

# **Written Testimony to the U.S. House of Representatives Committee on Ways and Means, Subcommittees on Oversight and Social Security**

**Brenda K. Uekert, PhD, Principal Court Research Consultant  
National Center for State Courts**

## **I. Introduction**

Chair Buchanan, Chair Johnson, Ranking Member Lewis, Ranking Member Larson, and Members of the Subcommittees, thank you for inviting me here to discuss the intersection of conservatorships and the Social Security representative payment program. My name is Brenda Uekert and I am a Principal Court Research Consultant and the Director of the Center for Elders and the Courts<sup>1</sup> at the National Center for State Courts (“the National Center”). The National Center is a non-profit organization with headquarters in Williamsburg, Virginia, whose mission is to improve the administration of justice through leadership and service to state courts, and courts around the world.

My areas of expertise include aging issues, elder abuse and exploitation, and adult guardianships and conservatorships. Because terminology varies from state to state, the National Center’s Court Statistics Project uses generalized terms: Guardianships refer to those cases in which the court has appointed an individual to handle the medical and well-being issues of an incapacitated person, while conservatorships refer to those cases in which an individual has been appointed by the court to manage the finances of another person. The following remarks focus on conservatorships, which are most pertinent to the Social Security representative payment program.

The National Center works with the state and territory supreme courts and their administrative offices to compile and report data. We estimate that there are approximately 1.3 million active adult guardianship or conservatorship cases and that courts oversee at least \$50 billion of assets under adult conservatorships nationally. Court practices tend to be highly localized and can vary widely. Yet there are national standards and innovative practices that

---

<sup>1</sup> See [www.eldersandcourts.org](http://www.eldersandcourts.org)

have implications throughout the United States. The issues that are most relevant for this testimony are:

- Modernization and auditing
- Differentiated case management strategies
- Training and assistance for nonprofessional conservators
- Information-sharing between courts and the Social Security Administration.

## **II. Modernization and Auditing**

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

Minnesota is the only state that requires all conservators to use software to electronically submit transaction level data. They have a centralized team of professional auditors to audit those accountings. The National Center has been working with the Minnesota Judicial Branch, with funding from the State Justice Institute, on the Conservatorship Accountability Project (CAP). There are two aspects of CAP: the use of predictive analytics to develop a set of risk indicators, and technical assistance to help other states pilot similar types of software. The primary research question is: Can we predict which cases are more likely to have a high risk of exploitation? If we can predict this subset of cases, then we have the potential to divert resources to high risk cases for the purposes of a speedy audit and follow-up court actions to address the problem.

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

The Conservatorship Accountability Project includes technical assistance to help other states adopt software similar to that used in Minnesota. To this end, the National Center worked with 5 states—Indiana, Iowa, Nevada, New Mexico, and Texas—to develop pilot programs. Each state court’s information technology division had access to Minnesota’s source code for the goal of adapting the software to meet the needs of their state. This component of the project was hindered by the fact that states have different terminology, laws, business practices, and case management systems, thus creating obstacles for the

implementation of the Minnesota software. In hindsight, the National Center has learned that states have a difficult time adapting the software as much of the code is intricately woven to unique Minnesota court practices. Additionally, the lack of resources and competing priorities led to a halt in software development and implementation in two of the five states—Iowa and New Mexico.

Despite challenges, the National Center is confident that more generic software code and a companion handbook can be developed and adapted to fit most state courts. Modernization of the process to improve oversight and efficiencies should be the goal. While funding remains the primary challenge, the potential of combining technology with predictive analytics and professional auditing is enormous. Our Center for Elders and the Courts, working with the Conference of Chief Justices and Conference of State Court Administrators, drafted the *Adult Guardianship Initiative*.<sup>2</sup> The Initiative envisions a national resource center that would help states develop software, periodically analyze transaction data to improve the algorithms that predict “concern of loss” cases, assist states in developing strategies to audit a subset of accountings, and draft judicial response protocols that emphasize conservator accountability and the return of assets that have been misappropriated.

### **III. Differentiated Case Management Strategies**

The National Center has worked with courts nationwide to apply the concept of “differentiated case management” or DCM to a wide variety of case types. The goal of DCM is to develop timely and just decisions consistent with the needs of each case and to optimize the use of court resources. For example, conservatorship petitions that are contested when filed or the subject of repeated family complaints may require additional resources and oversight than uncontested cases. Similarly, accountings that are “flagged” because they include transactions that have been empirically linked to potential exploitation deserve greater scrutiny than accountings without such transactions. DCM may be practiced formally or informally, and in the case of conservatorships, is aimed at preventing exploitation. An

---

<sup>2</sup> See <http://eldersandcourts.org/~media/Microsites/Files/cec/Guardianship%20Strategic%20Action%20Plan%202016.ashx>.

example of the informal use of DCM is demonstrated by the Richland County Probate Court in South Carolina, which uses some of the following tools:

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

The DCM strategies described above are an outcome of an individual judge's leadership and commitment to this issue. But generally, the National Center has found that judges and judicial officers often handle conservatorships as part of a larger caseload and do not have expertise or guidance that would allow them to proactively and quickly respond to exploitation. For this reason, the National Center is planning to collaborate with the National

College of Probate Judges on a grant submission to develop a guide for judges on responding to evidence of abuse, neglect or exploitation in adult guardianship and conservatorship cases.

The courts' abilities to address exploitation by conservators is the subject of great concern, and federal agencies and state courts have recently begun to grapple with the problem. In 2015, the Office for Victims of Crime entered into a cooperative agreement with the National Center to carry out a study on conservatorship exploitation and convene a national multidisciplinary forum. The National Center is working with the American Bar Association, the Virginia Tech Center for Gerontology, and the Minnesota Judicial Branch to carry out the project. The project includes several research components: the collection and assessment of data, the identification of innovative programs, an analysis of judicial responses to level 4 cases in Minnesota, and an exploration of the experiences of victims of conservatorship exploitation. The national forum, which is scheduled for next week, will result in recommendations that address data issues as well as judicial monitoring practices, systemic approaches to detect exploitation, laws and practices to address and prevent further exploitation, and how to safeguard the rights and assets of individuals victimized by conservator exploitation. The forum is expected to result in a wide range of recommendations. Findings are expected to be published following a review by the Office for Victims of Crime.

#### **IV. Training and Assistance**

There are three types of guardians and conservators: public, professional and family/personal. The majority of conservators are family members, who may or may not have the experience and background to serve as competent conservators. Most courts provide a basic level of instruction, usually through a written handbook or video. Conservators may also be able to find resources online, such as the free publication from the Consumer Financial Protection Bureau, *Managing Someone Else's Money: Help for Court-Appointed Guardians of Property and Conservators*.<sup>3</sup> Some courts offer in-person training sessions, usually sponsored by members of the probate bar or professional conservators. For example, the District of

---

<sup>3</sup> Available at [http://files.consumerfinance.gov/f/201310\\_cfpb\\_lay\\_fiduciary\\_guides\\_guardians.pdf](http://files.consumerfinance.gov/f/201310_cfpb_lay_fiduciary_guides_guardians.pdf).

Columbia Superior Court's Probate Division offers monthly seminars for the public on how to prepare an inventory and offers tips on handling the finances of a vulnerable person.

Training opportunities tend to be offered on a court-by-court basis and dependent on the resources available in the community. But this is beginning to change, as more states emulate the training program that emerged from an innovative partnership between the North Dakota Supreme Court and the National Center. The North Dakota Supreme Court determined that one of the challenges in getting people to serve as guardians or conservators was the lack of user-friendly resources on the basic roles and responsibilities required of the position. The North Dakota-National Center partnership resulted in an interactive online course that is free and includes exercises and scenarios that require the learner to participate in decision making that supports the interests of the protected person.<sup>4</sup> It can be revisited as frequently as desired and is available around the clock. The course can be easily modified as statutes or court practices change.

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

## **V. Information Sharing**

Data on the overlap between conservatorships and the Social Security representative payment program does not exist, but given the fact that persons under a conservatorship are elderly or disabled, a sizeable proportion of conservators are likely to be representative

---

<sup>4</sup> The course can be found at <http://ndtraining.org/course/guardianship-training/>.

payees. The Social Security Administration (SSA) recognizes a state court finding of incompetence. But the same does not hold true for other court findings. One of the biggest complaints we hear from judges is that the SSA does not recognize a court order to remove a conservator for cause. In practice, this means that a conservator who misappropriates or steals funds may continue to serve as a representative payee. The Social Security Administration may address the issue through its own internal investigation, but the court order is insufficient.

In 2014, the National Center conducted a survey of judges and court staff on behalf of the Administrative Conference of the United States to address collaboration between courts and the Social Security Administration. When asked to provide recommendations for improving coordination, a number of judicial respondents asked for a personal contact in the local or regional Social Security office. But a personal contact does not resolve the limitations placed on SSA by the federal Privacy Act of 1974, which limits the sharing of information about beneficiaries and representative payees with courts. The Privacy Act works to the detriment of protected persons. For example, if SSA finds that a representative payee has misappropriated funds and is also a conservator, they are forbidden from sharing such information with the court.

Despite these challenges, the level of collaboration between state courts and SSA has improved substantially, primarily as an outcome of the creation of Working Interdisciplinary Networks of Guardianship Stakeholders, otherwise known as WINGS. WINGS groups currently exist in 17 states and territories to advance guardianship reform, address abuse and promote less restrictive options.<sup>5</sup> WINGS are multidisciplinary entities for problem-solving that bring together key stakeholders to formulate and act on strategic plans. Nine such entities were launched with incentive mini-grants from the State Justice Institute, coordinated through the National Guardianship Network, and an additional eight states have established similar programs on their own. The Administration for Community Living recognized the potential of WINGS in its 2016 Elder Justice Innovation Grant program in which it funded the American Bar

---

<sup>5</sup> District of Columbia, Georgia, Guam, Indiana, Minnesota, Mississippi, Missouri, New York, North Carolina, Ohio, Oregon, Texas, Utah, Virginia, Washington, and Wisconsin.



Association Commission on Law and Aging, with the National Center, to establish, enhance and expand state WINGS, and currently these efforts are underway.

SSA has initiated a structured set of contacts with state WINGS groups by appointing a regional “SSA WINGS representative” for each of the 17 states. The intent is to enhance coordination between state courts with guardianship jurisdiction and the SSA representative payment program. SSA sponsors a quarterly or periodic conference call with WINGS state coordinators and SSA representatives. These calls resulted in the development by SSA of a set of judicial training slides called *Social Security Representative Payees: Judicial Training Guide*, which is currently in the final stages of review. SSA has indicated willingness to appoint additional regional representatives to upcoming new state WINGS under the Elder Justice Innovation Grant program.

## **VI. Conclusions**

The National Center, other non-profit organizations, and individual states and territories are making substantial efforts to reform the guardianship and conservatorship processes. Several of these reforms may have applicability to the Social Security Administration, including modernization, differentiated case management, training and collaboration.

**Modernization.** The guardianship and conservatorship processes can be vastly improved through modernization. Many of the tools exist or are already in development, but what is lacking are the resources to modernize systems on a grand scale. In terms of monitoring and holding conservators accountable, the necessary ingredients are: Transaction-based accounting software (preferably integrated with court case management systems); the application of empirically-based risk indicators to “flag” cases most likely to involve exploitation; a team of professionals auditing conservatorship accountings; and trained judges who have the tools to prevent exploitation and quickly restore assets when funds are misappropriated. Modernization is not a cheap proposition, but it will bring accountability and efficiencies to the courts and greatly enhance the protection of assets of some of our nation’s most vulnerable persons.

**Differentiated Case Management.** Differentiated case management is a “hands on” approach that recognizes the uniqueness of each case. As such, greater scrutiny of a subset of

cases can both prevent exploitation and provide an early warning system when exploitation does occur. By developing different levels of oversight based on the circumstances of the case, competent and honest conservators are not hindered by unnecessary layers of oversight, while those conservators who may have little knowledge of fiduciary practices or have less than honorable intentions are subject to additional and more frequent levels of monitoring.

**Training.** Technology, especially as it pertains to the development of online courses using adult learning instructional design, is a game changer that has the potential to reach millions of persons. The new technologies incorporate interactive exercises, including scenarios that require learners to make decisions and offer instant feedback as to whether those decisions were the most appropriate given the circumstances. This technology has been applied to conservatorships and could be used to serve the Social Security representative payment program.

**Collaboration.** Courts have increasingly embraced collaborative approaches that introduce multidisciplinary perspectives to specific problems, such as guardianships and conservatorships. The WINGS concept continues to expand to new states and territories and the participation of the Social Security Administration is promising. Yet for judges who strive to protect all assets, including Social Security checks, the Federal privacy laws have handcuffed the SSA, thus directly impacting the court's ability to protect assets from an exploitative conservator. These barriers should be addressed to better improve the financial stability of social security recipients who are placed under a conservatorship.