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.

STATEMENT OF ISSUE

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:

- 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?

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

1. ROLE OF THIRD PARTIES IN DETECTING CONSERVATOR EXPLOITATION

NAMED PARTIES IN THE CASE

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.

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."

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.

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.

Primary Authors
National Center for State Courts: Brenda K. Uekert, PhD, Kathryn Holt, Kathryn Genthon
American Bar Association: Erica Wood, JD, Lori Stiegel, JD, Dari Pogach, JD
Virginia Tech Center for Gerontology: Pamela Teaster, PhD, Karen Roberto, PhD, Chris Grogg, MPH
Minnesota Judicial Branch: Cate Boyko, Stepheni Hubert