

FUTURE TRENDS IN STATE COURTS 2012

*Probate DCM to Protect
Vulnerable Adults*
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PROBATE DCM TO PROTECT VULNERABLE ADULTS

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A recent national survey found that staff and resource limits can hinder probate court monitoring of guardians and conservators. Some probate courts are now considering time standards and new case management strategies and tools to handle expanding caseloads, including differentiated case management (DCM) both before and after fiduciary appointment.

Most guardianship and conservatorship matters in a probate court proceed without contest from case initiation to the determination of the need for and appointment of a fiduciary. Not all such cases are the same, however, and a distinction can be made between cases requiring emergency hearings and those that are not emergencies and are not contested. Moreover, although contested cases may be infrequent, they can involve pleadings, discovery, alternative dispute resolution or settlement conferences before trial, and trial proceedings that can make them very time-consuming.

After appointment, most guardians or conservators carry out their responsibilities in keeping with the trust that has been put in them. Yet a probate court may be unable to limit the risk of harm to the person and property of wards from potential noncompliance by fiduciaries if it waits until a fiduciary report or accounting is scheduled to be filed, especially for cases in which potential risk may be foreseeable. In fact, the U.S. Government Accountability Office (GAO) recently reported on finding hundreds of allegations of physical abuse, neglect, and financial exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010 (GAO, 2010: 2).

Probate courts across the country have traditionally handled cases on a first-in, first-out basis. Now, to help ensure timely appointments of guardians and conservators and enhance their post-appointment ability to monitor fiduciary compliance with available staff and resources, probate courts are beginning to apply time standards and such case management strategies as the use of differentiated management of cases both before and after fiduciary appointment.

Measuring Performance in Terms of Time Standards

It appears that only two state court systems—Michigan and Massachusetts—had time standards in early 2012 specifically addressing the time from petition to fiduciary appointment in guardianship and conservatorship cases (National Center for State Courts, 2012). Until recently, there have been no national time standards for guardianship and conservatorship cases, either in the Conference of State Court Administrators or American Bar Association time standards, the National Probate Court Standards, or the Uniform Guardianship and Protective Proceedings Act. It was only with the publication and approval of the *Model Time Standards for State Trial Courts* in 2011 that any norms were suggested for how long it should typically take (98 percent within 90 days) for the appointment of a fiduciary after the filing of a petition (see National Center for State Courts, 2011: 32). The *Model Time Standards* also provide more detail for purposes of case differentiation:

- In 98 percent of cases in which emergency action is required, a hearing should be held within 3 days.
- In 98 percent of uncontested cases, trials/hearings regarding a permanent appointment should be held within 30 days.
- In 98 percent of cases in which there are contested issues, a trial/hearing should be started within 75 days.

For the management of these cases after appointment, few states have time requirements other than to call for guardianship or conservatorship reports to be filed annually. Effective January 1, 2012, Nebraska has begun to provide some measure of more detailed time expectations for guardians or conservators with laws and rules for events after appointment (Hutton et al., 2012: 14-17):

- Within 30 days after appointment and before letters of fiduciary appointment are issued, file an acceptance, inventory, bond, and other information;
- Within 10 days after the issuance of letters, written financial institution acknowledgment that it has received a copy of the letters;
- Within 90 days after appointment, certify completion of a mandatory training course; and
- Within a year after appointment, file a report or accounting and other documents required by the court.

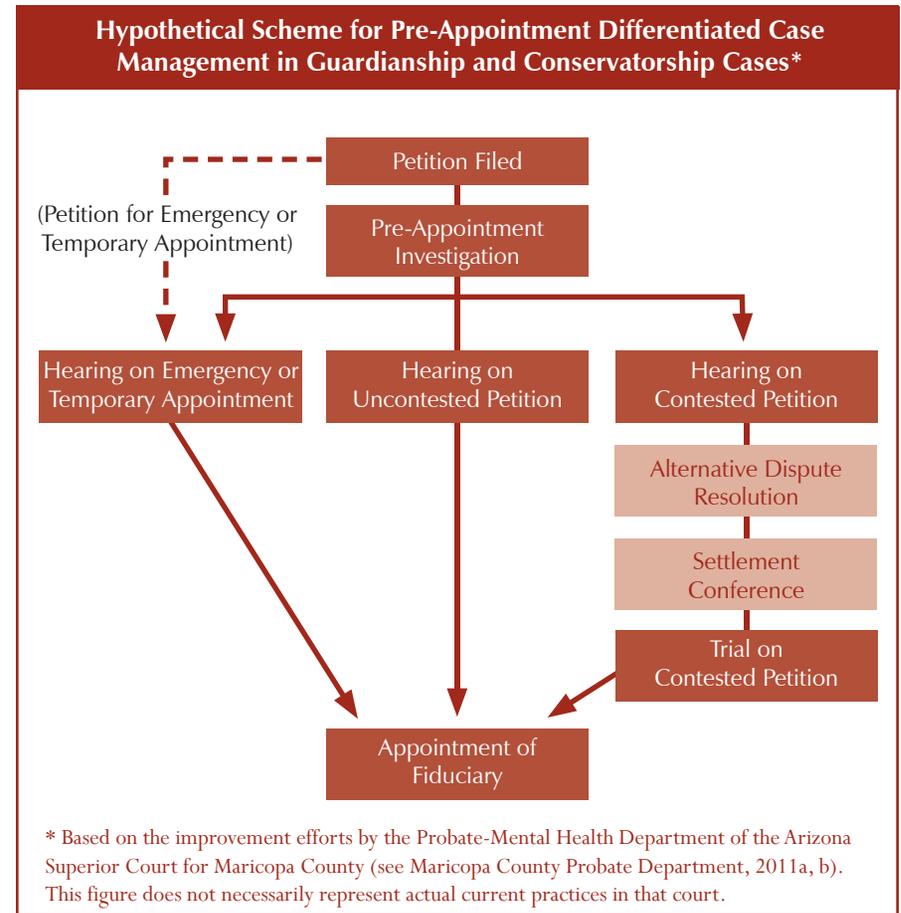
Differentiated Case Management (DCM) for Petitions to Appoint a Guardian or Conservator

During a recent NCSC project with the Probate Department of the Arizona Superior Court for Maricopa County (see Steelman and Davis, 2011a, b), a probate commissioner estimated to consultants that about three-fourths of all adult guardianship and conservatorship cases are uncontested on the need for a fiduciary and the suitability of a particular fiduciary candidate. For the remaining cases, differences and conflicts among family members may require further court proceedings before the appointment of a fiduciary.

To ensure timely and just fiduciary appointment decisions consistent with the needs of such cases, and to optimize the use of court resources, the development and application of a differentiated case management (DCM) approach is desirable, akin to what has previously been considered most often in criminal and general civil cases (see Cooper, Solomon, and Bakke, 1993, for suggested implementation steps; see also, Maricopa County Probate Department, 2011a). The figure shows how DCM might be applied in guardianship and conservatorship cases.

Differentiated Compliance Management After Fiduciary Appointment

While courts across the country rely on the expertise of their experienced judges and staff to identify cases requiring special attention, highly effective courts have developed criteria to particularize inquiry. For example, a list of risk factors for vulnerable persons has been developed in Arizona.



To test the impact of such factors as the size of estate or a dispute among family members on the likelihood of a post-appointment problem, an Arizona Supreme Court committee proposed in 2011 that any pre-appointment investigation in a guardianship or conservatorship case include an assessment to guide post-appointment monitoring (Arizona Supreme Court Probate Committee, 2011: 24-35, 139-62).¹

39 Risk Indicators for Protected Persons in Guardianship or Conservatorship Cases After Fiduciary Appointment

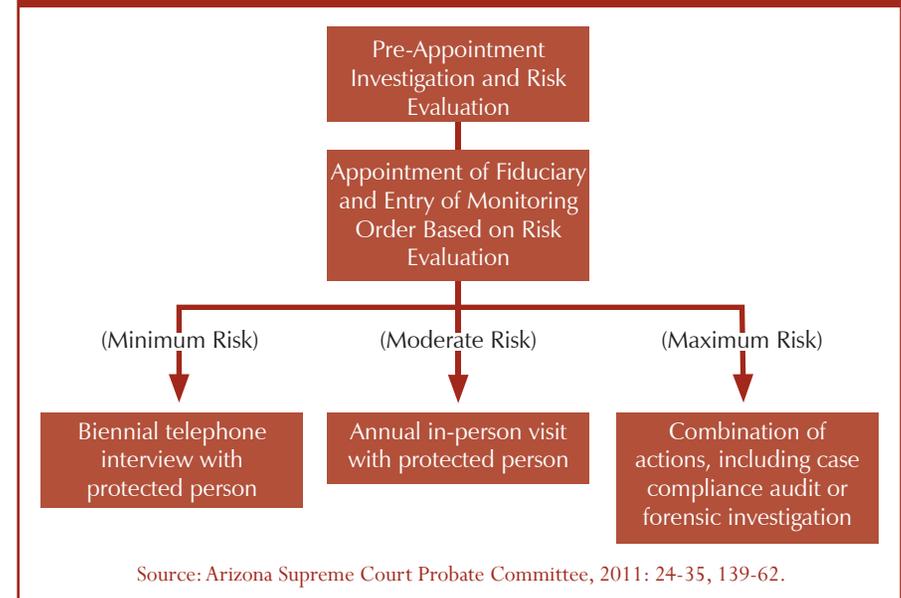
1. No family members
2. Large estate
3. Unprotected assets—unrestricted or non-bonded assets
4. Dispute among the parties, whether family or professional fiduciary
5. Late or no inventory
6. Late or no accountings
7. Late or no annual guardianship reports
8. Inaccurate record keeping, no automation
9. No record keeping
10. Unacceptable accounting practices
11. Disproportionate or unusual large transactions
12. Checks returned with insufficient funds or late charges
13. Use of ATMs or gift cards
14. Guardianship only appointment but handling assets
15. Health, business or personal problems of fiduciary—professional or family fiduciary
16. Financial difficulty of fiduciary, tax liens, judgments or bankruptcy
17. Difficulty in acquiring bond, especially with a professional fiduciary
18. Failure to renew bond, pay bond premium or bond revoked
19. For the professional, failure to renew license
20. Disciplinary action by a professional licensing agency—family or professional
21. Questionable fiduciary
22. Questionable attorney
23. Fiduciary with limited experience
24. Singular responsibility and control of information by fiduciary
25. Poor or no supervision of staff by professional fiduciary principal
26. Ignore request by court, including orders to show cause
27. Pattern of rebuffing requests for information by parties or attorneys
28. No court appointed attorney
29. Petition to withdraw by attorney
30. Unauthorized gifts or loans
31. Large fees—especially in relationship to overall assets and tasks accomplished
32. No notice to interested parties or lack of documentation
33. Pattern of complaints against the fiduciary
34. Fiduciary exclusively uses one vendor instead of a pool of vendors
35. Transfer between bank accounts, especially near inventory or accounting due dates
36. Professional fiduciary does not maintain written policies and procedures
37. Expenditures not appropriate for client’s level of care and market rate for services
38. Payment of interest or penalties in accounting summaries in addition to bank charges for insufficient funds
39. Fiduciary not visiting client when appointed as guardian

Source: Arizona Supreme Court Probate Committee, 2010: 63-64.

Following the recommendation of that committee, the Maricopa County Probate Court Department has developed and piloted a “Probate Evaluation Tool,” which allows court investigators to designate each new adult guardian or conservator case as “low,” “moderate,” or “high” risk. The court uses the tool to manage the caseload and to determine how frequently an investigator or volunteer visitor should be sent to check on the ward. Every month the court holds a “revision” meeting and, based on feedback from court investigators, edits questions and revises evaluation scoring.²

The use of such a “Probate Evaluation Tool” is an innovative technique that might inform any probate court in its case management system design, as well as allow it to focus limited resources on the cases with the greatest need for post-appointment monitoring and scrutiny.

Arizona Scheme for Post-Appointment Differentiated Compliance Management in Guardianship and Conservatorship Cases



Source: Arizona Supreme Court Probate Committee, 2011: 24-35, 139-62.

Other Court Management Steps Necessary for Probate DCM Effectiveness

To implement notions of probate DCM, courts are recognizing that they must pay attention to other important issues. Among them are the following:

- **Education and Training.** A national study of best practices for adult guardianships (Karp and Wood, 2007) emphasized the need for training programs and materials for fiduciaries. Such programs should help alleviate inadvertent problems both before and after fiduciary appointment.
- **Effective Staffing.** A recent study (Uekert, 2010) revealed that most probate courts do not have sufficient resources to fund monitoring staff at an adequate level. The Maricopa County Probate Department is considered “light years ahead” of other courts in the use of support staff for this purpose (see Steelman and Davis, 2011a). Court staff members provide audit, investigation, and examination services, and the court has established staffing levels necessary for one of the largest probate caseloads in the country.
- **Use of Information Technology (IT) to Expedite Processing and Monitor Cases.** Courts must monitor the performance of guardians and conservators through regular audits and reviews of accountings and reports. Use of technology, such as an e-filing system with automatic capacity to flag problems, is rare nationally, but is a practice that effective probate courts use to deter misfeasance or malfeasance. Notable among these are the probate courts in Broward County, Florida (see Florida 17th Judicial Circuit Court, 2012); Tarrant County, Texas (see Tarrant County Probate Courts, 2012); and Ramsey County, Minnesota (see Minnesota Second District Probate Court, 2012), all of which have IT applications for adult cases that warrant further inspection.

Conclusion

Any probate court must “guard the guardians” so that wards are protected from possible neglect or abuse by persons entrusted with their care (Karp and Wood, 2007). Although most fiduciaries are faithful to their responsibilities, a probate court must guard against the risk of harm to the person or assets of the wards. With a growing population of aging “baby boomers,” probate courts faced with budget constraints must make prudent use of finite resources to oversee the activities of guardians and conservators. DCM is a strategy that probate courts must increasingly use for this purpose.

ENDNOTES

¹ The Arizona Supreme Court probate committee reports using a “risk assessment tool.” That specific designation has caused one social scientist to ask whether there is any documentation as to whether the risk assessment “tool” has been validated for its accuracy—e.g., false positives/false negatives or statistical analysis. The Maricopa County Probate Court Department’s characterization of its instrument as a “Probate Evaluation Tool” avoids that problem, allowing the court to gather critical data on which to base the future development of a rigorous risk assessment tool that could be tested and validated.

² Electronic mail message, from Elizabeth Evans, court administrator, Maricopa County Probate Court Department, Friday, March 9, 2012, to Alicia Davis, NCSC.

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Justice Eileen C. Moore was charged with finding artwork for the new 4th District Court of Appeal building in Santa Ana, California with no budget. She contacted the school superintendent and then the probation department got involved. Students read court cases and depicted them in murals. This year's Trends cover was created by a 17 year old at Juvenile Hall. The case involved gang violations and disfiguring a public place and the young artist had also been charged with graffiti crimes. The resulting mural hangs in the courthouse, along with more than a dozen other paintings depicting Orange County, California cases.

