

INTRODUCTION

The CDC (Centers for Disease Control and Prevention) defines financial abuse or exploitation as:

"...[T]he unauthorized or improper use of the resources of an elder for monetary or personal benefit, profit, or gain. Examples include forgery, misuse or theft of money or possessions; use of coercion or deception to surrender finances or property; or improper use of guardianship or power of attorney."^{1/}

"Exploitation" is also defined in the 2006 Older Americans Act as:

"...[T]he fraudulent or otherwise illegal, unauthorized, or improper act or process of an individual, including a caregiver or fiduciary, that uses the resources of an older individual for monetary or personal benefit, profit, or gain, or that results in depriving an older individual of rightful access to, or use of, benefits, resources, belongings, or assets."^{2/}

Guardianship^{3/} has become a new profit industry. The media began exposing wrongdoing years ago and continues to this day. The federal government and various professional organizations have met numerous times over the years.

But the problems continue.

The 2005 White House Conference on Aging,^{4/} held only once a decade, was introduced as occurring when "the first wave of the baby boom generation prepares for retirement, creating an important opportunity to creatively assess aging in America and improve the lives of older Americans." It also stated the Boomers would be wealthier than prior generations. Of the approximately 50 resolutions presented, neither of the two specifically addressing guardianship were accepted.

Guardianship law, promulgated in the public interest, is critical to the welfare of the people. It is a necessary law, but abuse over the years has made it detrimental to the welfare of the very citizens it was designed to protect.

¹ Center for Disease Control and Prevention, *Definition of Elder Maltreatment*, <http://www.cdc.gov/ViolencePrevention/eldermaltreatment/definitions.html>

² Older Americans Act, as amended 2006, Public Law 109-365, Sec.1(a)(24)(A) http://www.doleta.gov/reports/pdf/Older_Americans_Act_2006.pdf

³ The term "guardianship" is used generically, to include "conservatorship."

⁴ <http://www.whcoa.gov/>

The U.S. Senate Special Committee on Aging agrees:

"[I]f guardians are not qualified or committed to exercise the highest degree of trust with regard to their wards, or are not held accountable for their actions by the courts, guardianship can place wards at risk of the very mistreatment it is intended to prevent."^{5/}

According to testimony by then Representative Rahm Emanuel^{6/} (sponsor of the Elder Justice Act, H.R. 1783) before the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security on April 17, 2008:

"...[T]he first hearing on elder abuse was in 1979 in the House Select Committee on Aging. The Senate has held over 20 hearings on the issue of elder abuse dating back to 1991. However, the House has only held one hearing in 1991 since those early hearings on the now defunct Select Committee on Aging. Today is the first time in 17 years that a House Committee will look at the issue of elder abuse."

There have been numerous conferences, detailed reports and studies addressing guardianship problems by professional organizations, the Senate Subcommittee on Aging, and the GAO.

All of these reports agree that:

1. Monitoring and oversight continues to be inadequate or lacking; and
2. Something more must be done to correct the known and continuing problems of guardianship.

Problems recognized as far back as the earliest studies/reports are now widely out of control.

Despite the multiple hearings devoted to the many problems of guardianship over the years (including testimony and reports by and on behalf of interested agencies and organizations), there has been no meaningful progress in dealing with the constantly increasing misuse of state protective statutes.

Years of studying and talking about guardianship problems have yielded no measurable results; vulnerable people and their families continue to suffer as a result of unlawful guardianships, with no meaningful remedy and no hope of redress.

⁵ United States Senate Special Committee on Aging, *Guardianship For The Elderly: Protecting The Rights And Welfare Of Seniors With Reduced Capacity*, by Senators Gordon H. Smith and Herb Kohl (Dec. 2007) http://aging.senate.gov/minority/files/guardianship_report.pdf

⁶ <http://wwwc.house.gov/judiciary/hearings/pdf/Emanuel080417.pdf>

The existing and continually growing epidemic of unlawful and abusive guardianships is shocking, outrageous, and contrary to the U.S. Constitution and statutes.

Frequently, guardianship proceedings are initiated by hospitals, nursing or rehab facilities after minimal observation of an elderly patient. Some of our members feel that these entities are engaging in computerized headhunting.

Other NASGA members have unsuccessfully attempted to defend themselves against false abuse complaints from protective services agencies such as APS/DCF, who too hastily refer matters to the courts before properly investigating the charges. The agencies will then close their files (as "unfounded") only after the litigation begins. Too little, too late: the guardianship will most likely never end. These agencies then hide behind "confidentiality" to prevent access to their files by the person complained against.

Wards of the state lose almost all their rights, including the right to complain when, under color of law, they are deprived of liberty, property, and sometimes life.

These vulnerable individuals can be subjected to the most devastating civil and human rights violations - imprisoned in locked nursing facilities, denied contact with even their closest family members, robbed of their assets and eventually killed through neglect, abuse or by design (after being overdosed with dangerous psychotropic drugs).

Once an alleged incapacitated person ("AIP") is adjudicated as such, the challenge of protecting him/her - with the ultimate goal being release - becomes a costly uphill battle for the family, most often in vain. Litigation delay is occasioned by motion-churning practices designed to extend the proceedings in order to generate exorbitant legal fees.

These fierce fights to protect beloved family members can well result in bankruptcy for those desperately trying to help extricate them from what they see as the "jaws of a monster." Sometimes the financial crisis moves into the third generation, and the exorbitant expense of increasing litigation, mostly to no avail, goes on.

This continues until either the ward's assets are fully converted or depleted, or until the ward's death. Even after the ward's passing, if there are assets remaining, there are fiduciaries who will refuse to surrender the assets to a decedent's representative, expanding legal problems for families during their difficult time of bereavement and the transition into a decedent's estate proceeding.

And this is all sanctioned by our broken "justice" system and its woefully inadequate and/or badly abused "protective" statutes!

When the guardianship nightmare has ended, either by death of the ward, inability to continue litigation due to depletion of assets - or in some rare cases, by successful termination - most victims and family are left damaged.

They no longer sleep soundly; they are nervous and irritable; and the core of their belief and trust system has been violently shaken or broken. They are haunted that they did not do enough to protect their vulnerable loved one; that they personally let him/her down. The anxiety becomes a dark cloud looming overhead and growing heavier each day.

The cries for help are growing louder today than ever before.

The purpose of this letter to Congress is to demonstrate what we have learned about the evils of guardianship when not operated according to the letter of the law.

Our population is expanding and aging. According to the US Census Bureau, the fastest growing segment of this population consists of individuals over the age of 65; their numbers are expected to increase 13.3% by 2010 and 53.2% by 2020.⁷

We expect unlawful and abusive guardianships - a growing national epidemic - will soon attack the Baby Boomers in the largest wave of such proceedings in history. Additionally, disabled young adults and people with only temporary physical disabilities can be taken into guardianships which can easily become permanent.

The intended legislative purposes of guardianship and conservatorship - "protect" and "conserve" - are not being met, as presently operated. Today, guardianship can actually constitute a form of elder exploitation when used to unjustly enrich the fiduciaries and their affiliates, including attorneys, nursing facility operators and others.

The caseloads are growing exponentially, while another problem emerges: theft by fiduciaries! There are no teeth in the existing law; enforcement and strong criminal penalties are needed now more than ever.

The blame for the escalation of abuse is shared by every branch of state government and the organized Bar. Guardianship has become the new "bread and butter" of the professionals, yielding higher profits than family law.

The resultant injury to the wards and their estates by their court-appointed "protectors" is enabled by lack of monitoring, oversight, enforcement, and penalties. The failure of government as *parens patriae* must be remedied.

⁷ <http://www.census.gov/popest/national/asrh/NC-EST2008-sa.html>

Courts have long demonstrated their inability or unwillingness to correct the now well-known problems. With patronage still at play and growing concern about judges' failure/refusal to comply with law, our most serious complaints continue: lack of due process; civil and human rights violations; lack of prudent - or any - investment; depletion of estate through unnecessary and excessive "fee" billings; and/or outright defalcation in considerably questionable proceedings under color of law.

To date, guardianship victims have not been involved in the discussion process; they need to be heard now. We wish to go on record with our firsthand experience and cumulative knowledge to present a "view from the other side." NASGA's perspective is drastically different from that of other organizations and entities - professionals and nonprofits - interested in, involved in or profiting from guardianship.

We have identified very specific problems in this document and in our Internet presence beyond what has been done by government or professional entities previously.

Our suggested remedies will originate from the victims' viewpoint. As an example, our solution for the major problem in guardianship today - lack of monitoring and oversight - is different from other entities addressing the same issue.

Because the courts have demonstrated their inability to control their court-appointed fiduciaries and carry out the law in the manner intended, it is critical, in our view, that monitoring and oversight simply cannot remain in the courts.

Monitoring and oversight must come from an outside source, especially in view of the shocking revelation that misuse of protective statutes are negatively affecting the public interest and placing a huge and unintended resultant burden on American taxpayers.

Due to the escalating crisis of unlawful and abusive guardianships, we come to our federal government seeking its expeditious intervention.

It is imperative for Congress to take action to correct this outrage and danger for all American citizens.