

Testimony to the United States Senate Special Committee on Aging
“Trust Betrayed: Financial Abuse of Older Americans by Guardians and Others in Power”
11/30/16

Chairman Collins, Ranking Member McCaskill, and other distinguished members of the committee: Thank you for the opportunity to provide testimony today. My name is Jessica Kruse and I am an attorney who provides Elder Law services to individuals in Southwest Missouri. I am the president of the Missouri Chapter of the National Academy of Elder Law attorneys and the Committee Chair for the Elder Law committee for the Missouri Bar. My firm has 7 full time attorneys, including myself and my law partner and we have four offices throughout Southwest Missouri. As elder law attorneys, a large part of our practice involves guardianship proceedings in which we represent both respondents (person over whom the Guardianship is sought) and petitioners (proposed Guardians and/or Conservators). In addition to handling guardianship matters, I also represent those who are acting as agents under Durable Powers of Attorney (legal document under which a person – the Principal – designates someone to act on his/her behalf – the Agent or Attorney-in-fact), those acting as the Principal under Durable Powers of Attorney, and at times, litigants in fiduciary actions brought against agents taking allegedly inappropriate actions under Durable Powers of Attorney. Today I look forward to sharing my perspective as one attorney working daily to improve the lives of older Americans who cannot act for themselves.

I. Abuse by fiduciaries or others in authority outside of guardianship proceedings

In my practice I see far more cases of elder abuse in situations involving fiduciaries or others in authority outside of guardianship proceedings. From an elderly woman made to live in a chicken coop in the back of her step-daughter’s property, to a man found stuck to his chair by his own feces because those caring for him did not move him, to the caregiver who befriends the vulnerable care recipient for the sole purpose of manipulating the care recipient into giving over assets. These are the stories that Elder Law attorneys hear on a regular basis.

These individuals are sometimes tricked into signing a Durable Power of Attorney the abuser printed off the internet or their vulnerabilities are exploited because they have no one else to take them to the doctor or prepare their meals. In these cases, there are no monitoring mechanisms unless a prosecutor is willing to take a case from the Adult Protective Services investigator or unless another party brings a civil action against the abuser. Both enforcement mechanisms come too late and often after all the vulnerable person’s assets have been taken or physical damage has been done.

If those abused or vulnerable individuals later become my clients, I will ask about what documents they may have signed and it is all too common to hear stories like “I thought I was signing a paper required for the bank” or “I was relying on the person to take me to the doctor so if I didn't sign, I wouldn't be able to get to the doctor.” Many times, the person doesn't even remember signing the document 10 minutes later in the case of a more advanced Alzheimer's or dementia diagnosis.

Once the document is signed, the abuser has full reign over bank accounts, investment accounts, real estate, and pensions. In other cases, I have seen abusers bully/coerce/persuade the incapacitated individual into putting the abusers name directly on bank accounts or real estate as a co-owner which can give them rights as the owner of the asset and can eliminate the ability to hold the abuser accountable as a fiduciary.

In these cases, there is far less accountability and monitoring as compared to guardianship and conservatorship cases. Once financial abuse is caught under these circumstances, the guardianship and conservatorship court action is one of the main ways to stop the abuse even though most of the damage is done by that point and there are little resources to bring the abuser to justice. Investigators from the Adult Protective Services investigate but the case generally ends there unless there is a public outcry demanding more. The cases are rarely prosecuted and there are generally few resources to go after the abuser civilly because there is a small chance any money would be recovered.

II. Abuse by Those Appointed by the Court as Guardians and Conservators

In Missouri, a guardian has authority to make personal decisions over one who is deemed to be incapacitated.¹ A conservator has authority to make financial decisions over one who is deemed to be disabled.² This terminology is different depending on the jurisdiction. In my experience, abuse by guardians and conservators is far less common than by those who were not appointed by the court or, if there is abuse, it is caught faster due to court monitoring.

The cases in which I have seen financial abuse occur within a guardianship and conservatorship have generally occurred in situations where court monitoring is lacking. One example of this occurred in a case in which family member co-conservators had been allowed to take actions on behalf of an incapacitated person for 2 years without submitting annual accountings for court approval. In that case, the co-conservators were given very little guidance by the attorneys who helped them petition the court for the conservatorship to begin with and then turned loose to basically do what they wanted to do with the estate. Once an attorney got involved in the proceeding, property had been sold, assets had been liquidated and property was given away all without court order and with some alleged misappropriation by one of the two co-conservators.

On the other hand, another county about 60 miles away from the county mentioned in the previous paragraph submits citations if annual accountings are not filed in a timely fashion and when the accountings are filed, an auditor reviews the accountings to make sure the figures balance. In addition, the clerk and Probate Commissioner review the entries within the accounting to make sure money is being spent on the person who is under the guardianship and conservatorship, which monitors the care being provided.

¹ Mo. Rev. Stat. § 475.010 (10) (2016)

² Mo. Rev. Stat. §475.010 (5) (2016)

With respect to the overlap in duties that arise between representative payees for SSA and VA, there is some frustration in that the SSA and VA do not tend to give preference to the court appointed fiduciary.³ As you may imagine, there can be highly contested guardianship and conservatorship proceedings in which the court will hear evidence on who may be the best person to act as the Guardian and/or Conservator. It is not surprising then when the party who lost the battle in the Guardianship and Conservatorship proceeding marches down to the SSA or VA to become the representative payee. This can clearly cause problems for the person under the guardianship and conservatorship because there are two people at odds with one another in charge of their assets. I am not suggesting a change to the representative payee requirement but rather providing the SSA and VA with the ability to give preference to the court appointed fiduciary unless there is a reason to separate the duties.

Additionally, there is some controversy on a national level about professional guardians and conservators vs. individuals.⁴ I do not see this personally in Southwest Missouri, as there are elected officials (public administrators) who are appointed to act in situations where family or individuals are not considered the appropriate choice and very few, if any, professional guardians and conservators in my area. In talking with colleagues of mine from other states who specialize in this area, they also have concerns regarding professional guardians and conservators. These concerns include the fees that are charged by professional guardians and conservators, in addition to the conflicts of interest that may arise (for example, the professional guardian or conservator appointed may also own the home health care company providing the services to the individual over whom they have guardianship). Professional guardians and conservators can fill a much-needed gap in communities that do not have elected officials to act as the guardian and conservator of last resort or provide services for individuals who do not have family or others willing to act as the guardian or conservator but, again, there appears to be inconsistency in monitoring the guardians and conservators in these situations as well.

My office practices regularly in about 10 counties and just within Southwest Missouri, judicial practices for guardianship cases varies widely. This inconsistency is multiplied over the approximately 3200 jurisdictions that adjudicate guardianship and conservatorship cases across the country. Some states, like Missouri, have elected officials serving as the guardians and conservators of last resort. Some jurisdictions have private individuals serving as professional guardians. Some jurisdictions require that a guardian be bonded in every case and some jurisdictions do not. Some jurisdictions take the time to determine the specific needs of the incapacitated and disabled person to determine whether a full guardianship is needed vs. a limited guardianship but some jurisdictions prepare full guardianship orders for everyone regardless of the specific abilities of the person under the guardianship. These are inconsistencies that are recognized by the legal industry and are not being ignored.

³ S.S.A. Program Operations Manual § GN 00502.100 (2016).

⁴ See generally Diane Dimond, Who Guards the Guardians, Albuquerque Journal, Nov. 28, 2016, at Al.

III. Steps Currently Being Taken to Address Issues

The problems I am pointing out about the guardianship process are not new and there are current efforts to address these issues by several guardianship organizations throughout the country. The approaches being taken are multidisciplinary with the hope that concerns will be addressed not only from the legal perspective but also from the perspective of those acting as guardians/conservators and those having to implement the actions that will be taken by guardians/conservators. The efforts taken by these guardianship organizations focus on making the process more consistent between jurisdictions and requiring anyone acting as a guardian to meet certain baseline requirements. One problem with many of the proposed changes is funding, or lack thereof, in a lot of jurisdictions.

The National Guardianship Network (hereinafter “NGN”) is a collaborative organization that brings together several national organizations to improve guardianship standards. These organizations include the National Academy of Elder Law Attorneys (“NAELA”), the National Guardianship Association (“NGA”), and the American Bar Association (“ABA”) to name a few. One of its accomplishments include the 2011 Summit which provided recommendations to improve the guardianship system across the country. These recommendations were published in the *Utah Law Review* in 2012⁵. In addition to the 2011 summit, the NGN has helped to provide funding for state Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS).

Missouri, for example, has MO-WINGS which has been meeting for several years to examine the guardianship section of the Missouri Revised Statutes dealing with guardianship proceedings. The MO-WINGS group has been made up of “representatives of persons with disabilities, parents, family members, lay guardians and conservators, service providers, AARP, NAMI, Alzheimer's Association, Missouri Developmental Disabilities Council, Missouri Bar Probate and Trust and Elder Law Committees, Missouri Association of County Developmental Disability Services, public administrators, social workers, nurses, psychologists, Missouri Protection and Advocacy, lay guardians, advocacy groups, long-term care ombudsmen, University of Missouri-Columbia Center for Health Ethics, Departments of Mental Health and Health and Senior Services, and Area Agencies on Aging with input from judges and national experts.”⁶ This is one example which shows that the WINGS groups are obtaining input from a vast array of individuals and groups who experience guardianship issues with the end goal of improving guardianship proceedings at the state level.

The National Guardianship Association is one example of an organization that is working to address some of the shortfalls in guardianship proceedings at the state level, which ultimately can reduce the instances of abuse within guardianship proceedings. The mission of the National Guardianship Association (hereinafter “NGA”) “is to advance the nationally recognized

⁵ Symposium, *Third National Guardianship Summit: Standards of Excellence*, 2012 *Utah Law Rev* 1155 (2012)

⁶ <http://mo-wings.org/>

standard of excellence in guardianship.”⁷ The NGA has developed 25 standards which serve as guidance to guardians, in addition to creating the Center for Guardianship Certification, which has certified approximately 2000 guardians across the country. The focus of the NGA is to educate guardians with the hope that this will improve the lives of those under a guardianship.

The Uniform Law Commission is also an organization that has worked to reduce abuse within guardianship and conservatorship proceedings by clarifying which court has jurisdiction to solve the jurisdictional disputes that would often arise and prevent abuses of a potentially incapacitated person being “kidnapped” and taken to a friendlier jurisdiction for the guardianship proceeding. The Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (UAGPPJA) was finalized by the Uniform Law Commission in 2007 and has since been adopted by 34 states. This act was narrowly focused on jurisdiction but there is a committee working on continuously revising this uniform law to address the concerns that arose at the 2011 Guardianship Summit. There are also current efforts to reform the Uniform Guardianship and Protective Proceedings Act (UGPPA) to address issues outside of the jurisdictional issues addressed by the UAGPPJA.

The National Academy of Elder Law Attorneys (NAELA) also focuses on education and advocacy for people as they age and people with special needs. NAELA has a national chapter in addition to local state chapters. Within NAELA there are committees based on practice area, including guardianships. The attorneys that belong to NAELA are dedicated to making sure the voices of older Americans and those with disabilities are heard.

Finally, the Commission on Law and Aging through the American Bar Association provides educational material to attorneys and judges on several different topics related to elder law abuse. This includes guide books on determining capacity. In addition, the Commission on Law and Aging assists in the implementation of the volunteer guardian monitoring system developed by the Legal Counsel for the Elderly, Inc., of AARP in 1992.⁸

IV. Conclusion

In conclusion, through my testimony today I would like to emphasize the positive work being done to reduce abuse in the guardianship and conservatorship system across all 50 states. Although there is still improvement to be made, there are grass roots efforts funded by private money that are making a difference at the local level. Unfortunately, the statistics show an overwhelming percentage of this type of abuse occurs by family members, whether dealing with abuse within Guardianships or otherwise. This can contribute to the difficulty in reducing the abuse, as Courts tend to give preference to family members who are available and willing to act as Guardians/Conservators. Also, older Americans tend to rely on family over all others

⁷ <http://guardianship.org/overview.htm>

⁸ http://www.americanbar.org/content/dam/aba/administrative/law_aging/2011/vol_gship_intro_1026.authcheckdam.pdf

when deciding who to name as agents under Durable Powers of Attorney or who they would want as a caregiver.

As with domestic violence and child abuse, more public awareness is needed so that communities can watch out for the most vulnerable members of society. In my experience, it can be difficult to balance the two goals of respecting the wishes of the older client and doing what I believe needs to be done to protect my older client. These two goals can be in opposition to one another if a client tells me they only want their child or caregiver or neighbor to act for them when I believe that child, caregiver or neighbor is not acting in their best interest. Far too often in our society, younger people bulldoze over the wishes of the older generation and it is always important to keep the older Americans voice at the forefront. Thank you again for this opportunity to speak. I hope that my testimony today makes a difference in some small way.