

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.*

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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.

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### *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.

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## REFER FOR CRIMINAL PROSECUTION

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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 offense. 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).

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## SHARING INFORMATION WITH FEDERAL AGENCIES

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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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