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EXPLOITATION OF SENIORS: AMERICA'S AILING GUARDIANSHIP SYSTEM

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BEFORE THE

SPECIAL COMMITTEE ON AGING
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

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EXPLOITATION OF SENIORS: AMERICA'S AILING GUARDIANSHIP SYSTEM

THURSDAY, SEPTEMBER 7, 2006

U.S. SENATE,
SPECIAL COMMITTEE ON AGING,
Washington, DC.

The Committee met, pursuant to notice, at 10 a.m., in room SD–562, Dirksen Senate Office Building, Hon. Gordon H. Smith, Chairman of the Committee, presiding.

Present: Senators Smith, Burns, Talent, Carper and Salazar.

OPENING STATEMENT OF SENATOR GORDON H. SMITH, CHAIRMAN

The CHAIRMAN. Good morning, ladies and gentlemen. The hour of 10 has arrived, so take your seats, be at home. We appreciate each of you taking the time to join us in what I believe is a topic that needs both light and heat. We have entitled this hearing "Exploitation of Seniors: America's Ailing Guardianship System."

I recently learned of an interstate guardianship dispute that has tied up the courts, conservators, attorneys, hospitals, police, ambulances, nursing homes, adult protective services, family and friends in three different States, all because a native New Yorker fell ill while at the Connecticut home of his daughter. The ensuing year-long battle over his guardianship, which continues today, has cost thousands of dollars, torn apart the family, drained taxpayer dollars and administrative resources, and illustrates how ill-equipped the courts are to handle such disputes.

Regrettably, this situation is far from unique. Horror stories abound in the press regarding the plundering of assets, physical neglect, and the indignity with which elderly wards have been treated by their guardians. As we have learned from the highly publicized Brooke Astor case, no matter your age, finances or social status, none of us in this room today are beyond potential abuse or neglect and any one of us at any time could become incapacitated and in need of assistance.

We are here today because, sadly, after 20 years of congressional hearings on elder abuse, most State guardianship systems are still failing vulnerable seniors. Every State in the country requires a license to practice medicine, law, or even to drive. Unfortunately, the same cannot be said for guardians, who in most States remain largely unregulated and unsupervised.

According to a recent L.A. Times series, there are approximately 500 professional conservators in California overseeing more than

$1.5 billion in assets, and these conservators are subject to less regulation and oversight than a hairdresser or a guide dog trainer.

Although States have made recent legislative strides to reform guardianship laws and ensure better oversight, experts feel there has been little progress when it comes to actual court practice. What has become clear is that Federal leadership is needed.

Now, Senator Kohl, who is tied up in another hearing—he is our ranking member, but he and I, along with members of the Aging Committee, are cosponsors of the Elder Justice Act, a critical and necessary step in guardianship reform. The Act funds public education, data collection, and training for law enforcement and elder care professionals. So I urge my Senate colleagues and those in the House to very quickly pass this important legislation.

However, States must also step forward and provide courts with the necessary staff and resources. Family law, after all, is primarily a State law issue. We are not trying to circumvent them or overtake them or preempt them, but clearly we need the States to do more when it comes to this very important area. Individuals also have a responsibility. They must plan ahead to ensure that someone they trust is in control of their financial and personal decisionmaking, should help be needed.

This morning, we will hear from guardianship experts, including Ira Salzman, an attorney in the Brooke Astor case; a long-term care ombudsman, and also a probate judge has joined us, and the National Guardianship Association. I hope we all leave here today with a better understanding of the protections needed by the elderly to grow old simply, with dignity, while also keeping their fundamental freedoms intact.

So let me introduce our witnesses: first, Mr. Ira Salzman. Welcome, sir. He is an elder law attorney in New York City and currently represents Philip Marshall, the grandson of Brooke Astor. Mr. Salzman will share with us the expertise he has gained in representing clients with cases involving guardianships and conservatorships.

He will be followed by Ms. Barbara Bovbjerg, who is the director of Education, Workforce, and Income Security Issues for the U.S. Government Accountability Office. She will provide an update on the status of guardianships and conservatorships in the United States.

Then we will hear from Mr. Terry Hammond, who is the executive director of the National Guardianship Association. Mr. Hammond's testimony will offer input and insight into the current state of guardianship in America, as well as the NGA's recommendations for guardianship standards.

We will then hear from the Honorable Judge Mel Grossman. He is the administrative judge for the Florida 17th Judicial Circuit Court's Probate Division. In 2004, Judge Grossman's circuit court was recognized as one of only four exemplary guardianship programs in the Nation by the U.S. Government Accountability Office. Judge Grossman will offer this Committee insight from his years of court experience with guardianships.

Finally, and certainly not least, Carol Scott, who is the Missouri Long-Term Care State Ombudsman, and has been so since 1989.

From 2000 to 2004, Ms. Scott served as the president of the National Association of Long-Term Care Ombudsman Programs.

Carol, you may wonder why you are seated in the middle and I read your name last. Senator Talent is between two committee meetings and wants very much to be here to hear your testimony. So when he arrives, which we estimate at about 10:20, we will just go to you next in line. So if everybody is OK with that, we will proceed in that order.

So, Ira Salzman, the mike is yours.

STATEMENT OF IRA SALZMAN, NEW YORK, NY

Mr. SALZMAN. Thank you, Senator, and thank you very much for the opportunity to testify before you.

As you said, I am the attorney for Philip Marshall, who is the grandson of Brooke Astor, and who has brought the petition to have a guardian appointed for his grandmother. But I think in terms of understanding where my testimony is coming from this morning, I think it is also important for you to know that I also represent a number of not-for-profit corporations in New York City that serve as guardian where there is no one else available to serve. These are publicly funded not-for-profits and are essentially New York City's equivalent of a public guardian program.

Now, a lot of people have read a lot of the allegations that have been made in the Brooke Astor case in the newspapers, and many, many people have walked up to me and told me they have found these allegations to be shocking. I believe that the sense of outrage that this case has engendered is fully justified.

But having said that, I think there is a really important point that needs to be made, and you made it in your opening statement, Senator. The Astor case is not unique. In the Astor case, my client is alleging that a power of attorney has been misused to misappropriate money. My firm has been involved in a lot of cases like this. This is not uncommon.

Similarly, in the Astor case it is alleged that money has been misspent or not spent for needed care. Again, this is not an uncommon situation. My firm has been involved in a lot of cases where this has happened. In the Astor case, we were lucky enough to be able to document the allegations of abuse so well that the court in New York was able to determine that the immediate appointment of temporary guardians was necessary.

There is an important lesson from this. Guardianship can be a powerful weapon in the battle to stop elder abuse, and when we talk about the regulation of guardianship, it is important not to lose track of the fact that it is an important tool to stop elder abuse, to prevent financial exploitation, to assist people who otherwise cannot manage for themselves.

The goal should be regulation with an appropriate balance. In terms of looking at that, I think one has to look at this also from not only the point of view of the regulator, but from the point of view of the guardian because the truth of the matter is being a guardian is hard work for which you are rarely adequately compensated. Supervising the care of an incapacitated person can be very time-consuming.

As I was outside, in front of this building this morning, my cell phone rang and it turned out that my mother-in-law's Lifeline alert system had gone off and it was the Lifeline people calling me to tell me there might be something wrong with my mother-in-law. Now, it turned everything was fine. There was a glitch in the phone system, but if you are a guardian, you may have a whole number of these systems. There may be a lot of Lifeline calls that you are going to get. If you get this kind of thing, you have stop what you are doing—it doesn't matter what it is—and you have to fix it. It takes an extraordinary kind of person to be willing to do this and to do it right.

You are not only managing personal affairs; you are also managing money, and you have to manage money with the knowledge that the court may come to you after the fact and says challenge you did, which means you have to be unafraid of being second-guessed by the court.

Being a guardian can be difficult particularly in abuse cases because sometimes abused elderly people oppose the elimination of the abuser from their lives. Therefore, those who want to intercede in abuse cases frequently have an extraordinarily difficult decision to make. What is going to cause more harm: allowing the abuse to continue or separating the incapacitated person who is being abused from his or her loved one?

If there is no one available who is willing to serve as a guardian without receiving the fair market value of the services that need to be rendered, then even the simplest of guardian cases can be expensive. Under New York law, for example, a guardian has to visit a ward at least four times a year.

Let's assume that a person is in a residential care facility and in stable condition. This is the simplest of simple care plans. Let's assume a visit takes 3 hours, including transportation. Let's assume further that the guardian only has to spend an hour a month paying bills and filing insurance claims, and another 3 hours a year filing reports for the courts. That means at a minimum, in the simplest of cases, you are talking about 27 hours a year, and that assumes nothing has gone wrong.

If someone is living at home, then the amount of time that a guardian has to spend is always going to be substantially more than that because especially when you are using a guardianship to manage a care plan at home, what you are doing is you are buying family, and family doesn't come cheap.

This is a particular problem for lower-middle-class and poor people who are incapacitated and therefore need guardians, because guardianship for the lower middle class and the poor can be critical in order to prevent homelessness or unnecessary institutionalization. Guardianship, as time-consuming and as expensive as it may be, is often a crucial part of the equation that allows people to live out their lives at home.

In the context of what I have said so far, I would like to make six points. First, guardianship is a really important tool that can be used to implement a care plan for incapacitated persons, stop elder abuse, and prevent self-neglect.

Second, being a guardian and doing it right is time-consuming, hard work. Third, if there is family involved and enough money to

pay for the care plan, plus legal and accounting expenses, a guardianship can work well.

Fourth, even committed and caring people can be scared off by having to be involved in a legal system and being required to file what appear to them to be complicated reports when there isn't enough money to pay for legal and accounting assistance and the guardian can't afford to pay for this assistance with his or her own funds.

Five, oversight is important, but oversight of guardians is expensive. The more oversight you have, the more complex the system becomes. By expensive, I don't just mean the cost of the people doing the oversight; I also mean the cost of the professionals necessary to help the guardians deal with the oversight. People don't like to go to court for a compliance conference in front of a judge without a lawyer. This is not an unreasonable position. How does that lawyer get paid?

Now, I am certainly not saying there shouldn't be oversight. What I am saying is the system needs to be user-friendly. Oversight should not just mean supervision; it should also mean technical assistance to help guardians so they don't trouble with the people doing the oversight.

Last, as baby-boomers age and find that their children do not live near them, there is going to be an increased need for public guardianship. Poor people needs guardians, too, and as I said, guardianship done well is expensive. But in many cases, public guardianship will be the only alternative for some people if society wants to avoid having them become homeless or being unnecessarily institutionalized.

Thank you very much for the opportunity to testify before you.

The CHAIRMAN. Thank you very much, Ira. As I listen to your testimony and I consider this whole category of guardianship and I think of the baby-boom generation that is going to double the size of the elder population in the next few years, I wonder if there isn't some level of increased professionalization that ought to take place in the whole category of being a guardian.

We don't set fees in government for lawyers, except as to public defense and things like that, but I am just troubled by anybody can be a guardian. There is no standard, apparently. There is no schooling, there is no level of qualification that can prepare a guardian for dealing with all the things you have just cited.

In your view, are there sufficient standards for guardianship in this country?

Mr. SALZMAN. Well, I can only speak for New York, and in New York guardians are required to go through training before they are permitted to serve. I actually chair one of the training programs in New York.

The CHAIRMAN. So New York is, but how about other States? Through your own knowledge, do they have such systems?

Mr. SALZMAN. I don't know, but I think there is a further point, if I can make it, Senator.

The CHAIRMAN. Yes.

Mr. SALZMAN. You first have to distinguish between lay guardians and professional guardians. I think that there has to be a bias in the system in favor of letting family members take care of their

own, and the goal there should have them not only go through training, but have available technical assistance for them.

The CHAIRMAN. For lay guardians?

Mr. SALZMAN. For lay guardians, for family members.

The CHAIRMAN. Does that exist adequately, in your view?

Mr. SALZMAN. No, it does not. We have one experimental program going on in Brooklyn, which I understand is going very well, but it is specially funded and it is only in Brooklyn.

I think that in New York, we have two kinds of professional guardians. We have not-for-profits who serve as community guardian programs or their equivalent. They are not licensed, per se, but they serve under contract with government agencies and are audited by the government agencies and supervised directly by the government agencies as part of the contract process.

In addition, the courts will appoint lawyers who serve as guardians from time to time or social workers who will serve as guardians from time to time. They are required to go through 6 hours of training in order to serve. In addition, they are required to file accounts which are reviewed annually.

The CHAIRMAN. Do they take an examination? Do they get a license?

Mr. SALZMAN. There is no examination, there is no license.

The CHAIRMAN. You spoke about how costly it is to be a guardian. Whether you are a professional or a lay guardian, there are fiduciary responsibilities attendant to that position, and taking time costs money. Yet, I am wondering if the lack of standards doesn't incentivize some of the financial malfeasance that seems to be reported with such regularity; that someone might feel justified in raiding the corpus of an elder's estate feeling like, well, they are entitled to it. That creates all kinds of litigation, I am sure, because some would regard it as excessive or in some cases even criminal.

Mr. SALZMAN. I have been involved in some of these cases, and you look at the financial records after the fact and you can see all kinds of different stories that pop up. I remember one of the first ones I saw was there was a guardian who was short of money. He took $200 out and then he put it back, and you could see it in the records; he put it back. Then a month later, he was short and he took another $300 and he put it back, and he repeated this half a dozen times. Then there was the first time that he didn't have the money and he couldn't put it back.

When people run into hard times, then the great quote from "Lady Windermere's Fan" becomes applicable: "I can resist anything except temptation." So, certainly, you want guardians who are financially stable. People get into trouble and they look at this pot of money and say, "Oh, it is only going to be a loan, no one is ever going to notice, I will take it and I will put it back." That is a common story, that is a common story.

There are some people who are just plain dishonest and do it immediately. There are lot of people who are just sloppy. There are a lot of people who think, well, it is just a little bit, nobody is going to notice. I just finished an audit of a guardianship account where they just ran up credit card bills to go out to dinner. There was a few million dollars involved and they ran up, over 3 years, $40,

$50,000 worth of really odd credit card bills. They figure, you know, I am doing the work, it is really for her benefit, we are talking about here. It would be deductible in the income tax, so I am going to take it under the same rule. There are varying levels of venality.

The CHAIRMAN. Should it be more formalized either in regulation or statute at the State level?

Mr. SALZMAN. Well, I think the laws are pretty clear. The issue is what do people do about it.

The CHAIRMAN. People are afraid to break the law. I mean, you are right.

Mr. SALZMAN. Yes.

The CHAIRMAN. But I guess I am just wondering if, in your view, in your experience, a lot of this goes away if someone does sufficient estate planning and provides for reasonable compensation for a guardian.

Mr. SALZMAN. Yes.

The CHAIRMAN. Yet a lot of people die intestate with no planning. You speak of the poor who need guardianship, just as someone who is wealthy, and I am just wondering if the difference between someone who is prepared—I mean, I have to believe Brooke Astor was prepared, and I don't want to ask you any details on a case. I know you have a responsibility there not to do that.

But it does seem to me that such a range of financial abilities, such a range of financial planning for one's later years—maybe there ought to be some general sorts of statutes in every State, and perhaps even the Federal Government, to give some guidance, some legal structure to this relationship.

Mr. SALZMAN. I think that in terms of cases where there are assets, when there is money around, there is always going to be somebody there who is going to complain. Ultimately it is going to pop up because ultimately the heirs are going to take a look at it and they are going to say what happened here.

My concern in terms of guardianship and in terms of where guardianship is going down the road is what happens with the people who don't have money and still need guardians. My clients have had extraordinary successes in keeping people home simply by virtue of the fact that the guardianship was in place and homes were preserved.

What I would hope that the Federal Government would do would be to look toward establishing best practices for guardianships, in general, and funding for public guardianship, in particular. I guess that leads me to the Elder Justice Act, which I think is an important first step by the Federal Government—should it pass, would be an important first step by the Federal Government to establish a national platform for the discussion of these issues, to establish funding for best practices, to deal with the data collection issues, because one of the things that I believe was pointed out in the GAO report is that we are really not sure as to what the nature and extent of the abuse is.

I don't think we want to regulate to the point where we squeeze family members out of the system and we don't want to regulate to the point where doing the job becomes prohibitively expensive.

The CHAIRMAN. Those three things you mention—data collection—well, it escapes me the other points you just made, but they are on the record. You are familiar with the Elder Justice Act?

Mr. SALZMAN. I am.

The CHAIRMAN. Do you think we have sufficiently addressed those concerns?

Mr. SALZMAN. I do.

The CHAIRMAN. So you would suggest we get it through?

Mr. SALZMAN. Without question, without question.

The CHAIRMAN. But you would add dollars for best practices to incentivize States?

Mr. SALZMAN. Absolutely.

The CHAIRMAN. Well, thank you very, very much. It has been very helpful to have your comments on the record.

[The prepared statement of Mr. Salzman follows:]

TESTIMONY OF IRA SALZMAN BEFORE THE UNITED STATES SENATE SPECIAL COMMITTEE ON AGING - SEPTEMBER 7, 2006

Good morning. Thank you for allowing me to testify before you about the Elder Justice Act.

My name is Ira Salzman. I practice law in New York City and I am a partner with the firm of Goldfarb Abrandt Salzman & Kutzin LLP. Almost from the time I was admitted to practice law in 1978 my practice has focused on Adult Guardianship, Mental Health Law, and what is now called Elder Law. Early in my career, I served as counsel for our local Adult Protective Services Agency. My current clients include not-for-profit corporations that serve as guardian where there is no one else available, or willing to serve. My firm also represents people who are petitioning for the appointment of a guardian for a loved one.

I am also the attorney for Philip Marshall, who has brought a proceeding to have a guardian appointed for his grandmother, Brooke Astor. Because this case is still in litigation and part of the file is under Court seal, it is not appropriate for me to make any comments about the specifics of the case. However, there are newspaper reports about the facts that are alleged in

the Court papers which I have filed. Many people have found these reports shocking. I believe that the sense of outrage that this case has engendered is entirely justified.

Having said that, I think there is a very important point that needs to be made.

The Astor case is by no means unique. In the Astor case the petition alleges that a power of attorney has been used to misappropriate money. My firm has been involved in many cases where this is an issue. In the Astor case it is alleged that money was not being spent for needed care. This is also the kind of case where my firm has been involved in litigation many times. In the Astor case we were able to document the allegations of abuse well enough for the court to determine that the immediate appointment of temporary guardians was appropriate. An important lesson of the Astor case is that guardianship proceedings can be a powerful weapon in the battle to stop elder abuse.

It is also important to note that guardianship is by no means a universal solution to the problem of elder abuse.

First, even assuming that guardianship is an appropriate goal in a particular case, there may be no one who is willing to be the person who petitions the court. More significantly there may be no one willing to serve as guardian. Supervising the care of an incapacitated person who has been abused is time consuming. It may involve frequent visits to supervise care. It may involve managing another person's finances. It requires someone who is willing to try to do the right thing, and is willing to take the personal risk of being second-guessed by someone else after the fact.

Second, even with a guardianship in place there may not be enough money available to pay for the cost of an appropriate care plan. For example, one of the common ways to resolve elder abuse problems is to put home care in place. This can be expensive. New York City has a generous Medicaid funded home care program but it is, to the best of my knowledge, relatively unique in this respect.

In addition, if there is no one available who is willing to serve as guardian without fee, then even in the simplest of cases the services of a guardian can be very expensive, given the household budgets of many people. Under New York law, a guardian has to visit his/her ward at least four times per year.

Let's assume that a visit takes three hours. Let's further assume that the guardian spends one hour per month paying bills, balancing checkbooks, filing insurance claims, etc., and three more hours per year preparing reports for the Court. That means that at a minimum a guardianship takes 27 hours per year. This assumes that there is no crisis to deal with (medical or otherwise), there is no fight with an insurance company over a claim, there is no heavy duty cleaning that needs to be done, and that four times per year is in fact an adequate number of times to visit.

In New York City you cannot get a professional to do anything for less than $100.00 an hour. This means that the minimum charge for a guardian to do an adequate job is $2,700.00 per year. This does not include legal fees for the filing of court reports.

A third problem that can arise is that sometimes the abused elderly person refuses to assist in any way in the appointment of a guardian and opposes the elimination of the abuser from his/her life. In a recent case handled by my firm, a mother refused numerous offers of assistance to remove an abusing adult child from her home, in part because of the concern by the elderly person that if the child were removed the child would

have no place to live and would be at risk. It is not uncommon that the person who is being abused has a powerful psychological bond with the abuser, is living with the abuser, and does not want to be separated from that person. Therefore, those who want to intercede in elder abuse cases frequently have an extraordinarily difficult decision to make. What is going to cause more harm, allowing the abuse to continue or separating the incapacitated person who is being abused from his/her loved one?

All this brings me to the Elder Justice Act. As noted in the Congressional findings, there are somewhere between 500,000 and 5,000,000 elderly who are abused, neglected or exploited each year. Most of this is unreported. Different states use different procedures to respond to these cases. In New York the procedures vary by county. For example, there is no statewide public guardian in New York. Counties are given the option to establish what is called a community guardian program. Some counties have one, others do not.

Guardianship is an important tool that can be used to end elder abuse in some cases. But it is certainly not the appropriate tool in every case. What is needed is a balanced comprehensive multidisciplinary approach. Research is needed to

establish best practices. There is a need to create a national platform for the discussion of this issue.

The passage of the Elder Justice Act is important because it provides funding to establish best practices in this area. This is an absolutely critical need.

The passage of the Elder Justice Act is important because it provides additional funding to adult protective services agencies in order to decrease caseload per worker. This is an absolutely critical need.

The passage of the Elder Justice Act is important because it establishes funding and procedures for data collection so that we can get a better understanding of the nature and scope of this problem. This is an absolutely critical need.

As outrageous as the allegations in the Astor case may seem to some, the important point that needs to be made is that the Astor case is only one of many. Elder abuse cuts across class lines and economic strata. There are hundreds of thousands if not millions of other elder abuse cases in the United States which also cry out for our outrage and concern. The passage of

the Elder Justice Act would be an important way to channel that outrage and concern in a productive way.

Thank you for the opportunity to testify before you today.

Respectfully submitted,

Ira Salzman

BIOGRAPHICAL INFORMATION ABOUT IRA SALZMAN

Ira Salzman is the former Chair of the Elder Law Committee of the New York County Lawyers' Association. He is currently a member of the Executive Committee of the Elder Law Section of the New York State Bar Association and the former Vice-Chair of its Guardianship subcommittee.

He is a Fellow of the Brookdale Center on Aging. He is a member of the National Academy of Elder Law Attorneys and a former editor of its quarterly journal.

He has written articles for the quarterly journal of the National Academy of Elder Law Attorneys, the Elder Law News (a publication of Little, Brown & Company), and for the Elder Law Attorney (published by the Elder Law Section of the New York State Bar Association). He is the co-author of the Guardianship Section of the New York Lawyer's Form Book (published by the New York State Bar Association). He is the author of the chapter on the responsibilities of the attorney for an alleged incapacitated person in Guardianship Practice In New York (published by the New York State Bar Association). He chairs the semi-annual New York State Office of Court Administration Certified Program for the training of guardians and court evaluators which are sponsored by the New York County Lawyers Association.

The CHAIRMAN. I see Senator Talent has just arrived. So as I mentioned in the beginning, what we will do is jump now to Carol Scott, who is from Missouri, and depending on where you are from in Missouri, you might say Missoura.

How do you say it, Senator Talent?

Senator TALENT. Well, that is a question I never answer. [Laughter.]

Either pronunciation is commonly used by fine Missourians all over our State. Am I recognized for my statement?

The CHAIRMAN. Yes, you are recognized for your statement and then we will go to your witness.

OPENING STATEMENT OF SENATOR JIM TALENT

Senator TALENT. Speaking of fine Missourians, Carol Scott is with us today. I want to thank you first, Mr. Chairman, for calling this hearing. There is just no question that we as a society need to commit ourselves, and I think we are committed, to helping our most vulnerable citizens. This certainly includes seniors who are subject to physical or financial threats, in some cases from those who ought to be close to them, who ought to be looking out the most for them. Guardianship is a great legal tool. It has benefited many, many people. It is an important tool, but if it is not carefully used and administered, it can hurt people as well.

So I am glad you are holding this hearing and I am pleased that my old friend, Carol, is with us today. Carol Scott and I met when I served in the Missouri legislature. She has served as the Missouri Long-Term Care Ombudsman for almost 20 years. She is the past president of the National Association of Long-Term Care Ombudsman Programs. Her service also includes the Medicare Fraud Prevention Program and the Missouri End-of-Life Coalition.

I will just say, Mr. Chairman, she really knows her stuff, so you picked a good witness. I am looking forward to hearing her testimony and the testimony of the other witnesses as well, and their recommendations about what we can do to help educate seniors and their communities about guardianship and how to use it in the right way to preserve seniors' physical and financial integrity.

Thank you, Mr. Chairman.

The CHAIRMAN. Thank you, Senator Talent.

Carol Scott.

STATEMENT OF CAROL J. SCOTT, MISSOURI STATE LONG-TERM CARE OMBUDSMAN, JEFFERSON CITY, MO

Ms. SCOTT. Senator Smith, Senator Talent, good morning. In Jenny Joseph's poem "Warning," she writes "When I am an old woman, I shall wear purple, with a red hat which doesn't go and doesn't suit me." At the end, she ends with, "But maybe I ought to start now so people who know me are not too shocked and surprised when I am suddenly old and start to wear purple." It seems that there is a never-ending battle to debunk stereotypic notions of older and disabled adults. Often, the labeling of an individual is tantamount to presumption of the need for guardianship. Finding yourself under a court-appointed guardian can happen quickly. There was a gentlemen in Missouri who was driving his pickup down the street and, within 2 weeks, was in a nursing home with

a guardian. Within 6 weeks, all of his belongings were thrown away and all his real estate was sold. Within that time, he got better, and with the help of the ombudsman's program, the nursing home and the physician he asked the court to overturn his guardianship and the request was denied.

In another Missouri case, the guardian of seven residents of one nursing home moved these individuals because the guardian was mad that the nursing home was requesting payment. One of these residents had lived in that nursing home for over 25 years.

From across the country, ombudsman stories remain the same that the system is not working as it should in all cases. It is far too easy to take advantage of people. There is a lack of training and there are few standards in place to protect these vulnerable people.

In Ohio, the ombudsman learned that an agency planned to move all their wards from their nursing home without even talking to them. The ombudsman visited and notified the court, but they were moved anyway. One resident died after that move. The agency then wrote a letter to the new nursing facility telling them not to allow the ombudsman to visit their residents without the guardian being present. Well, this is against Federal law, so the ombudsman program is not complying with that request.

In New Jersey, a case of an attorney who was appointed guardian. The guardian applied for Medicaid when the ward had $49,000, or should have had $49,000 in the bank. This case is now under investigation. In Michigan, two cases where the wards were placed in locked Alzheimer's units in the nursing home. Neither had dementia and in both cases the facility and physicians felt the individuals did not need a guardian.

While family members and friends assume the role of guardian or conservator, in Missouri there are no training requirements and only a yearly accounting of finances which is sent to the local probate court. Low-income family members face difficulties because of the cost of establishing a guardianship. In these situations, family members who are willing to be guardians should be encouraged, not discouraged and punished by the cost of becoming a guardian.

The CHAIRMAN. Should they be compensated, Carol?

Ms. SCOTT. That is a hard question. I don't know. I don't know where the money would come from.

The CHAIRMAN. I just ask that question because it leads back to this whole incentive for abuse. I am sorry to interrupt you.

Ms. SCOTT. No, that is OK. That is a tough question because I mean as Mr. Salzman says, there is a lot of time and energy put in. So I am not sure that paying is the right thing, but some incentive—in Missouri, it costs about $1,000 to get a guardianship established and that is what the beginning issue is, is just the cost of doing it.

There are many best practices across the States and I think States need to look at and make appropriate changes. As far as the role of the Federal Government, I have four ideas.

One is there is a need for coordination between the Social Security Administration, the VA representative payment programs and State courts handling guardianships. This issue is described in the 2004 GAO report. In the Older Americans Act, there is a need for

beefing up the legal services program. In many States, this program is floundering due to lack of attention and funding.

The National Conference of Commissioners on Uniform State Laws has convened a committee to address interstate issues. It would be great if Congress could somehow promote the portability of guardianships created in other States.

Fourth, the Federal Government could conduct a study of the connection between guardianship and the inappropriate institutionalization of individuals in nursing homes. When guardianship works well, it is fine to have control at the local probate court level. When it is not working, there is a need for some other type of oversight. There may be a need for someone to have oversight to review the financial dealings, the living arrangements of the ward, and other quality-of-life issues. Training, education and oversight are solutions that can happen, but will take time and money.

In addition to my testimony, I have submitted some other ideas for recommendations for actions. I look forward to going back to my State, and I hope everyone in this room does to their own States, to see if we can't make some changes.

Thank you very much.

The CHAIRMAN. Thank you, Carol. This question is not a criticism of Missouri, but just a question. Is the State legislature there taking this issue up?

Ms. SCOTT. We are identifying State legislators that are very interested in this case. We have a situation right now where in Missouri we have public administrators that are elected within each county, and we currently have in the news one of those that is under investigation for possible financial dealings. I think that case will result in there being a lot of interest in this topic in the next legislative session.

The CHAIRMAN. In Missouri, do public guardians get training? Are they licensed?

Ms. SCOTT. No, they are not licensed. They do have a requirement to receive training, but it is less than 30 hours. I mean, they have written it themselves and so it is information that is kind of passed on. It is not any kind of a certified training.

The CHAIRMAN. How about private guardians? If the public ones don't have any more than that, the private guardians have nothing?

Ms. SCOTT. It depends on the court as to how much information is even given on what the job is. From court to court, it is very much a good old—what is that called, the buddy system, so depending on the county and the judge on how much oversight is given. It could be that the paperwork is sent in and it is just filed in a filing cabinet and not ever even reviewed.

Senator TALENT. Mr. Chairman, can I ask——

The CHAIRMAN. Yes, Senator Talent.

Senator TALENT. Thank you, Mr. Chairman, because as is often the case, as you know, we have a lot of different things going on at the same time and I am not going to be able to stay for the whole thing.

I wanted to ask Carol—and with your permission, Mr. Chairman, if anybody else wants to chime in. To me, the guardian is one offi-

cer who is supposed to be looking out for seniors. The other person who is always supposed to be doing this is the judge.

Now, in my limited experience, because I never practiced in this field, judges are not just supposed to accept representations that are made to them when somebody seeks guardianship. I mean, you are supposed to ask questions particularly if the person has no attorney representing them, if it is an ex parte proceeding.

Is it your experience that people will falsify, say, affidavits to judges or testimony to judges about the mental state or condition of the senior in order to get guardianship rights? I am reading your anecdotes and I know this happens where people are treated as if they have Alzheimer's when they don't. Well, this is a factual question. I mean, you can't just go in to a judge and say, you know, my aunt has Alzheimer's, when she doesn't.

Is anybody holding these judges accountable for their decisions, or what is fouling up at this point?

Ms. SCOTT. Somebody else here might be able to answer.

Senator TALENT. I notice Mr. Grossman reacting to my question, so if he would like to add something.

Ms. SCOTT. I will tell you that my experience in Missouri is, again, in my counties there is that good old buddy system. We see instances where the ward is not even notified that there is a court hearing. We see instances where the family member is not even notified that this is happening. We see where the judge and the guardian, whether it be public or private—I don't know what the reason is.

The gentleman that was driving down the street and ended up—the only explanation we have is that he happened to own some lake property that some people wanted to get a hold of to do a development, and unfortunately this was a 70-some-year-old sailor who talked like he was still out on the sea and they absolutely took advantage of him. I have no understanding why the judge didn't do something different, other than didn't want to rock the boat, didn't look at it.

We actually did some training with The Missouri Bar to get the attorneys to do something, because we have attorneys who aren't even visiting their wards before they represent them in court.

Senator TALENT. Does anybody else want to comment on that?

Judge GROSSMAN. If I could respond?

The CHAIRMAN. Please, yes, go ahead.

Judge GROSSMAN. Florida is a little different because Florida for about 40 years has seen an influx of retirees whose children are up north, and a lot of them in Mr. Salzman's neck of the woods, and so we do have some history.

In 1989, the Florida legislature enacted some comprehensive statutes on guardianship, and then just this past session, as a result of recommendations from the State legislature, created a guardianship task force, on which I served representing the circuit court of the State. We had a bunch of recommendations and they were successfully passed this last session.

There is also, Senator Talent, a line of cases principally out of Maryland that takes the position—and it is a position I am comfortable with—that says that the person that we call a guardian is not really the guardian. Ultimately, the guardian is the judge and

the court, and the person we appoint as a guardian is, in fact, acting as an agent for the court.

We have in my circuit especially—and there are disagreements even among my colleagues in Florida, but every time there is a petition for incapacity in Florida, the first thing that happens is I enter an order appointing an attorney to represent that alleged incapacitated person and I appoint a guardianship examining committee composed of three people who go out and make a report back, and then there is an evidentiary hearing.

Ms. Scott, I will be happy to give you the cites that are here so that you can put some of those together with the State of Missouri. But once you get past the appointment process, I have to tell you all that we have a requirement that professional guardians, and if they are corporate guardians, that any employee that has a fiduciary duty to a ward have a background investigation done. In my circuit, we do it annually. It has to be done every 2 years under the statute, and we check for criminal, we check for credit, and we check with our Department of Children and Families for any reports of exploitation, abuse, or neglect before anybody is appointed.

Once they are appointed, there are educational requirements. We require 8 hours for family, generally, in terms of the elderly for a family member. Our bar association puts those on. For professionals, they have to be registered with the statewide public guardianship office, and if they are not on the registry, they can't be appointed and they can't get paid.

Then we have codified in State legislative provisions—we have the ability to appoint court monitors. In my circuit and in one other circuit, we have actually an in-house capability. In my circuit, we have a full-time in-house court monitor with a clerical staff, and we have probably the most robust set-up of any circuit in Florida. If there is any indication that comes to a judge or a magistrate that there is something that is not quite right, or even if we get a letter in the mail and even if it is anonymous, the first thing we will do is we will send out that in-house court monitor to check.

Now, 90 percent of the time——

Senator TALENT. No problem.

Judge GROSSMAN [continuing]. There is no problem, but it is that troublesome 10 percent. So we decided, after some negative newspaper series—nothing gets the attention of the judiciary more than a 5-day mini-series in a major newspaper in the area that appears at the top of 1A, and above the fold, as well, are the recommendations that say Broward judges do a poor job of oversight. So we took that very seriously and basically we default to worst-case scenario in terms of our operating procedures. Now, does that cost money? Mr. Salzman, you are absolutely right; it costs money, but we have been fortunate enough to get some resources.

The other thing, and it is really not directly related to this, but let me just touch on it anyway is we have an Office of Public Guardian. It is modestly funded, but what we did was I created a public-private partnership with Barry University, which is in south Florida, which has an excellent school of social work. Essentially, the university provides for our public guardian operation. So you don't have any education with that, but I do think education and I do think that there needs to be some funding.

Senator TALENT. Thank you, Mr. Grossman. Can I just make a final point for the record?

The CHAIRMAN. Of course.

Senator TALENT. I am glad you mentioned, Mr. Grossman, and I am sure you probably did also, Mr. Chairman, that there are thousands and thousands of devoted children and relatives out there caring everyday. I have staff members in this situation with an aged relative, and we should say that. I mean, the love that you see in this kind of a setting is just—you just never see it repeated.

We do have these abuses, and I congratulate you and Senator Kohl because this is one of the things this Committee is for. I suspect that if the Committee just issued a paper with some recommendations to some State supreme courts and some county public administrators, that publicity alone probably would light a fire under people to do what they are already supposed to be doing a little bit better. I would suggest that the Chairman consider that.

The CHAIRMAN. I am encouraged, Judge. I forget the Justice of the Supreme Court that made the comment in one of his opinions that judges read newspapers, too.

Senator TALENT. Not that we ever do, of course.

The CHAIRMAN. There is nothing like the court of public opinion to make modifications.

[The prepared statement of Ms. Scott follows:]

COMMENTS ON GUARDIANSHIP AND ABUSE

By Carol J. Scott, Missouri State Long-Term Care Ombudsman

Before the U.S. Senate Special Committee on Aging

September 7, 2006

Thank you for this opportunity to speak on an issue that affects an untold number of citizens of this country.

Let me start by quoting Jenny Joseph's poem "Warning": "When I am an old woman I shall wear purple with a red hat which doesn't go, and doesn't suit me" This poem ends with "But maybe I ought to practice a little now? So people who know me are not too shocked and surprised when suddenly I am old, and start to wear purple."

When guardianships occur, it is the constitutional rights (such as voting, property, contracts, etc.) that are taken away. It often seems that there is a never-ending battle to debunk stereotypic notions of older or disabled adults. Often the labeling of an individual is tantamount to creating a presumption of the need for guardianship.

Finding yourself under a court appointed guardianship could happen quickly. A man in Missouri was driving his pickup down the street and within two weeks was in a nursing home with a guardian. Within 6 weeks all his belongings were thrown away, and all real estate was sold. Within that time, he got better, and with the help of the Ombudsman Program, the nursing home and his physician, he asked the court to overturn the guardianship.

That request was denied.

In another Missouri case, the guardian of 7 residents of one nursing home moved these individuals to another facility because the guardian was mad at the nursing home for requesting payment of bills. One of those residents had lived in that nursing home for more than 25 years.

From across the country, the Ombudsman stories remain the same: the system is not working, as it should in all cases. It is far too easy to take advantage of people, no one is looking and there are no safeguards in place to protect these vulnerable people.

Ohio: The Ombudsman Program has had cases where the guardianship agencies have overstepped their bounds. One agency moved all their wards from their nursing home, without talking to them. The Ombudsman visited and notified the court, but the residents were moved anyway. One resident died after the move. The agency wrote a letter to the new facility telling them not to allow the ombudsman to visit residents without the guardian present. This is against federal law, and the Ombudsman Program is not complying with this request.

New Jersey: A case of an attorney who was appointed guardian. The guardian applied for Medicaid on behalf of the resident in 2005, who should have had $49,000 in the bank. This case is now under investigation by the County Prosecutor.

Michigan: Two cases where each of the wards was placed in a locked Alzheimer's unit in the nursing home. Neither person had dementia, and in both cases the facility and physicians felt the individuals did not need a guardian.

In Missouri, we have a system that has an elected official in each county, who assumes the role of guardian for our citizens who have no one else or for whom there is a dispute over who should

be the guardian. There are no requirements for being elected; these people have less than 30 hours of training, and yet control the lives and finances of many people. Their only oversight is from the judge in their county.

While many family members and friends assume the role of guardian or conservator, there are no training requirements and only a yearly accounting of finances, which is sent to the court.

Low-income family members face difficulties because of the cost of establishing a guardianship. In these situations, family members who are willing to be guardians ought to be encouraged, not punished by the cost of becoming the guardian.

There are many best practices across the country. States need to look at these and make appropriate changes.

As far as a role for the federal government:
First, there is a great need for coordination between the Social Security Administration, VA representative payment programs and state courts handling guardianships. This issue was described in the 2004 GAO report.

Second, in the federal Older American's Act, there is a provision for each state to develop a legal services program. In many states, that system is floundering due to lack of attention and funding. In states that have a strong legal services program as part of their services for the elderly and disabled, we have seen some good best practices.

Third, the National Conference of Commissioners on Uniform State Laws has convened a committee to address interstate issues. It would be great if Congress could somehow promote the portability of guardianships created in other states.

Fourth, the federal government could conduct a study of the connection between guardianship and the inappropriate institutionalization of individuals in nursing homes.

When guardianship works well, it is fine to have control at the local probate court level. When it is not working, there is a need for some other type of oversight. There may be a need for someone to have oversight to review financial dealings, the living arrangements of the ward and other quality of life issues.

So, training, education, and oversight are solutions that can happen, but will take time and money. Empathy, caring, showing respect and "doing the right" thing, can happen now. We must take care of the people who can't care for themselves. In addition to my testimony, I am submitting in writing some case stories and further recommendations for action.

I wish there were easy answers. In many, perhaps most cases, the current system is working. But there are lots of cases where that is not true. I look forward to going back to Missouri and expanding our current work group to identify specific solutions to our specific problems. I hope that everyone in this room will do the same.

Thank you for this opportunity to speak to you.

Some case examples:

Case No. 1
Ms. A, a retired real estate agent, lives at home. Her housekeeping skills deteriorate considerably. Daughter, only child, seeks and is granted limited guardianship and limited conservatorship. Ms. A must pay over $11,000 in daughter's attorney fees. Daughter lives 1,500 miles away.

Ms. A. is to retain right to pay her own bills. Daughter ignores this limitation, and fiercely controls money. Will not give Ms. A money to go out to lunch with her friends. Will give Ms. A only $10 to buy Christmas gifts for her great grandchildren (despite Ms. A having about $120,00o in the bank.)

Daughter seeks court permission to sell house and move Ms. A to assisted living. Granted by court. Ms. A is in assisted living for short period, and "acts out." Without seeking court approval, daughter places Ms. A in the Alzheimer's unit of a nursing home. Ms. A has no day-to-day medical needs.

Ms. A is conversant and entirely rational. Ms. A is miserable, for she loves to interact with people, but those who live on her unit cannot communicate.

Daughter refuses to consider assisted living, although this is both desired by Ms. A, and appropriate based on her abilities and needs.

Case No. 2.
Ms. B lives alone it her house, quite content. Her eyesight is failing. She crosses a road to get groceries and go to the bank. Instead of going to the light, she jaywalks, creating a danger to herself.

Ms. B has granted a durable power of attorney for health care in favor of her daughter, an only child.

After being hospitalized for a blood clot in her leg, her daughter, puts Ms. B. in the locked, Alzheimer's Unit of a nursing home. (Ms. B was recently tested with an IQ of 132; all agree she does not have Alzheimer's disease).

The nursing home contacts the State Long Term Care Ombudsman, for the nursing believes Ms. B has no nursing home needs, and fears there is financial abuse by daughter. The nursing home physicians refuse to trigger the advance directive, believing Ms. B is fully capable of making informed decisions.

Daughter applies for guardianship and conservatorship. Court grants emergency guardianship, then guardianship and conservatorship, even though a) there is no emergency; b) Ms. B is not an "incapacitated individual" as defined in statute; and c) guardianship is not necessary (a requirement of statute) because of the durable power for health care (statute states a guardian cannot be given powers a patient advocate
has).

Ms. B. requests reconsideration of the probate court's decision; it is summarily dismissed. Daughter refuses to consider assisted living. She expresses fear if Ms. B's home is sold to pay for assisted living, she will not inherit anything. On the other hand, if Ms. B is a nursing home

resident, and her (lifetime) stay is paid by Medicaid, the house will be an exempt asset, and inherited by daughter or granddaughter. (This is not true in all states. For instance in Missouri, the state would put a lien on the home to recoup the money that Medicaid paid on behalf of the resident.)

Case No. 3

Numerous hotlines since 2002 (substantiated filth/vermin/squalor, inadequate supervision, inadequate personal care, etc), numerous court hearings and entry warrant. Severely demented woman had a lot of money. The Dept. of Health and Senior Services (DHSS) staff had been told by the Trust of the Estate since 2002 that they controlled all aspects of the money of Ms. XXX. When she moved to Missouri, they purchased her a large brick home in a very nice neighborhood (not sure of the cost, but likely $200,000+) in which to live. Her caregiver neglected her, neglected the house, and basically trashed the house (many, many dogs, ferrets, cats) - so bad that Ms. XXX was removed, as well as the children of the caregiver, by children's services. The trust not only paid for the house, but also paid the monthly bills (without receipts, just with the caregiver telling them how much the bills were, which was not accurate!). Trust was made aware of the conditions of the home, but did nothing about it.

Guardianship was granted to the brother of the caregiver in 2003. Guardian lived in California and visited once for 2 days in the entire 4 years of this case. He was made aware of the situation, but did nothing visibly to rectify the situation. In fact, he often protested DHSS involvement and placement of Ms. XXX in a protected environment. In more than one instance, he could not be contacted for days on an issue pertaining to Ms. XXX's health. Guardian denied any information about assets or income of Ms. XXX (which is questionable, as he knew that caregiver did not work and had access to monthly money).

Trust was made the official conservator of Ms. XXX in 2005. It was not until 2006 that DHSS became aware that the trust DID NOT control (nor had EVER controlled) Ms. XXX's monthly income, which was about $2000 a month (Social Security and other Pension). Between 2002 and 2006, Ms. XXX had been in/out of the nursing home for over 20 months. The trust had paid cash for the nursing home stay. The caregiver had full access to the monthly income and had been spending this money on herself (she actually admitted this in court!). Even in the nursing home, the trust was still paying the household bills!

Basically, the caregiver had a house, all bills paid, monthly income of $2000, declared no income, got food stamps and Medicaid, and earned rent from outside people she allowed to live in the home. Public Administrator was made guardian/conservator in June 2006. She is currently in a lengthy court battle to remove caregiver from the home (which will have to be extensively remodeled before sold). PA has stopped the caregiver's access to monthly income of Ms. XXX's. PA and DHSS have filed Medicaid fraud charges against caregiver, food stamp fraud, and are seeking federal charges stemming from the misuse of social security funds. Ms. XXX now permanently resides in a nursing home and receives the best of care.

Some recommendations:

1. Designate funds for Adult Protective Services.

2. Provide guardianship grants to public agencies to provide guardianship services.

3. Provide incentives to state prosecutors to prosecute persons who exploit the elderly.

4. Ensure that all state Long-Term Care Ombudsman Programs have adequate legal counsel as outlined in the Older American's Act.

5. Clarify and more clearly delineate the requirements of Legal Services, as found in the Older American's Act.

6. Encourage banks and other financial institutions to always have a face-to-face meeting with the elderly person when executing loans or other indebtedness. Have trained staff evaluate whether the individual has capacity.

7. Encourage banks and other financial institutions to conduct educational sessions for their staffs on the exploitation of the elderly and what to look for, and how to react, e.g. don't give them large amounts of money without looking into the situation.

8. Address the issue of the undocumented incapacitated person, e.g. access to long-term care services.

9. Provide necessary services for the elderly person in need of mental health or substance abuse rehabilitation services and support services. These individuals do not always need to be under guardianship.

10. Have the Veterans Administration remove their guardians and transfer fund authority to a state/local appointed guardians, where one is appointed in order to reduce duplication of effort.

11. Continue to develop public assistance programs that serve low-income individuals and not allow eligibility to be based on voluntary impoverishment or other schemes. (Cap the cost of exempted purchases.)

12. Provide support for the states to develop and implement guardianship training programs for family/friends to be become guardian. Provide assistance to the elderly and disabled on how to avoid guardianship using other legal processes, such as durable powers of attorney.

13. Encourage courts to monitor guardianships.

The CHAIRMAN. We are also joined by Senator Burns, of Montana. Senator, if you have an opening statement or a question of any of the witnesses——

Senator BURNS. Well, no, and I just want to thank you. Just listening to this discussion this morning, whenever you appoint a guardian, do they also have the power of attorney?

Judge GROSSMAN. In Florida, there are different degrees in terms of guardianship. We have, pursuant to statute, a laundry list of rights and powers that an individual is free to enjoy in our society and which ones can be taken away and which can be delegated to a guardian and which cannot be delegated to a guardian.

If you are talking about a durable power of attorney for financial things, a durable power of attorney, if it did exist, would cease in Florida when a guardian is appointed and the guardian would be taking over the financial aspects of the ward. I am not sure that that answers your question.

Senator BURNS. Is that unique to Florida or are there other States——

Judge GROSSMAN. My understanding is it is not necessarily unique to Florida, but again more than any other State we have been out there a whole lot longer, although you are going to see the same situations as they sweep across the Sun Belt and this is just the beginning.

One of the problems with this particular area is that, No. 1, nobody likes to face their own mortality. No child likes to recognize the fact that their parents are in need of assistance, and no parent relishes the idea of any kind of even limited role reversal. So this becomes a really difficult deal for families to work out.

I agree with what Senator Talent said and, Senator Smith, what you said, as well as Mr. Salzman. I mean, most families really care about their families and really do everything they can to help them. Most professional guardians do the same way. But in answer specifically to your question about durable power of attorney, that would cease in Florida when a guardian was appointed.

Senator BURNS. Do you have the attorneys—do they sort of pull back on that?

Judge GROSSMAN. Well, you see, another difference between Missouri and many other States is every guardian, unless they are an attorney, has to be represented by an attorney. Originally, that was designed as best I can tell to provide a backup system for the court. For a good 10 years now, the general policy of the State of Florida has been that while the guardian is the representative, the attorney who has been selected by the guardian to represent the guardian has also a third-party beneficiary relationship with the ward, which brings on certain obligations.

In July, the Alaska Supreme Court just ruled in a guardianship case where the attorney knew or should have known that something wrong was happening as a result of what the guardian was doing with the ward's assets that the attorney was potentially liable for the losses and the injuries incurred by the ward by virtue of his or her not stepping forward and essentially blowing the whistle.

Senator BURNS. Well, I can see where there would be a little conflict there. I have been through this with my parents. Of course,

the toughest thing in the whole family deal is when you take the car keys away from them. That is the toughest part of managing your parents, so to speak, when everybody knows they shouldn't be driving. Now, once you make it over that hill, everything else falls in place, you know, but the toughest part is getting those car keys.

Judge GROSSMAN. You are braver than I. I told my father, may he rest in peace, that the car had been stolen. [Laughter.]

Senator BURNS. Well, my father was fortunate, or however you would term it. The first time he had a pain in his whole life, he was 86 and then they found there was cancer in his liver and they told him he only had 90 days to live. He looked at my mother and said, "Now, ain't that something?" But my mother was a very strong-willed lady and getting the car keys from her was a little bit tougher.

I just want to know the difference because are we saying here—and by the way, both of those people that I was talking about are buried in Davies County, MO. You know where Davies County is?

Ms. SCOTT. Yes.

Senator BURNS. This is where Frank James stood trial.

Are we saying here that we are suggesting guidelines should be passed on the Federal level to unify the laws across the land, because sometimes caring children are not residents of the States in which their parents reside? Are we suggesting that?

Mr. HAMMOND. Mr. Chair, is it my turn? I will go ahead and answer that question and make my comments, if that would be appropriate at this time, Mr. Chairman.

The CHAIRMAN. Sure.

STATEMENT OF TERRY W. HAMMOND, EXECUTIVE DIRECTOR, NATIONAL GUARDIANSHIP ASSOCIATION, EL PASO, TX

Mr. HAMMOND. Thank you. My name is Terry Hammond. I am the executive director of the National Guardianship Association. I am a practicing attorney in El Paso, TX. El Paso County, TX, is one of the poorest communities in this country, and so we see a lot of indigent guardianship issues where I practice. On behalf of the National Guardianship Association, I would like to thank Chairman Smith and the Special Committee for allowing the NGA to testify on the incidence of guardianship in the aging and disabled population in America.

The NGA was created in 1988 in response to a withering report by the Associated Press that exposed inadequacies in State guardianship systems. I will note that the theme of that report in 1987 was Guardians of the Elderly: An Ailing System. Today, in 2006, the theme of this hearing is Exploitation of Seniors: America's Ailing Guardianship System—almost exactly the same theme 20 years apart.

NGA membership is comprised of guardians and professionals from all walks of life. The mission of the NGA is to establish and promote a recognized standard of excellence in the guardianship practice. Honored Members, I must tell you that despite the best efforts of hundreds of committed guardians, judges and attorneys, at this time we have elderly and disabled Americans suffering in their homes and in our streets.

As more Americans age, Federal, State and county governments look to each other to meet the needs of a generation that has given its all and now is in need of support of governmental services to survive. The lack of a coordinated response at all levels of government too often leaves our elderly to live their final days penniless and in unspeakable pain. Simply put, we are not doing senior Americans justice. At a minimum, the Federal Government should create an environment conducive to successful judicial intervention for those in need of a guardian.

This is a challenging time to be engaged in the guardianship process in America. In recent years, we have had such high-profile cases as Rosa Parks, Brooke Astor, Molly Orshansky and Lillian Glasser, the numbers of which are eclipsed by scores of Americans in each of our hometowns. The national spotlight has been directed on guardianship often in an unflattering manner. The American guardianship system is far from perfect.

Americans may find themselves before a guardianship court with a loved one or third party seeking appointment as guardian. If the physician indicates there is a medical necessity for guardianship, the court may appoint a guardian even over the objection of the elderly person. Often, there is evidence of abuse, neglect or exploitation necessitating the appointment of the guardian.

The courts are increasingly turning to third-party professional guardians where there are family members who are not appropriate or not available, or even where distance separated loved ones. At this time, no one knows how many guardianships there are in America. This is because guardianship is a uniquely local process governed by State law and administered on a local level, often county by county.

For example, in Texas alone there are 254 counties, each of which administers guardianship slightly differently. There are no national standards for guardianship other than the standards of practice for guardians adopted by the National Guardianship Association. There is no national certification process for guardians—and this is, Senator, following up on your comments—other than the registered guardian and master guardian certification testing process adopted and promoted by the NGA's sister entity, the National Guardianship Foundation.

A recent study on guardianship by the ABA Commission on Law and Aging concluded basic data on guardianship is scant, offering courts, policymakers and practitioners little guidance for improving the system. The 2004 report by the GAO confirms these findings. Only a handful of State court systems are equipped or even interested in collecting data on guardianships. Although guardianships are local in nature, there are a number of areas in which the Federal Government's policies impact on guardianship. I would like to highlight a few of these areas.

First, the designations of representative payees by the Social Security Administration and the Department of Veterans Affairs often impede the administration of guardianships. It is like you have parallel tracks. You have the Federal Government's representative payee system and the guardianship system in a State and the two never cross, and so there is very little dialog or com-

munication between the Federal agencies administering Federal funds to payees and the courts that are considering these cases.

For example, in the court I practice in the probate judge has banned the Social Security representatives and the VA representatives from testifying in his court because they will typically tell him, we are the Feds, we don't have to come to your court unless you go through an extensive subpoena process, we are not going to participate. In response, our county judge has said, fine, I am never going to let you come at all. So that is the level of dialog we have in this area.

Social Security and the VA routinely appoint housing providers or other persons with potential conflicts of interest as representative payees, sometimes warranting intervention by guardianship courts. Adult protective services agencies which are funded with Federal block grants are part of the guardianship continuum. When APS systems fail, immense pressure can be placed on guardianship systems to step in on an emergency basis.

I have cited to you perhaps the most thorough analysis of a failed APS system which occurred in Texas in 2004 and 2005 because the guardianship process highlighted a number of cases where the elderly and disabled were left to live in squalor and to be exploited while adult protective services came in and investigated them. The report by the Texas Office of Inspector General revealed a total breakdown of that system, despite tens of millions of dollars of taxpayer money being appropriated for elderly protection.

State and local governments often continue to struggle to find funding for indigent guardianship services. There may be a role for the Federal Government in this area. Courts administering guardianship cases often do not properly monitor the cases. There may be a role for Federal funding in this area.

Finally, Federal funding to promote the use of alternatives to guardianship, properly drafted powers of attorney, money management services and other less restrictive alternatives to guardianship is essential. The failure of Americans to plan for incapacity is the primary cause for intervention in guardianship cases.

Again, the National Guardian Association appreciates the opportunity to present testimony before the Committee today. We hope that this will be the beginning of a national dialog that will lead to the assurance that each and every elderly or disabled person subjected to a guardianship proceeding, regardless of which State or county that person may live in, will be afforded the dignity, respect and civil rights to which all Americans are entitled.

[The prepared statement of Mr. Hammond follows:]

TESTIMONY BEFORE THE SENATE SPECIAL COMMITTEE ON AGING

PRESENTED BY

TERRY W. HAMMOND
EXECUTIVE DIRECTOR
NATIONAL GUARDIANSHIP ASSOCIATION

Corporate Address:
526 Brittany Drive
State College, Pennsylvania 16803
Tel. 814-238-3126
Fax 814-238-7051

Personal Address:
1020 Montana Avenue
El Paso, Texas 79902
Tel. 915-534-7000
Fax 915-534-7672

Testimony by Terry Hammond, Senate Special Committee on Aging

I would like to express my appreciation to Chairman Smith, Ranking Member Kohl, and the Senate Special Committee on Aging for considering the views of the National Guardianship Association (NGA) on the incidence of guardianship in the aging and disabled population in America.

History of the National Guardianship Association

The NGA was created in 1988 in response to a withering report by the Associated Press that exposed inadequacies in state guardianship systems. There are 650 members of the NGA, mostly professional and family guardians, attorneys, judges, social workers, nurses, physicians, psychiatrists, and other allied professionals. Membership dues are $50.00 per year for family members and volunteers and $170.00 per year for professional guardians and allied professionals. The mission of the NGA is to establish and promote a recognized standard of excellence in the guardianship practice. The website for the NGA is www.guardianship.org.

Current State of Guardianship in America

Honored members, I am here to sound an alarm—there is a perfect storm brewing that, without appropriate and measured federal oversight, is guaranteed to result in continued personal tragedies and financial devastation to elderly Americans. As more Americans age, federal, state and county governments look to each other to meet the needs of a generation that has given its all and now is in need of supportive governmental services to survive. Simply put, we are not doing senior Americans justice.

Testimony by Terry Hammond, Senate Special Committee on Aging

This is a challenging time to be engaged in the guardianship process in America. In recent years, such high-profile cases as Molly Orshansky, Lillian Glasser, Rosa Parks, and Brooke Astor (the numbers of which are eclipsed by scores of Americans in each of our home towns) have directed the national spotlight on guardianship, often in an unflattering manner. Americans are typically terrified of losing their independence and autonomy, but are increasingly faced with the prospect of living longer and seeing their capacity to manage their affairs being diminished by age and infirmity. By failing to engage in proper estate planning, elderly Americans may find themselves before a guardianship court with a loved one or third party seeking appointment as guardian. If a qualified physician indicates there is a medical necessity for guardianship, the court may appoint a guardian, even over the objection of the elderly person. Often, there is evidence of abuse, neglect or exploitation prompting the consideration of the appointment of a guardian. The courts are increasingly turning to third-party professional guardians when there are no family members who are available or appropriate to serve.

At this time, no one knows how many guardianships there are in America. This is because guardianship is a uniquely local process, governed by state law and administered on a local level – often county by county. For example, in Texas there are 254 counties, each of which administers guardianships slightly differently.

There are no national standards for guardianship, other than the Standards of Practice for Guardians adopted by the National Guardianship Association. See Attachment "A"; also posted at www.guardianship.org.

There is no national certification process for guardians other than the Registered Guardian and Master Guardian certification testing process adopted and promoted by the National Guardianship Foundation. See Attachment "B"; also posted at www.certificationforguardians.org.

Testimony by Terry Hammond, Senate Special Committee on Aging

The NGA is seeking funding to build on the most recent study on guardianship, entitled "State-Level Adult Guardianship Data: An Exploratory Survey," conducted by the American Bar Association Commission on Law and Aging for the National Center on Elder Abuse. See Attachment "C"; also posted at www.elderabusecenter.org. This initial study concluded, "basic data on guardianship is scant, offering courts, policymakers, and practitioners little guidance for improving the system. Indeed, the U.S. Government Accountability Office found that the dearth of statistical data limits oversight and reform efforts."

Only a handful of state court systems are even interested in collecting data on guardianship cases.

Recent Initiatives by the National Guardianship Association to Improve the Guardianship Practice in America

The NGA has engaged in the following initiatives in recent years to, on a private level, improve the guardianship practice in America:

- Development of Standards of Practice and a Model Code of Ethics for guardians. *See* www.guardianship.org;
- Promotion of the adoption of the Standards of Practice by state legislatures;
- Promotion of adoption of the National Guardianship Foundation's Registered Guardian and Master Guardian certification process by state legislatures. *See* www.certificationforguardians.org.
- Education and training of guardians through national and state conferences;
- Collaboration with state affiliate guardianship organizations (currently 20 state affiliates);

Testimony by Terry Hammond, Senate Special Committee on Aging

- Increasing public awareness of good guardianship (recent coverage of NGA includes National Public Radio, *Money* Magazine, the Wall Street *Journal*, the New York *Times*, and the Los Angeles *Times*;
- Educating probate and other judges with guardianship jurisdiction on guardianship issues;
- Encouraging state legislatures to devote sufficient financial resources to public and private guardianship programs;
- Participating in drafting model interstate guardianship jurisdiction legislation in conjunction with the efforts by the National Conference of Commissioners on Uniform State Laws. *See* www.nccusl.org;
- Chairing the National Guardianship Network, which consists of the National Guardianship Association, the National College of Probate Judges, the National Academy of Elder Law Attorneys, the ABA Commission on Law and Aging, the ABA Section of Real Property, Probate and Trust Law, and the National Center for State Courts, in a collaborative and collegial effort to better understand guardianship in America through research and analysis of guardianship systems.
- Urging the utmost integrity in the guardianship system.

The Impact of the Federal Government on Guardianship Practice in America

Although guardianships are uniformly considered, granted, and administered on a local level, there are a number of areas in which the federal government's policies and practices impact on the administration of guardianship cases:

- The designations of representative payees by the Social Security Administration and/or the Department of Veteran's Affairs may compliment or impede the administration of

guardianships. It is the experience of many guardianship practitioners that these federal agencies often disregard orders appointing guardians, thereby causing guardians (2/3 of which are family members) to duplicate time, effort, and expense for the benefit of an elderly ward.

- The Social Security Administration and Department of Veteran's Affairs routinely appoint housing providers or other self-interested persons as representative payees, thereby creating conflicts that may inure to the detriment of the elderly or disabled beneficiary. *See* recent reports in the El Paso *Times*.
- Adult Protective Services (APS) agencies, which are funded with federal funds, are part of the guardianship continuum as these agencies are the first and most immediate line of defense against abuse, neglect and exploitation of the elderly and disabled. When APS systems fail, immense pressure may be placed on guardianship courts to intervene on emergency bases, often depriving the elderly or disabled person of basic due process rights. Perhaps the most thorough analysis of a failed APS system occurred when, after a series of high profile cases were highlighted in Texas courts in 2004, the Texas Governor issued Executive Order RP33 and called for the investigation of the Texas APS system.

  The report of the Texas Office of Inspector General revealed a total breakdown of the state's protective services, despite tens of millions of taxpayer dollars being appropriated for elderly protection. This disturbing report can be found at http://www.hhsc.state.tx.us/pubs/051904_PR_RP33.html.
- State and local governments often continue to struggle to find funding for indigent guardianship services. Some states do not provide any funding, relying on anyone who can be found to do the job for free. Other states attempt to maintain guardianship programs, but struggle to ensure proper caseloads for guardianship case managers. A recent interview with the director of the Office of Public Guardian in Hawaii revealed

caseloads of 100 or more per caseworker. A few states approximate a state or county funded network to ensure seniors who need guardians can receive one. Federal funding and recognition of standards of care would provide a roadmap for a reasoned response to the needs of the elderly and disabled in all states of the Union.

- Studies by the American Association for Retired Persons have repeatedly revealed that courts administering guardianship cases do not properly monitor cases. Unmonitored guardianships may and often do result in transgressions by those entrusted with managing the well-being and finances for seniors with diminished capacity. Federal funding to ensure proper monitoring of guardianship cases would also benefit the elderly and disabled in all states.
- Resolution of the ongoing interstate guardianship jurisdiction battles is essential. The interstate battle over Lillian Glasser alone has cost more than $3 million in legal fees. This forum-shopping by litigants in these cases can only be addressed by uniform legislation. The effort by the National Conference of Commissioners on Uniform State Laws should be monitored and encouraged by federal authorities and, in the event that this effort may somehow fail, federal authorities should be prepared to implement federal interstate guardianship jurisdiction legislation.
- Federal funding for promotion of alternatives to guardianship – proper estate planning, money management, and other less restrictive alternatives to guardianship – is the fastest and least expensive way to address this problem. The failure of Americans to plan for incapacity is the primary cause of court-imposed guardianships.

Testimony by Terry Hammond, Senate Special Committee on Aging

NGA Challenges and Initiatives

The National Guardianship Association has been challenged to improve the guardianship practice in America with funding coming only from membership dues and conference revenue. Even so, the NGA is committed to working with Congress, state legislatures, county governments, and other governmental and private entities to ensure that the guardianship process is used to the maximum benefit of Americans with diminished capacity. This committee is aware of the demographic bulge that will consume the guardianship court systems in the coming decades.

The NGA is seeking funding from any federal or state agency charged with protection of the elderly and disabled to initiate and see to a conclusion a study to first and foremost do something which no one has ever done: determine the number of guardianships in the United States of America. Once this figure is determined, we can only then begin to formulate the other questions that must be answered in order to ensure those who are assigned as guardians to protect the elderly and disabled in this country actually do so.

The members of the National Guardianship Association are collectively pleased that the Senate Special Committee on Aging invited me, as Executive Director, to testify before the Committee today. We hope this will be the beginning of a national dialogue that will lead to the assurance that each and every elderly or disabled person subjected to a diminution of his or her rights in a guardianship proceeding – regardless of which state or county may consider the case – will be afforded the dignity, respect, and civil rights to which all Americans are justly entitled.

The CHAIRMAN. That was excellent testimony, Terry. Thank you so much.

I want to assure Barbara Bovbjerg we are not ignoring you; we are going to get to you. Judge Grossman, in your full testimony we will want to hear anything that you would like to add to your comments already. But I do want to acknowledge the presence of Senator Salazar, of Colorado, who was formerly the State attorney general and probably has a lot of insight into these types of issues.

Senator, if you have an opening statement or want to make a comment or question at this point, we would welcome that.

OPENING STATEMENT OF SENATOR KEN SALAZAR

Senator SALAZAR. Thank you very much, Chairman Smith, and thank you for holding this hearing on what is a very important topic. It may not be the sexiest topic in the world when people talk about guardianships, but it certainly is one of the most important questions that faces many people across our country.

During the time that I was the attorney general, one of the things that we did in Colorado was we held a summit on the financial exploitation of seniors and out of that came a number of recommendations, including a no-call telemarketing law and a whole host of other things. One of the items that was focused on also was needed changes with respect to the guardianship laws in Colorado, and as a result of that, in 2001, we in Colorado adopted the Uniform Guardianship and Protective Proceedings Act and were one of the first States to do that.

I am very interested in learning some more from the panel in terms of what you think we might be able to do at the Federal level to address the issues across the Nation and perhaps try to bring some uniformity, if that is desirable. I am pleased to be a cosponsor with Senator Smith, Senator Hatch, and Senator Lincoln, as well, with respect to the Elder Justice Act which we have introduced. So your recommendations to us on this issue are very important recommendations.

Mr. Chairman, I have a much longer statement for the record.

The CHAIRMAN. We will include it for the record, and thank you. We have been getting some tremendous ideas on just what you are asking for, as well, on what can we do at the Federal level to shore up this growing and emerging problematic area. Thank you for your presence here, Senator.

[The prepared statement of Senator Salazar follows:]

PREPARED STATEMENT OF SENATOR KEN SALAZAR

I would like to thank Chairman Smith and Ranking Member Kohl for holding this important hearing. Abuse of senior citizens by their guardians is a problem facing many seniors today. I welcome our panel of witnesses who have come to share their knowledge and provide guidance in addressing this problem.

When entering into a court appointed guardianship relationship, the financial, physical and emotional well-being of seniors is placed in the hands of an individual. Under the law, that guardian has a legal obligation to act in the best interests of their trustee.

And because many fundamental rights are lost due to the guardian's appointment, significant trust is placed in our state courts and social service agencies to ensure that seniors are protected.

While I am certain that many court appointed guardians act in good faith to further the best interests of the trustee, the system for monitoring these arrangements

to identify guardians acting in bad faith is severely under funded, and lacks the resources necessary to appropriately monitor guardian transactions.

My home state has a record of proactively addressing these problems.

In 2001, Colorado became one of the first states to pass the Colorado Uniform Guardianship and Protective Proceedings Act. This law codifies procedures, background checks, and the oversight responsibility to ensure that seniors are not taken advantage of by unscrupulous guardians.

This law—and other enacted in others states in recent years—is a step in the right direction to protect seniors against guardian abuse.

However, unless abuse is detected and reported by the Senior or third party, who subsequently brings a complaint, there is virtually no way to monitor and prevent abuse.

Oftentimes, impropriety is difficult to prove since many seniors are unaware that guardians are stealing from them and do not have family available to help them monitor their finances.

In addition, in many instances, the guardian that commits the abuse is a family member or close friend of the guardian—and seniors are reluctant to be removed from abusive environment caused by loved ones.

The qualification of guardians is also an important aspect of this relationship. In Colorado, there is currently no system of training and licensing for senior guardians. However, my state and others can learn from those who have implemented annual training requirements and licensing programs.

As senior citizens place their trust in the hands of court appointed guardians, they should expect that their financial matters and personal affairs are being handled by someone with a degree of competence and training.

Hearing the testimony of today's panel of witnesses and experts will help to frame the problem of guardian abuse, and provide some starting points as to what we at the federal level can do to help states and senior citizens to actively address this problem.

While the guardianship program is largely regulated by the state, there is one step we can take at the federal level to protect seniors from abuse. I believe that Congress should enact the Elder Justice Act.

I am proud to have recently joined the bipartisan group supporting this measure—which was unanimously passed out of the Senate Finance Committee in July.

As the findings in this proposal suggest, the estimated number of seniors who are abused each year greatly varies. Regardless of the figure, any abuse should not be tolerated. By creating a federally coordinated effort to prevent abuse and to support research and prevention service, passage of the Elder Justice Act would allow our federal government to take greater steps to eliminate abuse.

I look forward to today's testimony, and working with the members of this Committee to bring creative and lasting solutions to this problem.

The CHAIRMAN. We have also been joined by the great Senator from Delaware, former Governor of Delaware, Senator Carper. Tom, if you have a comment or an opening statement you want to make, we welcome that.

Senator CARPER. Just a question or two, if I could.

The CHAIRMAN. Sure.

Senator CARPER. Thanks, Mr. Chairman. Our thanks to all of you. As my colleagues know, we are all on a multitude of different committees and we have got a bunch of different committees and subcommittees meeting this morning, so I apologize for not being here for your testimony.

I tell people I am a recovering Governor. Senator Salazar is a recovering attorney general for his State. This is an issue we thought about in Delaware, in State government. But in our role as Federal legislators, let me just ask each of you to just briefly go down the line, if you will, and just share with us maybe your one best piece of advice for us at the Federal level as to what should be on the top of our to-do list as we consider these guardianship issues.

Mr. Salzman, can I start with you?

Mr. SALZMAN. I think the top of the to-do list is make sure that public guardianship throughout the country is adequately funded

because that is the only way poor people who need guardians in order to prevent institutionalization and homelessness are going to get the care and treatment that they need and be able to live out their lives in their homes.

Senator CARPER. Thank you.

Would you pronounce your name for me?

Mr. SALZMAN. Ira Salzman.

Senator CARPER. No, no, I am sorry. Barbara——

Ms. BOVBJERG. Barbara Bovbjerg. Actually, Delaware is my home State.

Senator CARPER. You are kidding. Do you live there?

Ms. BOVBJERG. I grew up in Wilmington.

Senator CARPER. Really? As a kid?

Ms. BOVBJERG. Yes.

Senator CARPER. Where did you go to high school?

Ms. BOVBJERG. Wilmington Friends.

Senator CARPER. Friends School. Great school. All right, well, it is nice to see you. Welcome.

Ms. BOVBJERG. It is nice to be here. I think the most important thing the Federal Government can do—and I am from the Government Accountability Office—I think the most important thing the Federal Government can do is demonstrate leadership, which is already happening from this Committee's work, the proposal of the Elder Justice Act, some actions that have been taken in the Department of Health and Human Services in response to some of our recommendations.

But I think that the idea that the Federal Government can foster and model collaboration among the States and the courts and can get the Federal agencies who have the representative payee programs to devise ways to communicate not only with each other, which is an important step, but also with the States and the courts, is very important. I think that those steps are starting in Congress, but certainly the Federal agencies need more of a push.

Senator CARPER. Thank you, and welcome.

Ms. Scott.

Ms. SCOTT. Carol Scott, from the State of—it is Missoura, by the way. Senator Talent was a little afraid to pick a side. I think a very important thing that the Federal Government could do is be supportive of the aging network and the Older Americans Act. There is a provision in there about having a legal services program that would be set up so that there would be opportunities for pro bono work and other networks to provide services for the elderly and disabled. So I think looking at the Older Americans Act and making sure that the Title VII elder rights section was beefed up under the legal services section.

Senator CARPER. Thank you.

Mr. Grossman.

Judge GROSSMAN. I think that one of the recommendations that you all ought to seriously consider is something that has been touched on before, which is data collection. If you look at, for example, Senator Salazar's State of Colorado, all the probate and guardianship matters are now conducted essentially by e-filing electronically.

My circuit actually is putting together a back-end system headed toward e-filing where, in addition to the document that is filed as a PDF document, there is going to be an envelope of XML data so that you can tag certain things. The beauty of the Federal Government supporting that—and I am not asking for money personally because we have dumped $500,000 in it and we will have the system and we are going to make it available to every circuit in my State.

You know, most every decision in the area of guardianship tends to be done on the basis of anecdotal information. I have stories, these folks have stories, you all have stories. One of the things we are looking to do is to tag important data that will dump into a database and will provide some real quantitative, accurate information as to what is going on there. I think that that will be of great benefit to the States and to local courts.

I also think it would be of great benefit to the Congress and to the Federal agencies to get a handle on what we are dealing with, because again we take anecdotal information and we extrapolate from that. But this more than any other thing that you all could do would provide a soundly based source of data that would provide us all with the information that all of us are looking to have.

Senator CARPER. Thank you.

Mr. Hammond, the last word.

Mr. HAMMOND. Thank you, Senator. You know, I think that there has to be a rethinking from the ground up of the way that the Federal agencies and the State agencies and the local courts are interacting and communicating and cooperating or not cooperating on guardianship issues.

In Texas, I referenced the APS investigation over the last couple of years. It was found that in 71 percent of the cases where mental illness was identified, no capacity questions were asked and no clinical assessment was done of the elderly or disabled person. It seems to me that the Federal Government is devoting resources to elderly protection, but I think with the National Guardianship Association there is a question as to whether those resources are really reaching the maximum benefit to the elderly people they are designed to protect.

Senator CARPER. Let me just say, Mr. Chairman, thanks for pulling this hearing together and for our witnesses for being here. My mom passed away about a year ago. She had Alzheimer's disease and it progressed, as we know it does. My sister and I were able to take care of her and make sure she had the help and support that she needed. We have probably all have had folks like that in our own families and experiences like that. But as we know, too often there aren't those supportive members of the family to be there when someone needs them. I just applaud your efforts to try to make sure that in those instances there is a helping hand and someone to provide the care and attention that we all deserve.

Thank you.

The CHAIRMAN. Terry, you heard Judge Grossman speak about data collection and what we could do at the Federal level to enhance that and nationalize it. I am wondering, in your experience, what data we ought to be collecting.

Mr. HAMMOND. Good question, Chairman Smith. You know, the American Bar Association just came out with this study a few months ago, and I have included it in my materials, where each State is doing it somewhat differently and many States are not doing it at all. I think that if this Committee and the appropriate entities could put together a group to work with the National Guardianship Association and other stakeholders, we could identify that information.

Certainly, the age of the person, the nature of the disability that may cause them to have a guardianship, whether there is an indication of elder abuse of some kind—those are some of the very key, basic questions that need to be asked. But as the GAO report indicated and the ABA report as well, in order to even begin to address the issues, we need to know what the numbers are, and the NGA is seeking private funding.

I referenced the Associated Press series earlier. The landscape in some ways has not changed in the last 20 years. One of the ways that it has changed is that you have had an increase in private efforts to shore up where the public efforts are failing. So you have the National Guardianship Association, you have 20 State guardianship organizations that have sprung up in the last 20 years.

So I think privately we are doing what we can to fill in those gaps, but if the private stakeholders could work with the Federal Government and the State governments to really devote resources and develop the criteria and mandate these statistic-gathering efforts, that is going to be a prerequisite in order to taking the next step further.

The CHAIRMAN. Are you familiar with the Elder Justice Act that is before the Congress?

Mr. HAMMOND. I am, Senator.

The CHAIRMAN. Do you think it does this sufficiently, or ought we to amend it and enhance it?

Mr. HAMMOND. I think that it comes close. I think that in light of these hearings and recent public scrutiny of guardianship systems, perhaps there needs to be a bit more emphasis in this area.

The CHAIRMAN. OK. You have given me some work to do and we will get on it and get that included because we want to make sure that when we pass this, it meets current needs and we are identifying a very real need.

Judge, he made some comments on the data we should be collecting. Do you want to add to things that ought to be——

Judge GROSSMAN. What I wanted to offer you is a few years back the Florida Supreme Court created a judicial applications development process, and as a result of that process we put together in guardianship, as well as probate and every other area that the trial courts deal with, a list of items that as a consensus we wanted to tag to go into the database. I would be more than happy to forward you all that information for your consideration.

The CHAIRMAN. We would be very appreciative if we could receive that. It would improve the work we do with the Elder Justice Act.

Yes?

Mr. HAMMOND. Senator, if I may add, in our reform effort in Texas the past couple of years, we had put into the bill that ended

up being Senate bill 6 an extensive data collection effort that would have mandated the 254 counties to report to the State information on guardianships. A significant part of that legislation was cut from the bill because it was considered to be too time-consuming, too expensive. So I think that our efforts on a State level, although well-intentioned, may not be very successful here and this may be something that has to be mandated at a higher level.

Ms. BOVBJERG. May I jump in, Mr. Chairman?

The CHAIRMAN. Yes, please, Barbara.

Ms. BOVBJERG. When we did this work for the Committee a couple of years ago on guardianship, I was completely amazed by how little information is out there, how data are not uniformly collected. Even within a single State, there will be differences among courts when data are collected. So we couldn't tell how many guardianship arrangements there were. We couldn't tell how many of them were specifically for elderly people, and certainly we couldn't tell to what extent guardians are involved in some of these cases of abuse.

I certainly agree with Mr. Salzman that we hear these high-profile cases, and there are certainly a lot more things going on under the radar. It is therefore very difficult for the Federal Government or national organizations to devise effective approaches to preventing and detecting abuse when we don't know much in any kind of comprehensive way about the circumstances of that abuse, or the incidence of that abuse.

We had suggested that HHS take the leading role in looking at how you could compile data, and what kind of data you should compile. But another way to think about it is to consider some of the databases we have on the criminal justice side and look at whether there isn't some way to get the crimes that involved guardians uniquely coded. There are different ways to think about it and we were hoping that perhaps HHS could take the lead.

The CHAIRMAN. Very good, and I have only one other question for you, Terry, because you related the experience with this one judge and how he doesn't involve the Federal agencies. Obviously, there are some competence issues that we ought to pursue with some of the Federal agencies, but in your experience how competent are the judges that you deal with in guardianship matters?

Mr. HAMMOND. With all due respect to Judge Grossman, I think that by and large the judges are pretty competent to adjudicate these cases. The challenge really is when you have courts of general jurisdiction deciding guardianship cases. Those judges are not well-trained on life-and-death issues, on capacity issues. So the Wingspan report from the year 2000 where there was a national conference of guardianship practitioners and experts recommended specialization of judges who adjudicate guardianship cases. Unfortunately, sir, that is still not very often the case.

I think where we have Judge Grossman here, any jurisdiction in this country would be honored and pleased to have him presiding over their cases. It is not very often we see a judge with this kind of expertise.

The CHAIRMAN. Well, I think we should stipulate for the Senate record the competence of Judge Grossman. [Laughter.]

Mr. SALZMAN. If I may say——

The CHAIRMAN. Please, Ira.

Mr. SALZMAN. I couldn't agree with that more. We had a similar problem in New York for many years where we had guardianships in some counties being dealt with in general parts and, you know, the judges moving from a negligence case to a contracts case to a guardianship case, and it was an unmitigated disaster. The improvement that we have had since we finally persuaded the court system to set up a specialized part is astronomic. It is a really, really important point, which is why I asked to cut in here.

The CHAIRMAN. That is very appreciated. I hope you see that the Aging Committee—I like to manage these sort of conversationally, and I find I and my colleagues usually get the most out of it in that way. So as I said to Barbara, we are not ignoring you. Let's go to your testimony.

STATEMENT OF BARBARA D. BOVBJERG, DIRECTOR, EDUCATION, WORKFORCE, AND INCOME SECURITY, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, WASHINGTON, DC

Ms. BOVBJERG. I appreciate that, Mr. Chairman. I swear I won't take my whole 5 minutes because we have had an opportunity——

The CHAIRMAN. We have discussed a lot of it and we will include your full testimony in the record, but you may want to cover some points that perhaps we have not already done.

Ms. BOVBJERG. Well, I appreciate that. I just wanted to remind everyone that we did this work 2 years ago, that we discovered that 50 States and the District of Columbia all have laws pertaining to guardianships, but the laws vary dramatically. Even within States, the way the courts implement these laws vary considerably. We also noticed that data are scarce on guardianships, something we already talked about today.

We also talked about what we call the exemplary guardianship programs, of which Broward County and Judge Grossman's was one, not chosen by us, but chosen by organizations that we spoke to who deal with guardianship issues. We asked them, if you needed a guardian, where do you wish you lived, and they told us that Broward County was one of those places. So we reported on what we thought were good practices among courts.

Then, finally, we observed that there is little cooperation between Federal agencies who have rep payee programs and between the Federal agencies and the courts.

The CHAIRMAN. So the comment from Texas wasn't surprising to you that they don't even ask the Federal people to come in anymore?

Ms. BOVBJERG. Actually, I was surprised by the comments about SSA and VA. I am not surprised by the variability, however.

The CHAIRMAN. Just encouragement on the part of this Senator if there is something you can do to alert SSA and VA to be cooperative and not stand on their prerogatives or priorities as a Federal official.

Ms. BOVBJERG. Well, I would certainly follow up with them. I know that the Social Security Administration, which has the biggest representative payee program in the Federal Government, has focused a lot of effort on that program in the last 2 years. In 2004, Congress passed the Social Security Protection Act and many of the provisions in that Act were focused on assuring that representative

payees were doing what they were supposed to do and not stealing money from the people that they were supposed to represent. So Social Security is on the case to a much greater extent than in the past, but I will make them aware of what has been happening in Texas.

I do want to provide a little update of our work for you, and certainly some progress has been made. About half the States in the country have amended their guardianship laws in some way since then, some in small ways, others in larger ways. New Jersey is now requiring guardians, both public and private, to be registered. California has new education requirements for guardians and continuing education requirements, which I think you were interested in, Senator. Wisconsin requires that guardians visit the incapacitated person regularly. This has increased attention to strengthening these programs, and so these are positive steps, we thought.

There are other steps that have been taken. The National Conference of Commissions on Uniform State Laws recently issued a discussion draft containing provisions that would allow guardianships to be recognized across States. It is model legislation. The National Academy of Elder Law Attorneys, the National Guardianship Association and others have a joint action plan on guardianships. They have 45 steps that could be taken at the national, State and local levels to accomplish the recommendations made in 2001 at the Wingspan conference on guardianship. This was a high-level effort by the professionals in this field, and they are important groups for the Federal Government and States to collaborate with; we hope for continued progress there.

We do see areas, however, where much remains to be done. I already touched on these. The Department of Health and Human Services—we recommended they develop cost-effective approaches for compiling consistent national data. They have supported a study by the ABA on guardianship practices in the States. They also supported including questions about guardians in the National Center on Elder Abuse's survey of adult protective services.

Although these actions represent progress, we still, as you have heard, do not have nationwide data on guardians and those under their care. As I think I may already have stated, the cross-agency cooperation needs attention. As you may be aware, the Social Security Administration did not agree with our recommendation that they form an interagency study group with VA and OPM to look at how they might share information with each other on rep payees.

The CHAIRMAN. Why?

Ms. BOVBJERG. Because they don't believe that such action is within their purview and they thought it was quite complex. Now, they share data regularly with other Federal agencies within the confines of the Privacy Act. I think their primary concern, honestly, was less with VA and OPM than that we also suggested they sit down with representatives of States and the courts and try to develop some way the three agencies and these other entities could share data.

They felt that this would not only be out of their purview, but that it would also be complicated, and that is true. It is complicated if you envision sharing information with the many courts

there are in the United States. They felt that such action would violate the Privacy Act. We did not agree with that. We felt that nothing prevents them from considering how they might do this. There must be other ways than matching data with each individual court. They do have authority to develop what are called "statements of routine use" that allow them to share data with States, for example, which they do for detecting prisoners who should not be receiving Social Security payments because they are in jail, things like that. They have agreements that do that. So we felt that even though it might require some time and attention on their part, and take them away perhaps from something else, that it was worth exploring, and so we are hopeful that we can encourage them to think about it.

I just wanted to say in the end that the number of elderly Americans is going to grow dramatically in the future. Clearly, guardianship arrangements for the elderly will rise dramatically in response. If we are not going to ensure now that these arrangements are safe and effective, such actions will be much more difficult in the next decade.

Progress is being made in the States and the courts in part because they are emulating strong programs and developing and deploying model legislation. But we believe that more must also be done to collect meaningful data and to foster continued coordination across the States and the Federal agencies.

The CHAIRMAN. Do you feel like if the Social Security Administration doesn't have the statutory authority to do this that we ought to include that in the Elder Justice Act?

Ms. BOVBJERG. We believe they have the statutory authority to do it, but any encouragement you could provide would probably be helpful.

The CHAIRMAN. Well, like a statute? [Laughter.]

Ms. BOVBJERG. Perhaps.

The CHAIRMAN. OK. Thank you so very much, Barbara.

[The prepared statement of Ms. Bovbjerg follows:]

United States Government Accountability Office

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Testimony
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GUARDIANSHIPS

Little Progress in Ensuring Protection for Incapacitated Elderly People

Statement of Barbara D. Bovbjerg, Director
Education, Workforce, and Income Security

GAO-06-1086T

September 7, 2006

GAO
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Highlights

Highlights of GAO-06-1086T, a testimony before the Special Committee on Aging, U S Senate

GUARDIANSHIPS

Little Progress in Ensuring Protection for Incapacitated Elderly People

Why GAO Did This Study

The Senate Special Committee on Aging asked GAO to follow up on its 2004 report, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, GAO-04-655. This report covered what state courts do to ensure that guardians fulfill their responsibilities, what exemplary guardianship programs look like, and how state courts and federal agencies work together to protect incapacitated elderly people. For this testimony, GAO agreed to (1) provide an overview and update of the findings of this prior work; (2) discuss the status of a series of recommendations GAO made in that report; and (3) discuss the prospects for progress in efforts to strengthen protections for incapacitated elderly people through guardianships

To complete this work, GAO interviewed lawyers and agency officials who have been actively involved in guardianship and representative payee programs, and spoke with officials at some of the courts identified as exemplary in the report.

What GAO Recommends

GAO is making no new recommendations in this testimony.

What GAO Found

GAO's 2004 report had three principal findings. First, all states have laws requiring courts to oversee guardianships, but court implementation of these laws varies. Second, those courts recognized as exemplary in the area of guardianships focused on training and monitoring. Third, there is little coordination between state courts and federal agencies or among federal agencies regarding guardianships. At present, these findings remain largely the same, but there are some new developments to report. Since GAO's report was issued, some states have strengthened their guardianship programs. For example, Alaska established requirements for licensing of private guardianships and New Jersey and Texas established requirements for the registration of professional guardians. However, there continues to be little coordination between state courts and federal agencies or among federal agencies in the protection of incapacitated people.

GAO's report made recommendations to federal agencies, but to date little progress has been made. GAO recommended that SSA convene an interagency study group to increase the ability of representative payee programs to protect federal benefit payments from misuse. Although VA, HHS, and OPM indicated their willingness to participate in such a study group, SSA disagreed with this recommendation, and its position has not changed. Second, GAO recommended that HHS work with national organizations involved in guardianship programs to provide support and leadership to the states for cost-effective pilot and demonstration projects to facilitate state efforts to improve oversight of guardianships and to aid guardians in the fulfillment of their responsibilities. HHS did support a study that surveyed the status of states' guardianship data collection practices. HHS also supported a National Center on Elder Abuse survey of adult protective services agencies to collect information including the extent to which guardians are the alleged perpetrators or the sources of reports about elder abuse. Third, GAO recommended a review of state policies and procedures concerning interstate transfer and recognition of guardianship appointments. A National Conference of Commissioners on Uniform State Laws, held in July of this year, issued a discussion draft for a uniform state law addressing these issues.

Following issuance of GAO's 2004 report, a joint conference of professional guardianship organizations agreed on a set of action steps to implement previously-released recommendations from a group of experts on adult guardianship, known as the Wingspan recommendations. Among other things, these action steps call for licensing, certifying, or registering professional guardians.

www gao gov/cgi-bin/getrpt?GAO-06-1086T,

To view the full product, including the scope and methodology, click on the link above. For more information, contact Barbara Bovbjerg at (202) 512-7215 or bovbjergb@gao gov

Mr. Chairman and Members of the Committee:

I'm pleased to be here today to discuss guardianships for the elderly. As people age, some become incapable of caring for themselves and must rely on a guardian—a person or entity appointed by the court to make decisions for them.[1] Despite existing safeguards, there continue to be instances where some guardians have taken advantage of the elderly people they were supposed to protect. Such cases of abuse and neglect have prompted questions about the oversight of guardianship programs.

In 2003, the Senate Special Committee on Aging asked GAO to study guardianships for the elderly, and the results of our work appeared in a 2004 report.[2] This work covered what state courts do to ensure that guardians fulfill their responsibilities, what exemplary guardianship programs look like, and how state courts and federal agencies work together to protect incapacitated elderly people. I am here today to (1) provide an overview and update of the findings of this work; (2) discuss the status of a series of recommendations GAO made in that report; and (3) discuss the prospects for progress in efforts to strengthen protections for incapacitated elderly people through guardianships.

To do this work, we reviewed changes in guardianship statutes nationwide since our 2004 report, interviewed lawyers and agency officials who have been actively involved in guardianship and representative payee programs, and spoke with officials at some of the courts identified as exemplary in our previous report. Our work for the 2004 report involved similar interviews, as well as surveys of courts in the three states with the largest elderly populations: California, New York and Florida. For the report we visited courts in eight states and we interviewed federal officials responsible for representative payee programs. We conducted our review in accordance with generally accepted government auditing standards.

In summary, our 2004 report noted that some state laws and some courts provide more protection for incapacitated elderly people than others. State laws have varied requirements for monitoring guardianships and

[1] For convenience, we use the term "guardian," though some states use other terms. California, for example, uses the term "conservator" when the incapacitated person is an adult.

[2] GAO, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, GAO-04-655 (Washington, D.C.: July 13, 2004).

court practices in the states we visited also varied widely. Coordination among federal agencies and courts was quite limited and on a case-by-case basis. Since our report was issued, some states have strengthened their guardianship programs and some efforts have been made to lay the groundwork for better collaboration. However, according to guardianship professionals, states and federal agencies have made only limited progress in improving guardianships. Some states, including Texas, New Jersey, and Wisconsin, adopted guardianship reform legislation that should help strengthen protections for people under guardianships in those states. Federal agencies administering benefit programs appoint representative payees to manage the benefits of incapacitated individuals. Our study found there is a lack of systematic coordination among the federal agencies and between federal agencies and the courts. In some cases, this may weaken protections for vulnerable incapacitated people.

Our report made recommendations to federal agencies, but to date little progress has been made. We recommended that the Social Security Administration (SSA) convene an interagency study group to increase the ability of representative payee programs to protect federal benefit payments from misuse. Although the Department of Veterans Affairs (VA), Department of Health and Human Services (HHS), and the Office of Personnel Management (OPM) indicated their willingness to participate in such a study group, SSA disagreed with this recommendation. We checked with SSA recently, and its position has not changed. Second, we recommended that HHS work with national organizations involved in guardianship programs to provide support and leadership to the states for cost-effective pilot and demonstration projects to facilitate state efforts to improve oversight of guardianships and to aid guardians in the fulfillment of their responsibilities. HHS did support a study that surveyed the status of states' guardianship data collection practices. HHS also supported an effort to include in a survey of adult protective service agencies information about the extent to which guardians are the sources of reports about elder abuse or the alleged perpetrator. We also recommended a review of state policies and procedures concerning interstate transfer and recognition of guardianship appointments. A National Conference of Commissioners on Uniform State Laws, held in July of this year, issued a discussion draft for a uniform state law addressing these issues.

Following issuance of our report, a joint conference of professional guardianship organizations agreed on a set of action steps to implement

previous recommendations made at the Second National Guardianship conference, known as the Wingspan recommendations.[3] Although only modest progress has been made overall, there are a few bright spots. For example, the Wingspan recommendations call for the licensure, certification, or registration of professional guardians. Several states now have such programs and in the last couple of years Texas and New Jersey have been added to the list of states that have such requirements for some guardians.

Background

The number of people age 65 and older will nearly double in the U.S. by the year 2030 to 71 million. Over time, some elderly adults become physically or mentally incapable of making or communicating important decisions, such as those required to handle finances or secure their possessions. While some incapacitated adults may have family members who can informally assume responsibility for their decision-making, many elderly incapacitated people do not. In situations such as these, additional measures may be necessary to ensure that incapacitated people are protected from abuse and neglect.

Several arrangements can be made to protect the elderly or others who may become incapacitated. A person may prepare a living will, write advance health care directives, appoint someone to assume durable power of attorney, or establish a trust. However, such arrangements may not provide sufficient protection. For example, some federal agencies do not recognize durable powers of attorney for managing federal benefits. SSA will assign a representative payee for an incapacitated person if it concludes that the interest of the incapacitated beneficiary would be served, whether or not the person has granted someone else power of attorney. In addition, many states have surrogacy healthcare decision-making laws, but these alternatives do not cover all cases. Additional measures may be needed to designate legal authority for someone to make decisions on the incapacitated person's behalf. To provide further protection for both elderly and non-elderly incapacitated adults, state and local courts appoint guardians to oversee their personal welfare, their financial well-being, or both. The appointment of a guardian typically means that the person loses basic rights, such as the right to vote, sign

[3] The second national guardianship conference, known as the "Wingspan Conference" was held at the Stetson University College of Law in Florida on November 30 to December 1, 2001.

contracts, buy or sell real estate, marry or divorce, or make decisions about medical procedures. If an incapacitated person becomes capable again, by recovering from a stroke, for example, he or she cannot dismiss the guardian but, rather, must go back to court and petition to have the guardianship terminated.

The federal government does not regulate or provide any direct support for guardianships, but courts may decide that the appointment of a guardian is not necessary if a federal agency has already assigned a representative payee—a person or organization designated to handle federal benefits payments on behalf of an incapacitated person. Representative payees are entirely independent of court supervision unless they also serve their beneficiary as a court-appointed guardian. Guardians are supervised by state and local courts and may be removed for failing to fulfill their responsibilities. Representative payees are supervised by federal agencies, although each federal agency with representative payees has different forms and procedures for monitoring them. Each state provides its own process for initiating and evaluating petitions for guardianship appointment. Generally, state laws require filing a petition with the court and providing notice to the alleged incapacitated person and other people with a connection to that person.

In many cases, both courts and federal agencies have responsibilities for protecting incapacitated elderly people. For federal agencies, a state court determination that someone is incapacitated or reports from physicians often provide evidence of a beneficiary's incapacity, but agency procedures also allow statements from lay people to serve as a sufficient basis for determining that a beneficiary needs someone to handle benefit payments on their behalf—a representative payee. SSA, OPM, and VA ask whether the alleged incapacitated person has been appointed a guardian and often appoint that person or organization as the representative payee. In some cases, however, the agencies choose to select someone other than the court-appointed guardian.

In many cases, guardians are appointed with a full range of responsibilities for making decisions about the incapacitated person's health and well-being as well as their finances, but several states' laws require the court to limit the powers granted to the guardian, if possible. The court may appoint a "guardian of the estate" to make decisions regarding the incapacitated person's finances or a "guardian of the person" to make nonfinancial decisions. An incapacitated person with little income other than benefits from SSA for example, might not need a "guardian of the estate" if he or she already has a representative payee designated by SSA

to act on their behalf in managing benefit payments. Sometimes the guardian is paid for their services from the assets or income of the incapacitated person, or from public sources if the incapacitated person is unable to pay. In some cases, the representative payee is paid from the incapacitated person's benefit payments.

Guardians and representative payees do not always act in the best interest of the people they are appointed to protect. Some have conflicts of interest that pose risks to incapacitated people. While many people appointed as guardians or representative payees serve compassionately, often without any compensation, some will act in their own interest rather than in the interest of the incapacitated person. Oversight of both guardians and representative payees is intended to prevent abuse by the people designated to protect the incapacitated people. While the incidence of elder abuse involving persons assigned a guardian or representative payee is unknown, certain cases have received widespread attention.

Collaboration to Protect Incapacitated Elderly People Continues to Be Limited

Our 2004 report noted that some state laws and some courts provide more protection for incapacitated elderly people than others. State laws have varied requirements for monitoring guardianships and court practices in the states we visited also varied widely. Coordination among federal agencies and courts was quite limited and on a case-by-case basis. Since our report was issued, some states have strengthened their guardianship programs and some efforts have been made to lay the groundwork for better collaboration. However, there continues to be little coordination between state courts and federal agencies in the area of guardianships.

While State Court Procedures Vary in Their Oversight of Guardianships, Some States Have Recently Strengthened Their Guardianship Programs

In our 2004 review we determined that all 50 states and the District of Columbia have laws requiring courts to oversee guardianships. At a minimum, most states' laws require guardians to submit a periodic report to the court, usually at least once annually, regarding the well-being of the incapacitated person. Many states' statutes also authorize measures that courts can use to enforce guardianship responsibilities. However, court procedures for implementing guardianship laws appear to vary considerably. For example, most courts in each of the three states responding to our survey require guardians to submit time and expense records to support petitions for compensation, but each state also has courts that do not require these reports. We also found that some states are reluctant to recognize guardianships originating in other states. Few have adopted procedures for accepting transfer of guardianship from another state or recognizing some or all of the powers of a guardian

appointed in another state. This complicates life for an incapacitated elderly person who needs to move from one state to another or when a guardian needs to transact business on his or her behalf in another state.

In addition, guardianship data are scarce. Most courts we surveyed did not track the number of active guardianships, let alone maintain data on abuse by guardians. Although this basic information is needed for effective oversight, no more than one-third of the responding courts tracked the number of active guardianships, and only a few could provide the number that were for elderly people specifically.

Since issuance of our report, several states have passed new legislation amending their guardianship laws. During 2004, for example, 14 states amended their laws related to guardianships, and in 2005 at least 15 states did so, according to the American Bar Association's annual compilations. Alaska, for example, established requirements for the licensing of private professional guardians and, in January of this year, New Jersey began requiring the registration of professional guardians. Acting on legislation in 2004, the California court system established an education requirement for guardians and a 15-hour-per-year continuing education requirement for private professional guardians.[4] In 2004 Hawaii adopted legislation requiring that guardians provide the court annual accountings. Wisconsin also adopted a major revision of its guardianship code this year; it establishes a new requirement that the guardian regularly visit the incapacitated person to assess their condition and the treatment they are receiving. The new law also leaves in effect powers of attorney previously granted by the incapacitated person unless it finds good cause to revoke them, and establishes procedures for recognition of guardianships originating in other states.

Several states' guardianship law amendments established or strengthened public guardian programs, including those in Texas, Georgia, Idaho, Iowa, Virginia, Nevada, and New Jersey. In Georgia and New Jersey, for example, public guardians must now be registered. Public guardians are public officials or publicly funded organizations that serve as guardians for incapacitated people who do not have family members or friends to be

[4] Those who have served as guardians in California for 10 or more people during the 2000 to 2005 period are exempt from the education requirement for appointment, but are subject to the annual continuing education requirement.

their guardian and cannot afford to pay for the services of a private guardian.

"Exemplary" Courts Focus on Training and Monitoring

In our 2004 report several courts were identified as having "exemplary" programs. As we conducted our review, we sought particular courts that those in the guardianship community considered to have exemplary practices. Each of the four courts so identified distinguished themselves by going well beyond minimum state requirements for guardianship training and oversight. For example, the court we visited in Florida provides comprehensive reference materials for guardians to supplement training. With regard to active oversight, the court in New Hampshire recruits volunteers, primarily retired senior citizens, to visit incapacitated people, their guardians, and care providers at least annually, and submit a report of their findings to court officials. Exemplary courts in Florida and California also have permanent staff to investigate allegations of fraud, abuse, or exploitation. The policies and practices associated with these courts may serve as models for those seeking to assure that guardianship programs serve the elderly well.

We recently contacted officials in each of these courts and received responses from two of them. We learned that officials in these two courts have worked to help strengthen statewide guardianship programs. For example, court officials in Fort Worth, Texas, have helped encourage adoption of Texas' recent reform legislation. However, we could not determine whether other courts had adopted these courts' practices.

State Courts and Federal Representative Payee Programs Serve Many of the Same Incapacitated Elderly People, but Continue to Collaborate Little in Oversight Efforts

There is also a role for the federal government in the protection of incapacitated people. Federal agencies administering benefit programs appoint representative payees for individuals who become incapable of handling their own benefits. The federal government does not regulate or provide any direct support for guardianships, but state courts may decide that the appointment of a guardian is not necessary if a representative payee has already been assigned. In our study, we found that although courts and federal agencies are responsible for protecting many of the same incapacitated elderly people, they generally work together only on a case-by-case basis. 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.

Since issuance of our report, we have not found any indication that coordination among the federal agencies or between federal agencies and the state courts has changed. SSA did, however, contract with the National Academies for a study of its representative payee program. The study committee issued a letter report including preliminary observations in 2005, and a final report is scheduled for release in May 2007.[5] The committee plans to use a nationally representative survey of representative payees and the beneficiaries they serve in order to (1) assess the extent to which the representative payees are performing their duties in accordance with standards, (2) learn whether representative payment policies are practical and appropriate; (3) identify types of representative payees that have the highest risk of misuse of benefits; and (4) suggest ways to reduce the risk of misuse of benefits and ways to better protect beneficiaries.

Limited Progress Has Been Made on Recommendations from 2004

Only limited progress has been made on our recommendations. In one recommendation we suggested that SSA convene an interagency study group to increase the ability of representative payee programs to protect federal benefit payments from misuse. Although VA, HHS, and OPM indicated their willingness to participate in such a study group, SSA disagreed with this recommendation. SSA stated that its responsibility focuses on protecting SSA benefits, cited concern about the difficulty of interagency data sharing and Privacy Act restrictions, and indicated that leadership of the study group would not be within its purview. We checked with SSA recently and learned that its position has not changed. Coordination among federal agencies and between federal agencies and state courts remains essentially unchanged, according to agency and court officials we spoke with. SSA continues to provide limited information to the VA in cases where issues arise such as evidence of incapability or misuse of benefits. However, to ensure that no overpayment of VA benefits occurs, SSA will provide appropriate VA officials requested information as to the amount of Social Security benefit savings reported by the representative payee.

[5] Committee on Social Security Representative Payees, National Research Council, "Assessment of the Representative Payee Program of the Social Security Administration: Letter Report," The National Academies, August 4, 2005.

In 2004, we also recommended that HHS work with national organizations involved in guardianship programs to provide support and leadership to the states for cost-effective pilot and demonstration projects to facilitate state efforts to improve oversight of guardianships and to aid guardians in the fulfillment of their responsibilities. Specifically, we recommended that HHS support the development of cost-effective approaches for compiling consistent national data concerning guardianships. HHS made a step in this direction by supporting a study by the American Bar Association Commission on Law and Aging of the guardianship data practices in each state, which could prove helpful in efforts to move toward more consistent and comprehensive data on guardianships.[6] The study found that although several states collect at least some basic data on guardianships, most still do not. Only about a third of states receive trial court reports on the number of guardianship filings. A total of 33 states responded to a question about whether they were interested in compiling data. Of these, 21 expressed interest and 12 indicated that they are not interested, as the barriers are too high. Thus, it is still not possible to determine how many people in the U.S. of any age are assigned guardians each year, let alone the number of elderly people who are currently under such protection.

Third, we recommended that HHS support the study of options for compiling data from federal and state agencies concerning the incidence of elder abuse in cases in which the victim had granted someone the durable power of attorney or had been assigned a fiduciary, such as a guardian or representative payee, as well as cases in which the victim did not have a fiduciary. HHS has taken a step in this direction by supporting the inclusion of questions about guardians in the National Center on Elder Abuse's annual survey of state adult protective services agencies.[7] Specifically, the survey asked each state about cases in which a guardian was the source of a report of abuse or was the alleged perpetrator in state fiscal year 2003. Only 11 states provided information about the source of reports of abuse. Similarly, 11 states indicated the relationship between the victims and the alleged perpetrators. Guardians were not often cited in

[6] Erica F. Wood, "State-Level Adult Guardianship Data: An Exploratory Survey," American Bar Association Commission on Law and Aging for the National Center on Elder Abuse, August 2006.

[7] Pamela Teaster et al., *The 2004 Survey of State Adult Protective Services: Abuse of Adults 60 Years of Age and Older* (Boulder, Colo.: February 2006).

either case. Indeed, a recent study found that existing data cannot provide a clear picture of the incidence and prevalence of elder abuse.[8]

Finally, we also recommended that HHS facilitate a review of state policies and procedures concerning interstate transfer and recognition of guardianship appointments to facilitate efficient and cost-effective solutions for interstate jurisdictional issues. The National Conference of Commissioners on Uniform State Laws (NCCUSL) met in July 2006 and issued a discussion draft for a Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. This draft contains provisions that would allow guardianships to be formally recognized by another state or transferred to another state. The draft is being refined, and a NCCUSL committee plans to discuss it at another meeting this November. Passage of this draft by the NCCUSL does not, however, guarantee that states will follow its provisions because they must decide on their own whether to amend their own laws.

Some Developments Regarding Guardianships Appear Promising

While little progress has been made on several of our specific recommendations, other steps taken since the release of our report are more promising. In November of 2004, a joint conference of the National Academy of Elder Law Attorneys, the National Guardianship Association and the National College of Probate Judges convened a special session to develop an action plan on guardianships.[9] This implementation session developed a series of 45 action steps that could be taken at the national, state, and local levels in order to accomplish a select subset of the recommendations made at the 2001 Second National Guardianship Conference–the "Wingspan Conference." These action steps fall into five main categories: the development of interdisciplinary guardianship committees at the national, state, and local levels; the development of uniform jurisdiction procedures, uniform data collection systems, and innovative funding mechanisms for guardianships; the enhancement of training and certification for guardians and the encouragement of judicial

[8] Erica F. Wood, *The Availability and Utility of Interdisciplinary Data on Elder Abuse: A White Paper for the National Center on Elder Abuse*, American Bar Association Commission on Law and Aging for the National Center on Elder Abuse (Washington, D.C.: May 2006).

[9] In addition to participants from the three organizations, representatives from the American Bar Association Commission on Law and Aging, the American Bar Association Section on Real Property, Probate and Trust Law, and the American College of Trust and Estate Counsel all participated in this conference.

specialization in guardianship matters; the encouragement of the most appropriate and least restrictive types of guardianships; and the establishment of effective monitoring of guardianships. The identification of these action steps and the work that has begun on them reflects a high level of commitment by the professionals working in the field.

In some cases work has begun on these action steps. Both the House and the Senate versions of bills calling for an Elder Justice Act[10] would establish an Advisory Board on Elder Abuse, Neglect, and Exploitation charged with making several recommendations including some concerning the development of state interdisciplinary guardianship committees. As noted earlier, the Commission on Uniform State Law has issued a discussion draft of a Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. Wisconsin's adoption of a reformed guardianship law this year emphasizes the use of the least restrictive type of guardianship that is appropriate. Regarding the monitoring of guardianships, recently Texas and New Jersey joined several states that now have programs in place to license, certify, or register professional guardians. In 2005, Colorado began requiring prospective guardians (with some exceptions such as parents who are seeking to be guardians for their children) to undergo criminal background checks.

Concluding Observations

In conclusion, as the number of elderly Americans grows dramatically, the need for guardianship arrangements seems likely to rise in response, and ensuring that such arrangements are safe and effective will become increasingly important. Progress on fulfilling some of our recommendations has been slow where it has occurred, and for some, no steps have been taken at all. The lack of leadership from a federal agency, and states' differing approaches to guardianship matters, make it difficult to realize quick improvements. Nonetheless, many people actively involved in guardianship issues continue to look for ways to make improvements. Emulating exemplary programs such as the four we examined would surely help, but we believe more can also be done to better coordinate across states, federal agencies, and courts. In our 2004 report we concluded that the prospect of increasing numbers of incapacitated elderly people in the years ahead signals the need to reassess the way in which state and local courts and federal agencies work

[10] *Elder Justice Act*, HR 4993, 109th Cong., 2d sess. (2006) and S 2010, 109th Cong., 1st sess. (2005).

together in efforts to protect incapacitated elderly people. Your Committee has played an important role in bringing these problems to light and continuing to seek improvements. In the absence of more federal leadership, however, progress is likely to continue to be slow, particularly in the coordination among federal agencies and between federal agencies and state courts.

Mr. Chairman and Members of the Committee, this concludes my prepared statement. I'd be happy to answer any questions you may have.

Appendix I: GAO Contact and Staff Acknowledgments

GAO Contact

Barbara D. Bovbjerg, Director, Education, Workforce, and Income Security Issues at (202) 512-7215.

Acknowledgments

Alicia Puente Cackley, Assistant Director; Benjamin P. Pfeiffer; Scott R. Heacock; Mary E. Robison; and Daniel A. Schwimer also contributed to this report.

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The CHAIRMAN. Judge Grossman, we have probably overused you already this morning, but we never actually got to your testimony.

STATEMENT OF HON. MEL GROSSMAN, ADMINISTRATIVE JUDGE, FLORIDA 17TH JUDICIAL CIRCUIT COURT, FORT LAUDERDALE, FL

Judge GROSSMAN. Well, let me just say two things. The statement that I prepared is going to be part of the record anyway. I think the only thing that I would really like to indicate is a profound belief that when the court takes away rights of an individual, the kinds of rights that all of us in this room enjoy, and appoints somebody as a guardian to make sure that that person is protected, we have got not only in Florida a statutory duty and a case law duty, but actually a moral duty to ensure that we have done the right thing and that that person is, in fact, protected. Otherwise, we should be out of the business completely.

Being out of the business completely is not an option, especially as the baby-boomers hit. So the kinds of resources that are necessary both in terms of data collection and in terms of staffing and in terms of education of judges, too—the comment was made by Terry that there are some judges that it is only part of general jurisdiction and they don't understand it. Then Ira had indicated that that had changed now in New York.

In Florida, 80 percent of the cases in Florida come with the 5 most populace circuits. Everywhere else, although that is now starting to change, it is only part of general jurisdiction of the court. What happens is we do an educational program twice a year at conferences, but if 90 percent of their workload is doing something else, they never show up for the education programs that involve guardianship. It is my belief that the new chief justice of the Florida Supreme Court will be remedying that.

But you are absolutely right, and I am prepared to take full responsibility for the fact that judges don't always—when we did the guardianship task force, the testimony of some of the lawyers that were filling out these forms and just having the judge rubber-stamp them was, well, we know better than the judge does. In some cases, they were probably right, but there are certainly serious due process implications to the person.

I mean, it is very efficient. I file a petition to determine Carol Scott's incapacity. I appoint her lawyer and I appoint the people examining her. There are some due process concerns that really need to be addressed, and I agree with these other folks here that part of it is developing specialized courts so that you have an in-house understanding of the issues and an understanding of what to look out for and provide better services than we frequently provide today.

The CHAIRMAN. Very good.

[The prepared statement of Judge Grossman follows:]

Remarks
Before the
U.S. Senate Special Committee on Aging
By
Judge Mel Grossman
17th Circuit, Florida

Mr. Chairman and Members of this Committee:

Thank you for inviting me to inform you as to how the State of Florida is handling guardianship issues affecting the elderly.

For the last 40 years Florida has been on the leading edge of a demographic wave of aging that has swept across the sunbelt and increasingly impacts every community. Because Florida has the longest history in dealing with issues resulting from the frequent occurrence of diminishing capacity, we have had the opportunity to develop systems of protection for those individuals who become vulnerable as a result of aging. This year our Legislature enacted and our Governor signed the second major rewrite of Florida's guardianship laws in less than 20 years.[1] While this legislation resulted in significant changes with regard to the process of guardianship, the intent to protect those subject to guardianship proceedings has not changed.

The principle goal in Florida was and is both the protection of individuals who find their capacity questioned as well as protecting those who have been determined to be partially or fully incapacitated and had a guardian appointed for them.

To these ends Florida has provided clear due process protections for someone alleged to have lost his or her capacity. There has also been created a system of significant and continual review of the personal and property issues affecting the individuals who have had some, or all, of their rights removed and are wards of the court.

The initiation of proceedings to determine an individual's capacity results from the filing with the Circuit Court a petition seeking a determination of the person's incapacity. This begins an adversarial proceeding wherein the court appoints an attorney to represent the individual

[1] See, Ch.744, Florida Statutes (2006).
http://www.flsenate.gov/statutes/index.cfm?StatuteYear=2006&Tab=statutes&Submenu=1 .

as well as a three person examining committee. The attorney and the members of the examining committee must have a background and education in elder issues.[2] My Circuit requires that each attorney and examining committee apply and be accepted by the Court. The attorney and examining committee are appointed on a rotating basis for each case. After the appointed attorney and the examining committee have met with the alleged incapacitated person, there is an evidentiary hearing before a Judge or General Magistrate, and based upon the evidence, the Court will find the individual is incapacitated or that the individual has capacity in which case the matter is dismissed. If an individual is determined to be incapacitated, the Court must decide in what areas the individual needs the protection of a guardian. The Court can make a determination that all rights or only some rights are removed from an individual. Before the Court appoints a guardian, a determination is made as to whether any less restrictive alternates may be in place that would provide sufficient protection for the individual. Less restrictive alternative may include health care surrogates, durable powers of attorney, and trusts. If any of these documents are in place, even where there is an incapacity, either no guardian will be appointed or a limited guardianship will be created to cover those areas that are not covered by the documents. The goal in Florida is not to appoint a guardian if there are less restrictive alternatives in place to protect an individual.

Should there be a need for a guardian; another set of protections exists for his or her appointment. If a professional guardian is appointed (a frequent occurrence since so many of our residents are retirees whose families live elsewhere), a background check of criminal and credit history,[3] is required as well as for any of their employees having a fiduciary obligation to the ward. Further, professional guardians must be registered with the Florida Office of Statewide Public Guardianship.[4] A professional guardian cannot be registered unless he or she has passed a competency exam, posted a bond in the amount of $50,000.00, and completes continuing education.[5]

My circuit was the first to rigorously employ criminal and credit checks for appointment of guardians and our methodology is now the standard for professional guardians.

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[2] See, s. 744.331, Florida Statutes (2006).
[3] See, s. 744.3135, Florida Statutes (2006).
[4] *See*, http://elderaffairs.state.fl.us/english/public.html.
[5] See, ss. 744.1083-744.1085, Florida Statutes (2006).

Non-professionals, such as family members, are not statutorily required to have criminal and credit investigations, but in my circuit and a few others, the investigations are mandatory. My circuit also requires an annual criminal and credit investigation.

After the adjudication of incapacity and the appointment of a guardian, there are, essentially, three levels of protection. First, every guardian in Florida must be represented by an attorney;[6] and while the attorney is hired by and represents the guardian, Florida's position is that the attorney has a fiduciary duty to the ward.[7] Nor is Florida alone in this position. The Supreme Court of Alaska in July of this year, held that an attorney for the ward has a duty to investigate the actions of the guardian and protect the ward.[8]

The second level of protection is the statutory requirement that annual reports are filed and reviewed by the Court to ensure that the ward's care[9] is appropriately managed and his or her assets[10] protected.

Finally, my Circuit has developed a robust monitoring function, including in-house personnel. Whenever concerns are raised about a ward, be it in a formal pleading, or just a letter (sometimes unsigned), we appoint a Court Monitor, under a statutory grant of authority, who will immediately investigate and file with the Court a report. The presiding judge will then take action, based upon the report, to protect the ward.[11]

We have spent a lot of time and effort in my Circuit and the 6th Circuit (the St. Petersburg, Florida area), to ensure that a ward's needs are met during the guardianship administration. The reason for this is simple: If we, as judges, are to exercise one of the most awesome powers available to any court, that is the removal of rights that all of us in this room enjoy, and we place someone in charge to protect the ward, it seems to me that the Court has both a legal and a moral obligation to insure that the ward is being truly protected. If we do not take measures to insure that, then what point is there in removing those rights?

There are two new tools on the horizon that will assist the Court in

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[6] See, Fla. Prob. R. 5.030.
[7] See, Fla. Op. Att'y Gen. No 96-94 (2006).
http://myfloridalegal.com/ago.nsf/Opinions/EC4BB94C5106D5B5852563F60052F39A .
[8] See, Pederson v. Barnes, 2006 Alas. LEXIS 112 (Alaska 2006) .
[9] See, s. 744.36.75, Florida Statutes (2006).
[10] See, ss. 744.365, 744.367, Florida Statutes (2006).
[11] See, ss. 744.105 - 744.1076, Florida Statutes (2006).

improving our protection of wards. Legislation passed this year provides an opportunity to use digital fingerprints so that at anytime a guardian is arrested, the information will be sent by the Florida Department of Law Enforcement to the supervising court.[12]

The other tool is based upon the move toward electronic filing and a paperless court. As of now, only Pasco County has implemented e-filing in probate and guardianship cases but we see more and more of this occurring in States like Colorado, Texas and Washington. My Circuit will begin beta testing of e-filing for probate and guardianship cases in January, 2007. An important and exciting difference between what currently exists and our plan is that we will not only be receiving imaged documents for our Court's records, but will also receive an XML data envelope that will allow data the Court wants to track be placed into a relational data base. The result of this will be the ability of the Court to be more productive and accountable, and perform better case management. It will also provide an ability to quantify information such as changing demographics and needs which will allow the judicial, legislative, and executive branches to plan prospectively for future needs based upon quantifiable information.

While I have been fortunate to obtain enough funds to create the software for developing a system which will be available to all the circuit courts in my state, other jurisdictions dealing with these issues may well need some assistance from the Federal Government in dealing with the increasing size and scope of this area of law. This could well be done with modest infusions of matching fund grants and I would hope that this committee sees its way clear to recommend such a plan.

Thank you for your attention and consideration.

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[12] See, s. 744.3135 (3), Florida Statutes (2006).

Mr. SALZMAN. Senator, may I add one particular point on the specialized courts? What we are finding in New York is having a specialized court for guardianship alone may not, in fact, be enough because, for example, one of the important things you need to do in an emergency is sometimes get an order of protection. Now, in New York that is normally not done in the same court that the guardianship is done in. There may be criminal issues involved. That is another court. So under a lot of cases, even with a specialized guardianship part, you can have the same case in three different courts or two different courts.

Again, we have an experimental program going on just in one county in New York now where we have one State court judge who is sitting simultaneously criminal, family, and what most other States would call superior and we call supreme, who can do all three things simultaneously. I don't practice there because it is a county that is some distance from where I am, but everybody I know is very enthusiastic about it and it is the kind of thing that I mention just because it is the kind that I think other places should be thinking about as well.

The CHAIRMAN. Do you find that these different courts of jurisdiction are open to that or are there turf battles over it, because it does make a ton of sense for some consolidation?

Mr. SALZMAN. It requires the involvement of the administrative judges. So, for example, in a case we had recently where we wanted to start a guardianship and simultaneously get an order of protection, since at least in New York you can't go in and get an order of protection for somebody else—you can only get an order of protection for yourself—we had to go into court, into the supreme court, get a temporary guardian appointed who would have the authority to apply for an order of protection, and then that temporary guardian had to go to family court to then make a separate application for the order of protection. With the experimental part in Suffolk County, that could all get done in front of one judge.

The CHAIRMAN. Well, thank you all so very much. We value your time and want to assure you that your testimony today and your contribution has added immeasurably to our doing our work at the Federal level and in the U.S. Senate. I know some of you have come a long way, but whether long or short, thank you for sharing your time and your expertise with us. It has made an immeasurable contribution and we heartily thank you.

With that, we adjourn this hearing with our appreciation.

[Whereupon, at 11:36 a.m., the Committee was adjourned.]

APPENDIX

Coalition of Wisconsin Aging Groups
Advocacy × Membership Elder Law

2850 Dairy Dr. Suite 100
Madison, WI 53718-6751
608-224-0606 ext. 314
800-488-2596 toll free
608-224-0607 fax
guardian@cwag.org
www.cwag.org/legal
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WRITTEN TESTIMONY OF ELLEN J. HENNINGSEN, J.D.

**EXPLOITATION OF SENIORS:
AMERICA'S AILING GUARDIANSHIP SYSTEM**

SENATE SPECIAL COMMITTEE ON AGING

September 29, 2006

Thank you for this opportunity to share Wisconsin's efforts to improve the guardianship system.

My name is Ellen Henningsen. I am an attorney with the Elder Law Center of the Coalition of Wisconsin Aging Groups. The Elder Law Center is a public interest law firm that provides legal education and services to seniors throughout Wisconsin.[1]

I staff the Wisconsin Guardianship Support Center. Funded by a grant from the State of Wisconsin's Department of Health & Family Services, the Support Center provides case consultation and education on legal issues pertaining to guardianship, protective services and powers of attorney. Many of my publications are available at www.cwag.org/legal/guardian-support.

The Wisconsin legislature recently passed legislation that totally revises Wisconsin's guardianship statute.[2] Advocates believe that the many improvements in the new law will reduce guardianships being imposed inappropriately, safeguard the rights of proposed wards and wards, and prevent incidences of neglect and abuse by

[1] The CWAG Elder Law Center assists in obtaining public benefits, such as Medicare and Medicaid, as well as provides counseling on issues of guardianship, elder abuse prevention, victim services and pension rights. The Elder Law Center receives funding through several sources including the Administration on Aging, The Victim of Crimes Act, The Older Americans Act, the State of Wisconsin, and private foundations. The Elder Law Center is also a Title III legal service provider for 65 of Wisconsin's 72 Counties.

[2] 2005 Wisconsin Act 387 is at www.legis.state.wi.us/2005/data/acts/05Act387.pdf The new guardianship statute created by Act 387, Chapter 54, Wis. Stats., is at www.legis.state.wi.us/2005/data/acts/05Act387.pdf

guardians. Although the vast majority of Wisconsin guardians[3] are caring, responsible individuals,[4] we know that some violate the trust placed in them by stealing from their wards, physically abusing them or failing to adequately advocate for their best interests. Wisconsin's new guardianship statute squarely faces the issue that some guardians abuse their positions.

However, no mechanism or funding was created to provide ongoing monitoring or assistance to guardians which would be the most effective way to prevent neglect and abuse. In this regard, federal financial assistance to state courts and local social service agencies to create monitoring programs would be of great help in reducing incidences of abuse and neglect. Passage of the Elder Justice Act is an important step to improving the guardianship system in other states and to assist Wisconsin to continue its efforts that have begun with the passage of its new guardianship law.

Wisconsin's new Chapter 54, Wis. Stats., effective December 1, 2006, provides the following provisions to improve the guardianship system.

1. **Guardianship may only be imposed after extensive notice to interested persons.**

   Wisconsin's new law requires that designated persons and agencies receive notice of the guardianship proceeding. Failure to provide notice deprives the court of jurisdiction. The notice requirements will ensure that designated family members, agents under Powers of Attorney, guardians previously appointed in other states or in Wisconsin, and other designated persons will have the opportunity to appear and raise issues before the court.

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[3] Wisconsin law provides for the appointment of a "guardian of the person" to make personal and medical decisions for adults whom the court determines to be incompetent. In addition, the law provides for the appointment of a "guardian of the estate" to make financial decisions for adults whom the court determines to be incompetent or to be a spendthrift. Wisconsin law also provides for the appointment of a "conservator" to make financial decisions on behalf of a "conversatee"; however, conservatorship is not the same as guardianship of the estate; a conservator is appointed at the request of the potential conservatee and there is no finding of incompetency of being a spendthrift. For purposes of this testimony, the discussion of guardianships and guardians will include conservatorships and conservators.

[4] Wisconsin law also provides that "corporate guardians" regulated by the State of Wisconsin may be appointed as guardians instead of individuals. Wisconsin does not have an office of public guardianship.

2. **Guardianship may only be imposed if the petitioner establishes and the court finds that guardianship is the least restrictive intervention consistent with the needs of the individual.**

   A finding of incompetency is the conventional requisite for imposition of a guardian. Wisconsin's current law includes such a requirement and the new law does as well. But in addition to incompetency, the new law also requires that guardianship be the least restrictive intervention consistent with the individual's needs.

   The court must find that "the individual's need for assistance in decision-making or communication is unable to be met effectively and less restrictively through appropriate and reasonably available training, education, support services, health care, assistive devices, or other means that the individual will accept."

   This substantive requirement creates a high standard before guardianship can be imposed and will ensure that guardianships will not be imposed when less restrictive forms of intervention are appropriate.

3. **Guardianship may only be imposed if the petitioner establishes and the court finds that any previously executed Powers of Attorney or other advance planning are inadequate.**

   If the individual had executed any Powers of Attorney or other advance planning documents such as trusts, the court must determine that the advance planning is inadequate to meet the needs of the individual before guardianship can be imposed. This requirement will prevent family members and others from disregarding the prior planning done by elders to avoid guardianship.

4. **Proposed wards have clear and comprehensive due process rights.**

   Current Wisconsin law provides due process rights for proposed wards. The new law states these more clearly and also expands them. They are:

   a. The right to counsel, upon request of the proposed ward or if recommended by the guardian ad litem[5] or if the court determines it is in the best interests of the proposed ward;

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[5] Current law requires the appointment of guardian ad litem (GAL) in all guardianship cases. A GAL must be an attorney licensed to practice law in Wisconsin who has completed required continuing legal education credits in areas relevant to representing adults in guardianship cases. The new law continues this requirement.

b. The right to a jury trial, upon request of the proposed ward or if requested by the proposed ward's attorney or by the guardian ad litem.
c. The right to present and cross-examine witnesses, including any physician or licensed psychologist who reports to the court concerning the proposed ward.
d. The right during the medical or psychological examination to refuse to participate in the exam unless ordered by the court to do so.
e. The right to an independent medical or psychological examination.
f. The right to be present at the hearing.
g. The right to have the hearing in an accessible location.
h. The right to petition the court every 180 days for a review of the guardianship, including restoration of particular rights or a termination of the guardianship.

These enumerated rights ensure that individuals will be able to effectively contest and, if appropriate, defeat petitions for guardianship.

5. A clear procedure for transferring foreign guardianships into Wisconsin is provided.

Current law is silent about the process for initiating a guardianship in Wisconsin when there is already a foreign guardianship, although the Wisconsin Supreme Court in 2005 issued a decision setting forth the process that must be followed in these situations. The new law provides a clear process for transferring a foreign guardianship into Wisconsin with notice to the foreign court and interested persons and an opportunity to object to the transfer.

6. The person nominated to be guardian must complete a sworn and notarized "Statement of Acts" to the court prior to his or her appointment.

A proposed guardian must submit to the court a sworn and notarized statement at least 96 hours before the hearing indicating whether he or she:

a. is currently charged with or has been convicted of a crime,
b. has filed for or received bankruptcy protection,
c. has had certain professional licenses or certificates suspended or revoked, or
d. has been listed in the caregiver misconduct registry.

The guardian ad litem must review the statement, interview the nominated guardian, and made a recommendation to the court regarding the fitness of the nominee to serve. If the nominated guardian fails to answer these questions truthfully, he or she may be removed as guardian.

7. **All wards *always* retain certain rights regardless of whether the guardianship is full or limited**. In particular, wards *always* retain the following rights:

   a. Right to have access to and communicate privately with the court and with governmental representatives, including the rights to have input into plans for support services, the right to initiate grievances, and the right to participate in administrative hearings and court proceedings.
   b. Right to have access to, communicate privately with, and retain legal counsel, with fees paid from the income and assets of the ward, subject to court approval.
   c. Right to access to and communicate privately with the protection and advocacy agency and the state ombudsman.
   d. Right to protest a residential placement, and review the need for guardianship and/or protective services.
   e. Right to petition for court review of guardianship, protective services, protective placement, or commitment orders.
   f. Right to exercise constitutional rights such as rights to free speech, freedom of association and the free exercise of religious expression.

   These retained rights will permit individuals under guardianship or those acting on their behalf advocate for their interests in remaining free from abuse and neglect at the hands of their guardians.

8. **The ward retains all rights except those that are specifically ordered to be transferred to the guardian.**

   Current Wisconsin law presumes that all guardianships will be full – that is, all rights will be removed from a ward on a finding of incompetency except for those that the court specifically determines that the ward should retain. For instance, under current law, a ward loses the right to vote unless it is ordered to be retained. Under the new law, this presumption is reversed – that is, the ward will retain all rights except for those that the court specifically removes based on a determination that the ward lacks the evaluative capacity to exercise that particular right. So voting, to use one example, is presumed to be retained unless the court specifically determines that the ward lacks the evaluative capacity to vote.

   This presumption in favor of limited guardianships ensures that individual's decision-making capacity will be respected, to the extent that he or she is capable.

9. Clear limits are placed on guardians.

a. The guardians' powers are limited to those that are authorized by statute or by court order and that are the least restrictive form of intervention.
b. In addition to the rights mentioned above, the ward retains all rights not assigned to the guardian or otherwise limited by statute.
c. The guardian must exercise the degree of care, diligence, and good faith when acting on behalf of a ward that an ordinarily prudent person exercises in his or her own affairs
d. The guardian is required to exhibit the utmost trustworthiness, loyalty and fidelity in relation to the ward.
e. Guardian's are prohibited from borrowing funds from the ward.
f. Guardians must obtain approval from the court before purchasing any property of the ward.

10. The duties and power of the guardian of the person are clearly stated.

a. A guardian of the person may exercise only those powers authorized by statute, rule, or court order.

b. Decisions on care or services must be based upon:
   - Regular in-person inspection of ward's condition, surroundings, and treatment;
   - Examination of ward's health care and treatment records;
   - Attendance at staffings,
   - Inquiry into the risks and benefits and alternatives to proposed treatments,
   - Consultation with providers of health care and social services in making all necessary treatment decisions.

11. The duties and powers of the guardian of the estate are clearly stated.

The duties and powers of the guardian of the estate are listed in detail and provide clear guidance on powers that require court approval and those that can be exercised without court approval.

In addition, if a temporary guardian of the estate is appointed, he or she may not expend more than $2,000 of the ward's assets without permission of the court or sell any real estate without permission of the court.

12. Clear standards, procedures and penalties are provided for removal of a guardian.

The new statute states that the court has continuing jurisdiction over the guardian, perhaps an obvious point but one that advocates felt should be expressly stated in order to ensure that there was no doubt.

Guardians can be removed (or the court may provide a remedy short of removal) for the following causes:

a. failure to file timely an inventory or account that is accurate and complete;
b. committing fraud, waste or mismanagement;
c. abusing or neglecting the ward or knowingly permitting others to do so;
d. engaging in self-dealing;
e. failing to provide adequately for the personal needs of the ward from the ward's available assets and income, including any available public benefits;
f. failing to exercise due diligence and reasonable care in assuring that personal needs are being met in the least restrictive environment consistent with the ward's needs and capacities;
g. failing to act in the best interests of the ward;
h. failing to disclose conviction for a crime that would have prevented appointment of the person as guardian;
i. failing to disclose that the guardian is listed on the caregiver misconduct registry;
j. failing to perform any required duties of a guardian or
k. performing acts prohibited to a guardian.

A petition for review of the conduct of the guardian may be filed by any person. A guardian ad litem must be appointed. A hearing must be held not less than 10, but not more than, 60 days after the petition is filed. Discovery under civil procedure laws is permitted.

The court has broad powers to provide a remedy including imposing a forfeiture up to $10,000, requiring the guardian to personally pay any costs of the proceeding, requiring the guardian to reimburse the ward or the ward's estate for any losses, and removing the guardian.

Although under current law, complaints about the conduct of guardians may be made to the court, but the lack of clear standards, procedures and remedies means that few such complaints are ever filed. It is hoped that the provisions of the new statute will have a chilling effect on guardians who may be inclined to abuse their

positions and will also quickly and appropriately deal with those who have abused their positions.

Thank you for the opportunity to highlight Wisconsin's efforts to improve the health of the guardianship system. We believe we have made meaningful steps toward safeguarding the autonomy of elders and vulnerable adults while at the same time protecting them from abuse, neglect, self-neglect and financial exploitation.

Prepared Statement of Elaine Renoire
September 7, 2006

I submit the following testimony for the Senate Hearing on guardianship abuse 9/7/06. My Grandmother was a victim of a forced guardianship. Her guardian, Old National Trust, over billed, double billed, submitted inaccurate and even false accountings and each time, the Judge got out his rubber stamp and approved the exorbitant fees with hardly a glance and never a question. I turned to every resource I could and no one, not any of my elected representatives, would help me. I would like to draw your attention to two other cases today as they demonstrate and represent a new all time low for guardians. Nancy Golin is a severely autistic 36 year old young woman who was conserved by the State of CA after an intern at a hospital made an error and falsely accused Nancy's parents of overmedicating her. She was taken from her parents and is confined in a group home where now she is in rapid decline. Her parents have documented numerous serious injuries (broken bones, etc.) and unproven, but likely sexual abuse as well. This summer, the guardian had 8 of Nancy's front teeth pulled – including 4 perfectly good teeth (because Medical wouldn't pay unless a quota of teeth were pulled). Prior to Nancy's "kidnapping", her teeth were in fine order and she practiced good oral hygiene. After 5 years of "protection" from the state, however, Nancy's teeth were rotting. Nancy's parents strongly objected to the drastic dental procedure and wanted to pay themselves to have Nancy's teeth treated properly. Oh no, the state wouldn't have that and against the parent's objections and with approval from the Court, Nancy was forced to endure a painful operation that she couldn't understand. This is bad enough, but it's not the worst of the story. Nancy's parents are only allowed to see their daughter one hour a week and only with a "visit supervisor". When Nancy needed the comfort of her Mom and Dad, the guardian would not permit it. I ask you to think and feel what Nancy must be thinking and feeling. In Wilkes Barre PA, Mary Claire Connors has only been allowed to see her Mom, Grace, less than a dozen

times in the five years that Grace has been confined to a nursing home against her will. It began when Grace's adopted niece kidnapped her from an Alzheimer's Day Program in CA where she lived with Mary and brought Grace to the family homestead in PA where the niece began cleaning out Grace's accounts using a forged power of attorney. In the legal battle that ensued Mary came out on top, but with a tragic twist. The Judge announced that even tho Mary had the legitimate power of attorney (given 10 years prior), the county was keeping Grace anyway because they "could take better care of her" --- thanks to a long term health care insurance police Grace had. Mary was also told Grace's missing funds were no longer her concern, nor was the care of her Mother. On the rare occasions Mary has been allowed to see her Mother, she is told she must come alone and bring nothing ---not a pen, nor paper, nor camera, not a treat for her Mom nor even a birthday card on her birthday. They are guarded by two supervisors. And if Mary "upsets" her Mom, the visit will end abruptly and there will be no more visits. So when Grace pleads with Mary to take her home and asks Mary if she doesn't love her anymore, Mary can only fight back tears and tell her Mom she does love her. She can offer no explanation. If Grace were to die tonite, God forbid, she would die thinking her only daughter abandoned her and didn't want her. Recently, Mary was surprised to be invited to a quarterly care meeting. She'd never been invited before and her inquiries and suggestions about her Mom's care are always dismissed as if she's not even the daughter, so she was suspicious. And she was right. She had been invited to inform her that her Mom is now in Hospice. Grace has given up. Her spirit is broken and she's tired. Mary has never given up but she continues to fight a losing battle because the guardianship has not only cleaned out Grace's funds, it's bankrupted Mary as well. My purpose in giving a summary of these two cases is to demonstrate the cruel and insidious power guardians use to blatantly torment not only the victim but the victim's family. Families are worried sick about their loved one but are powerless against the threat that if they make waves, it will be even harder on their loved one. Nancy and Grace are dying and their families can only watch them die a slow death. There

is no easy answer to clean up guardianship abuse. Obviously, it's driven by greed of guardians and their attorneys and so it's a powerful monster to battle. But, the buck stops at the Judge's bench. Guardians and attorneys wouldn't have easy access to people's life savings if the Judge would put away his/her rubber stamp and admonish those who take advantage of the weak and vulnerable of our society. That's what the Judge did on the Daniel Gross case in CT – setting an example for all the judiciary to follow. I ask you not to sit in the meeting and politely listen to the horror stories, and that be it. Guardianship abuse has to be stopped and we the people who have voted for you are counting on you to do it. Guardians and their attorneys are salivating for when the Baby Boomers become of age. Protect us. Sincerely Submitted, Elaine Renoire Elaine@abusiveguardianships.com www.abusiveguardianships.com Member of the National Association to Stop Guardian Abuse www.stopguardianabuse.org. For information on Nancy Golin, see www.freenancy.com For information on Grace Connors, see http://guardianshipgulag.blogspot.com

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