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 difficultly 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 NPCS 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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