

Protecting the Protected

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I. Introduction

The United States population is not as young as it used to be, and this aging trend is accelerating. Between 2006 to 2016, the population of U.S. citizens age 65 and older increased from 37.1 million to 49.2 million and is projected to double to a total of 98 million by 2060. This aging represents 23.5% of the projected U.S. population, (ACL, 2017). Another forecast asserts that by 2035, the U.S. population under the age of 18 will total 76.4 million, while it is estimated that the population 65-years-and-older will reach 78.0 million (U.S. Census, 2018). The elderly population will outnumber children for the first time in the country's history creating a demographic shift that poses a unique set of public challenges when it comes to elderly guardianship and conservatorship.

Guardianship occurs when a judge appoints an individual to care for an elderly person deemed to be mentally and/or physically incapacitated and no longer able to care for themselves. In states such as Michigan, adult guardianship cases are presided over by a probate court judge while guardianship cases for minors are presided over by family courts. All cases observed in this article are of the sole purview of the probate court. Such jurisdiction varies depending on the State. For example, in Nevada all adult guardianship cases are decided in family court. An estimated 1.3 million adults are under guardianship in this country, with as many as 85 percent of them over the age of 65 (Miller, 2018). A guardian is responsible for the personal and physical well-being of the legally incapacitated individual (called a “ward”).¹

A conservator acts as a fiduciary, or person given court authority to be responsible for the assets (estate) of a legally incapacitated individual. In Michigan, an individual under conservatorship is called a “protected person”² (Oakland County Probate Court, 2019). The probate court appoints both guardian and conservator, and it is possible for the same person to serve in both roles. In guardianship situations, a probate court judge transfers all of a ward's rights, such as signing contracts, medical decisions, where to live, and with whom they can associate (through, for example, visits or trips). For adults under conservatorship, a probate court transfers all of the protected person's rights to manage his/her property and financial matters, such as real estate, investment accounts and other types of property that have a financial value. Typically, a family member is appointed. However, where there are no available or appropriate family members, a professional guardian and conservator may be appointed by the judge. The second section of this research will provide more details about this process.

Despite the current laws in place, which vary from state-to-state, exploitation of wards under guardianship and protected persons under conservatorship continues at many levels nationwide (Johnson, 2003). Guardianship and conservatorship exploitation of elderly and developmentally disabled individuals is not new. In 1987, the Associated Press published the results of a year-long, groundbreaking, nationwide investigation into allegations of exploitation of elderly individuals under the U.S. guardianship system. The report concluded that guardianship was “failing many of those it is designed to protect.” (AP, 1987). Since the AP's report, cases have continued to appear over time and in states across the U.S., the most notable being the April Parks and Rebecca Fierle cases in Nevada and Florida, respectively. In both cases, investigations led to the arrest of these two private, professional guardians. In 2018, Parks pled guilty and, the following year, was jailed after 270 cases of exploitation were discovered, representing the most significant guardianship indictment in Nevada's history (Ferrara, 2019). In February 2020, Orlando, Florida-based professional guardian Rebecca Fierle was arrested and charged with “aggravated abuse and neglect of an elderly person.” The charges stemmed from the death of Fierle's 75-year-old

¹ The term “ward” will be used when referring to guardianship issues.

² The term “protected person” will be used when referring to conservator/fiduciary responsibilities.

ward. She had allegedly ordered the capping of his feeding tube and signed a Do Not Resuscitate (DNR) order against both the ward's wishes and those of his family.

Further investigation determined that Fierle had allegedly billed an Orlando hospital four million dollars over ten years for services she provided to 682 wards while allegedly double billing those wards for the same services. These allegations have been denied by Fierle's attorney and the investigation is ongoing (Sentinel, 2020). However, to date, we have not witnessed anything resembling the scale of alleged elderly abuse seen in the Oakland County, Michigan exploitation cases, which may be a result of both its demographic makeup and concentration of wealth in this particular area of Michigan. In 2018, the Michigan State Supreme Court listed a total of 60,712 adults and developmentally disabled individuals under guardianship and 10,912 adults with a conservator (Michigan Courts, 2016). Nearly 7.5 percent of these guardianships, or a total of 4,526, existed in Oakland County, Michigan (Oakland County Probate Court, 2018). More than half of these cases were handled by only four, for-profit entities/individuals assuming the role of professional guardians/conservators and attorneys.

This article focuses on conservatorship malfeasance and discusses possible exploitation through an examination of cases brought before the Oakland County Probate Court in the Detroit, Michigan suburbs. It reviews the different aspects of exploitation, allegedly perpetrated by professional guardians and conservators, with a focus on the financial facets including understated sales of real estate that were, often, executed in as little as five days, as well as other questionable financial decisions, misclassification and or overstatement of legal fees, and Medicaid program enrollment made by the fiduciaries of the protected persons.

A total of 2,278 separate Oakland County Probate Court cases belonging to four professional guardians were investigated over the course of one year. The results provided professional input for the gathered data. The four guardians, who were subjects of the investigation, were each private estate and probate attorneys when they took guardianship/conservatorship cases. At the time, three of the guardians had also been appointed as County Public Administrators. On the same day, the original investigation was published and following outcries from family members of the alleged victims, the Attorney General of Michigan removed the three guardians from their roles as public administrators. Such regulatory action did not appear to treat the problem, but rather the symptoms.

A public administrator (PA) is appointed by the State Public Administrator, who is an individual appointed by the Governor, to act as a personal representative of deceased estates where there is no family or when an impartial fiduciary is needed to handle estates of deceased persons with no heirs. In Michigan, PAs have also served in the role of guardian and/or conservator. When serving as a guardian and conservator appointed by a probate court through an order, these persons perform such roles as private attorneys and not in their capacity as a PA. They are, therefore, not subject to oversight by the State Public Administrator. However, in the past, the actions of PA faced greater scrutiny by the state, whereas the probate-court-appointed guardian/conservator is overseen by the probate court in the county(s) which they serve.

The goal of this study is to create awareness and to better educate the readers about the need for more progressive change in guardianship and conservatorship procedures, compliance, and oversight to protect elderly and developmentally disabled populations. Several recommendations are proposed to reduce the instances of guardianship and/or conservatorship fraud from happening in the future. Such recommendations are not a complete solution but considered the first step to cure the problem and reduce the likelihood from it happening in the future. This problem becomes a more pressing issue, given the significant growth of the elderly population in the U.S.

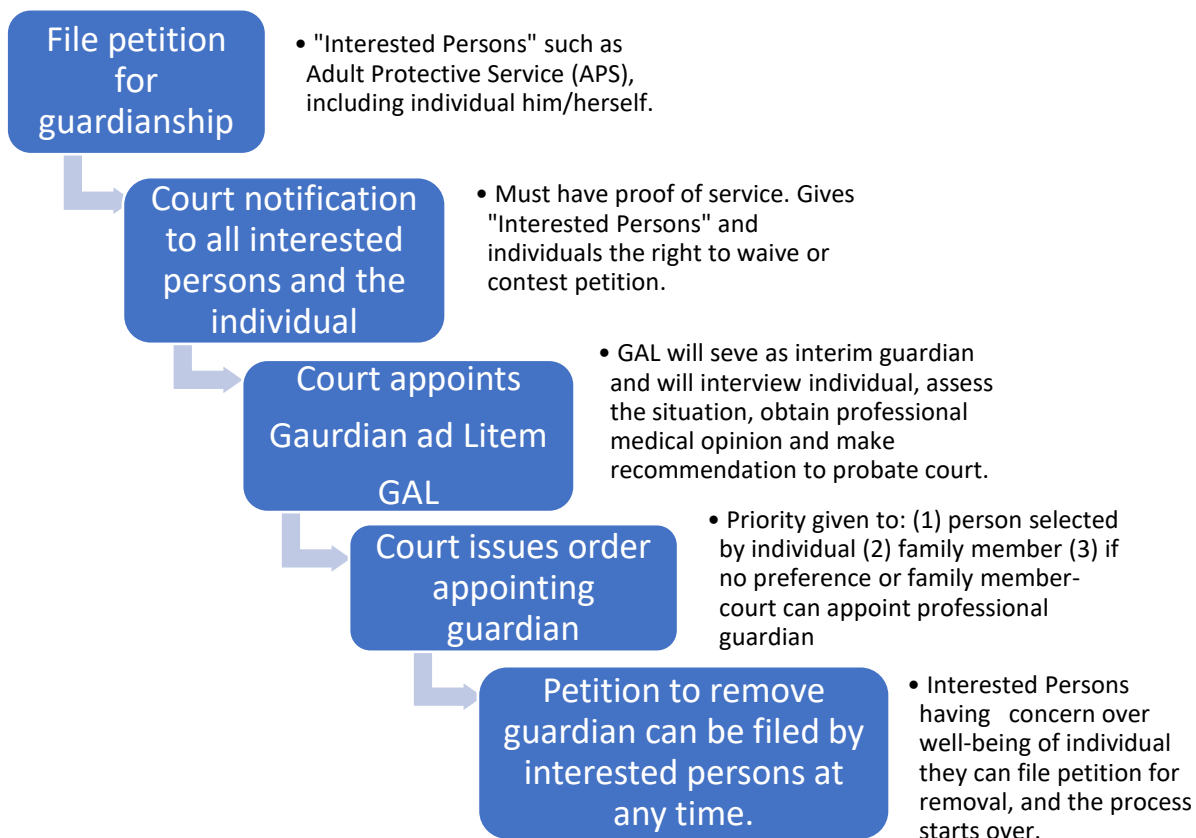
The remainder of the paper is organized as follows: Section II provides the necessary background by reviewing the guardianship and conservatorship process. Section III describes the three main exploitation themes. The last section is comprised of a finding's summary and conclusion.

II. Background

In this section, we provide a brief overview of the guardianship and conservatorship process in order to understand procedural weaknesses and deficiencies that may have created the opportunity for financial exploitation of elderly and developmentally disabled populations in Oakland County. While guardianships and conservatorships are generally similar (in terms of the process as well as case dispensation) across all states, the following section is specific to Michigan (Michigan Judicial Institute, 2020) and provides a general and basic overview in accordance with Michigan law. Figure 1 illustrates the process.

Generally speaking, the guardianship process starts before a conservatorship. For the appointment of a guardian, a petition is filed alleging an individual to be legally incapacitated. The petition can be filed by any interested person or organization acting on behalf of the individual's welfare. The petition must contain specific facts proving that the individual meets the definition of "legally incapacitated." Upon filing, the court must notify the individual and interested parties, such as family members. The notification should include the guardianship hearing date and the option to contest the guardianship. This step is crucial to ensure that the individual or interested parties can exercise the right to waive or contest the petition. A hearing will then be conducted based on the filed petition. Prior to the hearing, the court will appoint a Guardian Ad Litem (GAL) to serve as the individual's representative in the court proceedings. The GAL must interview the proposed ward, physicians, and family to assess his/her/their mental and physical condition and file a recommendation with the court no later than 24 hours before a hearing. In numerous cases, the GAL report and accompanying recommendation is the only evidence offered concerning an individual's capacity.

Figure 1: Guardianships Process



When a proposed ward contests the guardianship, the court will appoint an independent mental health professional to assess the individual. If an individual is deemed by the court to be "legally incapacitated," a guardian is then appointed by court order. A suitable guardian is one who is qualified, willing and able to provide for a ward's care, custody, and control (Michigan Judicial Institute, 2020).

Michigan Court Law (MCL 700.5313[2]) sets forth a prioritized list of who can be appointed as guardian. That list includes family members, holder of a Power of Attorney or a person chosen by the ward. The court can appoint a professional guardian only if no such individuals can be found or are willing to serve (MCL 700.5313[4]). For any guardian, the court requires qualifications such as competency and not being an agent that financially benefits from providing services to the ward.

A conservator is responsible for all finances and decisions regarding the protected person's assets. A conservator will be appointed by the probate court if the court determines an individual is unable to manage his/her financial affairs and personal property and that financial protection is required. Hence the reason why such a person is referred to as a "protected person."

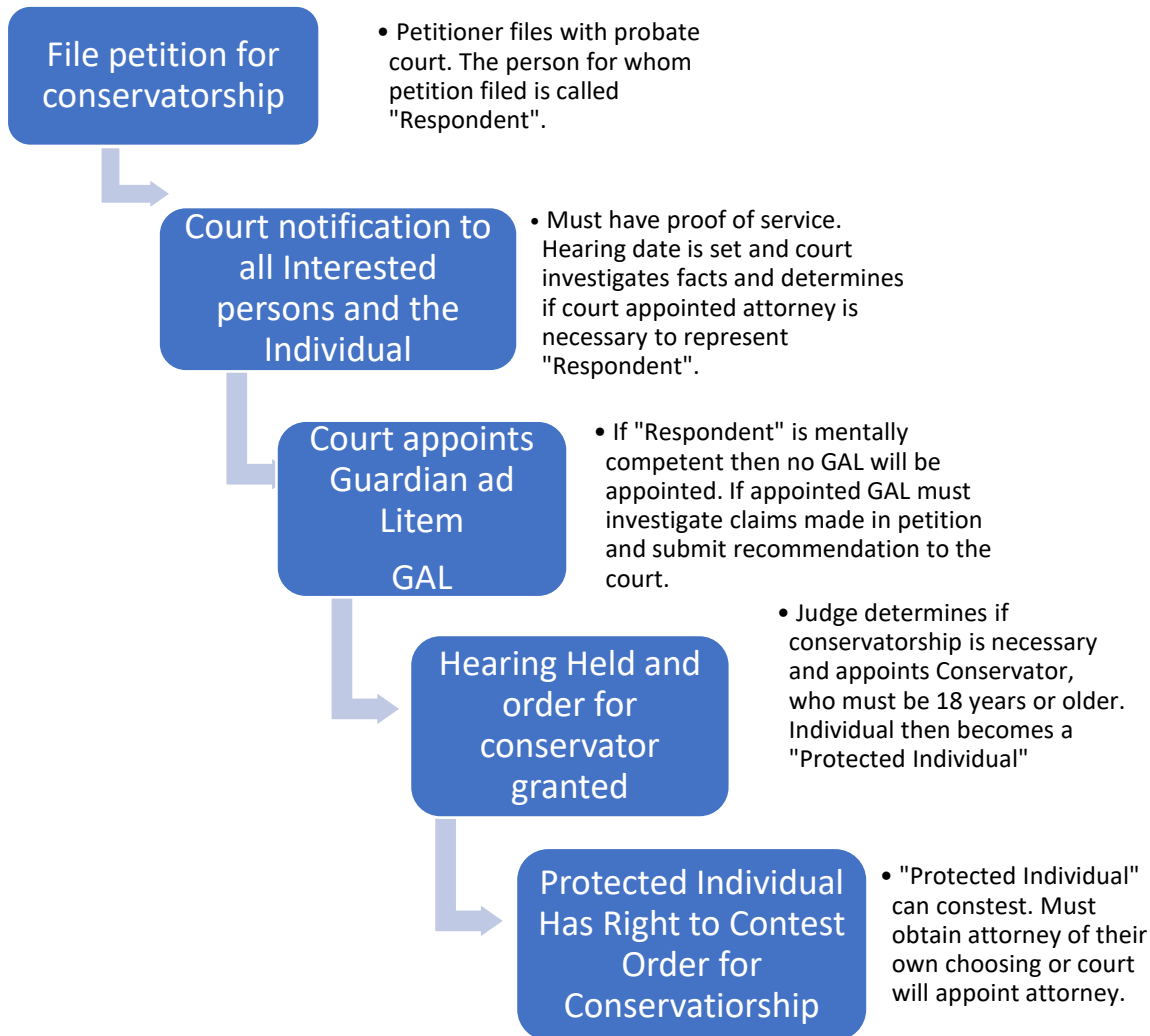
The following individuals may petition the court for conservatorship of a protected person: (1) the person to be protected, (2) a person interested in the individual's estate, or (3) anyone who would be adversely affected by the lack of effective management of the individual's property and business affairs (Michigan Judicial Institute, 2020). The guardian of a ward can petition, or be ordered by the court, to also serve as the protected person's conservator and therefore serve as both the guardian and conservator.

The qualifications to serve as a conservator are quite low; any competent person over age 18 may be a professional conservator (State Bar of Michigan, 2016). A conservator is considered to be a fiduciary, someone who is legally bound to put the protected person's best interests before his or her own. The conservator has full control over the protected person's financial assets and is responsible for all contractual obligations such as real estate and fees for support, maintenance, and education. Figure 2 illustrates the process. Since this article is focused upon the financial facets of fraud and exploitation allegations, or the potential thereof, the discussion is limited to alleged abuses involving conservatorships.

As with guardians, conservators must submit annual reports to the probate court detailing the physical and mental conditions of their protected persons as well as an annual accounting report detailing financial conditions and how a protected person's income and savings were spent.

Guardians and conservators are entitled to reasonable compensation. At least in theory, in approving a conservator's fee, the court will review and consider time spent, professional expertise and required skill, the nature, and complexity of assets, risks assumed, the extent of the responsibilities and risks assumed, and the results of administering the property (State Bar of Michigan, 2016). As part of their duties, conservators are allowed to hire attorneys who are also entitled to reasonable compensation from the protected person's estate. However, legal fees cannot be charged for services that would be considered the duty of a guardian. A guardian, conservator, and attorney may be the same person without any mandate of segregation of duties. Fortunately, the Michigan Court Law states that a fiduciary performing administrative duties cannot receive the rate of compensation as an attorney for professional services (Strander, 2015).

Figure 2: Conservatorships Process



As noted above, if the court cannot find a relative or a friend willing and able to act as a guardian/conservator for an individual, then a professional in the form of a guardianship service company, probate attorney, or County Public Administrator is assigned by the probate court for the protected person. This assignment typically occurs, for example, when an outside agency, such as Adult Protective Services (APS), files a petition for a person that is considered incapable of managing their affairs. A State Public Administrator is appointed by the Governor to represent the interests of deceased individuals in probate cases where the heirs are unknown. To efficiently practice in all 83 counties, the State Public Administrator Act authorizes the appointment of private attorneys in each county to serve on behalf of the State Public Administrator to handle cases for the state on an as-needed basis. While the county public administrators may have additional responsibilities outside of their appointment, their limited responsibility as a public administrator is deceased estates. When such public administrators separately serve as guardians and/or conservators, they do so as private probate or estate attorneys they are not subject to oversight by the State Public Administrator.

Such oversight is provided by the probate court that appointed the guardian/conservator. One tool in the execution of that oversight is the request of probate judge that a conservator be bonded. Bonding is a form of insurance policy designed to protect the assets of an individual under conservatorship against any potential misuse or carelessness and can be purchased through an insurance agent. The amount of the bond is set by the presiding judge and is based on the approximate value of the protected persons assets (Geller, 2012). However, for a bond to work as oversight, a lawsuit against a conservator must be filed and be successful. The bond is used to pay some or all of the resulting judgement against a conservator.

The removal of the guardian and/or conservator is a difficult process (Miller, 2018). To do so requires petitioning the court for removal of the guardian/conservator. The court can remove a conservator for good cause, upon notice and hearing or by accepting a conservator's resignation. The protected person or another interested person can petition for termination of the conservator. The conservator may also choose to resign or petition for a replacement (Michigan Judicial Institute, 2020). However, Michigan statute does not specify activities that fall under "good cause." A 2017 decision by the Michigan Court of Appeals used the dictionary definition whereby "good cause" simply means a satisfactory, sound or valid reason for removal.

In several observed cases, the conservator will consume all available funds of the protected person so that the guardian can file for Medicaid. In Michigan, a guardian is entitled to receive \$83-per-month by Medicaid for managing the process (Michigan Guardianship Association, 2019). But there are only few limitations/controls that may result in potential conflicts of interest between guardians and nursing homes/suppliers.

III. Exploitation Themes

In this section, we discuss the various practices that led to allegations of elder abuse and fraud. This article discusses some practices that were conducted by probate attorneys, appointed as conservators by Oakland County Probate Court judges, into the following major groups: real estate and asset liquidation; legal, guardian and conservator fees; and Medicaid program enrollment. In each group, we discuss actual examples of problematic practices found during the investigation. Specific actions that raised red flags are presented, and an evaluation of the different practices is given to provide suggestions on how to mitigate potential elder abuse and improve the guardianship and conservatorship process.

Real Estate and Asset Liquidation

As illustrated earlier, conservators have court-ordered authority to oversee a protected person's financial matters, and they have a fiduciary responsibility to buy, sell, or exchange assets and act in the protected person's best interest. That did not necessarily happen in Oakland County as the investigation reflected evidence of numerous properties that were sold below fair market value and in a short period of time. In the observed cases below, sales were concluded in as little as five days and a maximum of 17 days. According to data from Zillow (Zillow, 2019), the average market time between listing date and sale date for Oakland County was as high as 90 days and as low as 56 days during the same time period. Such a short period of time raises the question of potential prearranged sales when measured against the average time of listing in the Oakland County real estate market. Furthermore, several houses were sold well above their listing price; for example, in Table 1, house five was listed at 129K and then sold at 175K and at 35 percent higher than the listing price. Table 1 includes individual home sales sample data. The table provides the number of listings, average days on the market, and the percentage difference between the sales price and fair market values at the time of listing. Furthermore, there were 20 homes listed by one PA using only one real estate agent. This situation would not be an issue unless there were concerns of pre-arranged sales and/or conflict of interest. In the data examined, the above-mentioned realtor's wife was an employee in the PA's office at the time the listing and sales occurred.

Michigan law (Michigan Legislature, 1998) requires that conservators shall not sell a protected person's real estate without the approval of the court. They are required to petition the court for the sale of the protected person's real estate, with said petition including a value of the property and a copy of the most recent assessor's statement or tax statement. A probate court judge reviews the petition and orders the petition to be either granted or denied.

The court approved the sales of the homes based on State Equalized Value (SEV), which is calculated for property tax purposes. As documented by public records in the form of these petitions and orders, it was also found that there was no follow-up, by the court, regarding the actual sale price and subsequent resale recording as required by Michigan law. In other words, once the order was granted, there was no further accountability required by the conservator to the court. The effectiveness of this procedure is unknown as there were no recorded cases in this investigation where any conservator was found by an Oakland County probate judge to have acted in bad faith.

Table 1: Sample of Real-Estate Sales³

#	Date Listed	Date Sold	# of days	List Price	Est. Value ⁴	Sale Price	% of understatement
1	9/22/2018	9/27/2018	5	\$139,000.00	\$156,496.00	\$117,000.00	-25%
2	9/22/2018	9/27/2018	5	\$139,000.00	\$156,431.00	\$113,000.00	-28%
3	2/10/2018	2/15/2018	5	\$ 59,900.00	\$124,320.00	\$ 80,985.00	-35%
4	2/15/2018	2/20/2018	5	\$55,000.00	\$100,083.00	\$62,000.00	-38%
5	5/5/2018	5/11/2018	6	\$129,000.00	\$274,903.00	\$175,000.00	-36%
6	12/29/2017	1/5/2018	7	\$149,000.00	\$215,461.00	\$141,500.00	-34%
7	9/21/2018	9/28/2018	7	\$ 80,000.00	\$150,145.00	\$ 80,555.00	-46%
8	9/18/2018	9/26/2018	8	\$ 69,000.00	\$ 95,116.00	\$ 40,000.00	-58%
9	10/22/2018	11/1/2018	9	\$ 80,000.00	\$117,559.00	\$ 90,126.00	-23%
10	10/2/2018	10/12/2018	10	\$ 29,000.00	\$ 35,578.00	\$ 26,500.00	-26%
11	6/14/2018	6/25/2018	11	\$125,000.00	\$230,049.00	\$127,000.00	-45%
12	11/20/2017	12/1/2017	12	\$ 19,900.00	\$ 35,406.00	\$ 18,000.00	-49%
13	6/26/2017	7/8/2017	13	\$119,900.00	\$171,523.00	\$110,000.00	-36%
14	9/21/2018	10/4/2018	13	\$ 75,000.00	\$124,087.00	\$ 77,000.00	-38%
15	5/23/2018	6/6/2018	14	\$120,000.00	\$224,776.00	\$130,000.00	-42%
16	8/5/2018	8/21/2018	16	\$129,000.00	\$203,630.00	\$129,000.00	-37%
17	10/9/2017	10/25/2017	16	\$ 24,900.00	\$ 61,300.00	\$ 25,000.00	-59%
18	8/5/2018	8/22/2018	17	\$ 49,900.00	\$ 69,937.00	\$ 47,000.00	-33%

Giving the conservator Power of Attorney to control a protected person's assets may seem like a practical approach since the court, in theory, requires a third-party independent value appraiser. However, this approach could result in the abuse of a protected persons since the conservator can proceed with the sale using inappropriate appraisal value, such as SEV, and without having to account for the actual sale and subsequent activity.

While it is inefficient to make the court the only authorized party to execute any sale of a protected person's real estate, appointing an independent appraiser to identify the market sales value could be a good safeguard to ensure a better outcome in the sale. Furthermore, the courts would be advised to adopt a process of appraisal report review. Such a review is a common practice in the mortgage industry, and there is no major reason why it cannot be adopted by the probate court. To ensure effective and independent appraisals, a standard similar to the Appraiser Independence Requirements (AIR) must be established and adopted. AIR were developed by Fannie Mae, the Federal Housing Finance Agency (FHFA), Freddie Mac, and key industry participants to avoid appraisers getting pressured by interested parties to adjust their appraisals. To avoid slowing process and burden the court with additional duties of selecting appraisers, a third party can be hired to develop an approved list of all the qualified appraisers in the area, place appraisal orders on a rotating basis, and help to coordinate appointment between the appraiser, realtors and/or conservators. This process may incur additional nominal cost to the protected person's funds, but it is a small sacrifice to safeguard the protected person's assets and execute entitled fiduciary responsibilities. This suggestion is in line with the common practice known as "Segregation of Duties," where multiple parties are involved in approving a financial transaction.

Liquidation transactions were not only restricted to real estate, but also included investments, vehicles, and other non-real estate assets. These transactions suffered from the same pitfalls mentioned above for real estate. Thus, it is recommended that all of non-real estate non-cash assets that have a value of more than a certain threshold to require a court-approved appraiser or referee to assess the property value before a court sanctions the sale. This procedure can be mandated for almost

³ The sales data was obtained from the court records.

⁴ The estimated value was obtained from Zillow at the time of the listing.

all probate cases in a similar fashion to the California Probate Referee system. In California, the State Controller appoints probate referees to “perform reliable, prompt, and low-cost appraisals of estate assets.”

It goes without say that differences in the economic status of counties across the U.S. should be considered, and another value relevant to the concerned county should be used in determining the threshold for requiring the use of a court-approved appraiser. Conservators need to exercise their duties as fiduciaries and exercise judgment like that of a financial planner, rather than as pure liquidators of estates. There must be some accountability and benchmark measurement for actions taken by conservators, even if we do not assume any bad intentions.

Guardian, Conservator, and Attorney Fees

Public administrators who are assigned as guardians and/or conservators receive their fees from the protected individual's assets. Fees may be categorized into three major types: guardian fees that cover day-to-day living expenses, conservator fees that deal with financial matters, and attorney fees that cover services that are deemed necessary and beneficial to the protected person and cannot be otherwise performed by a guardian or conservator (Strander, 2015). Cases were often found where the guardian, conservator, and attorney were one in the same individual(s)/for-profit law firms.

Guardian fees are typically set at the order of appointment. If a protected person receives Veterans benefits, then the annual fee cannot exceed five percent of the individual's income. If the protected person is enrolled in Medicaid, the monthly fee is limited, and currently set by Michigan State Law at \$83.00/month. Furthermore, the Medicaid fee is deducted for the individual's spend-down or patient pay amount owed to the nursing home (Geller, 2012).

A conservator must file an annual Account of Fiduciary, a document necessary to process payments. The court will typically approve the fees for the conservator and a fee schedule for a person serving as both guardian and conservator. Attorney fees must also be approved by the probate court and are to be filed separately from conservator fees (Geller, 2012).

Michigan law is subjective in that it only requires attorney fees to be reasonable. In this situation, and due to the limitation of the first two types of fees, attorney fees have been exploited. This problem appears to be especially true when all three fees were charged by one entity. In other words, some administrative fees were billed as legal fees to avoid court-imposed limitations. This theme represents a classic misclassification fraud.

Such exploitation was evident while reviewing Accounts of Fiduciary and billing invoices. These reports detail the total assets and total expenses of the protected person as well as the bills accrued for services performed (time, amount, and the rate charged). The Accounts of Fiduciary are also supposed to be distributed to all interested parties who have the right to review and contest the report. It was concerning that in many cases reviewed, there were no family members or interested parties in a position to contest the charges, which meant that the court was the only buffer between the for-profit law firms and the protected person. In the cases examined, there were seldom ever questions or inquiries made by the court. In cases where a protected person died while under a court appointed conservatorship, the conservator was made Personal Representative of the estate. Any remaining assets were distributed in accordance with the protected person's Will. In one case, where no Will or heirs were determined, the remaining assets of the deceased protected person were allegedly sent to the Oakland County Missing Legatees Fund. In some states where there are no heirs or will, the protected individual's estate becomes the property of the State.

The investigation reviewed 2,278 cases, 26 of which were reexamined in more detail in order to document how some PAs appeared to exploit the guardian, conservator, and attorney fee structure. The following are a few of these cases:

A) PA 1 filed a six-month Account of Fiduciary that showed total expenses of \$54,367.30. Seventeen percent of the total amount, roughly \$9,245.82, was billed as attorney fees that ranged from \$85.00-per-hour, for work undertaken by a paralegal, to \$245-per-hour for work completed by the PA. This resulted in a higher overall blended rate for services that could fly under the radar. An examination of the individual, daily line-items submitted with the account illustrated a pattern of behavior where numerous activities, that would ordinarily be performed by a conservator, were charged at attorney fee rates. Examples of paralegal rates included, preparing USPS mail forward orders, setting up an-online Medicaid account, returning a phone call regarding an update on discharge, and mailing payment to locksmith. The PA billed the protected person at full attorney rates for activities that included hospital room visitation immediately after being granted conservatorship. This visit is required under Michigan statute (MCL 700.5314) to occur within three months of a guardian/conservator being appointed. However, it is important to note that the appointee is visiting the protected person as a guardian or conservator and not an attorney. In other words,

the conservator, in this case, misclassified guardian and/or conservator fees as attorney fees and showed no documentation or explanation as to the legal aspect of the line items. The guardian, conservator and attorney were one in the same, which raises the potential for fee co-mingling and misappropriation.

B) PA 2 filed an Account of Fiduciary for the period between December 2016 and December 2017. The fiduciary fees totaled \$4,215, and legal fees totaled \$14,602. PA 2's legal fees covered several activities, with some of them being legitimate, that were charged at rates that ranged between \$85-to-\$245-per-hour depending on the level of attorney expertise involved. It was striking that the highest legal rates were related to activities that were not considered legal activities that would have necessitated charging the highest rate. These included attending the protected person's residence for maintenance issues and attending a meeting to withdraw funds from a credit union. Both examples were charged at the highest rate of \$245-per-hour. Once again, the PA was billing at attorney rates for work completed in the capacity of a conservator.

It is worth mentioning that there is no limit as to the number of incapacitated individuals that these entities can represent. As we mentioned earlier, over one-half of the 7,752 cases of guardianship that existed in Oakland County, Michigan alone, were handled by just four, for-profit entities, who most often serve in all three roles as guardian, conservator, and attorney.

The disposition of a protected person's assets, as well as legal and other fees and expenses, appear to have been taken at face value by the court and were not independently verified or tied out in court documentation. There is a lack of transparency, especially when it comes to attorney fees, whereby the for-profit attorney is often the guardian and fiduciary as well. The lack of segregation of duties increases the possibilities of billing fraud and abuse. Closer scrutiny by the court and a redesigned process will help to mitigate misclassification and overcharging of legal fees. This attention is especially important with the lack of family members, or interested parties, supervision.

Medicaid Program Enrollment

Medicaid is a health care program that provides comprehensive health care services to low-income adults and children. According to the American Council on Aging (2020), there are three programs for which senior citizens in the State of Michigan are eligible. The first one is Institutional/Nursing Home Medicaid, which is an entitlement program that is provided only in nursing homes. The second program is Medicaid Waivers/Home and Community-Based Services, which provides services at home, adult daycare, adult foster care, or in an assisted living facility. Both of these programs have a limited number of participants, which means there may be a waitlist for benefits. The third program is called Regular Medicaid/Aged, Blind, and Disabled entitlement meeting the eligibility requirements of which ensures one will receive assistance. It is provided at home or through adult daycare.

In general, for Medicaid eligibility purposes, there are income and asset limitations. Any income that a Medicaid applicant receives is counted. Examples of this income are wages, pension payments, Social Security Disability income, Social Security income, IRA withdrawals, and stock dividends. For the purposes of Medicaid, countable assets include cash, stocks, bonds, investments, savings, and checking accounts, and real estate in which one does not reside. However, many assets are considered exempt or non-countable with some of these exemptions including personal belongings, household furnishings, an automobile, irrevocable burial trusts, and one's primary home, given the Medicaid applicant or his/her spouse lives in the home, and the home is valued under \$595,000 as of 2020.

In the state of Michigan, Medicaid eligibility for single residents who are 65-years of age or older has an income limit of \$2,349-per-month for Institutional/Nursing Home Medicaid and Medicaid Waivers/Home and Community Based Services and an asset limit of \$2,000. The income limit for Regular Medicaid/Aged Blind and Disabled is set at \$1,063-per-month and an asset limit of \$2,000. For those who do not meet the eligibility requirements mentioned above, there are other ways to qualify for Medicaid. For example, if the residents forecasted expenses exceeds income at a rate that will deplete his/her assets, then the income/asset limit may be waived. Protected persons who qualify for a Medicaid program also qualify their guardians, who often times also served in the capacity as conservator to receive additional income.

As a result, and in several cases reviewed, conservators had an incentive to qualify their protected persons for a Medicaid program by using their existing income/asset levels via adjustments that ensured they fell under one of the accepted criteria per the Medicaid program guidelines. In some of the cases that were examined, these adjustments included aggressive measures including, but not limited to, the selling of ward's assets, and overstating their expenses.

Such practice was evident in several cases. For example, an Account of Fiduciary filed for protected person A, listed \$19,551 in income and \$84,372 in expenses. These expenses included \$962 in personal items and clothing, \$1,250 in utilities and a cell phone, as well as \$32,097 in bills paid to the nursing facility. The problem was that the protected person claimed never to have received any clothing and had not owned a cell phone in over two years. Furthermore, the home for which the conservator was still claiming to pay utility bills, had been sold. The billing for the nursing facility occurred while the protected person still had health insurance coverage. There were no receipts provided for the expenses mentioned above.

The need to spend down assets of a ward to become eligible for Medicaid benefits and the huge sums involved in Medicaid payments to nursing home and care facilities opens the door for potential abuses and helps set the stage for the potential of abuse that we explained earlier in the real estate and asset liquidation section. The biggest beneficiaries of Medicaid are the nursing home facilities that are direct recipients of payments. For example, Lasher Hills Care Center in Southfield, Michigan (in Oakland County), received \$23,829,480 in Medicaid payments between 2016 and 2018.

To deal with overstated expenses, a robust and more transparent review system must be established. All expenses should be accompanied by source documents, verified by court staff and interested parties like the protected person's family member whenever applicable.

IV. Concluding Remarks

On March 25, 2019, after meeting with one of the investigators and affected family members, Michigan Attorney General Dana Nessel, announced the creation of an Elder Abuse Task Force partially charged with reforming the administration of Michigan guardianships and conservatorships.

In joining the announcement of the Task Force, Michigan Supreme Court Justice Richard Bernstein acknowledged that the loss of decision-making abilities leaves a ward/protected person at the mercy of their guardian/conservator. "It's not just about your money, it's not just about your finances. They have power over who your friends are going to be. They have power over who you are going to communicate with. When a court decides that you are going to have a guardian, it is the guardian who is solely and exclusive makes those decisions. You are no longer able to live the life that you want to live" (Frost, 2019).

During the March 25 announcement, the Task Force unveiled several initial recommendations in their document titled "Elder Abuse Task Force Initiatives". These recommendations received strong pushback from professional guardians in the form of the Michigan Guardianship Association (MGA)—a group which lobbies for the interests of court-appointed guardians. In an interview with Michigan State Radio, the day after the Task Force was announced, an MGA spokesperson stated "We're saving the state of Michigan hundreds of millions of dollars. We feel like, now, a Task Force is going to micromanage and cast a negative eye towards what we're doing." In response, the Elder Abuse Taskforce invited the MGA to take a prominent role in the crafting of legislative reform.

On October 19, 2019, The Elder Abuse Task Force released a series of updated recommendations. This release has raised concerns among advocates that the presence of organizations like the MGA alongside the Michigan Probate Judges Association and Estate and Probate Section of the Michigan Bar Association on the Taskforce is leading to a similar disappointing outcome of Michigan guardianship reform taskforces established in 1998 and 2005 respectively, both of which included pro-guardianship interest groups in their committees. The two versions of the Elder Abuse Task Force recommendations are listed Appendix 1 and 2. As of this writing, the task force recommendations have not been passed into legislation, but the Attorney General's office, the Michigan State Police, the Michigan Sheriffs' Association, the Michigan Association of Chiefs of Police, and several county prosecutors announced a voluntary statewide implementation of a form called "Standard Investigation Form for Vulnerable Adult Abuse" that is designed to aid in compacting the abuse of protected persons.

Although some may argue that the Elder Abuse Task Force recommendations are a step in the right direction, they are not enough to ensure adequate safeguards against potential exploitation of a protected person's funds and expenses. Both the original and updated Task force recommendations focused mainly on guardian issues and did not address many of the protected person abuses that we discussed in this research. For example, no recommendations were given to ensure that all expenses must be verified by independent court staff, ensure segregation of duties during asset liquidation, inclusion of independent appraisal reports, create transaction limits that trigger additional scrutiny and verification, and strengthen the code of conduct for conservators in a similar fashion to financial planners. To cure the problem, we believe a more in-depth

analysis should be undertaken by the state, with the assistance professional input of fraud examiners and auditors, to provide for a better examination process and a stronger accountability system.

While the need for legally protected persons to be provided with the help they need to make informed decisions is not in dispute, the cases in Michigan, and in many other States nationwide, have demonstrated that the sweeping nature of the rights and powers transferred from that individual to a conservator, have left open the possibilities for abuse and exploitation. At present, these activities are subject to such insufficient controls and oversight that the question remains as to whether a “protected person” is indeed protected.

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Appendix 1: March 2019 Elder Abuse Task Force Recommendations



- ☐ Require professional guardians to become certified (including minimum training, professional standards, bonded).
- ☐ Change the accounting form filed annually requiring the judge to sign an attestation that he/she reviewed it and finds it meets the fiduciary standard.
- ☐ Adopt the standard investigation form for vulnerable adult investigation and include training for law enforcement, prosecutors Adult Protective Service workers and Michigan Commission on Law Enforcement Standards academy.
- ☐ Review the process for emergency petitions for guardianship/conservatorship to require a full hearing with the ward present and medical testimony.
- ☐ Develop statutory basic rights for the family of the ward including notice and the opportunity to file *pro se* motions/documents, visitation, etc. Court to provide written opinions as to reasons a relative is not appropriate for guardian. Task force to review every six months.
- ☐ Review process of guardian removal of the ward from the home. Must present court with written plan exploring all alternatives to removal; review of the sale of the ward's home and appraisal shall be required to accompany any purchase agreement.
- ☐ Limit the number of wards per guardian.
- ☐ Mandate reporting for financial institutions on suspected fraud/exploitation.
- ☐ Help develop local level multi-disciplinary teams.

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Appendix 2: October 2019 Elder Abuse Task Force Recommendations

INITIATIVES UPDATE

Michigan Attorney General Dana Nessel, the Michigan State Police, the Michigan Sheriffs' Association, the Michigan Association of Chiefs of Police, and Midland, Isabella and Kalamazoo County Prosecutors recently announced the voluntary statewide implementation of the [standard investigation form for vulnerable adult abuse](#) to aid law enforcement in conducting such investigations more efficiently. While a form has not been mandated by the state, law enforcement collectively agreed this implementation was necessary statewide to truly combat the abuse of our most vulnerable residents. The use of this form and training modules will be rolled out officially by Nov. 1.

Attorney General Nessel, the Michigan Supreme Court and the entire Elder Abuse Task Force are proud to place a check in the box of one of its initial nine initiatives and are moving full speed ahead to accomplish the rest.

The Task Force has developed a proposed legislative package addressing many of the key task force initiatives, which includes the following statutory changes:

- Professional guardians would need to be certified by the National Guardian Association. This certification requires training, a background check, adherence to a code of ethics, bonding, and continuing education.
- The guardian would be required to file an accounting form whenever the guardian manages property of the ward.
- A family rights form would be available to explain the rights available to interested parties in guardianship and conservatorship proceedings.
- A guardian would not be allowed to prevent visitation with a ward without providing an affidavit with an explanation. The individual blocked from visitation would also have the right to a hearing.
- "Emergency" petitions for guardians would be limited to situations that pose a danger of "imminent and substantial harm."
- A ward could not be removed from his or her home in a non-emergency situation unless a petition was filed with the court explaining why there was no other viable option available to protect the ward, with a right to a hearing.



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