

NATIONAL CENTER FOR STATE COURTS

TESTIMONY

by

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On

*Protecting Seniors and Persons with Disabilities - An Examination
of Court-Appointed Guardians*

Submitted to the

**JUDICIARY SUBCOMMITTEE ON ADMINISTRATIVE OVERSIGHT
AND THE COURTS**

UNITED STATES SENATE

Subcommittee Hearing

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Madam Chairwoman and members of the Subcommittee,

I am Robert Baldwin, Executive Vice President and General Counsel for the National Center for State Courts. The National Center is a private not-for profit organization founded 40 years ago at the behest of another Minnesotan deeply concerned with the administration of justice, former U. S. Chief Justice Warren E. Burger. The National Center's mission is to promote the rule of law and improve the administration of justice in the state courts. We appreciate this opportunity to testify regarding the problems that are occurring in the process for protecting and providing needed services to adults with diminished capacity as well as the measures state courts and the National Center are taking to address those problems.

Each year, the National Center publishes a report on trends affecting the state courts. The 2008 *Trends* volume highlighted that:

In less than 25 years, the number of Americans over age 65 will double to over 70 million. The corresponding increase in cases within the jurisdiction of probate courts as well as those concerning elder abuse will present numerous challenges to the state courts.¹

This report described innovative approaches to monitoring guardianship and better meeting the needs of elderly litigants in a number of jurisdictions across the country. It noted, however, that the substantial increase in both the number and proportion of elder Americans will require:

- Development of new case management strategies and tools to handle newly expanding caseloads;
- Greater use of remote access technology to provide access to justice for those unable to come to the courthouse;
- Specialized legal assistance, counseling, and information services;
- Training to assist judges, court staff, and attorneys in communicating effectively with older persons and in better understanding the physical, mental, and social problems elders face, and the nature and pattern of elder abuse and fiduciary misconduct;
- Enhanced collaboration between courts and federal, state, and local agencies providing services to older persons similar to that being achieved between courts and agencies providing services to children and families; and
- Strengthened capacity to oversee court-appointed fiduciaries and deter, detect, and mitigate the impact of elder abuse.²

Responding to these challenges, the National Center is working closely with the National College of Probate Judges (NCPJ) to update and expand the national standards for probate courts

¹ R. Van Duizend, "The Implications of an Aging Population for the State Courts," NCSC, *Future Trends in State Courts 2008*, p.76 (Williamsburg, VA: NCSC, 2008).

² *Id.*, 76-79.

that were initially issued in 1993. Given that probate practice and procedure varies greatly from state to state, these standards are intended to promote uniformity, consistency and continued improvement in the operation of probate courts.

As part of its consulting function, the National Center conducts in-depth studies of adult guardianship and conservatorship cases handled by probate courts. These assessments compare current monitoring practices in the probate court to the NCPJ national probate standards; assess the probate court's programs and procedures; survey promising practices from other jurisdictions; and recommend promising practices that would be suitable for the probate court. Recently, the National Center conducted an assessment of the processing and monitoring of guardianship and conservatorship cases by the probate court in Maricopa County, Arizona. The National Center's assessment report published in September 2011 concluded that while the court was high functioning and that procedures used in Maricopa County were very effective, several improvements were recommended. In particular, a recommendation was made to develop a risk assessment tool to assist the court in determining the potential for abuse and exploitation and the intensity of monitoring that should be required for each case.³ We believe that this recommendation would no doubt be useful in other jurisdictions.

The National Center's Center for Elders and the Courts (CEC) provides training tools and resources to improve court responses to elder abuse and adult guardianships, and develops a collaborative community of judges, court staff, and aging experts. The centerpiece of the CEC is a website developed with grant support from the Retirement Research Foundation (RRF) (www.eldersandcourts.org). In addition to offering extensive information on aging issues, elder abuse, and guardianships, the CEC website includes:

- Information on the activities of [state guardianship task forces such as those in Nebraska, Arizona, and South Carolina](#);
- An [elder abuse curriculum for state judicial educators](#) designed to be adaptable to individual state laws that can be delivered in three modules (physiology of aging, identifying elder abuse, crafting court responses). The CEC partnered with the University of California at Irvine School of Medicine's Center of Excellence on Elder Abuse and Neglect to develop this curriculum; and
- Access to [state laws](#) on probate and guardianship, criminal and civil elder abuse, and adult protective services through an interactive map of the United States.

In 2009, the CEC conducted an online survey on behalf of the Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) Joint Task Force on Elders and the Courts. The survey focused on the availability and accuracy of adult guardianship data, sufficiency and training of guardians at the local level, and practices that hold promise in recruiting, retaining, and training guardians. Although the results are not nationally

³ D.C. Steelman & A.K. Davis, *Improving Protective Probate Processes: An Assessment of Guardianship and Conservatorship Procedures in the Probate and Mental Health Department of the Maricopa County Superior Court* (Denver, CO: NCSC, 2011).

representative, at least one response was received from 36 state jurisdictions. The findings point to noteworthy concerns for state court leaders, such as:

- The absence of quality data on adult guardianship filings and caseloads in most states;
- The increasing demand for adult guardianships along with the need for more public and private professional guardians;
- The increased dependence upon family and friends willing to serve as guardians in localities lacking public guardians; and
- The lack of sufficient court resources in many jurisdictions to monitor guardianships and conservatorships adequately.

Several of the recommendations from the CCJ/COSCA Joint Task Force on Elders and the Courts are consistent with the findings of the July 2011 Government Accountability Office (GAO) report [see *Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement (GAO-11-678)*] and are particularly pertinent to the matters under consideration by this Subcommittee:

- Each state court system should collect and report the number of guardianship, conservatorship, and elder abuse cases that are filed, pending, and concluded each year. (See attached 2009 CCJ/COSCA Resolution 14, *Encouraging Collection of Data on Adult Guardianship, Adult Conservatorship, and Elder Abuse Cases by All States*);
- Each state court system should implement procedures for monitoring the performance of guardians and conservators and the well-being of persons with diminished capacity;
- Courts should explore ways in which technology can assist them in documenting, tracking, and monitoring guardianships;
- Federal, state, and private funding sources should support the;
 - Collection and analysis of national information regarding the number of guardianships and effective court practices,
 - Development, evaluation, dissemination, and implementation of written and online material to inform non-professional guardians and conservators of their duties and responsibilities,
 - The use of technology to improve guardianship reporting and accountability,
 - Development, documentation, evaluation, dissemination, and evaluation of effective guardianship monitoring procedures and technologies, and
 - Development and delivery of judicial training materials and courses.⁴

⁴ B. Uekert, [Adult Guardianship Caseload Data and Issues: Results of an Online Survey](#) (Williamsburg, VA: NCSC, 2010).

The need for credible data is particularly important. Until this gap is filled, we can only estimate the number of pending cases in the state courts—currently, the best estimate of the number of open guardianship cases in the U.S. is 1.5 million.⁵ The National Center has repeatedly sought funding from the National Institute of Justice, the Bureau of Justice Statistics, and other sources to conduct such a survey, thus far, to no avail.

The National Center commends the Senator’s efforts to assess the impact of conducting criminal history background checks on proposed conservators and to test the use of electronic filing to simplify the submission of annual accountings and reports by conservators and to facilitate the analysis and monitoring of conservator activities and expenditures by the court. These programs will provide needed impetus in developing the most efficient and effective approaches and useful guidance to courts throughout the country, thereby reducing waste and duplication of efforts.

The National Center especially commends the proposed authorization of a Guardianship Court Improvement Program (CIP) modeled on the CIP grant program to improve the process and outcomes in child abuse and neglect cases. That CIP grant program, which is administered by the Children’s Bureau, has greatly strengthened collaboration, expanded training, and facilitated the collection of accurate, timely data to improve performance and assess outcomes. The establishment of a Guardianship Court Improvement Program has been endorsed by the Conference of Chief Justices and the Conference of State Court Administrators (See Conference of State Court Administrators White Paper, [*The Demographic Imperative: Guardianships and Conservatorships*](#), November 2010)

In addition to allowing for an assessment of the existing status of laws and procedures, such a program could encourage the creation of statewide guardianship task forces, the development of local data collection systems, the creation of state guardianship coordination positions, and the provision of technical assistance. Following the CIP model it would also be helpful to have a national guardianship summit. State teams representing the courts, the attorney general offices, agencies on aging and adult protective services, mental health associations, bar leaders and guardianship associations and service providers would come together to develop state court action plans. Implementation of similar plans in the CIP program for abused and neglected children has contributed to reducing the number of children in foster care. We are confident that a Guardianship Court Improvement Program will have similar beneficial results for adults with diminished capacity and for the public.

Thank you again for the opportunity to appear today.

⁵ B. Uekert & R. Van Duizend, [*Adult Guardianships: A “Best Guess” National Estimate and the Momentum for Reform*](#), NCSC, Future Trends in State Courts – 2011 (Williamsburg, VA: NCSC, 2011).

**CONFERENCE OF CHIEF JUSTICES
CONFERENCE OF STATE COURT ADMINISTRATORS**

Resolution 14

**Encouraging Collection of Data on Adult Guardianship, Adult Conservatorship,
and Elder Abuse Cases by All States**

WHEREAS, the number of vulnerable elderly persons will increase rapidly over the next twenty years; and

WHEREAS, this demographic trend is likely to result in a substantial increase in the number of cases intended to protect vulnerable elderly persons including guardianship, conservatorship, and elder abuse proceedings; and

WHEREAS, most state court systems are not currently able to determine the number of guardianship, conservatorship, and elder abuse cases that are filed, pending, and closed each year; and

WHEREAS, timely, accurate, and complete data on the number of guardianship, conservatorship, and elder abuse cases is essential in determining the policies, procedures, approaches, and resources needed to address these cases effectively and in measuring how the courts are performing in these cases; and

WHEREAS, the National Center for State Court's Court Statistics Project overseen by a Committee of the Conference of State Court Administrators has developed the attached standard definitions applicable to guardianship, conservatorship, and elder abuse proceedings;

NOW, THEREFORE, BE IT RESOLVED that the Conferences urge each state court system to collect and report the number of guardianship, conservatorship, and elder abuse cases that are filed, pending, and concluded each year.

Adopted as proposed by the CCJ/COSCA Task Force on Elders and the Courts at the CCJ/COSCA Annual Meeting in August 2009.

Guardianship–Adult: Probate/Estate cases that include cases involving the establishment of or a controversy over the relation existing between a person (guardian) and an adult (ward). *Note: The guardian is lawfully invested with the power and charged with the duty of caring for and managing the affairs of an adult (ward) who is considered by the court to be incapable of caring for himself/herself.*

Conservatorship/Trusteeship: Probate/Estate cases that include cases involving the establishment of, or a controversy over: 1) the relation existing between a person (conservator) and another person (ward) or 2) the legal possession of real or personal property held by one person (trustee) for the benefit of another.

Note: The conservator is lawfully invested with the power and charged with the duty of taking care of the property of another person (ward) who is considered by the court as incapable of managing his or her own affairs. When states cannot distinguish the person from property (guardianship from conservatorship in the above terms) they report their caseload here.

Probate/Estate–Other: Cases that include the establishment of guardianships, conservatorships, and trusteeships; the administration of estates of deceased persons who died testate or intestate, including the settling of legal disputes concerning wills. Use this case type for Probate/Estate cases of unknown specificity, when Probate/Estate cases are not attributable to one of the other previously defined Probate/Estate case types, or when all Probate/Estate cases are reported as a single case type. As distinguished from:

Probate/Wills/Intestate: Probate/Estate cases that include cases involving: 1) the determination of whether a will is a valid instrument; 2) the statutory method of establishing its proper execution; and 3) the determination, in the absence of a will, of the disposition of the decedent's estate. Court actions providing for estate administration, appointment of executors, inheritances, and so forth should be included in this category.

The data requested are the various categories of Incoming, Outgoing, and Pending cases outlined in the *Guide*. You can see these as the column headings on this web page: http://www.ncscstatsguide.org/civil_caseload.php

Elder Abuse: Criminal cases involving offenses committed against an elderly person. Seven types of offenses are usually included: physical abuse, sexual abuse, psychological abuse, neglect, abandonment and isolation, financial or fiduciary abuse, and self-neglect. Physical abuse is generally defined as improper use of physical force that may or does result in bodily harm, injury, physical pain, or restraint of an individual. Sexual abuse is any non-consensual sexual touching or contact with an elderly person or a person who is incapable of giving consent (e.g., a mentally disabled individual). Psychological abuse is the intentional or reckless infliction of psychological pain, injury, suffering, or distress through verbal or nonverbal acts. Neglect is the failure to provide for the care and treatment or safety of an elder. Abandonment is the desertion of an elderly person by an individual responsible for providing care or by a person with physical custody of an elder. Financial or fiduciary abuse is the illegal or improper use of an elder's funds, property, or assets, or the conversion or misappropriation of such property, for uses other than for the elder. Self-neglect is behavior of an elderly person that threatens his/her own health or safety.