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# INCAPACITATED ADULTS

## Improving Oversight of Federal Fiduciaries and Court-appointed Guardians

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Chairman Klobuchar, Ranking Member Sessions, and Members of the Subcommittee:

I am pleased to participate in today's hearing on the appointment and oversight of guardians. As people age, they often reach a point when they are no longer capable of handling their own finances or have difficulty making other decisions for themselves. To ensure that federal cash payments received by incapacitated adults<sup>1</sup> are used in their best interest, the Social Security Administration (SSA), Department of Veterans Affairs (VA), and other federal agencies assign a responsible third party or fiduciary<sup>2</sup> to oversee these benefits. SSA and VA can designate spouses, other family members, friends, and organizations to serve as fiduciaries. Similarly, when state courts determine that adults are incapacitated, they have the authority to grant other persons or entities—guardians<sup>3</sup>—the authority and responsibility to make financial and other decisions for them.<sup>4</sup>

Incapacitated adults are vulnerable to financial exploitation by fiduciaries and guardians, so these arrangements are not without risk. In 2010, we identified hundreds of allegations of abuse, neglect, and exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010. At that time, we reviewed 20 of these cases and found that guardians had stolen or otherwise improperly obtained \$5.4 million from

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<sup>1</sup>Here the term "incapacitated" is used recognizing that federal agencies and states use a variety of terms and somewhat different definitions to assess whether someone is in need of a guardian. SSA, for example, assigns a fiduciary to people it has determined are incapable of managing or directing the management of benefit payments. VA uses the term "incompetent" instead of incapacitated. Most states use a term such as "incapacitated," but others use such terms as "incompetent," "mentally incompetent," "disabled," or "mentally disabled."

<sup>2</sup>VA refers to these responsible parties as fiduciaries. SSA refers to them as representative payees. Here the term "fiduciary" is used to refer to both VA fiduciaries and SSA representative payees.

<sup>3</sup>As used here, the term "guardian" also includes conservators.

<sup>4</sup>The responsibilities of federal fiduciaries and court-appointed guardians differ in a number of ways. Federal fiduciaries oversee only federal cash payments while guardians typically manage all of an incapacitated adult's property. Moreover, guardianship is usually a legal relationship under which the incapacitated adult typically forfeits some or all civil liberties. This is not the case under federal fiduciary programs.

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158 incapacitated victims, many of whom were older adults.<sup>5</sup> To protect against financial exploitation, state courts as well as federal agencies are responsible for screening prospective guardians and federal fiduciaries, respectively, to make sure suitable individuals are appointed. They are also responsible for monitoring the performance of those they appoint.

My remarks today are based on our recent report on this topic.<sup>6</sup> They will cover (1) SSA and VA procedures for screening prospective federal fiduciaries, and state court procedures for screening prospective guardians; (2) SSA and VA monitoring of federal fiduciary performance, and state court monitoring of guardian performance; (3) information sharing between SSA and VA fiduciary programs and between each of these programs and state courts; and (4) federal support for improving state courts' oversight of guardianships.

Findings in the report are based on interviews with federal officials and state court officials and experts in this area. We also reviewed relevant federal laws, regulations, policies and procedures, as well as summaries of state guardianship laws compiled by other organizations. We did not independently review implementation of the laws, regulations, or policies referred to in the report. We also incorporated findings from prior work in which we proactively tested state guardian certification processes in four states: Illinois, Nevada, New York, and North Carolina.<sup>7</sup>

We conducted our previous work from June 2010 to June 2011 in accordance with generally accepted government auditing standards. These standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provided a reasonable basis for our findings and conclusions based on our audit objectives.

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<sup>5</sup>GAO, *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, [GAO-10-1046](#) (Washington, D.C.: Sept. 30, 2010). These case studies reflect varied guardianship arrangements, and their findings cannot be projected to the overall population of guardians.

<sup>6</sup>GAO, *Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement*, [GAO-11-678](#) (Washington, D.C.: July 22, 2011).

<sup>7</sup>[GAO-10-1046](#).

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In summary, we found that SSA and VA are required to and have procedures for screening prospective fiduciaries and are also required to monitor fiduciary performance. Most states, as well, have laws requiring courts to follow certain screening procedures for prospective guardians and to obtain annual reports from them, but there is evidence that courts often find monitoring guardian performance challenging. SSA and VA do not systematically share with one another the identities of beneficiaries determined to be incapacitated or the identities of fiduciaries who have misused an incapacitated adult's benefit payments, and there is evidence that state courts have difficulty obtaining similar information from SSA about SSA beneficiaries the courts have determined to be incapacitated and in need of a guardian. Finally, the federal government has a history of supporting technical assistance and training for state courts related to guardianship, primarily with funding from the Administration on Aging (AoA) in the Department of Health and Human Services (HHS).

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### SSA, VA, and Most State Courts Are Required to Screen Fiduciaries or Guardians

SSA, VA, and most state courts are required to follow screening procedures for ensuring that prospective fiduciaries and guardians are suitable to serve. SSA and VA strive to prevent individuals who have misused beneficiaries' payments from serving again, and each agency is currently developing an automated system that will enhance its ability to compile and maintain information about fiduciaries who have misused cash benefits.

Similarly, according to the AARP Public Policy Institute, most states require courts to follow certain procedures for screening prospective guardians and restrict who can be a guardian.<sup>8</sup> Thirteen states require prospective guardians to undergo an independent criminal background check before being appointed. Nine prohibit convicted felons, and two prohibit convicted criminals from serving. However, these screening procedures are not always effective. Using two fictitious identities—one with bad credit and one with the Social Security number of a deceased person—GAO obtained guardianship certification or met certification requirements in the four test states where we applied.

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<sup>8</sup>The AARP Public Policy Institute was created to inform and stimulate public debate on the issues related to aging and to promote development of sound, creative policies to address the common need for economic security, health care, and quality of life. This information is from a compilation of state guardianship laws provided to us by AARP.

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## SSA and VA Have Procedures for Monitoring Fiduciaries, but Monitoring Guardians Can Be Challenging for Many Courts

SSA and VA have similar procedures for monitoring fiduciary performance. SSA is required to establish a system of accountability monitoring that includes periodic reports from fiduciaries.<sup>9</sup> Certain organizational fiduciaries and individuals serving as an SSA fiduciary for 15 or more beneficiaries are also subject to periodic on-site review.<sup>10</sup> VA requires its fiduciaries to submit a two-page accounting report but asks those who are also court-appointed guardians to submit the same accountings that they submit to the court. Similar to SSA, VA is required to conduct periodic on-site reviews of certain organizational fiduciaries, as well,<sup>11</sup> and also conducts periodic site visits with incapacitated beneficiaries to reevaluate their condition and determine if their fiduciaries are properly using their payments.

Most states require court-appointed guardians to be monitored in some way, but according to an AARP Public Policy Institute report, in many states there are only limited resources to do so.<sup>12</sup> The American Bar Association (ABA) Commission on Law and Aging<sup>13</sup> has found that most states require courts to obtain annual reports from guardians on their incapacitated adult's condition, among other things.<sup>14</sup> In some states, court investigators may visit guardians and their wards either regularly or on an as-needed basis.

Monitoring court-appointed guardians' performance can prevent financial exploitation of incapacitated adults and stop it when it occurs. In our 2004 survey of state courts, most indicated they did not have sufficient funds to

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<sup>9</sup>42 U.S.C. §§ 405(j)(3)(A) and 1383(a)(2)(C).

<sup>10</sup>42 U.S.C. §§ 405(j)(6)(A) and 1383(a)(2)(G)(i).

<sup>11</sup>38 U.S.C. § 5508.

<sup>12</sup>AARP Public Policy Institute. *Guarding the Guardians: Promising Practices for Court Monitoring* (Washington, D.C.: 2007).

<sup>13</sup>The ABA Commission on Law and Aging was created to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training.

<sup>14</sup>See "Monitoring Following Guardianship Proceedings (as of December 31st, 2009)" at [http://www.americanbar.org/groups/law\\_aging/resources/guardianship\\_law\\_practice.html](http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html).

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oversee guardianships.<sup>15</sup> In its 2007 report, the AARP Public Policy Institute indicated that sufficient resources were not available to fund the staff, technology, training, and materials needed to effectively monitor guardians even though, according to Institute officials, judges and court administrators would like to improve guardianship monitoring. AARP has identified a number of promising practices to strengthen court monitoring or guardianship.<sup>16</sup> It has also noted that some state courts have begun to adopt these practices, but progress appears to be slow. Given limited resources for monitoring, courts may be reluctant to invest in these practices without evidence of their feasibility and effectiveness. The federal government has an opportunity to lead in this area by supporting evaluations of the feasibility, cost, or effectiveness of promising monitoring practices.

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### Information Sharing Between SSA, VA, and State Courts Could Improve Protection of Incapacitated Adults

Sharing certain information about beneficiaries and fiduciaries between SSA and VA enhances their ability to protect the interests of incapacitated beneficiaries by better ensuring that suitable fiduciaries are appointed. Although the Privacy Act generally prohibits a federal agency from disclosing personal information from a system of records without the consent of the individual to whom the record pertains, an agency may disclose such information without consent if there is a published statement of routine use that permits this disclosure.<sup>17</sup> According to SSA officials, there is a routine use provision that allows SSA to disclose certain information about its beneficiaries to VA, and there is a current data exchange agreement between SSA and VA that allows VA to directly

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<sup>15</sup>GAO, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, [GAO-04-655](#) (Washington, D.C.: July 13, 2004). We surveyed California superior courts in each of California's 58 counties, circuit courts in each of Florida's 67 counties, and courts in each of New York's 12 judicial districts. We received usable survey responses from 42 California courts, 55 Florida courts, and 9 of New York's judicial districts for response rates of 72 percent, 82 percent, and 75 percent, respectively.

<sup>16</sup>AARP Public Policy Institute. *Guarding the Guardians: Promising Practices for Court Monitoring* (Washington, D.C.: 2007).

<sup>17</sup>The Privacy Act applies to personal information under the control of an agency that is maintained in a system of records, which is any group of personal information that is retrieved by the name of the individual or other identifier. Under the Privacy Act, each agency that maintains a system of records must publish a notice describing that system and include a statement of routine uses of those records, including the categories of the uses and the purpose of use. A routine use of a system of records must be compatible with the purpose for which the record was collected. 5 U.S.C. § 552a.

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query an SSA automated system on a case-by-case basis. Through these queries, VA can learn key information such as whether or not SSA has appointed a fiduciary for a beneficiary and the identity of the SSA fiduciary. On the other hand, SSA officials indicated that obtaining similar information from VA may not be cost-effective given the relatively small proportion of SSA beneficiaries who also collect VA benefits.

With regard to state courts' access to SSA information about its incapacitated beneficiaries and their fiduciaries, this information could provide courts with potential candidates for guardians when there are no others available. Further, when SSA's automated system that will track fiduciaries who have misused benefits is complete, this information could help state courts avoid appointing individuals who, while serving as SSA fiduciaries, misused beneficiaries' SSA payments. Although the National Research Council has emphasized the importance of information sharing between SSA and the courts,<sup>18</sup> officials from organizations representing elder law attorneys, and advocating for elder rights, told us it is difficult for state courts to obtain information from SSA when it is needed. SSA officials do not believe their agency is permitted to provide information to state courts about an SSA beneficiary, or that beneficiary's SSA fiduciary, without the beneficiary's consent because there is no statement of routine use under the Privacy Act allowing it to do so. Moreover, officials said the agency has not considered establishing a routine use statement because SSA believes that sharing this information with state courts would not be compatible with the purpose for which the information was collected. Furthermore, agency officials told us that since disclosure of information to state courts is outside its mission, it could not use appropriated funds for this purpose and would have to charge courts for this information.

Regarding information sharing between VA and state courts, according to a VA official, the agency has no written policy on how requests for information about VA beneficiaries from state courts that appoint guardians should be handled. However, in guardianship proceedings involving VA beneficiaries, the agency does share its information about these beneficiaries with a court when a court requests this information. VA also has data-sharing agreements with courts in two counties and has

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<sup>18</sup>National Research Council, *Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse*, Committee on Social Security Representative Payees, Division of Behavioral and Social Sciences and Education (Washington, D.C.: The National Academies Press, 2007).

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reached out to organizations representing elder law attorneys and guardians to promote VA and state court information sharing.

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### The Administration on Aging Has Taken Some Steps That Could Help State Courts Improve Guardianship Oversight

In 2008, AoA established the National Legal Resource Center (NLRC), in part to support demonstration projects designed to improve the delivery of legal assistance and enhance elder rights protections for older adults with social or economic needs.<sup>19</sup> AoA funding enabled NLRC partners to provide training, case consultation, and technical assistance related to guardianship, including

- assistance drafting and promoting adoption of a model state law that would resolve long-standing issues with interstate transfer and recognition of guardianship appointments,<sup>20</sup>
- evaluation of Utah's public guardian program, and
- revision of guardianship provisions in South Carolina's probate code.

According to AoA officials, the agency has also supported development of guardianship training modules<sup>21</sup> for elder law attorneys and a guardianship webinar. AoA has not, however, recently supported any demonstrations or pilots to help evaluate guardian monitoring practices. Because of its activities in the guardianship area, the federal government is well-positioned and has an opportunity to lead in protecting the rights of incapacitated adults with court-appointed guardians, in particular by supporting evaluations of promising court guardianship monitoring practices.

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We made two recommendations in our report. Our first calls for SSA to take whatever measures necessary to allow it to disclose certain information about SSA beneficiaries and fiduciaries to state courts, upon their request, including proposing legislative changes to address the

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<sup>19</sup>NLRC partners include the American Bar Association Commission on Law and Aging, the Center for Elder Rights Advocacy, the Center for Social Gerontology, the National Consumer Law Center, and the National Senior Citizens Law Center.

<sup>20</sup>See [GAO-04-655](#), 12, 30-32.

<sup>21</sup>National Consumer Law Center. *Nuts and Bolts on Guardianship as Last Resort: The Basics on When to File and How to Maximize Autonomy*.



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impediments it identified. SSA has not identified what steps, if any, it will take to address this recommendation.

We also recommend that HHS direct AoA to consider supporting the development, implementation, and dissemination of a limited number of pilot projects to evaluate the feasibility, cost, and effectiveness of one or more generally accepted promising practices for monitoring guardians. In response, HHS agreed that AoA has the authority to take such action.

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This concludes my statement. I would be pleased to respond to any questions you or other members of the Subcommittee may have.

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## GAO Contacts and Acknowledgments

For questions about this testimony, please contact Kay E. Brown at (202) 512-7215 or [brownke@gao.gov](mailto:brownke@gao.gov). Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this statement. Individuals who made key contributions to this testimony include Clarita Mrena, Jaime Allentuck, David Perkins, Jessica A. Botsford, and Sheila R. McCoy.

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