

Brief No. 2

CONSERVATOR EXPLOITATION IN MINNESOTA - AN ANALYSIS OF JUDICIAL RESPONSE -

This is the second 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.

Judicial discretion is likely a key factor in determining what constitutes exploitation. The most common judicial responses to exploitation were the removal of conservators and the issuance of orders to repay the estate of the protected person.

BACKGROUND

Minnesota is the only state in the country that mandates that conservators record and submit all financial transactions through its software application (MyMNConservator). This innovation is coupled with a centralized professional auditing team—the Conservator Account Auditing Program (CAAP)—which is located in the Minnesota Judicial Branch. The CAAP team audits the first and every fourth annual accounting and audits additional cases upon the request of District Courts. Audits are extensive reviews of the accounting and supporting third party documentation, which makes the program inherently superior to cursory court reviews that are more typical throughout the United States.

CAAP uses a four-point scale to summarize audit findings. A level 1 finding concludes that there are no issues with the accounting, whereas a level 4 finding denotes a “concern of loss.” A “concern of loss” includes a variety of issues, such as loans given by the individual subject to conservatorship, comingling of funds, large and/or unusual expenditures made without court approval, and expenditures that are not in the individual’s

best interest. In these cases, the auditor may recommend that the court order repayment of funds to the individual and/or the removal of the conservator. The CAAP auditors also take into account additional factors, such as the lack of supporting documentation and conservator failure to respond to multiple requests in a timely manner. The auditors file the audit reports with the court that has jurisdiction over the case and they are made available to the conservator and judges.

The project team reviewed and coded court documents associated with level 4 audits to determine court responses. This Background Brief focuses on 139 adult conservatorship cases with recorded court outcomes audited between June 2012 and November 2015. The project team addressed two issues before the data were analyzed:

1. What actions do judges take when auditors find a “concern of loss”?
2. How is “exploitation” defined and measured?

Judicial Actions

Minnesota has 87 county District Courts—only Hennepin and Ramsey counties have specialized probate judges and judicial officers (referees) who handle adult guardianship and conservatorship cases. Outside of these two counties, judges handle conservatorship cases as part of a general jurisdiction docket that may consist of a variety of criminal, civil, probate and family matters. In this study, there were 61 different judges who held outcome hearings concerning the 139 level 4 audit reports.

Minnesota Court Administration Process states that Court Administration will set a hearing to address the issues in the audit report, as recommended by the CAAP team. If a hearing is held, there are a variety of actions the judge may take:

- Referring the case to prosecution for consideration of criminal charges
- Removing the conservator from the conservatorship
- Ordering repayment to the estate of the individual, including:
 - Bond reimbursement (the bond company reimburses the individual’s estate and then recoups its expenditure from the conservator) and,
 - Direct repayment from the conservator
- Requiring the conservator to obtain court permission before taking some financial action or actions on behalf of the individual
- Requiring the filing of an amended or adjusted account to resolve discrepancies
- Compelling the conservator to obtain a bond, if the conservator has not already been bonded
- Requiring the conservator to submit documentation to support claims made on the account
- Requiring that the conservator receive fiduciary advice from the judge or other appropriate person.

In some cases, the conservator may respond to the audit report on his or her own volition and repay any monetary loss without the need for a hearing.

Defining Exploitation

Under Minnesota statute, the crime of “financial exploitation” includes the “unauthorized expenditure of funds entrusted to the actor by the vulnerable adult which results or is likely to result in detriment to the vulnerable adult” (Minnesota Stat. 2016 §626.5572 subd. 9(a)(1)). Of the 139 cases included in the sample, only one professional conservator was charged and convicted of violating the Minnesota statute on financial exploitation. By examining only official crimes, financial exploitation would appear to be a rare occurrence in conservatorships. The reluctance to criminally charge conservators, many of whom are family members, requires a more expansive definition of exploitation.

This study was limited to level 4 audit findings, and in a number of cases, findings may be legitimately explained at a court hearing as honest mistakes or poor record keeping. However, the activities cited in the audit report may also meet the Minnesota definition of exploitation, even if criminal charges were not filed. In each instance, judges are responsible for following up to better understand the details of the case and to determine a course of action. For the purposes of this project, the project team focused on judicial responses that documented the loss and sanctioned the conservator. Exploitation was defined as any combination of the following:

1. Filing of criminal charges against the conservator
2. A judicial finding of monetary loss
3. A judicial order for repayment to the individual
4. Repayment made to the individual with or without a court hearing (e.g., through mediation or settlement).

Using these criteria, 31 of the 139 audit level 4 cases were classified as exploitation. It is important to note that the 108 remaining cases may contain elements of exploitation, but there is no documented occurrence of one of the four criteria listed above. For example, in 22 cases, the individual had died before the post-audit hearings or shortly thereafter, and the case was closed without a finding of loss. In 11 cases, a hearing was never scheduled, even though the individual was still living. When hearings did occur, the incidents cited in the audit report may not have been egregious enough for the judge to make a finding of loss or order repayment. Judicial discretion may be the key factor in determining how exploitation is evaluated and addressed.

WHO IS EXPLOITED?

About one out of every five of the “concern of loss” cases resulted in a judicial determination of “exploitation”—31 of the 139 cases. Two findings from the initial analysis of exploitation cases are particularly notable.

Gender

About half of the “concern of loss” cases included in the sample involved female individuals subject to conservatorship. Yet an examination of the 31 cases of

exploitation showed a disproportionate percentage of women victims—22 women (70% of the 31 victims).

Age

The age status of persons who are exploited is not a significant factor. Findings show that half of the 31 victims were under age 65, while the other half were over 65. Ages of the victims ranged from age 18 to 97 at the start of the conservatorship. Most exploited persons were living in a skilled nursing facility or memory care facility (45%) or an assisted living facility (19%), regardless of their age.

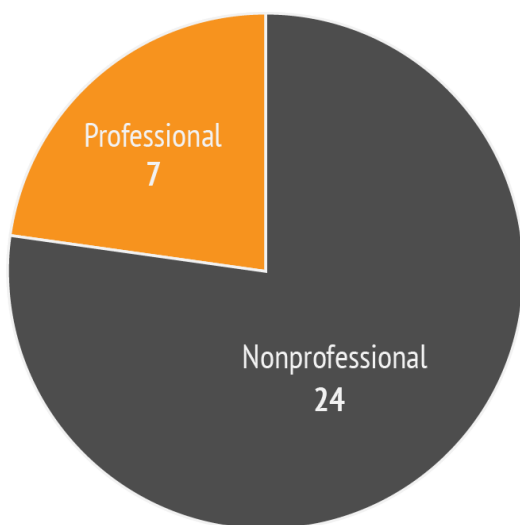
WHO IS EXPLOITING?

Preliminary analysis focused on the relationship between the conservator and the victim and whether the conservator was bonded. Findings show that the majority of conservators who engaged in exploitation were family members, and that more than half were not bonded.

Relationship

In Minnesota, professional conservators are defined as those who are appointed for three or more non-related individual subject to conservatorship. The state does not have a certification or licensure program, and professional conservators may be either individuals or organizations. The vast majority of conservators are family members - 71% of the 139 cases had family conservators. When examining the 31 cases of exploitation, 24 cases involved a family member, and 7 involved a professional

Figure 1 Exploitation Cases: Type of Conservator



conservator (1 professional conservator accounted for 4 of the exploitation cases). A closer analysis of family relationships showed that the greatest number of victims were exploited by their own children, followed by siblings, and then other close relatives.

Bonding

Minnesota statute requires bonding if the individual's assets exceed \$10,000, or that alternatives, such as restricted accounts, be used in conservatorships. Bonding is a highly recommended practice, as it acts as an insurance policy aimed at safeguarding the individual from the financial effects of mismanagement by the conservator. Furthermore, the failure to acquire a bond may be reflective of a poor credit history and/or bankruptcies, which suggest that additional safeguards may be appropriate. Despite the emphasis on bonding, fewer than half of the conservators in the exploitation cases were bonded (14 of 31). The lack of bonding also was evident in the larger sample of "concern of loss" cases.

OUTCOMES IN CASES OF EXPLOITATION

The project team reviewed and coded court orders to document judicial actions following level 4 audits. Three of the 31 exploitation cases did not involve a court order; two were cases in which the individual was deceased and a third case involved a professional conservatorship organization that discovered an employee was stealing funds from a individual. In fact, this employee was the only person charged under the Minnesota exploitation statute, while another professional conservator faced federal charges due to his role as a fiduciary for the Department of Veterans Affairs. In these instances, the CAAP team carried out an audit and confirmed the losses to which the employee confessed and cooperated in the cases arising from the Department of Veterans Affairs. Because the criminal charges in those cases did not originate from the audit process, these charges are not included in the outcome summary below.

Judicial Actions

Of 28 cases in which judges took action as a result of the audit report and subsequent hearing(s), the most common response was removing the conservator (20 cases) and ordering repayment of funds (18 cases). It was common for judges to require more than one action.

For example, a conservator may have been ordered to repay funds, obtain a bond, and receive management advice (e.g., establishing a separate bank account for the conservatorship, entering individual transactions). It is important to note that repayment from the conservator could either be made directly to the victim or come from a bond reimbursement.

Figure 2 Actions Required by Conservator in Exploitation Cases



Repayment

Repayment occurred in the aftermath of a judicial order requiring repayment (14 cases) or a mediation settlement (4 cases). Either type of repayment method can involve reimbursement from the bond. Five of the 18 repayment actions involved a bond reimbursement. In total, \$555,952.35 was required to be repaid to the individual’s estate, with bond reimbursements accounting for \$275,279.00 (about 50%) of that amount. At the time of data collection, 61% of the total owed had been repaid.

JUDICIAL DECISION MAKING

In Minnesota, most of the conservatorship cases are heard by general jurisdiction judges—the 31 cases of exploitation included in this study were overseen by 24 judges or specialist referees (judicial officers with probate specialization). To explore factors that go into judicial decision making in such cases, the research team interviewed six judges (including specialist referees). The Minnesota statute offers little guidance in terms of judicial actions when there is evidence of misappropriation or exploitation of funds in conservatorship cases.

Most prominently, judges differed in their interpretations of the court’s authority as allowed by statute. The

referee who specialized in probate matters stated that the statute grants the court any and all authority needed to take whatever action necessary to ensure the protection of funds. This interpretation varied from general jurisdiction judges, some who claimed that their authority was limited and required an attorney or outside party bringing actions before the court. Judges cited a number of challenges in handling conservatorship cases in which exploitation was alleged, such as time constraints, the lack of resources, cost and availability of lawyers, and often tense family dynamics. However, in cases where repayment was required, judges determined that the exploitation was “egregious” and “very apparent,” and they were confident in their action. Judges stated that although a centralized auditing team is a key component, it is not enough to ensure the protection of assets. Training and specialization for judges/judicial officers, conservators, and court staff who review files between audits is critical as well as clear statutes and rules.

Minnesota Stat. 2016 §524.5-410 addresses powers of the court. Under this statute, “After hearing and upon determining that a basis for a conservatorship or other protective order exists, the court has the following powers, which may be exercised directly or through a conservator for the benefit of the protected person and individuals who are in fact dependent on the protected person for support, all the powers over the estate and business affairs of the protected person which the protected person could exercise if an adult, present, and not under conservatorship or other protective order.”

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, Stephani Hubert