

**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 a 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. APS 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.

INTRODUCTION¹

Abuse by a guardian 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.

This article examines abuse by a guardian as it is currently 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.² It assesses system and intersystem effectiveness and provides recommendations for how to improve understanding of the problem and the response given to it. Throughout the article consideration is limited to guardianship of adults.

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

- The Problem of Abuse by Guardians provides an overview of the mistreatment of adult individuals by their appointed guardians in order to determine the dimensions of the problem.
- The Role of APS examines 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.
- The Role of law enforcement offers inquiry into how law enforcement handles situations of alleged abuse by guardians, including when it becomes involved and the barriers to its involvement.

1. The authors wish to thank the nine judges from across the country who participated in this study, Leslie McGee, Andy Capehart, Elizabeth Loewy, Esq., and Bonnie Olsen, Ph.D., who took their valuable time to be interviewed for this paper; and those who helped through time and footnoting assistance.

2. See *Elder Abuse Issue Summary*, U.S. GOV'T ACCOUNTABILITY OFFICE, <https://www.gao.gov/elder-abuse> (last visited Dec. 31, 2021).

- The Role of the courts considers the court's responsibilities in preventing and responding to abuse by guardians, including intervention options and their limitations.
- Multisystem Collaboration in Addressing Abuse by Guardians examines 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.
- The Recommendations section lists suggestions for improving our understanding and response to abuse by guardians, highlighting the roles of APS, law enforcement, the courts, and multisystem collaborations.

I. THE PROBLEM OF ABUSE BY GUARDIANS

A. History of Problem Recognition

Guardianship has existed for many centuries, with its origins during the early Greek and Roman empires.³ It may be that instances of abuse by a guardian occurred during that early period, but there is no evidence that it was a collective concern. This recognition only began during the past half-century, as the problem was chronicled by sources such as an Associated Press investigation,⁴ U.S. Congressional hearings,⁵ and Government Accountability Office (GAO) reports.⁶

3. See MARY JOY QUINN, *GUARDIANSHIP OF ADULTS: ACHIEVING JUSTICE, AUTONOMY, AND SAFETY* 17 (Helvi Gold & Brian Black eds., 2005).

4. See Fred Bayles, *Guardians of the Elderly: An Ailing System Part I*, AP NEWS (Sept. 19, 1987), <https://apnews.com/article/1198f64bb05d9c1ec690035983c02f9f> (investigating guardianship records and cases across the United States in a series of reports published in over 300 newspapers).

5. See *Forum on Protecting Older Americans Under Guardianship: Who Is Watching the Guardian?: Hearing Before the S. Spec. Comm. on Aging*, 108th Cong. 1–2 (2004) (statement of Sen. Larry E. Craig, Chairman; statement of Barbara Bovbjerg, Director, Education, Workforce, and Income Security Issues, U.S. Government Accountability Office); *Exploitation of Seniors: America's Ailing Guardianship System: Hearing Before the Special Commission on Aging*, 109th Cong. 1, 3–4 (2006) (statement of Sen. Gordon H. Smith, Chairman; statement of Ira Salzman, Attorney); *Trust Betrayed: Financial Abuse of Older Americans by Guardians and Others in Power*, U.S. S. SPEC. COMM. ON AGING (Nov. 30, 2016, 2:30 PM), https://www.aging.senate.gov/hearings/trust-betrayed_financial-abuse-of-older-americans-by-guardians-and-others-in-power (hearings and forums of the U.S. Senate Special Committee on Aging since 2000 which had expressed interest in abuse by guardians).

6. There have been five U.S. Government Accountability Office (GAO) reports since 2004 on abuse by guardians. See U.S. GOV'T ACCOUNTABILITY OFF., GAO-

Guardianship is used by society to safeguard people who lack the capacity to protect themselves.⁷ It can be, and often is, initiated to thwart actual or probable adult/elder abuse, or in other words, to prevent its occurrence or reoccurrence.⁸ Indeed, a primary responsibility of a guardian is protecting the individual from harm, including abuse.⁹ Therefore, when the guardian becomes abuser rather than protector, it reflects both personal and systemic failings.¹⁰ 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.

B. Understanding Abuse by Guardians

Abuse by guardians and adult/elder abuse have strong connections.¹¹ However, they are not the same. Abuse by guardians occurs when court-appointed guardians use the powers granted to

04-655, GUARDIANSHIPS: COLLABORATION NEEDED TO PROTECT INCAPACITATED ELDERLY PEOPLE 3-4 (2004); U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-1086T, GUARDIANSHIPS: LITTLE PROGRESS IN ENSURING PROTECTION FOR INCAPACITATED ELDERLY PEOPLE 1 (2006); U.S. GOV'T ACCOUNTABILITY OFF., GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, NEGLECT, AND ABUSE OF SENIORS 1-2 (2010); U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-678, INCAPACITATED ADULTS: OVERSIGHT OF FEDERAL FIDUCIARIES AND COURT-APPOINTED GUARDIANS NEEDS IMPROVEMENT 2 (2011); U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-33, ELDER ABUSE: THE EXTENT OF ABUSE BY GUARDIANS IS UNKNOWN, BUT SOME MEASURES EXIST TO HELP PROTECT OLDER ADULTS 2 (2016).

7. See Phillip B. Tor & Bruce D. Sales, *A Social Science Perspective on the Law of Guardianship: Directions for Improving the Process and Practice*, 18 L. & PSYCHOL. REV. 1, 1 (1994).

8. See Bryan Byers et al., *An Overview of Adult Protective Services*, in ADULT PROTECTIVE SERVICES: RESEARCH AND PRACTICE 3, 24-25 (Bryan Byers & James E. Hendricks eds., 1993).

9. See Dari Pogach & Erica Wood, *When the Guardian is An Abuser*, NAT'L CTR. ON L. & ELDER RTS. 1, 1 (2019), <https://ncler.acl.gov/getattachment/Legal-Training/When-the-Guardian-is-an-Abuser-Ch-Summary.pdf.aspx?lang=en-US>; Judith C. Barker & David King, *Taking Care of My Parents' Friends: Non-Kin Guardians and Their Older Female Wards*, 13 J. ELDER ABUSE & NEGLECT 45, 67 (2001). 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. *Id.*

10. See Lawrence A. Frolik, *Elder Abuse and Guardians of Elderly Incompetents*, 2 J. ELDER ABUSE & NEGLECT 31, 36-37 (1990).

11. See Lori A. Stiegel & Erica F. Wood, *Nine Ways to Reduce Elder Abuse Through Enactment of the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act*, 30 BIFOCAL A.B.A COMM. ON L. & AGING 35, 35 (2009).

them in ways that harm those they are charged to protect.¹² Adult/elder abuse has no standardized definition, but generally refers to harm or risk of harm to an adult in a trust relationship.¹³ That harm can take various forms, usually identified as physical, emotional, sexual, or financial (exploitation) abuse and neglect.¹⁴ Forms of harm involving abuse by a guardian can mirror those typically captured under definitions of adult/elder abuse, but they may also include harms that reflect violations of the rights retained by persons under guardianship despite any loss of freedom with court appointment.¹⁵ With adult/elder abuse, the trust relationship, and therefore the abuser, can vary, ranging from family members and friends to paid caregivers and financial planners.¹⁶ In contrast, the trust relationship in abuse by guardians is restricted to that between guardian and protected individual. However, there can be complications, as 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 adult/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.¹⁷

Both elder abuse and abuse by guardians were first acknowledged and initially investigated in the 1970s in the United States.¹⁸ However,

12. See Lloyd Hull, Gary E. Holmes & Ronald H. Karst, *Managing Guardianships of the Elderly: Protection and Advocacy as Public Policy*, 2 J. ELDER ABUSE & NEGLECT 145, 146–47 (1990).

13. See CTR. FOR VICTIM RSCH., RESEARCH BRIEF: ELDER ABUSE 1, https://ncvc.dspacedirect.org/bitstream/handle/20.500.11990/2165/CVR%20Synthesis_Elder%20Abuse_Brief.pdf?sequence=1&isAllowed=y (last visited Jan. 1, 2022).

14. See *Frequently Asked Questions: What is Elder Abuse?*, NAT'L CTR. ON ELDER ABUSE, <https://ncea.acl.gov/FAQ.aspx> (last visited Jan. 1, 2022); *Elder Fraud & Abuse Overview*, OFF. FOR VICTIMS OF CRIME, <https://ovc.ojp.gov/program/elder-fraud-abuse/overview> (last visited Jan. 1, 2022); See, e.g., CTR. FOR VICTIM RSCH., *supra* note 13, at 1.

15. See NAT'L GUARDIANSHIP ASS'N, THE FUNDAMENTALS OF GUARDIANSHIP: WHAT EVERY GUARDIAN SHOULD KNOW, 43–46, 48 (2017); Pogach & Wood, *supra* note 9, at 1.

16. See Mark S. Lachs & Karl A. Pillemer, *Elder Abuse*, 373 NEW ENG. J. MED. 1947, 1950, 1952, 1954 (2015).

17. See Candace J. Heisler, Pamela B. Teaster, & Georgia J. Anetzberger, *Abuse, Neglect, and Exploitation of Older Vulnerable adults*, in PAMELA TEASTER, CANDACE HEISLER & GEORGIA ANETZBERGER, ETHICS & VULNERABLE ELDER: THE QUEST FOR INDIVIDUAL RIGHTS AND A JUST SOCIETY 208–24 (Seidy Cruz et al. eds., 2020).

18. See GEORGE J. ALEXANDER & TRAVIS H.D. LEWIN, THE AGED AND THE NEED FOR SURROGATE MANAGEMENT 1 (1972) (research project began in 1968);

the pace of their study diverged afterwards, making for notable differences to date in understanding the dimensions and dynamics of these problems. Those in the field of adult/elder abuse often lament that research on the matter lags decades behind that of other aspects of family violence such as child abuse and intimate partner violence.¹⁹ However, the study of adult/elder abuse has shown significant progression and direction over time, aided in part by a sequence of national research agendas.²⁰ In contrast, the study undertaken on abuse by guardians seems minimal and unfocused. Making matters worse, data collection on abuse by guardians from sources like APS, law enforcement, and the courts is nearly non-existent. Indeed, there is no national or central data source that tracks abuse by guardians. This means that, beyond numerous anecdotes of the problem, we currently know little with certainty about any aspect of abuse by guardians.²¹

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 the data available on adult/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

Elizabeth E. Lau & Jordan I. Kosberg, *Abuse of the Elderly by Informal Care Providers*, AGING 10, 11 (1979).

19. See, e.g., Shelly L. Jackson, UNDERSTANDING ELDER ABUSE: A CLINICIAN'S GUIDE, 4–5, 11, 22 (Am. Psychol. Ass'n 2018); Richard J. Bonnie, *Preface* to ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA, at xiii–xiv (Richard J. Bonnie & Robert B. Wallace eds., 2003).

20. See Karl A. Pillemer, *Preface* to KAREN F. STEIN, NAT'L AGING RES. CTR. ON ELDER ABUSE, ELDER ABUSE AND NEGLECT at ii (1991); MARIE-THERESE CONNOLLY ET AL., THE ELDER JUSTICE ROADMAP: A STAKEHOLDER INITIATIVE TO RESPOND TO AN EMERGING HEALTH, JUSTICE, FINANCIAL AND SOCIAL CRISIS 23 (2014); SIDNEY M. STAHL, U.S. DEP'T JUST., BUILDING CONSENSUS ON RESEARCH PRIORITIES IN ELDER MISTREATMENT 13 (2015).

21. See QUINN, *supra* note 3, at 76–97; ERICA F. WOOD, NAT'L CTR. ON ELDER ABUSE, STATE-LEVEL ADULT GUARDIANSHIP DATA: AN EXPLORATORY SURVEY 10 (A.B.A. Comm. on L. & Aging 2006); GAO-17-33, *supra* note 6, at 6; NAT'L CTR. ON ELDER ABUSE, ROLE OF GUARDIAN STANDARDS IN ADDRESSING ELDER ABUSE 1 (2017) http://elder-mistreatment.usc.edu/wpcontent/uploads/2017/02/NCEA_GuardianStandardsFS2017_508web.pdf (last visited Jan. 1, 2022); Pamela B. Teaster & Holly Ramsey-Klawnsnik, *Safeguarding Guardianship for Older Adults*, USC CTR. FOR ELDER JUST. (Apr. 15, 2019), <https://elder-mistreatment.usc.edu/safeguarding-guardianship-for-older-adults/>; Sari Boren, *Elder Abuse: What Research Says About Prevalence, Assessment and Prevention*, JOURNALIST'S RES. (July 16, 2020), <https://journalistsresource.org/politics-and-government/elder-abuse-research-prevalence/>.

year.²² 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.²³ Higher rates of elder abuse victimization are found for those with cognitive impairment,²⁴ which is descriptive of many persons under guardianship. Institutionalization also brings with it vulnerability to abuse occurrence,²⁵ and this is characteristic of many under guardianship.²⁶ 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.²⁷

A consequence of adult/elder abuse can be financial loss. The limited research on losses to victims of financial abuse by trusted others suggest that the amount of financial loss 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

22. See, e.g., Ron Acierno et al., *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100 AM. J. PUB. HEALTH 292, 292 (2010).

23. See, e.g., *id.* at 292–94.

24. See Aileen Wiglesworth et al., *Screening for Abuse and Neglect of People with Dementia*, 58 J. AM. GERIATRICS SOC'Y 493, 494, 497 (2010); Colm Owens & Claudia Cooper, *The Relationship Between Dementia and Elder Abuse*, 14 WORKING WITH OLDER PEOPLE 19, 19, 21 (2010); XinQi Dong et al., *Association of Cognitive Function and Risk for Elder Abuse in a Community-Dwelling Population*, 32 DEMENTIA & GERIATRIC COGNITIVE DISORDERS 209, 210 (2011); Carla VandeWeerd et al., *Physical Mistreatment in Persons with Alzheimer's Disease*, 2013 J. AGING RES. 1, 1–2 (2013).

25. See, e.g., Yongjie Yon et al., *The Prevalence of Elder Abuse in Institutional Settings: A Systematic Review and Meta-analysis*, 29 EUR. J. PUB. HEALTH 58, 59 (2018).

26. See Jeri Spann, *Guardianship: A Neglected Piece of the Surrogate Decisionmaking Picture*, 13 STATE INITIATIVES IN END-OF-LIFE CARE, 1, 2–8 (2002).

27. See S.L. Reynolds, *Guardianship Primavera: A First Look at Factors Associated with Having a Legal Guardian Using a Nationally Representative Sample of Community-Dwelling Adults*, 6 AGING & MENTAL HEALTH 109, 116 (2002); Mark Johannesen & Dina LoGiudice, *Elder Abuse: A Systematic Review of Risk Factors in Community-Dwelling Elders*, 42 AGE & AGEING 292, 292–93 (2013); Xi Qi Dong, *Elder Abuse: Systematic Review and Implications for Practice*, 63 J. AM. GERIATRICS SOC'Y 1214, 1218 (2015).

reflective of Medicare/Medicaid fraud.²⁸ There also have been a few state-specific inquiries. For example, New York State in 2016 estimated an annual loss locally of \$1.5 billion due to financial exploitation,²⁹ and a recent study of 455 substantiated financial abuse cases in Pennsylvania resulted in an estimated average victim loss of over \$39 thousand and a total loss of \$58 million during fiscal year 2017–2018.³⁰ However, guardianship relationship, and whether or not it exists, was not mentioned in any of these studies.³¹ The only consideration of victim financial losses where the perpetrator is a guardian is found in GAO reports.³² The report published in 2010 included a review of twenty cases, which revealed that \$5.4 million had been improperly obtained by guardians of 158 incapacitated (mostly older) adults.³³ The other report, published in 2016, reviewed eight cases where guardians misappropriated over \$600,000 in cash from incapacitated older or younger adults.³⁴ 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.³⁵

Adult/elder abuse detection and reporting can be challenging, even with increased availability of screening tools³⁶ and mandatory reporting laws in all states but New York.³⁷ This is true for reasons that may include victim or perpetrator lack of awareness, denial, or personal attitude about family roles or privacy.³⁸ In addition, inadequate training, time pressures, and insufficient resources can

28. METLIFE MATURE MKT. INST. ET AL., A STUDY ON ELDER FINANCIAL ABUSE PREVENTION: BROKEN TRUST 7 (2009); METLIFE MATURE MKT. INST. ET AL., THE METLIFE STUDY OF ELDER FINANCIAL ABUSE: CRIMES OF OCCASION, DESPERATION, AND PREDATION AGAINST AMERICA'S ELDERS 7 (2011).

29. YUFAN HUANG & ALAN LAWITZ, THE NEW YORK STATE COST OF FINANCIAL EXPLOITATION STUDY 44 (N.Y. State Off. Child. & Fam. Servs. 2016).

30. PA. DEP'T OF AGING, FINANCIAL EXPLOITATION OF OLDER ADULTS STUDY REPORT 4–6 (2020).

31. *See id.*; HUANG & LAWITZ, *supra* note 29 *passim*.

32. *See* GAO-10-1046, *supra* note 6, at 12–13; GAO-17-33, *supra* note 6, at 5–10.

33. GAO-10-1046, *supra* note 6, at 7.

34. GAO-17-33, *supra* note 6, at 9–11.

35. *Id.*

36. *See* Margot J. Schofield, *Screening for Elder Abuse: Tools and Effectiveness*, in ELDER ABUSE 161–185, (XinQi Dong ed., 1st ed. 2017); Jeanette M. Daly, *Elder Abuse Prevention*, 44 J. GERONTOLOGICAL NURSING 21, 23 (2018).

37. *See* NAT'L CTR. ON ELDER ABUSE & NAT'L ADULT PROTECTIVE SERVS. ASS'N, MANDATED REPORTING OF ABUSE OF OLDER ADULTS AND ADULTS WITH DISABILITIES 1 (2020), https://ncea.acl.gov/NCEA/media/Publication/NCEA_NAPSA_MandatedReportBriefFull.pdf.

38. *See, e.g., id.* at 6.

inhibit the ability or willingness of a practitioner (e.g., counselor, nurse) to detect and report the problem. However, it is possible that additional barriers exist which 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 adult/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;
- 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.

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 government-based responsibility for handling abuse reports or referrals.³⁹ 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.

39. See, e.g., GAO-17-33, *supra* note 6, at 12–15.

II. THE ROLE OF ADULT PROTECTIVE SERVICES

A. Purpose and Operations of APS

APS is a social service program; its purpose is 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 are unable to protect themselves.⁴⁰ It is the only program nationwide dedicated to this purpose.⁴¹ Its origins are found in the mid-twentieth century, and its current federal “home” is with the Administration for Community Living.⁴²

State law authorizes and governs APS, delineating its target population and problems along with program structure and operations.⁴³ This results in considerable variation across the country.⁴⁴ 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 sixty and above), and in a couple of states only older adults are served.⁴⁵ Some states limit investigations to those living in the community, while others include those in long-term care facilities.⁴⁶ Most states include self-neglect and traditional abuse as forms qualifying for

40. *Fact Sheet: Adult Protective Services, What You Must Know*, NAT’L CTR. ON ELDER ABUSE & NAT’L ADULT PROTECTIVE SERVS. RES. CTR., <https://ncea.acl.gov/NCEA/media/publications/APS-Fact-Sheet.pdf> (last visited Jan. 1, 2022).

41. See Kathleen M. Quinn & William F. Benson, *The States’ Elder Abuse Victim Services: A System Still in Search of Support*, 36 J. AM. SOC’Y ON AGING 66, 67 (2012).

42. See Georgia J. Antezberger, *The Elder Abuse Policy Landscape in the United States*, in 1 J. ELDER POL’Y 31, 35, 38–39 (2021).

43. The various sources used to identify state variations in APS law and practice are the following: National Association of States United for Aging and Disabilities (NASUA) & National Adult Protective Services Resource Center. See NAT’L ASS’N OF STATES UNITED FOR AGING & DISABILITIES & NAT’L ADULT PROTECTIVE SERVS. RES. CTR., ADULT PROTECTIVE SERVICES IN 2012: INCREASINGLY VULNERABLE 2 (2012), <http://www.napsa-now.org/wp-content/uploads/2012/06/BaselineSurveyFinal.pdf> [hereinafter 2012 APS REPORT].

44. See *id.* at 2, 24.

45. See HOLLYRAMSEY-KLAWSNIK ET AL., NAT’L ADULT PROTECTIVE SERVS. ASS’N & NAT’L CTR. ON ELDER ABUSE, UNDERSTANDING AND WORKING WITH ADULT PROTECTIVE SERVICES (APS) 2 (2018), https://ncea.acl.gov/NCEA/media/Publication/Understanding-and-Working-with-APS_May2018.pdf.

46. See *id.*

investigation.⁴⁷ However, some will exclude self-neglect, add a form (such as abandonment), or alter a form's definition to increase or limit the investigation's scope.⁴⁸ In addition, as previously mentioned, all states but New York include mandatory reporting provisions in their APS or adult/elder abuse reporting laws.⁴⁹ Nonetheless, those required to report can vary widely, from everyone to specific persons, most often law enforcement and health personnel, but also others such as attorneys, aging service providers, and financial service professionals.⁵⁰ Finally, some state laws require reports to APS to also be made to law enforcement or other systems, like departments of health or long-term care ombudsman programs, under certain circumstances.⁵¹ With respect to APS structure and operations, key differences in state law surround program authority, auspices, and response times.⁵² For instance, generally APS is state-administered, but in some places it is county-administered or administered in other ways, such as contracts with other agencies.⁵³ The auspice for APS is usually human or social services, but in some locales it is aging services or public health.⁵⁴ Finally, most states must initiate investigation shortly after the report is received, within twenty-four hours or less, and most have requirements regarding when an investigation must be completed, usually ranging from thirty to ninety days.⁵⁵

Despite 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-

47. See L. MCGEE & K. URBAN, NAT'L ADULT MALTREATMENT REPORTING SYS. ET AL., ADULT MALTREATMENT DATA REPORT 2019 8 (2019), <https://namrs.acl.gov/getattachment/Learning-Resources/Adult-Maltreatment-Reports/2019-Adult-Maltreatment-Report/2019NAMRSReport.pdf.aspx?lang=en-US>.

48. See *id.* at 9, exhibit 1.6.

49. See 2012 APS REPORT, *supra* note 43, at 6–7.

50. See *id.* at 7 fig.4.

51. See *id.* at 9.

52. Pi-Ju Liu & Georgia J. Anetzberger, *Adult Protective Services*, in ENCYCLOPEDIA OF GERONTOLOGY AND POPULATION AGING 2 (Danan Gu & Matthew E. Dupre eds., 2019), https://doi.org/10.1007/978-3-319-69892-2_282-1.

53. See 2012 APS REPORT, *supra* note 43, at 2.

54. See *id.*

55. *Id.*

determination.”⁵⁶ The secondary value requires that older persons and adults with impairments or disabilities be treated in a manner that is honest, caring, and respectful.⁵⁷ From these core values emerge four principles that reflect the adult’s rights with respect to protective services: (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.”⁵⁸ Additional principles that guide APS include the primacy of the adult, the adult’s right to participate in decision-making 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.⁵⁹ 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.”⁶⁰

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.⁶¹ It should be noted that the specifics of these functions may vary from state to state, or even programs within a state.⁶² However, the essential elements describe the APS process nationwide.

The clientele served by APS can be seen in data captured by the National Adult Maltreatment Reporting System (NAMRS) from state

56. *NAPSA (or APS) Code of Ethics*, NAT’L ADULT PROTECTIVE SERVS. ASS’N, <https://www.napsa-now.org/about-napsa/code-of-ethics/> (last visited Jan. 2, 2022).

57. *See id.*

58. *Id.*

59. *See* Georgia J. Anetzberger, *Ethical Issues in Personal Safety*, in HANDBOOK ON ETHICAL ISSUES IN AGING 184, 194 (Tanya Fusco Johnson ed., 1999); Georgia J. Anetzberger & Carol A. Miller, *Elder Abuse and Neglect*, in CAROL A. MILLER, NURSING FOR WELLNESS IN OLDER ADULTS 188 (Natasha McIntyre et al. eds., 8th ed. 2019).

60. ADMIN. FOR CMTY. LIVING, NATIONAL VOLUNTARY CONSENSUS GUIDELINES FOR STATE ADULT PROTECTIVE SERVICES SYSTEMS 56 (2020).

61. Liu & Anetzberger, *supra* note 52 at 1.

62. *See* ANDREW CAPEHART ET AL., NAT’L CTR. ON LAW & ELDER RIGHTS, THE ROLE OF APS IN ELDER ABUSE CASES: LEVERAGING STRENGTHS ACROSS DISCIPLINES 2 (2020), <https://ncler.acl.gov/getattachment/Legal-Training/APS-Role-Ch-Summary.pdf.aspx?lang=en-US>.

programs nationwide.⁶³ The system is voluntary, which means that for some elements data may not have been submitted.⁶⁴ The latest report, for 2019, reveals the receipt of 1,315,992 reports of maltreatment.⁶⁵ Most were made by professionals (63.7%); only 4% were self-reports.⁶⁶ 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.⁶⁷ Of these victims, half (49.6%) received protective services.⁶⁸ Victims were most likely to experience self-neglect, followed by neglect, financial exploitation, emotional abuse, and physical abuse in that order.⁶⁹ They were least likely to experience sexual abuse and abandonment.⁷⁰ Victims were more likely to be women (53.5%) than men (38.9%) and age seventy or older (51.3%); over one-third (37.6%) had ambulatory difficulty and more than one-fifth (22.4%) had cognitive impairment.⁷¹ While 82% 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%).⁷² 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.⁷³

1. Intersect of APS and Guardianship

There are three 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.⁷⁴ This will initiate application of the APS process across its sequential functions. Second, guardians, among others, may report abuse perpetration of the

63. See *National Adult Maltreatment Reporting System (NAMRS)*, ADMIN. FOR CMTY. LIVING, <https://acl.gov/programs/elder-justice/national-adult-maltreatment-reporting-system-namrs> (last modified Oct. 29, 2021).

64. See *id.*

65. MCGEE & URBAN, *supra* note 47, at 2 exhibit A.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. MCGEE & URBAN, *supra* note 47, at 14 exhibit 2.6.

71. *Id.* at 17 exhibit 3.1, 18, 19 exhibit 3.4.

72. *Id.* at 21 exhibit 3.6.

73. *Id.* at 22.

74. See *id.* at 11.

protected individual by family members or other persons.⁷⁵ This can happen whether or not guardians are specifically identified as mandatory reporters under state law.⁷⁶ Third, APS may use guardianship in the course of case handling.⁷⁷ Although this can occur earlier in the APS process, it is most likely during intervention plan development and implementation.⁷⁸ Each of these three circumstances will be considered in the sections which follow.

A. Reports of Abuse by Guardians to APS

It is likely that each APS program nationwide sometimes receives a report of abuse by a guardian.⁷⁹ 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.⁸⁰ 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 tends to 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.⁸¹ However, some states, like Florida, require anyone who believes that abuse by a guardian is occurring to report that incident to APS.⁸²

There is little research on the extent of abuse by guardians evident in situations of ANE handled by APS. One study, published in 1997, that presented such data examined a sample of 2,679 substantiated reports of elder abuse made over a twenty-six-month period to Illinois

75. See *Mistreatment and Abuse by Guardians and Other Fiduciaries*, U.S. DEP'T JUST., <https://www.justice.gov/elderjustice/mistreatment-and-abuse-guardians-and-other-fiduciaries> (last visited Jan. 2, 2022).

76. See MCGEE & URBAN, *supra* note 47, at 11.

77. See WORKING INTERDISC. NETWORK OF GUARDIANSHIP STAKEHOLDERS & AM. BAR ASS'N COMM'N ON L & AGING, THE ROLE OF ADULT PROTECTIVE SERVICES (APS) IN GUARDIANSHIP CASES 1 (WINGS ACTION Tools), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-wings-action-tool-aps.pdf (last visited Jan. 2, 2022).

78. See ADMIN. FOR CMTY. LIVING, *supra* note 60, at 49–50.

79. See *generally* WORKING INTERDISC. NETWORK OF GUARDIANSHIP STAKEHOLDERS ET AL., *supra* note 77.

80. See CAPEHART ET AL., *supra* note 62, at 2.

81. See HOLLY RAMSEY-KLAWSNIK ET AL., *supra* note 45, at 3 (discussing the general criteria used to accept and reject reports).

82. NAT'L CTR. ON ELDER ABUSE, 2015 STATE GUARDIANSHIP LEGISLATION RELATING TO ELDER ABUSE 2 (last revised Aug. 2020), https://ncea.acl.gov/NCEA/media/Publication/NCEA_GuardLegFactSheet2015.pdf.

APS.⁸³ Among them were sixty (2.2%) where the abuser was the older adult's guardian.⁸⁴

B. 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.⁸⁵ Second, the guardian represents a profession, like attorney, or other category, like notary public, identified as a mandatory reporter.⁸⁶ Finally, guardians are specifically named as mandatory reporters. This happens in less than a dozen states, including Maine, North Dakota, and most recently Arizona.⁸⁷ 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.⁸⁸ The duty of guardians to report abuse also is contained in the National Guardianship Association Standards of Practice.⁸⁹

B. Use of Guardianship in APS Case Handling

In order to protect an older person or adult with impairments or disabilities from harm, APS may choose to petition the court for guardianship.⁹⁰ Considering the previously discussed APS values and principles, and sometimes state law, this should be done only if less restrictive measures have been assessed and found inadequate, making

83. Anne Victoria Neale et al., *Reason for Case Closure Among Substantiated Reports of Elder Abuse*, 16 J. APPLIED GERONTOLOGY 442, 442 (1997).

84. *Id.* at 448 tbl.1.

85. See NAT'L CTR. ON ELDER ABUSE & NAT'L ADULT PROTECTIVE SERVS. ASS'N, MANDATED REPORTING OF ABUSE OF OLDER ADULTS AND ADULTS WITH DISABILITIES 1 (2020), https://ncea.acl.gov/NCEA/media/Publication/NCEA_NAPSA_MandatedReportBriefFull.pdf. [hereinafter MANDATED REPORTING].

86. See *id.* at 3.

87. See ARIZ. REV. STAT. ANN. § 46-454(C) (2021); ME. STAT. tit. 22 § 3477(1)(A)(28) (2021); N.D. CENT. CODE § 50-25.2-03(1) (2021).

88. See MANDATED REPORTING, *supra* note 85, at 3.

89. See NAT'L GUARDIANSHIP ASS'N, STANDARDS OF PRACTICE 11 (4th ed. 2013), <https://www.guardianship.org/wp-content/uploads/2017/07/NGA-Standards-with-Summit-Revisions-2017.pdf>.

90. See NAT'L COUNCIL ON DISABILITY, TURNING RIGHTS INTO REALITY: HOW GUARDIANSHIP AND ALTERNATIVES IMPACT THE AUTONOMY OF PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES 24 (2019), https://ncd.gov/sites/default/files/NCD_Turning-Rights-into-Reality_508_0.pdf.

guardianship a kind of measure of “last resort.”⁹¹ Less restrictive options for avoiding exploitation, for instance, might include joint bank accounts, trusts, representative payees, and powers of attorney.

Guardianship has been seen as an important intervention for use by APS since the program’s origins.⁹² Some have described it as the most common, and perhaps overused, legal option available to APS.⁹³ 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.⁹⁴ However, there is little data on the actual use of guardianship in APS case handling.⁹⁵ According to a 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.⁹⁶ In addition, the options named,

91. *Id.* at 81.

92. See Margaret Blenkner & Ruth E. Weber, *The Service Components*, in MARGARET BLENKNER ET AL., BENJAMIN ROSE INST., FINAL REPORT: PROTECTIVE SERVICES FOR OLDER PEOPLE 84 (1974). The study identified guardianship as the least used ancillary service, but an important one, particularly “to meet the need of the client with assets or income too small to justify use of a commercial fiduciary.”

93. See Madelyn Anne Iris, *Uses of Guardianship as a Protective Intervention for Frail, Older Adults*, 2 J. ELDER ABUSE & NEGLECT 57, 58 (1990); Byers et al., *supra* note 8, at 24 (“Guardianship is perhaps the most common, best known, and most studied of all legal protective services used to aid older adults.”).

94. See NAT’L ADULT PROTECTIVE SERVS. ASS’N., REPORT ON PROBLEMS FACING STATES’ ADULT PROTECTIVE SERVICES AND THE RESOURCES NEEDED TO RESOLVE THEM 5 (January, 2003) (unpublished report) (on file with author) (“Other problem areas identified by states included . . . a lack of guardians, unequal distribution of guardians across the states and actual exploitation of APS clients perpetrated by guardians.”); Kathleen M. Quinn & Paula M. Mixson, *Adult Protective Services Face Critical Challenges*, 22 PUB. POL’Y & AGING REP. 28, 31 (2021) (“Affordable legal services are not available, for example, to pursue or contest guardianship . . .”).

95. See John M. Heath et al., *Interventions from Home-Based Geriatric Assessments of Adult Protective Services Clients Suffering Elder Mistreatment*, 53 J. AM. GERIATRIC SOC’Y 1538, 1539 (2005). An exception is found from a study on interventions for 211 Adult Protective Services clients referred for geriatric assessment in central New Jersey. *Id.* at 1539. Among them, guardianship actions were initiated for seventy four (35%), primarily in correlation with caregiver neglect or financial exploitation. *Id.* at 1540. All but four of these involved clients with newly diagnosed dementia. *Id.*

96. Interview with Leslie McGee, Senior Research. Assoc., APS Tech. Assistance Res. Ctr., WPMA, Inc. (Nov. 2, 2020). The details related to the interview have not been independently verified by *Syracuse Law Review* and *Syracuse Law Review*. Further identifying information may be obtained by contacting the authors directly. E-mail from Leslie McGee, Senior Research. Assoc., APS Tech. Assistance Res. Ctr., WPMA, Inc., to author (Nov. 17, 2020, 09:29 AM) (on file with author); E-mail from Leslie McGee, Senior Research. Assoc., APS

such as “Legal Services” and “Law/Judicial/Legal Professional,” tend to be broad and can include several other measures besides use of guardianship.⁹⁷ 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.⁹⁸ Considering just Ohio in fiscal year 2018, among 4,490 older adults found to be in need of protective services after investigation, only .5% were subject to court intervention of any kind, including guardianship.⁹⁹

It should be noted that few APS programs assume guardianship themselves on behalf of the victims they serve.¹⁰⁰ Reasons vary and include perceived conflict of interest, insufficient resources, and the availability of other local options.¹⁰¹ 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.¹⁰² In contrast, APS is the guardian of last resort in New York, with the number of guardianships statewide held by APS in 2019 numbering 3,095.¹⁰³

III. THE ROLE OF LAW ENFORCEMENT

Law enforcement is a key stakeholder in combating abuse by guardians.¹⁰⁴ However, as we look at the role of law enforcement in guardianship, there are several underlying questions that should be

Tech. Assistance Res. Ctr., WPMA, Inc., to author (Nov. 16, 2020, 01:49 PM) (on file with author).

97. Interview with Leslie McGee, *supra* note 96.

98. 2012 APS REPORT, *supra* note 43, at 6.

99. See *Adult Protective Services Data Fact Sheet for SFY 2018*, OHIO DEP’T OF JOB & FAMILY SERVS., (2018), <https://jfs.ohio.gov/OFC/APS-DataFactSheet-SFY2018.stm>.

100. See Interview with Andy Capehart, Senior Bus. Analyst, APS Tech. Assistance Res. Ctr., WRMA, Inc. (Nov. 9, 2020) (on file with author). The sources and details related to the interview have not been independently verified by *Syracuse Law Review*. Further identifying information concerning the interview may be obtained by contacting the authors directly.

101. See *id.*

102. See *id.*

103. *2019 Map, Guardianship for Adults New York State*, N.Y. STATE OFFICE OF CHILDREN & FAMILY SERVS., (Jan. 20, 2021) (unpublished). See also PAMELA B. TEASTER ET AL., INCAPACITATED, INDIGENT, AND ALONE: MEETING GUARDIANSHIP AND DECISION SUPPORT NEEDS IN NEW YORK 102 (2018) [hereinafter INCAPACITATED, INDIGENT, AND ALONE].

104. For the purpose of this article, law enforcement refers to criminal justice personnel, i.e., police and local prosecutors.

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 a guardian 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?

Initially, abuse by guardians involves the criminal justice system in three primary and traditional ways: (1) deterring abuse by the guardian before it happens, (2) holding guardians accountable if they commit a culpable act, and (3) assisting the victims through restorative actions like restitution or return of assets.¹⁰⁵

The deterrent effect of criminal laws is frequently debated, but if a guardian was certain that criminal actions would be caught and punished, then the deterrent can be a powerful tool.¹⁰⁶

The difficulty of classifying the criminality of the actions of guardians is further addressed herein, but if the abuse is discovered, then it is imperative that the bad acting guardian be held accountable.¹⁰⁷ The uses of “appropriate disciplinary measures” against guardians that act inappropriately and “dedicated investigative resources” were two of the recommended changes by the GAO report of 2016.¹⁰⁸ Palm Beach County in Florida has a specialized Audit and Investigations program which includes a guardian hotline.¹⁰⁹ In the author’s opinion, if dedicated investigators were widely available, and guardians that act inappropriately were subjected to appropriate discipline, including prosecution, then an increase in law enforcement referrals would likely ensue.

In addition, it is important that a crime victim, especially one with some level of incapacity, receives some form of restorative

105. See GAO-17-33, *supra* note 6, at 24.

106. See NAT’L INST. OF JUSTICE, FIVE THINGS ABOUT DETERRENCE 1 (May 2016), <https://www.ojp.gov/pdffiles1/nij/247350.pdf>; BEN JOHNSON, MINN. HOUSE RESEARCH, DO CRIMINAL LAWS DETER CRIME? DETERRENCE THEORY IN CRIMINAL JUSTICE POLICY 6 (2019), <https://www.house.leg.state.mn.us/hrd/pubs/deterrence.pdf>.

107. See Mike C. Materni, *Criminal Punishment and the Pursuit of Justice*, 2 BRIT. J. AM. LEGAL STUD. 263, 271–72 (2013).

108. GAO-17-33, *supra* note 6, at 24.

109. See U.S. S. SPEC. COMM. ON AGING, ENSURING TRUST: STRENGTHENING STATE EFFORTS TO OVERHAUL THE GUARDIANSHIP PROCESS AND PROTECT OLDER AMERICANS 17 (2018), https://www.aging.senate.gov/imo/media/doc/Guardianship_Report_2018_gloss_compress.pdf.

compensation.¹¹⁰ One of the tools in prosecuting an abuse by guardian case is an order of restitution to compensate the victim of the abuse.¹¹¹ Anecdotally, in the cases that the first 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 is supported by a 2018 GAO report that found most restitution debt remains outstanding, primarily due to the offender's inability to pay.¹¹²

A. Statutory Guidance

The involvement of law enforcement in abuse by guardians may be enhanced when there are defined criminal statutes. In the last ten years numerous new or expanded criminal statutes aimed at combating elder abuse were enacted into law across the country.¹¹³ The scope of this paper does not allow a survey of existing elder abuse statutes, but the U.S. Department of Justice Elder Abuse and Elder Financial Exploitation Statutes table resource explicitly details the statutes across the states.¹¹⁴ In addition, the University of Southern 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.¹¹⁵

As an example, New York State has several criminal statutes related to the mistreatment of vulnerable elderly individuals or incompetent or physically disabled individuals.¹¹⁶ These statutes specifically require that the perpetrator must be a caregiver for the victim/person at risk.¹¹⁷ New York Penal Law section 260.31 defines caregiver as “. . . a person who (i) assumes responsibility for the care

110. See NAT'L CRIME VICTIM LAW INST., FUNDAMENTALS OF VICTIM'S RIGHTS 5–6 (Victim Law Bulletin 2011), <https://law.lclark.edu/live/files/11823-fundamentals-of-victims-rights-a-summary-of-12>.

111. See *id.* at 5.

112. U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-203, FEDERAL CRIMINAL RESTITUTION: MOST DEBT IS OUTSTANDING AND OVERSIGHT OF COLLECTIONS COULD BE IMPROVED 26 (2018).

113. See *State Elder Abuse Statutes*, U.S. DEP'T JUST., <https://www.justice.gov/elderjustice/elder-justice-statutes-0> (last visited Jan. 2, 2022).

114. See *Elder Abuse and Elder Financial Exploitation Statutes*, U.S. DEP'T JUST., <https://www.justice.gov/elderjustice/prosecutors/statutes> (last visited Jan. 2, 2021).

115. See *Elder Abuse Guide for Law Enforcement*, UNIV. OF S. CAL., <https://eagle.usc.edu> (last visited Jan. 2, 2022).

116. See N.Y. PENAL LAW §§ 260.24, .25, .32, .34 (McKinney 2021).

117. See *id.* §§ 260.32, .34.

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.”¹¹⁸ 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.¹¹⁹ In 2017, partially in response to particularly egregious abuse by a professional guardian, Nevada’s guardianship statute was comprehensively amended, including the establishment of the State Guardianship Compliance Office, Protected Persons’ Bill of Rights, enhanced process service requirements, and the appointment of an attorney for the individual.¹²⁰

New York State added another charge within its scheme to defraud to include a course of conduct against more than one vulnerable elderly person.¹²¹ 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.¹²² These types of enhancements may serve not only as deterrents but also as tools for prosecutors dealing with guardianship matters that are considered hard to prosecute.¹²³

There are other options available. For example, in New York, the Attorney General has undertaken an active role in financial scams, including identity theft, throughout the state.¹²⁴ If the offending guardian is a licensed financial adviser, then federal agencies like the Securities and Exchange Commission (SEC) can become involved.¹²⁵ Locally, the first author of the paper was contacted in 2019 by the SEC to explore a joint case where a licensed financial adviser also was

118. *Id.* § 260.31.

119. *See* N.H. REV. STAT. ANN. § 631:9 (2021); MASS. GEN. LAWS ch. 265, § 13K (2021); UTAH CODE ANN. § 76-5-111 (LexisNexis 2021).

120. *See generally* NEV. REV. STAT. ch. 159; *see* Rachel Aviv, *How the Elderly Lose Their Rights*, NEW YORKER 10 (Oct. 9, 2017), <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights>.

121. *See* N.Y. PENAL LAW § 190.65 (McKinney 2021).

122. *See id.* § 120.05.

123. *See* GAO-17-33, *supra* note 6, at 24.

124. *See generally* *Identity Theft*, N.Y. ATTORNEY GEN., <https://ag.ny.gov/consumer-frauds/identity-theft>. (last visited Jan. 2, 2022) (giving directions to assist victims of various kinds of fraud).

125. *See* INV. ADVISER REGULATION OFFICE, REGULATION OF INVESTMENT ADVISORS BY THE U.S. SECURITIES AND EXCHANGE COMMISSION 1 (2013).

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.¹²⁶

B. 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 adult/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 “[v]ictim’s inability to assist in prosecution due to cognitive or physical impairment;” the “[v]ictim’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;” “[i]nsufficient training of first responders and criminal justice professionals;” a “[l]ack of expert witnesses, including forensic accountants and physicians and mental health professionals with geriatric expertise;” the “[m]isperception 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 “[l]ack of recognition that neglect of an older adult is a crime;” a “[g]eneral lack of public awareness and understanding of elder abuse;” and “[i]nadequate community resources to address the needs of victims and perpetrators.”¹²⁷ In addition, the isolation of the victim and feeling of shame and wanting

126. See *Identity Theft: Protect Yourself*, U.S. POSTAL INSPECTION SERV., <https://www.uspis.gov/tips-prevention/identity-theft> (last visited Jan. 2, 2022) (offering option to report identity theft on official website);

Instructions for Form 56, INTERNAL REVENUE SERV., <https://www.irs.gov/instructions/i56> (last visited Jan. 2, 2022).

127. BRENDA K. UEKERT ET. AL., NAT’L CTR. FOR STATE COURTS., *PROSECUTING ELDER ABUSE CASES, BASIC TOOLS AND STRATEGIES 2* (2012); see *Elder Justice Initiative (EJI): EAGLE (Elder Abuse Guide for Law Enforcement)*, U.S. DEP’T JUST., <https://www.justice.gov/elderjustice/eagle-elder-abuse-guide-law-enforcement> (last visited Jan. 4, 2021).

to protect their privacy prevents some criminal referrals from ever occurring.¹²⁸

Many of the same barriers to law enforcement involvement in elder abuse cases can be applied to abuse by guardians. One of the first obstacles that must be overcome is the belief that abuse by a 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 a civil matter.¹²⁹ 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.¹³⁰ These cases are difficult to prove.¹³¹ 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.¹³²

Secondly, in a criminal matter, it is important to consider the victim's ability to participate in prosecution. For the first author of this paper, APS workers in New York are mandated to report any crime that is suspected against the APS client.¹³³ However, on a frequent basis, law enforcement officers ask local APS workers whether the client wishes to press charges.¹³⁴ For the author, APS 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 concepts of pressing charges and prosecutorial discretion are often misunderstood.¹³⁵ Criminal matters are the *People v. Jane Doe*

128. See CHERYL GUIDRY TYISKA, NAT'L ORG. FOR VICTIM ASSISTANCE, WORKING WITH VICTIMS OF CRIME WITH DISABILITIES (1998), <https://www.ncjrs.gov/ovcarchives/factsheets/disable.htm>.

129. See GAO-17-33, *supra* note 6, at 24.

130. See LORI A. STIEGEL, NAT'L CTR. FOR ELDER ABUSE, DURABLE POWER OF ATTORNEY ABUSE: IT'S A CRIME TOO 2 (2008), <https://ncea.acl.gov/NCEA/media/docs/Durable-PofA-Abuse-FactSheet-Criminal-Justice-Professionals.pdf>.

131. See *id.*

132. See Ward & Smith, P.A., *Parallel Universe: Navigating Discovery in Concurrent Civil and Criminal Procedure*, 7 NAT'L L. REV. 1, 1 (2017).

133. See N.Y. SOC. SERV. LAW § 473(5) (McKinney 2021).

134. *Id.* § 473(2).

135. BRUCE FREDERICK & DON STEMEN, THE ANATOMY OF DISCRETION: AN ANALYSIS OF PROSECUTORIAL DECISION MAKING, TECHNICAL REPORT 1 (2012), <https://www.ojp.gov/pdffiles1/nij/grants/240334.pdf>.

and not the Victim v. Jane Doe. Individuals frequently are prosecuted where there is no available or competent victim.¹³⁶ 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.

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.¹³⁷ 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 in order to counter an argument/defense of consent.¹³⁸ 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.¹³⁹

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.¹⁴⁰ Training for law enforcement is not a panacea, and law enforcement should leverage available emerging technology in identifying and developing financial exploitation cases, including abuse by guardians.¹⁴¹

136. Erin Leigh Claypoole, *Evidence-Based Prosecution: Prosecuting Domestic Violence Cases Without a Victim*, 39 PROSECUTOR 18, 19 (2005).

137. See, e.g., Audrey S. Garfield, *Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California*, 42 HASTINGS L. J. 859, 932 (1991).

138. WORKING INTERDISC. NETWORK OF GUARDIANSHIP STAKEHOLDERS ET AL., *supra* note 77, at 1–2.

139. Pogach & Wood, *supra* note 9, at 7.

140. Interview with Elizabeth Loewy, Chief of the Manhattan Dist. Att'y Office Elder Abuse Unit (Nov. 6, 2020) (on file with author). The interviews require confidentiality. The sources and details related to the interview have not been independently verified by *Syracuse Law Review*. Further identifying information concerning the interview may be obtained by contacting the authors directly.

141. See *id.*; STEPHEN DEANE, OFFICE OF THE INV'R. ADVOCATE, ELDER FINANCIAL EXPLOITATION 18–19 (2018).

As stated previously in this paper, there is minimal research on the prevalence of abuse by guardians.¹⁴² 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.¹⁴³ 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.¹⁴⁴

New York State conducted a prevalence study that documented the incidence rate of elder abuse and statistics on underreporting of the problem.¹⁴⁵ 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 twenty-four situations that went unreported.¹⁴⁶ Considering the research activities by New York 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.¹⁴⁷ Secondly, the authority of the guardian is often misunderstood or over-estimated.¹⁴⁸ 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 should be limited in nature.¹⁴⁹

A potential solution is a liaison between law enforcement and APS and direct contact referrals. APS is currently using its Enhanced

142. See U.S. S. SPEC. COMM. ON AGING, *supra* note 109, at 6.

143. See *id.* at 9.

144. Jean Callahan et al., *Guardianship Proceedings in New York State: Findings and Recommendations*, 37 BIFOCAL A.B.A COMM. ON L. & AGING, 83, 83 (2016).

145. See LIFESPAN OF GREATER ROCHESTER, INC. ET AL., N.Y. OFF. OF CHILD. & FAM. SERVS., UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY 7 (2011), <https://ocfs.ny.gov/reports/aps/Under-the-Radar-2011May12.pdf>.

146. See *id.* at 55.

147. Dari Pogach, *Guardianship and the Right to Visitation: An Overview of Recent State Legislation*, 40 BIFOCAL A.B.A COMM. ON L. & AGING 27, 27 (2018).

148. See Garfield, *supra* note 137, at 906–07; *Forum on Protecting Older Americans Under Guardianship: Who Is Watching the Guardian?: Hearing Before the S. Spec. Comm. on Aging*, 108th Cong. 3 (2004).

149. See N.Y. MENTAL HYG. LAW § 81.02 (McKinney 2021).

Multi-Disciplinary Team (EMDT) structure to establish a more effective referral process for suspected crimes against APS victims, including cases involving guardians.¹⁵⁰ Direct referrals to the district attorney are used on a limited basis, as well.¹⁵¹

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 first 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. The first 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.¹⁵²

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.¹⁵³ Through these grants and associated extensions, Onondaga County has been able to train nearly 400 law enforcement officers concerning abuse in later life.¹⁵⁴ Additionally, four assistant district attorneys and four judges were sent for national training concerning elder abuse.¹⁵⁵ The ability to contact an informed individual that one knows and with whom one has an existing relationship concerning a potential abuse case is inimitable.

IV. THE ROLE OF THE COURT

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

150. See RISA BRECKMAN ET AL., NYC ELDER ABUSE CTR. ET AL., ENHANCED MULTI-DISCIPLINARY TEAMS (E-MDTs): POLICIES AND PROCEDURES MANUAL MANHATTAN 15 (2017), https://nyceac.org/wp-content/uploads/2018/09/FINAL_E-MDT-Policies-and-Procedures-Manhattan-v5-copy.pdf.

151. See *id.* at 10.

152. See *id.* at 27–28.

153. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, SEMI-ANNUAL PROGRESS REPORT FOR GRANTS TO ENHANCE CULTURALLY AND LINGUISTICALLY SPECIFIC SERVICES FOR VICTIMS OF DOMESTIC VIOLENCE, DATING VIOLENCE, SEXUAL ASSAULT AND STALKING PROGRAM (Jan. 1, 2019 – June 30, 2019) (on file with *Syracuse Law Review*); 34 U.S.C. § 20124 (2021).

154. DEP'T OF JUST., OFF. ON VIOLENCE AGAINST WOMEN, *supra* note 153.

155. *Id.*

individuals.”¹⁵⁶ The authors further found that “[c]ourts lack adequate resources, technical infrastructure, and training to monitor guardianships effectively and to hold guardians accountable”¹⁵⁷ What role does the court play in preventing and responding to abuse by the guardian? Are guardianships too freely granted, resulting in the unnecessary loss of civil rights and creating the potential for abuse? Additionally, another role for the courts has emerged wherein the guardianship process becomes therapeutic with the goal of benevolent provision of helpful services at a minimal expense and disruption rather than the more traditional role of deciding the issue presented.¹⁵⁸

An area of concern regarding the courts and guardianships identified by the authors is the assignment of the judge appointed determining the need for and appointment of a guardian. The concern is that judges with little or no specialized training or experience are presiding over these tremendously important cases. Further, there are issues as to whether the assigned judge will retain the case throughout the proceedings and after appointment of a guardian.

In New York, the general trial court (Supreme Court) has 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.¹⁵⁹ In the Sixth Judicial District of New York, a Surrogate Court judge (Probate Court), acting as a Supreme Court judge, hears all guardianship matters in the mainly rural district unless there is a conflict.¹⁶⁰ 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.¹⁶¹ Specific guardianship training for judges is an area of need.¹⁶²

156. NAT’L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION, 22 (2018), https://ncd.gov/sites/default/files/NCD_Guardianship_Report_Accessible.pdf.

157. *Id.*

158. Marshall B. Kapp, *Reforming Guardianship Reform: Reflections on Disagreements, Deficits, and Responsibilities*, 31 STETSON L. REV. 1047, 1048–49 (2002).

159. See SUPREME COURT OF N.Y. APPELLATE DIV., SECOND JUDICIAL DEPARTMENT, BEST PRACTICES: GUARDIANSHIP PROCEEDINGS 1 (2005), https://www.nycourts.gov/courts/AD2/pdf/BestPracticesHandbook_1.pdf.

160. See *Cortland County Courts: Overview*, N.Y. STATE UNIFIED COURT SYS., <https://ww2.nycourts.gov/courts/6jd/cortland/surrogate.shtml> (last visited Jan. 2, 2022).

161. See N.Y.C.R.R. § 202.3 (2021).

162. See Interview with Andy Capehart, *supra* note 100.

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, either by avoiding the guardianship entirely by dismissal, supportive decision making or less restrictive intervention, or if guardianship is necessary, then by choosing the appropriate guardian.

On December 4, 2020, the second 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.¹⁶³ One component of the instrument considers whether that person has evidence-based risk factors for abuse occurrence.¹⁶⁴ That component uses the Abuse Intervention Model in considering risk factors associated with the victim, perpetrator, and interaction between victim and perpetrator.¹⁶⁵ The research is funded by the U.S. Department of Justice.¹⁶⁶ The Worksheet was developed using suggestions from an expert advisory board and focus group of probate judges nationwide.¹⁶⁷ The focus group felt that the Worksheet would enable judges to make more informed opinions/orders.¹⁶⁸ Currently the Worksheet is being piloted across the country using twenty probate judges who regularly hear guardianship cases and twenty judges who infrequently hear such cases.¹⁶⁹ The Worksheet is not yet at a point where it can be disseminated or published. If found effective, however, the Worksheet can help judges better identify potential abuse by guardians and prevent the problem before it happens.

163. See S. HENNING ET AL., ELDER ABUSE INTERVENTION PREVENTION PROGRAM ET AL., TAKE AIM AGAINST ELDER ABUSE: THE ABUSE INTERVENTION MODEL (2015), https://acl.gov/sites/default/files/programs/2016-09/4_ElderAbuse_USC_RB.PDF; Interview with Bonnie Olsen, Ph.D., Professor of Clinical Fam. Med., Keck Sch. of Med., Univ. of S. Cal. (Dec. 4, 2020) (on file with author).

164. See *id.*

165. See *id.*

166. See interview with Bonnie Olsen, *supra* note 163; *Abuse Intervention Model: A Pragmatic Approach to Intervention for Elder Mistreatment*, U.S. DEP'T JUST., <https://www.ojp.gov/ncjrs/virtual-library/abstracts/abuse-intervention-model-pragmatic-approach-intervention-elder> (last visited Jan. 2, 2022) (providing abstract of journal article co-written by Olsen about Abuse Intervention Model (AIM), noting its "Sponsoring Agency: National Institute of Justice").

167. See interview with Bonnie Olsen, *supra* note 163.

168. See *id.*

169. *Id.*

Does the jurisdiction's statute mandate a preference for who should serve as guardian? In New York, for instance, there is not a mandatory preference, but there is a list of who may petition.¹⁷⁰ May the incapacitated person indicate who they want to serve as guardian? Can the court follow previously written directives by the person? Again, in New York, the person alleged to be incapacitated may nominate a guardian.¹⁷¹ The Uniform Guardianship Act lists an order of priority for who should be appointed as guardian.¹⁷²

If family is not appropriate, is a professional or public guardian available? In the Guardianship Project, conducted in New York, 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.¹⁷³ How does the court decide which professional guardian should be chosen? For how many other people does the professional serve as guardian and 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 to consider in deciding whether a professional 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 New York State the county acts as the guardian of last resort and is generally only appointed when no one else is available.¹⁷⁴ 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.¹⁷⁵

Other questions regarding the court's role in guardianships suggest further measures for appropriate guardian selection and prevention of abuse occurrence.¹⁷⁶ Is there a requirement that the

170. See N.Y. MENTAL HYG. LAW § 81.06 (McKinney 2021).

171. See *id.* § 81.17.

172. See UNIF. GUARDIANSHIP, CONSERVATORSHIP AND OTHER PROTECTIVE ARRANGEMENTS ACT § 309 (UNIF. LAW COMM'N 2017).

173. See INCAPACITATED, INDIGENT, AND ALONE, *supra* note 103, at 24.

174. *Id.* at 7.

175. See HUANG & LAWITZ, *supra* note 29, at 86.

176. See Interview with Andy Capehart, *supra* note 100.

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?

For this portion of the paper, the authors interviewed nine judges.¹⁷⁷ The interviewed judges were identified as judges who possess experience, expertise, and interest in the hearing of guardianship matters. The interviewed judges represent a diverse geographic and population group. They were presented the same questions concerning a breadth of issues on guardianship and specific questions about abuse by guardians. 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.

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

177. The judges interviewed for Section IV were identified with the assistance of Erica Wood. The interviews require confidentiality. The sources and details related to the cases studied have not been independently verified by *Syracuse Law Review*. Further identifying information concerning the interviewed judges may be obtained by contacting the authors directly.

for criminal background checks on every guardian, including family members.¹⁷⁸ 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.¹⁷⁹ Abuse by familial guardians likely receives less scrutiny for some of the same reasons that adult/elder abuse in general is not pursued criminally.¹⁸⁰ On the professional guardianship side, there is always the underlying issue that remuneration is a motivating factor.¹⁸¹ 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.

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.

178. NAOMI KARP & ERICA F. WOOD, A.B.A. PUB. POLICY INST., *GUARDING THE GUARDIANS: PROMISING PRACTICES FOR COURT MONITORING 20* (2007), https://www.aarp.org/money/estate-planning/info-2007/2007_21_guardians.html [hereinafter, KARP & WOOD, *GUARDING*].

179. *See, e.g., id.* at 35.

180. *See* HUANG & LAWITZ, *supra* note 29, at 9–10.

181. Alison Barnes, *The Virtues of Corporate and Professional Guardians*, 31 *STETSON L. REV.* 942, 956 (2002).

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.

Possible actions for further addressing abuse by guardians will be discussed briefly herein.¹⁸² One issue that consistently arises concerning the oversight for guardians are reporting and accounting requirements. In New York although there are mandated reports, 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 submitted reports.”¹⁸³ The Guardianship Project found that a large number of guardian reports and accountings are not submitted on time, and without timely reporting, the court has

182. See Sally Balch Hurme & Diane Robinson, *What’s Working in Guardianship Monitoring: Challenges and Best Practices*, 72 SYRACUSE L. REV. 289, 289–365 (2022).

183. Callahan, *supra* note 144, at 84.

no way of assessing the well-being of the individual or the extent to which the guardian is carrying out fiduciary duties.¹⁸⁴

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.

Annual reports are an area where the use of technology may afford the courts a tremendous opportunity to discover and prevent abuse by guardians.¹⁸⁵ Pennsylvania implemented a statewide Guardian Tracking System (GTS) which allows the online submission of reports and can assist in the review process.¹⁸⁶ GTS instituted reforms to the guardian accounting system, allowing the courts to act quicker, with an ability to check the entire state to see if the guardian ever committed previous misdeeds and to raise red flags on a particular report.¹⁸⁷ An interviewed judge describing GTS 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.¹⁸⁸

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. From

184. *See id.*; NAOMI KARP & ERICA F. WOOD, AARP PUB. POLICY INST., GUARDIANSHIP MONITORING: A NATIONAL SURVEY OF COURT PRACTICES 15–16 (2006), http://assets.aarp.org/rgcenter/consume/2006_14_guardianship.pdf.

185. *See* Hurme & Robinson, *supra* note 182, at 362–63.

186. *See* *Guardianship in Pennsylvania*, UNIFIED JUD. SYS. PA., <http://www.pacourts.us/judicial-administration/court-programs/office-of-elder-justice-in-the-courts/guardianship-in-pennsylvania> (last visited Jan. 2, 2022).

187. *See* ADMIN. OFFICE PA. COURTS, *PA Guardianship Tracking System*, YOUTUBE (Oct. 23, 2018), <https://www.youtube.com/watch?v=T6Ai1IXm1Lw>.

188. DIANE ROBINSON ET AL., STATE JUST. INST., GUARDIANSHIP/CONSERVATORSHIP MONITORING: RECOMMENDED DATA ELEMENTS 4 (2020), https://www.eldersandcourts.org/_data/assets/pdf_file/0029/54758/GuardianshipConseruatorship-Monitoring-Recommended-Data-Elements.pdf.

Wingspan: The Second National Guardianship Summit, held in 2001, there was a call for courts to maintain adequate data systems in order to assure that required plans and reports are filed in a timely fashion and for the increased use of technology in order to better monitor guardianships.¹⁸⁹ In 2005, in *Guardianship Monitoring: A National Survey of Court Practices*, the use of technology in monitoring was still minimal.¹⁹⁰ 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.¹⁹¹ However, the Conservator Accountability Project determined that:

[N]ot 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.¹⁹²

Despite these efforts, we still lament the lack of proactive use of technology in guardianship reporting and monitoring.

Another option 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.¹⁹³ 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?¹⁹⁴

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. Once again, there was no uniformity

189. See Symposium, *Wingspan – The Second National Guardianship Conference, Recommendations*, 31 STETSON L. REV. 595, 606 (2002).

190. KARP & WOOD, *supra* note 184, at 29–30, 33.

191. See U.S. S. SPEC. COMM. ON AGING, *supra* note 109, at 23.

192. *Conservatorship Accountability Project*, CENTER FOR ELDER AND THE COURTS, <https://www.eldersandcourts.org/guardianship/CAP> (last visited Jan. 2, 2022).

193. See KARP & WOOD, *supra* note 184, at 13; Hurme & Robinson, *supra* note 182, at 305.

194. See Hurme & Robinson *supra* note 182, at 306–307.

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.

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.¹⁹⁵ Unfortunately, visitor programs still are not widespread.¹⁹⁶ 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 person, such as a court-appointed visitor, to get out of the courthouse and into ‘the field’ to investigate.”¹⁹⁷

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.¹⁹⁸ 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.¹⁹⁹ Another jurisdiction has an Adult Guardianship and Assistance Monitoring Program that provides for court visitors to look

195. KARP & WOOD, *supra* note 184, at 34; *see* KARP & WOOD, *GUARDING*, *supra* note 178, at 65.

196. *See* KARP & WOOD, *supra* note 184, at 34–35.

197. Norman Fell, *Guardianship and the Elderly Oversight Not Overlooked*, 25 U. TOL. L. REV. 189, 206 (1994).

198. *See* Hurme & Robinson, *supra* note 182, at 302.

199. *See Stark County Probate Court*, STARK CNTY. GOV’T, <https://starkcountyohio.gov/probate/volunteers> (last visited Jan. 2, 2022).

at the guardian's care of the protected person and the continued need for the guardianship.²⁰⁰ One of the retired judges would like to see Court Appointed Special Advocate (CASA)-type volunteer programs established nationally.²⁰¹ 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.²⁰² However, who the visitors are varies. One program uses mostly local law students, another uses AARP volunteers, and still another uses master's-level social work students.²⁰³

Another common call for preventing abuse by guardians is sufficiently funding the courts so that they could perform the necessary oversight functions.²⁰⁴ 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.²⁰⁵

There are several other recommended practices that can potentially prevent or detect abuse by guardians. First would be the implementation of a standardized uniform and accessible process for addressing grievances against guardians, including the jurisdiction and powers available to the court.²⁰⁶ In addition, it is thought helpful to use 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

200. See *Adult Guardianship and Assistance Monitoring Program*, CHARLESTON COUNTY, S.C., <https://www.charlestoncounty.org/departments/probate/gc-monitoring.php> (last visited Jan. 2, 2022).

201. See KARP & WOOD, *GUARDING*, *supra* note 178, at 28; *Fourth National Guardianship Summit Standards & Recommendations*, 72 SYRACUSE L. REV. 29, 37 (2022).

202. See KARP & WOOD, *GUARDING*, *supra* note 178, at 15, 28.

203. See Hurme & Robinson, *supra* note 182, at 326, 332.

204. See KARP & WOOD, *GUARDING*, *supra* note 178, at 26, 30, 62; *Elder Abuse Guide for Law Enforcement*, *supra* note 127.

205. DAVID HARDY, *WHO IS GUARDING THE GUARDIANS? A LOCALIZED CALL FOR IMPROVED GUARDIANSHIP SYSTEMS AND MONITORING* 26–27 (2008) https://www.leg.state.nv.us/74th/Interim_Agendas_Minutes_Exhibits/Exhibits/SeniorCitizens/E020508P-2.pdf.

206. See *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 201, at 36–37 (Recommendation 4.2 promoting “[u]niform statewide forms” and Recommendation 4.3 promoting “[a] complaint process . . . that is accessible, user-friendly, transparent and effective for all”).

mediation model for conflicted guardianships, considering the complexity of family dynamics.)²⁰⁷ One example of an ongoing alternative dispute resolution model is Eldercaring Coordination, a court dispute resolution mechanism for aggravated family conflicts.²⁰⁸

An additional important tool can be the continued appointment of an attorney to represent the individual or reappoint the attorney, if an issue arises.²⁰⁹ 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.²¹⁰ The Senate Special Committee on Aging found that there should be strengthened protections for individuals under guardianships to “ensure individuals seeking a restoration of rights are guaranteed unbiased legal representation.”²¹¹ The first 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.

Another recommendation to avoid abuse is a biannual status conference with the required appearance of the guardian and the incapacitated individual.²¹² The National Probate Court Standards dictate that courts “should adopt procedures for the periodic review of the necessity for continuing a guardianship.”²¹³ The authors believe that 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 protected individuals because then they know

207. HARDY, *supra* note 205, at 28.

208. See *Eldercaring Coordination Programs*, ELDERCARING COORDINATION, <https://www.eldercaringcoordination.com/programs> (last visited Jan. 2, 2022).

209. See *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 201, at 37 (Recommendation 4.3, promoting “continuing representation by a qualified lawyer” for the adult under guardianship).

210. See N.Y. PENAL LAW §§ 260.24, .25, .32, .34 (McKinney 2021) (citing sections of N.Y. Penal Law that criminalize endangering the welfare of an incompetent, disabled, or vulnerably elderly persons).

211. U.S. S. SPEC. COMM. ON AGING, *supra* note 109, at 7.

212. See *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 201, at 37 (Recommendation 4.3 calling for an annual judicial in-person review).

213. COMM’N ON NAT’L PROB. COURT STANDARDS & ADVISORY COMM. ON INTERSTATE GUARDIANSHIPS ET AL., NATIONAL PROBATE COURT STANDARDS 72 (1999), <https://ncsc.contentdm.oclc.org/digital/api/collection/spcts/id/140/download>.

that someone is interested in them and their welfare. That judge felt that the time and effort put into those appearances are beneficial.

V. MULTISYSTEM COLLABORATION IN ADDRESSING ABUSE BY GUARDIANS

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

An important step in improving communication and collaboration among APS, law enforcement, and the courts in addressing abuse by guardians would be to use established multisystem approaches in responding to adult/elder abuse or guardianship. The history, importance, and evaluation of these approaches are discussed in the paragraphs that follow.

Both APS as an intervention system for adult/elder abuse and the field of adult/elder abuse itself have long histories of embracing a multidisciplinary or multisystem approach to abuse understanding and response. For APS, it began with recognition during the 1950s and 1960s that the combination of problems experienced by protective clients was such that no single professional discipline would suffice for assessment and intervention.²¹⁴ Rather, many different perspectives and “a constellation of services” were necessary.²¹⁵ 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.²¹⁶ 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.²¹⁷ 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,

214. See Gertrude H. Hall, *Protective Services for Adults*, in 2 ENCYCLOPEDIA SOC. WORK 999, 1001–02 (Robert Morris et al. eds., 1971).

215. *Id.* at 1002–03.

216. See *Adult Protective Services: History*, JRANK, <https://medicine.jrank.org/pages/29/Adult-Protective-Services-History.html> (last visited Jan. 2, 2022) (noting the seminal impact of the 1960 Arden House Conference on Aging and the 1963 National Council on the Aging’s National Seminar on Protective Services for Older People); Virginia O’Neill, *Protecting Older People*, 23 PUB. WELFARE 119, 120 (1965).

217. See FRED A BERNOTAVICZ ET AL., COMMUNITY ROLE: IMPROVING PROTECTIVE SERVICES FOR OLDER AMERICANS 14–20 (1982).

besides those in the core planning group, include “law enforcement agencies [and] guardian office services” among ten service organization categories as network members.²¹⁸

For the field of adult/elder abuse, the recognized importance of a multidisciplinary approach to research, prevention, and intervention occurred with the 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.²¹⁹ Early acknowledgement of the importance of a multidisciplinary perspective to understanding adult/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, criminal justice, and law prominent among them.²²⁰ 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 the Consortium Against Adult Abuse, were founded in early 1980s.²²¹

Although there has been some evaluative research on the adult/elder abuse multidisciplinary approach, most of it has focused on “outputs” and member satisfaction rather than “outcomes.”²²² What

218. *Id.* at 14.

219. *See, e.g.*, MARY JO QUINN & SUSAN K. TOMITA, *ELDER ABUSE AND NEGLECT: CAUSES, DIAGNOSIS, AND INTERVENTION STRATEGIES* (Albert R. Roberts et al. eds., 2d ed.1997) (1986); BONNIE BRANDL ET. AL., *ELDER ABUSE DETECTION AND INTERVENTION: A COLLABORATIVE APPROACH* (2007); LISA NERENBERG, *ELDER ABUSE PREVENTION: EMERGING TRENDS AND PROMISING PRACTICES* (Sheri W. Sussman et al. eds., 2008) (these publications discuss the use of multidisciplinary approaches).

220. *See* *ABUSE AND MALTREATMENT OF THE ELDERLY: CAUSES AND INTERVENTIONS passim* (Jordan I. Kosberg ed., 1983).

221. *See* Georgia J. Anetzberger, *Making a Difference: Elder Abuse Networks*, USC CTR. FOR ELDER JUSTICE (Mar. 14, 2018), <https://eldermistreatment.usc.edu/making-a-difference-elder-abuse-networks/>; *About C3A*, C3A CONSORTIUM, <https://www.c3a5county.org/about-c3a/> (last visited Jan. 2, 2022).

222. Georgia J. Anetzberger, *The Evolution of a Multidisciplinary Response to Elder Abuse*, 13 MARQ. ELDER’S ADVISOR 107, 124 (2011) [hereinafter Anetzberger, *The Evolution*].

223. *Id.* at 126.

exists, however, suggests member enthusiasm for collaborations, which are seen to “increase[] problem awareness,” professional camaraderie, and both understanding and appreciation of the “roles and limitations of individual disciplines systems.”²²³ At the same time, they offer a holistic analysis for issues and cases and promote a coordinated and cooperative problem response.²²⁴ It should be mentioned that all of these qualities also are needed to better recognize and address abuse by guardians as a multisystem concern.²²⁵ On the other hand, most members of such networks and teams agree that these groups can be challenging. Ensuring participation by key disciplines and systems, effective communication between those with differing philosophies and goals, dealing with distrust and misperceptions, and handling diminished interest and involvement of members over time, are particularly difficult.²²⁶

1. Current Adult/Elder Abuse Multisystem Collaborations

There are two types of multidisciplinary or multisystem adult/elder abuse collaborations: networks (established for systemic improvements) and teams (established “for case review and recommendations”).²²⁷ Each is defined in Table 1. 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 adult/elder abuse networks and teams to address abuse by guardians. First, they are found

224. *See id.*

225. *See* Georgia J. Anetzberger, Carol Dayton, Carol A. Miller, John F. McGreevey, Jr., & Maria Schimer, *Multidisciplinary Teams in the Clinical Management of Elder Abuse*, CLINICAL MGMT. ELDER ABUSE 158, 160–61 (2005); Georgia J. Anetzberger & Shantha Balaswamy, *Elder Abuse Awareness and Action: The Role of State Summits*, 22 J. ELDER ABUSE & NEGLECT 180, 181 (2010); Anetzberger, *The Evolution*, *supra* note 222, at 107–08; Georgia J. Anetzberger, *Elder Abuse Multidisciplinary Teams*, in ELDER ABUSE: RESEARCH, PRACTICE & POLICY 417, 417–21 (XinQi Dong, ed., 2017).

226. *See* Interview with Andy Capehart, *supra* note 100.

227. Anetzberger, *The Evolution*, *supra* note 222, at 119. *See infra* Table 1.

228. *See generally* *Elder Justice Network Locator Map*, U.S. DEP’T JUST., <https://www.justice.gov/elderjustice/elder-justice-network-locator-map> (last visited Jan. 3, 2022) (provides the Elder Justice Network Locator Map of the U.S. Department of Justice’s Elder Justice Initiative Multidisciplinary Team Technical Assistance Center).

throughout the country,²²⁸ 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.²²⁹ Second, as discussed earlier in this paper, there is overlap between adult/elder abuse and abuse by guardians, making the latter a legitimate concern for those already focused on adult/elder abuse. Finally, most adult/elder abuse networks and teams include as members representatives from both APS and law enforcement.²³⁰ Many, too, have members from the courts and/or guardianship services.²³¹ 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 adult/elder abuse collaborations. First, although widespread, adult/elder abuse 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 (APS Technical Assistance Resource Center) revealed that the majority of state APS programs lack advisory groups.²³² 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 U.S. Department of Justice's Elder Justice Initiative, which offers tools and services and hosts the online National Elder Abuse MDT Peer Support Community.²³³ Second, few adult/elder abuse

229. See Anetzberger, *The Evolution*, *supra* note 223, at 126; Interview with Andy Capehart, *supra* note 100.

230. See Anetzberger, *The Evolution*, *supra* note 222, at 116–17.

231. See *id.*

232. See ADULT PROTECTIVE SERVICES TECHNICAL ASSISTANCE RESOURCE CENTER, <https://apstarc.acl.gov> (last visited Jan. 3, 2022) (providing information on the Administration for Community Living's Adult Protective Services Technical Assistance Resources along with its services and products). The poll was conducted the week of December 7, 2020. See *APS TARC Webinar: APS Study on the Impact of COVID-19*, YOUTUBE (Jan. 7, 2021), <https://www.youtube.com/watch?v=sZy7eT8IpDM>.

233. See *generally Multidisciplinary Team Technical Assistance Center*, U.S. DEP'T JUST., <https://www.justice.gov/elderjustice/mdt-tac> (last visited Jan. 3, 2022) (providing information on tools, resource materials, and individualized consultations to facilitate the expansion of elder abuse case review multidisciplinary teams across the nation and more information on the center itself).

234. See *National Network of State Elder Justice Coalitions (NNSEJC)*, CAL. ELDER JUSTICE COAL., www.elderjusticecal.org/nnsejc.html (last visited Jan. 3,

collaborations are known to have abuse by guardians as an acknowledged interest area. For example, the second 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.²³⁴ Addressing this barrier should begin by educating members of adult/elder abuse networks and teams that abuse by guardians exists, overlaps with adult/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 maybe impossible to have representation everywhere. Scarce personnel and other commitments can deter involvement, but so too can a 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. However, Utah has developed a memorandum of understanding between APS and the court to facilitate the sharing of information.²³⁵

Although abuse by guardians could and should fall under the purview of adult/elder abuse networks and teams, it also is a legitimate concern of Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS).²³⁶ The Third National Guardianship Summit, held in 2011, recommended the formation and sustainability of state groups dedicated to advancing adult guardianship reform.²³⁷ 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

2022) (survey was distributed to the membership of the National Network of State Elder Justice Coalitions on October 21, 2020).

235. See *Utah Department of Human Services Aging and Adult Services: Protection*, UTAH.GOV, <https://daas.utah.gov/protection/#teams> (last visited Jan. 3, 2022) (link to sample Memorandum of Understanding (MOU) located under heading Multidisciplinary Community Teams).

236. See *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 201, at 37–38 (Recommendation 4.4).

237. Symposium, *Third National Guardianship Summit Standards and Recommendations*, 3 UTAH L. REV. 1191, 1199, 1203–04 (2012).

development in several states.²³⁸ Currently WINGS, or something similar, exists in half of all states.²³⁹ They are premised on the collective impact construct, which suggests that large-scale change requires broad coordination among multiple organizations.²⁴⁰ Assessment of the grant-funded WINGS revealed that the issues addressed vary by state.²⁴¹ 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.²⁴² 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 addresses 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.²⁴³ Still, abuse by guardians could and should be a WINGS concern, no less than an adult/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.²⁴⁴

238. See *Working Interdisciplinary Networks of Guardianship Stakeholders (WINGS)*, NAT'L GUARDIANSHIP NETWORK, https://www.nacla.org/NGN_PUBLIC/WINGS/NGN_PUBLIC/Wings.aspx?hkey=7779904f-99fa-4184-aeb0-253e11bef518 (last visited Jan. 3, 2022).

239. See *id.*

240. See John Kania & Mark Kramer, *Collective Impact*, STAN. SOC. INNOVATION REV. 36, 38 (2011), https://ssir.org/articles/entry/collective_impact.

241. See RICHARD VAN DUIZEND, NAT'L CTR. FOR STATE COURTS, FINAL WINGS ASSESSMENT REPORT 3–4 tbl.1 (2019); AM. BAR ASS'N COMM'N ON L. & AGING, WINGS BRIEFING PAPER: ADVANCING GUARDIANSHIP REFORM AND PROMOTING LESS RESTRICTIVE OPTIONS 14, 15 (2020), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2020-wings-briefing-paper.pdf [hereinafter BRIEFING PAPER].

242. See A.B.A., ADULT GUARDIANSHIP HANDBOOKS BY STATE *passim* (2019), https://www.americanbar.org/content/dam/aba/administrative/law_aging/2019-gshp-adult-gship-hdbks-state.pdf; VAN DUIZEND, *supra* note 241, at 1.

243. See WINGS BRIEFING PAPER, *supra* note 241, at 16.

244. See *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 201, at 37–38 (Recommendation 4.4).

VI. RECOMMENDATIONS

A. *The Role of APS*

APS 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.²⁴⁵ 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.²⁴⁶ This may require an expansion or clarification of existing statutory provisions or regulations at the state level to insure acceptance of abuse by guardian reports and establish protocols for their handling across key systems following abuse substantiation.

APS should commit itself to data collection and reporting on abuse by guardians at state and national levels, using the 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 of understanding of abuse by guardians as reported to and handled by APS, one of the three key systems charged with addressing it.²⁴⁷

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 roles and responsibilities of APS programs in responding to it. Too often public awareness and professional education regarding abuse by guardians has relied on media exposé 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.

245. See NAT'L CTR. ON ELDER ABUSE & NAT'L ADULT PROTECTIVE SERVS. RES. CTR., *supra* note 40.

246. See *supra* notes and accompanying text 113–15.

247. See *supra* notes and accompanying text 95–96.

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.²⁴⁸ 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.²⁴⁹ 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.²⁵⁰

In certain areas, state legislatures enacted enhanced penalties related to elder abuse, but there are no known enhanced penalties for abuse by a guardian.²⁵¹ 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 offense, the erosion of trust freely sought by the guardian and thoughtfully bestowed by

248. See *Fourth National Guardianship Summit Standards & Recommendations supra* note 201, at 37–38 (Recommendation 4.4).

249. See *supra* notes 116–18 and accompanying text.

250. See *supra* notes 119–20 and accompanying text.

251. See *supra* notes 121–23 and accompanying text.

the courts.²⁵² 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 its role in combating abuse by guardians.²⁵³

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

252. Deepak V. Thiagarajan, *Geriatrics for the Practicing Physician – Elder Abuse and Mistreatment*, 90 MED. & HEALTH R.I. 253, 253–54 (2007); *Elder Abuse: Curbing a National Epidemic: Hearing on Health and Long-Term Care Hearing Before the H. Select Committee on Aging*, 101st Cong. 7, 17 (1990) (statement of Rep. Mary Rose Oaker and “Mrs. Jones,” anonymous witness); see Pogach & Wood, *supra* note 9, at 3.

253. See *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 201, at 37–38 (Recommendation 4.4).

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 removing the civil rights of an individual should be determined by a court 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. After appointment, the guardian should be required to be proactive in establishing a detailed forward-viewing guardian plan for the expectations, assistance, and care of the incapacitated person. The guardianship plan also must be revised and updated over time. A uniform method for the timely submission and thorough review of required accountings with appropriate documentation 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.

Further, there should be a revision of guardianship statutes to require establishment and funding of a court-appointed visitor program that 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.²⁵⁴ The visitor could serve as both as a deterrent to abuse by the guardian and a tool to discover the abuse. 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.

Additionally, the guardianship order should continue the appointment of an attorney to represent the individual or reappoint the attorney, if any issues arise.²⁵⁵ The court should maintain jurisdiction of the matter and hold biannual status conferences with the required appearance of the guardian and the protected individual.²⁵⁶

254. See *Fourth National Guardianship Summit Standards & Recommendations*, *supra* note 201, at 37 (Recommendation 4.3).

255. See *id.*

256. See *id.*

Guardianship statutes should be revised to standardize and make accessible the process for addressing grievances against guardians, including the jurisdiction and powers available to the court.²⁵⁷ Alternative dispute resolution methods should be implemented either to avoid the necessity for guardianship in its entirety or to settle issues that are raised in the guardianship.

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.

Finally, sufficient funding of the courts would also enhance the courts' ability to perform these necessary oversight functions.

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. APS, 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 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.

CONCLUSION

As detailed throughout this paper, the abuse of protected persons by their guardians is a nationwide problem that requires coordinated

257. *See id.*

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 citations. 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).²⁵⁸ 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 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

258. *Advancing Independence, Integration, and Inclusion throughout Life*, ADMIN. FOR CMTY. LIVING, <https://acl.gov> (last visited Jan. 3, 2022); *see generally Funding & Awards*, NAT'L INST. JUST. <https://nij.ojp.gov/funding> (last visited Jan. 3, 2022) (illustrating types of research grant funding).

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.

Table 1: Existing Adult/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:		
Local:	Adult/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
	Adult/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
	Adult Protective Services (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 adult/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	Groups of professional leaders charged with oversight of a clinical

	clinical teams	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 adult/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, usually 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,

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