

July 2011

INCAPACITATED ADULTS

Oversight of Federal Fiduciaries and Court- Appointed Guardians Needs Improvement

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Highlights of [GAO-11-678](#), a report to the Chairman, Special Committee on Aging, U.S. Senate

Why GAO Did This Study

If Social Security (SSA), Veterans Affairs (VA), and state courts find that adults are incapacitated, they appoint federal fiduciaries and court-appointed guardians to make decisions on their behalf. Incapacity is often associated with old age, so if these arrangements are not overseen, older adults could be vulnerable to financial exploitation.

This report assesses (1) SSA, VA, and state court procedures for screening potential fiduciaries and guardians; (2) SSA, VA, and state court fiduciary and guardian monitoring; (3) information sharing between SSA and VA and between each agency and state courts; and (4) federal support for court oversight of guardians. GAO interviewed federal and court officials and experts, and reviewed federal laws, regulations, and policies, and others' compilations of state guardianship laws.

What GAO Recommends

The Department of Health and Human Services (HHS) should consider funding evaluations of practices for monitoring guardians, and HHS agreed that the Administration on Aging (AoA) has the authority to take such action.

GAO also believes SSA should determine how it can, under current law, disclose certain information about beneficiaries and fiduciaries to state courts, upon request.

SSA disagreed and asserted that Privacy Act limitations prevent sharing this information with state courts. Given SSA's position, it should take whatever measures necessary to allow it to do so, including proposing legislative changes.

View [GAO-11-678](#) or key components. For more information, contact Kay Brown at (202) 512-7215 or brownke@gao.gov.

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What GAO Found

SSA, VA, and state courts have screening procedures for ensuring that fiduciaries and guardians are suitable. SSA and VA strive to prevent individuals who have misused beneficiaries' payments from serving again, and each is currently developing an automated system that will enhance its ability to compile and maintain information about misuse of benefits by fiduciaries. Similarly, according to the AARP Public Policy Institute, laws in most states require courts to follow certain procedures for screening guardians. However, only 13 states conduct criminal background checks on all potential guardians.

There are also statutes and regulations requiring SSA and VA to monitor fiduciary performance. Fiduciaries in each agency must periodically report on their responsibilities. Similarly, most states require courts to obtain annual reports from guardians. There is evidence that guardianship monitoring by state courts, however, needs improving, and promising practices have been proposed to strengthen it. Given limited resources for monitoring, courts may be reluctant to invest in these practices without evidence of their feasibility and effectiveness from projects designed to evaluate these practices.

Gaps in information sharing may adversely affect incapacitated adults. When VA and SSA have incapacitated beneficiaries in common, sharing certain information about them could enhance each agency's ability to protect the interests of these beneficiaries. While SSA and VA do not systematically share such information, VA can obtain such information from SSA on a case-by-base basis. SSA officials indicated, however, that obtaining similar information from VA may not be cost-effective given the relatively small proportion of SSA beneficiaries who also collect VA benefits. It is also in the best interest of incapacitated beneficiaries for federal agencies to disclose certain information about these beneficiaries and their fiduciaries to state courts. National organizations representing elder law attorneys and advocating for elder rights have noted that courts have difficulty obtaining such information when it is needed, particularly from SSA.

The federal government has a history of funding technical assistance and training related to guardianship for state courts, primarily through the AoA within HHS. In 2008, AoA established the National Legal Resource Center (NLRC) to support improvements in legal assistance for older adults and to support elder rights protections. Among its other projects, NLRC has supported an evaluation of Utah's public guardian program. Because of the federal government's activities in this area, it is well positioned and has an opportunity to lead in ensuring the rights of incapacitated adults with court-appointed guardians by supporting evaluations of promising court monitoring practices.

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Abbreviations

ABA	American Bar Association
AoA	Administration on Aging
DI	Disability Insurance
HHS	Department of Health and Human Services
NLRC	National Legal Resource Center
OAA	Older Americans Act
OASI	Old-Age and Survivors Insurance
SSA	Social Security Administration
SSI	Supplemental Security Income
TCSG	the Center for Social Gerontology
VA	Department of Veterans Affairs

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G A O

Accountability * Integrity * Reliability

United States Government Accountability Office
Washington, DC 20548

July 22, 2011

The Honorable Herb Kohl
Chairman
Special Committee on Aging
United States Senate

Dear Mr. Chairman:

When federal agencies such as the Social Security Administration (SSA) and the Department of Veterans Affairs (VA) determine that an adult receiving cash benefits through one of their programs is incapacitated, they appoint a responsible third party to ensure these payments are used in the beneficiary's best interest. The responsible parties who receive SSA benefits on behalf of incapacitated individuals are known as representative payees, while those who receive VA benefits are known as fiduciaries.¹ Similarly, courts in each state have the authority to appoint a guardian or conservator for individuals the court determines to be incapacitated.² Generally, guardianships are legal relationships created when a state court grants one person or entity the authority and responsibility to make decisions in the best interest of an incapacitated individual concerning his or her person or property.³

Incapacity is often associated with old age, and as of December 2009, 765,771 SSA beneficiaries age 65 or older had fiduciaries—a 7 percent increase since December 2003. As of July 2011, 56,077 VA beneficiaries age 65 or older had fiduciaries—a 21 percent increase since September 2003. Few national data are available on the number of guardians state courts have appointed. As the number and proportion of older adults in

¹In this report, we use the term “fiduciary” to refer to both SSA representative payees and VA fiduciaries.

²In this report, we use the term “guardian” to refer to both guardians and conservators.

³We use the term “incapacitated,” recognizing that federal agencies and states use a variety of terms and somewhat different definitions to assess whether someone is in need of a guardian or representative payee. SSA, for example, assigns a fiduciary to people it has determined are incapable of managing or directing the management of benefit payments. VA uses the term “incompetent” instead of incapacitated. Most states use the term “incapacitated,” but others use “incompetent,” “mentally incompetent,” “disabled,” or “mentally disabled.”

the population increases, so will the demand for federal fiduciaries and court-appointed legal guardians.⁴

Fiduciary and guardianship arrangements are not without risk to incapacitated adults, who are vulnerable to financial exploitation by their fiduciaries and guardians. In a 2010 report, we identified hundreds of allegations of abuse, neglect, and exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010. At that time, we reviewed 20 of these cases and found that guardians had stolen or otherwise improperly obtained \$5.4 million from 158 incapacitated victims, many of whom were older adults.⁵

To protect against such exploitation, federal agencies and state courts generally are responsible for screening proposed fiduciaries and guardians to make sure they appoint suitable individuals to oversee the federal cash benefits and other finances of incapacitated adults. They are also generally responsible for monitoring the performance of those they appoint. This report assesses (1) SSA and VA procedures for screening prospective federal fiduciaries, and state court procedures for screening prospective guardians; (2) SSA and VA monitoring of federal fiduciary performance, and state court monitoring of guardian performance; (3) information sharing between SSA and VA fiduciary programs and between each of these programs and state courts; and (4) federal support for improving state courts' oversight of guardianships.

To obtain this information, we interviewed and contacted officials from SSA, VA, and the Administration on Aging (AoA) in the Department of Health and Human Services (HHS). We also interviewed officials from state courts considered to have noteworthy guardianship programs by the National Center for State Courts and other experts. These included courts in California, Delaware, the District of Columbia, Florida, Minnesota, and Texas. We reviewed relevant federal laws, regulations, and policies regarding SSA and VA fiduciary programs, including written procedures for screening or determining the suitability of proposed fiduciaries and for

⁴ For earlier reports on these topics, see GAO, *Guardianships: Collaboration Needed to Protect Incapacitated Elderly People*, [GAO-04-655](#) (Washington, D.C.: July 13, 2004), and *Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People*, [GAO-06-1086T](#) (Washington, D.C.: Sept. 7, 2006).

⁵ GAO, *Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors*, [GAO-10-1046](#) (Washington, D.C.: Sept. 30, 2010).

monitoring their performance. We also reviewed compilations of state guardianship laws developed by the American Bar Association Commission on Law and Aging and AARP. With regard to information sharing in this area and federal support for improving court guardianship monitoring, we interviewed relevant agency officials and reviewed relevant reports and documents. We did not independently verify implementation of federal laws, regulations, or policies described in this report.

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

Background

Under federal law, SSA⁶ and VA⁷ are authorized to determine whether beneficiaries are capable of managing their own cash benefits and, if not, to designate a responsible third party to serve as their fiduciary. SSA-designated fiduciaries are responsible for ensuring that these benefits are used to pay for beneficiaries' food, clothing, housing, medical care, personal items, and other immediate and reasonably foreseeable needs. Similarly, VA fiduciaries are required to manage VA payments for the use and benefit of veterans. SSA and VA can designate spouses, other family members, friends, and organizations to serve as fiduciaries. If an incapacitated adult already has a guardian appointed by a court, SSA and VA may designate that guardian as the beneficiary's fiduciary. Qualified organizations that serve as SSA fiduciaries may receive a fee for this service if they represent at least five beneficiaries and are not a creditor

⁶SSA administers the Old-Age and Survivors Insurance (OASI) and Disability Insurance (DI) cash benefit programs. OASI provides monthly payments to eligible retired workers and their families and to survivors of deceased workers. DI provides monthly payments to eligible workers with disabilities and their families. SSA also administers the Supplemental Security Income program (SSI), a federal cash assistance program that guarantees a minimum level of income for eligible needy aged, blind, and disabled individuals.

⁷VA administers its disability compensation and pension programs. Disability compensation is paid monthly to eligible veterans with service-connected injuries or diseases. VA pension benefits are paid monthly to eligible wartime veterans who have limited or no income and are over 65, or are permanently and totally disabled.

of the beneficiary.⁸ VA-designated fiduciaries, excluding those who are dependents or other close family members, may receive a fee for serving as a fiduciary, if VA determines that a commission is necessary to obtain fiduciary services.⁹ SSA and VA fiduciaries permitted to receive fees obtain them from the incapacitated person's funds.

In general, state courts appoint a guardian for adults when a judge or other court official determines that an adult lacks the capacity to make important decisions regarding his or her own life or property. Depending on the incapacitated person's needs, a court can appoint a single guardian who is responsible for making all decisions for the incapacitated person. A court can also appoint either a "guardian of the estate" who makes decisions regarding the incapacitated person's property and/or a "guardian of the person" who makes all other decisions. Courts can appoint a private professional guardian or private organization if an incapacitated adult's income and assets can cover their fee.¹⁰ Otherwise courts must turn to publicly funded individuals or organizations, or unpaid volunteers.

When state courts appoint guardians, incapacitated adults often forfeit some or all of their civil liberties; under SSA and VA programs, they do not. Depending on the terms of the court's guardianship appointment, they may no longer have the right to sign contracts, vote, marry or divorce, buy or sell real estate, decide where to live, or make decisions about their own health care.

Two key federal statutes play an important role in establishing the federal government's role and responsibilities with regard to the well-being and rights of older adults, including those for whom a court has appointed a guardian—the Older Americans Act of 1965 (OAA), as amended¹¹ and

⁸Only state or local government agencies or community-based nonprofit social service agencies bonded and licensed by the state (if licensing is available in the state), that have SSA's prior approval, can receive a fee for serving as an incapacitated beneficiary's fiduciary.

⁹Court-appointed guardians receiving fees for guardianship services that VA selects as fiduciaries may not collect additional VA fiduciary fees.

¹⁰Professional guardians typically serve as guardian for more than one client at a time. They can work independently or be a part of an organization such as a private guardianship agency or a financial institution.

¹¹42 U.S.C. § 3001 et seq.

the Elder Justice Act of 2009.¹² The OAA created the AoA within HHS. Among other responsibilities, AoA administers formula grants made to state agencies on aging for elder abuse awareness and prevention activities. The act also requires AoA to develop objectives, priorities, policy, and a long-term plan for facilitating the development, implementation, and continuous improvement of a coordinated, multidisciplinary elder justice system in the United States.¹³ The recent passage of the Elder Justice Act reaffirmed the role of the federal government in this area. The act created the Elder Justice Coordinating Council, made up of representatives from the Departments of Health and Human Services and Justice, and other relevant federal departments and agencies. The council is charged with making recommendations to the Secretary of Health and Human Services for the coordination of elder justice activities across the federal government. It is also required to make recommendations to the Congress for additional legislation or other actions it determines to be appropriate in this area. The act requires the council to report to the Congress no later than 2 years after enactment and every 2 years thereafter.

SSA, VA, and Some States Take Steps to Screen Fiduciaries or Guardians

Both SSA and VA are required by law to investigate potential fiduciaries before they are designated to ensure they are suitable, and certain types of individuals are prohibited from serving as fiduciaries, with the SSA statute being more proscriptive in this regard. For example, persons convicted of an offense that resulted in imprisonment for more than 1 year cannot serve as SSA or VA fiduciaries unless the agencies determine that an exception is appropriate.¹⁴ However, while the SSA statute prohibits former fiduciaries who have misused benefits from serving again, unless SSA determines that an exception is in the best interest of the beneficiary,¹⁵ we could find no explicit statutory or regulatory provisions

¹²Pub. L. No. 111-148, tit. VI, subtit. H, §§ 6701 – 6703, 124 Stat. 119, 782-804 (2010) (to be codified at 42 U.S.C. §§ 1320b-25, 1395i-3a, and 1397j - 1397m-5).

¹³The OAA defines elder justice as “efforts to prevent, detect, treat, intervene in, and respond to elder abuse, neglect, and exploitation and to protect older individuals with diminished capacity while maximizing their autonomy; and the recognition of the [older] individual’s rights, including the right to be free of abuse, neglect, and exploitation.” 42 U.S.C. § 3002(17).

¹⁴42 U.S.C. §§ 405(j)(2)(C)(i)(IV) and 1383(a)(2)(B)(iii)(IV).

¹⁵42 U.S.C. § 405(j)(2)(C)(ii) and 1383(a)(2)(B)(iv).

prohibiting these individuals from being designated a VA fiduciary. A VA official told us that, in practice, the agency does not designate individuals with a known history of misuse, although we did not independently verify this.

Enhancements SSA and VA plan to make in their automated systems could help them better screen potential fiduciaries to ensure that prior fiduciaries who have misused cash benefits are not designated again. SSA is required by statute to establish and maintain a centralized file, which includes the names and Social Security numbers of representative payees whose certification of payments of benefits has been revoked or to whom payment of benefits has been terminated on or after January 1, 1991, because of misuse of those benefits. SSA is required to periodically update that file and maintain it in a form retrievable by each SSA servicing office.¹⁶ According to SSA officials, the agency currently has such a file. SSA officials told us they are enhancing their automated system to better track and maintain information for each fiduciary suspected of misusing a beneficiary's payments from the initial allegation through final resolution. SSA officials indicated that the first phase of these enhancements is expected to be completed in July 2011.

Similarly, VA is required by law to annually report the number of former fiduciaries who have misused benefits and other information regarding these cases, and includes this information in its annual Veterans Benefits Report to the Congress.¹⁷ However, VA officials told us that when screening potential fiduciaries, field office staff must rely on individual lists they compile of former fiduciaries in their jurisdiction who have misused payments, and field offices do not systematically share their lists with one another. Consequently, a field office might unknowingly designate a fiduciary that another field office has identified as having misused payments to a beneficiary. VA officials indicated, however, that they are in the process of updating their case management system, and it will eventually contain nationwide information on fiduciary misuse that will be accessible to all field offices.¹⁸ VA officials told us that their new system

¹⁶42 U.S.C § 405(j)(2)(B)(ii).

¹⁷38 U.S.C. § 5510(5)-(7).

¹⁸See GAO, *VA's Fiduciary Program: Improved Compliance and Policies Could Better Safeguard Veterans' Benefits*, [GAO-10-241](#) (Washington, D.C.: February 26, 2010).

was a priority and they anticipate it will begin providing data on fiduciary misuse in 2012.

Regarding the courts, according to the 2011 AARP Public Policy Institute compilation of state guardianship laws, most states restrict who is eligible to be a guardian.¹⁹ In 9 states, laws prohibit convicted felons from serving as guardians, and 2 states have laws that prohibit convicted criminals from doing so. Only 13 states require that guardians undergo independent criminal background checks before being appointed.

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

SSA and VA have similar procedures for monitoring fiduciary performance. In addition, SSA is required by law to establish a system of accountability monitoring that includes a requirement for periodic reports from fiduciaries.²⁰ Certain SSA organizational fiduciaries and individuals serving as a fiduciary for 15 or more beneficiaries are subject to periodic on-site review.²¹

VA requires its fiduciaries to submit a two-page accounting report, but asks those who are court-appointed guardians to submit the same accountings that they submit to the court. All fiduciary accountings submitted are required to include documents from financial institutions, such as bank statements, covering the entire accounting period. VA is required to conduct periodic on-site reviews of institutional fiduciaries who oversee more than 20 beneficiaries with combined benefits of at least \$50,000.²² VA also conducts periodic site visits with incapacitated beneficiaries to reevaluate their condition and determine if their payments have been properly used by their fiduciary. In 2010 we reported that the first routine follow-up visit generally takes place 1 year after a fiduciary is selected, and subsequent visits typically take place every 1 to 3 years.²³

¹⁹The AARP Public Policy Institute was created to inform and stimulate public debate on the issues related to aging and to promote development of sound, creative policies to address the common need for economic security, health care, and quality of life.

²⁰42 U.S.C. §§ 405(j)(3)(A) and 1383(a)(2)(C).

²¹42 U.S.C. §§ 405(j)(6)(A) and 1383(a)(2)(G)(i).

²²38 U.S.C. § 5508.

²³[GAO-10-241](#). Unscheduled reviews may also be conducted as needed. During on-site reviews, staff are required to examine the financial records of multiple beneficiaries concurrently and examine any questionable expenses.

VA generally requires staff to obtain yearly financial reports and bank statements from some fiduciaries to determine how beneficiary funds were used.²⁴

Most states require court-appointed guardians to be monitored, but specific requirements vary by state. According to the 2007 AARP report, many have only limited resources to devote to monitoring, however.²⁵ The American Bar Association (ABA) Commission on Law and Aging²⁶ compilation of state guardianship monitoring laws indicates that most states require courts to monitor guardianships by obtaining an annual report from each guardian on the incapacitated individual's condition, among other things.²⁷ In some states, court investigators may visit guardians and their wards either regularly or on an as-needed basis.

The AARP Public Policy Institute has emphasized the importance of monitoring guardians and the need for improvement in this area.²⁸ To promote improvement, the institute conducted an in-depth study that identified nine promising current and emerging practices to strengthen

²⁴VA requires financial reports from fiduciaries who oversee beneficiary estates of \$10,000 or more, who are also the beneficiary's guardian appointed by a court, who are authorized to collect a fee, who oversee estates of beneficiaries who receive the maximum disability payment possible, who are appointed temporarily, or in other situations. Exceptions to this requirement can include fiduciaries who are spouses and chief officers of federal institutions.

²⁵AARP Public Policy Institute. *Guarding the Guardians: Promising Practices for Court Monitoring*. Washington, D.C.: 2007.

²⁶The ABA Commission on Law and Aging was created to strengthen and secure the legal rights, dignity, autonomy, quality of life, and quality of care of elders. It carries out this mission through research, policy development, technical assistance, advocacy, education, and training.

²⁷See "Monitoring Following Guardianship Proceedings (as of December 31st, 2009)" at http://www.americanbar.org/groups/law_aging/resources/guardianship_law_practice.html.

²⁸AARP, *Guarding the Guardians*.

court monitoring (see table 1).²⁹ According to one AARP Public Policy Institute official, little has been done to evaluate these practices, however.

Table 1: Promising Practices for Court Monitoring

Promising practice	Description
Reports, accounts, and plans	Requiring early first reports to ensure the guardian is on track, providing clear and web-accessible forms, and requiring prospective plans for personal decisions and estate management.
Court actions to facilitate reporting	Courts should provide ample support for guardians while rigorously enforcing reporting responsibilities. E-filing, personal instruction by judges and staff, automated reminder notices, and scheduling compliance conferences all can help.
Practices to protect assets	To ensure that guardians properly manage finances and to prevent financial abuse, courts can require a financial management plan, require supporting documentation with accountings, and use bonding and restricted accounts.
Court review of reports and accounts	Reports and accounts are of little use if courts do not review them and respond to irregularities. Courts can use staff auditors and state administrative agencies to conduct a baseline review, and could perform more in-depth review in a random sample of cases.
Investigation, verification, and sanctions	Someone needs to visit the incapacitated person, and it can be a trained staff investigator, a trained volunteer monitor, or a court-appointed attorney or investigator. Sanctions such as fines, removal, and calling in bonds address malfeasance.
Database and other technology	Use of technology, such as an e-filing system with automatic capacity to flag problems, may be the most important trend for monitoring in an age when funds for staff are scarce.
Court links with community groups and government agencies	Working with community resources and agencies like adult protective services and long-term care ombudsmen can leverage training resources, enhance volunteer monitoring, and extend the court's reach.
Guardian training and assistance	Court handbooks, videos, and other resources for guardians, as well as required training for professional fiduciaries, are promising tools.
Funding for monitoring	Ideas for bolstering resources include dedicating filing and investigation fees to monitoring, using volunteers well, raising the awareness of county councils, and doing "things that do not cost a dime."

Source: AARP Public Policy Institute. *Guarding the Guardians: Promising Practices for Court Monitoring*.

These practices have received attention from national organizations in the guardianship community, and courts are beginning to integrate some into their monitoring efforts. According to an official from the National Center

²⁹This AARP study consisted of site visits to four courts with what AARP considered to be exemplary monitoring practices, telephone interviews with two courts testing new technologies for monitoring, and a symposium of guardianship experts, including judges, court monitoring staff, elder law and mental health attorneys, and representatives from the National Center for State Courts, the Conference of State Court Administrators, and the National Guardianship Association.

for State Courts, the National College of Probate Judges is considering incorporating versions of these practices into the update of National Probate Court Standards. In addition, national organizations in the guardianship community are disseminating these practices via their websites as a resource to courts and others, and some have been adopted in certain locations. For example, courts with limited funding have demonstrated their commitment to strengthen monitoring by “bolstering resources.” Officials from Delaware, the District of Columbia, and Texas said that their states have recruited volunteers to help oversee guardians. Officials from Delaware told us these volunteers serve as liaisons between guardians and the courts, visit guardians and wards, and report to court officials approximately once every 6 months. In addition, an official from the AARP Public Policy Institute told us one court in Minnesota has adopted a system that allows guardians to e-file their accounting reports, that New Mexico passed a law requiring newly appointed guardians to file their initial report in 90 days instead of a year, and that Nebraska passed similar legislation, as well as a requirement that most guardians overseeing assets exceeding \$10,000 be bonded.

Although it appears courts are beginning to adopt promising monitoring practices aimed at improving oversight of guardians, limited resources for monitoring may prevent many courts from adopting most of them. The AARP Public Policy Institute reported in 2007 that sufficient resources to fund staff, technology, training, and materials are needed to effectively monitor guardians, and institute officials told us that judges and court administrators would like to improve guardianship monitoring. In our 2004 survey of selected state courts in California, New York, and Florida, however, most indicated they did not have sufficient funds to oversee guardianships.³⁰ Given the courts’ limited resources, an official from the Public Policy Institute observed that evaluations of promising practices aimed at establishing their feasibility or effectiveness could encourage courts to invest in practices that could improve their monitoring practices.

³⁰We surveyed California superior courts in each of California’s 58 counties, circuit courts in each of Florida’s 67 counties, and courts in each of New York’s 12 judicial districts. We received usable survey responses from 42 California courts, 55 Florida courts, and 9 of New York’s judicial districts for response rates of 72 percent, 82 percent, and 75 percent, respectively.

Information Sharing among Federal Fiduciary Programs and State Courts Could Improve Protection of Incapacitated Adults

Federal officials have long recognized the need for better exchange of information between federal fiduciary programs, particularly when they have beneficiaries in common. In addition, a study of SSA's fiduciary program by the National Research Council emphasized the importance of information sharing between SSA and state courts. Sharing certain information about beneficiaries and fiduciaries could enhance, for example, both SSA's and VA's ability to protect the interests of their incapacitated beneficiaries. According to agency officials, however, SSA and VA fiduciary programs do not systematically share such information. VA does have access to this information from SSA, but only on a case-by-case basis, and SSA officials indicated that obtaining such information from VA may not be cost-effective considering the relatively few SSA beneficiaries who also collect VA cash benefits. SSA officials also told us they believe that the Privacy Act places some limitations on their ability to share their fiduciary program information with state courts that appoint guardians.

Information Sharing between SSA and VA

In 2004, we reported that federal officials have long recognized the need for better exchange of information between federal fiduciary programs, particularly when they have beneficiaries in common.³¹ To improve the ability of these programs to adequately protect the interests of incapacitated adults, we recommended that SSA convene an interagency study group, consisting of representatives from various federal fiduciary programs, to assess the cost and benefit of sharing:

1. the identities of beneficiaries federal agencies have in common and have determined to be incapacitated,
2. the identities of fiduciaries federal agencies designate for beneficiaries they have in common, and
3. the identities of fiduciaries who fail to fulfill their duties for beneficiaries federal agencies have in common.

While VA indicated its willingness to participate in this study group, SSA indicated that leading such a group was beyond its purview. In the absence of action by SSA in response to our 2004 recommendation, VA has taken steps to promote information sharing by convening an interagency working group consisting of VA officials and representatives

³¹[GAO-04-655](#).

from SSA, the Office of Personnel Management, and the Department of Defense.³² This working group first met in January 2011 and plans to continue meeting on a quarterly basis. The group identified areas for improvement during the first meeting, including the need for more data sharing—for example, on fiduciaries in each agency who have misused benefit payments—and better alignment between different agencies' processes and procedures.

Although the Privacy Act generally prohibits an agency from disclosing information from a system of records without the consent of the individual to whom the record pertains, an agency may disclose such information without consent if there is a published statement of routine use that permits this disclosure.³³ SSA officials told us that the agency has routine use provisions for multiple SSA systems of records that support SSA/VA data exchanges and that there is a current data exchange agreement between SSA and VA. In accord with this agreement, VA can directly query an SSA automated system on a case-by-case basis to obtain information about individual SSA beneficiaries. This information includes whether or not SSA has determined that the beneficiary is incapacitated and, if so, the identity of that beneficiary's SSA fiduciary, the date of the fiduciary's appointment, and contact information for the fiduciary.

Under this data exchange agreement, VA is not able to determine if a specific person has ever been appointed an SSA fiduciary or, if so, whether that person has ever misused SSA benefits or had his or her fiduciary responsibilities revoked by SSA. A VA field office may request this information from a local SSA office on a case-by-case basis, and SSA policy describes how such requests should be made and how SSA should respond to them.

³²The Office of Personnel Management administers the fiduciary program for recipients of federal retirement benefits. The Department of Defense administers the fiduciary program for military retirement recipients.

³³The Privacy Act applies to personal information under the control of an agency that is maintained in a system of records, which is any group of personal information that is retrieved by the name of the individual or other identifier. Under the Privacy Act, each agency that maintains a system of records must publish a notice describing that system and include a statement of routine uses of those records, including the categories of the uses and the purpose of use. A routine use of a system of records must be compatible with the purpose for which the record was collected. 5 U.S.C. § 552a.

According to SSA officials, the agency does not routinely request the same type of information from VA, however, and the VA data exchange agreement does not allow SSA to access information from any VA record systems. While it is very common for VA beneficiaries to also collect SSA benefits, it is less common for SSA beneficiaries to also collect VA benefits. Consequently, SSA officials indicated that it may not be cost-effective for SSA to systematically check VA fiduciary program information when it designates SSA fiduciaries. Moreover, there are no requirements for either SSA or VA to systematically notify the other when one of their fiduciaries has misused cash benefits.³⁴ SSA policy, however, is to share that information on a case-by-case basis if requested by VA.

Information Sharing between Federal Fiduciary Programs and State Courts

With regard to state courts' access to SSA beneficiary and fiduciary information, officials from two national organizations representing elder law attorneys and advocating for elder rights, respectively, told us it is difficult for state courts to obtain this information from SSA when it is needed. Moreover, the 2007 National Research Council report on the SSA fiduciary program emphasized the importance of information sharing between SSA and the courts.³⁵ This report went on to say that "conflicts among federal law, SSA policies, and state practices" could arise when an incapacitated adult's SSA-designated fiduciary and his or her court-appointed guardian are not the same person. Because the accounting requirements and other rules that apply to SSA fiduciaries are likely to be different from those that apply to court-appointed guardians, the report further noted that "violation of Social Security Administration rules, inefficiencies and inaccuracies in reporting, delays in payee selection, and duplication of effort" could also result. In light of these findings, the report recommended that SSA give preference to existing legal guardians when designating a fiduciary. SSA regulations indicate that existing guardians, if known, should be given preference when SSA designates a fiduciary.³⁶ According to SSA officials, however, existing guardians are

³⁴In addition, neither SSA nor VA is required to notify fiduciary programs administered by other federal agencies, such as the Office of Personnel Management.

³⁵National Research Council, *Improving the Social Security Representative Payee Program: Serving Beneficiaries and Minimizing Misuse*, Committee on Social Security Representative Payees, Division of Behavioral and Social Sciences and Education. (Washington, D.C.: The National Academies Press, 2007).

³⁶20 C.F.R. §§ 404.2021 and 416.621.

not automatically designated SSA fiduciaries if a more suitable payee applicant exists.

Because a statement of routine use allowing SSA to share beneficiary or fiduciary information with state courts does not currently exist, SSA does not believe it is permitted to provide information to state courts about an SSA beneficiary or that beneficiary's SSA fiduciary without the beneficiary's consent. While VA is permitted to access SSA information based on a statement of routine use and a data exchange agreement with SSA, according to SSA officials, the agency has not yet determined whether any existing statement of routine use would permit disclosure of SSA information to courts, nor has the agency considered establishing one.

Regarding information sharing between VA and state courts, according to a VA official, the agency has no written policy on how requests for information about VA beneficiaries from state courts that appoint guardians should be handled. However, in guardianship proceedings involving VA beneficiaries, the agency does share its information about these beneficiaries with a court when a court requests this information. In addition, VA currently has ongoing data-sharing agreements with courts in Denver County, Colorado, and Hennepin County, Minnesota. Further, to encourage data sharing between its fiduciary program and courts, VA has engaged in outreach with organizations such as the National Academy of Elder Law Attorneys³⁷ and the National Guardianship Association.³⁸

³⁷The National Academy of Elder Law Attorneys is a professional association of attorneys dedicated to improving the quality of legal services provided to seniors and people with special needs.

³⁸The National Guardianship Network is a group of 10 national organizations created to promote effective guardianship law and practice. It includes AARP; the ABA Commission on Law and Aging; the ABA Section of Real Property, Trust and Estate Law; the Alzheimer's Association; the American College of Trust and Estate Counsel; the Center for Guardianship Certification; the National Academy of Elder Law Attorneys; the National Center for State Courts; the National College of Probate Judges; and the National Guardianship Association.

The Administration on Aging Has Taken Some Steps That Could Help State Courts Improve Oversight of Guardianships

AoA, within HHS, has provided support to state courts, as well as national guardianship organizations for technical assistance, training, and dissemination of existing information on guardianship. In 2008, it established the National Legal Resource Center (NLRC), in part to support demonstration projects designed to improve the delivery of legal assistance and enhance elder rights protections for older adults with social or economic needs. According to AoA officials, with NLRC funding, its partners have provided training, case consultation, and technical assistance related to guardianship with NLRC funding.³⁹ For example,

- In response to long-standing issues concerning interstate transfer and recognition of guardianship appointments,⁴⁰ ABA's Commission on Law and Aging has helped the Uniform Law Commission⁴¹ draft and promote adoption of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, a model law for states.⁴²
- The Center for Social Gerontology (TCSG)⁴³ has evaluated Utah's public guardian program.
- TCSG has helped develop recommendations for a public guardianship program in Oregon.
- TCSG has advised South Carolina on revising guardianship provisions in its probate code.

AoA officials told us that, in addition to funding NLRC, the agency also has supported efforts to develop training modules on guardianship for

³⁹NLRC partners are the American Bar Association Commission on Law and Aging, the Center for Elder Rights Advocacy, the Center for Social Gerontology, the National Consumer Law Center, and the National Senior Citizens Law Center.

⁴⁰See [GAO-04-655](#), 12, 30-32.

⁴¹The Uniform Law Commission is a nonprofit unincorporated association composed of commissions on uniform laws from the states, the District of Columbia, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands. It was created to improve state laws by drafting uniform state laws on subjects where uniformity is desirable and practicable.

⁴²According to the Uniform Law Commission, as of June 15, 2011, 28 states and the District of Columbia have passed the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act.

⁴³The Center for Social Gerontology is a nonprofit research, training, and social policy organization dedicated to promoting the individual autonomy of older persons and advancing their well-being in society.

elder law attorneys, and a 2009 guardianship webinar training.⁴⁴ According to an AoA official, however, AoA has not recently supported any efforts to evaluate guardian monitoring practices.

Conclusions

Federal agencies and state courts are responsible for ensuring that, respectively, fiduciaries and guardians appointed to oversee the cash benefits and other finances of incapacitated adults act in their best interest. The number of incapacitated adults is likely to grow as the population ages, signaling the need for agencies and state courts to find better ways to share information that will protect these adults from financial exploitation.

Information about SSA's incapacitated beneficiaries and their fiduciaries could help state courts avoid appointing individuals who, while serving as SSA fiduciaries, have misused beneficiaries' SSA payments in the past, and provide courts with potential candidates for guardians when there are no others available. Currently, SSA does not have a statement of routine use allowing it to share beneficiary or fiduciary information with state courts, however.

Monitoring court-appointed guardians' performance can prevent financial exploitation of incapacitated adults and stop it when it occurs. Adopting promising monitoring practices could help courts improve monitoring. However, many courts have limited resources, so they may be reluctant to invest in practices that have not been proven feasible or effective. The federal government has an opportunity to lead in this area by supporting evaluation of the feasibility, cost, and effectiveness of promising monitoring practices. NLRC's past support for development and evaluation of public guardian programs and state guardianship regulations has demonstrated AoA's interest in guardianship. Moreover, support for pilot projects aimed at protecting the welfare of older adults—a key objective of NLRC—positions AoA to devote some of its resources to evaluating promising monitoring practices.

⁴⁴National Consumer Law Center. *Nuts and Bolts on Guardianship as Last Resort: The Basics on When to File and How to Maximize Autonomy*.

Recommendations for Executive Action

To help state courts fulfill their role in appointing guardians for incapacitated adults, we recommend the Commissioner of SSA take whatever measures necessary to allow it to disclose certain information about SSA beneficiaries and fiduciaries to state courts, upon request, including proposing legislative changes needed to allow it to do so.

To help state courts more effectively monitor guardianships, we recommend that the Secretary of HHS direct AoA to consider supporting the development, implementation, and dissemination of a limited number of pilot projects to evaluate the feasibility, cost, and effectiveness of one or more generally accepted promising practices for improving court monitoring of guardians.

Agency Comments

We provided a draft of this report to HHS, SSA, and VA for comment. Their responses can be found in Appendices I, II, and III. HHS indicated that Section 420(a)(2) of the Older Americans Act (OAA), as amended, gives the department the statutory authority to support the type of pilot projects we recommend it consider.⁴⁵ It also noted that pilots incorporating elements of interface and collaboration with state courts could be incorporated into future grant design structures within its Model Approaches to Statewide Legal Assistance Systems demonstration grant projects (Model Approaches). Using Model Approaches to support such pilots would be consistent with our recommendation. We encourage AoA to pursue incorporating pilots of promising guardianship monitoring practices into its future grant design structures for Model Approaches.

In its comments, SSA asserted that Privacy Act implications prevent the agency from sharing information about beneficiaries and fiduciaries with state courts without their written consent. According to SSA, the only alternative, under the Act, to disclosing such information without consent is a routine use statement. SSA believes this is not an option, however, because sharing this information with state courts does not appear to be compatible with the purpose for which it was collected.

Aside from Privacy Act implications in this area, SSA cited other reasons why it did not consider our recommendation viable. Specifically, the agency indicated that disclosure of information to state courts is outside

⁴⁵ 42 U.S.C. § 3022i (a)(2).

its mission and, as a result, SSA would have to charge state courts for providing this information because it cannot use congressionally-appropriated funds for this purpose. SSA also stated that the potential cost of developing and maintaining data sharing agreements with every court that makes guardianship decisions would be prohibitive.

While we recognize SSA's concerns, we believe these are issues the agency may be able to address. For example, in response to SSA's concern about the cost of developing a system for sharing its information with state courts, our recommendation is intended to be general enough to allow the agency to determine the most cost-effective method for doing so. Also, we are not specifically recommending that each court have access, similar to VA's, to an SSA automated data system. Accordingly, data exchange agreements with every relevant court may not be necessary.

Despite SSA's concerns, the potential benefits to incapacitated SSA beneficiaries justify providing certain information about beneficiaries and fiduciaries to state courts upon request on a case-by-case basis. For example, a court's request for the identity of a beneficiary's SSA fiduciary, if there is one, could provide a potential candidate for that beneficiary's guardian when no other candidates are available. Also, a court's request for information about whether a potential guardian has ever served as an SSA fiduciary, as well as information about that individual's performance as a fiduciary, could be used to aid in determining that individual's suitability, or unsuitability, to serve as a guardian. Moreover, providing such information to a state court opens communication with a court that could alert SSA to a beneficiary's potential incapacity and need for an SSA fiduciary. It could also facilitate the appointment of a single person to manage a beneficiary's affairs, a goal the National Research Council recommended SSA pursue.

Consequently, we continue to believe that it is in the best interest of incapacitated SSA beneficiaries for the agency to disclose certain information about beneficiaries and fiduciaries to state courts, upon request. Given SSA's position that the Privacy Act prevents the agency from undertaking this important activity, we now recommend that it take whatever measures are necessary to allow it to do so, including proposing legislative changes.

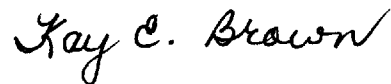
HHS, SSA, and VA provided technical comments on our draft report, which we incorporated as appropriate. VA also provided a description of information sharing activities within its Fiduciary Program.

As agreed with your office, unless you publicly announce this report's contents or authorize its release sooner, we will not distribute it until 30 days from the date of issuance.

We are sending copies of this report to HHS, SSA, VA, relevant congressional committees, and other interested parties. We will also make copies available to others upon request. This report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-7215 or brownke@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs can be found on the last page of this report. Key contributors to this report are listed in appendix IV.

Sincerely yours,

A handwritten signature in black ink that reads "Kay E. Brown". The signature is written in a cursive, flowing style.

Kay E. Brown
Director, Education, Workforce,
and Income Security Issues

Appendix I: Comments from the Department of Health and Human Services



DEPARTMENT OF HEALTH & HUMAN SERVICES

OFFICE OF THE SECRETARY

Assistant Secretary for Legislation
Washington, DC 20201

Kay E. Brown, Director
Education, Workforce
and Income Security Issues
U.S. Government Accountability Office
441 G Street N.W.
Washington, DC 20548

JUL 06 2011

Dear Ms. Brown:

Attached are comments on the U.S. Government Accountability Office's (GAO) draft report entitled, "INCAPACITATED ADULTS: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement" (GAO 11-678).

The Department appreciates the opportunity to review this report prior to publication.

Sincerely,

A handwritten signature in cursive script that reads "Jim R. Esquea".

Jim R. Esquea
Assistant Secretary for Legislation

Attachment

GENERAL COMMENTS OF THE DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS) ON THE GOVERNMENT ACCOUNTABILITY OFFICE'S (GAO) DRAFT REPORT ENTITLED, "INCAPACITATED ADULTS: OVERSIGHT OF FEDERAL FIDUCIARIES AND COURT-APPOINTED GUARDIANS NEEDS IMPROVEMENT" (GAO-11-678)

The Department appreciates the opportunity to review and comment on this draft report.

We note GAO's recognition that the Administration on Aging (AoA) has done substantial work in this area of critical importance to the independence and financial security of seniors.

GAO Recommendation to HHS:

To help state courts more effectively monitor guardianships, we recommend that the Secretary of HHS direct the Administration on Aging to consider supporting the development, implementation, and dissemination of a limited number of pilot projects to evaluate the feasibility, cost, and effectiveness of one or more generally accepted promising practices for improving court monitoring of guardians.

AoA Response:

Statutory authority currently does exist for the creation of potential pilot projects as described by GAO under Section 420 (a)(2) of the Older Americans Act (OAA), which is intended to support demonstration projects related to the delivery of legal assistance and elder rights protections to older persons with social or economic needs. The *Model Approaches to Statewide Legal Assistance Systems* (Model Approaches) demonstration grant projects are intended to support the creation of high quality and high impact legal service delivery systems that effectively target scarce legal resources to older persons most in need. Model Approaches have proven highly effective in enhancing the delivery of legal service to seniors in the most need of assistance on priority legal issues.

Existing Model Approaches demonstration project parameters may be sufficiently broad in terms of their legal "systems building" objectives so that elements of interface and collaboration with state courts on the issue of guardianship monitoring could potentially be incorporated into future grant design structures. AoA is also positioned to sharpen focus through the National Legal Resource Center (NLRC) on the provision of technical support and training to states on guardianship monitoring issues and continues to explore data collection options related to elder victims of guardianship abuse.

Appendix II: Comments from the Department of Veterans Affairs



DEPARTMENT OF VETERANS AFFAIRS
Washington DC 20420

July 8, 2011

U.S. GAO-GENERAL COUNSEL
2011 JUL 11 PM 2:37

Ms. Kay E. Brown
Director, Education, Workforce,
and Income Security Issues
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Ms. Brown:

The Department of Veterans Affairs (VA) has reviewed the Government Accountability Office's (GAO) draft report, "***Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement***" (GAO-11-678) and is providing technical comments in the enclosure.

VA appreciates the opportunity to comment on your draft report.

Sincerely,

A handwritten signature in cursive script that reads "John R. Gingrich".

John R. Gingrich
Chief of Staff

Enclosure

Enclosure

Department of Veterans Affairs (VA) Comments to
Government Accountability Office (GAO) Draft Report
***Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed
Guardians Needs Improvement***
(GAO-11-678)

Additional Comments:

In June 2011, VA formed a workgroup to identify areas for improving collaboration between VA Medical Center (VAMC) social workers and fiduciary program staff and to clarify roles and responsibilities in cases of mutual concern and collaboration.

The Fiduciary Program provides oversight of VA benefits paid to beneficiaries who are unable to manage their funds because of injury, disease, or age-related infirmities. Social workers often serve as case managers for Veterans determined to be at high risk, including those with a fiduciary, guardian, and/or surrogate decision-maker. Social workers coordinate services and care provided to the Veteran and monitor high-risk Veterans for potential abuse and exploitation.

As routine practice, social workers develop an information sharing relationship with the Fiduciary Program at the VA Regional Office (RO) in their area. They consult with the RO if it appears a Veteran is being financially exploited and questions exist on how to proceed. Social workers notify the RO if a Veteran has a fiduciary who is not providing for his or her needs. Social workers also notify the RO when there are concerns that a Veteran is at risk and may be in need of an evaluation for a fiduciary.

VA is also developing plans to improve communication as well as conduct a nationwide training program on the mutual interests and opportunities for enhancing collaborations and fine-tuning the role of social workers. The target date for training is August 2011.

Appendix III: Comments from the Social Security Administration



SOCIAL SECURITY
Office of the Commissioner

July 12, 2011

Ms. Kay E. Brown
Director, Education, Workforce, and Income Security Issues
United States Government Accountability Office
441 G. Street, NW
Washington, D.C. 20548

Dear Ms. Brown,

Thank you for the opportunity to review the draft report, "INCAPACITATED ADULTS: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement" (GAO-11-678). Our response is enclosed.

If you have any questions, please contact me at (410) 965-0520. Your staff may contact Frances Cord, Director, Audit Management and Liaison Staff, at (410) 966-5787.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dean Landis".

Dean S. Landis
Deputy Chief of Staff

Enclosure

SOCIAL SECURITY ADMINISTRATION BALTIMORE, MD 21235-0001

RESPONSE TO RECOMMENDATION IN THE GOVERNMENT ACCOUNTABILITY OFFICE (GAO) DRAFT REPORT “INCAPACITATED ADULTS: OVERSIGHT OF FEDERAL FIDUCIARIES AND COURT-APPOINTED GUARDIANS NEEDS IMPROVEMENT” GAO-11-678

Recommendation

The Commissioner of the SSA should determine how, under applicable laws and consistent with SSA’s existing legal authority, the agency might be permitted to disclose information about incapacitated beneficiaries and their fiduciaries to State courts.

Response

We disagree. We previously evaluated applicable laws to determine if we may disclose this information to States. We assert, as we did in response to your 2004 report, “Guardianships – Collaborations Needed to Protect Incapacitated Elderly People” (GAO-04-655), that privacy implications prevent us from doing so.

We may only disclose information to State courts or other Federal agencies in accordance with the Privacy Act, section 1106 of the Social Security Act, and regulations at 20 C.F.R. Part 401. The Privacy Act governs how Federal agencies collect, use, maintain, and disclose personal information, and it forbids disclosure of personal information about a living person without the written consent of the individual or someone who can consent on the individual’s behalf. Without consent, the only relevant Privacy Act exception is the routine use exception 5 U.S.C. § 552a(b)(3).

To create a routine use, we must determine if the requested disclosure is compatible with the purpose for which we collect the information. In this case, it does not appear the proposed disclosure is compatible. We collect information about representative payees solely to evaluate whether they are fit to manage Social Security benefits. State-appointed legal guardians, on the other hand, may have broader legal authority to care for personal property and other interests. There is no clear indication of how any SSA disclosure of beneficiary or representative payee information to a State court is compatible with SSA’s collection of the information to assist beneficiaries in managing their benefits or payments.

There are other reasons why your recommendation is not viable. Specifically:

- Disclosure of the information to State courts is outside our mission. We use appropriated funds from Congress to monitor representative payees’ management of Social Security payments to our beneficiaries. We cannot use appropriated funds to provide this information to State courts. If we disclosed the requested information to States, we would have to charge them for our services.
- It is not cost effective. In your September 2010 Report, “GUARDIANSHIPS: Cases of Financial Exploitation, Neglect and Abuse of Seniors” (GAO-10-1046), you noted “...court-appointed guardians also serve as federal representative payees in 1 percent of

cases at SSA...” It would be prohibitively expensive to develop and maintain data sharing arrangements with every court that makes guardianship decisions, especially in light of the small population of cases at issue.

Appendix IV: GAO Contact and Staff Acknowledgments

GAO Contact

Kay E. Brown, (202) 512-7215, brownke@gao.gov

Staff Acknowledgments

Clarita A. Mrena was the Assistant Director on this study. Divya Bali and Benjamin P. Pfeiffer contributed substantially to all aspects of the work. Luann M. Moy and Walter K. Vance provided technical assistance. Kathleen L. Van Gelder assisted with report writing. Jessica A. Botsford and Sheila R. McCoy provided legal counsel.

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