Issue Brief for Working Group #5
Fiduciary Responsibilities and Tensions –

Commissioned Papers:

- Guardianship vs Special Needs Trusts and Other Protective Arrangements: Ensuring Judicial Accountability and Beneficiary autonomy/Self Determination, by Johns, Dinerstein & Dudek;
- The Time Has Finally Come: An Argument and a Roadmap for Regulating the Court-Appointed Professional Fiduciary, by Seal & Teaster

Statement of Issue:

Guardians and conservators are a subset of a broader category called "fiduciaries." Legal and ethical standards require fiduciaries to act with a high level of responsibility and trust. In practice, fiduciaries don't always meet these high standards. How can fiduciaries best be regulated and monitored to maximize autonomy/self-determination of beneficiaries while at the same time ensuring accountability? What solutions exist when differing fiduciary responsibilities – including those of guardians and conservators --come into conflict and compete?

Background:

A fiduciary may act on behalf of – or consult with and advise -- another person or persons, with a high duty to preserve good faith and trust, to avoid conflicts of interest and even the appearance of such conflicts, and to act in the other's best interests. Legal and ethical mandates require a fiduciary to manage money and property for another with great care, and for the benefit of the other. The fiduciary must be trustworthy, honest, avoiding self-dealing, and must keep the other's information confidential.

Guardians, conservators, agents under powers of attorney, a range of different kinds of trustees, representative payees, VA fiduciaries, and executors are all fiduciaries. Each kind of fiduciary has specific duties – to the beneficiary or beneficiaries, to the court if court-appointed, and to the probate estate if there is one. A supporter in a supported decision-making agreement has similar duties of trust and confidentiality, but the key function of a supporter is to help an individual with a disability to make and communicate to others their own decisions.

Fiduciaries and Elder/Disability Rights. State law is the principal source for understanding the relationship among guardianship, supported decision-making, trusts, and other protective arrangements. While state laws vary, there are many provisions in state guardianship law requiring that less restrictive options be explored, that guardianships be limited if possible, that the individual's rights be recognized, that the individual participate in the decision-making, and that restoration of rights be considered or even mandated. Additionally, a growing number of states have laws concerning supported decision-making (See papers and Issue Brief for Working Groups #1 and 2). These state provisions suggest a strong rights-based context for fiduciary actions.

International law and federal disability law also play a key role in fiduciary issues. The U.N. Convention on Rights of Persons with Disabilities states that all persons with disabilities must have full enjoyment of human rights and equality under the law -- and that governments have an obligation to support the exercise of these rights, as through supportive services and supported decision-making. (The U.S. has signed but not ratified the Convention.) Additionally, in the 1999 case of *Olmstead v. L.C.* the Supreme Court held that unjustified institutional isolation of persons with disabilities is a form of discrimination. Some advocates have argued that this "integration mandate" applies to guardianship, in that the loss of rights entailed is a form of segregation and isolation. In any case, the requirement that people of all ages with disabilities should receive needed services in the least restrictive setting should inform the decisions and interactions of all fiduciaries.

Interaction of Fiduciaries. One fiduciary may serve more than one beneficiary – which could bring questions of fairness among beneficiaries – and if a professional fiduciary has a substantial caseload of many beneficiaries, at what tipping point is the fiduciary's attention so diluted as to lose meaning?

But other questions arise when one beneficiary has different kinds of fiduciaries. For example, in the Johns/Dinerstein/Dudek paper, an adult with a disability has both a guardian and a trustee of a special needs trust – and their interests and requests of the court were conflicting. The paper profiled another case that shows disagreement between the adult and his supporters on the one hand vs his co-trustees on the other hand. The disagreement concerns expenditures under the trust, in which the co-trustees have a potential conflict of interest in the trust , as there may be a remainder after the death of the beneficiary. Similarly, there are instances in which a guardian and an agent under a financial power of attorney may have competing concerns; or in which a guardian/conservator and a representative payee appointed by the Social Security Administration come into conflict.

Court Tools for Fiduciary Conflicts. When fiduciaries become entangled in competing interests, court jurisdiction over each of these conflicted roles may be limited or unclear—pointing to a need for policies to better delineate the court's reach. Moreover, creative solutions are needed to work out individualized strategies addressing the competing tensions. The Johns/Dinerstein/Dudek paper describes a number of helpful tools such as periodic status reviews, care plans, trust audits, use of bonds, modifying the scope of the guardianship, requesting a change in the SSA representative payee, and considering restoration of rights of the beneficiary. Such tools should be emphasized in judicial training, in particular including:

- Appointment of a guardian ad litem (GAL) or court visitor to investigate. A GAL is in a position to see the entire case and understand the needs, preferences and values of the adult with a disability. The GAL could identify possible supports for the individual, and determine whether the fiduciaries are acting with the individual's inputs and values in mind, and whether the individual is or would be living in the least restrictive setting, as frequently required by state guardianship statutes.

- ABLE Accounts. ABLE accounts help individuals with disabilities save money to pay for qualified expenses, without being taxed on the earnings, and in most cases, without losing eligibility for certain means-tested benefit programs. For example, in the paper, funds from an adult's SSI payments were transferred monthly into an ABLE account to avoid going over the $2,000 limit, and were used for home repairs for increased accessibility.

- Mediation. Increasingly, mediation is a standard tool of many courts -- and specifically, guardianship mediation has been piloted, evaluated and used in a growing number of jurisdictions. Mediation could allow the adult with a disability and the competing fiduciaries to "tell their story" and identify the real interests behind the stated positions. Mediation often results in an individualized agreement that the parties have helped to create and in which they are thus invested.

- Eldercaring Coordination. If disputes involving family fiduciaries are too aggravated for mediation, and if there are multiple competing petitions to court, the judge may order eldercaring coordination. Eldercaring coordination is a court-ordered dispute resolution process in which a trained coordinator assists families to resolve disputes with high levels of conflict that impede the individual's autonomy and safety. The coordinator works under the court's order to reduce risks, manage the family dynamics, support the individual's self-determination, and develop a support system. The model could be adapted for younger individuals with disabilities as well.

- Protection & Advocacy Agency. An adult with disabilities may need advocacy and representation when fiduciaries breach their duties or have competing interests. Courts may make available to the public information on a range of aging and disability resources, including the federally-funded national network of state Protection and Advocacy agencies. (See the Issue Brief for Working Group #4 on Guardian Abuse.) Some P&As now are called "Disability Rights" offices for their state.

Court Monitoring of Guardians/Conservators. While fiduciaries such as guardians and conservators have high legal and ethical standards, there is always the risk that some will breach their fiduciary responsibilities, fail to recognize rights, and take advantage of those they were named to protect.

States can address fiduciary guardian/conservator misconduct in two ways – through improved court oversight, and through professional regulation. The best approach may be to use both. The Seal/Teaster paper points out that "licensure would assist the judicial system in the important role of monitoring conduct of private professional guardians and conservators and may aid in recognizing improper conduct." For a thorough review of court monitoring, see the Hurme/Robinson paper and the Issue Brief for Working Group #4. The Seal/Teaster paper recommends state licensure, along with solid monitoring.

State Regulation of Professional Guardians/Conservators. Certification is a recognition process by a non-governmental agency or association of an individual who has met certain qualifications through education, examination, and experience. The Center for Guardianship Certification (CGC) offers guardians/conservators throughout the nation an opportunity for certification. Additionally, nine states have either enacted their own certification process or use a combination of CGC certification and state licensing. A 2020 judicial survey summarized in the paper showed that certification made a significant impact on guardian/conservator's knowledge of responsibilities and procedures, filing of reports, and application of ethical codes.

Licensure is a process by which a government agency grants permission of individuals to engage in a profession or occupation, setting out standards to ensure protection of the public. Currently three states require private professional guardians and conservators to be licensed by the state – Alaska, California, and Nevada.

The Seal/Teaster paper recommends state licensure, and sets out eight specific elements of a licensure scheme for professional guardians and conservators. The paper points out that from the public's perspective, the process of filing a complaint with a state licensure agency is simpler and less costly than filing a complaint in court. From the judicial perspective, a licensure complaint process could supplement that of the court, providing additional investigative resources, or impartial fact finding.

Where We Stand in Practice:

There are significant barriers to better addressing fiduciary misconduct. The following are barriers to better communication and collaboration between and among fiduciaries:

- *Education, education, education*! Many professional, family and other lay guardians and conservators lack training. Combined with a lack of training of other fiduciaries such as agents under a power of attorney, trustees, and representative payees, this could result in a muddled interpretation of fiduciary roles and misunderstandings of how fiduciaries should relate to each other and to the individual.

- *Lack of state jurisdictional clarity***.** Essential to addressing fiduciary misconduct and fiduciary interactions is whether judges have jurisdiction – for example, whether probate or general jurisdiction judges handling adult guardianship issues have jurisdiction and authority over trusts, trustees and beneficiaries; and whether judges of trusts have jurisdiction over guardianships, conservatorships.

- *Lack of coordination and information sharing between federal and state systems.* Many studies, including a 2004 report by the U.S. Government Accountability Office, have cited a lack of coordination between the Social Security representative payee program (and to some extent other governmental fiduciary programs such as the VA fiduciary program) and state courts with adult guardianship jurisdiction. To properly address fiduciary misconduct on either side – whether or not the payee and the guardian are the

same person or entity – requires that both sides have full information for fiduciary selection and monitoring. A recent 2020 report by the Administrative Conference of the U.S. thoroughly explored the need for information sharing and proposed strategies to better inform SSA and courts.

- *Lack of data.* As with all areas of guardianship reform, there is a lack of consistent data and lack of a solid approach to data management as to guardian/conservator misconduct or abuse in general; and as to problems between or among fiduciaries specifically.

- *Underutilization of dispute resolution mechanisms*. Forms of dispute resolution have existed for decades, and some court systems have offices of dispute resolution. Elder mediation is widely recognized, and diverse training opportunities exist, including through the Association for Conflict Resolution's Elder Mediation Section. Some states and localities have had guardianship mediation programs – and at least one entity conducted guardianship mediation training for several years. More recently, eldercaring coordination provides an option where family dynamics are aggravated and an elder needs the support of a trained coordinator, with court authorization. Despite all of this, there is little indication that courts are routinely relying on dispute resolution when faced with fiduciary tensions and conflicts.

- *Lack of attention to least restrictive decisional options.* Most state statutes require an examination of less restrictive options before resorting to guardianship. The Uniform Guardianship, Conservatorship and Other Protective Arrangements Act (UGCOPAA) requires that an order appointing a guardian just include a specific finding that the needs at hand cannot be met by a protective arrangement instead of guardianship or other less restrictive alternative, including supportive services and supported decision-making. If states were to adopt this UGCOPAA requirement, and if states with existing mandates on less restrictive options were to fully implement them in practice, it might reduce opportunities for fiduciary misconduct and fiduciary tensions – being mindful, though, that some options such as powers of attorney also have the potential for fiduciary abuse.

- *Lack of standards on interaction of fiduciaries.* Guidance on adult guardianship practice includes state statutes, caselaw, model acts, judicial standards, and guardian standards of practice – as well as guardianship certification and licensure standards in some states. However, the kinds of tensions raised in the Johns/Dinerstein/Dudek paper do not appear to be sufficiently addressed in guardianship guidance.

There are also barriers to the adoption and effective use of <u>guardianship certification and licensure.</u> The Seal/Teaster paper notes that those receiving guardianship and conservator services are often in a crisis at the time of appointment, and unable to assess whether a certification or license is or would be of value, so there is no market-based advocacy promoting it. Moreover, critics of licensure may maintain that it would be a barrier to entry into the

professional field, and that it would result in an increase in the cost of services. Finally, state policymakers may oppose it due to the cost of establishing and operating the system. The Seal/Teaster paper argues that:

> "Professional guardians and conservators make important decisions about their clients, including end of life decisions and management of significant property. With such responsibility, it is reasonable to have some barriers to entry through licensure and ethical standards to make certain that professional guardians and conservators have basic competency."

Discussion Prompts:

1. How can effective fiduciary roles and fiduciary interaction bolster both autonomy and accountability – the two themes of the Summit?

2. What different issues arise if the same person or entity vs a different person or entity fulfills more than one fiduciary role?

3. How can state guardianship statutes be strengthened to address conflicts between or among fiduciaries – such as between guardians/conservators, trustees, and representative payees? Do any provisions of UGCOPAA address fiduciary conflicts?

4. How can court jurisdiction over various fiduciaries such as conservators and trustees be clarified?

5. How can guardianship monitoring, as well as guardianship licensing/certification, be strengthened to address tensions between or among fiduciaries?

6. Is mediation an effective option to address conflicts between fiduciaries? Could Eldercaring Coordination play a role in reducing fiduciary tension?

7. What should be the role of supporters in supported decision-making agreements in relating to fiduciaries? Should the supporter be called a fiduciary?

8. What standards should apply to family or lay fiduciaries, and how should they be regulated? What training should they receive on fiduciary duties?

9. How can the full range of fiduciaries better incorporate principles of less restrictive options, supported decision-making, and the Olmstead integration mandate into their practice?