

# ADDRESSING ABUSE BY GUARDIANS: THE ROLES OF ADULT PROTECTIVE SERVICES, LAW ENFORCEMENT, AND THE COURTS

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## ABSTRACT

This paper analyzes the abuse of adults subject to guardianship by their guardians and/or conservators and the systems in place to address the abuse. As a result of the analysis, issues and limitations for effective abuse prevention, detection, and response are revealed and recommendations for improvement are offered. Abuse by guardians occurs across settings and locales, and the mistreatment has severe impact on the victims. However, there is little comprehensive research examining the prevalence and severity of the abuse and, as a result, little understanding of its nature and scope. Through case studies and interviews with judges and others the dynamics and dimensions of the problem and intervention challenges are illustrated. Adult Protective Services (APS), Law Enforcement, and the Courts are the systems charged with addressing the abuse, but there is no uniformity in their roles and little coordination between the system providers. Adult Protective Services is responsible for addressing the abuse of older persons and/or adults with a mental or physical impairment, but often cases of abuse by guardians are not reported to APS or the statutory referral criteria are not satisfied, as there is an appointed guardian. Law Enforcement, both through the police and prosecutors, lacks a clearly defined role in the guardianship process. However, criminal statutes addressing elder abuse have increased nationwide, which in turn has elevated Law Enforcement's role in addressing the abuse. Education of Law Enforcement about the existence of abuse by guardians and its role in problem response is essential. Finally, the Courts are intricately and primarily involved in abuse by guardians as a result of their roles and responsibilities in creating and overseeing guardianships. To improve the Courts' response to this problem, the statutory system for appointment should be uniform and assigned to Courts and judges familiar with, trained in, and/or specializing in the guardianship, first through the appointment of a guardian only when necessary and then with the appropriate powers, and second giving the appointment to the

correct person, with adequate training. Post-appointment proactive involvement of the Courts also is essential in the prevention of abuse and the effective response after the discovery of the abuse. Finally, the implementation and allowance of a coordinated response between APS, Law Enforcement, and the Courts through current and emerging multisystem collaborations is fundamental for a satisfactory response.

## I. INTRODUCTION

The two cases described below represent abuse by guardians as experienced by older adults or adults with disabilities. They illustrate the diversity found in such situations. They also underscore the ease in which incidents can occur and even remain undetected for long periods. Finally, the cases suggest the far-reaching effects of the problem.

The authors of this paper have vivid recollections of the initial abuse by guardian cases encountered in the course of their work. For the first author, that incident occurred decades ago, revealing itself only days after she started a new job, as director of community services in a large urban social services agency, exclusively targeting older adults. Suddenly the local newspaper headlined the attorney under contract with her division as allegedly having stolen large sums of money from several of his private clients for whom he served as guardian. Agency staff was horrified. So much trust had been placed in him, and his father before him. Two generations of esteemed attorneys had served this agency, while it led the nation in developing adult protective services as a program model for assisting those older adults unable to adequately care for and protect themselves, often due to mental incapacity. The headlines triggered a search of all cases at the agency in which the attorney had involvement in order to determine if any wrongdoing had occurred. None surfaced. However, before any professional sanctions were imposed or criminal

trials were scheduled, the attorney took his life. In its wake were the client victims, their families, and agency staff, who had held the attorney in high regard, only to be betrayed and left to pick up from the damage he had left them.

The initial case of abuse by a guardian experienced by the second author also represents the most challenging situation that he ever encountered in his employment as a county attorney. It involved an individual in their twenties with multiple disabling conditions, engaging in dangerous behaviors, and who also had been the victim of multiple violent crimes. A relative served as guardian of the person and property for the individual. The second author was called upon to modify the guardianship to replace the parent as guardian for reasons that included protection of a settlement the person with mental incapacity soon would receive. In the modification to the guardianship, it was discovered that previously the person had received a personal injury settlement, and it appeared that the relative had used at least a portion of the funds for their own purposes, something which happened too long ago to be pursued civilly or to be prosecuted. Ultimately, the department represented by the second author was appointed as co-guardian with the relative, and the proceeds of the second settlement were placed into a supplemental needs trust, with an independent third-party trustee to prevent any further misuse of the person's funds.

The intent of this paper is to examine abuse by a guardian as it currently is known in the United States along with the roles, responsibilities, and experiences of the three key systems charged with addressing the problem—Adult Protective Services (APS), Law Enforcement, and the Courts. In so doing, we will assess system and intersystem effectiveness and provide recommendations for improving our understanding of the problem and the response given it. Throughout the paper the term guardianship will refer to both guardianship over the person

(frequently called guardian) and guardianship over the property (frequently called conservator). Consideration will be limited to guardianship of adults.

Abuse by guardians is worth our attention. It violates the purpose and provisions of guardianship appointment. It reflects erosion of the standards and expectations of guardian conduct. It contradicts the widely accepted ethical principles of beneficence, fidelity, justice, and respect for persons. It breaches the fundamental rights and protections of individuals. It also can compromise their financial, physical, mental, and/or social well-being.

After this Introduction, the paper is divided into six parts. Each is listed below along with its essential aim.

II. The Problem of Abuse by Guardians: overview of the mistreatment of adult individuals by their appointed guardians to determine the dimensions of the problem.

III. The Role of APS: examination of APS as social service system charged with addressing adult/elder abuse in order to understand its multiple functions and potential intersect with other systems in handling abuse by guardians.

IV. The Role of Law Enforcement: inquiry into how Law Enforcement handles situations of alleged abuse by guardians, including when it becomes involved and the barriers to its involvement.

V. The Role of the Courts: consideration of the Court's responsibilities in preventing and responding to abuse by guardians, including intervention options and their limitations (See also the Summit paper by Hurme and Robinson.).

VI. Multisystem Collaboration in Addressing Abuse by Guardians: examination of various established vehicles for communication and cooperation across service systems for better addressing adult/elder abuse in order to identify those most useful in impacting abuse by guardians as a problem of mutual concern.

VII. Recommendations: suggestions for improving our understanding and response to abuse by guardians, highlighting the roles of APS, Law Enforcement, the Courts, and multisystem collaborations.

## II. THE PROBLEM OF ABUSE BY GUARDIANS

### *A. History of Problem Recognition*

Labeling something as a “social problem” has special importance. Hallmark to the distinction is a call to action for correcting or remedying the matter of concern. Conditions or behaviors can exist that are seen as troublesome or deleterious, even by significant numbers of people. They also can conflict with prevailing expectations and values. However, such conditions and behaviors fail to qualify as a social problem without a commitment for change.<sup>1</sup>

Guardianship has existed for many centuries, with its origins during the early Greek and Roman empires. Instances of abuse by a guardian undoubtedly occurred during that time and ever since. However, if they aroused public interest at all, most likely it was as an anomaly, certainly not worth collective action. This perception began to change only during the past half century.

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<sup>1</sup> Definitions of “social problems” generally include the elements identified in the paragraph, e.g., Rubington, E., & Weinberg, M.S. (Eds.). (1995). *The study of social problems: Seven perspectives* (5<sup>th</sup> ed). New York: Oxford University Press.

As is often true with social problems, the recognition history for this one most likely began almost as a whisper, a subject for conversation among informed individuals and then groups, with perhaps occasional reference in the literature.<sup>2</sup> Only in recent decades has it become a movement, chronicled in print and social media, and a focus of multiple government hearings and reports. The trigger event for the transition from private concern to social problem occurred in the late 1980s, with publication of an Associated Press series on guardianship of older adults as an “ailing system”. One component of that exposé was on abuse by guardians.

Excavating the recognition history for abuse by guardians prior to the 1980s is unlikely to yield meaningful material for understanding it as a social problem. Therefore, this history (as found in Appendix A: History of Problem Recognition) considers only activities during the last thirty-five years, organized by primary sources: Associated Press investigation, US Congressional hearings, Government Accountability Office reports, and a sampling of other exposure outlets (See also the Summit paper by Pogach and Wu.).

## *B. Understanding Abuse by Guardians*

### *1. The Interface between Abuse by Guardians and Adult/Elder Abuse*

Guardianship is used by society to safeguard people, most commonly older adults, who lack the capacity to protect themselves. It can be, and often is, initiated to thwart actual or probable adult/elder abuse, in other words, to prevent its occurrence or reoccurrence. Indeed, a primary responsibility of a guardian is protecting the individual from harm, including abuse.<sup>3</sup>

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<sup>2</sup> Alexander, G., & Lewin, T. (1972). *The aged and the need for surrogate management*. Syracuse, NY: Syracuse University.

<sup>3</sup> Pagach, D., & Wood, E. (2019, June). *When the guardian is an abuser: Issue brief of the National Center on Law and Elder Rights*. Retrieved from <https://ncler.acl.gov/getattachment/legal.Training/when-the-Guardian-is-an-Abuser-Ch-Summary.pdf.aspx?lang=en-usp>. 1.

Therefore, when the guardian becomes abuser rather than protector, it reflects both personal and systemic failings.<sup>4</sup> Complicating this situation is the reality that guardianship may leave individuals less able to protect themselves than before appointment, since former freedoms have been curtailed, thereby rendering possible access to measures offering safety or rights restoration more difficult. This can allow the abuse to continue, or even exacerbate, unabated.

As evident above, abuse by guardians and adult/elder abuse have strong connections.<sup>5</sup> However, they are not the same. Abuse by guardians occurs when court-appointed guardians use the powers granted them in ways that harm those they are charged to protect.<sup>6</sup> Elder abuse has no standardized definition (which is the default in any consideration of adult/elder abuse, since the abuse of adults with impairments or disabilities age 18-59 years is so little researched and discussed as a separate construct in the literature). However, there is general consensus that elder abuse refers to harm or risk of harm to an older adult in a trust relationship. That harm can take various forms, usually identified as physical, emotional, sexual, or financial (exploitation) abuse and neglect.<sup>7</sup> Forms of harm under abuse by a guardian mirror those typically captured under definitions of elder abuse, but they also include harms that reflect violation of rights, those

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In a study on non-kin guardians, researchers found that the guardians were very aware of elder abuse as an issue and took measures not only to keep themselves above suspicion but also to protect their wards from untrustworthy others.

Barker, J.O., & King, D. (2001). Taking care of my parents' friends: Non-kin guardians and their older female wards. *Journal of Elder Abuse & Neglect*, 13(1), 45-69.

An early study of guardianship showed its benefit in improving the quality of life in cases where abuse precipitated the petition for guardianship.

Wilbur, K., Harter, K., & Reiser, T. (1991). *Assessing the quality of life of elders appointed to guardianship*. Los Angeles: Andrus Gerontology Center, University of Southern California.

<sup>4</sup> Frolik, L. (1990). Elder abuse and guardians of elderly incompetents. *Journal of Elder Abuse & Neglect*, 2(3/4), 31-56.

<sup>5</sup> Stiegel, L., & Wood, E.F. (2007). *Nine ways to reduce elder abuse through enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*. Washington, DC: American Bar Association Commission on Law and Aging Joint Campaign for Uniform Guardianship Jurisdiction.

<sup>6</sup> Hull, L., Holmes, G.E., & Karst, R.H. (1990). Managing guardianships of the elderly: Protection and advocacy as public policy. *Journal of Elder Abuse & Neglect*, 2(3/4), 145-162.

<sup>7</sup> Comparable definitions and forms of elder abuse are found through such sources as the National Center on Elder Abuse, Center for Victim Research, and Office for Victims of Crime.

retained by persons under guardianship despite any loss of freedom with court appointment.<sup>8</sup>

With elder abuse, the trust relationship, and therefore the abuser, can vary, ranging from family members and friends to paid caregivers and financial planners. In contrast, the trust relationship in abuse by guardians is restricted to that between guardian and protected individual. However, it can be complicated in instances when the guardian also is a family member, paid caregiver, or has some other additional trust relationship with the individual. Finally, either abuse by a guardian or elder abuse can happen in both domestic and institutional settings, the former exemplified by private homes or apartments and the latter by residential care facilities or hospitals.

## 2. *Research-to-Date and Its Limitations*

Both elder abuse and abuse by guardians were first acknowledged and initially investigated in the 1970s in the United States.<sup>9</sup> However, their pace of inquiry diverged afterwards, making for notable differences to date in understanding the dimensions and dynamics of these problems (including victim/perpetrator characteristics, prevalence/incidence, and victim consequences). Those in the field of elder abuse often lament that research on the problem lags decades behind that of such other aspects of family violence as child abuse and intimate partner violence.<sup>10</sup> However, study of elder abuse has shown significant progression and direction over

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<sup>8</sup> e.g., National Guardianship Association. (2017). *The fundamentals of guardianship: What every guardian needs to know*. Washington, DC: American Bar Association, Senior Lawyers Division.

Pagach, D., & Wood, E. (2019, June). *When the guardian is an abuser: Issue brief of the National Center on Law and Elder Rights*. Retrieved from <https://ncler.acl.gov/getattachment/legal.Training/when-the-Guardian-is-an-Abuser-Ch-Summary.pdf.aspx?lang=en-us>

<sup>9</sup>Alexander & Levin, *supra* note 2.

Lau, E.E., & Kosberg, J.I. (1979). Abuse of the elderly by informal care providers. *Aging*, 299-300, 10-15.

<sup>10</sup> e.g., National Research Council. (2003). *Elder mistreatment: Abuse, neglect, and exploitation in an aging America*. Panel to Review Risk and Prevalence of Elder Abuse and Neglect. R.J Bonnie & R.B. Wallace, Eds. Committee on National Statistics and Committee on Law and Justice, Division of Behavior and Social Sciences and Education. Washington, DC: The National Academies Press. pp. xiii-xiv.

Jackson, S.L. (2018). *Understanding elder abuse: A clinician's guide*. Washington, DC: American Psychological Association. pp 4-5.

time, aided in part by a sequence of national research agendas,<sup>11</sup> In contrast, that undertaken on abuse by guardians seems minimal and unfocused. It is certainly hampered by having few dedicated researchers and no driving research agenda. Making matters worse, data collection on abuse by guardians from sources like Adult Protective Services (APS), Law Enforcement, and the Courts is nearly non-existent, due to factors that range from lack of priority to insufficient resources. Indeed, there is no national or central data source which tracks abuse by guardians, although the need for such data has been long recognized. This means that beyond numerous anecdotes of the problem, we currently know little with certainty about any aspect of abuse by guardians.<sup>12</sup>

Even data sources once thought promising, such as those identified in the 2016 GAO report, have failed to yield anything meaningful to date. According to the report, the key federal source was to be the Administration for Community Living's (ACL) National Adult Maltreatment Reporting System (NAMRS), which has as its purpose to collect data nationwide on adult/elder abuse as reported to state APS programs. Officials with ACL and its contractor, the Adult Protective Services Technical Assistance Resource Center, indicated at the time that

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<sup>11</sup> e.g., Pillemer, K. (1986, June). *Elder abuse and neglect: Recommendations from the Research Conference on Elder Abuse and Neglect*. Durham, NH: University of New Hampshire.  
Stein, K.F. (1991, January). *Elder abuse and neglect: A national research agenda*. Washington, DC: National Aging Resource Center on Elder Abuse.  
Connolly, M.T., Brandl, B., & Breckman, R. (2014). *The Elder Justice Roadmap: A stakeholder initiative to respond to an emerging health, justice, financial and social crisis*. Washington, DC: US Department of Justice.  
Stahl, S.M. (2015, July). *Building consensus on research priorities in elder mistreatment*. Washington, DC: US Department of Justice.

<sup>12</sup> Quinn, *supra* note 5, pp. 71-104.

Wood, E.F. (2006, August). *State-level adult guardianship data: An exploratory survey*. Washington, DC: American Bar Association Commission on Law and Aging.

GAO (2016, November), *supra* note 8, pp. 6-14.

National Center on Elder Abuse. (2017). *Fact sheet: Role of guardian standards in addressing elder abuse*. Retrieved from [https://ncea.acl.gov/NCEA/media/Publication/NCEA\\_DA.pdf](https://ncea.acl.gov/NCEA/media/Publication/NCEA_DA.pdf)

Teaster, P.B., & Ramsey-Klawnsnek, H. (2019, April 15). *Safeguarding guardianship for older adults*. University of Southern California Center on Elder Mistreatment Blog.

Boren, S. (2020, July 16). *Elder abuse: What research says about prevalence, assessment and prevention*.

Journalists Resource, Harvard Kennedy School, Shorenstein Center. Retrieved from <https://journalistsresource.org/studies/society/public-health/elder-abuse-research-prevalence>

NAMRS was capable of obtaining information about substitute decision-makers, like guardians, with respect to their presence at investigation onset, whether or not they perpetrated the reported abuse, and what actions were taken against them as perpetrators.<sup>13</sup> However, the most recent NAMRS report, capturing state data reported for 2019, offers little on abuse by guardians.<sup>14</sup> Reasons for this relate to several factors. Most importantly, “guardian” does not exist as a category within the perpetrator classification for NAMRS, and without it, relevant data simply will not be collected nationally, even if it might be at state and local levels. Data on perpetrators is limited to substantiated maltreatment type by perpetrator age group and gender along with perpetrator relationship to victim (with all options listed either familial in nature or none/unknown). What does exist among data elements that could reveal abuse by a guardian (i.e., perpetrator association at start/close, perpetrator substitute decision maker at start/close, and perpetrator legal remedy recommendation) are so rarely reported by state APS programs that they are not highlighted in the annual Adult Maltreatment Report. Moreover, according to a representative of the contractor, only about half of state APS agencies even provide perpetrator data, either because it is not collected or because releasing it might be seen as an infringement of due process. Among those states for which perpetrator data is available, ACL will not release it on a state-by-state basis presently. However, ten states did submit data on whether or not the perpetrator was the victim’s guardian at the start of the investigation. Of 15,968 cases that year among the ten states, just 1.2% named perpetrators who were known to be guardians. For the

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<sup>13</sup> GAO (2016, November), *supra note* 8, pp. 12-13.

<sup>14</sup> Adult Protective Services Technical Assistance Resource Center (APS TARC). (2020). *Adult maltreatment report 2019*. Washington, DC: Author. Retrieved from <https://acl.gov/sites/default/files/programs/2020-10/2019%20NAMRS%20Report.pdf>

remainder, 39.0% had no substitute decision-maker, and for 55.9% it was unknown whether or not they did.<sup>15</sup>

The 2016 GAO report also identified some state and local efforts to collect data on abuse by guardians. However, as described, none have as their intent to collect such actual abuse data per se, but rather something else, which may or may not capture abuse by guardians. That includes potential abuse (Florida county), concerns regarding the well-being or financial exploitation of persons under guardianship (Texas), complaints and grievances about professional guardians (Washington), grievances filed regarding guardianships (Ohio), requests for restraining orders (California), and risk indicators on the need for additional guardianship review or monitoring (Minnesota).<sup>16</sup>

### 3. *The Nature and Scope of Abuse by Guardians*

Although research and data collection specific to abuse by guardians may be lacking, it is possible to obtain some understanding of the probable nature and scope of this problem by considering that available on elder abuse. For example, relevant literature suggests that one in ten community-dwelling older Americans experienced some form of abuse by a trusted other during the past year. That trusted other may or may not be a guardian, but most often it is a family member, particularly a spouse/partner or adult child, and this person also may have surrogate decision-making, along with familial responsibilities, for the older adult.<sup>17</sup> Higher rates of elder abuse victimization are found for those with cognitive impairment<sup>18</sup>, which is descriptive of

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<sup>15</sup> Interview on November 2, 2020 with Leslie McGee, Senior Research Associate and Subject Matter Expert, APS TARC, WRMA, Inc.

<sup>16</sup> GAO (2016, November), *supra note* 8, pp. 13-14.

<sup>17</sup> Acierno, R., Hernandez, M.A., Amstadter, A.B., Resnick, H.S., Steve, K., Muzzy, W., & Kilpatrick, D.G. (2010). Prevalence and correlates of emotional, physical, sexual, and financial abuse and potential neglect in the United States. The National Elder Mistreatment Study. *American Journal of Public Health, 100*, 292-297.

<sup>18</sup> e.g., Wigglesworth, A., Mosqueda, L., Mulnard, R., Lian, S., Gibbs, L., & Fitzgerald, W. (2010). Screening for abuse and neglect of people with dementia. *Journal of the American Geriatrics Society, 58*, 493-500.

many persons under guardianship. Institutionalization also brings with it vulnerability to abuse occurrence<sup>19</sup>, and this is characteristic of many under guardianship.<sup>20</sup> Still other risk factors associated with elder abuse victims include social isolation, physical disability, medical conditions, and depression or other mental disorders, which frequently describe the circumstances of those under guardianship.<sup>21</sup>

Less is known about risk factors for elder abuse associated with the perpetrator. However, among those found salient through research, financial dependency and perpetrator dependency on the older adult victim for housing or in other ways represent two risk factors that may have relevance to abuse by guardians,<sup>22</sup> since so much can be categorized as financial abuse.<sup>23</sup> In addition, there is some evidence that the most violent or dangerous of perpetrators are those who exhibit such behaviors as being challenging or emotionally-draining, hostile or with temper control problems, and with contempt for the older adult or failing to provide that person

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Owens, C., & Cooper, C. (2010). The relationship between dementia and elder abuse. *Working with Older People*, 14(1), 19-21.

Dong, X., Simon, M., Rajan, K., & Evans, D.A. (2011). Association of cognitive function and risk for elder abuse in a community-dwelling population. *Dementia and Geriatric Cognitive Disorders*, 32, 209-215.

VandeWeerd, C., Paveza, G.J., Walsh, M., & Corvin, J. (2013). Physical mistreatment in persons with Alzheimer's Disease. *Journal of Aging Research*, 920324ID, 10 pages.

<sup>19</sup> Yon, Y., Ramiro-Gonzalez, M., Mikton, C.R., Huber, M., & Sethi, D. (2019). The prevalence of elder abuse in institutional settings: A systematic review and meta-analysis. *European Journal of Public Health*, 29(1), 58-67.

<sup>20</sup> Spann, J. (2002). Guardianship: A neglected piece of the surrogate decision-making picture. *State Initiative in End-of-Life Care*, 13, 1-8.

<sup>21</sup> Reynolds, S.L. (2002). Guardianship primavera: A first look at factors associated with having a legal guardian using a nationally representative sample of community-dwelling adults. *Aging & Mental Health*, 6(2), 109-120.

Johannesen, M., & Logiudice, D. (2013). Elder abuse: A systematic review of risk factors in community-dwelling elders. *Age & Aging*, 42, 292-298.

Dong, X. (2015). *Elder abuse: Systematic review and implications for practice*. *Journal of the American Geriatrics Society*, 63(6) 1214-1238.

<sup>22</sup> Jackson, S.L., & Hafemeister, T.L. (2011). Risk factors associated with elder abuse: The importance of differentiating by type of elder mistreatment. *Violence & Victims*, 26, 738-757.

DeLiema, M., Yonashiro-Cho, J., Gassoumis, Z.D., Yon, Y., & Conrad, K.J. (2017). Using latent class analysis to identify profiles of elder abuse perpetrators. *Journals of Gerontology: Social Sciences*, 73(5), e49-e58.

<sup>23</sup> e.g., GAO (2010, September), *supra* note 8, p. 5. The report discusses review of hundreds of alleged instances of abuse by guardians between 1990 and 2010 in 45 states and the District of Columbia, with most of the allegations involving financial exploitation and the misappropriation of assets. From 20 selected closed cases, it was found that guardians had stolen or improperly obtained \$5.4 million from 158 incapacitated victims, many of whom were older adults.

with emotional support.<sup>24</sup> It is unknown, but this may describe many guardians (including the initial case study of the second author of the paper, discussed in the Introduction). It especially describes those having a kinship relationship to the protected individual, whose behavior extends beyond financial abuse to perpetrate such other forms as physical or emotional abuse or intentional neglect towards the individual.

Research on the consequences of elder abuse suggests that it can include adverse physical and mental health. Examples of the former are chronic pain and high blood pressure, and examples of the latter are anxiety and depression. In addition, elder abuse has been found to result in premature death.<sup>25</sup> However, none of the studies on elder abuse consequences specifically examines abuse by guardians for its effects, although there is no reason to believe that it would be different than that perpetrated by some other trusted person.

Another consequence of elder abuse can be financial loss. The limited research on losses to victims of elder financial abuse by trusted others suggest that the amount can be staggering. For instance, studies conducted in 2008 and 2011 using media databases of news article reporting nationwide revealed losses totaling \$2.6 billion and \$2.9 billion respectively, with one-third of incidents perpetrated by trusted others and the remainder by strangers or reflective of Medicare/Medicaid fraud.<sup>26</sup> There also have been a few state- or municipality-specific inquiries.

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<sup>24</sup> Anetzberger, G.J. (1987). *The etiology of elder abuse by adult offspring*. Springfield, IL: Charles C Thomas Publishers.

DeLiema et al. (2017), *supra note* 33, p. 7.

<sup>25</sup> Dong. (2015), *supra note* 32, pp. 1228-1232.

Podneiks, E., & Thomas, C. (2017). The consequences of elder abuse. In X. Dong (Ed.), *Elder abuse: Research, practice and policy* (pp. 109-123). Cham, Switzerland: Springer Nature.

<sup>26</sup> MetLife Mature Market, National Committee for the Prevention of Elder Abuse, and Center for Gerontology at Virginia Tech. (2009). *The MetLife study of elder financial abuse: Broken trust: Elders, families, and finances*. Westport, CT: MetLife Mature Market Institute.

MetLife Mature Market, National Committee for the Prevention of Elder Abuse, and Center for Gerontology at Virginia Tech. (2011). *The MetLife study of elder financial abuse: Crimes of occasion, desperation, and predation against America's elders*. Westport, CT: MetLife Mature Market Institute.

For example, Maine analyzed 664 cases handled by two local programs (i.e., APS and Legal Services for the Elderly) during fiscal years 2010-2016 to reveal victim losses from \$71 thousand to \$451 thousand during that period, with most financial abuse perpetrated by a family member (typically the adult child) and secondarily by a friend/neighbor or care provider. A more recent study of 455 cases of financial abuse in Pennsylvania resulted in an estimated average victim loss of over \$39 thousand and a total loss of \$56 million among substantiated cases during fiscal year 2017-2018. Finally, New York State in 2016 estimated an annual loss locally of \$1.5 billion due to financial exploitation. However, guardianship relationship, and whether or not it exists, was not mentioned in any of these studies.<sup>27</sup> The only consideration of victim financial losses where the perpetrator is a guardian is found in GAO reports. The report published in 2010 included a review of 20 cases, which revealed that \$5.4 million had been improperly obtained by guardians of 158 incapacitated (mostly older) adults.<sup>28</sup> The other report, published in 2016, reviewed eight cases where guardians misappropriated over \$600 thousand in cash from incapacitated older or younger adults. The uses for the cash obtained by the guardians varied widely, from personal restaurant tabs to drug addiction support to a pick-up truck purchase for a friend.<sup>29</sup>

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<sup>27</sup> Griffin, E., McGuire, C., & Snow, K. (2017). *Financial exploitation of Maine's older adults: An analysis of Maine's Adult Protective Services and Legal Services for the Elderly case records*. Portland, ME: Muskie School of Public Service.

Pennsylvania Department of Aging. (2020, September). *Financial exploitation of older adults: Study report*.

Retrieved from <https://www.pa.gov/publications/older-adults-financial-exploitation-study>

Office of Children and Family Services. (2016, July 15). *The New York State cost of financial exploitation study*. Unpublished paper.

<sup>28</sup> GAO (2010, September) *supra note 8*.

<sup>29</sup> GAO (2016, November), *supra note 8*, pp. 3-4.

Elder abuse detection and reporting can be challenging, even with increased availability of screening tools<sup>30</sup> and mandatory reporting laws in all states but New York.<sup>31</sup> This is true for reasons that include victim or perpetrator lack of awareness, denial, or personal attitude about family roles or privacy. In addition, inadequate training, time pressures, and insufficient resources can inhibit the ability or willingness of a practitioner (e.g., counselor, nurse) to detect and report the problem. However, additional barriers exist that can further restrain detection and reporting of abuse by guardians. These may include the following on the part of victims:

- Inability to recognize and report elder abuse because of limitations posed by cognitive or mental incapacity
- Isolation from sources of help locally available
- Belief that the label of “ward” carries with it widespread assumption that what such a person has to say should not necessarily be believed
- Fear that alternative sources of surrogate decision-making (than the current guardian) may be non-existent or worse

For other persons, like practitioners and trusted others of the protected individual, the barriers may include:

- The mistaken perception that guardians always act to safeguard the protected individual against abuse and, therefore, would never inflict harm

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<sup>30</sup> e.g., Schofield, M.J. (2017). Screening for elder abuse: Tools and effectiveness. In X. Dong (Ed.), *Elder abuse: Research, practice and policy* (pp. 161-199). Cham, Switzerland: Springer Nature.

Daly, J.M. (2017). *Elder abuse prevention*. Iowa City, IA: University of Iowa College of Nursing.

<sup>31</sup> National Center on Elder Abuse, National Adult Protective Services Association, and Keck School of Medicine of the University of Southern California. (2020). *Brief: Mandated reporting of abuse of older adults and adults with disabilities*. Retrieved from

[https://ncea.acl.gov/NCEA/media/Publication/NCEA\\_NAPSA\\_MandatedReportBriefFull.pdf](https://ncea.acl.gov/NCEA/media/Publication/NCEA_NAPSA_MandatedReportBriefFull.pdf)

- An assumption that the Court's role to monitor guardianships enables it to easily identify and address any existing problems
- Belief that the relationship between guardian and the protected individual is such that the former is "due" some reward, or at least indulgence, for providing the individual protection and surrogate decision-making
- Lack of knowledge about the responsibilities and limitations of the guardian's role.

#### *4. Identification of Key Response Systems for Abuse by Guardians*

There are three key systems for responding to situations of abuse by guardians. Each is found nationwide, in every state and locality, and each has responsibility for handling abuse reports or referrals. However, beyond these commonalities, the systems are distinct. They differ from one another in ways that include professional orientation, primary concern, and intervention focus. The key systems are APS, Law Enforcement, and the Courts. The sections which follow describe them in some detail with respect to function and structure, role in addressing abuse by guardians, and barriers in fulfillment of that role.

Beyond these three key systems, others exist with important but typically less direct involvement in instances of abuse by a guardian. Some are situated in ways to detect and report its possible occurrence. This includes health care, aging and disability service networks, and financial institutions. Others also are expected to respond, but only in very specific and limited circumstances. These include state departments of health, protection and advocacy services, and long-term care ombudsman programs, the last when abuse takes place in long-term care settings. Although these additional systems are not the focus of this paper, they are worth noting, because their involvement can be important in abuse recognition and resolution and because they are

essential members of collaborative networks to impact abuse of any variety, a matter considered further in section VI.

### III. THE ROLE OF ADULT PROTECTIVE SERVICES (APS)

#### *A. Purpose and Operations of APS*

##### *1. Program Structure and Underpinnings*

Adult Protective Services represents a social service program which has as its purpose to promote the safety, independence, and quality of life of older adults and/or adults with impairments or disabilities who have experienced or are in danger of abuse, neglect, or exploitation (ANE) and unable to protect themselves.<sup>32</sup> It is the only program nationwide dedicated to this purpose. Its origins are found in the mid-twentieth century, and its current federal “home” is with the Administration for Community Living (as described in Appendix B: The Developmental History of APS).

State law authorizes and governs APS, delineating its target population and problems along with program structure and operations. This results in considerable variation across the country.<sup>33</sup> For example, in most states, any adult with an impairment or disability qualifies for APS, but in some states impairment or disability is not a requirement for older adults (usually age 60 and above) and in a couple of states only older adults are served. Some states limit investigations to those living in the community, while others include those in long-term care

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<sup>32</sup> National Center on Elder Abuse & National Adult Protective Services Resource Center. (n.d.). Fact sheet: Adult protective services, what you must know: What is adult protective services. Retrieved from <https://ncea.acl.gov/NCEA/media/Publication/APS-Fact-Sheet.pdf>

<sup>33</sup> The various sources used to identify state variations in APS law and practice include the following: National Association of States United for Aging and Disabilities (NASUA) & National Adult Protective Services Resource Center. (2012). *Adult protective services 2012: Increasingly vulnerable*. Washington, DC: NASUA. National Adult Protective Services Association & National Center on Elder Abuse. (2018, May). *Understanding and working with adult protective services (APS): Part I: Overview of APS programs*. Retrieved from <https://nces.acl.gov/NCEA?media/Publication/understanding-and-working-with-APS-May2018.pdf> McGee, L., & Urban, K. (2020). *Adult maltreatment data report 2019*. Submitted to the Administration for Community Living, US Department of Health and Human Services. Retrieved from <https://acl.gov/sites/default/files/programs/2020-10/2019%20NAMRS%29Report.pdf>

facilities. Most states include self-neglect and traditional abuse forms as qualifying for investigation. However, some will exclude self-neglect, add a form (such as abandonment), or alter a form's definition to increase or limit its scope. Ohio illustrates the last by recently expanding the targeted abuser for exploitation from a caregiver to any person.<sup>34</sup> In addition, as indicated earlier in this paper, all states, but New York, include mandatory reporting provisions in their APS or adult/elder abuse reporting laws. Nonetheless, who is required to report can vary widely, from everyone to only specific persons, most often Law Enforcement and health personnel, but also such others as attorneys, aging service providers, and financial service professionals. Finally, some state laws require reports to APS also be made to Law Enforcement or other systems, like departments of health or long-term care ombudsman programs, under certain circumstances.

With respect to APS structure and operations, key differences in state law surround program authority, auspices, and response times. For instance, generally APS is state-administered, but in some places it is county-administered or administered in such other ways as through contract with other agencies. The auspice for APS is usually human or social services, but in some locales it is aging services or public health. Finally, most states must initiate investigation shortly after the report is received, within 24 hours or less, and most have requirements around when an investigation must be completed, usually ranging from 30 to 90 days.

Outside of statutes, state variation in APS programs is evident in other ways. Lacking dedicated federal revenues, states generally rely on multiple sources to fund APS. Ranked from the most to the least used, they include state appropriations, Social Services Block Grant, Older

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<sup>34</sup> Ohio Revised Code 5101, 60(J) Adult protective services definition: Exploitation.

Americans Act, Medicaid, US Department of Justice, and miscellaneous other sources. Available services to meet identified needs also can vary widely, with deficiencies especially evident in rural areas, and gaps most noteworthy with respect to housing and relocation, mental health, transportation, and financial planning services. Although most states have staffs to receive reports at any time, some use contracted call centers or other options. Staff in APS programs nationwide is more likely to be social workers than other professionals. However, states differ in whether or not a social work degree/license or any higher education degree/professional license is required.<sup>35</sup> Staff does not tend to work in APS exclusively. Rather they divide their responsibilities, typically with child protective services followed by aging, disability, and guardianship services in that order. Lastly, APS staff caseload size varies from under 25 to over 100, averaging between 26 and 50 per worker.

For all the variation in APS structure and operations across states, there is commonality with respect to values, principles, and approaches. As articulated by the National Adult Protective Services Association (NAPSA), the guiding value in APS directs every action to balance duty to protect with the adult's right to self-determination. The secondary value requires that older persons and adults with impairments or disabilities be treated in a manner that is honest, caring, and respectful. From these core values emerge four principles that reflect the adult's rights with respect to protective services, namely: (1) the right to be safe, (2) the right to retain civil and constitutional rights, (3) the right to make unconventional decisions so long as they do not harm others, and (4) the right to accept or refuse services.<sup>36</sup> Additional principles that guide APS include the primacy of the adult, the adult's right to participate in decision-making

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<sup>35</sup> Daly, J.M., Jogerst, G.J., Haigh, K.M., Leeney, J.L., & Dawson, J.D. (2005). Adult protective services job requirements associated with elder abuse rates. *Social Work in Health Care, 40*(3), 89-102.

<sup>36</sup> National Adult Protective Services Association (NAPSA). (n.d.). NAPSA (or APS) Code of ethics. Retrieved from <https://www.napso-now.org/about-napsa/cod-of-ethics>

affecting his or her situation, use of least restrictive interventions, not taking actions that place the adult at greater risk, and respect for the adult's privacy.<sup>37</sup> Finally, key approaches for APS were identified in the recently revised Voluntary Consensus Guidelines for State APS Systems. They include person-centered service, trauma-informed approach, and supported decision-making.<sup>38</sup>

## 2. APS Functions, Process, and Clientele

There are four essential functions of APS everywhere: (1) receive and investigate reports or referrals of adult/elder abuse; (2) assess adult status and service needs; (3) arrange and coordinate or provide services to treat harm or prevent its future occurrence; and (4) seek legal intervention in the form of surrogate decision-making authority for the adult, if incapacitated, and/or criminal penalty for the abuser, if indicated.<sup>39</sup> Each function is accompanied by roles and responsibilities that may vary by state or locale.

Understanding the APS process requires identifying its major steps (i.e., report, intake, investigation, assessment, plan development and implementation, and case closure) along with their functions, key activities, and possible legal interventions. These are summarized in Table 1. It should be noted that the specifics of these features may vary from state to state, or even programs within a state. However, the essential elements describe the APS process nationwide.

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<sup>37</sup> Anetzberger, G.J. (1999). Ethical issues in personal safety. In T. F. Johnson (Ed.), *Handbook on ethical issues in aging* (pp. 187-219). Westport, CT: Greenwood Press.

Anetzberger, G.J., & Miller, C.A. (2019). Elder abuse and neglect. In C. A. Miller, *Nursing for wellness in older adults* (pp.163-192). Philadelphia: Wolters Kluwer.

<sup>38</sup> Administration for Community Living. (2020, March). National voluntary consensus guidelines for state adult protective services systems: Updated. Retrieved from <https://acl.gov/sites/default/files/programs/2020-05/ACL-Guidelines-2020-pdf>

<sup>39</sup> Liu, P., & Anetzberger, G.J. (2019). Adult protective services. In D. Gu & M. E. Dupre (Eds.), *Encyclopedia of gerontology and population aging*. Cham, Switzerland: Springer Nature. (Online publication May 10, 2019; hard copy release April 16, 2021).

The clientele served by APS can be seen in data captured by NAMRS from state programs nationwide. The system is voluntary, which means that for some elements data may not have been submitted. The latest report, for 2019, reveals the receipt of 1,315,992 reports of maltreatment. Most were made by professionals (63.7%); only 4% were self-reports. Nearly two-thirds (62.3%) met the criteria for APS investigation; of these, one-third (32.4%) resulted in a substantiated investigation, meaning the report of maltreatment was confirmed. Of these victims, half (49.6%) received protective services. Victims were most likely to experience self-neglect, followed by neglect, financial exploitation, emotional abuse, and physical abuse in that order. They were least likely to experience sexual abuse and abandonment. Victims were more likely to be women (53.5%) than men (38.9%) and age 70 or older (51.3%); over one-third (37.6%) had ambulatory difficulty and more than one-fifth (22.4%) had cognitive impairment. Eighty-two percent of victims lived in their own residence or that of a relative or caregiver at the start of the investigation; by case closure the percentage fell to 71%, with placement most commonly in a nursing home (17%) or residential care facility (8%). Perpetrators of maltreatment were more likely to be women (41.5%) than men (36.8%) and a relative of the victim, typically the adult child (22.7%); however, one-third of perpetrators (33.1%) had no family relationship with the victim.<sup>40</sup>

### 3. *Criticisms Surrounding APS*

Adult Protective Services has been the target of criticism from its inception. Criticism has come from varied sources, such as other service providers, public officials, and abuse victims themselves. The appropriate response to such criticism often rests on the nature of the APS

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<sup>40</sup> McGee & Urban, *supra* note 52.

process itself, including its legal constraints and ethical underpinnings. Table 2 provides illustration of this connection.

Other criticisms fall outside the APS process. Some reflect decisions made in the evolution of APS as a program, decisions that may have been controversial at the time and remain so today. Foremost among them is mandatory reporting. Criticism of mandatory reporting began with the enactment of the earliest state laws containing the provision.<sup>41</sup> Mandatory reporting was a concept borrowed from child protective services statutes. Arguments in favor of its inclusion in APS or adult/elder abuse reporting laws include its importance in underscoring the seriousness of the problem, motivating professionals and others to report, and making interventions available at an early stage. Arguments against mandatory reporting are also compelling. It is seen as a threat to the autonomy of older persons and adults with impairments or disabilities, intruding on their lives with no guarantee of available and quality services to address their needs, and perhaps placing them at great risk. For professionals identified as mandatory reporters, the provision further can be seen to erode established confidential and trust relationships and perhaps even sever them, compromising the support base of those most in need of it, without any guarantee of successful APS intervention.

There has been limited research on the merit of mandatory reporting, although priority for inquiry into it was given in the earliest national elder abuse research agenda.<sup>42</sup> Most recently, however, in developing the first national APS Research Agenda, two questions on the effectiveness of mandatory reporting were among the original listings, only to be removed in the

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<sup>41</sup> e.g., Faulkner, L. R. (1982). Mandating the reporting of suspected cases of elder abuse: An inappropriate, ineffective and ageist response to the abuse of older adults. *Family Law Quarterly*, 16(1), 69-91.  
Gilbert, D.A. (1986). The ethics of mandatory elder abuse reporting statutes. *Advances in Nursing Science*, 8(2), 51-62.

Callahan, J.J., Jr. (1988). Elder abuse: Some questions for policy makers. *The Gerontologist*, 28(4), 453-458.

<sup>42</sup>Stein, *supra* note 22.

final published version for not having received sufficient priority from the panel of APS/elder abuse experts charged with their ranking.<sup>43</sup> Studies to date offer limited support for mandatory reporting provisions. A 1991 GAO report found public and professional awareness more effective in generating reports.<sup>44</sup> Subsequent research in Massachusetts concluded that higher reporting was associated with greater training of area professionals and high rates of area services.<sup>45</sup> Other studies found factors like creating an atmosphere of trust more important, or they produced mixed results about the value of mandatory reporting.<sup>46</sup>

More recent controversies about APS are those surrounding its growing reach and its relative lack of evaluative research. Expansive reach is seen in the enhanced number and/or definitions of abuse forms and sometimes the persons who qualify as victims or perpetrators in state APS law. Again, using Ohio law for illustration, not long ago abandonment was added to the definition of neglect, and fraud and scams now are covered under the definition of exploitation.<sup>47</sup> One should remember that APS began as an intervention for self-neglect primarily and potential exploitation secondarily. It covers much more now. The NAMRS listing of maltreatment forms currently includes self-neglect, neglect, financial exploitation, physical abuse, emotional abuse, exploitation (non-specific), other, sexual abuse, other exploitation, and

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<sup>43</sup> The first author of this paper served on the Administration for Community Living Technical Expert Panel (TEP) that facilitated the development of the APS Research Agenda in 2020. Previously she had served on the TEP that developed (2016) and then updated (2019) the APS Voluntary Consensus Guidelines. Administration for Community Living (ACL). (2020, August 13). *Building the evidence base for adult protective services, Part I: APS research agenda*. Retrieved from <https://acl.gov/sites/default/files/news%2020-10/APS%20Research%20Agenda.pdf>

<sup>44</sup> US General Accounting Office. (April, 1991). *Elder abuse: Effectiveness of reporting laws and other factors*. Washington, DC: Government Printing Office.

<sup>45</sup> Wolf, R.S., & Li, D. (1999). Factors affecting the rate of elder abuse reporting to a state protective services program. *The Gerontologist*, 39(2), 222-228.

<sup>46</sup> Rodriguez, M.A., Wallace, S.P., Woolf, N.H., & Mangione, C.M. (2006). Mandatory reporting of elder abuse: Between a rock and a hard place. *Annals of Family Medicine*, 4(5), 403-409.

Malks, B.F., Strobel, D.M., Leung, Y., Court, M.W., Morris, J.R., May, G., Reeves, S., Davies, M. Cartan, H., & Philyaw, M.L. (2010). Changing systems to address elder abuse: Examples from aging services, the courts, the long-term care ombudsman, and the faith community. *Journal of Elder Abuse & Neglect*, 22, 306-327.

<sup>47</sup> Ohio Revised Code 5101.60(J) (O) Adult protective services definitions: Exploitation, neglect.

abandonment.<sup>48</sup> Proponents of this trend point to the advantages of centralizing report receipt and investigative authority in a single program. They also note the unfortunate reality of poly-victimization (when multiple abuse forms occur within a single situation), and the benefits of consolidated or coordinated response handling. Opponents argue that APS already is underfunded in most locales. Taking on more obligations is irresponsible. Moreover, APS is less equipped to be the lead in handling forms of abuse like fraud and scams or even sexual abuse, when other agencies have developed specialized expertise in these areas.

It is widely acknowledged that despite a more than fifty-year history, there has been little evaluative research on APS.<sup>49</sup> Therefore, we know almost nothing about whether or not APS works, and if it works, when, how, and for whom. The controversy surrounding this issue sometimes is less about the need for related study than on the potential of negative findings and their implications for existing programs, including staff jobs. Even if inadequacies can be fixed, it may mean law revisions, staffing changes, more funding, and other measures requiring significant commitments of time, perseverance, and resources to effect. Moreover, if APS does not work in addressing vulnerable adult/elder abuse, do alternatives exist? What kind of success have they shown? These questions are as difficult to answer as those surrounding the effectiveness of APS.

### *B. Intersect of APS and Guardianship*

There are four ways in which APS and guardianship intersect. First, APS may receive a report of ANE perpetrated by someone who serves as guardian to the adult/elder victim. This

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<sup>48</sup> Capehart, A. (2020, November 30). NAMRS: The latest from our national data system. APS TARC Blog. Retrieved from <https://aptarc.acl.gov/APS-Blog/November-30-2020.aspx>

<sup>49</sup> Ernst, J.S., Ramsey-Klawnsnik, H., Schillerstrom, J.E., Dayton, C., Mixson, P., and Counihan, M. (2014). Informing evidence-based practice: A review of research analyzing adult protective services data. *Journal of Elder Abuse & Neglect*, 26, 458-494. ACL, *supra note* 62.

will initiate application of the APS process across its sequential steps. Second, guardians may report abuse perpetration of the protected individual by family members or others. This can happen whether or not guardians are specifically identified as mandatory reporters under state law. Third, APS may use guardianship in the course of case handling. Although this can occur earlier in the APS process, it is most likely during Plan Development and Implementation. Each of these three circumstances will be considered in the sections which follow. Fourth, APS may contact Law Enforcement and/or the Courts around abuse by guardian concerns. This might represent consultation around a case accepted by APS for investigation, or it might be referral of a report received by APS that the program deems to be more appropriately handled by some other system. This circumstance will not be examined here, but has implied meaning under Part VI of the paper on Multisystem Collaboration in Addressing Abuse by Guardians.

#### *1. Reports of Abuse by Guardians to APS*

It is likely that APS programs nationwide sometimes receive a report of abuse by a guardian. However, whether or not such a report is accepted for the purpose of APS investigation depends upon the legal parameters found in the ANE definitions and who qualifies as perpetrator. If the act of abuse by a guardian, such as theft of money or failure to provide necessary care, falls under the definition of ANE, the report must be accepted, unless the definition specifically excludes someone who serves as guardian of the victim (conceivably because the act is regarded as a referral to be handled by another system, like the Courts or Law Enforcement) or the guardian fails to fall under a named category of perpetrator, such as

caregiver. However, some states, like Florida, require anyone who believes that abuse by a guardian is occurring to report that incident to APS.<sup>50</sup>

Generally, under state APS law most abuse by guardians will qualify for report investigation. Ohio law illustrates this, as the following definitions for ANE indicate:

- “Abuse” means the infliction upon an adult by self or other of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish.
- “Exploitation” means the unlawful or improper act of a person using, in one or more transactions, an adult or an adult’s resources for monetary or personal benefits, profit, or gain when the person obtained or exerted control over the adult or the adult’s resources in any of the following ways: (1) without the adult’s consent or the consent of the person authorized to give consent on the adult’s behalf; (2) beyond the scope of the express or implied consent of the adult or the person authorized to give consent on the adult’s behalf; (3) by deception; (4) by threat; (5) by intimidation.
- “Neglect” means any of the following: (1) failure of an adult to provide for self the goods or services necessary to avoid physical harm, mental anguish, or mental illness; (2) failure of a caretaker to provide such goods or services; or (3) abandonment.

“Caretaker” means the person assuming the responsibility for the care of an adult on a voluntary basis, by contract, through receipt of payment for care, as a result of a family relationship, or by order of a court of competent jurisdiction. “Abandonment” means the

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<sup>50</sup>National Center on Elder Abuse. (2015). 2015 State guardianship legislation relating to elder abuse. Retrieved from [https://ncea.acl.gov/NCEA/media/publications/State-Guardianship-Legislation-Addressing-Elder-Abuse-\(2015\).pdf](https://ncea.acl.gov/NCEA/media/publications/State-Guardianship-Legislation-Addressing-Elder-Abuse-(2015).pdf)

desertion of an adult by a caretaker without having made provision for transfer of the adult's care.<sup>51</sup>

More specifically, consider the first case study presented in the Introduction, that of an attorney who stole from multiple persons for who he served as guardian. Had a report of the situation been made to Ohio APS today, it would have been accepted for investigation. It meets the qualifications under state law for "exploitation". In addition, that definition does not exclude any perpetrator identity or perpetrator/victim relationship.

Of course, sometimes practice can differ from established policy. For example, Ohio represents a state where APS is county-administered. Therefore, individual locales can show some variation in program structure and operations. More specifically and anecdotally, counties have been known to vary in whether or not and how they handle a report of abuse by a guardian, with some initiating an investigation, others not, and still others investigating jointly with probate court. Variation in practice can arise for many reasons, including differences in the interpretation of statutory provisions and locally established relationships across systems. However, its effect can create confusion and inconsistency, which may undermine confidence in APS as a service system.

There is little research on the extent of abuse by guardians evident in situations of ANE handled by APS. One study that presented such data examined a sample of 2,679 substantiated reports of elder abuse made over a 26-month period to Illinois APS. Among them were 60 (2.2%) where the abuser was the older adult's guardian.<sup>52</sup>

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<sup>51</sup> Ohio Revised Code 5101.60 (A) (B) (E) (J) (O) Adult protective services definitions: Abandonment, abuse, caretaker, exploitation, and neglect.

<sup>52</sup> Neale, A.V., Hwalek, M.A., Goodrich, C.S., & Quinn, K.M. (1997). Reason for case closure among substantiated reports of elder abuse. *Journal of Applied Gerontology*, 16(4), 442-458.

## 2. *Guardians as Abuse Reporters*

Guardians may be included as mandatory reporters in state APS or abuse reporting laws. This happens in any of three ways. First, everyone is required to report, which, of course, would include guardians. Nearly one-third of the states do this, including Indiana, New Hampshire, and Louisiana. Second, the guardian represents a profession, like attorney, or other category, like notary public, identified as a mandatory reporter. Finally, guardians are specifically named as mandatory reporters. This happens in less than a dozen states, including Maine, North Dakota, and most recently Arizona.<sup>53</sup> The importance of guardians as abuse reporters rests with the guardian's responsibility to safeguard the protected individual, which can include alerting authorities to abuse when it is known or suspected. The duty of guardians to report abuse also is contained in the NGA Standards of Practice.

## 3. *Use of Guardianship in APS Case Handling*

In order to protect an older person or adult with impairments or disabilities from further harm, APS may petition the Court for guardianship. In accordance with APS values and principles, and sometimes state law, this should be considered only if less restrictive measures have been assessed and found inadequate, making guardianship the measure of last resort. For instance, less restrictive options for exploitation might include joint bank accounts, trusts, representative payees, and powers of attorney.

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<sup>53</sup> National Center of Elder Abuse & National Adult Protective Services Association. (2020). Mandated reporting of abuse of older adults and adults with disabilities. Retrieved from [https://ncea.acl.gov/NCEA/media/Publication/NCEA\\_NAPSA\\_MandatedReportBriefFull.pdf](https://ncea.acl.gov/NCEA/media/Publication/NCEA_NAPSA_MandatedReportBriefFull.pdf)

Guardianship has been seen as an important intervention for use by APS since the program's origins.<sup>54</sup> Some have described it as the most common, and perhaps overused, legal option available to APS.<sup>55</sup> Others have lamented on the sometimes lack of available guardians, particularly for lower income or isolated persons, due to insufficiencies of such resources as public or volunteer guardians.<sup>56</sup> However, there is little data on the actual use of guardianship in APS case handling.<sup>57</sup> According to the representative for the NAMRS contract organization, the reason for this rests on the discretion states have in whether or not they report data and how they classify this option among alternatives given.<sup>58</sup> In addition, the options named, such as "Legal Services" and "Law/Judicial/Legal Professional", tend to be broad and can include several other measures besides use of guardianship. The same limitation is seen in findings from the 2012 survey of state APS programs, where more than 60% of respondents provided "Legal Interventions" directly or indirectly to victims.<sup>59</sup> Considering just Ohio in fiscal year 2018,

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<sup>54</sup> Blenkner, M., Bloom, M., Nielsen, M., & Weber, R. (1974). *Final report: Protective services for older people: Findings from The Benjamin Rose Institute study*. Cleveland, OH: The Benjamin Rose Institute.

<sup>55</sup> Byers, B., Hendricks, J.E., & Wiese, D. (1993). An overview of adult protective services. In B. Byers & J. E. Hendricks (Eds.), *Adult protective services: Research and practice* (pp. 3-31). Springfield, IL: Charles C Thomas Publisher.

<sup>56</sup> National Association of Adult Protective Services Administrators. (2003, January). *Report on problems facing states' adult protective services and the resources needed to resolve them*. Unpublished paper.

Quinn, K.M., & Mixson, P.M. (2012). Adult protective services face critical challenges. *Public Policy & Aging Report*, 22(1), 28-32.

<sup>57</sup> An exception is found from a study on interventions for 211 Adult Protective Services clients referred for geriatric assessment in central New Jersey. Among them, guardianship actions were initiated for 74 (35%), primarily in correlation with caregiver neglect or financial exploitation. All but four of these involved clients with newly diagnosed dementia.

Heath, J.M., Kobylarz, F.A., Brown, M., & Castano, S. (2005). Interventions from home-based geriatric assessments of adult protective services clients suffering elder mistreatment. *Journal of the American Geriatrics Society*, 53, 1538-1542.

<sup>58</sup> Information is based on an interview with Leslie McGee on November 2, 2020. She is Senior Research Associate and Subject Matter Expert for the Adult Protective Services Technical Assistance Resource Center, WPMA, Inc. and former Chief of Adult Protective Services for the Ohio Department of Job and Family Services.

<sup>59</sup>National Association of States United for Aging and Disabilities & National Adult Protective Services Resource Center, *supra note 52*.

among 4,490 older adults found to be in need of protective services after investigation, only 0.5% was subject to court intervention of any kind, including guardianship.<sup>60</sup>

It should be noted that few APS programs assume guardianship themselves on behalf of the victims they serve. Reasons vary and include perceived conflict of interest, insufficient resources, and the availability of other local options. Moreover, once guardianship appointment occurs, APS tends to bow out of the case, except perhaps for a brief transition period, out of belief that the situation is effectively resolved and responsible oversight placed in the hands of the Court.<sup>61</sup> In contrast, APS is the guardian of last resort in New York, with the number of guardianships for the APS jurisdiction that the second author represents having tripled in the last six years.

#### IV. THE ROLE OF LAW ENFORCEMENT

Law Enforcement is another key stakeholder in combating abuse by guardians. However, as we look at the role of Law Enforcement in guardianship, there are several underlying questions that should be considered. Is Law Enforcement a necessary party to combat abuse by guardians? What can Law Enforcement do to target the problem? When does abuse by guardians cross the line from a civil matter to a criminal action? How does Law Enforcement become involved in abuse by guardian cases? Finally, what barriers are there to involving Law Enforcement?

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<sup>60</sup> Ohio Department of Job and Family Services. (2019). *Adult protective services data fact sheet for SFY 2018*. Unpublished paper.

<sup>61</sup> Information is based on an interview with Andy Capehart on November 9, 2020. He is Senior Business Analyst, Subject Matter Expert, and lead staff on technical assistance for the Adult Protective Technical Assistance Resource Center, WRMA, Inc. and former Assistant Director for the National Adult Protective Services Association.

### *A. History, Purpose, and Operations of Law Enforcement*

In 2020 the role of Law Enforcement in the United States was one of the most scrutinized and debated issues. Like many other institutions, it has changed dramatically since the country's inception. During early times, the role was carried out by volunteer groups and part-time officers who were privately funded by local community members.<sup>62</sup> A centralized municipal police department was first created in Boston in 1838.<sup>63</sup> Today, there are more than 18,000 local, state, and federal Law Enforcement agencies that employ more than 420,000 officers. However, the size of police departments varies greatly by location and population.<sup>64</sup>

Police officers play only part of the role of Law Enforcement in the United States. The police are the investigatory arm and often make initial decisions concerning arrests of individuals. The second role in the Law Enforcement function is that of the prosecutor. For most abuse by guardian cases, that prosecutorial function is the duty of the local district attorney. However, in certain circumstances the role can be the responsibility of the state attorney general or even federal prosecutors. The prosecutor's role is ultimately to decide whether to charge any criminal activity, present any felonies to the Grand Jury, resolve any charges through plea (or otherwise), and ultimately present the criminal evidence at trial.

The decision whether to pursue criminal charges is called "prosecutorial discretion", which is an enormous power that at times has been questioned. For example, Professor Angela Davis of American University College of Law has opined that "Unchecked power in the hands of

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<sup>62</sup> Mosteller, J. (2019, August 09). Role of Police in America. Retrieved from <https://www.charleskochinstitute.org/issue-areas/criminal-justice-policing-reform/role-of-police-in-america/>

<sup>63</sup> See *id.*

<sup>64</sup> See *id.*

prosecutors is as much a threat to our democracy as it is with any other government official, if not more. Prosecutorial decisions often result in a loss of liberty and even life.”<sup>65</sup> In this regard it is interesting to note that the prosecution of white-collar crime in the federal system has decreased 51.3% over the last five years.<sup>66</sup>

Police and prosecutors must work together to successfully maintain the sanctity of the Law Enforcement process. It is important that the police and district attorney work collaboratively, since a failure to do so can call the efficacy of the Law Enforcement system into question.

### *B. Law Enforcement and Abuse by Guardians*

In the last ten years numerous new or expanded criminal statutes aimed at combating elder abuse were enacted into law across the country.<sup>67</sup> This undoubtedly positive initial step must be followed by training and implementation activities concerning the new statutes. If Law Enforcement is not aware of the new criminal statutes, then its effectiveness will be limited. The scope of this paper does not allow a survey of existing elder abuse statutes, but the US Department of Justice Elder Abuse and Elder Financial Exploitation Statutes table resource explicitly details the statutes across the states.<sup>68</sup> In addition, the University of Southern

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<sup>65</sup> Davis, A. J. (2015, January 14). Do Prosecutors Have Too Much Power? Retrieved from <https://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/federal-prosecutors-have-way-too-much-power>

<sup>66</sup> White Collar Crime Prosecutions for 2020. (2020, November 12). Syracuse University Transactional Records Clearing House. Retrieved from <https://tracfed.syr.edu/results/9x775fad7367f6.html>.

<sup>67</sup> See the United States Department of Justice Website. <https://www.justice.gov/elderjustice/elder-justice-statutes-0>.

<sup>68</sup> See *id.*, <https://www.justice.gov/elderjustice/prosecutors/statutes>.

California has created EAGLE (Elder Abuse Guide for Law Enforcement), which has state specific laws on elder abuse, an elder abuse overview, and Law Enforcement resources.<sup>69</sup>

Within these criminal statutes, an area to examine is whether the specific crimes require the victim to be elderly or incapacitated. Additionally, are there crimes limited to those in a fiduciary capacity, which would be more tailored to abuse by a guardian? For example, New York State has several criminal statutes related to the mistreatment of vulnerable elderly individuals or incompetent or physically disabled individuals.<sup>70</sup> These statutes specifically require that the perpetrator must be a caregiver for the victim/person at risk.<sup>71</sup> New York Penal Law § 260.3 defines caregiver as, “. . . a person who (i) assumes responsibility for the care of a vulnerable elderly person pursuant to a court order; or (ii) receives monetary or other valuable consideration for providing care for a vulnerable elderly person”. As such, a duly appointed guardian would qualify as a caregiver pursuant to the New York Penal Law and thus subject to the potential criminal penalties related thereto. Several other states also have instituted criminal statutes that specifically reference a guardian as someone who can be charged for crimes related to the assault or exploitation of an elderly, disabled, or impaired adult.<sup>72</sup>

New York State added another charge within its scheme to defraud to include a course of conduct against more than one vulnerable elderly person.<sup>73</sup> Further, it added an enhanced penalty to a felony to its assault statute if the victim is sixty-five or older and the perpetrator is more than ten years younger than the victim. These types of enhancements may serve not only as

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<sup>69</sup>Elder Abuse Guide for Law Enforcement, <https://eagle.usc.edu>

<sup>70</sup> See N.Y. Penal Law §260.24, 260.25, 260.32 & 260.34, New York Penal Law Sections 260.32 and 260.34

<sup>71</sup> See *id.*

<sup>72</sup>For examples see N.H. Rev. Stat. §631:9 (2016); Mass. Gen. Laws ch. 265 §13K; and Utah Code Ann. §76-5-111 (2015)

<sup>73</sup> See N.Y. Penal Law §190.65

deterrents but also as tools to prosecutors that are dealing with a harder to prove guardianship matter.<sup>74</sup>

One of the tools in prosecuting any abuse by guardian case is an order of restitution to compensate the victim of the abuse. Anecdotally, in the cases that the second author of this paper has handled concerning financial exploitation, there is little reliance on meaningful restitution, due to an inability to repay by the offender and lack of desire to seek repayment by the victim. This perception in part is supported by a 2018 Government Accountability Office (GAO) report that found most restitution debt remains outstanding, primarily due to the offender's inability to pay.<sup>75</sup>

After it is determined that a crime was committed by the guardian, another daunting decision for any person wanting to make a Law Enforcement referral about the abuse is where and how to make a referral to Law Enforcement. Which Law Enforcement agency is responsible? Where should the referral go in the Law Enforcement agency? As stated previously, there are many thousands of Law Enforcement agencies in the United States.<sup>76</sup> For instance, Onondaga County in New York State (NYS) has a population of approximately 460,000<sup>77</sup> and has 15 different Law Enforcement agencies.<sup>78</sup> Cuyahoga County in Ohio, which contains the

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<sup>74</sup> See NYS Penal Law §120.05

<sup>75</sup> U.S. Government Accountability Office. (2018, February 02). Federal Criminal Restitution: Most Debt Is Outstanding and Oversight of Collections Could Be Improved. Retrieved from <https://www.gao.gov/products/gao-18-203>.

<sup>76</sup> Mosteller, *supra* note 1.

<sup>77</sup> See United States Census Bureau, <https://www.census.gov/quickfacts/onondagacountynewyork>.

<sup>78</sup> See Onondaga County District Attorney, <https://da.ongov.net/police-agencies/>.

City of Cleveland, has more than 1.2 million people<sup>79</sup> and has approximately 60 Law Enforcement agencies.<sup>80</sup>

In most locales there is at least one agency that has jurisdiction throughout the county. However, Law Enforcement agencies are often careful not to interfere in perceived exclusive jurisdiction of another Law Enforcement. Thus, if criminal activity takes place in a city with a city police department, an agency with county wide jurisdiction may be unlikely to investigate a referral in the city. This concept of specialized jurisdiction can lead to confusion on the part of victims and the possibility that referrals are not made. Continued budget restrictions, prioritization of violent crime, and the general categorization of adult/elder abuse crimes as non-emergency matters may result in long wait times for the response of Law Enforcement to calls made by APS. A potential solution is a liaison between the two systems and direct contact referrals. Syracuse is currently using its Enhanced Multi-Disciplinary Team (EMDT) structure to establish a more effective referral process for suspected crimes against APS victims, including cases involving guardians. Direct referrals to the District Attorney are used on a limited basis as well.

There are other options available. For example, in NYS, the Attorney General has undertaken an active role in financial scams, including identity theft, throughout the State. If the offending guardian is the spouse of a licensed financial adviser, then federal agencies like the Securities and Exchange Commission (SEC) can become involved. Locally, the second author of the paper was contacted in 2019 by the SEC to explore a joint case where a licensed financial

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<sup>79</sup> See United States Census Bureau, <https://www.census.gov/quickfacts/fact/table/cuyahogacountyohio,US/PST045219>.

<sup>80</sup> See USACOPS, <https://www.usacops.com/oh/cuyahoga.html>.

adviser also was acting as a power of attorney and undertaking inappropriate financial activity. Finally, postal inspectors have jurisdiction in many identity theft matters, and the Internal Revenue Service also will have jurisdiction, if a guardian has failed to report income gained from the incapacitated person.

The emergence of EMDTs and being awarded elder abuse grants can be transformative for relationships with Law Enforcement. Grant trainings, co-presentations, and serving on these teams has enabled the second author of this paper to establish and maintain relationships with Law Enforcement (both police agencies and district attorneys) in ways that did not exist previously. More specifically, Onondaga County received the Enhanced Training and Services to End Violence and Abuse in Later Life grant and the Enhanced Culturally Specific Services for Victims of Sexual Assault, Domestic Violence, and Stalking Program grant through the Office on Violence Against Women.<sup>81</sup> Through these grants and associated extensions Onondaga County has been able to train nearly 400 Law Enforcement officers concerning abuse in later life. Additionally, four assistant district attorneys and four judges were sent for national training concerning elder abuse. The ability to contact an informed individual that you know and have an existing relationship with concerning a potential abuse case is inimitable.

Thus far the discussion about Law Enforcement has been on general issues, including elder abuse. Now the focus transitions to abuse by guardians. Without research or collected data revealing the prevalence of abuse by guardians, it becomes necessary to concentrate on anecdotal cases.

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<sup>81</sup> See 34 U.S.C. § 12421 and 34 U.S.C §20124.

Radio personality, Casey Kasem, was the subject of disputed guardianship proceedings and resulting isolation from family members. When Kasem became incapacitated, his wife denied visitation for his daughter Kerri Kasem and her siblings. The family's story gained nationwide attention. Kerri and her siblings pursued a Court action to gain access to their father. While the Court action eventually succeeded, their father's health deteriorated to the point that he died shortly after a Court granted Kerri conservatorship. There also were allegations of neglect against Kasem's spouse. However, the Los Angeles District Attorney declined to prosecute the case due to lack of evidence of criminal neglect or abuse. Kerri Kasem also has made efforts nationally to revise guardianship visitation laws.<sup>82</sup> The identity of which states passed laws concerning visitation and isolation can be found in the Legislative Fact Sheet: Guardianship and the Right to Visitation, Interaction, and Communication to Guardianship.<sup>83</sup>

A case involving a professional guardian in Clark County, Nevada was detailed in the *New Yorker* in 2017.<sup>84</sup> The professional guardian, April Parks, was indicted on more than 200 felony charges related to multiple guardianships.<sup>85</sup> Ms. Parks enlisted medical facilities and lawyers to seek out potential clients, and she also engaged physician assistants and instructed them on how to write medical notes to ensure that Ms. Parks was granted guardianship by the Court. Nevada's guardianship system allowed a professional guardian to obtain temporary guardianship on an Ex Parte basis solely on verification from a medical professional. In 2017, Nevada's guardianship statute was comprehensively amended, including the establishment of a

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<sup>82</sup> Mayoras, D. (2015, June 05). Casey Kasem's Daughter Fights For New Guardianship Visitation Laws. Retrieved from <https://www.forbes.com/sites/trialandheirs/2015/06/03/casey-kasems-daughter-fights-for-new-guardianship-visitation-laws/?sh=a5ba52947f34>

<sup>83</sup> See American Bar Association Visitation Legislative Factsheet, [https://www.americanbar.org/groups/law\\_aging/](https://www.americanbar.org/groups/law_aging/).

<sup>84</sup> Aviv, R. (2017, October 09). How the Elderly Lose Their Rights. Retrieved from <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>.

<sup>85</sup> See *id.*

Guardianship Compliance Office, Protected Person's Bill of Rights, enhanced process service requirements, and the appointment of an attorney for the individual.<sup>86</sup> Ultimately, Ms. Parks pleaded guilty to exploitation, theft, and perjury charges; was sentenced to 16 to 40 years; and was ordered to pay more than \$500,000 in restitution to victims with co-defendants.<sup>87</sup>

As with many government actions, it sometimes takes a tragedy or bad result to influence activity and changes in process. In Florida, Governor DeSantis proposed that lawmakers provide \$6.4 million to the Office of Public and Professional Guardians, which included an increase of \$454,390 for professional guardian investigative services and legal fees. The increased funding proposal was partially driven by the death of an incapacitated person, who reportedly died in part due to a Court appointed professional guardian, who served as guardian for at least 450 people. The professional guardian was criminally charged in the case and resigned as guardian from the other cases where she was guardian. One of the individuals also was successful in going to Court to have the guardianship terminated and his rights restored.<sup>88</sup>

The use of appropriate disciplinary measures against guardians that act inappropriately and dedicated investigative resources were two of the recommended changes by the GAO report of 2016.<sup>89</sup> Palm Beach County in Florida has a specialized Audit and Investigations program which includes a guardian hotline.<sup>90</sup> If dedicated investigators were widely available and

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<sup>86</sup> Nevada Revised Statutes Chapter 159

<sup>87</sup> Ferrara, D. (2019, January 05). Ex-Nevada guardian to serve up to 40 years behind bars. Retrieved from <https://www.reviewjournal.com/crime/courts/ex-nevada-guardian-to-serve-up-to-40-years-behind-bars-1565690/>

<sup>88</sup> Cordeiro, M. (2020, September 01). Former ward of disgraced guardian Rebecca Fierle won his rights back. Then he died. Retrieved from <https://www.orlandosentinel.com/news/florida/guardians/os-ne-jack-meagher-rebecca-fierle-guardianship-20200828-hwmkve3tyvaazhcuasavq2bko4-story.html>

<sup>89</sup> United States Government Accountability Office. (2016). Elder Abuse: The Extent of Abuse by Guardians is Unknown, but Some Measures Exist to Help Protect Older Adults. *Report to Congressional Requesters*, p. 24.

<sup>90</sup> U.S. Senate Special Committee on Aging. (2018). Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans, p. 17.

guardians that act inappropriately are subjected to appropriate discipline, including prosecution, then an increase in Law Enforcement referrals would likely ensue.

### *C. Barriers and Opportunities for a Law Enforcement Response to Abuse by Guardians*

When examining Law Enforcement involvement in abuse by guardian situations, it is beneficial to look at the difficulties faced by Law Enforcement in the prosecution of elder abuse cases in general. As detailed in *Prosecuting Elder Abuse Cases, Basic Tools and Strategies* from the National Center for State Courts, some issues faced in prosecuting elder abuse are: an inability to recognize and report abuse due to cognitive or physical impairment; the victim's inability to assist in prosecution due to cognitive or physical impairment; the victim's reluctance to report abuse and cooperate in prosecution due to love for the perpetrator, fear of retaliation by the perpetrator, or fear of loss of independence if abuse is discovered; insufficient training of first responders and criminal justice professionals; a lack of expert witnesses, including forensic accountants and physicians and mental health professionals with geriatric expertise; the misperception that misuse of an older adult's assets by persons who have apparent legal authority to make decisions on behalf of the older adult is always a civil matter and not criminal conduct; a lack of recognition that neglect of an older adult is a crime; a general lack of public awareness and understanding of elder abuse; and inadequate community resources to address the needs of victims and perpetrators.<sup>91</sup> In addition, the isolation of the victim and feeling of shame and wanting to protect their privacy prevents some criminal referrals from ever occurring.

Many of these same barriers to Law Enforcement involvement can be applied to abuse by guardians. One of the first obstacles that must be overcome is the belief that abuse by a

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<sup>91</sup> Brenda K. Uekert, Ph.D., Susan Keilitz, J.D. and Deborah Saunders, J.D., *Prosecuting Elder Abuse Cases, Basic Tools and Strategies*, National Center for State Courts; See also <https://www.justice.gov/elderjustice>

guardian can be a criminal matter and not solely a civil issue. There is a long-standing view that Law Enforcement will not prosecute abuse by a power of attorney, because it is civil.<sup>92</sup> In fact there is no prohibition against pursuing an abusive power of attorney in a criminal fashion. This same thought process must be applied to guardianship proceedings as well. It is easy to anticipate that Law Enforcement will not wish to become involved in a guardianship proceeding, because the guardianship is seen as a civil matter.

Secondly, in a criminal matter, it is important to consider the victim's ability to participate in prosecution. In the county of the second author of this paper, Adult Protective Services (APS) workers are counseled to inform police officers if any crime is suspected against the APS client.<sup>93</sup> However, on a frequent basis, Law Enforcement officers ask local APS workers whether the client wishes to press charges. Adult Protective Services workers are trained to reply to Law Enforcement that their role is to make the referral and that Law Enforcement must determine whether charges are appropriate. The concept of pressing charges is often misguided. Criminal matters are the People v. Jane Doe and not the Victim v. Jane Doe. This is where the previous concept of prosecutorial discretion is involved. Individuals frequently are prosecuted where there is no available or competent victim. For example, murders are prosecuted without an available victim. Child abuse victims are prosecuted without a competent victim available to testify. The same should apply to individuals that experience abuse by guardians.

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<sup>92</sup> See Lori A. Stiegel. (2008). *Durable Power of Attorney Abuse: It's a Crime Too*. American Bar Association Commission on Law and Aging.

<sup>93</sup> See NYS Social Service Law Section 473.

In fact, once a guardian is appointed, prosecution may be easier, because the victim may lack capacity to request arrest and may not have the capacity to consent to a transfer of assets. Further, when a guardian is appointed, the person has a fiduciary duty to the individual, and should be held to a higher standard of care in dealing with the incapacitated person. Also, with the appointment of a guardian, there is a definitive point of incapacity for any referral to Law Enforcement. A frequent problem encountered in New York on criminal referrals made by APS would be establishing that the victim lacked capacity on the date of an alleged activity. When there is a court order establishing incapacity, then consent should not be a valid defense. Courts also may lack an institutional mechanism to refer a victim to Law Enforcement. Furthermore, judges may feel that they face ethical considerations that prevent them from referring a case to Law Enforcement.<sup>94</sup>

Training for Law Enforcement officers and prosecutors about the existence and potential criminal nature of abuse by guardians is critical if significant advances are to be made in combating the problem. Elizabeth Loewy is the former chief of the Manhattan District Attorney's Office Elder Abuse Unit, prosecutor of the Brooke Astor case, and Co-Founder and Chief Operating Officer of Eversafe. Eversafe is dedicated to using technology in protecting older adults from abuse and exploitation and is a grant partner in the federal Rapid Response guardianship program. In an interview for this paper, Loewy acknowledged the importance of training for Law Enforcement. She also stressed that while education is important, it is not a panacea. She further saw Law Enforcement as not using technology to its advantage. Available software and technology can assist Law Enforcement in identifying and developing financial

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<sup>94</sup>Pogach, D., & Wood, E. (2019). *When the Guardian is An Abuser*. National Center on Law & Elder Rights. American Bar Association Commission on Law and Aging, p.7.

exploitation cases, including abuse by guardians. Loewy expressed frustration at the inadequacies of technology within financial institutions. As a result, financial institutions and Law Enforcement lack the ability to process available data, including the discovery of erratic financial activity by a guardian.

Loewy also is concerned about the prosecution of theft or fraud by guardians. These cases are difficult to prove. In addition, there often is a failure on the part of Law Enforcement to bring the cases to arrest, and a misconception by Law Enforcement that civil matters and criminal cases cannot move forward at the same time. Her frustration at times extends to the belief that Law Enforcement simply does not want to get involved or do the work necessary in abuse by guardian cases. It is worth noting that the second author's local EMDT has the ability, through its contracted forensic accountant, to consolidate materials and identify potentially fraudulent activity in a fraction of time required to do so by hand.

As stated previously in this paper, there is simply no research on the prevalence of abuse by guardians.<sup>95</sup> The Senate Special Committee on Aging referenced in 2018 that there are approximately 1.3 million guardianships in the United States, with an estimated \$50 billion of assets under guardianship.<sup>96</sup> States across the country lack centralized data tracking systems, and therefore struggle to manage guardianship caseloads and ensure that record keeping is consistent and up-to-date.”<sup>97</sup>

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<sup>95</sup> U.S. Senate Special Committee on Aging. (2018). Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans.

<sup>96</sup> See *id.*, p. 9.

<sup>97</sup> Callahan, J., Romanick, R., & Ghesquire, A. (2016). Guardianship Proceedings in New York State: Findings and Recommendations. *Bifocal*, 37(4), 84.

New York State conducted a prevalence study which documented the incidence rate of elder abuse and also statistics on the underreporting of the problem.<sup>98</sup> In the study, a primary finding was that for every reported case of elder abuse to social services, Law Enforcement, or other legal authorities, there were another 24 situations that went unreported.<sup>99</sup> Considering the research activities by New York State on the prevalence of elder abuse and the underreporting of abuse, it can be assumed that the reporting of abuse at the hands of guardians also is underreported.

There are several factors that contribute to the underreporting of abuse by guardians, including isolation of the individual and misperception of the role of guardian. In addition to the adverse health effects of isolation, an isolated incapacitated individual is extremely vulnerable to abuse.<sup>100</sup> Secondly, the authority of the guardian is often misunderstood or over-estimated. People mistakenly assume that guardianship results are a total loss of rights, with the guardian having total control of the individual. However, when it is used properly, guardianship can be limited in nature.<sup>101</sup>

Finally, if abuse by a guardian is suspected, then who is responsible for reporting it to Law Enforcement? Judges interviewed for this paper indicated that it was their belief they could make Law Enforcement referrals. However, such referrals are not frequent.

## V. THE ROLE OF THE COURT

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<sup>98</sup> See Under the Radar: New York State Elder Abuse Prevalence Study, May 2011.

<sup>99</sup> See *id.*, p. 10.

<sup>100</sup> Pogach, D. (2018). Guardianship and the Right to Visitation, an Overview of Recent State Legislation. *Abu Commission on Law and Aging*, 40(2).

<sup>101</sup> See NY Mental Hygiene Law §81.02.

## A. Introduction

In *Beyond Guardianship: Toward Alternatives that Promote Greater Self-Determination*, the National Council on Disability found, “Guardianship is considered protective, but Courts often fail to protect individuals”. The authors further found that “Courts lack adequate resources, technical infrastructure, and training to monitor guardianships effectively and to hold guardians accountable...”<sup>102</sup> The Court’s role in the creation of the guardianship is unmistakable. A guardianship does not take place without a court order. However, when it comes to abuse by an appointed guardian, what role does the Court play in preventing and responding to the abuse? Despite the call for a uniform national guardianship system, guardianship requirements vary from jurisdiction to jurisdiction, and it raises the question as to whether the Court systems are adequately situated to protect the needs and rights of a person lacking capacity.<sup>103</sup> Another frequent issue is whether guardianships are too freely granted, resulting in the unnecessary loss of civil rights and a potential for abuse. Additionally, another concept and role for the Courts has emerged wherein the guardianship process serves a therapeutic role with the goal of the benevolent provision of helpful services at a minimal expense and disruption rather than the more traditional role of deciding the issue presented.<sup>104</sup>

For this portion of the paper, the authors interviewed nine judges across the country that presently oversee or previously oversaw guardianship proceedings. Table 4 provides a listing of pertinent information concerning the judges. The interviewed judges represent a diverse

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<sup>102</sup> National Council on Disability. (2018, March 22). *Beyond Guardianship: Toward Alternatives That Promote Greater Self-Determination* [PDF].

<sup>103</sup> See the *Uniform Guardianship, Conservatorship and Other Protective Arrangements Act*, Uniform Law Commission.

<sup>104</sup> Marshall B. Kapp, *Reforming Guardianship Reform: Reflections on Disagreements, Deficits, And Responsibilities*, 31 *Stetson L. Rev.* 1047 (2002)

geographic and population group. They were presented the same questions concerning a breadth of issues on guardianship and abuse by guardians. The judges were gracious in giving their time and insights into guardianship practice from the view of the Court. Reflecting on those interviews, perhaps the most important finding was that while none of the judges downplayed the importance of abuse by guardians, none of them felt abuse by guardians was a pervasive or prevalent problem.

Which Court has jurisdiction for guardianship proceedings? Jurisdiction may be exclusive to one Court or there may be multiple Courts with co-equal jurisdiction. In New York State (NYS), for example, guardianship proceedings for adults fall under the jurisdiction of the Supreme Court, which is the court of general civil jurisdiction.

Once the appropriate Court is determined, how is the judge assigned? Which judge hears the case? Does the case remain with the judge? Does the judge possess any specialized training to hear guardianship cases? How many guardianship cases does the judge hear per year? How many guardianships has the judge heard over the course of their judgeship? In NYS, the general trial court (Supreme Court) may have jurisdiction, but which judge will hear the case depends on the area of the state, with variation by locale. In New York City, due to the volume of the cases, there are dedicated guardianship parts. In the 6<sup>th</sup> Judicial District of New York, a Surrogate Court judge (Probate Court) acting as a Supreme Court judge, hears all the guardianship matters in the mainly rural district, unless there is a conflict. In Onondaga County, one Supreme Court judge hears all guardianship matters, but this coming year it appears that the Surrogate Court judge, acting as a Supreme Court judge, will preside over adult guardianships. In other areas of the state, the assignment is made by the Individual Assignment System, meaning that judges who

infrequently hear guardianships may be assigned. Specific guardianship training for judges is an area of need.<sup>105</sup>

### *B. Abuse by the Guardian*

Once the Court determines that there is a need for a guardian, who should serve? Preventing abuse by a guardian before it happens should be paramount, and a huge tool in preventing abuse is choosing the appropriate guardian.

On December 4, 2020, the first author of this paper conducted a brief interview with Bonnie Olsen, PhD, Professor of Clinical Family Medicine in the Keck School of Medicine, University of Southern California. Dr. Olsen is part of a research team that has developed the Judicial Guardianship Evaluation Worksheet, aimed at helping judges better assess whether the prospective guardian is the right person to undertake the role. One component of the instrument considers whether that person has evidence-based risk factors for abuse occurrence. That component uses the Abuse Intervention Model in considering risk factors associated with the victim, perpetrator, and interaction between victim and perpetrator. The research is funded by the US Department of Justice. The Worksheet was developed using suggestions from an expert advisory board and focus group of probate judges nationwide. The focus group felt that the Worksheet would enable judges to make more informed opinions/orders. Currently the Worksheet is being piloted across the country using 20 probate judges who regularly hear guardianship cases and 20 judges who infrequently hear such cases. The Worksheet is not yet at a point where it can be disseminated or published. If found effective, however, the Worksheet

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<sup>105</sup> National Council on Disability, *supra* note 1.

can help judges better identify potential abuse by guardians and prevent the problem before it happens.

Does the jurisdiction's statute mandate a preference for who should serve as guardian? In NYS, for instance, there is not a mandatory preference, but there is a list of who may petition.<sup>106</sup> May the incapacitated person indicate who they want to serve as guardian? Can the Court follow previously written directives by the person? Again, in NYS, the person alleged to be incapacitated may nominate a guardian.<sup>107</sup> The Uniform Guardianship Act lists an order of priority for who should be appointed as guardian.<sup>108</sup>

If family is not appropriate, is a professional or public guardian available? Who is responsible for oversight of a public guardianship program and assignment of the guardian for a case? How does the Court decide which professional guardian should be chosen? For how many other people does the professional serve as guardian? Are all their reports up to date? Have they ever been disciplined or removed for their activities as guardian? Is the professional guardian bondable? These are important questions for judges to consider in deciding whether a professional or public guardian should be selected to serve as guardian.

Are co-guardians a viable option? The appointment of co-guardians may prevent abuse due to inherent checks and balances, but it may make the guardianship unworkable. Who are the co-guardians? Does the court appoint multiple family members or friends, or possibly a mixture of professional and relatives? As indicated earlier, in NYS the county acts as the guardian of last

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<sup>106</sup> See New York Mental Hygiene Law Section 81.06.

<sup>107</sup> See New York Mental Hygiene Law Section 81.17.

<sup>108</sup> See the *Uniform Guardianship, Conservatorship and Other Protective Arrangements Act*, Uniform Law Commission.

resort and is generally only appointed when no one else is available. The county has served in the role of co-guardian, wherein the county acts as guardian of the property while a family member acts as guardian over the person, especially when the Court feels that the family member is not capable of handling the finances or there were claims of prior financial misdeeds by the family member.

Other questions regarding the Court's role in guardianships suggest further measures for appropriate guardian selection and prevention of abuse occurrence. Is there a requirement that the person to be appointed as guardian be present at the hearing? Is it important that the Court view the demeanor and behaviors of the person to be appointed? Prior to being appointed as guardian, is a criminal, bankruptcy, or other background check required? If a background check is required, are certain individuals prevented from serving? For instance, are felons or people who filed for bankruptcy absolutely prevented from serving? Are potential guardians required to disclose their criminal background or bankruptcy short of a formal review?

One of the interviewed judges, who now is a trainer concerning guardianships, had numerous suggestions about making sure that an appropriate guardian is appointed. These included not appointing someone who already is over-their-head in responsibilities, adequately advising and providing guidance to the guardian, and believing that the judge's role does not stop at appointment but minimally requires adequately reviewing annual reports as they are completed. Similarly, most of the interviewed judges felt that family members/lay guardians require additional training, including training about the parameters of their powers.

The judges were mixed in their feelings about professional guardians. One judge felt that professional guardians are compassionate and do a good job, while another judge showed a

preference to appoint family members. A third judge preferred to appoint a professional and a family member as co-guardians, or one for person and one for the estate, in order to counterbalance interests and serve as a check and balance. Another judge called for a national certification of professional guardians, while still another judge called for criminal background checks on every guardian, including family members.<sup>109</sup> As there is no affirmative data, there is debate as to whether family members or professional guardians commit abuse more frequently. Abuse by professional guardians draws more media attention due to its size and scope, but abuse in a singular case can have a devastating result. Abuse by familial guardians likely receives less scrutiny for some of the same reasons that elder abuse in general is not pursued criminally. On the professional guardianship side, there is always the underlying issue that remuneration is a motivating factor. The use of a hybrid model of shared powers between a professional and family guardian has the added benefit of checks and balances, but it also brings additional expense and the need to clearly define the roles.

In relation to the sufficiency of guardian powers, some interviewed judges felt that even with a guardian, people need to be able to make mistakes, which is more empowering to the protected person. Others reasoned that judges should be more astute in considering alternatives to guardianship, open to less restrictive alternatives, and tailor orders to maintain independence. However, one judge felt that tailoring the orders is difficult, because the needs of the individual might change quickly, making it difficult to appropriately limit powers. Interestingly, another judge felt that society should be more sensitive to the effects of a guardianship on the person and their psyche, with its potential for trauma and depression.

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<sup>109</sup> Karp, N., & Wood, E. (2007, December). *Guarding the Guardians: Promising Practices for Court Monitoring* [PDF], p. 16.

As there are no extensive studies on the prevalence of abuse by guardians, the authors felt the opportunity to interview judges active in guardianship proceedings would provide tremendous insight into the issue. As was previously stated, none of the judges felt that abuse by guardians was a pervasive or prevalent problem. Instead, a few of them believed that abuse by powers of attorney was more common and that abuse by others often was a factor identified as the reason for the bringing of guardianship proceedings. One judge, who saw more power of attorney abuse cases, stated that what scared judges the most was what they did not know. Further, whereas that judge used to see a lot more will contests, now the judge sees more cases concerning denial of visitation and children not wanting to wait for their inheritance.

The judges were asked whether they could describe any cases of abuse by a guardian that they had presided over, without revealing identifying details. Almost all the judges had at least one case to relay, and some had multiple cases. A dozen of these follow:

- 1) An individual had guardianship over two older men but did so under two different names, using an alias. The guardian took over care of the men and then began exploiting them.
- 2) A guardian insinuated on an annual report that he had invested in automobile stock, when he actually purchased a car.
- 3) A young person with developmental disabilities was severely abused and neglected by his mother and her boyfriend. The young person was removed from the home and placed in another setting.
- 4) A court volunteer reported that a new automobile was purchased for the person with a guardian, even though the person was bedridden and had not left the home.

- 5) A somewhat remote family member was named as guardian. The protected person received a lawsuit settlement, and the guardian invested approximately \$150,000 of that money in a business owned by the guardian that failed. There was a contempt proceeding, and some of the funds were recovered.
- 6) A high-profile case involved a local elected official, who used the funds of the incapacitated person to advance his and his children's business interests. That guardian ultimately returned all the misappropriated funds to the incapacitated person with interest but was removed as guardian.
- 7) An incapacitated person was placed in a nursing facility where the care was very inadequate. The professional guardian failed to make the required visits, and the neglect at the facility went unnoticed for a long period.
- 8) A niece and nephew were appointed as guardians, and they received income on their uncle's real property but failed to report the income. The guardians also failed to pay taxes or provide maintenance on the property, resulting in code violations. Ultimately the property was transferred by a tax deed. There were no annual reports filed by the guardians for four years, and the guardians kept no receipts. The case was referred to Law Enforcement, but the local sheriff declined to bring charges.
- 9) A high-profile case involved a professional guardian, who had a previous criminal record for fraud and bad checks. That person was appointed as guardian for over a hundred cases across several counties. There were numerous complaints about the behavior of the guardian, and the guardian eventually was charged with multiple counts of theft and removed as guardian from all of the appointments.

- 10) A guardian committed financial exploitation and stated, “Mom would have wanted me to have this.”
- 11) An adult child acted as guardian and bought a vacation home for her bedridden mother and paid for her child’s college tuition, while other family members received nothing.
- 12) A guardian took loans for the incapacitated person and then used the funds to remodel his own home.

Finally, judges worried about “grey areas” where the family member guardian is meeting the needs of the incapacitated person but also benefiting themselves, such as taking vacations with the protected person at the expense of the protected person. One judge further questioned the activities of financial institutions that released money from restricted accounts of individuals without further inquiry or reporting.

### *C. Interdisciplinary Role of the Court*

The Courts should not hesitate to refer any suspected abuse by a guardian to Adult Protective Services (APS) and Law Enforcement. Continued use of these resources can prevent abuse and develop cases when abuse has occurred. A further discussion of the interdisciplinary role of the Courts is attached hereto as Appendix C.

### *D. Effect of the Corona Virus on Abuse by Guardians*

The judges were asked whether they observed any impact on guardianships due to the corona virus (COVID) pandemic. Several saw an impact on guardianships, because physicians

and nurses assisting with capacity evaluations, court evaluators, attorneys, and APS workers are not able to meet in-person with their clients, especially in facilities. In addition to the lack of visitation, the judges raised additional COVID concerns which potentially impact abuse by guardians, including:

- 1) Serious allegations regarding persons in congregate settings;
- 2) More orders being entered on consent;
- 3) Increased requests for money distributions from guardians;
- 4) The isolation and exploitation of incapacitated persons during the pandemic;
- 5) The pandemic as having caused resources to be blocked and shifted to other proceedings and guardianships not viewed with the same importance; and
- 6) The guardianship powers not reviewed as thoroughly with the appointed guardian due to remote proceedings and waiving the requirement that the order be reviewed with the client.

#### *E. Recommendations*

Recommendations for further addressing abuse by guardians will be discussed briefly herein. An in-depth examination of recommendations is undertaken in another Summit paper by Hurme and Robinson. In addition, a further examination of recommendations for preventing abuse by guardians by the authors this paper is found in Appendix D.

In part, recommendations for preventing the occurrence of abuse by guardians and/or discovering abuse by guardians are as follows:

1. Assure that guardianship reports are timely submitted with appropriate documentation and thoroughly reviewed;
2. Require that the guardian develop a detailed plan for meeting the expectations of the guardianship;
3. Sufficiently fund the Courts so that they can perform necessary oversight functions;
4. Revise guardianship statutes to require the assignment of a “visitor” to investigate the guardianship proceeding and to continue to visit the person after appointment, both as a deterrent to abuse by the guardian and a tool to discover the abuse;
5. Continue use of virtual technology by Courts in the guardianship hearings, allowing appearances by remote parties and also for continued appearances;
6. Standardize and make accessible the process for addressing grievances against guardians, including the jurisdiction and powers available to the Court;
7. Use alternative dispute resolution, either to avoid the necessity for guardianship in its entirety or to settle issues that are raised in the guardianship (One example of an ongoing alternative dispute resolution model is Eldercaring Coordination, a court dispute resolution mechanism for aggravated family conflicts.<sup>110</sup>);
8. Continue appointment of an attorney to represent the individual or reappoint the attorney, if any issues arise; and

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<sup>110</sup>See <https://www.eldercaringcoordination.com/>

9. Hold biannual status conferences with the required appearance of the guardian and the protected individual.

### *F. Conclusion*

The interviews with the judges left the authors impressed with the dedication and breadth of their knowledge. While most of the judges conveyed individual anecdotal cases of abuse by guardians, none of them conveyed a feeling that abuse by guardians is a prevalent issue. It also was interesting to gain some insight into the vast differences in how jurisdictions handle guardianship, both in implementation and oversight after appointment. These differences between jurisdictions reinforce the continuing benefits that uniform guardianship laws would impart across the country. Ideas such as court visitors, which may prevent or alleviate abuse by guardians, were supported by the judges, both those who maintain programs and those who do not. However, many of the judges pointed out the constraints of limited resources, which often prevent the implementation of programs or reforms.

## VII. MULTISYSTEM COLLABORATION IN ADDRESSING ABUSE BY GUARDIANS

### *A. Appeal of Multisystem Work in Adult/Elder Abuse Detection, Prevention, and Intervention*

Both Adult Protective Services (APS) as an intervention system for adult/elder abuse and the field of elder abuse itself have long histories for embracing a multidisciplinary or multisystem approach to abuse understanding and response. For APS, it began with early recognition that the combination of problems experienced by protective clients was such that no single professional discipline would suffice for assessment and intervention. Rather, many

different perspectives and a constellation of services were necessary.<sup>111</sup> By 1963 and the Arden House Seminar on Aging there was consensus that an interdisciplinary approach was required for protective services wherein the professions of law, medicine, and social work would interact as equals.<sup>112</sup> The 1982 National Law and Social Work Seminar further underscored the importance of this approach, publishing a guide on the development of multisystem community networks. The guide recommended that such networks include representatives “from the public adult protective services agency [and] Probate Court” among select others in the core planning group and, besides those in the core planning group, include “law enforcement agencies [and] guardian office services” among ten service organization categories as network members.<sup>113</sup>

For the field of elder abuse, the recognized importance of a multidisciplinary approach to research, prevention, and intervention occurred with revelation of the problem as complex and often difficult to identify or treat, because it could take many forms, occur across settings, and involve various victims and perpetrators. Therefore, it was unlikely that a single discipline, system, or organization would be sufficient for addressing it.<sup>114</sup> Early acknowledgement of the importance of a multidisciplinary perspective to understanding elder abuse is evident in the first book on the subject. Published in 1983, just a few years after the initial research conducted on elder abuse, its contributors represent nearly a dozen distinct disciplines, with social work,

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<sup>111</sup> Hall, G. (1971). Protective services for adults. In R. Morris (Ed.), *Encyclopedia of Social Work* (16<sup>th</sup> ed., pp. 999, 1002-1003). Washington, DC: National Association of Social Workers.

<sup>112</sup> O’Neill, V. (1965). Protecting older people. *Public Welfare*, 23, 119, 124.

<sup>113</sup> Bernotavicz, F. (1982, September). *Improving protective services for older Americans: A national guide series: Community role*. Portland, ME: University of Southern Maine, Human Services Development Institute.

<sup>114</sup> e.g., Quinn, M.J. & Tomita, S.K. (1997). *Elder abuse and neglect: Causes, diagnosis, and intervention strategies* (2<sup>nd</sup> ed.). New York: Springer Publishing Company.

Brandl, B., Dyer, C.B., Heisler, C.J., Otto, J.M., Stiegel, L.A., & Thomas, R.W. (2007). *Elder abuse detection and intervention: A collaborative approach*. New York: Springer Publishing Company.

Nerenberg, L. (2008). *Elder abuse prevention: Emerging trends and promising practices*. New York: Springer Publishing Company.

criminal justice, and law prominent among them.<sup>115</sup> Evidence of an early commitment to multisystem work in addressing elder abuse is reflected in the development of various networks and teams at local and state levels for problem response. The oldest continuously operating ones, located in Ohio, namely the Ohio Coalition for Adult Protective Services and Consortium Against Adult Abuse, were founded in early 1980s.<sup>116</sup>

Although there has been some evaluative research on the elder abuse multidisciplinary approach, most of it has focused on outputs and member satisfaction rather than outcomes. What exists, however, suggests member enthusiasm for collaborations, which are seen to increase problem awareness, professional camaraderie, and appreciation of the roles and limitations of individual disciplines and systems at the same time that they offer a holistic analysis for issues and cases and promote a coordinated and cooperative problem response. It should be mentioned that all of these qualities also are needed to better recognize and address abuse by guardians as a multisystem concern.<sup>117</sup> On the other hand, most members of elder abuse networks and teams agree that these groups can be challenging. Particularly difficult are insuring participation by key disciplines and systems, effective communication between those with differing philosophies and

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<sup>115</sup> Kosberg, J.I. (Ed.). (1983). *Abuse and maltreatment of the elderly: Causes and interventions*. Littleton, MA: John Wright.

<sup>116</sup> More information on these groups can be found by visiting their websites.

Consortium Against Adult Abuse [www.c3a5county.org/about-c3a/](http://www.c3a5county.org/about-c3a/)

Ohio Coalition for Adult Protective Services <https://www.ocapsohio.org>

<sup>117</sup> Anetzberger, G.J., Dayton, C., Miller, C.A., McGreevey, J., & Schimer, M. (2005). Multidisciplinary teams in the clinical management of elder abuse. In G.J. Anetzberger (Ed.), *The clinical management of elder abuse* (pp. 157-171). Binghamton, NY: The Haworth Press.

Anetzberger, G.J., & Balaswamy, S. (2010). Elder abuse awareness and action: The role of state summits. *Journal of Elder Abuse & Neglect*, 22, 180-190.

Anetzberger, G.J. (2011). The evolution of a multidisciplinary response to elder abuse. *Marquette Elder's Advisor*, 13(1), 107-128.

Anetzberger, G.J. (2017). Elder abuse multidisciplinary teams. In X. Dong (Ed.), *Elder abuse: Research, practice and policy* (pp. 417-432). Cham, Switzerland, Springer Nature.

goals, dealing with distrust and misperceptions, and handling diminished interest and involvement of members over time.<sup>118</sup>

### *B. Current Adult/Elder Abuse Multisystem Collaborations*

There are two types of multidisciplinary or multisystem elder abuse collaborations: networks (established for systemic improvements) and teams (established for case review and recommendations). Each is defined in Table 3. In addition, the variations of each type which have potential for considering abuse by guardians on their work agendas are identified along with their description and membership.

There are three arguments for using elder abuse networks and teams to address abuse by guardians. First, they are found throughout the country<sup>119</sup>, and many have a strong record of achievement in areas relevant to addressing abuse by guardians, particularly raising problem awareness and insuring collaboration among the key systems. Second, as discussed earlier in this paper, there is overlap between elder abuse and abuse by guardians, making the latter a legitimate concern for those already focused on elder abuse. Finally, most elder abuse networks and teams include as members representatives from both APS and Law Enforcement. Many, too, have members from the Courts and/or guardianship services. As discussed previously, these are the key systems for responding to abuse by guardians as well.

There are three barriers that would have to be overcome to include abuse by guardians on the agenda of established elder abuse collaborations. First, although widespread, elder abuse

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<sup>118</sup> See footnote 165 above.

<sup>119</sup> See the Elder Justice Network Locator Map of the US Department of Justice's Elder Justice Initiative Multidisciplinary Team Technical Assistance Center found at <https://www.justice.gov/elderjustice/elder-justice-network-locator-map>

networks and teams are not found everywhere. For instance, less than one-third of all states have state elder abuse/justice coalitions, and a recent poll undertaken by APS TARC revealed that the majority of state APS programs lack advisory groups.<sup>120</sup> Therefore, in states and communities where no networks or teams exist, effort would have to be made to establish them. Fortunately, help is available from several sources, including the Multidisciplinary Team (MDT) Technical Assistance Center of the US Department of Justice's Elder Justice Initiative, which offers tools and services and hosts the online National Elder Abuse MDT Peer Support Community.<sup>121</sup>

Second, few elder abuse collaborations are known to have abuse by guardians as an acknowledged interest area. For example, the first author of this paper recently surveyed members of the National Network of State Elder Justice Coalitions about past involvement in issues related to guardianship and perceived role in addressing abuse by guardians. Only one state coalition affirmed prior involvement and interest.<sup>122</sup> Addressing this barrier should begin by educating members of elder abuse networks and teams that abuse by guardians exists, overlaps with elder abuse, and is worthy of group concern. Ultimately, however, it is vital to reframe the group's problem focus to include abuse by guardians and to add measures for preventing and responding to it on the group's strategic plan or action agenda. Lastly, although it is likely that the three key systems for addressing abuse by guardians either are or could be members of some variations of elder abuse networks and teams, it is may be impossible to have representation everywhere. Scarce personnel and other commitments can deter involvement, but so too can a

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<sup>120</sup> The poll was conducted the week of December 7, 2020. Information on the Administration for Community Living's Adult Protective Services Technical Assistance Resources along with its services and products can be found through its website at <https://apstarc.acl.gov>

<sup>121</sup> The multidisciplinary Team Technical Assistance Center has as its mission to provide tools, resource materials, and individualized consultations to facilitate the expansion of elder abuse case review multidisciplinary teams across the nation. Further information on the Center can be found at <https://www.justice.gov/elderjustice/mdt-tac>

<sup>122</sup> The survey was distributed to the membership of the National Network of State Elder Justice Coalitions on October 21, 2020. Information on the Network can be found at [www.elderjusticecal.org/nsejc.html](http://www.elderjusticecal.org/nsejc.html)

perception of conflict of interest, which often limits the Courts' participation on clinical teams, since review cases may be situations that eventually require Court intervention.

Although abuse by guardians could and should fall under the purview of elder abuse networks and teams, it also is a legitimate concern of Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS). The Third National Guardianship Summit, held in 2011, recommended the formation and sustainability of state groups dedicated to advancing adult guardianship reform. Subsequent leadership from the National Guardianship Network and funding grants in 2013, 2015, and 2016 from the State Justice Institute and Administration for Community Living supported their development in several states. Currently WINGS, or something similar, exists in half of all states.<sup>123</sup> They are premised on the collective impact construct, which suggests that large scale change requires broad coordination among multiple organizations.<sup>124</sup> Assessment of the grant-funded WINGS revealed that the issues addressed vary by state. However, all states have sponsored training, and some have undertaken other measures as well, notably legislation and other efforts directed at supportive decision-making, websites and written materials to inform the public about guardianship and less restrictive alternatives, and/or improvements in guardianship monitoring.<sup>125</sup> Not specifically mentioned were initiatives to address abuse by guardians, although this may have occurred within the context of other efforts. On the other hand, a recent WINGS brief drafted by the American Bar Association listed

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<sup>123</sup> National Guardianship Network (n.d.). *WINGS*. Retrieved from <https://nationalguardianshipnetwork.org/NGN-PUBLIC/WINGS/NGN-PUBLIC/wings.aspx?hkey+7779904F-99fa=4184-aebO-253-11beP518>

<sup>124</sup> Kania, J., & Kramer, M. (2011, Winter). *Collective impact: Innovation review*. Retrieved from [https://ssir.org/articles/entry/collective\\_impact](https://ssir.org/articles/entry/collective_impact)

<sup>125</sup> Van Duizend, R. (August, 2019). *Final WINGS assessment report*. Washington, DC: American Bar Association Commission on Law and Aging, National Center for State Courts, and Working Interdisciplinary Networks of Guardianship Stakeholders.

Commission on Law and Aging, American Bar Association. (2020). *WINGS Briefing paper: Advancing guardianship reform and promoting less restrictive options*. Retrieved from [https://www.americanbar.org/content/am/aba/administration/law\\_aging/2020-wings-briefing](https://www.americanbar.org/content/am/aba/administration/law_aging/2020-wings-briefing)

addressing abuse by guardians among identified accomplishments, but indicated that WINGS were precluded from in depth work in this area because of a lack of sustainable funding and technical assistance. Still, abuse by guardians could and should be a WINGS concern, no less than an elder abuse network and team concern. By their very nature, both kinds of multisystem collaborations are vested in this problem's acknowledgement and action, with specific initiatives that could be undertaken either individually or together.

## VII. CONCLUSION

As detailed throughout this paper, the abuse of individuals subject to guardianship by their guardians is a nationwide problem that requires coordinated attention. The lack of research to establish the prevalence and forms of abuse by guardians leaves gaps in determining the frequency of abuse and requires a reliance on anecdotal case cites. This paper was introduced with two cases of abuse by guardians encountered by the authors that offered an insight into the abuse suffered by protected persons. However, reference to anecdotal cases does not sufficiently establish the breadth of the issue. A comprehensive quantitative investigation and analysis of the nature and frequency of abuse by guardians is necessary to establish it as a national issue. Such research also can serve as a basis for funding and education concerning the problem.

Abuse by guardians and interventions aimed at addressing it should be a focus of empirical investigation, included on research agendas developed for both adult/elder abuse and guardianship, and prioritized for research grant funding by federal government sources, like the National Institute of Justice and Administration for Community Living (ACL). The research gaps surrounding abuse by guardians are enormous and erode our ability to understand the nature, scope, and seriousness of the problem as well as to advocate for effective resources to address it. The gaps can only be filled through broad commitment to scientific inquiry into the

problem and dedicated funding for prioritized areas of inquiry, which can serve to attract capable investigators.

Another difficulty is that the roles of Adult Protective Services (APS), Law Enforcement, and the Courts in addressing abuse by guardians are not uniformly or consistently defined. Enactment of the Uniform Guardianship, Conservatorship, and Other Protective Arrangements Act by all states is a crucial first step toward overcoming the myriad of forms of statutory frameworks that are encountered in guardianship proceedings. In the authors' experiences, APS guidelines are not uniformly applied even from county-to-county or jurisdiction-to-jurisdiction. There also are no uniform criminal statutes concerning abuse by guardians across jurisdictions. Uniform systems would increase the ability to share information and education across like systems nationwide as well as promote easier establishment of precedential handling of abuse cases.

The most valuable technique of handling abuse by guardians in any setting would be to prevent its occurrence in the first instance, which really falls on the Courts to grant appropriately tailored and limited guardianships to adequately trained and monitored capable guardians. However, even with the most effective system for the appointment of guardians, some abuse will occur. Therefore, a uniform and consistent system for the reporting of abuse by guardians needs to be created or enhanced. Additionally, collaboration among the stakeholder systems involved in addressing the abuse must be encouraged, heightened, or required.

#### *A. The Role of APS*

Adult Protective Services should play a prominent role in investigating and responding to abuse by guardians. It is already charged with addressing adult/elder abuse and also is familiar

with other systems handling adult/elder abuse. However, under the statutory criteria for APS reports, in some instances APS has refused to accept abuse by guardian referrals, because in theory the person at risk has someone available to assist them. This may require an expansion or clarification of existing statutory provisions or regulations at the state level to require acceptance of abuse by guardian reports and establishment of protocols for their handling across key systems following abuse substantiation.

Adult Protective Services should commit itself to data collection and reporting on abuse by guardians at state and national levels, using the National Adult Maltreatment Reporting System (NAMRS), minimally including specifics on abuse forms, perpetrator characteristics, victim/perpetrator relations, and case interventions. Abuse by guardians is an aspect of adult/elder abuse, with problem reporting to APS nationwide. To date, state APS programs typically fail to collect and report related data into NAMRS, resulting in a lack understanding of abuse by guardians as reported to and handled by APS, one of the three key systems charged with addressing it.

The Administration for Community Living should direct the National Center on Elder Abuse to partner with the Adult Protective Services Technical Assistance Resource Center and National Adult Protective Services Association in order to develop, test, and disseminate information targeting professionals and the public on abuse by guardians as an aspect of adult/elder abuse and concern of APS. This will enable professionals and the public to be better aware of the problem and the role and responsibilities of APS programs in responding to it. Too often public awareness and professional education regarding abuse by guardians has relied on media expose' and popular press articles, which can serve to sensationalize the problem, creating misunderstanding and misdirected focus. Information sources are needed that will present the

problem in a way that it can be accurately understood, capably reported, and appropriately handled.

To further assist in their role in handling abuse by guardian cases, APS staff and administration need training to better understand guardianship and its use, including limitations of guardianship and available less restrictive measures. This training also serves the additional educational role for those APS jurisdictions that are charged with acting as the guardian of last resort and may become the guardian if abuse occurs.

To effectively undertake its job of protecting the most vulnerable in a community, it is critical that APS develop relationships with Law Enforcement and the Courts via multisystem collaborations. Further, despite the requirement of Court independence, APS functions are enhanced if relationships with the Courts are developed. Involvement in multisystem collaborations is an excellent tool to enhance the relationship building process. Involvement in trainings and grant opportunities also can lead to relationship development with other stakeholders.

### *B. The Role of Law Enforcement*

Law Enforcement is the stakeholder with the least defined role when it comes to guardian abuse, and it is crucial that Law Enforcement receive a better defined and specific role in responding to the problem. There has been an expansion of criminal statutes related to adult/elder abuse recently. While the authors are unaware of criminal statutes that relate solely to abuse by a guardian, there are numerous statutes that specifically reference criminal charges of guardians for the failure to care for or activities against the person at risk.

In certain areas state legislatures enacted enhanced penalties related to elder abuse, but there are no known enhanced penalties for abuse by a guardian. State legislatures should enact or revise criminal codes to enhance the penalty for adult/elder abuse when the perpetrator serves as guardian of the victim. If adult/elder abuse is a “shame” and “crime”, as it has been called, then abuse by guardians is a “transgression” of much greater dimension and offence, the erosion of trust freely sought by the guardian and thoughtfully bestowed by the Courts. As such, the guardian who inflicts abuse is doubly culpable for harmful actions taken, with penalties that should be reflective of this greater culpability.

Training and education for Law Enforcement, including prosecutors, is necessary to ensure that Law Enforcement is fully aware that misdeeds of guardians can be criminally charged, even if the civil matters are in process. Just as with APS, Law Enforcement needs training to better understand guardianship and its use, again including the limitations of guardianship and available less restrictive measures.

Law Enforcement should be actively encouraged to investigate reports of abuse by guardians. Law Enforcement also needs additional resources to assure it can capably do so, including sufficient staffing and access to available technology. Likewise, Law Enforcement will be more involved in abuse by guardian cases if it is encouraged to actively engage in existing multidisciplinary and multisystem networks and teams and understands their role in combating abuse by guardians.

Finally, specialized elder abuse units at both police and prosecution levels would dramatically improve the quality of Law Enforcement’s response. The ability of units to focus on adult/elder abuse, including abuse by guardians, would enhance understanding and response to the problem. These specialized units also would act as the direct reference source for abuse by

guardians case referrals. The units should possess cross-jurisdictional authority and possible regional authority, especially in more rural settings.

### *C. The Role of the Courts*

The role of the Courts in abuse by guardian cases is essential, as a guardianship does not exist without the Court signing an order appointing a guardian. The establishment of uniform guardianship statutes, with their enactment by states nationwide, would assist in the prevention of abuse by guardians, since uniform laws could lead to the appointment of more appropriate guardians, with authority limited in powers or duration, depending on the facts of the case. Together with better training for the guardian and post-appointment monitoring, including a format for guardianship complaint handling and oversight, much abuse by guardians would be averted.

In view of the Court's essential role in guardianships, it also follows that Court removing the civil rights of an individual should be done in one dedicated to guardianships, or in the least by judges with specialized training and considerable experience in overseeing guardianship proceedings. The underlying importance of this process should not be left to jurists, who have little training or experience in these matters.

Several practices are recommended to assist the Courts in the prevention and thereafter discovery of abuse by guardians. First, requiring the guardian to be proactive in establishing a forward-viewing guardian plan for the assistance and care of the incapacitated person should be required. The guardianship plan also must be revised and updated over time. A uniform method for the submission and review of required accountings is a recommended practice as well. The accounting reviews should use available technology and require submission of all supporting

account documents. Making the accounting information available across jurisdictions also would be of assistance.

Second, the establishment and funding of a Court-appointed visitor program would allow someone to visit individuals in their living environments, make sure that appropriate care is being provided, and report on any unsafe or inappropriate conditions. Most such programs incorporate the use of volunteers to do the visits, but it is critical to fund the programs to at least provide for a paid volunteer coordinator.

The Courts should be encouraged to make referrals to APS, Law Enforcement, and multisystem collaborations if abuse by guardians is suspected. The Court system simply lacks the investigatory apparatus and experience in evaluating these occurrences. It also would be helpful if regulations and statutes were expanded to clearly allow or require these referrals in order to avoid any apprehension about the independent nature of the Court.

#### *D. The Role of Multisystem Collaborations*

Multisystem collaborations are effective tools in developing cross-system relationships, addressing adult/elder abuse, and preventing duplication of efforts. Adult Protective Services, Law Enforcement, and the Courts should commit themselves to developing protocols for effectively handling cases of abuse by guardians that involve multiple systems. Currently there is little formal guidance on how abuse by guardian situations should be processed in a multisystem setting in order to ensure that all systems know and accomplish their individual and collective responsibilities in a cooperative and effective manner.

Multidisciplinary and multisystem elder abuse networks and teams as well as Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS) must include abuse by

guardians as an important area for recognition and action. Although abuse by guardians clearly falls within the parameters of existing multidisciplinary and multisystem collaborations, they rarely pay much attention to it. Understanding and responding to the problem, whether overall or as individual cases, would benefit greatly from the diverse perspectives, skills, and resources of the various stakeholder members.

Table 1: Adult Protective Services (APS) Process

Step	Purpose	Key Activities	Possible Legal Intervention
Report	Contact is made with APS by someone who has cause to believe that a vulnerable adult or older person has experienced abuse, neglect, or exploitation (ANE) and needs assistance.	<ul style="list-style-type: none"> <li>· Is alert to and suspicious of possible ANE</li> <li>· Contacts APS when ANE is known or suspected</li> <li>· Understands when and how to make the report to APS</li> </ul>	
Intake	Intake is the repository of all reports; it begins with the receipt of the report and ends once enough information has been collected to make an appropriate assignment of the report.	<ul style="list-style-type: none"> <li>· Screens calls</li> <li>· Collects specific information</li> <li>· Checks past records</li> <li>· Identifies and contacts others for information</li> <li>· Evaluates degree of risks</li> <li>· Transfers the report to an APS supervisor/worker if it meets the requirement for investigation</li> <li>· Provides cross-referrals</li> <li>· May provide information and referral, if indicated and the report does not meet investigation requirements</li> <li>· Documents to report or referral</li> </ul>	
Investigation	The purpose of investigation is to determine whether or not the adult named in the report qualifies for protective services by virtue of criteria found in law or regulation.	<ul style="list-style-type: none"> <li>· Substantiates the report</li> <li>· Evaluates the degree of danger</li> <li>· Establishes the relationship of APS with the adult and others</li> <li>· Determines the ability and willingness of the</li> </ul>	<ul style="list-style-type: none"> <li>· court-ordered access for investigation</li> <li>· court-ordered intervention in emergency situations</li> </ul>

		<p>adult to accept intervention</p> <ul style="list-style-type: none"> <li>· Collects information from persons knowledgeable about the report allegation</li> <li>· Explores how significant others address the adult's needs</li> <li>· Gathers evidence for possible legal action</li> <li>· Documents findings</li> </ul>	
Assessment	<p>Assessment represents a systematic attempt to gather information about people and their circumstances, targeting the adult subject of the investigation but also others important in the adult's life, particularly the abuser and/or any caregiver.</p>	<ul style="list-style-type: none"> <li>· Gathers information</li> <li>· Analyzes and interprets information</li> </ul>	
Plan Development and Implementation	<p>The purpose of these steps are: (1) to specify what actions will be taken and what resources will be used to alleviate or reduce problems identified during assessment, and (2) to insure the effective arrangement or provision of these resources.</p>	<ul style="list-style-type: none"> <li>· Sets objectives</li> <li>· Identifies possible solutions</li> <li>· Selects intervention activities</li> <li>· Evaluates actions taken and, if necessary, tries alternatives</li> </ul>	<ul style="list-style-type: none"> <li>· court-ordered protection for incapacitated adults</li> <li>· court-ordered restraint from interference in providing protection services</li> </ul>
Case Closure	<p>Appropriate case termination occurs when the adult no longer needs protective services, requests case closure, dies, or represents other circumstances warranting closure as</p>	<ul style="list-style-type: none"> <li>· Consults with supervisor</li> <li>· Prepares adult</li> <li>· Documents in the case record</li> </ul>	

	identified in law or regulation.		
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Table 2: Sample Criticisms of Adult Protective Services (APS)  
That Are Reflective of the Nature of the Program Itself

Criticism	Possible Response
APS is too intrusive.	A good investigation usually requires thorough interviews with many contacts, certainly with the adult alleged to be mistreated, but also with significant others in that person’s life who might be knowledgeable about the situation, including family members, neighbors, and service providers. Multiple contacts expressing the same concerns or describing the situation in a similar manner enhance the reliability of APS investigative findings.
The APS process takes too long.	Many steps in the APS process are very time consuming, if done well. For example, assessment information gathering may involve interviews, observations, reviews of agency records or medical charts, background checks, measurement tool use, clinical testing, and outside consultation. Analyzing and interpreting the information obtained may include identifying inconsistencies, weighing motives, clarifying values, determining credibility, and considering strengths and weaknesses.
APS does too little.	A key concern of APS is protecting the individual’s right of self-determination, including the right of capacitated adults to refuse needed services. Moreover, APS is limited in resources that can be offered to address needs by what is locally available through the APS auspice agency or other agencies and institutions. Unfortunately resources can be temporarily or permanently in short supply due to economic, geographic, and other reasons.
APS does too much.	Sometimes, APS must seek court-ordered restrictive intervention, because adults are incapacitated and unable to protect themselves or their situations are life-threatening or likely to result in irreparable damage without emergency assistance.
APS makes things worse.	Ethical principles guide APS work, including the primacy of the adult and do no harm. Sometimes providing protective services means helping to secure placement of the adult in a nursing home or other care facility. Such placement can be seen as undesirable, although the intent may be to prevent further harm. Placement, however, can be undertaken only with consent from the adult to the adult’s legal surrogate decision-maker, or with court order. Other actions taken by APS also may be viewed negatively, such as reporting criminal conduct to the police. Although this can be a legal requirement, it also may be done to hold the abuser accountable for maltreatment inflicted and/or to prevent further abuse occurrence.

Table 3: Existing Elder Abuse Multisystem Groups with Potential for Considering Abuse by Guardians

Type	Variation	Description
Networks		Collaborations or partnerships across systems and disciplines at state and local levels formed to promote improvement in abuse detection, prevention, and response.
State:	Elder abuse summits or task forces	Time-limited groups typically formed by state executive order or state agency initiative to develop recommendations for addressing abuse through statewide multisystem intervention
	Elder abuse or justice coalitions	Ongoing multisystem state collaborative with defined membership dedicated to identifying and addressing gaps or inadequacies in policy and practice related to elder abuse
Local:	APS advisory councils	Voluntary groups of professionals representing service systems which commonly interface with APS that meet regularly to provide technical expertise and support for state APS programming
	Community elder abuse consortiums or coalitions	Multisystem responses for addressing the collective concerns around elder abuse within a single locale, whether community or region
	Steering committees for clinical teams	Groups of professional leaders charged with oversight of a clinical team, having particular responsibility for handling its concerns about service gaps and policy inadequacies
Teams:		Assemblies of professionals from multiple disciplines and systems for case review and recommendation, and occasionally for the identification of system problems or gaps
	Community case consult teams	Generally under the auspice of an elder abuse network or cooperative partnership, often with large and diverse memberships
	Adult protection teams	Under the auspice of a local APS program, sometimes required by state statute or regulation, assists APS staff in case assessment and securing resources, promotes

		connections with community agencies, informs community agencies about the role and limitations of APS
	Financial Abuse Specialist Teams	Specializing in financial exploitation, emphasizing early detection, typically including as members those from the private sector (such as bankers and accountants) and those from state and federal law enforcement and regulatory agencies (Enhanced multidisciplinary teams represent a sub-variety.)
	Fatality review teams	Focused on identifying and prosecuting abuse-related deaths that otherwise might not be uncovered, with members typically not found on other teams (such as representatives from the coroner's office and funeral homes)
	Forensic center teams	Applying scientific knowledge to legal problems toward protecting vulnerable adults from abuse, with activities surrounding case analysis, problem-solving, service provision, and prosecution

Table 4: Interviewed Judges

Judge	Title	Dates of Service	Jurisdiction	Population (Approximate)
Honorable Irvin G. Condon	Probate Judge	1995-present	Charleston County, South Carolina	400,000
Honorable David Guy	Surrogate's Court Judge acting as Supreme Court Judge	2011-present	6 <sup>th</sup> Judicial District of New York, based in Binghamton, NY	700,000 over 10 mostly rural counties
Honorable Lauren Holland	Circuit Court Judge with a Probate Assignment Administrative Role	1993-present	Lane County, Oregon	376,000
Honorable Janice Martin	District Court Judge	1993-2011	Jefferson County, Kentucky (Louisville)	700,000
Honorable Michelle Morley	Circuit Judge	2006-present	Fifth Judicial Circuit, Sumter County, Florida	132,000
Honorable Lois Murphy	Administrative Judge of the Orphan's Court Division	2010-present	Montgomery County, Pennsylvania	800,000
Honorable Dixilene N. Park	Probate Judge	2004-present	Stark County, Ohio	370,000

Honorable Jean Stewart	Presiding Judge of the Denver Specialized Metropolitan Probate Court	1995-2011	Denver, Colorado	725,000
Honorable Charles M. Troia	Court of Claims Judge acting as Supreme Ct. Justice Guardianship Part	2010-present	Richmond County, New York (Staten Island)	476,000

The judges mostly hear cases in one geographic county, although they may have authority to hear cases on a statewide basis. The one exception was a judge that hears the guardianship cases across a Judicial District, which spans ten mostly rural counties with an overall population of just over 700,000 people (see <http://ww2.nycourts.gov/courts/6jd/index.shtml> and [www.census.gov](http://www.census.gov)). The smallest jurisdiction by population was Sumter County in Florida with approximately 94,000 people. Sumter County is very interesting, however, as it has the oldest median age in the United States, is home to part of The Villages, and is a very fast-growing area after historically being rural farm country ([www.census.gov](http://www.census.gov)). Richmond County, which is the Staten Island Borough of New York City, has a population of 476,000 in an area of only sixty square miles ([www.census.gov](http://www.census.gov)).

Although few of the judges maintain guardianship case statistics for immediate access, all have extensive experience in presiding over guardianship cases. The number of estimated cases ranged from 1000 heard over time on the bench to 200-250 heard per year, with several hearing around 50 per year. Interestingly, in Kentucky all guardianship matters are jury trials, and there is an interdisciplinary committee which includes a physician, psychologist, and social worker that report on the necessity for a guardian.

## Appendix A: History of Problem Recognition

### *1. Associated Press Investigation*

The investigation began in 1986 with two Associated Press reporters assigned to inquire into the guardianship of older adults in eight states. It grew to involve nearly sixty reporters, covering all fifty states and the District of Columbia, who analyzed state laws, examined over two thousand randomly selected court files, and conducted numerous interviews. The resulting six-part series was published in newspapers nationwide in September 1987, drawing attention to a process where the “helpless often [are] not helped” and “basic rights [are] stripped away by [a] pen stroke”. Although the series focus was not specifically on abuse by guardians, cases of it did emerge from the inquiry, as the following attest<sup>126</sup>:

- “...a former Bay County, Mich. public guardian admitted...that he embezzled \$129,500 from some of his 75 wards. He was sentenced to five years in prison.”
- “The son of an elderly Alzheimer’s victim has been charged with spending tens of thousands of dollars from his mother’s bank accounts after he was appointed her legal guardian last year.”
- “...the guardian of a Kansas World War I veteran...ran through \$112,000 in a little more than a year, paying for a car and car repairs for a relative, spending \$1,800 on a hotel stay in San Francisco and lending \$2,000 to a relative who built kitchen cabinets.”

### *2. US Congressional Hearings*

The first US Congressional hearing that included consideration of abuse by guardians followed on the heels of the Associated Press investigation. It was convened by Congressman

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<sup>126</sup> “Guardians of the Elderly: An Ailing System” by F. Bayles & S. McCartney is a six-part series from Associated Press that appeared in local newspapers nationwide beginning on September 20, 1987, e.g., Akron Beacon Journal.

Claude Pepper, chair of the Subcommittee on Health and Long-Term Care of the US House Select Committee on Aging. His concern about guardianship “wrongdoings” grew out of eight years of inquiry by the Committee and personal receipt of “considerable mail and phone calls” on the subject. Hearing testimony revealed such wrongdoings as loose system monitoring and constitutional rights violations. It also included depictions of abuse by guardians, representing varied relationships and mostly financial abuse. Reflecting on the testimony presented, Congressman Pepper concluded that there were few measures “in place to protect the elderly person from abuse by his or her guardian”.<sup>127</sup>

Together, the Associated Press investigation and Pepper Congressional hearing sparked formation of the National Guardianship Association (NGA) and a series of guardianship summits organized by the National Guardianship Network (of which NGA is a member), generating consensus recommendations and inspiring work across multiple areas of reform, such as a code of ethics and standards of practice for guardians. States, too, were galvanized to improve their guardianship systems, enacting new or revising existing laws.<sup>128</sup>

Congressional hearings on guardianship continued in later decades, albeit in the US Senate Special Committee on Aging, following the demise of the House Select Committee on Aging. No federal legislation has been enacted as a result. However, increasingly the hearings have shown specific interest in abuse by guardians.<sup>129</sup> The most recent one illustrates this. Chair Susan Collins and Ranking Member Bob Casey introduced the Guardianship Accountability Act

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<sup>127</sup> Pepper, C. (1981). Guardianships: Friend or foe of America’s frail and elderly? *Journal of Elder Abuse & Neglect*, 1(3), 65-74.

<sup>128</sup> Quinn, M.J. (2005). *Guardianship of adults: Achieving justice, autonomy, and safety*. New York: Springer Publishing Company.

<sup>129</sup> Hearings and forums of the US Senate Special Committee on Aging since 2000 which had expressed interest in abuse by guardians include the following: “Forum on protecting older Americans under guardianship: Who is watching the guardian?” (July 22, 2004), “Exploitation of seniors: America’s ailing guardianship system” (September 7, 2006), and “Financial abuse of older Americans by guardians and others in power” (November 30, 2016).

in 2019, following the Committee’s year-long investigation with public hearing into abuse by guardians. In the press release accompanying the Act’s introduction Senator Collins states, “Combating abuse by guardians of seniors requires law enforcement and social service agencies at all levels of government to work together and the...Act promotes this kind of collaboration” through provisions that include federal demonstration grants to develop state databases for collecting information on guardians, training for court visitors, shared information on guardian background checks, and establishment of a National Online Resource Center on Guardianship.<sup>130</sup> The collaborative approach contained in the Act reflects the purpose of this paper and the reality of addressing abuse by guardians as a complex social problem, with multiple disciplines and systems having roles for responding to it.

### 3. *Government Accountability Office Reports*

From 2004 to 2016 five reports were released from the Government Accountability Office (GAO) focused on abuse by guardians and/or efforts to better identify and respond to the problem.<sup>131</sup> The reports are listed below:

- Guardianships: Collaboration Needed to Protect Incapacitated Elderly People (2004)

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<sup>130</sup> “Senators Collins, Casey introduce bipartisan bill to protect individuals under the care of guardians” (2019, March 1). Retrieved from <https://www.again.senate.gov/press-releases/senators-collins-casey-introduce-bipartisan-bill-to-protect-individuals-under-the-care-of-guardians>

<sup>131</sup> There have been five US Government Accountability Office (GAO) reports since 2004 on abuse by guardians: *Guardianships: Collaboration needed to protect incapacitated elderly people*, GAO-04-655, A report to the Chairman, Special Committee on Aging, US Senate (2004, July). *Guardianships: Little progress in ensuring protection for incapacitated elderly people*, GAO-06-1086T, A testimony before the Special Committee on Aging, US Senate (2006, September 7). *Guardianships: Cases of financial exploitation, neglect, and abuse of seniors*, GAO-10-1046, A report to the Chairman, Special Committee on Aging, US Senate (2010, September). *Incapacitated adults: Oversight of federal fiduciaries and court-appointed guardians needs improvement*, GAO-11-678, A report to the Chairman, Special Committee on Aging, US Senate (2011, July). *Elder abuse: The extent of abuse by guardians is unknown, but some measures exist to help protect older adults*, GAO-17-33, A report to Congressional requesters (2016, November).

- Guardianships: Little Progress in Ensuring Protection for Incapacitated Elderly People (2006)
- Guardianships: Cases of Financial Exploitation, Neglect, and Abuse of Seniors (2010)
- Incapacitated Adults: Oversight of Federal Fiduciaries and Court-Appointed Guardians Needs Improvement (2011)
- Elder Abuse: The Extent of Abuse by Guardians is Unknown, but Some Measures Exist to Help Protect Older Adults (2016)

Each report includes key findings and/or recommendations. Together, they call for changes at federal and state levels aimed at:

- better discovery of and data collection on cases of abuse by a guardian,
- development and evaluation of measures to enhance the protection of older adults from abuse by a guardian, and
- cooperation among courts and federal agencies charged with protecting incapacitated older adults under either guardianship or representative payee.

More specifically, in 2004 the GAO recommended that the Social Security Administration (SSA) lead a federal interagency and state court effort to identify options for sharing information to protect incapacitated older adults and that the US Department of Health and Human Services (HHS) offer support to states and national organizations toward compiling national data on guardianship and representative payee as well as reviewing state policy for interstate guardianship transfers and appointments. In 2006 the GAO found that only limited progress had been made toward the accomplishment of the recommendations. In 2010 the GAO still could not determine if allegations of abuse by guardians were widespread, but it was able to

identify hundreds of them across nearly all states and the District of Columbia with some common themes, i.e., Court failure to adequately screen potential guardians, Court failure to oversee guardians once appointed, and Court and federal agency failure to communicate effectively about abusive guardians. In 2011 the GAO recommended that HHS consider funding evaluation of guardianship monitoring practices and that SSA take measures to disclose information about beneficiaries and fiduciaries to state Courts, upon request, toward protecting vulnerable older adults from financial exploitation. Finally, in 2016 the GAO made no specific recommendations, but did underscore data limitations about abuse by guardians and recent efforts to collect better data, particularly the launch of the National Adult Maltreatment Reporting System, based on data from state APS programs, which could help identify elder abuse cases involving a guardian. The report also identified promising practices among state and local entities for protecting older adults from abusive guardians, including enhanced Court screening, and required training of prospective guardians along with better monitoring of guardian activities and taking action against those who commit abuse, through removal of duties and/or criminal prosecution. It is noteworthy that the five GAO reports, like the Congressional hearings, recognize the responsibility of multiple agencies at all government levels in addressing abuse by guardians, with special attention given to the roles of APS, Law Enforcement, and the Courts.

#### *4. Select Additional Outlets*

In recent years exposure of abuse by guardians has found other outlets besides a national newspaper series and federal government hearings and reports. For example, local newspapers have conducted their own inquiries and published the results, including The Columbus Dispatch

and Cleveland's Plain Dealer in Ohio.<sup>132</sup> The problem also has been chronicled in film. The recent Toronto Film Festival showing of "I Care a Lot" illustrates the former, with its depiction of a guardian "scamming defenseless seniors out of their assets as she and her co-conspirators take control of their lives, shutting out pesky family members whenever necessary".<sup>133</sup> Other film examples include the investigative documentary "The Guardians" and the episode titled "Guardians, Inc." in the television series "Dirty Money".

Moreover, the call for action has broadened from professional organizations and responsible systems to victims and their advocacy organizations. The National Association to Stop Guardian Abuse (NASGA) and Americans Against Abusive Probate Guardianship (AAAPG) represent the combination. NASGA describes itself as "an organization of victims and families working for reform of unlawful and abusive guardianship and conservatorships nationwide". It reportedly does this through outreach and support for victims and families battling guardianship as well as legal reform via education and advocacy.<sup>134</sup> AAAPG was established by Sam Sugar, MD, "after experiencing the horrors of guardianship firsthand". Its mission is to reduce or eliminate the incidence of abuse by guardians through both prevention strategies and public awareness activities.<sup>135</sup>

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<sup>132</sup>*The Columbus Dispatch*. (2014, May 19):

Reipenhoff, J., Wagner, M., Jarman, J., & Sullivan, L. "Ohio doesn't require guardians to meet with wards, and many don't."

Wagner, M. "Regretful mom removed as guardian: 'I failed my son.'"

Sullivan, L., Wagner, M., Jarman, J., & Reipenhoff, J. "Guardianship system oversight: Intended to protect elderly and disabled, legal mechanism fosters abuse, neglect."

<sup>133</sup>*The [Cleveland] Plain Dealer*. (2019, February 24).

Ellington, K. "Who's protecting elderly wards? Ohio courts struggle to monitor guardians, abuse."

Rooney, D. (2020, September 12). "I care a lot": Film review, Toronto International Film Festival." *Hollywood Reporter*. Retrieved from <https://www.hollywoodreporter.com/news/i-care-a-lot-film-review-tiff-2020>

<sup>134</sup> The website for Americans Against Abusive Probate Guardianship is: <https://aaapg.net>

<sup>135</sup> The website for the National Association to Stop Guardian Abuse is: <https://stopguardianabuse.org>

## Appendix B: The Developmental History of APS

### 1. Program Origins

The beginnings of APS can be found in the mid-twentieth century. They started as local dialogues in large urban centers, like Chicago and Cleveland, where service professionals and community leaders voiced concern about growth in the number of older adults who lived alone, without nearby family for support, and were often mentally compromised. The fear was that without specialized intervention, they might suffer self-neglect or possible financial exploitation. Local dialogues drew the attention of federal agencies and national associations, such as the Social Security Administration and American Public Welfare Association, and ultimately resulted in recognition of the need for protective services at the first White House Conference on Aging in 1961.<sup>136</sup> Pivotal forums during the early 1960s, notably the Arden House Seminar on Aging and National Council on the Aging Seminar on Protective Services for Older People, served to delineate protective services and stimulate its development as a distinct program.<sup>137</sup>

Seven demonstration projects followed in the late 1960s and early 1970s. Collectively they revealed that 7-20% of older adults needed protective services because of reduced mental or physical capacity, rendering them unable to adequately safeguard themselves or their interests. In addition, protective services required access to a wide range of services, potential use of legal

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<sup>136</sup> Cole, H.B. (1962, October 22). *Older persons in need of protective services*. Paper presented at the Ohio State Welfare Conference held in Columbus, OH.

Barry, M.C. (1963, March 10-15). *Responsibility of the social welfare profession on providing guardianship and protective services*. Paper presented at the Arden House Seminar on Aging held in Harriman, NY.

Ross, H.A. (1968). Protective services for the aged. *The Gerontologist*, 8(1), 50-53.

Hall, G. H. (1971). Protective services for adults. In R. Morris (Ed.), *Encyclopedia of social work* (Vol. II, pp. 999-1007). Washington, DC: National Association of Social Workers.

<sup>137</sup> O'Neill, V. (1965). Protecting older people. *Public Welfare*, 23(2), 119-127.

authority, and availability of multiple professional disciplines, with social work in the coordinating role. Project evaluation results were disappointing, however. Few cases were closed due to successful intervention<sup>138</sup>, and paradoxically, findings from Cleveland's Benjamin Rose Institute indicated that protective services tended to increase the likelihood of institutionalization and potential premature mortality.<sup>139</sup>

The dialogues and demonstrations provided impetus for the expansion of APS, which was facilitated by the enactment in 1974 of Title XX of the Social Security Act. The law gave federal funding to states to create and expand various social services, including APS as one of only two universal public welfare programs. Simultaneously there arose a substantial amount of disillusionment about APS.<sup>140</sup> It began with the demonstration project results, but grew as APS became perceived as a potential infringement on individual rights. The subsequent enactment of state laws and development of model APS legislation, beginning in the mid-to-late 1970s, served to stem some of these fears, with provisions on the right to refuse intervention, if the adult is capable of such decision-making, and any use of involuntary protective services with time and scope limitations.<sup>141</sup> However, perhaps nothing propelled the standing of APS forward more than the "discovery" of elder abuse during that time period. Adult Protective Services became the "go

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<sup>138</sup> Burr, J.J. (1971). Protective services for older adults: A demonstration project. *Welfare in Review*, 9, 1-6.  
Horowitz, G., & Estes, C. (1971). *Protective services for the aged*. Washington, DC: US Department of Health, Education, and Welfare; Administration on Aging.

<sup>139</sup> Blenkner, M., Bloom, M., & Nielsen, M. (1971). A research and demonstration project of protective services. *Social Casework*, 52(8), 483-499.

<sup>140</sup> Regan, J.J. (1978). Intervention through adult protective services programs. *The Gerontologist*, 18(3), 250-254.  
Regan, J.J. (1982). Adult protective serves: An appraisal and a prospectus. In W. D. Callender, Jr. (Ed.), *National law and social work seminar: Proceedings and prospects (Improving protective services for older Americans: A national guide series)* (pp. 11-19). Portland, ME: University of Southern Maine, Human Services Development Institute.

<sup>141</sup> US Senate Special Committee on Aging. (1977, July). *Protective services for the elderly: A working paper*. Washington, DC: US Government Printing Office.

to” response to the problem.<sup>142</sup> Only later would such other systems, as Law Enforcement and domestic violence programming, be seen as having key intervention roles.

## 2. *Subsequent Key Events*

Later events, beginning in the early 1980s, had varying impacts on the status and reach of APS. The Reagan Administration’s efforts to move social welfare responsibilities from federal to state and local government levels had two major effects. First, APS was not given the uniform nationwide function and structure that occurred for child protective services, which “came of age” during the 1960s, when the political philosophy was reversed. In addition, with the block granting of Title XX, APS lost its designated federal funding, becoming just one of many possible uses for the decreased amount of federal funds from this source now available to states.<sup>143</sup>

In an effort to unify and strengthen APS as a national system, attempts to grapple with these losses began shortly after, and have accelerated in recent years. Among the most notable are the following:

- Establishing what eventually would be called the National Adult Protective Services Association, with membership across the country and vehicles for broad information sharing and potential policy or program replication, such as annual national conferences and the development of APS values and principles (late 1980s)
- Designating the American Public Welfare Association as initial auspices for the National Center on Elder Abuse, thereby assuring APS a prominent “place at the table” in early Center activities (1990)

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<sup>142</sup> Zborowsky, E. (1985). Development in protective services: A challenge for social workers. *Journal of Gerontological Social Work*, 8(3/4), 71-83.

<sup>143</sup> Anetzberger, G.J. (2002). Adult protective services. In D. J. Ekerdt (Ed.), *The Macmillan Encyclopedia of Aging* (pp. 14-17). New York: Macmillan Reference USA.

- Enacting the Elder Justice Act as an amendment to the federal Patient Protection and Affordable Care Act, with the largest specified fund authorization (although not appropriated to date, except partially as a pandemic emergency measure in 2021) going to strengthen APS operations in state and local APS offices (2010)
- Providing a “home” for APS under the federal Administration for Community Living and offering a number of voluntary initiatives toward standardizing APS practice across the country, most importantly the National Adult Maltreatment Reporting System (NAMRS), Voluntary Consensus Guidelines for State APS Systems, and Research Agenda for APS, some bolstered by available grants toward their implementation at state and local levels (2012-2020)
- Establishing the National Adult Protective Services Technical Assistance Resource Center, with its purpose to enhance the effectiveness of APS programs nationwide through guidance and training on best practices and innovative strategies as well as implementation of NAMRS (2015)

## Appendix C: Interdisciplinary Role of the Court

The Courts should not hesitate to refer any suspected abuse by a guardian to Adult Protective Services (APS) and Law Enforcement. Continued use of these resources can prevent abuse and develop cases when abuse has occurred. Courts are encouraged to be proactively involved in guardianships of minors, including the development of programs of interagency coordination, but the same activity has not necessarily been encouraged in adult guardianships.<sup>144</sup> An active position or role by judges in community guardianship activities could help elevate the problematic issues faced in guardianships.

The interviewed judges were asked whether their jurisdictions had Multidisciplinary Teams (MDT) and the ability of the Court to make referrals to MDTs, APS, and Law Enforcement. Some of the jurisdictions maintain formal MDTs, while others have less formal arrangements, like a coordinated community response, and still others do not possess a program at all.

Almost all the interviewed judges felt that they could refer a potential case to an MDT. One judge felt that she could not make a referral where the Court was involved in order to preserve the Court's neutrality. Additionally, all the judges felt they could assist in the formation of an MDT, but none of them felt that they could participate in a case review in order to maintain

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<sup>144</sup> See California Rules of Court Standard 5.40.

neutrality. Some of the judges can and do participate in community networks that deal with elder abuse in general, but never with direct case reviews. Two jurisdictions, however, have Court staff participate in MDT reviews.

All the judges felt that they were able to make referrals to Law Enforcement concerning abuse by a guardian and most said they had done so. One judge felt that he would prefer to make referrals to APS, rather than Law Enforcement, although that judge said that APS had refused to take some referrals in the past.

All the judges, except one, said that they could make referrals to APS. One judge felt that he had made more referrals to APS in an effort to protect the guardian from abuse as opposed to cases of abuse by the guardian. Another judge is mandated to make referrals to APS under an expanded mandated reporter statute. Still another judge made referrals to APS and conducted training for APS staff after she found an APS worker failed to visit with a client alone. Utah has developed a memorandum of understanding between APS and the Court to facilitate the sharing of information.<sup>145</sup>

The judges were asked about California's statutory requirement that Juvenile Court judges take an active leadership role within the community, including the development and maintenance of a permanent program of interagency cooperation, and whether they saw a similar role for judges in guardianship cases.<sup>146</sup> All interviewed judges felt that there was a role for guardianship judges in this type of community leadership. One judge saw the need for the involvement based upon the aging of our society. Another judge saw it as appropriate and a need that should be met, but it was a matter of finding the time to do it. A third judge feels that the community needs more stakeholders and has not been good

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<sup>145</sup> Pogach, D., & Wood, E. (2019). *When the Guardian is An Abuser*. National Center on Law & Elder Rights. American Bar Association Commission on Law and Aging, p.7.

<sup>146</sup> See California Rules of Court Standard 5.40.

in making the linkages. Still other judges had already participated in similar activities, like a Guardianship Advisory Committee and Elder Justice Roundtable.

## Appendix D: Recommendations for Court Activity on Abuse by Guardians

### *I. Reports*

Once a guardian is appointed, what are the reporting and accounting requirements for the guardian? Is an accounting/report required? How often? Who is responsible for reviewing the reports when they are submitted? Is it a Court official, the judge, or an independent person who reports back to the Court? How many reports is the person responsible for reviewing? What documents are required to be submitted with the reports? Are medical reports and supporting financial documents supposed to be submitted with the reports? Is the incapacitated person contacted or visited during the review of the annual reports? Are notices or copies of the reports sent to other interested parties? The answer to these questions can have implications for detecting, and therefore responding, to abuse by guardians.

In New York State (NYS), for example, an initial report is required within 90 days of appointment, an annual report by the end of May every year, and a final report after death of the individual or removal of the guardian.<sup>147</sup> While there are mandated reports in NYS, at least one source found that “the monitoring of guardians is very limited, primarily due to poor compliance with reporting requirements and a lack of timely review of reports.”<sup>148</sup>

In the Guardianship Project, conducted in NYS, over half the responding judges said that there are not enough resources to handle their current, active caseload involving no-fee or low-fee cases.<sup>149</sup> The Guardianship Project found that a large number of guardian reports and

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<sup>147</sup> See NY Mental Hygiene Law Sections 81.30-81.33.

<sup>148</sup> Callahan, J., Romanick, R., & Ghesquire, A. (2016). Guardianship Proceedings in New York State: Findings and Recommendations. *Bifocal*, 37(4), 84.

<sup>149</sup> Teaster, P. B., Wood, E. F., Holt, J. N., & George, K. S. (2018, November 30). Incapacitated, Indigent, and Alone: Meeting Guardianship and Decision Support Needs in New York [PDF]. The Guardianship Project.

accountings are not submitted on time, and without timely reporting, the Court has no way of assessing the well-being of the individual or the extent to which the guardian is carrying out fiduciary duties.<sup>150</sup>

For the interviewed judges there was a lack of uniformity in the review of the reports and an unexpected role by the judges themselves in conducting the reviews. All the judges reported that they play a role in reviewing accountings, but only a few stated that they personally performed all the accounting reviews.

A judge in a jurisdiction where there are independent appointed individuals to review annual reports, discovered issues not with the guardians but with the examiners of the reports not effectively doing the review, in part because they had taken on the role in more than one jurisdiction. That judge instructs the examiners to make compliance motions if the guardian is not appropriately filing reports. Another judge felt that the reports are sufficient if they are required to be filed, raising a concern for that judge that sometimes reports slipped through the cracks and were not tracked sufficiently. The judge had the ability to appoint a monitor when there was a need, and in another area of the state, an Inspector General could review accountings as well.

Annual reports are an area where the use of technology would afford the Courts a tremendous opportunity to discover and prevent abuse by guardians. Two of the interviewed judges referenced technology systems or grants, which mark a step forward. The second author's experience in completing annual reports for over 17 years contrasted with seeing the use of current technology by forensic accountants in preparing reports in EMDTs, illustrating the

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<sup>150</sup> See *id.* Also see Karp, N., & Wood, E. (2006, June). *Guardianship Monitoring: A National Survey of Court Practices* [PDF], p. 16.

benefits that can come from the proactive use of technology. Additionally, Elizabeth Loewy previously referenced in this paper, expressed some surprise that none of the judges felt that abuse by guardians is a pervasive problem. Ms. Loewy believes that the fully implemented use of available technology would reveal the true scope of abuse by guardians.

Pennsylvania implemented a statewide Guardian Tracking System which allows the online submission of reports and can assist in the review process.<sup>151</sup> The System instituted reforms to the guardian accounting system, allowing the Courts to act quicker, with an ability to check the whole state to see if the guardian ever committed previous misdeeds and to raise red flags on a particular report. The judge describing the System further submitted that the guardian is not required to provide bank records with the reports and that each Court handles the review of the reports differently.

The Conservator Accountability Project further underscores the importance of this type of initiative by finding that, “To protect individuals subject to guardianships or conservatorships, courts must communicate with other courts and other entities. Both those subject to a guardianship/conservatorship as well as those serving as guardians or conservators cross jurisdictional, county, and state lines. Being able to share data and exchange information is critical to detect and prevent abuse and fraud”.<sup>152</sup>

One interviewed judge called for a requirement of bonds for all conservators. In addition, the conservators should be required to provide all bank statements and to check guardianship account titles. Minnesota has developed a statewide accounting and computer system

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<sup>151</sup> Guardianship in Pennsylvania. (n.d.). Retrieved from <http://www.pacourts.us/judicial-administration/court-programs/office-of-elder-justice-in-the-courts/guardianship-in-pennsylvania>

<sup>152</sup> Conservatorship Accountability Project. (2020, April 05). Retrieved from <http://www.eldersandcourts.org/guardianship/conservatorship-accountability-project>.

(MyMNConservator) which is another step forward. However, the system is not able to identify red flags in a submitted accounting.<sup>153</sup>

The ideas of centralized data collection and enhanced use of technology in accounting reviews to curbe the potential of abuse by guardians or assist in detecting such abuse are not new. Wingspan--The Second National Guardianship Summit in 2001--called for Courts to maintain adequate data systems in order to assure that required plans and reports are filed in a timely fashion and called for the increased use of technology for better monitoring guardianships.<sup>154</sup> In 2006, in *Guardianship Monitoring: A National Survey of Court Practices*, the use of technology in monitoring was still minimal.<sup>155</sup>The Senate Special Committee on Aging recognized the need for accurate and detailed data to help policymakers make informed decisions to improve the guardianship system.<sup>156</sup>However, the Conservator Accountability Project determined that, "... not only do most state courts lack the capacity to develop and implement broad-scale changes, but antiquated systems create struggles with even simple tasks, such as documenting the number of active conservatorship cases and tracking compliance with reporting requirements. Further without this data, technology solutions and targeted reform cannot be applied."<sup>157</sup>Despite these efforts, we still lament the lack of proactive use of technology in guardianship reporting and monitoring.

## 2. Guardianship Plans

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<sup>153</sup> See Myles, O., Boyko, C., Holt, K., Allred, A., & Graves, S. (2019, June). *Implementation Guide for Modernizing Conservatorship Monitoring* [PDF]. National Center for State Courts.

<sup>154</sup> See Wingspan – The Second National Guardianship Summit. (2002). *Stetson Law Review*, 596.

<sup>155</sup> Karp and Wood, *supra* note 12, p. 30, 33.

<sup>156</sup> U.S. Senate Special Committee on Aging. (2018, November). *Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans*[PDF].

<sup>157</sup> Conservatorship Accountability Project. (2020, April 05). Retrieved from <http://www.eldersandcourts.org/guardianship/conservatorship-accountability-project>

Another option, in addition to annual reports, is the requirement that the guardian develop a detailed plan for meeting the expectations of the guardianship. Guardianship plans are described as forward-looking documents submitted by the guardian to the Court, describing the proposed care of the individual and reporting on past care, and can serve as a baseline inventory to measure the future performance of the guardian.<sup>158</sup> Guardianship plans answer such questions as: What goals does the guardian wish to accomplish for the incapacitated person? What barriers are they facing? What financial activities need to be met or resolved?

The interviewed judges were asked about their jurisdiction's use of a guardianship plan, whether it was required and, if not, whether they thought it was a good idea. It is important to make sure that one is using language that is understood when discussing guardianship plans. Some jurisdictions' guardianship plans are the initial or annual report. The concept herein is a plan developed by the guardian stating goals and tasks to be accomplished on behalf of the protected person.

Once again, there was no uniformity in the requirement and use of guardianship plans across the jurisdictions represented by the judges, although all of them supported the development of plans as a useful tool. Some judges felt cases really require a plan of what is needed for the protected person. They saw its development as empowering, enabling the guardian to examine the long-term care needs for the person. One judge currently has a case where the alleged incapacitated person was given the opportunity to develop her own care plan, including obtaining a care manager.

### *3. Court Funding*

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<sup>158</sup> Karp and Wood, *supra* note 12, p. 13.

A common call for preventing abuse by guardians is sufficiently funding the Courts so that they can perform the necessary oversight functions.<sup>159</sup> If sufficient funds existed, it is argued, it would be possible, and desirable, to create the position of paraprofessional guardianship specialist to handle these responsibilities.<sup>160</sup> One of the judges called on the states to dedicate sufficient resources to address the problem. The judge cited chronic tension between Court administration and judges concerning specialized courts. The jurisdiction lost nearly half of its staffing, which resulted in the loss of the volunteer coordinator. The judge recommended that Courts possess the resources needed to hire individuals to review financial accounts and do visits.

#### *4. Court Visitor Program*

Guardianship statutes should require the assignment of “visitor” to investigate the guardianship proceeding and to continue to visit the person after appointment as a deterrent to guardian abuse and a tool to discover abuse. In 1991, AARP initiated a National Volunteer Monitoring Project that used trained volunteers as court visitors, auditors, and researchers.<sup>161</sup> Unfortunately, visitor programs still are not widespread.<sup>162</sup> Literature on the subject suggests that in order to “adequately protect the ward, the court must conduct more than just a paper review of the guardian’s report. ... The only sure way to accomplish this is for a non-involved

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<sup>159</sup> See *id.* p. 24.

<sup>160</sup> Hardy, D., CELA. (n.d.). Who is guarding the guardians A localized call for improved guardianship systems and monitoring [PDF]. NV State Legislature.

<sup>161</sup> Karp and Wood, *supra* notes 7 (p.34) and 10 (p.64).

<sup>162</sup> See *id.*, p.190.

person, such as a court appointed visitor, to get out of the courthouse and into ‘the field’ to investigate.”<sup>163</sup>

The judges were asked about the use of visitors appointed by the Court to conduct visits with the incapacitated person. Every judge felt that the use of Court visitors would impart a positive effect. However, not every jurisdiction has assigned visitors and the jurisdictions that do have visitor programs are not uniform. As with other initiatives, funding and resources are always an issue. Interestingly, two judges that do not have a visitor program saw the value of such a program but questioned whether the visitor program would be the most valuable use of limited resources.

Judges that have visitor programs all saw their value. One judge felt their Court Angel program deterred abuse by guardians, as the visitors provide information, detect problems, and suggest resources.<sup>164</sup> Another jurisdiction has an Adult Guardianship and Assistance Monitoring Program<sup>165</sup> that provides for Court visitors to look at the guardian’s care of the protected person and the continued need for the guardianship. Another judge noted that the visitor program is critical, important for both pre-and post-appointment of a guardian, while stressing that the visitors must be trained and independent. That judge detailed a previous 10-year volunteer program in the state which made a whole range of discoveries, including guardianships that could be terminated and cases that resulted in the removal of guardians. One of the retired judges would like to see CASA-type (Court Appointed Special Advocate)

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<sup>163</sup> Fell, N. (1994). Guardianship and the Elderly: Oversight Not Overlooked [PDF]. University of Toledo.

<sup>164</sup> See [www.starkcountyohio.gov/StarkCounty/media/StarkCounty/StarkCountMain/Probate/Revised-SCPC-Volunteer-Guardian-Visitor-Application-Form.pdf](http://www.starkcountyohio.gov/StarkCounty/media/StarkCounty/StarkCountMain/Probate/Revised-SCPC-Volunteer-Guardian-Visitor-Application-Form.pdf)

<sup>165</sup> See [www.charlestoncounty.org/departments/probate](http://www.charlestoncounty.org/departments/probate).

volunteer programs established nationally.<sup>166</sup> These special advocates typically are appointed to represent minors but could assist adults in guardianship settings. The one area in which programs have uniformity is that the visitors are all volunteers. However, who the visitors are varies. One program uses mostly local law students, another AARP volunteers, and still another master's level social work students.<sup>167</sup>

##### 5. *Use of Virtual Formats*

Lastly, the interviewed judges were asked if the virtual format would allow the Courts to conference more cases for review or if they observed any limitations with the virtual process. One judge reported that while virtual appearances are efficient, they often are not effective, since it is frequently hard for the incapacitated person to use the technology, which makes them appear more incapacitated. The judge further felt that assessing the limitations of the incapacitated person is difficult in the virtual setting. Finally, the judge felt that with the COVID restrictions, he is not able to explain the powers as well as was done in the past. Another judge has found virtual appearances are not any quicker than in-person appearances due to the difficulties in getting everyone connected.

Some judges see benefits incidental to virtual appearances continuing because the proceedings are more accessible. The proceedings were more expansive, with some witnesses testifying from out-of-state and out-of-town, which would not have happened with in-person hearings. One judge felt that virtual appearances could be a viable option for annual report appearances by the guardian but not by the incapacitated person, and another judge saw virtual status conferences as an option if the parties agreed. Other judges had no complaints about virtual appearances, seeing them as the wave of the future with some modifications.

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<sup>166</sup>See Karp and Wood, *supra* note 7, p. 28.

<sup>167</sup> Karp and Wood, *supra* note 7, p.33.

## 6. Other Recommendations

There are several other recommended practices that can potentially prevent or detect abuse by guardians, but due to the scope of this paper they will not be discussed in detail.

Recommended additional practices include the following:

- 1) Standardized uniform and accessible process for addressing grievances against guardians, including the jurisdiction and powers available to the Court;
- 2) Use of alternative dispute resolution, either to avoid the necessity for guardianship in its entirety or to settle issues that are raised in the guardianship. (Judge David Hardy suggested the development of a mediation model for conflicted guardianships, considering the complexity of family dynamics.);<sup>168</sup>One example of an ongoing alternative dispute resolution model is Eldercaring Coordination, a court dispute resolution mechanism for aggravated family conflicts.<sup>169</sup>
- 3) Continued appointment of an attorney to represent the individual or reappoint the attorney, if an issue arises (Continuing the post-appointment of an attorney can give the incapacitated person the ability to speak freely with a guarantee of confidentiality. In addition, counsel may learn of an issue and has the ability to report to the Court.<sup>170</sup> The Senate Special Committee on Aging found that there should be strengthened protections for individuals under guardianships to ensure that individuals seeking a restoration of

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<sup>168</sup> See *id.*

<sup>169</sup>See <https://www.eldercaringcoordination.com/>

<sup>170</sup> Pogach, D., & Wood, E. (2019). *When the Guardian is An Abuser*. National Center on Law & Elder Rights. American Bar Association Commission on Law and Aging, p.3.

rights are guaranteed unbiased legal representation.<sup>171</sup> The second author of this paper has found the Courts more than willing to continue the appointment of an attorney if the abilities of the guardian are in question or if the scope of the guardianship is intended to be limited in duration.); and

- 4) Biannual status conferences with the required appearance of the guardian and the incapacitated individual (The National Probate Court Standards dictate that Courts should adopt procedures for the periodic review of the necessity for continuing a guardianship.<sup>172</sup> The continued Court review also would serve as a significant deterrent to abuse or a tool to identify abuse by guardians. One of the interviewed judges further observed that another judge felt continued appearances benefitted individuals, because then they know that someone is interested in them and their welfare. That judge felt that the time and effort put into those appearances are beneficial.<sup>173</sup>).

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<sup>171</sup> U.S. Senate Special Committee on Aging. (2018). *Ensuring Trust: Strengthening State Efforts to Overhaul the Guardianship Process and Protect Older Americans*, p. 7.

<sup>172</sup> National College of Probate Judges, & National Center for State Courts. (n.d.). *NATIONAL PROBATE COURT STANDARDS* [PDF]. Commission on National Probate Court Standards and Advisory Committee on Interstate Guardianships.

<sup>173</sup> See *Elder Abuse: The Extent of Abuse by Guardians Is Unknown, but Some Measures Exist to Help Protect Older Adults* [PDF], p. 16. (2016). GAO.