



# Financial Exploitation in the Context of Guardianships and Other Legal Arrangements

SEPTEMBER 6, 2017

DEPARTMENT OF JUSTICE  
**ElderJustice**  
INITIATIVE



**OVCTTAC**  
OFFICE FOR VICTIMS OF CRIME Training and Technical Assistance Center



# TECHNICAL OVERVIEW

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- ▶ If you have technical difficulties during the webinar, contact Jason Adams, who is providing technical support for this webinar. His email address is [jadams@ovcttac.org](mailto:jadams@ovcttac.org).
- ▶ Today's session will be recorded and made available on the training website.
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# TODAY'S WEBINAR

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## Financial Exploitation in the Context of Guardianships and Other Legal Arrangements

# ELDER JUSTICE INITIATIVE

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- The **mission** is to support and coordinate the Department of Justice's enforcement and programmatic efforts to combat elder abuse, neglect, and financial fraud and scams that target older adults.
- The Initiative does so by—
  - Promoting justice for older adults.
  - Helping older victims and their families.
  - Enhancing state and local efforts through training and resources.
  - Supporting, organizing and presenting research to improve elder abuse policy and practice.

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Promoting Justice for Older Americans



Helping Older Victims and Their Families



Enhancing State and Local Efforts Through Training and Resources



Supporting Research to Improve Elder Abuse Policy and Practice

## Introducing

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**Brenda K. Uekert (Ph.D.)**, Principal Court Research Consultant at the National Center for State Courts, has worked extensively in the areas of elder issues, domestic violence, and problem-solving courts. She is the founder and director of NCSC’s Center for Elders and the Courts—a national resource to the courts on aging issues, elder abuse and guardianship. Dr. Uekert is the author of the Elder Abuse Toolkits for prosecutors and courts and served as the Research Director on the National Probate Court Standards project. She directed the development of a multidisciplinary distance-learning course, *Justice Responses to Elder Abuse*, and is currently leading a national effort to modernize and improve conservatorship processes. Dr. Uekert staffs the Conference of Chief Justices and Conference of State Court Administrators Joint Committee on Elder and the Courts. She is on the advisory board of the National Center on Elder Abuse and is the 2016 recipient of “the Isabella” award from the National College of Probate Judges in recognition of her achievements in the field of guardianships. She has an undergraduate degree from the University of Wisconsin at Eau Claire and a M.A. and Ph.D. in Sociology from Syracuse University.



# Financial Exploitation in the Context of Guardianships and Other Legal Arrangements

Brenda K. Uekert, Ph.D.

Director, Center for Elders and the Courts  
National Center for State Courts

September 6, 2017

# Before we begin:

- What options are available to older persons to help them with finances?
- What are the basic components of a power of attorney?
- What are the definitions of guardianships and conservatorships?
- What is financial exploitation?



# Examples of Financial Help

- Supported decisionmaking
- Electronic bill-paying and deposits
- Joint bank accounts with a trusted person
- Properly drawn trusts
- Properly drawn durable power of attorney
- Representative payee (SS Admin, Veterans Affairs)
- Guardianship/conservatorship

Retain Control



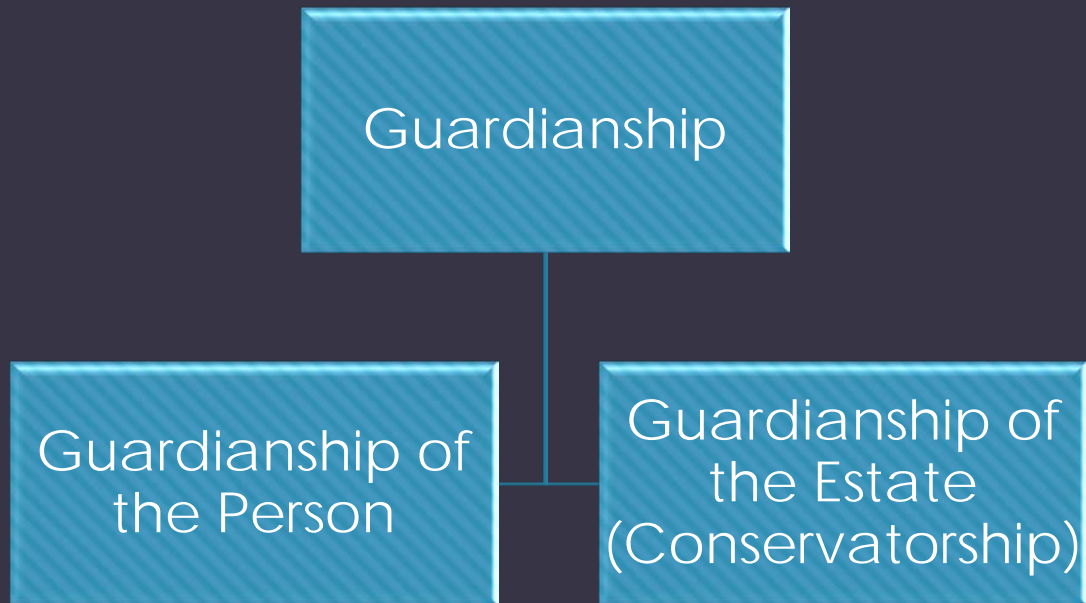
Lose Control

# Durable Power of Attorney (DPA)

- Legal document that allows someone to act on another's behalf
  - Durable means the POA continues if incapacity occurs
  - A "springing durable power of attorney" becomes effective after a later time or when a certain event occurs
- Not subject to oversight by a court or third party
- "License to Steal"



Poll: Do you have a current durable power of attorney?



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There are approximately **1.3 million** active adult guardianship or conservatorship cases in the United States, and at least **\$50 billion** in assets under conservatorships.

# Conservatorships

- Conservators are court appointed
- There is some level of court oversight (annual accountings, reviews)
- Generally, persons under conservatorship have some functional limitations
- Practices vary from court to court

*Guardianship is both an essential tool and a dangerous weapon.*

--Joanne Marlatt Otto  
National Adult Protective Services Association

# Financial Exploitation

The **illegal** taking, misuse, or concealment of funds, property, or assets of a **vulnerable** elder.



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*We are entitled to make dumb  
money decisions, regardless of  
our age!*





*Brenda*



Can exploitation be prevented?

# Prevention of DPA Abuse?



- Clear statement of agent's duties
- Specific language required to give the agent "hot powers"
- Third party refusal to honor POA if abuse suspected
- Agent violating act must restore value

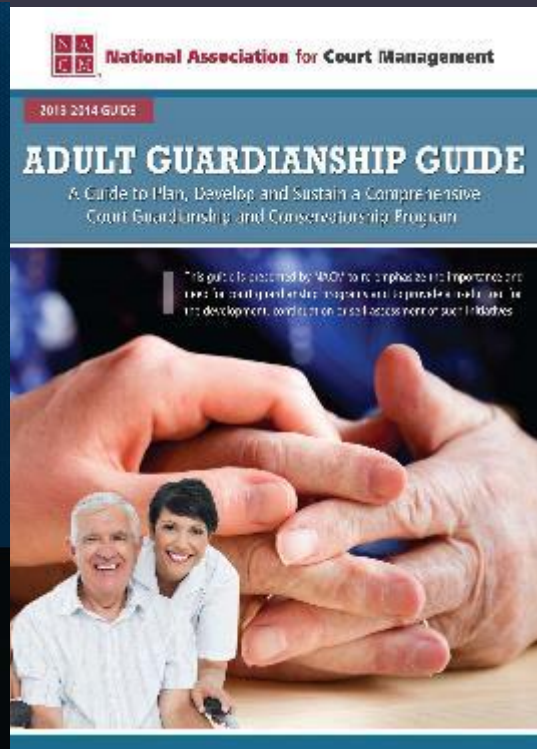
See AARP Public Policy Institute, <sup>20</sup>POA Abuse: What States Can Do About It, 2009

# Prevention of Conservator Abuse?

## NATIONAL PROBATE COURT STANDARDS



Borchard Foundation  
Center on Law & Aging



- Use as last resort
- Require criminal and credit background checks
- Create limited orders
- Mandate court approval prior to selling property
- Require restricted accounts
- Set fee schedules
- Audit accountings

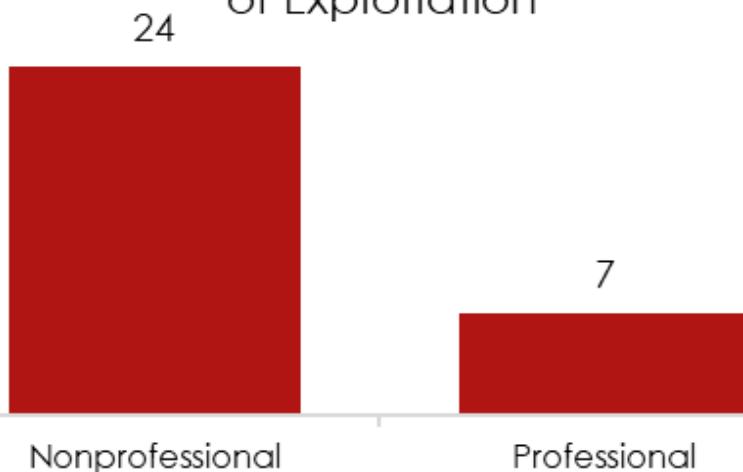
What does exploitation  
by conservators look  
like?

# How big is the problem?

- A study funded by the Office for Victims of Crime (OVC) found that—
  - States do not have the capacity to report the number of conservatorships in which instances of exploitation occur.
  - In many cases of exploitation, the estate was plundered prior to detection of the problem or before authorities with the power to intervene are notified. It is often too little and too late for the victims.

# Characteristics of Exploiters

Type of Conservator in 31 Cases of Exploitation



## OVC Study Component: Exploitation in Minnesota

- N=139 cases in which auditors found "concerns of loss"
- 31 (22%) counted as exploitation (criminal charges, judicial findings of loss, orders for repayment, repayment)
- Only 2 cases (professional conservators) prosecuted



# More from the Minnesota Study

- Half of the victims of conservator exploitation of adults were under the age of 65
- Women were disproportionately more likely to be victims than men
- Judicial discretion was a key factor in determining whether exploitation occurred
- Exploitation is typically addressed by removing the conservator and ordering repayment of misappropriated funds (FEW prosecutions)
- No action taken upon the death of the person under conservatorship

# Exploitation by Professional Conservators

From the OVC study (national review of media stories)—

- Persons were isolated from their families, neglected, and placed in living conditions to which they were unaccustomed.
- Some worked off a profile of vulnerable adults:
  - High caseloads, sizeable estates, dysfunctional families
- Lack of oversight created a “perfect storm.”
- In most cases reported in the media, conservators were not prosecuted.

# Exploitation by Family Conservators

- Sale of house and keeping proceeds or selling “at discount” to family members
- Cash withdrawals
- Purchase of vehicles, even though the person under conservatorship doesn't have a driver's license
- Home repairs by unqualified family members
- Gifts or loans to family (early inheritance)
- Family members move into the person's residence without paying rent or expenses



"There doesn't seem to be a path for anyone to independently verify information from conservators. Once a decision was made to appoint a conservator, [he] lost his voice. His view as to how he was treated could be easily dismissed since he was already judged as incapacitated."

-Interview with reporter from *Roanoke Times* (Virginia)

What can be done  
when exploitation is  
discovered?

# Civil Remedies

## DPA Abuse

- Revoke DPA
- Request accounting
- File lawsuit against agent
- Request court to appoint a guardian or conservator

## Conservator Abuse

- Remove conservator and appoint successor conservator
- Order repayment of funds
  - Personal repayment
  - Bond reimbursement
- Require court approval before taking some financial actions

**Referral to Adult  
Protective Services,  
Law Enforcement,  
Prosecution**

# Criminal Remedies

- Exploitation
- Embezzlement
- Forgery
- Fraud
- Larceny
- Money Laundering
- Theft



What are the challenges  
of holding the exploiter  
criminally responsible?



# What is Criminal?



The **illegal** taking, misuse, or concealment of funds, property, or assets of a **vulnerable** elder.

# What to look for...

- TRANSACTION FACTORS
- VULNERABILITY

# Transaction Factors

- ❑ An assessment of the older person's capacities was not conducted prior to the transfer of assets.
- ❑ The benefits received by the elder are not proportional to the assets or other items given up by that individual.
- ❑ The transaction may not be consistent with the vulnerable adult's belief system.
- ❑ Common business or personal ethics are not followed.
- ❑ Alleged perpetrator does not give consideration of the effects on others.

# Vulnerability “Risk Factors”

Good Health

Rational

Content

Mobile

Independent

Socially connected

Financially secure

Poor Health

Irrational

Depressed

Limited mobility

Dependent

Socially isolated

Financially insecure



DPAs

Conservatorships



Older person is vulnerable  
(lonely, depressed)

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graph TD; A[Older person is vulnerable (lonely, depressed)] --> B[Another person takes advantage]; B --> C[Assets transferred during that period]; C --> D[Older person and/or transaction kept isolated, controlled, secret];
```

Another person takes  
advantage

Assets transferred during that  
period

Older person and/or  
transaction kept isolated,  
controlled, secret

# Arrest & Prosecution Challenges

## Is it illegal?

- Doubt 1: There's a legal document giving someone power to make decisions
- Doubt 2: The older person agreed to the arrangement
- Doubt 3: The older person has dementia and/or poor recall
- Doubt 4: A family member insists he/she is acting at the request of the older person and on their behalf

## Is the older person vulnerable?

- Did person have **capacity** at time of transaction(s)?
- Did the individual give his/her **consent**?
- Was **undue influence** used to persuade the older person to agree to the transaction?

# Common Defenses: Financial Crimes

He gave it to me. He insisted I take it.

Consent

I have power of attorney and am only doing what is best for my dad.

Legal Authority

We are spending down his assets so the he can qualify for Medicaid.

Strategic Spending

Loan

I planned to pay her back real soon.

Ownership

It's my inheritance, and I'll use it when I need it.

*Exploitation, regardless of the presence of a civil legal agreement, is a criminal activity!*



What can you do about  
it?

Poll: Does your community have a FAST or similar team that handles exploitation cases?

# Financial Abuse Specialist Teams

## If YES

- Specifically look for DPA and conservator abuse cases.
- These cases are tough!
- Build your skills and crush assumptions that these cases are civil.

## If NO

- Develop a collaborative team of stakeholders.
- Refer to the [FAST section of the National Center on Elder Abuse website](#).
- Train team that crimes occur in the context of civil legal arrangements.



**Prosecution Guide  
to Effective  
Collaboration  
on Elder Abuse**



**Court Guide  
to Effective  
Collaboration  
on Elder Abuse**





[www.eldersandcourts.org](http://www.eldersandcourts.org)

Thank you!

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[www.elderjustice.gov](http://www.elderjustice.gov)

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# Questions & Suggestions

Suggestions can be emailed to  
**[elder.justice@usdoj.gov](mailto:elder.justice@usdoj.gov)**

