and approves fees after the expenditures have been made, rather than approving a maximum or fee basis in advance.
- There may be a lack of transparency about the anticipated fee, and a lack of clarity about how a fee claim must be documented. Parties and the court may be surprised by a hefty fee claim with uncertain documentation.
- If a conservator is serving in a dual role as an attorney/other professional with a different rate, it may be unclear which rate is being charged for which type of work.
- Conservators and attorneys may charge fees for tasks that could be delegated to a lower paid provider such as assistants or paralegals.
- A conservator is a fiduciary and must manage the estate prudently. In practice, some conservators charge high fees that may drain an estate and leave the individual with little or no money for care.
- Disputes over fees can be costly and acrimonious, and may result in additional fees that can erode an estate.
- The appropriateness and reasonableness of fees is highly subjective. Fees are seldom documented across cases and courts, which results in a lack of standards and practical guidance for judges.

USING CONSERVATOR BACKGROUND CHECKS

Conservator background checks—including criminal histories and credit scores—may be seen as a panacea in addressing conservator exploitation, but actually have substantial limitations.

Laws and Guidelines

The NPCS recommend that courts require a national background check on prospective conservators who are not otherwise subject to such a check through certification or licensing procedures, or licensed financial institutions. This includes criminal history checks; abuse, neglect and exploitation findings, and professional suspension or disbarment. Approximately 20 states require some type of criminal background check, and a few also require an investigation of credit history.

Where We Stand in Practice

There is no information on the effectiveness of criminal background checks in detecting conservator exploitation. Despite this, the NPCS Commentary states that given the opportunities for misuse and the vulnerability of persons subject to conservatorship, requiring background checks “is an appropriate safeguard.” Courts have discretion on use of the information gleaned – taking into account in the selection of conservators factors such as the seriousness of the offense and its relevance to the conservator role. Criminal background checks may offer an incomplete picture, as many elder abuse cases are not prosecuted -- and even prosecuted cases may not appear in background checks. Moreover, criminal background checks are more preventive in nature, and generally don’t play a role in detecting exploitation post-appointment.

Increasingly, some courts are requiring potential conservators to submit credit histories. When credit histories are a concern, judges may schedule a hearing in which the proposed conservator has the opportunity to explain past financial difficulties. The court may then require additional financial training and oversight. For example, the Richland County Probate Court in South Carolina adds safeguards to protect the estate in cases where the conservator has a questionable credit history (see Innovative Programs Brief).

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Brief No. 4

DETECTING EXPLOITATION BY CONSERVATORS
- SYSTEMIC APPROACH -

This is the fourth in a series of eight Background Briefs produced by the National Center for State Courts and its partners under a project funded by the U.S. Department of Justice Office for Victims of Crime to assess the scope of conservator exploitation and explore its impact on victims.

take action. Each stands in a different position to discern conservator wrongdoing.

1. ROLE OF THIRD PARTIES IN DETECTING CONSERVATOR EXPLOITATION

STATEMENT OF ISSUE

NAMED PARTIES IN THE CASE

Courts alone cannot fully detect conservator exploitation. A broader set of “eyes and ears” and robust court-community partnerships may raise detection to a higher level. What systemic approaches could be effective in spotting exploitation? Specifically:

Laws and Guidelines

The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA), the National Probate Court Standards (NPCS) and most state statutes set out parties entitled to receive notice of a guardianship/conservatorship petition – family members, persons having care and custody of the individual, and existing surrogates such as agents under a power of attorney or advance directive. Under many state laws and court rules, these parties may receive, or may request the right to receive, court documents in the case – sometimes specifically including the conservator inventory and accountings.

- How can courts increase detection of conservator exploitation through communications from other stakeholders?
- What policies and practices would best promote transparency in conservatorship cases?
- What state laws and court practices would promote court integrity and impartiality concerning conservatorship practice?
- How can the courts and federal agencies improve their communication to better detect exploitation?

The UGCOPAA, a model act approved by the Uniform Law Commission in 2017 for adoption by state legislatures, places a strong emphasis on the involvement of family members and other named parties. It requires the court order to identify persons entitled to notice of the filing of the conservator’s report (which includes an accounting, list of services provided, most recently approved plan and statement of any deviations from the plan, supplemental documentation and other key information). These named persons must have access to records related to the conservatorship, and notice of certain other important information. The Act’s Comments observe that this “important innovation... leverages the interest of private individuals to monitor conservatorships at minimal cost to the public... . These individuals on notice can then act as an extra set of eyes and ears for the court to prevent or remedy abuse.”

BACKGROUND

Courts have begun to recognize that to make real change in the guardianship and conservatorship process, they need to collaborate with involved stakeholders. The NCSC High Performance Court Framework says courts should “engage in a vigorous campaign to organize and mobilize partners.” Some states have created Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) to enhance communication among state entities about issues such as conservator exploitation. Such a collaborative approach – whether a formal partnership or an informal communication path – can galvanize a focus on detecting conservator exploitation. An array of “third parties” can use their unique vantage points to expose conservator exploitation so the court can

Where We Stand in Practice

The extent to which named parties in the case actually receive and review the accountings and bring suspected exploitation to the attention of the court is not known. Anecdotally, concerned family members have combed court documents and spotted instances of possible conservator wrongdoing. Sometimes their resulting complaint to the court is in the context of a family dispute over care and finances. Sometimes a potential exploiter is a named party and the conservator has been appointed to protect the estate. It may be difficult for the court to disentangle the situation, but having an additional viewpoint can be valuable.

PUBLIC ACCESS TO COURT DOCUMENTS

Public access to court conservatorship documents can enhance accountability and counter a perception of secrecy under which exploitation might flourish. But it must be balanced by a respect for privacy and confidentiality.

Laws and Guidelines

Legal provisions grapple with this challenging balance.

The UGCOPAA section on confidentiality of conservator records states that the existence of a proceeding for, or the existence of, conservatorship is open to the public unless sealed by the court. The underlying conservatorship records are not public, but access is granted to the adult subject to conservatorship, the adult's attorney, and to persons named by the court order as entitled to notice. In addition, any person for good cause may petition the court for access to court records, and the court must grant access if it would be in the adult's best interest and not endanger the adult's welfare. A visitor's report or a professional evaluation is confidential and must be sealed on filing. It is available only to the individual and the individual's attorney, the petitioner, the petitioner's attorney and the visitor – but may be available to a health care agent or to others for good cause.

Many states have statutory or court rule provisions limiting public access to conservatorship documents. According to a 2016 ABA review, thirteen state statutes generally seal guardianship/conservatorship records in the entirety, sometimes conditioned on a finding that

the petition was malicious. For example, the Alaska law specifies that “Upon finding that a petition . . . was malicious, frivolous, or without just cause, the court may order that all information contained in the court records . . . be sealed and that the information be disclosed only upon court order for good cause shown.” Roughly half the states have some provision limiting public access to certain parts of the record, often including the annual reports and accountings. In addition, approximately 33 states have some form of rule-based privacy protection varying from redaction of personal information to complete exemption from state public access laws, but the extent to which they are used for conservatorship in practice is not known.

Where We Stand in Practice

Practice appears uneven, and the extent to which privacy protections are enforced for conservatorship in practice is not known. In many instances, elected clerks of court are the official record keepers and determine what information, if any, should be released and to whom. Courts may provide that all or parts of the record should be sealed for confidentiality, presenting obstacles to any third-party investigators seeking to detect conservator exploitation. Media stories have highlighted instances in which sealed case records appear to hide exploitation, questioning, for example, whether “state judges have adhered to sealing rules that were established in part to protect the public's interest in open courts.”

Many courts redact specific identifying information in court documents, such as account numbers, addresses and transactions. However, the responsibility for redaction often lies with the individual or attorney who is submitting the reports. There are some efforts underway to use technology so that sensitive electronic documents can be submitted with some fields automatically redacted from public files.

REVIEWERS EXTERNAL TO COURT

Laws and Guidelines

At least two state statutes designate attorneys to examine conservator accountings and report any problems to court. In Virginia, attorneys named as Commissioners of Account are charged with examining the financial filings of conservators; and in New York, attorneys appointed as

Court Examiners review the accounting before it is filed with the court.

Where We Stand in Practice

A 2001 national guardianship reform conference recommended that “while recognizing the ultimate responsibility of courts to monitor guardianships, a study should . . . [examine court practices to] delegate or contract out guardianship monitoring to other public or private organizations.” Various writings have questioned whether executive branch agencies might be better positioned than courts to examine and detect exploitation.

The real question appears to be not where the monitoring is administratively located, but the backgrounds and skills of the monitors. While guardianship falls under the aegis of the court, training in accounting, auditing and financial management is critical to enable judicial examiners – or anyone delegated by the court, including attorneys (as in the states mentioned above) -- to detect exploitation. Such courses are not generally offered in judicial training curricula or law school. Thus, judges, clerks and lawyers mandated to examine accounts may be ill equipped to uncover exploitation.

The Palm Beach County Clerk and Comptroller’s Office in Florida operates a conservatorship auditing program which is independent of the judiciary. Trained court clerks conduct reviews of financial reports, and identify “red flags.” They also receive cases from a guardianship hotline, as well as other referrals (see Innovative Programs Brief). The program exists in other counties in Florida as well. It has not been evaluated for outcomes.

The real question appears to be not where the monitoring is administratively located, but the backgrounds and skills of the monitors.

PROFESSIONAL CERTIFICATION, LICENSING, AND DISCIPLINARY BOARDS

Laws and Guidelines

The Center for Guardian Certification (CGC) operates a national, voluntary guardian certification program. Approximately 13 states operate their own guardian/conservator licensing or certification programs established statutorily or through administrative regulations. Three of these statewide programs are located in executive agency departments concerning commerce, consumer affairs and business; others are operated by the state court. A statutory provision in Florida exemplifies a different approach, expanding the duties of the statewide public guardianship office to include oversight of all registered professional guardians. The office must investigate complaints against professional guardians and enforce disciplinary actions. Public guardian oversight of private professional guardians is a practice used in several Canadian provinces and other countries.

Where We Stand in Practice

While CGC and state certification programs receive complaints about qualified guardians/conservators, the numbers appear small and the outcome of the totality of the programs has not been evaluated. The CGC 2017 annual report states that CGC received eight complaints in that year, concerning a total of 1,301 certified guardians – and that in previous years the number of complaints received was similarly low. Summarizing complaints received from 2008 to 2017, the report found that 23 were referred to a professional review board -- and of those 23, sanctions were imposed in 15 cases. Eight of the 15 sanctions were certification revocations due to “mishandling or co-mingling of funds, fraudulent fee petitions, embezzlement or other mismanagement of client funds.”

In addition, attorneys frequently serve as conservators, especially where family members are not available. Attorneys may serve in a dual role, providing legal advice and conservatorship services. Attorneys are licensed by the state, and are subject to court rules and bar disciplinary actions. There is no collected information about the number or extent of complaints concerning exploitation against attorney conservators.

One promising practice might be to require the referral of certification program complaints and bar disciplinary actions concerning conservator exploitation to the local court, and to law enforcement if a crime is suspected.

HUMAN SERVICE PROGRAMS

A number of state and local human services staff stand in a position to observe the actions of conservators and detect exploitation.

- Adult protective services (APS) staff investigate reports of suspected abuse, neglect and exploitation, and if appropriate provide needed protections and interventions. While some states provide adult protective services to older adults only, many serve adults with disabilities over the age of 18 who meet state criteria. It is not known how frequently APS staff encounter and report instances of conservator exploitation to the court or to law enforcement.
- State and local long-term care ombudsman programs operating under the Older Americans Act advocate for and resolve complaints of residents in long-term care settings such as nursing homes and assisted living. They may discover situations in which a resident is being exploited by a conservator. It is not known how frequently ombudsman staff encounter such exploitation and report their observations to APS, the court or law enforcement. Residents must consent to ombudsman disclosures, except in specified situations.
- Other human service staff that might detect exploitation include, for instance, senior housing services coordinators, and staff in senior centers, area agencies on aging, nursing homes, assisted living and group homes. Generally, they have little connection with the court, but may report any suspected exploitation to APS.

LAW ENFORCEMENT

While there is no information on the frequency, some complaints about conservator exploitation from individuals, family members and others reach local law enforcement. The extent to which law enforcement pursues such complaints, brings them to the attention

of the court for action -- or simply defers on the basis that the case already is under court supervision -- is not known.

OTHER COURTS

In some states such as Ohio and Oregon, a number of local courts have appointed the same conservator for dozens of individuals. Courts in one county or jurisdiction may have no knowledge that the conservator already has been appointed by other courts, or that a conservator has been sanctioned for exploitation. A statewide database and case management system such as in Minnesota would bring this situation to light for court action and facilitate restoration of assets and/or criminal prosecution. The 2015 Ohio Supreme Court Rule requires the court to maintain a roster of guardians with ten or more cases, so that each local court is alerted that the conservator also may be serving in other courts. In Oregon, 2018 legislation required that a conservator or proposed conservator must inform the court if he or she “has caused any loss resulting in a surcharge” under Oregon law or a similar statute of another jurisdiction, or has been removed by a court of any jurisdiction.

REPRESENTATIVE PAYMENT SYSTEMS

Laws and Guidelines

The Social Security Administration (SSA), the Department of Veterans Affairs (VA) and the federal Office of Personnel Management (OPM) have programs that appoint representative payees to manage federal benefits for individuals determined unable to do so. The SSA program is by far the largest, with over 550,000 payees for beneficiaries over age 65. The federal agencies are responsible for oversight of the payees. Some payees are also conservators appointed by state courts for the same individual. According to SSA, the federal Privacy Act prevents it from sharing information about payees who misuse beneficiary funds.

Where We Stand in Practice

The Government Accountability Office (GAO) stated in 2004 that “federal agencies and courts do not systematically notify other agencies or courts . . . when they discover that a guardian or a representative

payee is abusing the incapacitated person. This lack of coordination may leave incapacitated people without the protection of responsible guardians and representative payees.” The GAO reiterated this concern in 2010, 2011 and 2016 reports. A 2014 report by the Administrative Conference of the United States (ACUS) found that almost two-thirds of the court respondents surveyed (not a representative sample) did not know what percentage of conservators also serve as SSA payees.

Because the Privacy Act prevents SSA from sharing information with state courts, judges have no way of knowing if a guardian who is also a payee has misused federal beneficiary funds, which might help to spot broader exploitation of the individual’s estate. Some efforts are underway to enhance coordination – for instance SSA has appointed a regional liaison to each of the 26 existing state WINGS or similar collaborative guardianship reform groups. In 2018, federal legislation, the Strengthening Protections for Social Security Beneficiaries Act, required the Social Security Administration to contract with ACUS to conduct a study on opportunities for and barriers to information sharing with state courts.

Guardianship Abuse Case Review Protocol

Child abuse, domestic violence, and elder abuse fatality review teams bring together professionals to examine deaths in order to improve system responses and prevent similar deaths. Similarly, this kind of structured, objective review process identifying gaps and solutions without blame of involved parties could be adapted to study in hindsight failures in detecting conservator exploitation, for systemic improvement.

A number of communities have developed FAST (Financial Abuse Specialist Teams) teams to address elder abuse. One concept may be to have the FAST teams purposely select some cases of conservator exploitation to make suggestions on how the system can be improved to better detect exploitation and safeguard assets.

Court Watch Programs

Court Watch programs train volunteers to observe court proceedings, with the aim of holding the justice system accountable. Such programs have focused on proceedings

related to sexual assault and child abuse. There is no information on possible adaptation of court watch programs to conservator proceedings such as a show cause hearing or a hearing on a complaint of exploitation. The concept may have potential but requires careful development.

2. ENGAGEMENT OF COURT OFFICIALS IN DETECTING CONSERVATOR EXPLOITATION

Detection of conservator exploitation through software applications and case management systems, as well as through third party observations, will be of little use if the court is not responsive to providing the needed access to justice – or does not appear to be nor present itself as responsive. Detection may fall on deaf ears unless:

1. the judge has the background and interest in protecting victims;
2. the court’s relationship with the bar and other professionals is arms’ length; and,
3. there is necessary training for judges, court staff, investigators, lawyers and law enforcement.

ENSURING THE COURT IS RECEPTIVE AND RESPONSIVE TO DETECTING EXPLOITATION

Law and Guidelines

Judicial ethics and state law address court accountability and avoidance of conflict of interest that bear on the detection of exploitation.

- According to the ABA Model Code of Judicial Conduct, upon which state codes are based, judges must at all times “act in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety.” For example, in order to avoid any possible conflict, a new judge must resign from any fiduciary position unless it involves a family member.
- Some state laws now require judicial impartiality in fiduciary and other professional selection, signaling an open court and paving the way for

solid detection practices. In 2015, a Texas Senate Committee analysis for a guardianship bill stated that “For more than two decades there has been controversy regarding favoritism, cronyism, and nepotism in court appointments. The occurrence, possibility, or even the appearance of some attorneys and judges colluding to profit from these appointments simply is unacceptable and undermines the public’s confidence in the entire judicial system....”

As a result, Texas required the court to use rotation lists for the appointment of most attorneys and guardians ad litem, professional guardians, and mediators – while still maintaining the judge’s discretion on complex matters. Similarly, in 2015, a Florida bill required that a court must use a rotation system for the appointment of a professional guardian, unless it makes specific findings concerning why the guardian was selected.

Guardians or conservators may prevent the visitation of family members and friends, thus making exploitation easier.

Where We Stand in Practice

Media stories have highlighted egregious cases in which judges, attorneys and other professionals appeared to form a closed circle that could aggravate and hide rather than detect conservator exploitation. The Examples of Exploitation Brief describes some of these cases and maintains that sometimes there are conservator exploitation “scams” and “pockets of corruption.” The Exploitation in Minnesota Brief reports 31 exploitation cases out of the 139 audited cases in which there was a potential problem (“concern of loss”). However, there is no empirical study of the extent of exploitation in other states.

A critical element emphasized in the Examples of Exploitation Brief is use of isolation tactics. Guardians or conservators may prevent the visitation of family members and friends, thus making exploitation easier. In the past three years, many states have enacted visitation

provisions to better define the rights of the individual, the role of the guardian (who also may be the conservator) and the role of the court – and seeking to strike an appropriate balance of individual rights and safeguards from harm.

PROVIDING JUDICIAL, LEGAL AND PROFESSIONAL TRAINING IN DETECTING EXPLOITATION

Without training in detecting exploitation, judges, court staff, investigators and other professionals may not “see” what is right before their eyes in a pattern of abuse. There is no compendium of training for judges and court staff with guardianship/conservatorship jurisdiction. Each state has a judicial education officer to develop courses and sponsor training events, but the extent to which these curricula focus on conservator exploitation is not known. Entities such as the National Judicial College and National College of Probate Courts have offered guardianship courses, some of which have included the monitoring of guardianship cases.

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Brief No. 5

COURT ACTIONS UPON DETECTION OF EXPLOITATION

This is the fifth in a series of eight Background Briefs produced by the National Center for State Courts and its partners under a project funded by the U.S. Department of Justice Office for Victims of Crime to assess the scope of conservator exploitation and explore its impact on victims.

Courts often lack the resources, infrastructure, and statutory authority to address financial exploitation by conservators.

STATEMENT OF ISSUE

Once a court detects exploitation, it should be the first line of action to address, mitigate, and prevent further harm. Yet courts often lack the resources, infrastructure, and statutory authority to address financial exploitation by conservators. What laws and practices can enable courts to consistently and effectively address and prevent further exploitation? Specifically:

- What changes in state law, court rule or court practice can best protect and restore assets subject to conservator exploitation?
- How can courts best investigate allegations of wrongdoing in conservatorship cases?
- Are there legal or ethical impediments for the court in making referrals upon detecting conservator exploitation?
- If courts make no response upon allegations or detection of exploitation, what policies and practices can best prompt them to act?

BACKGROUND

The National Probate Court Standards (NPCS), which are instructive but not compulsory, direct that upon learning that an individual’s assets are endangered, courts

should “take timely action to ensure the safety of . . . the estate.” Courts have several means available to address exploitation: (1) initiating an effective investigation; (2) protecting and restoring assets; (3) imposing civil sanctions including removal of the conservator; (4) imposing criminal sanctions and/or referring the case to criminal authorities; and (5) sharing information with federal agencies that provide financial benefits and/or conduct investigations. Given the range of jurisdictional authority of courts handling conservatorship cases, judges may find certain practices more appropriate and accessible than others. In order to take action, judges and court staff must be receptive and responsive to problems once they are detected.

INITIATE AN EFFECTIVE INVESTIGATION

Once a court detects exploitation, a thorough investigation is key to assessing the extent of harm to the individual’s assets, and determining what judicial actions are necessary to address that harm.

Laws and Guidelines

The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA), the National Probate Court Standards (NPCS), and many state laws offer guidance on appointment of investigators to address problems in an existing conservatorship:

- The UGCOPAA, a model act approved by the Uniform Law Commission in 2017 for adoption by state legislatures, allows the court to appoint a visitor to investigate problems.
- Many state laws specifically allow the court to appoint an investigator, visitor or guardian ad litem to investigate problems. For example, California law provides for probate court investigators.

Where We Stand in Practice

Even if state law does not explicitly confer authority on a court to appoint an investigator, courts still have the discretion to do so when appropriate. Court practices in investigating conservator exploitation vary. There is little if any research examining the level of problematic accounting that would prompt an investigation, the timeliness with which an investigation occurs, or the qualifications of any investigator. Promising practices might include:

- **Appoint a qualified investigator to examine allegations and findings of exploitation.** Minnesota’s probate judges reported that having a centralized auditing team was instrumental, but specialized training was critical for judges and court staff responsible for taking action (see *Exploitation in Minnesota Brief*). However, it is often difficult for courts to find and pay for skilled investigative personnel. And, when courts appoint an attorney or professional who also serves in other cases as a guardian or guardian ad litem, there may be a conflict of interest or a lack of will on the part of the investigator to pursue a finding against a colleague. Moreover, attorneys generally lack the necessary skills and background for investigating exploitation.
- **Assemble an “in house” investigative staff with diverse professional backgrounds.** Conservator exploitation can take many forms, from a family conservator using someone’s public benefits for personal use rather than the benefit of the recipient, to a professional conservator stealing thousands of dollars from an estate. Ideally, the court could assign an investigator with expertise suited to individual circumstances – such as a social worker familiar with public benefits or a paralegal who can interpret financial records. However, many courts lack resources to assemble such a team and must rely on court staff assigned to other duties to perform needed investigations.
- **Create well trained volunteer auditor programs with sufficient support and oversight.** Some states, including Utah and New Jersey, are developing volunteer monitoring programs in which selected volunteers are trained to conduct, at a minimum, an initial inquiry. Selected local courts

have similar programs (see *Innovative Programs Brief*).

- **Order an in-depth audit of financial assets.** While courts can audit an individual’s assets, some courts will order a “forensic accounting” by a certified public accountant. Such an accounting, which is performed by a neutral party, is a complete assessment of where an individual’s assets came from, and how, when, and to whom they were dispersed.
- **Hold a show cause hearing.** In Minnesota, judges may hold a hearing to address issues reported by the auditing team. If the judge identifies exploitation from the evidence presented at the hearing, the judge may order the conservator to repay the amount of funds in question, remove the conservator, or refer the conservator for prosecution. (see *Exploitation in Minnesota Brief*).

PROTECT AND RESTORE ASSETS

As soon as the court confirms exploitation, it should act quickly to protect whatever assets remain in the estate. The court can also order repayment of stolen assets and property.

Laws and Guidelines

The NPCS direct courts, upon detection of possible theft or mismanagement of assets, to freeze accounts and suspend the conservator’s access. The UGCOPAA, the NCPS and many states also require bonding of assets, unless otherwise provided. Bonding is addressed in the *Supporting Victims Brief*.

Where We Stand in Practice

Courts use an array of tools to protect and restore assets, although there is no data to document their frequency or effectiveness. Ideally, judges should issue detailed orders, rather than verbally or informally directing conservators, court staff, and other stakeholders to undertake the following actions:

- **Freeze accounts.** Courts can freeze assets and suspend access by the conservator, while ensuring that in the interim the victim’s living expenses are paid.

- **Require court approval.** The court could require the conservator to obtain court approval for large or unusual expenses, such as home modifications, medical equipment, reverse mortgages, loans, and gifts—either in the original court order or upon detection of red flags showing possible exploitation.
- **Restrict accounts.** Courts could require that bank accounts above a certain amount be restricted or “blocked” by the bank, and that the conservator must file proof of the restricted account with the court. Note that bank merger or reorganization could make it difficult to maintain and trace records on the account restrictions. Also, not all banks accept restricted accounts.
- **Adjust or require bond.** Courts could modify the amount of an existing bond or require bond of a conservator without one (see the Supporting Victims Brief and Exploitation in Minnesota Brief).
- **Impose repayment.** Courts can order repayment, but the loss to the estate may never be repaid without a bond. If a conservator is incarcerated, has spent all stolen funds, or lacks other assets, there may not be sufficient income to repay the debt. In Minnesota, when judicial action occurred as a result of the audit, judges ordered repayment, along with removal of the conservator in 18 of the 28 cases. Judges characterized the exploitation in these cases as “egregious” and “very apparent.” In one instance when the person was deceased, a judge ordered the conservator to repay the state for the audit.
- **Order remedies for lost property.** Courts can void a deed or set aside a contract. For instance, the Richland County Probate Court of South Carolina can void a deed if real estate was transferred without the court’s permission and to the detriment of the estate, or order the conservator to repay funds if the conservator transferred title of a vehicle for less than full market value (see Innovative Programs Brief).

civil sanctions in different states. According to the report, four of every five states and territories have statutes guiding the removal and sanctioning of guardians. Only 7% of state statutes reportedly list civil penalties, such as fines. Three states require a showing of “gross negligence” before the court can impose a civil penalty. A conservator in California or Kansas can be removed for failing to exercise due diligence.

The UGCOPAA allows courts to remove a conservator “for failure to perform the conservator’s duties or other good cause.” The NPCS direct courts to enforce their orders by appropriate means, if necessary with sanctions, including suspension, contempt, removal, and appointment of a successor. Furthermore, the NPCS recommend that the court remove the conservator and appoint a temporary replacement when the conservator’s failure to fulfill court - appointed duties results in the endangerment of the safety and welfare of the individual or of the assets.

If the conservator is an attorney, the NPCS suggests the court inform the appropriate disciplinary authority that the conservator may have violated a fiduciary duty.

There is little information on the manner and frequency of sanctions courts impose for conservator exploitation.

Where We Stand in Practice

There is little information on the manner and frequency of sanctions courts impose for conservator exploitation. The NCSC study of judicial responses in Minnesota offers initial empirical findings, as described below. The 2014 ACUS report included a non-representative survey that gives a snapshot of judicial actions: 64% of judges and court staff reported their courts had taken actions against at least one guardian for misconduct, malfeasance, or serious failure to fulfill their obligations in the last three years. Possible judicial sanctions include:

- **Remove conservator.** Courts may be hesitant to remove conservators because of a lack of qualified potential successors. Available replacements may be unqualified due to criminal records, inability to

IMPOSE CIVIL SANCTIONS INCLUDING REMOVAL OF THE CONSERVATOR

Laws and Guidelines

A 2014 report from the Administrative Conference of the U.S. (ACUS) provides an overview of statutes concerning

get bond, or poor financial skills – or simply lack of reliable family members, friends, professionals or agencies to serve. Removal may also be complicated when the conservator is a family member who was the choice of the individual, and a successor conservator has not been designated.

Despite challenges, removal of conservators is one of the most common judicial responses to exploitation. In Minnesota, judges used removal in 20 of 28 cases in which judicial action occurred in response to exploitation exposed by an audit (see Exploitation in Minnesota Brief). Of judges surveyed in the ACUS study, 44% reported suspending and appointing a temporary guardian, and 89% reported removing and appointing a replacement conservator. In one specific example included in a 2010 Government Accountability Office (GAO) study, an Alaska court removed a professional company as conservator and transferred the case to a public guardianship office after discovering the company stole \$90,000 of a veteran’s inheritance.

- **Report to professional boards.** If the conservator is a professional, the court could report to the agency responsible for licensing and disciplining that profession. While every state has an attorney disciplinary agency, only a few states that have licensing/certification programs and appropriate disciplinary boards for conservators. Court reporting to professional boards was a practice used by 7% of judges in the ACUS survey. For example, a Washington, D.C. conservator responsible for the theft of \$97,000 from an estate was suspended from the practice of law. In a 2017 Indiana case, a court’s actions and findings laid the foundation for a disciplinary committee to act against a conservator who stole \$20,000 from an elderly individual. The conservator was suspended from the practice of law for a minimum of three years. The National Guardianship Association’s annual Legal and Legislative Review profiles many additional instances of conservators being disciplined for misconduct.

- **Require corrected accountings.** The court could require the conservator to re-submit a correct accounting for an audit (see Exploitation in Minnesota Brief).
- **Increase oversight.** The court could increase its oversight of the conservator, including requirements for submitting monthly bank statements to the court, establishing direct payments to the provider, and regularly providing documentation to the court that funds have been spent appropriately (see Innovative Programs Brief).
- **Refer to APS.** The court could make a referral to adult protective services (APS). APS is responsible for receiving and investigating reports of abuse, neglect, and exploitation of older individuals and persons with disabilities. If APS determines that the report is valid, it may provide or arrange for an array of protective services including:
 1. referrals for legal assistance to protect remaining assets and recover those that were exploited,
 2. emergency shelter (which may be necessary if the conservator is also the exploited individual’s caregiver),
 3. housing assistance,
 4. capacity assessments, and more.

The ACUS Survey found that 39% of surveyed judges had referred at least one case to APS or for criminal prosecution. The proportion of referrals to APS versus criminal prosecution is unknown.

- **Take additional actions.** The court could issue show cause or contempt citations, order additional trainings, increase or collect on a bond -- or refer a case to criminal justice, as outlined below.

Conservator exploitation, particularly if committed by a family member, is all too often perceived by the court as well as by law enforcement officers and prosecutors as a personal or civil legal matter, rather than as a crime.

REFER FOR CRIMINAL PROSECUTION

There is little information on how often judges refer matters for criminal prosecution, but it is clear that there are several barriers. Conservator exploitation, particularly if committed by a family member, is all too often perceived by the court as well as by law enforcement officers and prosecutors as a personal or civil legal matter, rather than as a crime. Many courts lack an institutional mechanism to refer a victim to a law enforcement agency or prosecutor's office. Judges may face ethical considerations that prevent them from referring a case to law enforcement. Finally, even if a judge refers victims to the appropriate local agency for prosecution, or suggests that the victim or concerned others file a complaint, these agencies may be reluctant to handle such complaints due to a lack of institutional knowledge and resources.

Laws and Guidelines

Conservator exploitation that rises to the level of criminal activity as defined by every state statute – such as theft, larceny, embezzlement, fraud – is a prosecutable offence. Furthermore, an increasing number of states are enacting laws that impose criminal penalties for various forms of elder or adult abuse, which may include enhanced penalties. Some states even have laws that specifically criminalize financial exploitation of an individual subject to conservatorship. These laws may facilitate more expedient prosecution of conservator misconduct and enhance data collection.

Where We Stand in Practice

Depending on the nature of the crime, courts may refer allegations of criminal activity to the local, state, or federal criminal prosecutor, or recommend that victims or concerned individuals do the same. As noted earlier, there is no data on how often cases are referred. Out of 139 Minnesota cases in which auditors found a concern of loss, only one professional conservator was charged with a crime under Minnesota's exploitation statute. The Richland County Probate Court of South Carolina can hold a conservator in contempt and even incarcerate a conservator when appropriate. As a last resort, the court can report a case for criminal investigation (see Innovative Programs Brief).

The 2016 GAO report on abuses in guardianship noted several examples of conservators who were prosecuted and convicted for financial exploitation. The report did not clarify whether these cases came to the attention of prosecutors via referrals from the courts with jurisdiction over the conservatorship cases or another source:

- A professional guardian in Oregon stole money from or mistreated 26 people subject to guardianship/conservatorship. Among other findings, the conservator was convicted of four counts of aggravated theft in the first degree, one count of theft in the first degree, one count of money laundering and one count of tax evasion. The conservator received a 48-month prison sentence and was ordered to repay over \$117,000 in restitution to the victims.
- A Nevada guardian withdrew money from the bank accounts of people subject to guardianship, including over \$78,000 from one individual. She also falsified payments to her own company, and used funds for personal purchases. The guardian pled guilty to exploitation of an elderly or vulnerable adult, a felony in Nevada, was sentenced to 8 years in prison, and ordered to repay over \$160,000 (see Examples of Exploitation Brief).

Depending on the nature of the crime, courts may refer allegations of criminal activity to the local, state, or federal criminal prosecutor, or recommend that victims or concerned individuals do the same.

SHARING INFORMATION WITH FEDERAL AGENCIES

Courts could act to prevent continuing exploitation by fraudulent conservators who also serve as federally appointed representative payees under the Social Security Administration (SSA), the Department of Veterans Affairs (VA), or the Office of Personnel Management (OPM). Communication between courts and federal agencies could prevent bad actors from continuing to

exploit their victims. Examples of conservators who have exploited funds and been discovered by courts, yet are able to maintain representative payee status, are particularly troubling. For example, the GAO report in 2010 describes a Washington, D.C. professional guardian who generated tens of thousands of dollars in unnecessary fees from an individual's estate. The guardian received a disciplinary letter, but continued to serve as the representative payee for 69 beneficiaries of the Social Security Administration, three beneficiaries of the Department of Veterans Affairs, and two beneficiaries of the Office of Personnel Management (2010 GAO Report).

Laws and Guidelines

Currently, there are no national standards or procedures for reporting conservatorship exploitation between courts and federal agencies.

Where We Stand in Practice

Several GAO reports on guardianship issues have addressed the need for information sharing between federal payee programs and state courts. As the reports conclude: SSA and other federal agencies could alert state courts when they discover that a representative payee who is also a conservator has misused funds, so the court can investigate and take appropriate action if it finds exploitation. Currently the federal Privacy Act prevents SSA from sharing such information.

Conversely, upon finding exploitation by a conservator who is also a payee, courts could alert SSA or other federal agencies, so the agency can investigate and if necessary remove the payee. There is no directive preventing such an information flow. However, courts need a clear pathway and procedure for informing SSA. Efforts are underway to determine the most appropriate protocol for courts (see Systemic Approach Brief) - for instance through SSA-WINGS (state Working Interdisciplinary Networks of Guardianship Stakeholders) connections.

A few courts have established a process for communicating with state or federal agencies if exploitation is detected. The volunteer monitoring program of Ada County Probate Court of Boise, Idaho has an administrator that refers cases of suspected abuse to an APS state office. The court auditor of Tarrant County, Texas communicates directly with SSA and the VA.

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Brief No. 6

INNOVATIVE PROGRAMS THAT ADDRESS - FINANCIAL EXPLOITATION BY CONSERVATORS -

This is the sixth in a series of eight Background Briefs produced by the National Center for State Courts and its partners under a project funded by the U.S. Department of Justice Office for Victims of Crime to assess the scope of conservator exploitation and explore its impact on victims.

Innovative programs detect and address exploitation through the use of technology and auditing staff. However, the impact of these programs on victim outcomes is largely undocumented.

IDENTIFYING INNOVATIVE PROGRAMS

Nationally, there is a dire need for guardianship/conservatorship reform, as relatively few courts have the resources, staffing or expertise to actively monitor conservatorships. Despite these limitations, several programs and courts have engaged in promising reform. To identify such programs, the project team queried multiple guardianship-related email discussion lists, performed an internet search, and identified well-established programs mentioned in previous reports and articles. After compiling a list of programs, the project team interviewed program directors. The availability of data to document program activities and/or outcomes was a key factor in the final selection of innovative programs highlighted in this Background Brief. Once selected, program directors completed a standard set of interview questions. None of the programs had “evidence-based” results; their effectiveness in detecting and responding to conservator exploitation had not been measured. For this reason, the programs described below are referred to as innovative programs rather than national models.

PROFESSIONALLY STAFFED STATE-LEVEL AUDITING PROGRAMS

In nearly every state, conservators are appointed by a judge or judicial officer. The courts are then responsible for reviewing accountings and ensuring that the individual’s estate is managed properly. Practices vary from one locality to another, and even among judicial officers in the same court. Reform at the state level has the broadest impact, but state efforts are influenced by the organizational structure of the state court system, their authority over trial and probate courts, state court budgets, and leadership priorities. Three state courts have engaged in systemic reforms to modernize the conservatorship process and improve the auditing component: Minnesota, Texas, and Colorado.

Minnesota

The Minnesota Judicial Branch’s conservatorship program is highly regarded and has become the model for court reform in other states. The Minnesota program includes two separate but complementary tracks: (1) the mandatory statewide use of conservatorship software, and (2) professional auditing by a centralized team of auditors. The current version of software (MyMNConservator) was launched in 2014 and became mandatory for all conservators. The software requires conservators to enter individual transactions, which allows auditors to quickly determine changes in income and expenditures over time and analyze specific categories of transactions. In 2012, Minnesota became the first state to launch a centralized team of auditors to review accountings submitted statewide. Auditors use a scale of one to four to assign a value to each case and file an audit report with the court of jurisdiction summarizing audit findings and recommendations. The local court then has the discretion to call for a judicial hearing and take follow-up actions where appropriate.

Minnesota is one of the few states that can document the amount of assets under conservatorship—over \$900 million in 2015. The audit team found that almost 14 percent of the accountings audited have “concerns of loss” findings, which include things such as inappropriate loans or expenditures or comingling of funds.

Texas

Whereas Minnesota is a centralized court structure with a single case management system for all trial courts, Texas has a decentralized structure in which each judge acts as his/her own court operating independent of other courts. There are at least 14 different case management systems that operate throughout the state. Additionally, much of rural Texas relies on constitutional judges, who may or may not be law trained, to appoint and oversee conservators. In this context, the Texas Office of Court Administration (OCA), with significant legislative support, created a Guardianship Compliance Pilot Project. Guardianships include guardianships of the estate—conservatorships.

As of December 2016, the Compliance Specialists had gone from court to court in 11 counties to review paper files, starting with the oldest files. The Specialists identified cases that should be closed (due to emancipation, death, temporary status of conservatorship, transfer to another jurisdiction) and documented a variety of elements, such as whether background checks were carried out and accountings submitted on time. On average, they discovered that 48% of the cases reviewed in eight counties were non-compliant—missing and late accountings. The Compliance Specialists are working with each court to send out letters to conservators requesting the necessary information.

Additionally, the OCA is developing software, similar to Minnesota’s approach, that will require conservators and guardians to submit annual reports and accountings through a state guardianship reporting protocol.

Colorado

Colorado has a small program at the State Court Administrator’s Office consisting of two Protective Proceedings Auditors (PPAs). At the judicial district level, designated staff are responsible for monitoring

conservatorship filings to ensure that reports are timely and contain sufficient information. The district court staff and judicial officers can refer a case to the PPA team for audit, and the PPA team can work with courts to periodically select cases at random for audit. The number of cases audited remains limited by staff—between April 2013 and December 2016, the PPA program completed audits of approximately 100 conservatorship cases with a combined estate value of over \$90 million. Colorado is also considering a statewide software system to improve the submission of accountings.

Each of the programs noted above has made great strides in modernizing the system and improving the ability to detect financial exploitation on a statewide basis. However, a gap remains between audit findings and court responses. This gap is addressed in greater detail in another study component in which Minnesota “concern of loss” audits were tracked for court actions (see Exploitation in Minnesota Brief). These state-level programs have definitively improved the ability of the court to detect exploitation on a statewide basis. Their impact on case outcomes that prioritize justice and the restoration of assets is not yet known.

These state-level programs have improved the ability of the court to detect exploitation on a statewide basis.

LOCAL JUDICIAL AND COURT CLERK MONITORING EFFORTS

Locally, court clerks and judges can champion reform and create meaningful levels of oversight. Two examples model the impact of strong leadership and a commitment to protect assets. In Richland County, South Carolina, the probate court judge has developed practices that individualize the level of monitoring. In Palm Beach County, Florida, the Clerk of Court has a specialized Audit and Investigation Program.

Richland County Probate Court, South Carolina

Judicial leadership and a passion for guardianship/conservatorship cases can lead to practices that prevent,

identify, and address exploitation by conservators. The Richland County Probate Court in Columbia, South Carolina, is led by a judge who has taken measures that enhance conservator accountability. The Court oversees about 379 adult conservatorships. The oversight process begins at the time of petition. Proposed conservators are required to provide a credit report and submit to a criminal background check. If there are any issues, such as questionable credit scores, the judge may ask for supporting documentation and an explanation. The judge often requires the conservator to prepare a monthly needs budget for the individual, and may order that a restricted account (contract with bank, conservator, and court) be established. The restricted account may be based on the monthly budget and in some cases, may completely restrict the account so that no expenditures can be made without court approval. According to the judge, “this is very time intensive, but we discovered we spent more time chasing the money to get it back.” The first accounting is due six months following the appointment and then annually.

If there are any issues, such as questionable credit scores, the judge may ask for supporting documentation and an explanation.

Courts use a term called “differentiated case management,” in which certain cases are given more attention than others due to a number of factors. The Richland County Probate Court employs this concept to place additional restrictions on conservators who may have poor credit scores or need substantial assistance with financial management. For example, the court may require monthly bank statements, the establishment of automatic payments to directly pay the service provider, and proof that the money was spent appropriately. The judge may send a Special Visitor (trained law school student) to the residence to verify certain expenditures and may appoint a guardian ad litem to review transactions and explore the case further.

When an expenditure is considered inappropriate, the judge uses a number of tools to ensure a fair outcome. The judge may require a hearing to receive testimony

on the issue, may terminate or remove the conservator, may set up a repayment schedule for the conservator, and finally, can hold a conservator in contempt and incarcerate when appropriate. The court works in a variety of ways to recover assets. For instance, in cases where real estate is transferred without permission from the court and to the disadvantage of the individual, often to another family member, the judge may order the deed to be voided. Similarly, the judge may order the repayment of funds if a vehicle is transferred without receiving full market value. As a last resort, the case can be reported for criminal investigation.

Palm Beach County Clerk and Comptroller’s Office, Florida

The Palm Beach County Clerk and Comptroller’s Office in Florida is independent of the judiciary and has a specialized Audit and Investigation Program. The core components of the program are (1) independence; (2) unfettered access to records; (3) highly trained auditors and investigators; (4) use of professional standards; and (5) strong local relationships and community outreach. Trained court clerks are responsible for high-level reviews to ensure that reports are timely, complete and accurate. The initial review may identify “red flags,” which trigger a review by the Audit and Investigation Program. The Program also receives cases from the guardianship hotline, referrals from judges, and the Florida Department of Elder Affairs Office of Public and Professional Guardians. Depending on the number and severity of “red flags” that were identified, an audit may be carried out to focus on a specific set of issues or on the entire accounting. With court approval, third party verification may be required—this calls for in-person inspection of bank vaults and safe deposit boxes or physical verification of reported personal property. The Clerk’s office may also issue a subpoena to obtain records from a conservator or third parties. Investigators may also search public and commercially available information, including social media accounts (e.g., Facebook, Twitter), interview parties who may have relevant information, and in potentially criminal acts, carry out covert surveillance.

In Fiscal Year 2015-16, clerks carried out 311 reviews of accountings. The Program received 132 hotline calls and referred eight cases to law enforcement and other groups. They reported \$247,000 in unsubstantiated

expenditures and missing assets. The Program has been implemented in at least ten other counties in Florida and has become a statewide model. The amount recovered and any sanctions placed on conservators is unknown, as the Program does not collect data on judicial responses to audit reports.

Reforms to local court and clerk conservatorship practices require resources and leadership. A comprehensive package would include professional audits, such as those carried out in Palm Beach County, with a deliberate judicial response that prioritizes accountability and the restoration of assets, as modeled by the Richland County Probate Court.

VOLUNTEER MONITORING PROGRAMS

Volunteer monitoring programs can be instituted statewide and locally. In each case, a volunteer coordinator is responsible for training and monitoring volunteer monitors. Two states—New Jersey and Utah—have developed ambitious programs that currently serve a number of counties. An example of a local volunteer monitoring program is the Spokane County, Washington, Guardianship Monitoring Program.

Utah and New Jersey

The Utah Courts have a Guardianship Reporting and Monitoring Program (GRAMP) that assigns volunteers, called “court visitors,” to investigate guardianship and conservatorship cases. There is also a specific role for auditors—court visitors with accounting backgrounds—who document the submission of timely accountings and look for indications of financial exploitation. In 2018, the program secured ongoing funding through state appropriations. The New Jersey Courts have a similar Guardianship Monitoring Program (GMP), which includes the use of volunteers to examine inventories and annual accountings and make recommendations about follow-up action. The availability of trained and experienced volunteers is an ongoing challenge for both programs. Both programs are relatively new, and according to program managers, the lack of consistent judicial follow-up to audit reports remains problematic.

Volunteer monitoring programs can be instituted statewide and locally. In each case, a volunteer coordinator is responsible for training and monitoring volunteer monitors.

Spokane County, Washington

In Spokane County, Washington, the Superior Court has a Guardianship Monitoring Program that originated in 2000. The Program relies on trained volunteers to review court files to ensure that the required documents are filed and to conduct audits to ensure that the estate is being managed effectively. They oversee about 2,000 active cases, including both guardians and conservators. The program has not been evaluated—the number of cases in which a conservator breached his or her financial duty and the outcomes of those cases is unknown.

The degree to which volunteer monitors have the sufficient education and experience to examine and audit cases varies considerably, and coordinator supervision is critical. Evaluations are necessary to determine the quality of audits and the impact of audit findings on court actions.

PROGRAMS OUTSIDE OF COURT

Guardianship/conservatorship is considered a “last resort” because it removes fundamental rights from individuals, and thus less restrictive options are preferred when possible (although such options may result in exploitation as well). For this reason, the project team carried out interviews with non-court programs to determine their role in identifying conservator exploitation and producing positive outcomes for victims. The project team contacted four programs for additional information: Cook County, Illinois’ Public Guardian Program; Eldercaring Coordination, Guardian Partners in Portland, Oregon; and British Columbia’s (Canada) Nidus Personal Planning and Resource Center.

- The Cook County Public Guardian Program has a Financial Recovery Unit (FRU) staffed by attorneys who investigate complex cases of financial exploitation, some of which involve former conservators. The Unit handles between 35 to 40 cases at a time and has recovered more than

- \$50 million from individual exploiters, insurance companies, and surety bonds.
- Guardian Partners, operating in four Oregon counties, assists the court in protecting seniors, adults with disabilities, and children under guardianship care through monitoring, training, and supporting guardians. Volunteer monitors investigate specific guardianship cases. When the monitors find abuse, Adult Protective Services, the court, and others are notified as appropriate.
- Eldercaring Coordination in Florida, Ohio, and other states is a dispute resolution option specifically for high conflict cases involving issues related to the care and needs of elders. A trained coordinator appointed by the court uses mediation, problem-solving skills, education, community resources, and the limited authority granted by the court to address aggravated situations, frequently in the context of family disputes. Some Eldercaring coordinators charge a fee for their services.
- Nidus, in British Columbia, Canada, encourages the use of Representation Agreements, which are legally enforceable and used in case of incapacity, for end-of-life, and other support needs. There are no specific criteria for capability—individuals who are diagnosed as mentally incompetent by a physician may still enter into a Representation Agreement. The Agreements use a team approach in which there is a designated monitor. The number of executed Representation Agreements is unknown.

Programs outside of court offer the potential for those who are able to access such services. Cook County’s program is impressive in terms of its ability to recover assets in general, but the small caseload limits its impact on a much larger conservatorship caseload. Eldercaring Coordination, Guardian Partners, and Nidus depend on voluntary participation and on court buy-in; and Nidus depends on voluntary participation, which is unlikely for someone who deliberately exploits. More research and data are needed to explore the programs’ impact on the identification of and response to exploitation by conservators.

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Brief No. 7

DATA QUALITY UNDERMINES ACCOUNTABILITY IN CONSERVATORSHIP CASES

This is the seventh in a series of eight Background Briefs produced by the National Center for State Courts and its partners under a project funded by the U.S. Department of Justice Office for Victims of Crime to assess the scope of conservator exploitation and explore its impact on victims.¹

A great deal of work lies ahead to modernize guardianship/conservatorship systems. At the local level, poor documentation directly impacts the ability of courts to detect and respond to exploitation.

BACKGROUND

In November 2016, the Government Accountability Office (GAO) issued a report, *The Extent of Abuse by Guardians is Unknown, but Some Measures are Being Taken to Help Protect Older Adults*. The report concludes that “the extent of elder abuse by guardians nationally is unknown due to limited data on the numbers of guardians serving older adults, older adults in guardianships, and cases of elder abuse by a guardian” (p. 6).

Two promising developments noted in the GAO report are worth highlighting:

- The U.S. Department of Health and Human Services has built the National Adult Maltreatment Reporting System (NAMRS), which is designed as a national reporting system for Adult Protective Services (APS) programs. NAMRS has the potential to determine the extent of reports of financial exploitation by a substitute decision-maker, including a guardian or conservator. In states that have an age criterion for APS services, the data will exclude younger adults who are placed

under a conservatorship. Moreover, it is uncertain how many cases of alleged conservator exploitation are reported to APS. The first iteration of data for 2016 was released on July 23, 2018 with 54 of 56 states and territories contributing data in the first year. Two states have reported data on substitute decision-making in the first year. However, there is no data reporting financial exploitation by a substitute decision-maker at this time.

- The Minnesota Judicial Branch has led the nation in the development of transaction-level software (MyMNConservator) and centralized auditing of conservatorship accountings. NCSC partnered with Minnesota on the Conservatorship Accountability Project to explore the use of analytically-based risk indicators as a predictor of a subset of problematic accountings (“concern of loss”). NCSC is working with several states to pilot a similar software approach, with the goal of modernizing the system and developing tools that courts can use to direct resources to cases most likely to involve some level of financial exploitation.

Despite these targeted efforts to document exploitation in guardianship or conservatorship cases, most reports and studies lack empirical data to enumerate the problem of conservator exploitation. Over the years, the National Center for State Courts has engaged in numerous attempts to collect data on adult guardianships and conservatorships. NCSC conducted a 2014 Survey of Local Courts on behalf of the Administrative Conference of the United States. While the survey was not based on a representative sample of local courts, “two-thirds of court respondents (64%) indicated that the court had taken actions against at least one guardian for misconduct, malfeasance, or serious failure to fulfill his or her obligations in the past three years. In these cases, the most serious sanctions applied were the removal and appointment of a successor guardian and issuing a show

¹ Data and practices presented in this Background Brief were collected in the fall of 2016, and do not necessarily reflect current state information.

cause or contempt citation.” This suggests that most judges who handle this case type have encountered cases that include an element of financial exploitation, however the data is still limited and does not paint a national picture. This Background Brief reports the project’s effort to document barriers to state court data collection, national estimates of caseloads based on the limited data available, and potential next steps to improve data collection and reporting.

STATE COURT DATA COLLECTION EFFORT

NCSC’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 remains highly problematic. To determine if the quality of data had improved and to explore challenges in documenting adult conservator exploitation, NCSC undertook a national survey of administrative offices of the courts in fall 2016. The project team also collected additional information from some individual states that have been working to reform 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 guardian and conservator cases filed
- Total active guardian and conservator cases
- Total dollar value for conservatorship cases
- Cases in which a conservator was removed for cause
- Cases in which a conservator was criminally charged
- 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 and therefore were not able to provide further information (KS, ME, OK, RI). 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. None of the states was able to fully report all data elements in the detail requested.

BARRIERS TO REPORTING QUALITY DATA

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.

Conservatorship Practices are Highly Localized

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—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 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.

Next Steps

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.

Before implementing new data definitions and collecting more detailed information, states must document their current caseload and purge outdated or closed cases. The file review analysis should be carried out using a standardized checklist and form that documents the open/closed status of each case as well as compliance with state requirements, such as background checks, and recommended practices. Additionally, documentation of the amount of assets under the court's watch and reporting compliance—the submission of required reports and accountings on time—should be gathered to assess changes in asset values over time and to bring cases into compliance. State and local courts should conduct a file review analysis to determine the actual number of active cases and to improve compliance.

Data standards for what needs to be collected and reported often do not exist within a state.

Lack of Standards for Data Reporting

Data standards for what needs to be collected and reported often do not exist within a state. Multiple states do not offer or enforce guidelines on what data to capture or how to count guardianship/conservatorship cases. Regardless of whether a state has administrative authority over probate cases, many states reported that the level of detailed data requested could only be found in local court records. This type of detail is often not collected at the state-level. Instead, only aggregate information, such as total probate filings, is required to be reported to the administrative office. Without clear guidance or standards from the state on the type of information to collect and report, local courts often rely on past practice. This leads to inconsistent counting practices and data elements collected. Specific examples and quotes from POCs help illustrate these problems.

- **Is the case open or closed?** In each state that has moved toward statewide reform, the first step has been to review each case file in the local courts to determine if the case is open or not. All too often, courts have not followed up on cases and have failed to close cases in which the individual has died, the guardianship/conservatorship was temporary, the individual relocated to another jurisdiction,

or the minor reached the age of emancipation. Texas provides an illustration where the Office of Court Administration's Guardianship Compliance Pilot Project reviews uncover that many cases are not closed appropriately. Texas' experience is not unique. Nevada and New Mexico's efforts to document guardianships and conservatorships in several courts and have similar findings.

- **Are conservators submitting accountings on time?** Most states require annual accountings be filed with the court, yet local courts may not be sending notices to conservators or tracking the receipt and timing of submitted documents. Courts and judges may also be inconsistent in determining the anniversary/due date of annual accountings.
- **What are the key characteristics of individuals and conservators?** Most states do not include individual-level data in data systems, such as the date of birth of individuals, which is critical to distinguishing juvenile from adult cases and whether the case should be closed due to emancipation or death. Local courts do not necessarily collect information on whether the conservator is a family member or a professional. This information becomes particularly critical when allegations of misconduct against a professional conservator may involve a number of individuals.
- **What are the terms and conditions of the conservatorship?** Some judges do not write explicit orders that outline the specific powers of the guardian or conservator. In some cases, it is unclear as to whether the appointed person was given the authority to act on behalf of the person's health and well-being (guardian) and/or financial matters (conservator).
- **What data systems, if any, are used?** Some local courts, usually in rural jurisdictions, may not use a case management system. Even in larger jurisdictions, case management systems were designed to manage court events, primarily hearings, that result in disposition. They are often insufficient in tracking cases requiring review year after year, such as conservatorships.

- **How is the case being coded in the case management system?** Across localities, there are inconsistencies in how cases are coded. Generally, judges and court staff work to close cases and remove them from the docket. Some clerks consider the appointment of a conservator to be the event that closes a case, while others may keep it open because of ongoing oversight required by the court. While NCSC recommends that case management systems include a “set for review” option, there remain inconsistencies in how the cases are coded.

do not have a single case management system that covers all jurisdictions, and instead must combine information collected on multiple systems with varying data elements and level of detail.

The lack of reliable and comprehensive data at the local court level results in a large number of states unable to provide reliable state-level data on the number of active adult guardianship or conservatorship cases.

The long-term nature of guardianships and conservatorships and the need for ongoing monitoring raises the level of reporting needed.

MOST STATES HAVE UNRELIABLE DATA

The lack of reliable and comprehensive data at the local court level results in a large number of states unable to provide reliable data on the number of active adult guardianship or conservatorship cases. Survey data reported by the states often lacked basic distinguishing detail such as the age of the individual (minor or adult, and age of adult) and whether the guardianship case included guardianship of the person, conservatorship, or both. Often states could provide only high-level totals, such as total guardianship cases filed or active cases. Also, states were unable to provide reliable counts of the number of cases in which a conservator was removed for cause, a conservator was criminally charged, and the total dollar value of assets under court oversight.

Next Steps

NCSC’s Court Statistics Project (CSP) has a data dictionary, the State Court Guide to Statistical Reporting, that defines each case type and discusses how cases should be counted for compiling a national picture of caseloads across the states. The CSP focuses on capturing an accurate count of the number of filings and the total number of active cases but captures high-level information in order to include all states in a national picture. More detailed data around guardianship and conservatorship cases are needed. The long-term nature of guardianships and conservatorships and the need for ongoing monitoring raises the level of reporting that should be done. NCSC suggests the development of a set of reporting guidelines that include several tiers, the basic level being the minimum required data submitted to the CSP, with additional levels to include case and event details needed by local courts and states to monitor active cases and detect the problem of financial exploitation.

NATIONAL DATA ESTIMATES

Sixteen states provided reliable data on adult guardianship or conservatorship cases that were used to create national estimates. However, a number of states were unable to differentiate between cases that involve a guardianship of the person, conservatorship, or both. For these reasons, estimates refer to guardianship and/or conservatorship cases.²

Outdated Technology Contributes to Poor Reporting

Outdated technology and case management systems are not flexible with data collection fields. It is a time intensive and expensive task to reconfigure the data collection systems and process, and therefore, paper or hard copy files remain the most common location where detailed data is captured. Additionally, many state courts

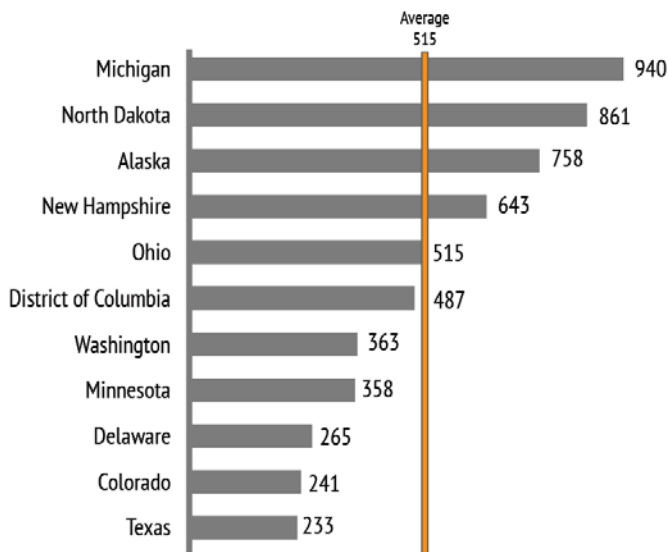
Caseloads

- In 2015, an estimated 180,000 new adult guardianship and/or conservatorship cases were filed in the United States. This estimate is based on an average (from 16 states) of 71 cases being filed per 100,000 adult population.

² Data and practices presented in this paper were collected in the fall of 2016, and do not necessarily reflect current state information.

- An estimated 1.3 million guardianship and/or conservatorship cases were active or awaiting a hearing or review in 2015. This estimate is based on an average (from 11 states) of 515 active cases per 100,000 adult population.

Figure 1 Active Adult Guardianship or Conservatorship Cases



ASSETS UNDER COURT WATCH

Data on the total dollar value under court oversight for conservatorship cases was difficult for states to report. Four states were able to report asset data totaling \$5.4 billion or an average \$16.2 million under court conservatorship per 100,000 population. When applying that to the national population, an estimated \$50 billion is under court oversight for adult conservatorship cases in the United States.

States were often only able to report dollar value for cases under a public or professional conservator, not those with a family member or friend acting in that role. Other states were only able to report a subset of counties or courts that report dollar value as these localities are part of an optional guardianship registry or have data capabilities beyond the rest of the state. Also, very few states were able to distinguish the dollar value for minor estates separately from those of adult estates. Table 1 outlines available asset data.

Table 1 Assets Under Court Oversight

State	Total Assets Under Court Oversight (rounded)		Assets per 100k population (rounded)
Idaho	\$342 Million		\$21 Million
Minnesota	\$909 Million		\$17 Million
Texas	\$4 Billion		\$15 Million
Delaware	\$125 Million		\$13 Million
Total	\$5.4 Billion	Average (per 100k)	\$16.2 Million

Next Steps: NCSC has developed court performance measures for trial courts as well as problem-solving courts and on particular case types, including elder abuse. Performance measures are desperately needed on guardianship/conservatorship cases that emphasize procedural satisfaction and accountability. Examples of performance measures in this area may be the percentage of cases in which there is a bond, the percentage of cases in which complete annual accountings have been submitted by the due date, and timeliness measures (e.g., number of days from petition to hearing, from appointment to inventory submission, from accounting submission to audit, from audit report to court hearing), and percentage of assets recovered. Other measures may focus on issues such as background checks and credit histories (e.g., number/percentage conducted, use of extra safeguards where necessary). The goal should be to develop a performance management system in which the court periodically reviews findings and makes system improvements that are constantly informed by data. Data used to inform the measures should be developed into a “dashboard” for judges that will display specific measures and provide alerts to judges when cases may need greater attention—for instance, accountings are delinquent.

CONSERVATORS REMOVED / CHARGED FOR EXPLOITATION

Five states were able to provide some information on cases where guardians were removed or charged, potentially due to exploitation. However, none of the five were able to provide a complete picture for the state or verify that removal or charges were for financial exploitation. Specific details are listed below for each of the five states.

In **Delaware**, guardianship data is filed electronically since 2007 and therefore staff can conduct key word searches to identify cases within the system where there are concerns of exploitation or where a conservator was removed. However, this is a manual process to search, find, and review cases. The process also relies on correct search terms, and requires users to know and use these terms to capture information.

Indiana reported guardians who have been revoked or removed, however the specific reason for removal is not known, therefore financial exploitation is not necessarily the cause. Also, revocation or removal data is only available for counties that participate in an optional guardianship registry system, and therefore complete state-level data is unavailable at this time.

Minnesota has incorporated a “finding of loss” data element in their case management system to be able to track if conservatorship removal was due to financial loss. However, at this time this is not part of a regular report and requires manual checking. Judicial Officers may also handle exploitation cases in multiple ways: ordering repayment, removing a conservator, making it difficult to get a complete picture of all cases where exploitation occurred.

Texas, in accordance with state code, tracks the number of investigations and removals of guardians by county. Texas was able to provide state-level data for removals; however, the data quality is suspect based on county by county review by the Guardianship Compliance Project. At this time criminal charge information resulting from investigation is not available.

Washington began tracking both removal and criminal charge data in 2015 for professional guardians and conservators only. Currently, the process and data collection for counting these removals and charges is a paper process.

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 person’s subject to 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.

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Brief No. 8

SUPPORTING VICTIMS OF CONSERVATOR EXPLOITATION

This is the eighth in a series of eight Background Briefs produced by the National Center for State Courts and its partners under a project funded by the U.S. Department of Justice Office for Victims of Crime to assess the scope of conservator exploitation and explore its impact on victims.

STATEMENT OF ISSUE

Court detection, monitoring, and action are necessary to protect individuals subject to conservatorship, but not sufficient without support for victims of exploitation. What can enhance the ability of protected persons, their family and friends, or concerned professionals or service providers to raise allegations of exploitation to courts or other authorities? What strategies can be put in place to safeguard the rights and assets of individuals victimized by conservator exploitation? Specific issues for consideration might include:

- What are the essential characteristics of a user-friendly and effective court process for complaining about conservator exploitation?
- What steps can enhance the use of bonding to recoup a victim’s assets from conservator exploitation?
- What actions can strengthen access to civil justice for victims of conservator exploitation?

BACKGROUND

Protected persons, their family members, and other interested individuals voice frustration over the difficulty of raising their suspicions about conservatorship exploitation to the court and of having their concerns heard and acted upon. They also face challenges in recovering exploited assets, including the cost of legal services.

ENABLING VICTIMS TO COMPLAIN TO THE COURT

Laws and Guidelines

A few states have developed approaches to enable victims to complain to court. Statutes in Washington and Wyoming set forth procedures for submitting a complaint to a court about conservatorship exploitation, establish a timeframe for court response, and allow courts to assess court costs and impose attorneys’ fees against any party involved. In 2015, Texas enacted a bill of rights giving a protected person the right to have a court investigator, guardian ad litem, or attorney appointed to investigate complaints. A Supreme Court Rule in Ohio requires local courts to establish a process for receiving and considering complaints and comments about guardians and sets forth five components to ensure that complaints are acted upon, that the guardian is notified of the complaint, and that the complainant and the guardian are informed of the outcome. In Idaho, court rules allow a judge to review ex parte communications regarding complaints about guardians and conservators; the state’s WINGS (Working Interdisciplinary Network of Guardianship Stakeholders) takes complaints from the public and then transmits them to the complainant, the protected person, and the court. Informative although not directly relevant, 20 state statutes allow an individual subject to a guardianship or conservatorship to informally ask the court to reconsider the person’s capacity, as through a letter or note to the judge.

The National Probate Court Standards (NPCS) state that probate courts “should establish a clear and easy-to-use” complaint process that indicates when a court “can receive ex parte communications,” and should provide information about that process to the protected person, the conservator, and to “all persons notified of the original petition.” Commentary to that standard suggests that “care should be taken to ensure that an unrepresented person is able to use the complaint process,

that the court receives the necessary information, and that the process is flexible enough to accommodate emergency or urgent circumstances.” The National Association for Court Management (NACM), in its Adult Guardianship Guide, elaborates on that standard and urges courts to:

1. make complaint procedures easy for laypersons to understand and to access,
2. establish internal procedures for timely review of and action about the complaint, and
3. track data from, review, and evaluate the complaint process itself.

The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA), a model act approved by the Uniform Law Commission in 2017 for adoption by state legislatures, contains a section allowing a person subject to conservatorship or someone interested in that person’s welfare to file “a grievance in a record with the court” about a conservator’s breach of fiduciary duty or other failure to act consistently with the law. Unless a similar grievance was filed and acted upon in the previous six months, the section also requires the court to review the grievance and, if necessary, schedule a hearing about the complaint; it also authorizes the court to take any action supported by the evidence.

There do not appear to be any state laws, rules, or guidelines addressing the response to serial complaints, or requiring that complaints be investigated in a manner that is transparent and that is free from or mitigates conflict of interest.

Where We Stand in Practice

Some state courts or other entities have created complaint procedures due to or despite the lack of statutory or court rule mandates. Examples include the District of Columbia, Florida, Idaho, Washington, and Wyoming.

Complaint procedures vary. Wyoming requires a “verified writing.” Washington provides a three-page form but indicates that the complainant may submit a letter instead of the form. The District of Columbia requires that complainants complete every section of a two-page form. In Idaho, the court system provides a short form that must be completed in full; an interactive version

of the form is also available on the website of Idaho Legal Aid Services. The County Clerk in Palm Beach County, Florida, established an independent hotline to receive allegations—including anonymous complaints—of conservator exploitation. In states that certify conservators, complaints may be made to the certification agency.

There has been little to no analysis of whether existing complaint procedures are accessible and easy to use, whether they provide for time-sensitive, transparent, fair reviews that are free from or mitigate conflicts of interest, and their outcomes.

MAKING VICTIMS WHOLE THROUGH BONDS

By requiring a conservator to obtain a bond, monitoring compliance, and ordering bond reimbursement if exploitation occurs (which means that the bonding company reimburses the protected person’s estate and then recoups its expenditure from the conservator), a court may help the victim recoup or minimize financial losses and avoid civil litigation.

Laws and Guidelines

The Uniform Guardianship and Protective Proceedings Act (UGPPA) gives the court discretion over whether to require that a conservator secure a bond. If a court does require a bond, then unless the court decides otherwise, “the bond must be in the amount of the aggregate capital value of the property of the estate in the conservator’s control, plus one year’s estimated income, and minus the value of assets deposited under arrangements requiring an order of the court for their removal and the value of any real property that the fiduciary, by express limitation, lacks power to sell or convey without court authorization.” The new UGCOPAA, however, makes bonding default with very limited options for waiver. Indeed, the UGCOPAA Commentary says “Bond for a conservator is nearly always required under this act. The bond may be waived only if:

1. the conservator is a financial institution with trust powers,
2. the court finds that a bond is not necessary to

- protect the interests of the individual, or,
3. the court orders an alternate asset arrangement.”
- The UGCOPAA retains the UGPPA requirement about the amount of the bond.

Statutory research in 2017 indicated that bonding is required in 21 states and permissible in four states. Most of the states that require bonding allow the court discretion for good cause or other specified circumstances, or provide exceptions to the requirement. Exceptions include the waiver of the requirement by the individual subject to conservatorship; the appointment of a public guardian or other government agency, of a financial institution or trust company, or of family members; or the establishment of a restricted account. Despite examples of family members serving as conservator engaging in exploitation, some states exclude them from bond requirements. Nevada law enacted in 2017 requires professional guardian companies to obtain bonds on their employees.

The NPCS state that “except in unusual circumstances, probate courts should require for all conservators to post a surety bond in an amount equal to the liquid assets and annual income of the estate” and provides factors that a court should consider in assessing whether circumstances are unusual. The National Guardianship Association Standards of Practice say only that a “guardian shall take all steps necessary to obtain a bond to protect the estate, including obtaining a court order.”

“The guardian shall take all steps necessary to obtain a bond to protect the estate...”

- National Guardianship Association Standards of Practice

Where We Stand in Practice

Virtually nothing is known about bonding practices. The Minnesota data analyzed for this project indicated that fewer than half of the conservators in the exploitation cases were bonded (see Exploitation in Minnesota Brief). There are no other data demonstrating the extent to which bonds are implemented, waived, or reimbursed.

No one has assessed whether using restricted accounts (see Court Actions Brief) might be a viable alternative to bonding, or whether the appointment of a professional or other third-party conservator because a caring family member cannot obtain a bond results in conflict, including allegations of exploitation. There has not been any evaluation of the outcome of bonding to victims, conservators, or the courts.

These promising practices for courts were identified in 2007 by AARP’s Public Policy Institute:

- Requiring that all liquid assets and income be fully bonded;
- Precluding the individual subject to conservatorship from waiving the bond requirement;
- Requiring that the court check within a specified time period whether the bond was obtained and take action against the conservator if it was not;
- Periodically reassessing the whether the bond amount needs to be adjusted; and
- Using bond reimbursement when court monitoring or other activities demonstrate “red flag” problems (See Court Monitoring Brief).

The AARP report suggested that a bonding requirement also may weed out unqualified conservators because “even if the court does not require credit history checks, bonding companies generally do.”

HELPING VICTIMS PURSUE CIVIL LEGAL REMEDIES

Victims or others acting on their behalf may need to seek civil legal remedies to mitigate or recover losses due to conservator exploitation. Additionally, others who have a potential interest in the victim’s estate (such as family members, other possible heirs including charities, and the state Attorney General) may bring lawsuits in civil court to recover losses or to challenge the legality of transactions and documents made by the conservator. (See Court Actions Brief for other remedies).

However, the ABA Commission on Law and Aging and other organizations often are contacted by victims and their family members who express high levels of frustration about barriers to accessing the civil justice

system. Victims and family members say that they cannot afford to pay for a lawyer in private practice and that legal aid programs will not get involved in conservatorship exploitation cases. Those who say that they can pay for a lawyer complain that they cannot find one who is knowledgeable about this issue or who is willing to bring a lawsuit against a professional guardian (especially if that guardian is a lawyer). Lawyers—whether working for a legal aid agency or in private practice—may decline to represent an individual subject to conservatorship because they believe that the individual’s incapacity precludes the establishment of a lawyer-client relationship and may raise other professional ethics issues related to confidentiality and conflict of interest.

Laws and Guidelines

Several federal laws authorize and/or fund programs that provide free legal services (generically referred to as legal aid) to individuals who meet the program criteria.

- The Older Americans Act (OAA) and regulations support legal assistance for individuals over age 60, and require that those services be targeted to individuals in the greatest economic and social need. OAA funds may not be used on cases that would generate fees for private lawyers.
- Several federal laws authorize State Protection and Advocacy Systems to provide legal representation to individuals with disabilities, including those who are experiencing abuse and neglect.
- The Legal Services Corporation (LSC) Act and regulations authorize services for individuals who have low incomes and limited assets. Like the OAA funds, LSC funds may not be used on cases that would generate fees for private lawyers. Volunteer lawyer programs (pro bono) run by bar associations or legal aid programs generally follow the LSC income and asset criteria.

Where We Stand in Practice

In recent years both the U.S. Department of Justice (USDOJ) and the US Administration for Community Living (ACL), which administers the OAA, have made substantial efforts to support access to civil justice for victims of elder abuse. Both agencies have enhanced their technical assistance and training on elder abuse. The USDOJ—through its Elder Justice Initiative, Office for Access to Justice, and Office for Victims of

Crime—partnered with the Corporation for National and Community Service to establish the Elder Justice AmeriCorps program. This program funded 300 AmeriCorps lawyers and paralegals working in 15 states and the District of Columbia to provide legal services to victims of elder abuse. The ACL has provided grants to numerous states to support development of statewide legal and protective service delivery systems that better address legal issues stemming from elder abuse. These important USDOJ and ACL efforts do not, however, overcome the fact that legal aid programs are underfunded and unable to meet the legal needs of a majority of the population groups eligible for their services.

Faced with surging numbers of litigants who are not represented by lawyers (pro se or self-represented litigants), many courts have established or expanded court services and programs to assist those individuals.

A 2016 law review article highlighted the reluctance lawyers may have in representing individuals for whom the court already has appointed a guardian or conservator (see Resource List). Lawyers may perceive barriers in legally or ethically representing a client the court has determined to lack capacity. The article concludes that the perceived legal barriers are not real, and suggests a clarification in ethical rules for lawyer, as well as education about the importance and appropriateness of representation of such individuals – which could include victims of conservator exploitation.

COURT PROGRAMS AND PRACTICES TO ENHANCE ACCESS TO JUSTICE

Faced with surging numbers of litigants who are not represented by lawyers (pro se or self-represented litigants), many courts have established or expanded court services and programs to assist those individuals. An ABA report published in 2014 identified approximately 500 court self-help centers in 36 states. Although the report indicated that about 50% of the self-help centers that responded to the census survey were providing help to unrepresented litigants in guardianship matters, there

was no data about the nature of those matters or about any assistance for individuals with cognitive impairments or who were subject to guardianship or conservatorship.

Laws and Guidelines

Examples of programs and services that might benefit victims of conservator exploitation include self-help centers, elder justice centers, court ombudsmen or court facilitators, and eldercaring coordination services. The NPCS say that “court facilities should be safe, accessible, and convenient to use,” and that individuals appearing in court should have the opportunity to do so “without undue hardship or inconvenience.” The NPCS urge use of alternative dispute resolution (ADR) techniques, which would include eldercaring coordination, but the Commentary cautions that ADR “may not be a viable alternative when one of the parties is at a significant disadvantage.”

Where We Stand in Practice

Court programs and services exist in a few communities. A 2015 Washington law allowed local courts to expand its existing court facilitator program to assist pro se litigants in conservatorship cases. Three courts have elder justice centers (Hillsborough County, Florida; Cook County, Illinois; Philadelphia, Pennsylvania) that, among other things, refer older litigants to services including legal aid. Eldercaring coordination is discussed in the Innovative Programs Brief. Virtually nothing is known about whether these elder justice centers or other court services are used by victims of conservator exploitation and, if they are, whether they make any difference.

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.

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KEY RESOURCES ON CONSERVATOR EXPLOITATION

This is the supporting key resource list for a series of eight Background Briefs produced by the National Center for State Courts and its partners under a project funded by the U.S. Department of Justice Office for Victims of Crime to assess the scope of conservator exploitation and explore its impact on victims.

RESOURCE LIST

AARP & American Bar Association Commission on Law and Aging, *Guarding the Guardians: Promising Practices in Court Monitoring*, 2007,

https://assets.aarp.org/rgcenter/il/2007_21_guardians.pdf

Administrative Conference of the U.S., *SSA Representative Payee: Survey of State Guardianship Laws and Court Practices*, 2014,

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