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.
REPORT

Introduction. The proposed resolution requests the ABA to support collaboration between state/territorial courts and executive branch representative payment programs for government benefits, to better protect vulnerable individuals with fiduciaries who make financial decisions on their behalf.

The U.S. Government Accountability Office (GAO) has called for such collaboration for nine years, and American Bar Association research pointed out the need long before that. The proposed resolution is timely in that the number of older people and individuals with disabilities in the population is increasing. At the same time, financial exploitation -- including exploitation by fiduciaries – has gained high visibility during the recession.

This report presents background information; describes the need for coordination among key fiduciary systems; summarizes reports and recommendations calling for such coordination; and addresses the lack of relevant Association policy.

Background. Critical to an understanding of the proposed resolution is information about: (1) demographic changes; (2) three fiduciary systems -- state/territorial guardianship systems, the Social Security Representative Payment Program, the VA Fiduciary Program; and (3) the recent rise in financial exploitation.

Demographic Changes. The need for strong fiduciary systems and collaboration among these systems is accentuated by ongoing demographic trends. The older population (age 65+) numbered 40.4 million in 2010; and as the boomers age, it will spiral upwards, reaching 55 million by 2020.\(^1\) The number of “old old,” age 85+ is growing especially rapidly and is expected to reach 6.6 million by 2020.\(^2\) At the same time, Alzheimer’s disease and related dementias are becoming more prevalent. In 2013, an estimated 5.2 million people in the U.S. have Alzheimer’s disease and the number of new cases per year will increase significantly. By 2025, the number of people age 65 and older with Alzheimer’s disease is estimated to reach 7.1 million.\(^3\)

Fiduciary systems also serve a younger population of adults with intellectual disabilities and mental illness. Nearly 30 million families in the U.S. are directly affected


\(^2\) Id.

by a person with intellectual disability at some point in their lifetime.\textsuperscript{4} Additionally, about 1.4 million people in the U.S. sustain a traumatic brain injury each year.\textsuperscript{5} Finally, adults of all ages may experience cognitive impairment due to chronic illnesses and substance abuse.

**Fiduciary Systems.** The proposed resolution concerns three key fiduciary systems in which someone is entrusted to manage property for someone else -- often a vulnerable individual easily at risk for abuse.

(1) **Adult guardianship** is a relationship created by state/territorial law in which a court gives one person or agency (the guardian) the duty and power to make personal and/or property decisions for another (the incapacitated person), when a judge decides an individual lacks capacity to make decisions on his or her own behalf. (State terms vary. Guardians responsible for financial management may be called “conservators,” “guardians of property” or “guardians of the estate.”)

Courts that appoint guardians are responsible for oversight of those guardians. State laws require guardians to submit financial accountings and personal status reports as well. Within the constraints of available resources, courts review the accountings and reports, identify any problems, send out investigators when needed, make modifications in the guardianship and apply guardian sanctions if guardians fail to fulfill their duties or engage in exploitation or abuse.\textsuperscript{6}

There is no data on the number of adults under guardianship in the U.S. However, in 2011 the National Center for State Courts estimated that the number of active, pending cases is between 1.5 million and three million, but could range from fewer than 1 million to more than three million.\textsuperscript{7}

(2) **Social Security Representative Payees.** Social Security's Representative Payment Program provides financial management for the Social Security and SSI payments of beneficiaries who are not able to manage their Social Security or SSI benefits. Close to 5.6 million beneficiaries have representative payees -- including over


\textsuperscript{5} Brain Injury Association of America, http://www.biausa.org/.


3.9 million children and almost 1.6 million adults, of which approximately 700,000 are age 65+.\(^8\) These payees may be family members, other individuals or organizations.

Representative payees must receive the beneficiary’s Social Security funds and use them in the best interest of the beneficiary, paying for current and foreseeable needs. Payees must keep careful records, and submit reports to the Social Security Administration. Representative payees are authorized only to manage the agency benefits, not the person’s other funds.

(3) **VA Fiduciary Program.** The Veterans Fiduciary Program was established to protect Veterans and other beneficiaries who, due to injury, disease, or age, are unable to manage their financial affairs. Usually, the fiduciary is a family member, but in some cases is a paid fiduciary and may be a court-appointed guardian. In the fiscal year 2010, the VA reported approximately $696 million in benefits payments to more than 102,000 beneficiaries with a cumulative estate value of $3.1 billion.\(^9\)

(4) **Other Federal/State/Territorial Representative Payment Programs.** Other federal agencies have representative payment programs as well. For example, the Office of Personnel Management has a system which in 2004 had over 11,000 beneficiaries.\(^10\) Railroad Retirement also has a representative payee system.\(^11\) Some state and territorial agencies have similar programs.

**Rise in Financial Exploitation; Fiduciary Role.** Financial exploitation of vulnerable seniors and other adults unable to manage their financial affairs is a growing concern. The recession has fueled motives for financial malfeasance. A 2011 national study by Metlife, with the Virginia Tech Center for Gerontology and the National Committee for the Prevention of Elder Abuse estimated the annual financial loss by victims of elder financial abuse in the U.S. to be at least $2.9 billion, a 12% increase from 2008 (Metlife Study of Elder Financial Abuse, [http://www.metlife.com/](http://www.metlife.com/)). A 2011 New York state elder abuse prevalence study stated that the highest rate of elder mistreatment in a substantial self-reported prevalence survey occurred for financial exploitation, with a rate of 41 per 1,000 people surveyed.\(^12\) A 2012 Government Accountability Report stated

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\(^8\) Social Security Administration, Office of Retirement and Disability Policy, *Annual Statistical Supplement*, 2012.


\(^12\) Weill Cornell Medical Center, Cornell University, New York City Department for the Aging, *Under the Radar: New York State Elder Abuse Prevalence Study, Final Report* (May 2011),
that financial exploitation of elders “has been described as an epidemic with society-wide repercussions,” and many sources highlight exploitation of adults with disabilities as well.

Federal third party representative payees and court-appointed guardians and conservators fill a role that society calls “fiduciaries” – those entrusted to manage property for someone else, often a vulnerable individual easily at risk for abuse. Fiduciaries are to act according to the highest standards of loyalty, good faith, trustworthiness and honesty. Fiduciaries play dual roles on financial exploitation. First, they stand as a bulwark against it, protecting beneficiary funds. That’s why they were appointed -- to manage and protect the funds of another. But sadly, they sometimes become the perpetrators, despite their fiduciary role. While many perform well, inevitably some take advantage of their position of trust and confidence, misusing or exploiting funds that are to be for the sole use of the beneficiary -- and others simply lack an understanding of their responsibilities.

In 2010, a U.S. Government Accountability Office issued a report on Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors. While the report “could not determine whether allegations of abuse by guardians are widespread,” it identified hundreds of such allegations in 45 states and DC between 1990 and 2010. The GAO examined 20 cases in which criminal or civil penalties resulted, and found significant exploitation of assets. The report showed that in many instances guardians are not sufficiently screened or monitored by the court.

Violations and misuse of funds by Social Security and other representative payees have ranged from high visibility egregious cases to more routine exploitation of benefits, control of funds beyond the benefits, charging of excessive fees, and failure to keep records and submit reports. While misuse and mismanagement is not common, it does occur in the mammoth SSA program. SSA officially reported the amount of misuse in the program as less than 0.01 percent, but a 2007 National Research Council study required by Congress found misuse in 0.2 percent of payees. An egregious 1988 case involving a


14 See for example recent settlement concerning financial exploitation of persons with disabilities at http://www.desmoinesregister.com/article/20120920/NEWS/309200054/Henry-s-Turkey-Service-ordered-pay-men-1-3M.
boarding home operator payee\textsuperscript{18} who abused individuals with disabilities led to an SSA contract with the National Disability Rights Network to have state protection and advocacy agencies review selected organizational payees.\textsuperscript{19}

The VA Office of Inspector General has reported on inappropriate use of beneficiary funds by VA fiduciaries, and cited concerns with VA efforts to safeguard beneficiary assets. In 2010, the Government Accountability Office issued a report on the VA fiduciary program, recommending improved approaches to protecting benefits managed by fiduciaries, including better collection and reporting of misuse data.\textsuperscript{20}

\textbf{Coordination Needed.} Representative payment programs are not coordinated with guardianship systems and other payee systems serving the same population, putting vulnerable adults at risk of financial exploitation. There are several different permutations – for example, one person could serve as both guardian and representative payee for one or more individuals; or an individual could have two or three different people or entities making financial decisions on his or her behalf in different roles.

The U.S. Government Accountability Office (GAO) stated that overlap of federal agency and state court programs “is known to occur among the incapacitated populations they serve, [but] the extent of this overlap is not known. Some state courts and federal agencies share certain information on a case-by-case basis. However, the absence of a systematic means of compiling and exchanging pertinent information may leave many incapacitated people at risk and result in the misuse of benefits and increased federal expense.”\textsuperscript{21} Consider these situations:

\begin{itemize}
  \item B was appointed by SSA as rep 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.
  
  \item Adult protective services received a report of alleged abuse by guardian B, who was also the SSA rep payee, but APS could get no information on B’s rep payee performance or record.
\end{itemize}

\textsuperscript{18} U.S. Senate, Special Committee on Aging, \textit{SSA’s Representative Payee Program: Safeguarding Beneficiaries From Abuse}, Hearing, Serial No. 101-5, p. 2 (June 1989).
\textsuperscript{21} Government Accountability Office, \textit{Guardianships: Collaboration Needed to Protect Incapacitated Elderly People}, p. 22, GAO-04-655 (July 2004). Note that some coordination does take place through the Uniform Veterans Guardianship Act. In states that have adopted this Act, state courts must notify the VA when they appoint a guardian for a veteran, and send copies of court orders and accountings.
• B was appointed by the court as A’s guardian, but C was appointed by SSA as A’s rep 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 rep payee, yet there was no coordination between the court and SSA about B’s separate reports.

In addition to systematic information sharing about specific cases, coordination among SSA field offices, VA regional offices, and state or territorial courts would make it easier to identify trends, develop training, recruit volunteers, and educate the public. For example, coordination could enhance the training of guardians and payees concerning the filing of annual reports.

Reports and Recommendations Urging Coordination. In 1998, the State Justice Institute, with shared funding from the Social Security Administration, funded a grant for the American Bar Association Commission on Legal Problems of the Elderly (now the Commission on Law and Aging) and the ABA Center on Children and the Law “to explore and enhance coordination, communication and mutual assistance between state court systems and the Social Security Administration’s representative payment program.” The project produced a report in 2001 including suggested best practice ideas and a curriculum for courts to advance these goals. For example, the report urged that:

• When investigating guardianship petitions, courts should seek to examine the SSA benefit and representative payment status of the respondent; and should interview any rep payee;

• If a payee exists, courts should consider whether a guardianship is necessary;

• Courts should consider requiring guardians who are rep payees to submit their SSA report along with their guardianship accounting;

• Courts should use SSA offices and field specialists in judicial education; and

• Court leaders should periodically meet with SSA field offices.

In 2004, a GAO report, Guardianships: Collaboration Needed, 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

22 American Bar Association Commission on Legal Problems of the Elderly and Center on Children and the Law, State Guardianship and Representative Payment: Enhancing Coordination of State Courts with the Federal Representative Payment Program (2001).
23 GAO, note 15 supra.
guardianship and representative payees.” The GAO recommended that SSA convene an interagency study group to increase the ability of representative payee programs to protect federal benefit payments from misuse. The GAO recommended that the study group assess the costs and benefits of sharing the identities of common beneficiaries, common fiduciaries and fiduciaries who fail to fulfill their duties. The SSA disagreed with these recommendations, stating that the federal Privacy Act prohibits disclosing such information without individual consent.24

In 2006, the GAO reported that “with few exceptions, courts and federal agencies don’t systematically notify other courts or agencies when they identify someone who is incapacitated, nor do they notify them if they discover that a guardian or a representative payee is abusing the person.” The report noted that “although VA, HHS and OPM indicated their willingness to participate in such a study group, SSA disagreed with this recommendation and its position has not changed. . . .”25

In 2006, the AARP Public Policy Institute and the ABA Commission on Law and Aging convened a “Roundtable on Representative Payees and Guardianship” before the AARP National Policy Council consumer & Housing Committee. The Roundtable included judges, as well as officials from Social Security and the VA Fiduciary Office, in an effort to follow up on the GAO reports.

In 2007, a report by the National Research Council of the National Academies, following a Congressional direction for such a study, found that “state court guardianship and conservatorship programs operate totally independently from the SSA Representative Payee Program even through the program requires any beneficiary who has a guardian or conservator to also have a payee appointed by SSA. In addition, there is no coordination between SSA and state courts for the training of guardians, conservator, and payees regarding the filing of annual reports.”26 Further, the report indicated that “conflicts among federal law, SSA policies, and state practices” could arise when the representative payee and the guardian are not the same person. The report recommended that SSA give preference to existing court-appointed guardians when designating a payee.

A 2011 GAO report on Oversight of Federal Fiduciaries 27 found that gaps in information sharing continued to exist, and recommended disclosure of information by

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24 However, if there is a published statement of “routine use” that permits such disclosure, consent of the individual would not be necessary. 5 U.S.C §552a.
federal agencies to state courts: “It is . . . in the best interest of incapacitated beneficiaries for federal agencies to disclose certain information about these beneficiaries and their fiduciaries to state courts.”

Finally, at the May 2013 meeting of the Elder Justice Coordinating Council established by the Elder Justice Act of 2009, among the nine proposals for increased federal involvement presented was a proposal to “reduce financial exploitation by fiduciaries through enhanced oversight and collaboration among federal and state entities.”

ABA Policy

While the ABA has extensive policy on adult guardianship, it does not fully address needed collaboration among state/territorial courts, the SSA representative payee program and the VA fiduciary program. The most relevant policy, adopted by the Association’s House of Delegates in February 2002 urges that “the Social Security Administration, in the case of organizational representative payees . . . cooperate with state and territorial courts with guardianship, juvenile, or family law jurisdiction, by disclosing to them and member of the immediate family of a Beneficiary, under an appropriate exception to the Privacy Act of 1974 . . . information about representative payees or former representative payees being considered for appointment as guardians. . . .” This policy is an important beginning. However, it is now over ten years old, applies only to organizational payees, fails to encourage courts to initiate the collaboration, and looks only at cooperation in specific individual cases rather than in a larger context of trend identification and education.

ABA policy adopted in August 2002 provides that the court should require guardians to submit, along with their reports and accountings, “any other mandated reports which are the guardian’s responsibility, such as reports to the Social Security Administration or the Department of Veterans Affairs.” While submission of such reports could trigger questions and needed coordination in some cases, it is not a current practice, and would be only one step in a much broader collaborative approach needed.

The ABA in 2012 adopted the standards and recommendations of the 2011 National Guardianship Network’s Third National Guardianship Summit, including recommendations that states develop Working Interdisciplinary Networks of
Guardianship Stakeholders (WINGS) to advance adult guardianship reform and serve as an ongoing problem-solving forum. The recommendations list examples of stakeholders in the guardianship process, but the list does not include regional or local SSA or VA offices. Previous ABA guardianship policy from 1989, 1991 and 2001 also mentions state interdisciplinary networks to improve guardianship, but none specially mention SSA or VA.

While the ABA has extensive policy on adult guardianship, it does not address needed collaboration among state/territorial courts, the SSA representative payee program and the VA fiduciary program.

Respectfully submitted,
David English, Chair
Commission on Law and Aging
August 2013
1. Summary of Resolution.

The proposed resolution urges state and territorial courts with jurisdiction over adult guardianship and federal/state/territorial agencies that administer representative payment programs for government benefits to coordinate in information sharing, training and education to best serve individuals with fiduciary financial decision-makers.

2. Approval by Submitting Entity.

The Commission on Law and Aging approved the proposed policy recommendation on April 19, 2013.

The Resolution is co-sponsored by the Section on Real Property, Trust and Estate Law, the Senior Lawyers Division, the Commission on Disability Rights, and the Commission on Homelessness & Poverty.

3. Has this or a similar recommendation been submitted to the ABA House of Delegates or Board of Governors previously?

No.

4. What existing Association policies are relevant to this recommendation and how would they be affected by its adoption?

The Association has extensive policy on adult guardianship reform, dated August 1987, February 1989, August 1991, February 2000, August 2002, and February 2009. However, none of these policies directly urge the kind of court-agency coordination supported in the proposed resolution. The most relevant policy, adopted by the Association’s House of Delegates in February 2002 urges that “the Social Security Administration, in the case of organizational representative payees . . . cooperate with state and territorial courts with guardianship, juvenile, or family law jurisdiction, by disclosing to them and member of the immediate family of a Beneficiary, under an appropriate exception to the Privacy Act of 1974 . . . information about representative payees or former representative payees being considered for appointment as guardians. . . .” This policy is an important beginning. However, it is now over ten years old, applies only to organizational payees, fails to encourage courts to initiate the collaboration, and looks only at
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5. **What urgency exists which requires action at this meeting of the House?**

The proposed policy is timely in that the number of older people and individuals with disabilities in the population is increasing. At the same time, financial exploitation -- including exploitation by fiduciaries – has gained high visibility during the recession. Lack of collaboration among courts and representative payment agencies leaves vulnerable individuals at risk. The U.S. Government Accountability Office (GAO) has called for such collaboration for nine years, and American Bar Association research pointed out the need long before that. The ABA should have a voice in any upcoming developments. The ABA has played a leadership role in adult guardianship reform for 25 years, and should continue its active involvement.

6. **Status of Legislation.**

No current legislation.

7. **Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates**

Advocacy and support of any proposed legislation in Congress and in state legislatures consistent with the policy; promote collaboration through “Working Interdisciplinary Networks of Guardianship Stakeholders” (WINGS) through the
National Guardianship Network; and work with the Social Security Administration, the VA Fiduciary Office, and the HHS Administration on Community Living.

8. **Cost to the Association.**

None.

9. **Disclosure of Interest.** (If applicable.)

N/A

10. **Referrals.**

The recommendation has been referred to the following ABA entities:

- Standing Committee on Client Protection
- Standing Committee on the Delivery of Legal Services
- Standing Committee on Ethics and Professional Responsibility
- Standing Committee on Government Affairs
- Standing Committee on Lawyers’ Professional Liability
- Standing Committee on Legal aid and Indigent Defendants
- Standing Committee on Medical Professional Liability
- Special Committee on Bioethics and the Law
- Commission on Domestic and Sexual Violence
- Commission on Homelessness and Poverty
- Center on Human Rights
- Commission on Disability Rights
- Center for Human Rights
- Government and Public Sector Lawyers Division
- Section of Administrative Law and Regulatory Practice
- Section of Criminal Law
- Section of Dispute Resolution
- Section of Family Law
- Solo, Small Firm and General Practice Division
- Government and Public Sector Lawyers Division
- Section of Health Law
- Section of Individual Rights and Responsibilities
- The Judicial Division
- Section of Litigation
- Section of Real Property, Probate, and Trust Law – agreed to co-sponsor on 5/04/13
- Section of Science and Technology Law
- Senior Lawyers Division
- Section of State and Local Government Law
- Section of Tort, Trial and Insurance Practice
Young Lawyers Division
Conference of Chief Justices
National Association of Bar Executives
National Legal Aid & Defender Association
National Conference of Bar Presidents
National Association of Attorneys General
National Conference of Bar Presidents
National District Attorneys Association.

11. **Contact Name and Address.** (Prior to the meeting. Please include name, address, telephone number and e-mail address)

Charles Sabatino  
Director  
ABA Commission on Law and Aging  
740 15th Street NW  
Washington DC 20005  
(202) 662-8686  
(202) 390-8447 (cell)  
Charles.sabatino@americanbar.org

12. **Contact Name and Address.** (Who will present to the House? Please include name, address, telephone number, cell phone number and e-mail address)

David English  
Commission Chair  
University of Missouri Columbia Law School  
203 Hulston Hall  
Columbia MO 65211-4300  
573-882-6854  
Cell 573 489 1407  
englishda@missouri.edu
EXECUTIVE SUMMARY

1. **Summary of the Resolution.** The proposed policy urges state and territorial courts with jurisdiction over adult guardianship and executive agencies that administer representative payment programs for government benefits to coordinate information sharing, training and education.

2. **Summary of the Issue that the Resolution Addresses.** State and territorial courts appoint guardians to make decisions for individuals determined to be incapacitated. The Social Security representative payment program provides financial management for Social Security and SSI payments of beneficiaries who are not able to manage their benefits. The Veterans Fiduciary Program was established to protect Veterans and other beneficiaries who, due to injury, disease, or due to age, are unable to manage their financial affairs.

The need for strong fiduciary systems and collaboration among these systems is accentuated by ongoing demographic trends, including increases in the population of older people, as well as adults with dementia, intellectual disabilities, mental illness, substance abuse, and traumatic brain injuries.

Federal third party representative payees and court-appointed guardians fill a role that society calls “fiduciaries” – those entrusted to manage property for someone else, often a vulnerable individual easily at risk for abuse. Yet instances of misuse and exploitation of funds by guardians, representative payees and VA fiduciaries have been identified by the U.S. Governmental Accountability Office and other significant studies. There is a compelling need to protect funds managed by fiduciaries in all three arenas.

Representative payment programs are not coordinated with guardianship systems and other payee systems serving the same population, putting vulnerable adults at risk of financial exploitation. The GAO has urged such coordination for over nine years. The GAO has stated that “the absence of a systematic means of compiling and exchanging pertinent information may leave many incapacitated people at risk and result in the misuse of benefits and increased federal expense.” In addition to systematic information sharing about specific cases, coordination among SSA field offices, VA regional offices, and state courts would make it easier to identify trends, develop training, recruit volunteers, and educate the public.

3. **How the Proposed Policy Position Will Address the Issue.**

While the ABA has extensive policy on adult guardianship, it does not address needed collaboration among state courts, the SSA representative payee program and
the VA fiduciary program. The ABA should have a voice in supporting any proposed legislation in Congress and in state legislatures consistent with the policy, promoting collaboration through state networks, and working with the Social Security Administration, the VA Fiduciary Office, and the HHS Administration on Community Living.

4. Summary of Minority Views

None identified.