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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