



Federal Options to Improve America's Ailing Guardianship System

*A White Paper for the Senate Special Committee on Aging
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Adult guardianship is a two-edged sword – a mechanism that protects some of the most vulnerable in our society from abuse, and an instrument that removes fundamental rights and thereby may increase opportunities for abuse of those we strive to protect. Court-appointed guardians step into the shoes of at-risk elders, making judgments about medical care, property, living arrangements, lifestyle and potentially all personal and financial decisions. Guardianship can both prevent and promote elder abuse. On one hand, a guardian can *protect* an incapacitated person from abuse, neglect and exploitation. Conversely, without sufficient court monitoring, guardian education and standards, guardians may *commit* elder abuse, neglect or exploitation or *fail to protect* an incapacitated person from abuse or exploitation by others.

AARP has approved the following principles in support of exactly those goals.

- **Freedom from exploitation and abuse** – strong legal protections against, and effective protective services addressing, all forms of exploitation and abuse of incapacitated and vulnerable adults
- **Safeguarding rights** – strong procedural and substantive safeguards to protect individual rights.

To enhance these important rights and freedoms, AARP endorses the following policies:

* The author thanks Sally Balch Hurme of AARP Outreach and Services for her invaluable contributions to this White Paper.

- **Coordinated approach** – Comprehensive legislation should be enacted to implement a coordinated approach to the problems of elder abuse and neglect. The legislation should establish a federal infrastructure; develop a public awareness strategy; support research, training and technical assistance; fund services and coordinate the work of federal, state and local government and organizations.
- **Less restrictive alternatives and improved guardianship process** - The federal government should encourage the expansion of programs that provide alternative protective arrangements less restrictive than guardianship (such as representative payment); educational and support programs to assist guardians; and effective programs to monitor guardians and other fiduciaries to ensure that they utilize their authority and fulfill their responsibilities appropriately.
- **Strong federal-state coordination** - Federal-state coordination of guardianship [and federal representative payment programs] should be strengthened.
- **Support for improved monitoring and data collection** - Congress should support: demonstration projects on model guardianship monitoring practices; provision of authorized fiduciaries including public guardians; study of the roles and responsibilities of government entities regarding fiduciaries; and a uniform system of data collection on key aspects of the guardianship process.

AARP suggests three primary areas for intervention and change on the federal level. First, the federal government can enhance protections for incapacitated elders by *improving coordination between federal fiduciary programs (e.g. Social Security representative payees, Department of Veterans Affairs fiduciaries) and state guardianship systems*. Second, federal level actions can *improve guardianship monitoring*, which is critical to protect this vulnerable population. Finally, the *Elder Justice Act can serve as a vehicle for improving the guardianship system* and thereby preventing and redressing elder abuse.

Federal Fiduciary Programs and Guardianship: Enhancing Coordination

About seven million Social Security beneficiaries have representative payees appointed for them by the Social Security Administration (SSA) who manage over \$43 billion in benefits—and other federal agencies such as the Department of Veterans Affairs (VA) have similar programs. In 2004, the Government Accountability Office (GAO) found that state courts and federal agencies “collaborate little in the protection of incapacitated elderly people and the protection of federal benefit payments from misuse” and recommended increased coordination among federal agencies, and between federal agencies and state guardianship courts.¹ In its 2006 reexamination of the issue at the request of this Committee, the GAO stated that little had changed.² Noting the role for the federal government in the protection of incapacitated people, GAO said, “With few exceptions, courts and federal agencies don’t systematically notify other courts or agencies when they identify someone who is incapacitated, nor do they notify them if they discover that a guardian or a representative payee is abusing the person. This lack of coordination may leave incapacitated people without the protection of responsible guardians and representative payees or, worse, with an identified abuser in charge of their benefit payments.”

AARP recently examined these issues at a Roundtable on Representative Payees and Guardianship, where representatives of SSA and the VA engaged in a panel discussion with experienced state court judges, including the President of the National College of Probate Judges. This Roundtable generated a number of ideas for increasing coordination between and among state courts and federal agencies, including:

- *Requiring that Social Security representative payees and VA fiduciaries provide courts with copies of the monitoring reports they file with their supervising federal agencies in cases where there is also a court-appointed guardian. This requirement*

¹ U.S. Government Accountability Office. (2004, July). *Guardianships: Collaboration needed to protect incapacitated elderly people*. GAO-04-655. Washington, DC: GAO.

² U.S. Government Accountability Office. (2006). *Guardianships: Little progress in ensuring protection for incapacitated elderly people*. GAO-06-1086T. Washington, DC: GAO.

would ensure that courts have all available information for monitoring when they share monitoring responsibilities for a particular incapacitated individual with federal agencies.

- *Removing barriers to information exchange between federal agencies and courts* regarding specific incapacitated individuals. Federal agencies should be able to inform courts when a representative payee fails to perform adequately or commits malfeasance, and vice versa. Even more basic, federal agencies should be able to reveal to a court whether an individual has a representative payee or other federal fiduciary. SSA has raised concerns that the Privacy Act prevents sharing of information about individual beneficiaries and their representative payees with courts. Congress could mandate a study of potential legal barriers to information sharing, or could propose legislation to remove such barriers, while still protecting individual privacy to the greatest degree possible.
- *Developing national, systemic approaches to promote collaboration and information sharing between federal agencies and courts* by establishing a working group to include SSA, VA, other federal agencies with fiduciary programs, state court judges and relevant national organizations (such as National College of Probate Judges, National Guardianship Association, National Academy of Elder Law Attorneys). To date, SSA has declined to take the lead in forming an interagency study group. Congressional action may be needed to spearhead this needed step towards protecting vulnerable elders.

Strengthening Guardianship Monitoring

Court monitoring of guardians is essential to ensure the welfare of incapacitated persons, identify abuses, and sanction guardians who demonstrate malfeasance. AARP's Public Policy Institute is engaged in a two-year national study of guardianship monitoring practices that will yield recommendations for best practices, to be published next year.

As part of this comprehensive study, a 2005 national survey³ of 387 experts with frontline experience revealed striking gaps in current practices, including:

- Over one-third of respondents said no one is designated by their court to verify the information in reports and accountings filed by guardians, and only 16% said that someone verifies every report;
- Over 40% report that no one is assigned to visit individuals under guardianship, and only one-fourth said that someone visits regularly;
- Only 11% of respondents reported that the court collaborates with community groups on training for guardians;
- Technology is underutilized, with 22% reporting that their court does not use any computer technology in monitoring, only 4% stating that their court emails guardians about reporting status, and only 28% indicating that the court has a computerized data system to track the number of guardianship filings and dispositions; and
- 43% of respondents said that funding for monitoring is unavailable or insufficient.

Yet the Institute's research is identifying some bright spots. Some courts are moving towards harnessing existing technology for monitoring and data collection – for example, by setting up systems for e-filing of required monitoring reports and accountings; by developing software to screen these filings for red flags that may indicate financial abuse or exploitation by guardians; and, even more basic, by creating effective, user-friendly databases to track the numbers of cases filed, their current status, and characteristics of individuals under guardianship. A number of courts are making good use of supervised volunteers to visit individuals and their guardians, or are hiring staff social workers, lawyers, accountants or other highly trained personnel for systematic review of cases after guardians are appointed. These promising practices should be publicized and replicated.

³ Karp, Naomi & Wood, Erica. (2006). *Guardianship monitoring: A national survey of court practices*. Washington, DC: AARP.

The federal government can play a significant role in improving guardianship monitoring, thereby improving the quality of guardians' services and protecting older adults unable to make their own decisions from neglect and abuse. To that end, Congress and administrative agencies should:

- *Support the development and use of technology in guardianship monitoring.* Adults subject to guardianship have disabilities impairing their decision-making capacity. Therefore, the Assistive Technology Act of 1998 may be an existing vehicle to accomplish this technology goal, or may provide a model for the type of federal legislation that could enhance state courts' technical capacity to better monitor guardianships. The price tag for such assistance may well be low – adaptation of existing court databases appears feasible and cost-effective.
- *Support multidisciplinary training of all participants in the guardianship community* including judges, court personnel, law enforcement, prosecutors, Adult Protective Services (APS) agency personnel, guardians, attorneys and others. A re-introduced Elder Justice Act or similar legislation can serve as the vehicle for such monitoring support. Training could address the front-end of the guardianship process (before a finding of incapacity and appointment of a guardian) to ensure that guardianship is used sparingly and appropriately. Training also would shore up the process' back-end (post-appointment) to provide guardians with the necessary skills and an understanding of their reporting responsibilities, to help judges and court personnel to maximize monitoring, and to ensure that law enforcement, APS and prosecutors act appropriately and effectively when there is evidence of abuse by guardians or others.
- *Enhance the ability of local jurisdictions and states to compile uniform, consistent data on guardianship* such as age of the incapacitated person, type of guardian appointed, reason for appointment, status of required reports and accountings, involvement of elder abuse and other key factors that would aid in understanding the landscape and bolstering monitoring practices. A dedicated elder justice office in the Department of Health and Human Services and/or the Department of Justice could support the development of a model for guardianship data collection; support pilot

data collection projects; and assist states and local jurisdictions in implementing data systems and assessing the lessons learned through data collection.

Improving Guardianship as Part of a Comprehensive Approach to Elder Justice

Since the original introduction of the Elder Justice Act in 2002, AARP has supported the enactment of a comprehensive federal approach to addressing elder abuse, neglect and exploitation. Protection from elder abuse and fraud is a key concern for AARP members, and the risk of harm grows as the number of people living into advanced age increases dramatically.

The federal government can most effectively improve the current guardianship system as part of a broad-based approach to elder justice. While some elements of the Elder Justice Act were enacted as part of the Older Americans Act Amendments of 2006, most key provisions did not make it out of the 109th Congress. AARP supports reintroduction of the Act, restoring important provisions from the original version that would improve the guardianship system, use it to better protect older persons against abuse, and eradicate abuse by fiduciaries. These provisions include:

- Establishment of *Centers of Excellence* that would research successful fiduciary practices and systems;
- Authorization of *legal advocacy grants* to provide court-appointed advocates and authorized fiduciaries including public guardians for unbefriended older persons without available surrogates;
- Provision of *training grants* to targeted disciplines, including fiduciaries such as guardians, conservators and agents under powers of attorney;
- A *mandated study* by the Secretary of the Department of Health and Human Services and the Attorney General of the roles and responsibilities of government or government-funded entities responsible for addressing elder abuse, including fiduciaries, judges and court personnel; and

- *Examination by the Attorney General of state fiduciary laws, including guardianship and power of attorney laws.*

In supporting and overseeing this combination of research, training and advocacy, the federal government can go a long way towards improving current guardianship practices and enhancing protection for vulnerable incapacitated adults at risk of abuse.

Conclusion

There are numerous ways in which Congress and the Executive branch can meet the challenge of improving guardianship and its alternatives to protect our seniors from abuse, neglect and exploitation. The federal efforts outlined above would go a long way towards enhancing coordination between overlapping fiduciary programs, improving guardianship monitoring, and addressing guardianship in the context of a comprehensive federal program to combat mistreatment of vulnerable older citizens. AARP looks forward to working with the Senate Special Committee on Aging to reach these goals.

The views expressed herein are for information, debate, and discussion, and do not necessarily represent official policies of AARP.