

Issue Brief for Working Group #4: Rethinking Monitoring and Addressing Abuse by Guardians

Commissioned Papers:

- What’s Working In Guardianship Monitoring, by Hurme & Robinson
- Addressing Abuse by Guardians: The Role of Adult Protective Services, Law Enforcement, and the Courts, by Anetzberger & Thurston

Statement of Issue:

What laws, policies and practices can best ensure guardian accountability and address abuse by guardians of adults they were named to protect? Once the judge appoints a guardian, some courts see it as the end of the case. But there is increasing recognition that actually the case is just beginning, and the individual will be under the aegis of the court for an unknown time period – perhaps months, years or even decades.

What oversight processes can the court use to track the actions of the guardian and the welfare of the adult subject to guardianship – and to intervene if necessary? At the same time, the court is not the only entity that can intervene if guardians breach their fiduciary duties, harming the adult or putting the adult at risk. What other governmental systems can intercede if a guardianship “goes bad” and how should these systems best work with the courts?

Background:

Guardianship monitoring processes stem from the court’s ancient *parens patriae* role in which the courts were responsible for the protection of those unable to care for themselves. Additionally, some caselaw considers guardians as agents of the court, necessitating continuing oversight. Moreover, good guardianship monitoring helps to build public confidence in the court.

The need for monitoring crosses all type of guardians – family and other lay fiduciaries, professionals, for-profit and non-profit agencies, and public programs – whether guardians of person, guardians of property or both.

Guardianship monitoring is a continuum or progression of post-appointment events that aim to protect the individual and ensure the guardian is accountable to the court. The National Probate Court Standards (3.3.17) list necessary elements of monitoring:

- Ensure that plans, reports, inventories, and accountings are filed on time;
- Review promptly the contents of all plans, reports, inventories, and accountings;

- Independently investigate the well-being of the individual and the status of the estate as needed;
- Improve the performance of the guardian and enforce the terms of the order; and
- Consider whether a less restrictive option would be appropriate.

As extensively detailed in the Hurme-Robinson paper, state statutes have addressed these elements to varying extents. Virtually all states require periodic personal status reports and accountings. Other provisions enacted in some state laws include the filing of guardianship plans; specified court review and verification/investigation of plans, reports and accountings; continuing the role of counsel for the respondent post-appointment; as well as guardian training and certification/licensing.

The 2017 Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA) includes a guardian plan, guardian report, conservator report and accounting, and a grievance procedure. Under the Act, if a problem arises or is suspected, the court may require additional information, appoint a visitor to investigate, hold a hearing, and consider removal of the guardian or changes in the order. An innovation highlighted in the Act is to “allow the court to identify people who are to be given notice of certain key changes or suspect actions, and who can therefore serve as an extra set of eyes and ears for the courts.” The Act also makes bonding a default option for conservators. Thus far, UGCOPAA has been enacted in only two states, but legislatures are currently reviewing it, and may adopt or adapt specific provisions.

In parallel with court monitoring processes, as set out in the Anetzberger-Thurston paper, there are other systems in place that could protect an individual from abusive actions by a guardian. Adult protective services (APS), law enforcement, and protection and advocacy agencies (P&A agencies, sometimes called disability law centers) – all found nationwide -- are charged with protection from abuse and exploitation. Other entities that may be involved with adult abuse include long-term care ombudsman programs, state attorneys general, and selected health and financial offices. Moreover, an increasing number of state and local multisystem collaborative networks address adult abuse, and could play a role in targeting abuse by guardians.

Where We Stand in Practice:

Despite statutory provisions for court monitoring and the existence of other protective systems, an unknown number of guardians continue to abuse, neglect or exploit the individuals under their care. Several reports by the U.S. Government Accountability Office, and a hearing by the Senate Special Committee on Aging -- as well as numerous media reports -- identified alarming failures in which guardians took advantage of vulnerable individuals and there was little effective intervention. Without data, the proportion of such abusive cases is unclear. In the

judicial interviews conducted by Anetzberger-Thurston, while none of the nine judges “felt that abuse by guardians was a pervasive or prevalent problem,” all could describe a case or multiple cases of guardian abuse they encountered.

Continuing evidence of abusive guardianship practices has prompted innovative court monitoring strategies in some states and localities. The Hurme-Robinson paper describes numerous “enhanced practices” in selected jurisdictions – such as checklists and protocols for review, identification of cases for extra review, post-appointment visitor programs, guardianship compliance programs, complaint processes, guardian training programs, case management systems, guardianship registries, and online reporting and auditing programs. Each of these programs offers a model for replication.

Moreover, the National Center for State Courts has provided important tools on guardianship data collection, standards and governance, including a list of recommended data elements for courts to collect in guardianship cases. NCSC also has published a Guardianship Judicial Response Protocol. The challenge is how to enhance the use of these tools in courts throughout the country.

Among the barriers to effective monitoring by courts are:

- A lack of funding to pay for additional staff and case management technology to track cases;
- The sheer variety of court rules, processes and even terminology not only from state to state, but court to court;
- The disturbing lack of current data on cases, demographics, compliance with court requirements, and types of problems;
- In some cases, a less than rigorous guardian selection process up front and a reluctance to remove a problematic guardian if there is no other person or entity available and appropriate to serve.
- Judicial turnover and lack of experience with guardianship;
- Variation in judges’ perceptions of their ethical role in targeting abuse. Historically, probate cases took a passive and detached role, in which a harmed party must come back to court to show that action is needed;
- A frequent judicial view that once a guardian is appointed, the case is closed;
- Frequent dismissal of the adult’s attorney following appointment of a guardian.

These challenges are substantial, and court actions should be supplemented by actions of other systems as described below – yet each of these systems also faces barriers:

Adult protective services (APS) receives, identifies and investigates reports of abuse, neglect or exploitation of adults/older adults, as described in state law, and provides needed services. APS programs vary greatly. APS intersects with guardianship in a number of ways – a guardian may report abuse, someone else may report abuse by the guardian, APS may petition for guardianship services for an adult in need, or in selected cases APS may serve as guardian, at least temporarily. However, there are significant barriers to APS intervention. In some instances, a person with a guardian may be isolated from sources of help, and no report may be filed. In other instances, APS may receive a report but may not pursue it, presuming that the court is monitoring the guardian, and/or that the guardian is acting appropriately to meet fiduciary duties. Moreover, the court may suspect abuse by the guardian, but may not always report it to APS, viewing such reporting as outside the court’s responsibilities or authority.

Law enforcement also may play a role in targeting guardian abuse. Law enforcement includes both police officers who investigate, and prosecutors who decide whether to charge any criminal activity. There are multiple obstacles to law enforcement intervention in adult guardianship cases. For example, it may be difficult for a court, APS or anyone else to make a referral, since there are multiple and varying law enforcement agencies, and jurisdiction may be confusing. The victim may be isolated, or may be seen as incapacitated and therefore unable to assist in prosecution. Victims may fear retaliation or be reluctant to have family members prosecuted, and may not want law enforcement involved. Law enforcement personnel often lack training about guardianship, elder abuse, and disability rights.

A key obstacle is the presumption by law enforcement that abuse by a guardian is primarily a civil matter, and not a criminal activity. In recent years, states have passed new or expanded statutes specifically making abuse of older persons and/or incapacitated persons -- especially by those in trusted positions -- a crime, and/or providing for enhanced penalties. But to be effective, these statutes must be widely understood through public outreach and training of judges, police, prosecutors, and others – and such training should include the role of guardians. The Anetzberger-Thurston paper found that “judges interviewed indicated it was their belief they could make law enforcement referrals; however, such referrals are not frequent.”

Protection & advocacy agencies in each state make up a network of Congressionally mandated, legally-based disability rights offices. They provide legal representation and other advocacy services to people with disabilities. These agencies increasingly have become involved in guardianship issues. In the 2018 Strengthening Protections for Social Security Beneficiaries Act, they are mandated to conduct reviews of Social Security representative payees nationally and investigate allegations of abuse and neglect. This role may also bring them into contact with guardianship cases and they may be positioned to identify a need for intervention. Also, the

perspective of protection and advocacy agencies on ensuring rights and maximizing self-determination can be important in trainings for APS, law enforcement and courts.

Multidisciplinary systems. The field of elder abuse has long recognized the need for a multidisciplinary or multi-systems approach. Multidisciplinary collaborations could be for either: (1) case review; or (2) systemic improvements. Using such elder justice collaborations for systemic improvements appears to have potential for addressing guardianship abuse. However, as outlined in the Anetzberger-Thurston paper, these multidisciplinary elder abuse or elder justice coalitions do not exist everywhere. Additionally, they have not focused attention on guardianship abuse, and would require significant education and training to do so. Finally, a perception of conflict of interest may limit court involvement, especially if there is not a clear line between individual case review and systems change.

One type of multidisciplinary collaboration focused on systems change in guardianship is WINGS --- Working Interdisciplinary Networks of Guardianship Stakeholders. The WINGS concept emerged from the 2011 Third National Guardianship Summit; and currently between 20 and 25 states have some form of WINGS court-community partnership or a similar collaborative group, often based in the state's highest court. These WINGS have made significant guardianship improvements, especially in training and resources. However, cost limitations have precluded greater achievements such as targeting financial exploitation through monitoring strategies. For real systems change, WINGS needs more sustainable, ongoing financial and technical assistance support – similar to what has existed in child welfare for 28 years through the federally funded Court Improvement Program that has markedly improved legal processes and outcomes for children and families (to be discussed in Working Group #6).

Discussion Prompts:

1. Accurate data collected according to uniform standards is fundamental for improving monitoring and addressing abuse. What are the key steps in making such data collection widespread?
2. Aside from court data, what other data collection would help in targeting guardianship abuse? What changes are required in the NAMRS (National Adult Maltreatment Reporting System)?

3. What key changes are needed for improving court monitoring? Which ones are statutory? Which are most and least costly? Which require court partnerships with other entities? Which are included in UGCOPAA?
4. What are incentives for localities, courts, states, and the federal government to fund better guardianship monitoring systems?
5. What steps are needed to implement the recent elder abuse criminal statutes and/or enhanced penalties when a guardian is the perpetrator?
6. What steps are needed for guardianship issues to be included in existing and future elder justice multidisciplinary coalitions focused on systems change?
7. How can courts be more responsive to allegations of abusive guardians, whether from the court's monitoring, a court complaint system, APS, law enforcement, the protection and advocacy agency, or other interested parties?
8. Would a state or federally funded CASA (Court-Appointed Special Advocate) program work for adults under guardianship, as it has worked in the child welfare system for many years?
9. What kinds of enhanced information sharing between courts and the Social Security Administration would best help in monitoring both guardians and representative payees?
10. What would encourage judges to take a more active role in community efforts to improve guardianship?