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Written Testimony

Elder Justice Coordinating Council

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“Preventing Elder Financial Exploitation by Fiduciaries”

The Elder Justice Coordinating Council (EJCC) has adopted *Eight Recommendations for Increased Federal Involvement in Addressing Elder Abuse, Neglect and Exploitation*. Recommendation #7 is to “combat elder financial exploitation, including abuse by fiduciaries.” At the first EJCC meeting in October 2012, I presented a series of collaborative federal agency strategies to address financial exploitation by fiduciaries – specifically by representative payees[[1]](#endnote-1) and court-appointed guardians.[[2]](#endnote-2) This paper highlights progress on these strategies in the past four years, as well as possible additional steps.

The paper focuses more on big-picture federal coordination rather than recent or current internal federal agency improvements – emphasizing ways in which federal agencies can work collaboratively with public or private partners, and on federal actions can be mutually reinforcing for greater collective impact. The paper outlines federal agency strategies in: (1) education and training of fiduciaries; (2) coordination of federal representative payee programs and state courts with guardianship jurisdiction; (3) use of trained volunteers as fiduciaries; and (4) oversight of fiduciaries.[[3]](#endnote-3)

The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and should not be construed as representing the policy of the American Bar Association. This paper is drawn from my professional experience where I serve as Assistant Director for the Commission on Law and Aging.

A fiduciary is charged with managing money and property for someone else -- such as an

older person with dementia or an adult with intellectual disabilities -- who is not able to manage it him or herself. Fiduciaries must act according to the highest standards of loyalty, good faith, trustworthiness and honesty.[[4]](#endnote-4) In the real world, fiduciaries may play dual roles, paradoxically serving as both a solution for, and a source of, financial exploitation.[[5]](#endnote-5) While many are dedicated and perform well, some take advantage of their position of trust and confidence – and others simply lack an understanding of their responsibilities.

1. **Education and Training of Fiduciaries.**

Representative payees and guardians -- particularly family members and other non-professionals – may not fully understand their basic responsibilities and do not always know what is expected of them. According to the National Research Council, “payees must understand their duties and responsibilities, including details such as how to keep records, how to deposit benefits into separate accounts, and how to save money.”[[6]](#endnote-6) Guardians must understand similar responsibilities, including prudent asset management, and the requirements for an inventory, accountings to court and elements of a financial plan. Both representative payees and guardians must understand not only the basic precepts of financial management, ethical rules about conflict of interest and confidentiality, and how to find community resources and supportive services, but also how to carry out their duties to best promote the self-determination of those they serve, under principles of supported decision-making.[[7]](#endnote-7)

The Social Security Administration (SSA) and the VA (Department of Veterans Affairs) have taken steps in providing guidance. SSA has a handbook,[[8]](#endnote-8) available online and in print, as well as additional resources for payees.[[9]](#endnote-9) The VA web site has a guide for fiduciaries, and videos on how to complete accountings.[[10]](#endnote-10) However, it appears that payees still need more help. Educating guardians is the work of state courts, and a number of state court offices and local courts have developed handbooks and videos,[[11]](#endnote-11) but additional guidance is needed.

In 2013, the Consumer Financial Protection Bureau (CFPB) published four guides to help non-professional fiduciaries – variously called lay fiduciaries or financial caregivers -- carry out their responsibilities in managing someone else’s money.[[12]](#endnote-12) The series of four plain-language guides, called *Managing Someone Else’s Money,* is targeted at court-appointed guardians of property or conservators, agents under a power of attorney, trustees under a revocable living trust, and representative payees or VA fiduciaries. Each guide explains in easy-to-understand terms the four main responsibilities of a fiduciary: (1) to act in the person’s best interest; (2) to manage money and property carefully; (3) to keep the money and property separate from their own; and (4) to keep good records. All of the guides also have tips on how to spot financial exploitation and avoid scams, as well as resources that can help with their duties.

To date, the CFPB has distributed almost a million guides in hard copy or electronically. Because fiduciary powers and duties, as well as resources, vary by state, the CFPB is releasing specially adapted guides for six states, and already has launched guides for Virginia and Florida. Also, the CFPB has developed tips and templates to help key state professionals adapt the guides for additional states.

**Getting Out the CFPB Guides.** Widespread distribution of the CFPB guides could help curb exploitation. While the guides may not stop someone intent on fraud, they can get across the basic idea that the money you are handling is not your own, and can alert families and professionals to signs of exploitation by fiduciaries.

EJCC agencies have the channels to get the word out. The guides are on both the SSA representative payee web site and the VA fiduciary web site. Through the Administration on Community Living (ACL), the National Adult Protective Services Resource Center, the National Center on Elder Abuse, Older Americans Act legal providers, protection and advocacy agencies, long-term care ombudsman programs, pension counseling projects, and state and area agencies on aging could bring greater visibility to the guides, and well as to related SSA and VA web site resources. Department of Housing and Urban Development (HUD) service coordinators and the Centers for Medicare & Medicaid Services (CMS) insurance counselors are ideally positioned to promote the guides, as is the Department of Justice (DoJ) through its Elder Justice Initiative and other channels.

Federal Support for Guardian Training. While guardian training on financial exploitation is a state responsibility, federal support can reinforce state efforts. For example, the State Justice Institute has provided small grants for state courts to adapt lay fiduciary training curricula under development by the National Center for State Courts. The DoJ Elder Justice Initiative has expressed interest in a national training resource to assist family and other lay guardians, as well as supporters helping an individual in decision-making.

1. **Coordination of Federal Representative Payee Programs and State Courts.[[13]](#endnote-13)**

As detailed in the 2012 statement, representative payment programs frequently are not coordinated with other systems serving the same population, putting vulnerable adults at risk of financial exploitation. In 2004, a Government Accountability Office (GAO) report,

*Guardianships: Collaboration Needed,[[14]](#endnote-14)* found a lack of coordination among state courts handling guardianship, the VA fiduciary program, and the SSA representative payee program. The GAO concluded that “this lack of coordination may leave incapacitated people without the protection of responsible guardianship and representative payees.”

A 2011 GAO report on *Oversight of Federal Fiduciaries[[15]](#endnote-15)* found that gaps in information sharing continued to exist, and recommended disclosure of information by federal agencies to state courts. In 2014, at the request of SSA, the Administrative Conference of the U.S. (ACUS) conducted a survey on state court guardianship practices, and found that: (1) over half of the court respondents reported no interaction with federal agencies; (2) almost two-thirds did not know what percentage of guardians of property also serve as representative payee; and (3) two-thirds of guardian respondents said enhanced coordination or sharing of information with SSA would be beneficial.[[16]](#endnote-16) Consider these situations:

• B was appointed by SSA as representative payee for A. B also petitioned the court to be A’s guardian. The court appointed B, not knowing that B had misused A’s Social Security benefit funds.

* Adult protective services received a report of alleged abuse by guardian B, who was also the SSA representative payee, but APS could get no information on B’s SSA payee performance or record.
* B was appointed by the court as A’s guardian, but C was appointed by SSA as A’s representative payee and by the VA as A’s fiduciary. Neither B nor the court had adequate information about A’s situation to act in his best interest – and each would have had a more complete picture had they shared information.
* B was appointed by the court as A’s guardian and by SSA as A’s representative payee, yet there was no coordination between the court and SSA about B’s separate reports.

SSA has maintained that the federal Privacy Act of 1974[[17]](#endnote-17) limits the sharing of information about beneficiaries and representative payees with courts, adult protective services and the aging network.[[18]](#endnote-18) Amendments to the Act providing an appropriate exception for information sharing to address financial exploitation of both organizational and individual payees would offer welcome communication flexibility. However, short of enacting an amendment to the Privacy Act, there are a number of EJCC agency initiatives underway, as well as additional steps to be taken, as detailed below.

**Exploring Information Exchange.** ACL, SSA, the VA and other agencies have begun to recognize the need for coordination and take action. The 2013 Elder Justice Interagency Working Group list of agency programs and initiatives states that “ACL/AoA has worked collaboratively with the Social Security Administration to improve their representative payee program....Through conversations with SSA and SSA-OIG [SSA Office of the Inspector General] on improving coordination and collaboration between aging networks, APS, and Ombudsman on financial fraud investigations involving representative payees, SSA-OIG agreed to explore opportunities to facilitate information exchange and training for aging and protective service networks.”[[19]](#endnote-19) In a related recognition of the need for coordination, ACL in May 2016 held a “Federal Conversation on Guardianship” bringing together federal agency representatives and guardianship experts and advocates to begin exchange of information on the need to target exploitation and support decision-making by individuals with disabilities.

**The WINGS-Representative Payee Connection**. In 2013 and again in 2015, the State Justice Institute (supplemented by private resources) provided incentive mini-grants to the highest court in a total of nine states to create state Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS). Seven additional states have created similar ongoing court-community partnerships to improve adult guardianship systems and target less restrictive options, and at least three more are in the planning stages. In these 16 states, multidisciplinary entities for problem-solving bring together key stakeholders to formulate and act on strategic plans.[[20]](#endnote-20) ACL has recognized the potential of WINGS in its 2016 Elder Justice Innovation Grant Request for Proposals.[[21]](#endnote-21)

SSA has initiated a structured set of contacts with state WINGS groups by appointing an “SSA WINGS representative” for each of the 16 states. The intent is to enhance coordination between state courts with guardianship jurisdiction and the SSA representative payment program. SSA sponsors a quarterly or periodic conference call with WINGS state coordinators and SSA representatives. In some states, the SSA representatives have given presentations on the SSA representative payment system to WINGS participants. Also, the WINGS-SSA participants have developed a draft set of training slides on the SSA representative payee program for judges and court staff, currently under SSA review.

The VA Fiduciary Program also has designated a “point of contact” for each of the state WINGS.[[22]](#endnote-22) Promoting Promising Court Practices for Coordination. While there may be limits on SSA sharing information under the Privacy Act, there are no such limits on courts, and EJCC might encourage promising court practices including for example:

* Providing newly appointed guardians with information about the representative payee
* program;
* Alerting the local SSA office of appointment of a guardian for an SSA beneficiary;
* Notifying SSA of any changes in the status of a guardian who is also a representative payee, especially removal for exploitation, fraud or other malfeasance; and
* Reporting any suspected exploitation by a guardian who is also a representative payee to the local SSA office, the HHS SSA Office of the Inspector General and local adult protective services. State and local relationships between judges and SSA regional or field offices could help to facilitate these practices. To spur court notification of financial exploitation to SSA, it would be useful to develop a protocol and a form, so judges and court staff might readily and routinely take the needed steps.

**3. Use of Trained Volunteers as Fiduciaries.**

The SSA may not have a sufficient pool of responsible payees for the growing number of beneficiaries unable to manage their own funds - - especially for high risk “unbefriended” beneficiaries who may be homeless, have substance abuse or mental health problems, as well as multiple chronic health conditions. The demands of such beneficiaries are enormous; and crisis situations may force use of payees not well qualified to meet the needs, paving the way for possible exploitation.

Pro Bono Programs. In 2014, SSA launched a Maryland Representative Payee Pro Bono Pilot to expand the pool of suitable payees.[[23]](#endnote-23) Through outreach to local and state legal entities, the project recruited attorneys admitted to the Maryland State Bar Association to serve as representative payees on a pro bono basis. Partnering with the legal community can be a good fit, as attorneys are licensed and held to high ethical standards.

SSA is currently evaluating the Maryland attorney pro bono pilot by studying the experiences of the attorneys and the SSA staff who have participated. SSA plans to use the evaluation to make determinations about any future expansion.[[24]](#endnote-24) Such evaluation might consider:

* The kinds of in-depth training needed for attorneys to serve as payee. Many attorneys have no background in serving in fiduciary roles, and require guidance not only on the representative payee responsibilities, but also ethical standards for fiduciaries, supported decision-making, and community resources.
* The need to clearly distinguish the fiduciary role from the traditional attorney advocacy role, and to clarify this for beneficiaries and the public.[[25]](#endnote-25)
* Partnering with state and local bar associations, especially elder and probate law sections as well as Emeritus Attorney organizations, on recruitment and training.
* Partnering with other qualified professionals and retired professionals such as social workers, accountants, and public administrators.

**4. Oversight of Fiduciaries.**

To protect vulnerable individuals, both representative payees and court-appointed guardians require monitoring and implementation of sanctions[[26]](#endnote-26) for malfeasance. Internally, SSA is in the process of implementing a new representative payee site review program making strategic improvements to better protect beneficiaries. According to SSA, this includes increasing oversight of high-risk payees, conducting more robust reviews, using a trained contractor in the reviews, and increasing the number of reviews annually.[[27]](#endnote-27) However, until recently, there has been no independent third-party review of individual SSA representative payees and less than full review of organizational payees. Outside review by a qualified entity knowledgeable about needs of elders and adults with disabilities can help SSA to better target misuse and abuse.

For guardianships, oversight is by state courts, but monitoring practices vary significantly from state to state, court to court, and judge to judge.[[28]](#endnote-28) Federal agency support for court monitoring could bolster practices to protect individuals subject to guardianship. Third Party Oversight of Selected SSA Organizational Payees. Beginning in 2009, SSA contracted with the National Disability Rights Network -- the national membership and technical assistance/training provider for the federally funded and mandated state Protection & Advocacy (P&A) system – to conduct reviews of selected SSA organizational representative payees.[[29]](#endnote-29) The P&A network not only assisted SSA to identify misuse of beneficiary funds, but also addressed other issues important to beneficiaries in housing, safety, employment, health care, community integration, mental health and other areas. As of June 2016, the total number of reviews completed by NDRN and the P&A network was 4,165, with over 19,700 individual beneficiaries interviewed.[[30]](#endnote-30)

In 2015, SSA expanded the program to include additional review tools and additional organizational reviews, as well as selected individual reviews to get “eyes and ears” on a broader range of payees. The program is currently in the final stages of an RFP process, and it will be critical for SSA to consider skills and background in aging and disability, as well as aging and disability services.

**Possible Volunteer Payee Monitors.** As suggested in 2012, another approach to independent third-party review of payees might be to develop a program of volunteer payee monitors for selected cases. This concept is patterned after the successful model of court-based volunteer guardianship visitor programs originated by AARP and updated by the American Bar Association.[[31]](#endnote-31) SSA offices could select, screen, coordinate, train and supervise a cadre of dedicated volunteers to visit and interview beneficiaries and payees, and report back. SSA could use the volunteer reports to identify red flags where there may be payee problems, and better target follow-up checks.

**APS Perpetrator Data on Fiduciaries.** In developing policy to combat financial exploitation by fiduciaries, it is critical to know the extent to which adult protective services cases involve fiduciaries as perpetrators. In 2012, this was unknown. In 2013, ACL began developing and has piloted a National Adult Maltreatment Reporting System (NAMRS) – a national reporting system based on data from state adult protective services agency information systems. The NAMRS Case Component Data includes a section on “Client Perpetrator Relationship.” This perpetrator relationship data includes a section on “perpetrator substitute decision-making” and lists health and financial agents under powers of attorney, guardian of person, guardian of property, and representative payee. Collection of this data will clarify our picture of fiduciary exploitation and the kinds of cases in which it is occurring – as a platform for action. Federal Support Targeting Conservator Exploitation.[[32]](#endnote-32) While frequently highlighted by media, the actual extent and consequences of conservator (guardian of the property) fraud and financial exploitation is not known. In 2015, the DoJ Office of Victims of Crime funded the National Center for State Courts and partners to assess the scope of fraud and financial exploitation by conservators and convene a national forum to craft recommendations. The project is to identify and document model programs and court processes that proactively address conservator exploitation and suggest changes in policy and practice. One key element of addressing conservator exploitation is how courts can best track cases and flag possible problems for action. The State Justice Institute has provided important support to help courts do this. It has funded the National Center for State Courts to conduct a Conservatorship Accountability Project[[33]](#endnote-33) to develop and test software accounting and tracking tools to identify problematic cases; adapt and pilot the tools in three states; and develop a Conservatorship Accountability Project Network. The potential for progress on this front is substantial.

Conclusion.Collaboration of EJCC agencies has the potential to make a real difference in addressing financial exploitation by fiduciaries. The past four years show significant progress – plain language guides for lay fiduciaries, the beginnings of coordination between SSA and state judicial systems, a pilot pro bono representative payee program, expanded third party oversight of SSA payees, development of a system to collect APS data on perpetrators who are fiduciaries, and federal support for targeting conservator exploitation. Yet there are important additional steps to be taken – steps that call for effective coordination among the participating EJCC entities to get the greatest “bang for the buck.”

1. While this paper focuses primarily on SSA representative payees and VA fiduciaries, other federal agencies – such as the Office of Personnel Management and Railroad Retirement – have similar payee program, as do some state and even private entities. [↑](#endnote-ref-1)
2. In this paper, the generic term “guardianship” refers to guardians of property, frequently called “conservators,”including guardians of both person and property, unless otherwise indicated. [↑](#endnote-ref-2)
3. Kania, J. & Kramer, M., “Collective Impact,” *Stanford Social Innovation Review,* pp. 36 - 41 (Winter 2011). [↑](#endnote-ref-3)
4. *Black’s Law Dictionary,* 2nd Ed., http://thelawdisctionary.org/fiduciary. [↑](#endnote-ref-4)
5. Wood, E., “The Paradox of Adult Guardianship: A Solution To – and A Source For – Elder Abuse,” *Generations,*American Society on Aging, Vol. 36, No. 3, pp. 79 – 82 (Fall 2012). [↑](#endnote-ref-5)
6. National Research Council, *Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse, Executive Summary,* p. 9 (2007). [↑](#endnote-ref-6)
7. National Guardianship Association, *Position Statement on Guardianship, Surrogate Decision-Making and Supported Decision-Making* (2015), http://www.guardianship.org/documents/NGA\_Policy\_Statement\_052016.pdf. Also see National Resource Center for Supported Decision-Making, http://www.supporteddecisionmaking.org *.* [↑](#endnote-ref-7)
8. Social Security Administration, *A Guide for Representative Payees,* SSA Publication No. 05-10076 (July 2015), <https://www.ssa.gov/pubs/EN-05-10076.pdf> [↑](#endnote-ref-8)
9. Social Security Administration, *When People Need Help Managing Their Money* (2015), https://www.ssa.gov/payee. [↑](#endnote-ref-9)
10. U.S. Department of Veterans Affairs, *A Guide for VA Fiduciaries* (2013), http://benefits.va.gov/fiduciary . Wynn, S., Justice in Aging, *Issue Brief: How SSA Can Improve the Representative Payee Program to Protect Vulnerable Seniors* (June 2016). Also see Wynn, S., Justice in Aging, *Fact Sheet: SSA’s Representative Payee.* [↑](#endnote-ref-10)
11. American Bar Association Commission on Law and Aging, “Guardianship Law and Practice,” – List of State Guardianship Handbooks, List of State Guardianship Videos, http://www.americanbar.org/groups/law\_aging/resources/guardianship\_law\_practice.html . [↑](#endnote-ref-11)
12. Consumer Financial Protection Bureau, “CFPB Releases Guides for Managing Someone Else’s Money” (October 23, 2013), http://www.consumerfinance.gov/about-us/newsroom/cfpb-releases-guides-for-managing-someoneelses-money. [↑](#endnote-ref-12)
13. American Bar Association policy approved by the Association’s House of Delegates in August 2013 states: “Resolved, that the American Bar Association urges courts with jurisdiction over adult guardianship and governmental agencies that administer representative payment programs for benefits to collaborate with respect to information sharing, training and education in order to protect vulnerable individuals with fiduciaries who make financial decisions on their behalf.” [↑](#endnote-ref-13)
14. U.S. Government Accountability Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People* (2004) [↑](#endnote-ref-14)
15. U.S. Government Accountability Office, *Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement* (2011). [↑](#endnote-ref-15)
16. Administrative Conference of the United States, *SSA Representative Payee: Survey of State Guardianship Laws and Court Practices* (2014), https://www.acus.gov/sites/default/files/documents/SSA%2520Rep%2520Payee\_State%2520Laws%2520and%252

    0Court%2520Practices\_FINAL.pdf [↑](#endnote-ref-16)
17. Pub.L. 93–579, 88 Stat. 1896, enacted December 31, 1974, 5 U.S.C. § 552a. [↑](#endnote-ref-17)
18. U.S. Government Accountability Office, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People* (2004). [↑](#endnote-ref-18)
19. Elder Justice Interagency Working Group, “Participating Federal Departments and Agencies Mission Statements and Agency Activities Relevant to Elder Justice” (May 2013). [↑](#endnote-ref-19)
20. National Guardianship Network, http://www.nationalguardianshipnetwork.org/NGN/WINGS/Court-Community\_Reform\_Through\_WINGS/NGN/WINGS/Court-Community\_Reform.aspx?hkey=7d32011f-2ac5-461a-9b4a-5636722c4914 . The WINGS effort has been coordinated by the National Guardianship Network and theAmerican Bar Association Commission on Law and Aging. [↑](#endnote-ref-20)
21. Administration for Community Living, Elder Justice Innovation Grants, http://www.grants.gov/web/grants/view-opportunity.html?oppId=283115. [↑](#endnote-ref-21)
22. Email message from VA Fiduciary Program, June 27, 2015, in file with author. [↑](#endnote-ref-22)
23. Truhe, J., “Social Security Seeks Pro Bono Lawyers to Meet Need for Representative Payees,” *Bifocal*, American Bar Association Commission on Law and Aging, Vol., 36, Issue 4 (April 2015). SSA has also initiated a volunteer pilot in Chicago, Illinois. [↑](#endnote-ref-23)
24. Email message from SSA Office of Income Security Programs, September 16, 2016, on file with author. [↑](#endnote-ref-24)
25. Wynn, S., “Ways to Meet the Growing Need for Representative Payees,” Policy Issue Brief, Justice in Aging (2016), <http://www.justiceinaging.org/our-work/economic-security/rep-payee-program>. [↑](#endnote-ref-25)
26. Concerning the Office of Personnel Management payee program, note that in 2015, S. 1576 would have “close[d] a loophole that currently exists in statute whereby the embezzlement or conversion of federal Social Security and Veterans benefits by representative payees is a federal felony but the same embezzlement or conversion of benefits provided to federal retirees through the federal retirement system is not.” Representative Payee Fraud Prevention Act of 2015 (S. 1576) Senate Report 114-95 (July 2015). [↑](#endnote-ref-26)
27. Email message from SSA Office of Income Security Programs, September 16, 2016, on file with author. [↑](#endnote-ref-27)
28. Karp, N. & Wood, E., *Guarding the Guardians: Promising Practices for Court Monitoring*, AARP Public Policy Institute (2007). Also see National Association for Court Management, *Adult Guardianship Guide* (2014),

    https://nacmnet.org/sites/default/files/publications/AdultGuardianshipGuide\_withCover.pdf . Also see Administrative Conference of the United States, *SSA Representative Payee: Survey of State Guardianship Laws and Court Practices* (December 2014). [↑](#endnote-ref-28)
29. Office of the Inspector General, Social Security Administration, “The Social Security Administration’s Oversight of Employer Representative Payees, Congressional Response Report, A-13-10-20125 (2010),

    <http://oig.ssa.gov/sites/default/files/audit/full/html/A-13-10-20125_7.html> [↑](#endnote-ref-29)
30. National Disability Rights Network, *Representative Payee Reviews* (March – June 2016). [↑](#endnote-ref-30)
31. American Bar Association Commission on Law and Aging, *Volunteer Guardianship Monitoring and Assistance:Serving the Court and the Community* (2011), http://ambar.org/VolunteerGrdMonitor . [↑](#endnote-ref-31)
32. In addition to the SJI and DoJ initiatives described, note that in previous sessions, a U.S. Senate bill entitled the Court-Appointed Guardian Accountability and Senior Protection Act would have bolstered state efforts to develop accountability tools such as guardian background checks and court guardianship databases. Elements of the bill are incorporated into S. 3270, the Elder Abuse Prevention and Prosecution Act. [↑](#endnote-ref-32)
33. The National Center for State Courts is partnering with the Virginia Tech Center for Gerontology and the American Bar Association Commission on Law and Aging in the conservator fraud project. [↑](#endnote-ref-33)