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### Stripped of Funds, Stripped of Rights: A Critique of Guardianship as a Remedy for Elder Financial Harm

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# CARDOZO LAW

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## **Stripped of Funds, Stripped of Rights: A Critique of Guardianship as a Remedy for Elder Financial Harm**

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STRIPPED OF FUNDS, STRIPPED OF RIGHTS: A CRITIQUE OF  
GUARDIANSHIP AS A REMEDY FOR ELDER FINANCIAL HARM

BY REBEKAH DILLER AND LESLIE SALZMAN\*

**Abstract.** There is a growing consensus in the United States and abroad recognizing the right to “legal capacity”—the right to make legally binding decisions for oneself—as a basic human right. Despite this recognition, adult guardianship—the state court procedure by which a person is declared incapacitated and stripped of decision-making rights—remains a widely used tool, particularly for older adults who have suffered financial exploitation or loss. For this population, guardianship is considered an unpleasant yet necessary remedy to address their financial harms. But what if the cure does not really work as intended, while other, less intrusive means could prevent and redress elder financial exploitation without stripping older persons of their rights?

This Article acknowledges that elder financial exploitation is a significant problem that causes great distress and harm but recognizes that, to date, many responses have been distorted by ageism and a reluctance to allow older adults some “dignity of risk.” Applying lessons from the lived experiences of older adults, the Article takes a clear-eyed look at how guardianship is being asked to solve problems it may not, in fact, be capable of solving. In doing so, the Article challenges the view that elder financial exploitation and loss is an individual problem that is effectively addressed by transferring decision-making rights to a surrogate. Instead, the Article calls for systemic measures to prevent elder financial harm and more robust remedial measures that do not remove a person’s decision-making rights.

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\* Clinical Associate Professors of Law and Co-Directors, Bet Tzedek Civil Litigation Clinic, Benjamin N. Cardozo School of Law. The Authors wish to extend our tremendous gratitude to Jennifer Miller, who served as a fellow on our Alternatives to Guardianship Advocacy Project and without whose contributions this Article would not have been possible. We also thank Bryan Wein, Cardozo '20, for his excellent research assistance. We are indebted to the Open Society Foundations for financial support of our Alternatives to Guardianship Advocacy Project, which served as a basis for this Article.

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## STRIPPED OF FUNDS, STRIPPED OF RIGHTS

### INTRODUCTION

A growing consensus recognizes the right to “legal capacity”—the right to make legally binding decisions—as a basic human right.<sup>1</sup> Yet an estimated 1.3 million people in the U.S. are under adult guardianship, resulting from state court proceedings that strip individuals of their decision-making rights and vest those powers in surrogate decision-makers appointed by the courts. The guardianship system is in perpetual crisis. Report after report reveals that courts often impose guardianship<sup>2</sup> when less restrictive alternatives would suffice and then fail to monitor and hold guardians accountable for misconduct.

Still, guardianship remains a dominant response for addressing financial crises experienced by older persons with cognitive limitations or psychosocial disabilities.<sup>3</sup> Courts continue to place older people under guardianship, often without adequate consideration of whether it is likely to be an effective remedy or whether there are less intrusive ways to address elder financial distress. These tendencies belie that much of the rhetoric supporting the continued need to impose property guardianships rests on the unexamined assumption that guardianship is the appropriate mechanism for addressing financial exploitation or loss in individual cases.<sup>4</sup>

To be sure, elder financial exploitation is a rampant problem and older persons are at risk for being targeted based on age and higher rates of social isolation. As a society, we have legitimate concerns about the financial security of our aging adults. Some of those concerns, however, are inflected with ageism and a reluctance to allow older adults the dignity of risk.

The use of guardianship as a response turns financial harm into an individual misfortune, borne by an older person whose cognitive capacity may be waning, rather than a broad-based societal failing that requires a systemic approach. Addressing the problem of elder financial exploitation is in fact a difficult and time-consuming process, requiring the implementation of strong preventive measures and the provision of adequate social services support. There is no quick and easy “fix.” By relying too heavily on guardianship as a remedy for the problem of elder financial abuse, we fail to adequately consider guardianship’s financial and personal costs, as well as its limits. Wittingly or unwittingly, we may be asking too much from guardianship, which may sometimes be a cure worse than the disease.

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<sup>1</sup> Article 12 of the U.N. Convention on the Rights of Persons with Disabilities requires that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life. G.A. Res. 61/106, art. 12, ¶ 4, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

<sup>2</sup> Some states use the term “guardianship over property” and some states use the term “conservatorship.” The use of the word guardianship in this report is intended to include “conservatorships” as well as “property guardianships.”

<sup>3</sup> See NAT’L COUNCIL ON DISABILITY, BEYOND GUARDIANSHIP: TOWARD ALTERNATIVES THAT PROMOTE GREATER SELF-DETERMINATION 65, 69 (2018), <https://ncd.gov/publications/2018/beyond-guardianship-toward-alternatives> [<https://perma.cc/SF7L-W789>] (recognizing the dearth of guardianship data generally and citing to Brookdale Center for Health Aging’s review of New York state guardianship cases that found 59% of the persons subject to guardianship under the state’s Article 81 general adult guardianship statute were 65 or older)

<sup>4</sup> In this report we use the term “financial exploitation” to include the taking, withholding, expenditure, diminution, or use of the property, assets, or resources of a person without their express voluntary consent or the consent of their legally authorized representative. As a result, this terminology would encompass the types of financial misconduct referred to as “financial abuse,” “financial exploitation,” and “financial fraud.”

This Article is animated throughout by the principles of Article 12 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD),<sup>5</sup> which holds that the right to “legal capacity” is a legal right that should not be taken away on the basis of disability—age-related or not—and requires that abiding respect for the autonomy of older persons must be a cornerstone of any approach to elder financial exploitation. We assess whether guardianship is the least restrictive way of addressing financial harms that older persons may face and ask whether, as a policy matter, we can continue to justify guardianship as a necessary mechanism for addressing adult financial exploitation beyond the most extreme situations. Our analysis bridges the gap between the growing body of disability rights literature concerning the right to legal capacity and the literature on elder abuse.<sup>6</sup> It also bridges the gap between theory and guardianship practice by weaving in the lived experiences of older adults we have represented who were not well-served by guardianship when it was imposed to assist with financial management. Our experiences representing older adults who fought significant uphill battles to redress abuse outside of guardianship lend insights into some of the challenges of pursuing the alternatives recommended here. In the vacuum of high-quality data around guardianship as a remedy, we believe these experiences, while not a systematic empirical treatment, are telling.

This Article proceeds in four parts. In Part I, we briefly discuss the phenomenon of elder financial exploitation and examine whether guardianship in fact protects against financial exploitation. We also address guardianship’s inherent costs and risks, both personal and financial, and consider whether guardianship is being asked to do something it simply cannot do—plug gaps in the social safety net to alleviate elder poverty. Part II discusses alternatives to guardianship that are equally

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<sup>5</sup> G.A. Res. 61/106, art. 12, ¶ 4, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

<sup>6</sup> On the right to legal capacity, see Kristin Booth Glen, *Not Just Guardianship: Uncovering the Invisible Taxonomy of Laws, Regulations and Decisions That Limit or Deny the Right of Legal Capacity for Persons with Intellectual and Developmental Disabilities*, 13 ALB. GOV’T L. REV. 25 (2020); Kristin Booth Glen, *Introducing a “New” Human Right: Learning From Others, Bringing Legal Capacity Home*, 49 COLUM. HUM. RTS. L. REV. 1 (2018); Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495, 511-15 (2016); Piers Gooding, *Navigating the ‘Flashing Amber Lights’ of the Right to Legal Capacity in the United Nations Convention on the Rights of Persons with Disabilities: Responding to Major Concerns*, 15 HUM. RTS. L. REV. 45 (2015); Eilionóir Flynn & Anna Arstein-Kerslake, *Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity*, 10 INT’L J.L. CONTEXT 81, 83 (2014); Eilionóir Flynn, *Making Human Rights Meaningful for People with Disabilities: Advocacy, Access to Justice and Equality Before the Law*, 17 INT’L J. HUM. RTS. 491 (2013); Tina Minkowitz, CRPD Article 12 and the Alternative to Functional Capacity (Dec. 25, 2013) (manuscript not formally published), <https://ssrn.com/abstract=2371939> [<https://perma.cc/FHJ4-TRKM>]; Nandini Devi, *Supported Decision-Making and Personal Autonomy for Persons with Intellectual Disabilities: Article 12 of the UN Convention on the Rights of Persons with Disabilities*, 41 J.L. MED. & ETHICS 792 (2013); MICHAEL BACH & LANA KERZNER, LAW COMM’N OF ONT., A NEW PARADIGM FOR PROTECTING AUTONOMY AND THE RIGHT TO LEGAL CAPACITY (2010), <http://www.oas.org/dhrs/INTERNNEWS/2013/WEEKLY%20MEETINGS/S-2013/16th%20MOAS%20PC/Bach-kerzner-2010.pdf> [<https://perma.cc/AA35-FPWU>]. *But see, e.g., Guardianship and Conservatorship*, NAT’L ACAD. OF ELDER LAW ATTORNEYS, [https://www.naela.org/Web/Consumers\\_Tab/Consumers\\_Library/Consumer\\_Brochures/Elder\\_Law\\_and\\_Special\\_Needs\\_Law\\_Topics/Guardianship\\_Conservatorship.aspx](https://www.naela.org/Web/Consumers_Tab/Consumers_Library/Consumer_Brochures/Elder_Law_and_Special_Needs_Law_Topics/Guardianship_Conservatorship.aspx) [<https://perma.cc/7NZA-YDVZ>] (last visited August 21, 2020) (“A guardian is sometimes necessary to prevent the exploitation or abuse of a vulnerable person, or to recover assets wrongly taken from the vulnerable person.”). *See generally* A. Frank Johns, *Person-Centered Planning in Guardianship: A Little Hope for the Future*, 2012 UTAH L. REV. 1541, 1544 (noting that states are so wedded to their guardianship laws that it is unlikely they would ever be eliminated); Lawrence A. Frolik, *Promoting Judicial Acceptance and Use of Limited Guardianship*, 31 STETSON L. REV. 735, 743-44 (2002) (noting that plenary guardianship saves the time of judges and litigants by removing the need to return to court to petition for expanded powers when the incapacitated person’s cognitive condition declines).

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effective, produce fewer harms, and preserve the older adult’s legal capacity. In Part III, we analyze the challenges of pursuing some of the recommended alternatives to guardianship and suggest ways to mitigate those challenges. Part IV addresses how we might ensure that the right to legal capacity remains front and center in those instances when a court is asked to impose guardianship as a remedy for elder financial harm and discusses two alternatives that have gained more attention recently: court approval of a single transaction or protective arrangement, and the emerging alternative of supported decision-making. Finally, the Conclusion provides recommendations to improve preventive mechanisms for elder financial exploitation and to advance legal and policy reforms that can obviate the need for and promote alternatives to guardianship.

### I. USING GUARDIANSHIP TO ADDRESS ELDER FINANCIAL EXPLOITATION

The following Sections describe the pervasive problem of elder financial exploitation. We critically examine the efficacy of guardianship as a mechanism for addressing elder financial crises. Guardianship offers a blunt tool, but its effectiveness is more limited than those seeking and imposing guardianship often realize. Serious consideration must be given to the many costs of guardianship to older persons and their property.

#### *A. The Phenomenon of Elder Financial Exploitation*

Elder financial exploitation comes in many forms and is characterized by a range of actors – from organized scams by strangers, to the use of an account by a loved one, to predatory lending by mortgage brokers, to the use of a credit card by a caregiver, and more. The problem is often described in terms of a public health catastrophe—akin to an epidemic<sup>7</sup>—and it is costly to both individuals and society more generally.<sup>8</sup>

Older adults are prime targets for financial exploitation—both because some older adults may experience health-related effects of aging that make them more vulnerable to financial exploitation and because their access to retirement funds and assets acquired over a lifetime can make them attractive targets for exploitation.<sup>9</sup> Studies indicate that if an older adult begins to experience cognitive decline, their financial capacity—the ability to manage finances—is often one of the first abilities to be lost.<sup>10</sup> In addition, older adults may also “experience a decline in their ability to judge trustworthiness and riskiness,” making them more readily susceptible to scams or other deception.<sup>11</sup>

It is challenging to understand the full nature and extent of elder financial exploitation because of limitations in the available data and research and, as significantly, because the problem is

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<sup>7</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-13-110, ELDER JUSTICE: NATIONAL STRATEGY NEEDED TO EFFECTIVELY COMBAT ELDER FINANCIAL EXPLOITATION 1 (2012), <https://www.gao.gov/assets/660/650074.pdf> [<https://perma.cc/M6NN-FKUP>].

<sup>8</sup> See STEPHEN DEANE, U.S. SECS. & EXCH. COMM’N, OFF. INV’R ADVOC., ELDER FINANCIAL EXPLOITATION: WHY IT IS A CONCERN, WHAT REGULATORS ARE DOING ABOUT IT, AND LOOKING AHEAD 10–12 (2018), <https://www.sec.gov/files/elder-financial-exploitation.pdf> [<https://perma.cc/PXJ4-4VNF>].

<sup>9</sup> See *id.* at 1–7.

<sup>10</sup> See GAO, *supra* note 7, at 3–5.

<sup>11</sup> DEANE, *supra* note 8, at 2–3.

seriously underreported.<sup>12</sup> Many older adult victims are reluctant to report incidents of financial exploitation due to their own shame or embarrassment for having “allowed” such exploitation or their concerns that others will take steps to reduce their financial independence once the exploitation is revealed.<sup>13</sup> Older adults may also be reluctant to report financial exploitation by a family member, friend or caregiver because of their emotional ties to or dependence on that person.<sup>14</sup> Critically situated professionals such as bankers often fail to report suspected financial exploitation owing to a lack of understanding of the relevant reporting procedures or concerns about disclosing confidential client information.<sup>15</sup> There is little doubt that available statistics significantly undercount the incidence of this phenomenon—one 2011 study estimated that only 1 out of every 44 cases of elder financial exploitation was reported to relevant authorities.<sup>16</sup>

From the available data, prevalence rates for financial exploitation of adults age 60 and older are estimated to range from 3.5 to 15 percent,<sup>17</sup> with an estimated 3.5 million adults having experienced elder financial abuse in 2017.<sup>18</sup> Studies have shown that African Americans are at heightened risk for experiencing elder financial exploitation.<sup>19</sup> Low-income older persons also

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<sup>12</sup> See, e.g., *id.* at 7-9.

<sup>13</sup> See YUFAN HUANG & ALAN LAWITZ, N.Y. OFF. OF CHILD. & FAM. SERVS., THE NEW YORK STATE COST OF FINANCIAL EXPLOITATION STUDY 20 (2016), <https://ocfs.ny.gov/main/reports/Cost%20of%20Financial%20Exploitation%20Study%20FINAL%20May%202016.pdf> [<https://perma.cc/9T9U-5M9A>]; GAO, *supra* note 7, at 1.

<sup>14</sup> See HUANG & LAWITZ, *supra* note 13, at 18-19.

<sup>15</sup> See GAO, *supra* note 7 at 32-33, 39. See generally, CONSUMER FIN. PROT. BUREAU: OFF. OF FIN. PROT. FOR OLDER AMS., SUSPICIOUS ACTIVITY REPORTS ON ELDER FINANCIAL EXPLOITATION: ISSUES AND TRENDS 12, 25 (2019), [https://files.consumerfinance.gov/f/documents/cfpb\\_suspicious-activity-reports-elder-financial-exploitation\\_report.pdf](https://files.consumerfinance.gov/f/documents/cfpb_suspicious-activity-reports-elder-financial-exploitation_report.pdf) [<https://perma.cc/Z343-X7E8>] (noting that a review of elder financial exploitation Suspicious Activity Reports (SARs) indicates that financial institutions likely filed reports of elder financial exploitation in only about 2% of the cases of actual elder financial exploitation in 2017).

<sup>16</sup> LIFESPAN OF GREATER ROCHESTER, INC., WEILL CORNELL MED. CTR. OF CORNELL UNIV. & N.Y.C. DEP'T OF AGING, UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY 50 (2011), <http://www.ocfs.state.ny.us/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf> [<https://perma.cc/L9SZ-Q9M5>]; see also CONSUMER FIN. PROT. BUREAU, *supra* note 15, at 23, 25 (concluding that banking institutions reported suspected elder financial exploitation to law enforcement or adult protective authorities in only 28 percent of those cases actually reported); HUANG & LAWITZ, *supra* note 13, at 21.

<sup>17</sup> CONSUMER FIN. PROT. BUREAU, *supra* note 15, at 12, n.24. Until very recently, the small number of studies attempting to quantify the problem have looked only at subsets of the relevant populations and case types, such as only cases involving older adults with *no* cognitive limitations or only those involving financial exploitation by family members. See DEANE, *supra* note 8, at 8-9. The more recent requirements that financial institutions report suspected elder financial abuse cases meeting specified monetary thresholds to the U.S. Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) may improve our understanding of the prevalence, type and extent of elder financial exploitation. See *id.* at 11; CONSUMER FIN. PROT. BUREAU, *supra* note 15, at 8-10; *infra* notes 64-69 and related text.

<sup>18</sup> CFPB, *supra* note 15, at 12 (applying a conservative prevalence rate of 5.2 percent to the number of adults sixty and older in 2017).

<sup>19</sup> See e.g., Janey C. Peterson et al., *Financial Exploitation of Older Adults: A Population-Based Prevalence Study*, 29 J GEN. INTERN. MED. 1615 (2014). See also Scott R. Beach et al. *Financial Exploitation and Psychological Mistreatment Among Older Adults: Differences Between African Americans and Non-African Americans in a Population-Based Survey*, 50 THE GERONTOLOGIST 744 (2010). Studies measuring the prevalence of elder financial mistreatment among Latinx older adults are less definitive. One study found



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experience higher rates of elder financial exploitation.<sup>20</sup>

In terms of the resulting costs, studies earlier this decade estimated total annual losses to older adults in the U.S. from elder financial exploitation in amounts ranging from approximately \$3 billion<sup>21</sup> to over \$36 billion.<sup>22</sup> A more recent Consumer Financial Protection Bureau (CFPB) study found that in 2017 financial institutions reported \$1.7 billion in suspicious activities involving potential elder financial abuse.<sup>23</sup> If the CFPB is correct that reports of suspicious activity are filed in only about 2% of the cases,<sup>24</sup> then it is quite possible that when considering losses to both individuals and financial institutions, annual losses from elder financial exploitation connected to financial accounts may have exceeded \$80 billion in 2017. That figure, moreover, does not consider the myriad other types of possible losses that occur which are not connected to a financial account. Finally, it is notable that the adult's losses were higher when the suspected perpetrator was known to them and "a loss was more common, and the amount lost was greater, when the suspects were fiduciaries."<sup>25</sup>

In sum, elder financial exploitation is a real, serious, and very costly problem. This Article argues that the problem should be addressed through a carefully considered, multi-pronged approach that prioritizes protecting the interests of older adults without further undermining their independence and autonomy.

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that Latinx older persons were less likely to suffer financial mistreatment than white counterparts. See Edward O. Laumann et al., *Elder Mistreatment in the United States: Prevalence Estimates From a Nationally Representative Study*, 63 THE JOURNALS OF GERONTOLOGY: SERIES B S248 (2008). However, another study surveying low-income, Spanish-speaking Latinos in several Los Angeles neighborhoods found that 16.7 percent reported experiencing financial exploitation in the prior twelve months. Marguerite DeLiema et al., *Determining Prevalence and Correlates of Elder Abuse Using Promotores: Low Income Immigrant Latinos Report High Rates of Abuse and Neglect*, 60 J. AM. GERIATR. SOC. 1333 (2012).

<sup>20</sup> Peterson et al., *supra* note 19. Researchers hypothesize that the higher rate of financial exploitation among low-income older adults may be traced to sharing a home with more people and thus "increas[ing] opportunities" for abuse. *Id.* at 1620-21.

<sup>21</sup> METLIFE MATURE MKT. INST. ET. AL., THE METLIFE STUDY OF ELDER FINANCIAL ABUSE: CRIMES OF OCCASION, DESPERATION, AND PREDATION AGAINST AMERICA'S ELDERS 2 (2011), <https://ltombudsman.org/uploads/files/issues/mmi-elder-financial-abuse.pdf> [<https://perma.cc/3X5S-C2GZ>]; See DEANE, *supra* note 8, at 10–11. See generally JILENE GUNTHER, AARP PUB. POL'Y INST., JOIN THE FIGHT: WHY FINANCIAL INSTITUTIONS SHOULD FIGHT EXPLOITATION AND PROTECT SAVINGS 5 (2016), <https://www.aarp.org/content/dam/aarp/ppi/2016-11/Join-The-Fight-Financial-Institutions.pdf> [<https://perma.cc/MAW2-SJ7Y>] (citing to 2013 data indicating that financial institutions lose \$1 billion each year in banking deposits due to elder financial exploitation).

<sup>22</sup> TRUE LINK FIN., THE TRUE LINK REPORT ON ELDER FINANCIAL ABUSE 2015 1, 11 (2015), <http://documents.truelinkfinancial.com/True-Link-Report-On-Elder-Financial-Abuse-012815.pdf> [<https://perma.cc/G86B-PAEQ>].

<sup>23</sup> CFPB, *supra* note 15, at 25.

<sup>24</sup> *Id.* at 12, 25. The report found average losses of \$34,200 per incident per older adult, with approximately 7% exceeding \$100,000. *Id.* at 15-16.

<sup>25</sup> *Id.* at 17-18. The study found that approximately half of the suspected perpetrators were known to the older adult victim, and approximately 7 percent of the suspects were identified as fiduciaries. *Id.*

*B. Mechanisms Within Guardianship to Address Financial Exploitation: Their Benefits and Limitations*

In certain situations, guardianship may effectively address financial exploitation by third parties. It is not a magic bullet, however, and recovery of lost funds is limited by many of the same problems that those who are not under guardianship face when seeking a remedy for elder financial exploitation. This Section describes the mechanisms for preventing future harm that are built into guardianship and then assesses their limitations.

First, the guardianship court has authority to appoint a temporary guardian or order injunctive relief that may immediately stop current wrongdoing. For example, the court can freeze access to the person's accounts and thus put a stop to any activity by an exploiter who has commandeered those particular accounts. The guardianship court can also stay actions such as foreclosures or evictions that threaten the loss of the older person's home.<sup>26</sup> In addition, the ultimate appointment of a guardian with exclusive control over the older adult's accounts and property can prevent further misappropriation of funds by others who had previously gained access to those assets.

As a formal matter these powers are vast, but they are limited by practical concerns. First, identifying the person's assets is a cumbersome process that can take time even when a guardian has been given authority over property. The court and the guardian may not learn of all of the relevant accounts and obtain authority over them (i.e., marshal the accounts) for some time, during which a wrongdoer with access may deplete them.<sup>27</sup> Second, while state guardianship laws require annual reporting by the guardian so that, at least theoretically, there is court oversight to ensure there is no financial exploitation after the appointment of the guardian, such laws are underenforced and persons with means can become targets for financial exploitation by guardians as well.<sup>28</sup>

Second, guardianships can also be used to void contracts made when the older adult was "incapacitated." A guardianship court may be able to modify or revoke a contract, conveyance, or disposition that was executed when the individual lacked "capacity" to execute it.<sup>29</sup> However, such an order would ordinarily require the same showing about lack of capacity at the time the contract was

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<sup>26</sup> See, e.g., N.Y. Mental Hyg. Law § 81.23(a) (authorizing temporary guardian to prevent "waste, misappropriation or loss of property" of alleged incapacitated person); *id.* at § 81.23(b) (authorizing restraining orders and injunctions to prevent a person from selling, assigning, disposing or otherwise encumbering the property of the person alleged to be incapacitated or subject to guardianship to that person's detriment); Unif. Guardianship, Conservatorship, & Other Protective Arrangements Act (UGCOPAA) §§ 404, 413 (UNIF. LAW COMM'N 2017) (orders to preserve or apply property while proceeding is pending, and appointment of emergency conservator, respectively); *In re Ella C.*, 34 Misc.3d 1203(A), 2011 WL 6757850 (Sup. Ct. Kings County 2011), *appeal dismissed*, 171 A.D.2d 744 (App. Div. 2019) (appointing temporary guardian and issuing restraining orders to prevent further financial exploitation of 72-year-old woman with post-stroke cognitive limitations).

<sup>27</sup> See THE HARRY AND JEANETTE WEINBERG CENTER FOR ELDER ABUSE PREVENTION & THE GUARDIANSHIP PROJECT, ELDER ABUSE IN GUARDIANSHIP CASES: A LEGAL RESOURCE GUIDE 10 (2d ed.), <https://nyceac.org/wp-content/uploads/2018/06/EA-in-Guardianship-Cases-Guidelines.pdf> [<https://perma.cc/H565-PFSM>].

<sup>28</sup> See *id.*; CFPB, *supra* note 15, at 17–18 (determining that approximately 7 percent of the suspected perpetrators of elder financial abuse were identified as fiduciaries); see also discussion *infra* Part IV.

<sup>29</sup> See, e.g., N.Y. MENTAL HYG. LAW § 81.29(d); MINN. STAT. ANN. § 524.5–417(e) (permitting conservator to petition for court review of transaction, gift, or contract entered into by person during the two years prior to establishment of the conservatorship).

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entered, just as it would in a non-guardianship context.<sup>30</sup> In addition, in many states, after appointing a guardian (and declaring the adult to be *incapacitated*), a guardianship court can modify or revoke a power of attorney or health care proxy if the previously appointed agent acted improperly.<sup>31</sup>

Guardians have the ability to discover and recapture misappropriated funds. There are guardianship statutes with special provisions authorizing a guardian to commence proceedings to discover and take possession of property that rightfully belongs to the person under guardianship.<sup>32</sup> Others provide that the guardianship court has concurrent jurisdiction over questions of title to the property in question.<sup>33</sup>

Although the ability to proceed against a wrongdoer within the guardianship court may provide some procedural advantages, proceedings to recover misappropriated funds may present many of the same burdens and challenges of proving financial exploitation as those brought outside of guardianship. The guardian still has to demonstrate that any transfers or alleged gifts were the product of undue influence or duress, were the result of conversion, or were otherwise invalid.<sup>34</sup> Making such a showing can be particularly difficult in cases involving a victim with cognitive limitations.<sup>35</sup> In addition, when monies have been taken, it may be impossible to collect on a

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<sup>30</sup> Under the Minnesota law, “[i]f the court finds that the protected person was incapacitated or subject to duress, coercion, or undue influence when the transaction, gift, or contract was made, the court may declare the transaction, gift, or contract void except as against a bona fide transferee for value and order reimbursement or other appropriate relief.” *Id.*; see also *In re Lucille H.*, 833 N.Y.S.2d 200 (App. Div. 2007) (reversing guardianship order provision that had declared contract for sale of property entered into prior to guardianship void and remanding for hearing on issue of capacity to enter contract on notice to other party with whom contract was entered). See generally UGCOPAA § 503(c)(1)(G) (without appointing a conservator/property guardian, the court can authorize or direct the “ratification or invalidation of a contract, trust, will, or other transaction, including a transaction related to the property or business affairs of the respondent” to protect the adult or their property, based on a finding that the adult meets the criteria for appointment of a conservator/property guardian).

<sup>31</sup> See, e.g., N.Y. MENTAL. HYG. LAW § 81.29(d); UGCOPAA § 503(c)(1)(G) (allowing for invalidation of any “other transaction”); see also MINN. STAT. ANN. § 524.5-417(d) (granting to conservator “the power to revoke, suspend, or terminate all or any part of a durable power of attorney of which the protected person [subject to conservatorship] is the principal with the same power the principal would have if the principal were not *incapacitated*”).

<sup>32</sup> See, e.g., N.Y. MENTAL HYG. LAW § 81.43 (McKinney 2004) (proceedings to discover property withheld); CAL. PROB. CODE § 2405 (West 1990) (creating summary proceeding to determine disputes between guardian and third party with regard to estate); see also *In re Frank A.L. v. Vaccarelli*, 985 N.Y.S.2d 618 (App. Div. 2014) (discussing guardian’s post-appointment proceeding to recover monies that incapacitated person’s sisters improperly stole from the incapacitated sister); N.Y. MENTAL. HYG. LAW § 81.29 (McKinney 2010) (requiring fiduciary to account to incapacitated person where there is evidence of fiduciary’s misappropriation of the beneficiary’s property). In addition, the guardianship order may be helpful in arguing for a tolling of relevant statutes of limitations for causes of action to recover funds.

<sup>33</sup> See generally UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 104(c)(3) (2007) (providing that the guardianship court has “nonexclusive jurisdiction to determine . . . a question of title concerning the property”).

<sup>34</sup> See, e.g., MINN. STAT. ANN. § 524.5-417(e) (permitting reimbursement of monies previously taken from the now-incapacitated person subject to guardianship through “duress, coercion, or undue influence” as an alternative to showing that the “protected person” was incapacitated at the time of the problematic financial transaction); *In re Frank A.L. v. Vaccarelli*, 985 N.Y.S.2d at 619 (noting the element of a “wrongful taking” in post-guardianship appointment proceeding seeking turnover of monies taken).

<sup>35</sup> See discussion *infra* Part III, *Potential Proof Problems*.

judgment against the wrongdoer if they have no assets or income against which to collect.<sup>36</sup> Whether inside or outside of guardianship, recovery of stolen monies or property requires time, energy, resources and real commitment, making it unlikely that the guardian would pursue recovery unless the funds at stake were significant.

### *C. Costs and Risks of Guardianship*

When looking to guardianship as the cure for exploitation and other financial harms, we often fail to fully consider all the human and financial costs. For instance, the person under guardianship loses decision-making rights. The guardianship makes the older person the object, rather than the subject, of decisions about the important aspects of their lives.<sup>37</sup> Under guardianship, the older adult may lose the right to choose where to live, whom to see, how to spend their money, which medical care to obtain, and more. As such, guardianship inevitably infringes on the individual's autonomy and self-determination.

Additionally, there are monetary costs. For those with assets, guardianship can deplete the older adult's funds rapidly. The due process rights afforded to persons alleged to be or declared incapacitated all have a price tag. And when the person under guardianship has even minimal means, their "estate" pays for all manner of court process. Fees and commissions are paid to lawyers, court evaluators who perform investigations for the court during the initial proceedings, experts, guardians and court examiners or monitors who review guardian reports.<sup>38</sup> When the guardianship is opposed by the older subject of the guardianship or another person, the litigation may be prolonged and intensified, adding greater costs.

Further, there is the possibility of financial mismanagement or exploitation by an appointed guardian. With full financial control of the individual's property in the hands of the guardian, an unscrupulous guardian is in a prime position to mismanage or misappropriate the older adult's assets. While hard data regarding the full extent of guardian financial exploitation is lacking, existing evidence shows that the problem is significant.<sup>39</sup> A 2010 Government Accountability Office (GAO) report "identified hundreds of allegations of physical abuse, neglect and financial exploitation by guardians in 45 states and the District of Columbia between 1990 and 2010," and concluded that it is

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<sup>36</sup> See, e.g., David Godfrey, *Civil Recovery in Elder Financial Exploitation Cases*, 41 BIFOCAL 240, 242 (2020) ("The perpetrators often spend or hide the money they've taken, making recovery impossible."); GAO, *supra* note 7, at 1.

<sup>37</sup> See Leslie Salzman, *Rethinking Guardianship (Again): Substituted Decision Making as a Violation of the Integration Mandate of Title II of the Americans with Disabilities Act*, 81 U. COLO. L. REV. 157, 165–82 (2010).

<sup>38</sup> The notable guardianship case of Brooke Astor, for example, resulted in an award of more than \$2.2 million in fees to lawyers and others. See *In re Marshall*, 831 N.Y.S.2d 360 (Sup. Ct. 2006).

<sup>39</sup> See NAT'L COUNCIL ON DISABILITY, *supra* note 3, at 70–71, 103–04. We may have better data on this phenomenon in the coming years through the U.S. Department of Health and Human Services' National Adult Maltreatment Reporting System (NAMRS) that gathers national statistics on financial exploitation by guardians from state Adult Protective Services (APS) agencies and through state initiatives to identify abuse by guardians through analysis of key data points, complaint data, and "red flags" such as unusually high guardian fees or excessive vehicle or dining expenses. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 17–33, THE EXTENT OF ABUSE BY GUARDIANS IS UNKNOWN, BUT SOME MEASURES EXIST TO HELP PROTECT OLDER ADULTS 12–14 (2017), <https://www.gao.gov/assets/690/681088.pdf> [<https://perma.cc/R84P-R8QX>].

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likely that there is widespread abuse by guardians.<sup>40</sup> A steady drumbeat of press reports from around the country continues to expose incidents of guardian malfeasance.<sup>41</sup> Once a person is placed under guardianship it is very difficult for them to garner basic information about their finances and other matters under the guardian's control, dispute actions taken by the guardian, or lodge a complaint against the guardian.<sup>42</sup>

Inadequate court monitoring of existing guardianships decreases the likelihood that a court will discover a guardian's misfeasance or malfeasance. There is little dispute that courts inadequately monitor the status of existing guardianships—by failing to take such measures as enforcing requirements that guardians file proper annual reports, adequately reviewing reports that are submitted, and appropriately acting against the guardian when improprieties are identified.<sup>43</sup> The National Council on Disability recently concluded that “courts are not currently able to safeguard individuals against abuse, neglect and exploitation committed by guardians.”<sup>44</sup> Court systems often lack the financial resources, and in some cases possibly the general commitment, to monitor property guardians.<sup>45</sup> There is even less court monitoring of more modest estates, which are likely to have

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<sup>40</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-1046, GUARDIANSHIPS: CASES OF FINANCIAL EXPLOITATION, ABUSE, AND NEGLECT OF SENIORS (2010), <https://www.gao.gov/assets/320/310741.pdf> [<https://perma.cc/XPS2-X2LQ>]. To cite just one example, the GAO recounted a New York case in which the guardian misappropriated at least \$327,000 from an 82-year-old retired judge—all while presiding over the decrease of his estate from several million dollars to almost nothing. *Id.* at 13.

<sup>41</sup> See, e.g., Rachel Aviv, *How the Elderly Lose Their Rights*, THE NEW YORKER (Oct. 2, 2017), <https://www.newyorker.com/magazine/2017/10/09/how-the-elderly-lose-their-rights> [<https://perma.cc/DGE6-9CX8>]; Arian Campos-Flores & Ashby Jones, *Abuse Plagues System of Legal Guardians for Adults*, WALL ST. J. (Oct. 30, 2015, 1:18 PM), <http://www.wsj.com/articles/abuse-plagues-system-of-legal-guardians-for-adults-1446225524> [<https://perma.cc/U7RF-8YQD>] (providing examples of abuse and the lack of oversight for guardians); Colton Lochhead, *Clark County's Private Guardians May Protect—or Just Steal and Abuse*, LAS VEGAS REVIEW-JOURNAL (last updated Oct. 13, 2017 5:06 PM), <http://www.reviewjournal.com/news/las-vegas/clark-county-s-private-guardians-may-protect-or-just-steal-and-abuse> [<https://perma.cc/Q9GK-LZLN>]; Shannon Mullen, *Betrayal of Trust: Stealing from Seniors*, ASBURY PARK PRESS (last updated July 12, 2015, 9:47 AM), <http://www.app.com/story/news/investigations/watchdog/investigations/2015/06/27/guardianship-abuse-incapacity-trial/71006830/> [<https://perma.cc/H4XM-2ME2>]; Lucas Sullivan, Jill Riepenhoff, Mike Wagner & Josh Jarman, *Elderly, Mentally Ill and Children Trapped in Broken Court System*, COLUMBUS DISPATCH (last updated May 18, 2014, 12:26 PM), <https://www.dispatch.com/article/20140518/NEWS/305189912> [<https://perma.cc/7J7G-XQ5V>].

<sup>42</sup> See THE GUARDIANSHIP CLINIC, CARDOZO SCHOOL OF LAW, GUARDIANSHIP IN NEW YORK: DEVELOPING AN AGENDA FOR CHANGE 10 (2012).

<sup>43</sup> See BRENDA K. UEKERT, CTR. FOR ELDERS & THE CTS., ADULT GUARDIANSHIP COURT DATA AND ISSUES: RESULTS FROM AN ONLINE SURVEY 5 (2010), <https://ncsc.contentdm.oclc.org/digital/collection/famct/id/291> [<https://perma.cc/257A-4PN2>]; GUARDIANSHIP MONITORING COMM., GUARDIANSHIP MONITORING COMMITTEE REPORT 118 (2014), <http://www.pacourts.us/assets/files/page-543/file-4022.pdf?cb=1444534377573> [<https://perma.cc/8UKX-KXXF>] (reporting on Pennsylvania court clerk survey finding that sixty-nine percent of clerks did not monitor whether guardians submitted required annual reports); GAO, *supra* note 36. More recently, in Texas, an initial review of cases in select counties identified significant problems with filing and monitoring of reports as well as financial exploitation engaged in by guardians. OFF. OF CT. ADMIN., TEXAS JUDICIAL COUNCIL, SUMMARY OF RECOMMENDATIONS-SENATE 5 (2019), [http://www.lbb.state.tx.us/Documents/SFC\\_Summary\\_Recs/86R/Agency\\_212.pdf](http://www.lbb.state.tx.us/Documents/SFC_Summary_Recs/86R/Agency_212.pdf) [<https://perma.cc/QSX2-XKWE>].

<sup>44</sup> NAT'L COUNCIL ON DISABILITY, *supra* note 3, at 71, 85.

<sup>45</sup> In a report on a survey of judges and court personnel, the National Center for State Courts quoted a number of respondents as stating that their courts did not have the resources to adequately monitor guardianships. See UEKERT, *supra* note

fewer interested family members watching the guardian’s actions.<sup>46</sup> With regard to non-financial aspects of the guardianship—which can include critical personal matters such as the individual’s living conditions, access to health care, and isolating restrictions on the person’s interactions with others—there is even less monitoring by the court.<sup>47</sup>

In the case of an elderly client Mr. D, the lack of oversight and monitoring resulted in his being stuck in what was supposed to be a time-limited guardianship for years after it was supposed to have ended. Mr. D lived in senior housing with his mother, who was already under guardianship. When they both were threatened with eviction, the local social services department filed a guardianship petition against Mr. D as well. Mr. D was told that if he consented to a time-limited guardianship with the same agency that served as his mother’s guardian, the guardian would ensure that they could continue to live together. On that basis, he consented to a guardianship that had two conditions: first, after one year, the guardian was supposed to either move to terminate the guardianship or show the need to extend it; and second, any effort to move him away from his mother would require court approval. When he sought legal representation, it was three years later. He had been moved away from his mother to an institutionalized setting without court approval and the guardian had never returned to court to extend the guardianship, yet it continued to act as his guardian. Every time Mr. D attempted to raise the one-year time limit with his guardian agency’s caseworkers, he got no response. Yet the guardian continued to file annual reports to the court, which were approved without the slightest inquiry into either the expiration of the guardianship or the fact that Mr. D had been moved in violation of the court order. Mr. D was able to terminate the guardianship with legal assistance, but only after it took a significant toll on his dignity and personal well-being.

Another harm of guardianship are the dangers of a “civil death.” Once under guardianship, persons are often legally barred from arranging alternative housing, obtaining services and benefits, or accessing their own funds, placing them at the mercy of a potentially inattentive or uncommunicative guardian.<sup>48</sup> Moreover, for low-income individuals under guardianship, it is not uncommon to

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43, at 24–25; *see also* Campos-Flores & Jones, *supra* note 41 (explaining that many judges “struggle to keep up with the rising flood of paperwork” in reviewing guardianship reports). The uniform guardianship law provides that additional persons can be entitled to notice of key actions by the conservator and be entitled to access court records. *See* UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 411(e) (2007). This measure, if adopted by states, would help ensure that guardians are not able to operate in secrecy, but it is not a substitute for adequate court monitoring.

<sup>46</sup> For example, in some New York counties, annual reports in low-asset cases are only reviewed every other year, notwithstanding the statutory requirement for annual review. *See* Jean Callahan, Raquel Malina Romanick & Angela Ghesquiere, *Guardianship Proceedings in New York State: Findings and Recommendations*, 37 BIFOCAL 83, 88 (2016).

<sup>47</sup> *See* UEKERT, *supra* note 43, at 5 (explaining that guardianship monitoring efforts are generally inadequate because few courts regularly monitor the conditions of incapacitated persons).

<sup>48</sup> *See, e.g.*, NAT’L COUNCIL ON DISABILITY, *supra* note 3, at 33-34 (noting that guardianship orders can remove many decision-making rights from the individual and transfer those rights to a guardian, including the rights to apply for government benefits, manage money or property, contract, and decide where to live), 81 (citing finding from 2014 Study that approximately two-thirds of “court respondents indicated that the court had sanctioned a guardian for failure to fulfill their obligations, misconduct or serious malfeasance within the past three years.”), 117-18 (observing that guardianship removes fundamental rights and may increase opportunities for abuse); Robert D. Dinerstein, *Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road from Guardianship to Supported Decision-Making*, HUMAN RIGHTS BRIEF 19 (2012): 8-12 (observing that persons subject to guardianship are “no longer permitted to participate in

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experience a loss or reduction of benefits due to a guardian's failure to timely recertify eligibility or other financial neglect.<sup>49</sup> Other individuals have missed chances to move to subsidized housing because the guardian failed to participate in the application process.<sup>50</sup> In these instances, the guardianship is not just unprotective but affirmatively harmful because it bars the individuals from pursuing these matters themselves or with the assistance of other supporters or social service agencies. Guardianship can also make everyday life unnecessarily more difficult for persons under it. These adults may be subject to practices created for the convenience of the guardian such as only being able to access money on certain days or being forced to travel significant distances to pick up monthly stipends or funds to meet unexpected needs.<sup>51</sup>

Lastly, guardianship is extremely difficult to terminate. Once guardianship takes effect, it is nearly impossible to get out or even to scale back the guardian's authority.<sup>52</sup> Many, if not most, guardians are appointed for an indefinite duration even if their appointment is intended to address a temporary crisis. Despite the requirement that the guardianship be reviewed each year through the annual reporting process—which should bring to light changes in circumstances that would obviate

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society without mediation through the actions of another if at all”).

<sup>49</sup> For example, many institutional guardians serve as the public assistance or social security representative payee for the person under guardianship (“IP”). In the authors’ experiences, guardians have missed benefit recertification deadlines causing a delay in receipt of the IP’s only source of income. In addition, we have seen instances where a person under guardianship is charged with an overpayment and the guardian agrees to repay the overpayment, resulting in an ongoing reduction of monthly benefits, when the guardian could have challenged the overpayment or asked for repayment to be waived. See 20 C.F.R. §§ 404.502, 404.502a, 404.506; 20 C.F.R. §§ 416.537, 416.550, 416.558; see also Patrick Michels, *Who Guards the Guardians*, TEXAS OBSERVER (July 6, 2016), <https://www.texasobserver.org/texas-guardianship-abuse/> [<https://perma.cc/9WEV-NQQ8>] (“According to complaints filed with the state, some wards lost their Medicaid and Social Security because [their professional guardian] failed to mail the paperwork to keep them current.”). See generally, Paul S. Appelbaum, Carol Mason Spicer, and Frank R. Valliere, “Informing Social Security’s Process for Financial Capability Determination,” *The National Academies Press*, accessed November 30, 2020 (discussing general problems with appointment of social security representative payees [such as the appointed guardian], including their inability to manage or the potential mismanagement of beneficiary funds), <https://www.ncbi.nlm.nih.gov/books/NBK367675/> [<https://perma.cc/TSQ3-6HPT>]; NAT’L COUNCIL ON DISABILITY, TURNING RIGHTS INTO REALITY: HOW GUARDIANSHIP AND ALTERNATIVES IMPACT THE AUTONOMY OF PEOPLE WITH INTELLECTUAL AND DEVELOPMENTAL DISABILITIES, 8 (2019) (noting general problem of guardian neglect), <https://ncd.gov/publications/2019/turning-rights-into-reality> [<https://perma.cc/R5LP-4K4C>].

<sup>50</sup> For example, in a December 19, 2019 interview with the authors, staff at Breaking Ground, a New York City social services organization that assists homeless individuals locate permanent housing, reported that they were unable to assist a woman under guardianship obtain an available, affordable apartment because the woman’s guardian would not respond to requests for financial information in the guardian’s exclusive control. In another case in which the authors served as legal counsel, an incapacitated person lost several potential subsidized apartments because the appointed guardian would not request an application and apartment management would not provide the application to the IP without the guardian’s request.

<sup>51</sup> In this December 19, 2019 interview, Breaking Ground staff also reported that the woman under guardianship was required to travel close to an hour by public transportation to retrieve the monthly allowance from her guardian. In another case, a client also had to travel at least an hour by public transportation to obtain her allowance from her guardian. Guardianship trial transcript on file with author.

<sup>52</sup> See Jenica Cassidy, *Restoration of Rights in the Termination of Adult Guardianship*, 23 ELDER L.J. 83, 115 (2015) (“Restoration is an uphill battle. There are numerous barriers to restoration that can prolong the guardianship long after the regaining of capacity.”).

the need for guardianship—guardianships almost never end, except upon the death of the person under guardianship.<sup>53</sup> It is also extremely difficult for individuals under guardianship to successfully move to restore their rights. State laws do not adequately set forth the bases for termination, and as a result either of state statute or practice, the burden of proof may be placed on the person under guardianship rather than the party opposing termination.<sup>54</sup> Obtaining free counsel is very difficult as few agencies represent individuals in restoration petitions. Proceeding pro se is very challenging. Courts sometimes appoint counsel upon the filing of a restoration petition, but an individual would have to file papers to even get this far in the process—a difficult feat especially given that most court clerks do not have information about restoration available to the public nor do they have template forms to assist a pro se litigant.

In the case of Mr. A, after a spinal injury prevented him from working and paying his rent, he was on the brink of eviction from his apartment of several decades. In the midst of the eviction proceeding, at this very low point in his life, Mr. A consented to appointment of a guardian reasonably assuming that he could withdraw that consent at some future date. After completing physical rehabilitation, Mr. A, with the assistance of counsel, filed papers to withdraw his consent and end the guardianship. Despite the fact that Mr. A had never been adjudicated incapacitated, the guardian vigorously opposed the termination, arguing that the court could not terminate Mr. A's guardianship without holding a hearing to determine that Mr. A no longer needed a guardian. In this protracted and contentious litigation, Mr. A was required to undergo an assessment by a court evaluator and defend himself at a full evidentiary hearing. Even though the court ultimately ruled in Mr. A's favor, the case demonstrated just how difficult it is to terminate a guardianship once it has been imposed, even when the guardianship was based on consent rather than a determination of incapacity.<sup>55</sup>

#### *D. Guardianship's Inability to Plug Gaps in the Social Safety Net*

Guardianship is legally nothing more than the transfer of decision-making rights from the individual to a surrogate.<sup>56</sup> Appointing a guardian does not ensure that an individual will be provided with a range of services and benefits. And when the guardian fails to provide services that the court anticipated when it appointed the guardian, the individual can end up in a worse position than they

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<sup>53</sup> See Erica Wood, Pamela Teaster & Jenica Cassidy, ABA Comm. on Law & Aging, RESTORATION OF RIGHTS IN ADULT GUARDIANSHIP: RESEARCH AND RECOMMENDATIONS 6 (2017), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/restoration-of-rights-in-adult-guardianship.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/restoration-of-rights-in-adult-guardianship.pdf) [<https://perma.cc/KW7Y-PCU5>] (finding it was nearly impossible to get out of guardianships and concluding that some number of adults remain under guardianship past the period of need and that some number may never have needed the more restrictive guardianship alternative). Under the UGCOPAA and in many states, guardians are required to indicate in the annual report whether or not the guardianship should continue and whether any changes in powers are warranted. See *id.* at 10-11.

<sup>54</sup> See *id.* at 66-67.

<sup>55</sup> The court ultimately decided that a person who consents to guardianship may withdraw that consent without having to prove that they no longer need a guardian, and that a party seeking to continue a guardianship must bring a new petition and establish that the person is incapacitated. See *In re Banks (Richard A.)*, 64 Misc.3d 191 (Sup. Ct. N.Y. County 2019).

<sup>56</sup> See generally UGCOPAA §§ 314, 414 (2017) (describing powers that guardians and conservators may exercise on behalf of person under guardianship).



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would have been in had they never had a guardian appointed in the first place because they are limited in their ability to get help outside the guardianship.

To the extent we rely on guardianship to address a set of problems facing certain older individuals in distress, we may be asking too much of it. Gaps in the social safety net for older people are significant, and a guardian cannot repair them.<sup>57</sup> Nor can a guardian compensate for elder poverty in cases where the older person can no longer afford their rent, make payments on their mortgage, or pay existing or renegotiated debts. To the extent that public guardianship is used in such situations, it would be more effective to expand rental subsidies or homeowner relief programs, or to provide more robust assistance earlier in eviction and foreclosure proceedings, than to address these crises through guardianship. In many cases, intense case management support would be a more appropriate and effective way to address the crisis that an older person faces.<sup>58</sup>

Moreover, programs designed to assist older persons often have unnecessarily burdensome application and recertification requirements that can result in improper denials and terminations of benefits for older persons with cognitive impairments. When necessary benefits are denied or terminated, the consequences can be severe and set the older person on a path toward eviction, institutionalization, and/or guardianship. For example, obstacles obtaining home care through the Medicaid program can result in extended nursing home placement. Similarly, older persons with cognitive impairments found themselves terminated from a rent freeze program because their impairments prevented them from returning paperwork on time—a set of events that often led to the threat of eviction,<sup>59</sup> which in turn, can be a pathway toward guardianship.<sup>60</sup> By making these programs more accessible, we can not only facilitate their goals of providing support to older persons but get at the roots of some of the factors that push persons with cognitive impairments down the pathway to guardianship.

The case of Ms. Z, a woman who was placed in an involuntary, plenary guardianship at the time that she was being evicted from her long-term apartment, illustrates both how guardianship is used to address a gap in the social safety net, and the very real difficulty of getting oneself out of even an inappropriate and ineffective guardianship. The guardianship order provided that upon Ms. Z's safe relocation to a new apartment the guardian should seek to terminate the guardianship. The unique structure of the court's order suggested that the client was not actually *incapacitated* and that the guardianship was imposed only to assist her in locating a new apartment. Nevertheless, the court gave the guardian broad powers over all of Ms. Z's finances as well as a number of areas of personal decision-making. Despite the court's goal of appointing a guardian to prevent homelessness, the guardian placed Ms. Z in a homeless shelter, where she remained for close to two years. After her

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<sup>57</sup> See, e.g., CONG. RESEARCH SERV., R45791, POVERTY AMONG AMERICANS AGED 65 AND OLDER (2019) (noting that the poverty rate for older Americans has declined in recent decades but the raw number of older people living in poverty has risen). In 2017, the supplemental poverty rate for persons sixty-five and older was 14.1 percent. *Id.*

<sup>58</sup> PAMELA B. TEASTER ET AL., GUARDIANSHIP PROJECT, INCAPACITATED, INDIGENT AND ALONE: MEETING GUARDIANSHIP AND DECISION SUPPORT NEEDS IN NEW YORK 29-30 (2018), <https://www.vera.org/downloads/publications/incapacitated-indigent-and-alone-guardianship-new-york.pdf> [<https://perma.cc/975J-CR3C>].

<sup>59</sup> See Complaint at 1–5, Pfeffer v. N.Y.C. Dep't of Fin., No. 1:15-CV-03547 (E.D.N.Y. 2018) (alleging that New York City agencies failed to provide benefit program beneficiaries with reasonable modifications to filing deadlines in violation of the Americans with Disabilities Act).

<sup>60</sup> PAMELA B. TEASTER ET AL., *supra* note 58, at 30 (describing eviction as “gateway to guardianship”).

first year in the homeless shelter, Ms. Z sought to terminate her guardianship arguing that she didn't need the guardian, and in any event, that the guardian was not providing any useful assistance to her. The guardian agency aggressively opposed the motion, and the court denied termination because Ms. Z still lacked permanent housing and continued to have a "lack of insight into her own condition" that placed her "at risk of harm if the guardianship was to be terminated. . . ."<sup>61</sup> When, seven months after the court's decision, Ms. Z found her own apartment, the guardian finally consented to termination.

The real problem here had little to do with Ms. Z's ability to make decisions or manage her finances—she was a meticulous and knowledgeable manager of her limited finances. In fact, the guardianship made managing finances worse, as Ms. Z had to travel a significant distance to obtain her monthly stipend, and any additional funds she needed, from the guardian. The real problem, which was exacerbated by the guardian's lack of attention to assisting Ms. Z's move to permanent housing, was simply the lack of affordable housing options in the city where Ms. Z was living. In this case, the guardianship added burdens to Ms. Z's life but did nothing to assist her.

## II. ALTERNATIVE APPROACHES TO ELDER FINANCIAL HARM: PREVENTION AND REDRESS OUTSIDE OF GUARDIANSHIP

There are other ways to approach elder financial harm without divesting the older adult of legal capacity. First, policies and services to prevent elder exploitation should be expanded. When elder financial exploitation does occur, victims can bring common law and consumer protection claims to seek recovery. As with guardianship, neither of these approaches is guaranteed to address the problem.<sup>62</sup> However, they are worthy of serious consideration as alternative approaches because they prevent or provide relief for the problem without removing the older adult's decision-making rights.

### *A. Measures to Prevent Elder Financial Harm*

The following financial supports and early warning systems to detect financial exploitation before significant damage occurs can minimize the risk of exploitation while preserving an older adult's decision-making authority over finances. Some have likened elder financial exploitation to a public health crisis and called for a public health-like approach to identifying risk factors and implementing containment measures.<sup>63</sup> The measures described below are a good first step, but in most cases, rely on proactive steps by the individual and voluntary action by financial institutions. More action is needed from banks and other financial institutions, as well as their regulators, to

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<sup>61</sup> Court Decision and Order filed February 28, 2019 (on file with the authors).

<sup>62</sup> See GAO, *supra* note 7, at 1 (observing that monies lost through elder financial abuse are rarely recovered).

<sup>63</sup> See Jason Karlawish & Dan G. Blazer, *Why Bankers, Financial Analysts and Doctors Need to Start Working Together*, FORBES (July 22, 2015, 9:10 AM), <https://www.forbes.com/sites/sciencebiz/2015/07/22/why-bankers-financial-analysts-and-doctors-need-to-start-working-together/#5f44ac245415> [https://perma.cc/Z2D6-FEWQ] (describing how problems with financial management are one of the earliest signs of cognitive decline and how bankers can play an important role by screening for and reporting suspicious transactions).

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impose mandatory policies that can better detect and stop elder exploitation.<sup>64</sup>

There are a number of practical alternatives that can be used by an older person to gain assistance with management of their finances. One alternative is to set up convenience accounts, which permit another person to administer an account without establishing co-ownership of the funds, as a joint account does.<sup>65</sup> Limits on withdrawal amounts or types of transactions are available at some banks and can guard against accounts being commandeered.<sup>66</sup> Automatic bill pay and money management programs can keep finances on track and eliminate the risk of double paying or missing a payment altogether.<sup>67</sup> However, the public financial management programs are often difficult to access and sometimes unreliable, and private programs may be costly. Another alternative is a debit card connected to an account with limited funds or a prepaid debit card that can provide for more stringent limits on both the amount and type of spending done.<sup>68</sup>

Beyond the measures to obtain assistance with financial management, there are a number of measures that can assist with preventing fraud. For example, securities brokerages must ask accountholders for a trusted contact for the accounts to be notified of suspicious activities.<sup>69</sup> In contrast, banks are not required to affirmatively ask for a trusted contact, but older adults may ask banks to designate a trusted contact and to set up alerts for withdrawals over a certain amount or other events on their accounts.<sup>70</sup> Third party monitoring systems such as Eversafe permit trusted parties to monitor financial accounts for irregularities in real time without the ability to access funds in the account.<sup>71</sup>

Older persons can also minimize the risk of phone and other scams by limiting unsolicited calls, emails, and direct mail through the National Do Not Call Registry, spam-blocking apps, and mail screening services.<sup>72</sup> Obtaining reports from credit bureaus on a frequent basis is advisable to

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<sup>64</sup> See, for example, LARRY SANTUCCI, FED. RESERVE BANK OF PHILA., CFI IN FOCUS: ADDRESSING THE FINANCIAL WELL-BEING OF OLDER ADULTS 9-10 (2018), <https://www.phil.frb.org/-/media/consumer-finance-institute/news/cfi-in-focus/addressing-the-financial-well-being-of-older-adults/addressing-the-financial-well-being-of-older-adults.pdf?la=en>, [<https://perma.cc/A5F5-X88Z>], for a fuller discussion of additional measures that could be employed to address elder financial exploitation.

<sup>65</sup> See, e.g., N.Y. Banking Law § 678.

<sup>66</sup> See CONSUMER FIN. PROT. BUREAU, RECOMMENDATIONS AND REPORT FOR FINANCIAL INSTITUTIONS ON PREVENTING AND RESPONDING TO ELDER FINANCIAL EXPLOITATION 51 (2016), [https://files.consumerfinance.gov/f/201603\\_cfpb\\_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf](https://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf) [<https://perma.cc/MH5C-MZK4>].

<sup>67</sup> *Id.* See also CONSUMER FIN. PROT. BUREAU, MONEY SMART FOR OLDER ADULTS 63, 64, 68 (2018), [https://www.consumerfinance.gov/documents/2954/201703\\_cfpb\\_money-smart-for-older-adults-resource-guide.pdf](https://www.consumerfinance.gov/documents/2954/201703_cfpb_money-smart-for-older-adults-resource-guide.pdf) [<https://perma.cc/LC8F-5EB8>] (recommending automatic bill pay systems as one way to guard finances).

<sup>68</sup> Paula Span, *Better than a Credit Card*, N.Y. TIMES, Feb. 21, 2014, <https://newoldage.blogs.nytimes.com/2014/02/21/a-better-credit-card/> [<https://perma.cc/D6A6-7HEW>].

<sup>69</sup> FINRA, RULE 4512 (2019).

<sup>70</sup> JEANNE RENTEZELAS & LARRY SANTUCCI, FED. RESERVE BANK OF PHILA, *Combining Forces to Combat Elder Financial Victimization: How Consumers Can Avoid the Financial Pitfalls of Cognitive Aging and What They Should Be Asking Their Financial Institutions* (June 2018) 8, 15–16, <https://ideas.repec.org/p/fip/fedpdp/18-02.html> [<https://perma.cc/5W9G-PBN9>].

<sup>71</sup> See *What We Do*, EVERSAFE, <http://www.eversafe.com> [<https://perma.cc/XX7N-6EER>] (last visited Aug. 4, 2020).

<sup>72</sup> See *Stopping Unsolicited Mail, Phone Calls, and Email*, FED. TRADE COMM'N (Mar. 2011), <https://www>.

ensure there are no unauthorized entries and to guard against identity theft.<sup>73</sup> And finally, alerts from real property registries can help guard against deed theft and other fraudulent real estate schemes by informing a homeowner or their designated person of any changes in title.<sup>74</sup>

More important than these individual actions are measures by financial institutions and government agencies to address elder financial exploitation as a widespread systemic problem rather than something that individuals have to bear the entire burden of guarding against. First, financial institutions can place temporary holds on disbursements from an account when activity is suspicious, allowing time for a trusted person or law enforcement to intervene and assist an older person before their life savings are diminished. At least six states have laws that immunize banks from liability for placing holds based on a reasonable suspicion of exploitation, provided they report the suspected exploitation to designated authorities, though there is no federal law providing immunity for holds.<sup>75</sup> Securities broker-dealers also enjoy immunity from liability for imposing temporary holds based on suspicion of exploitation under a national rule.<sup>76</sup> Notably, none of these rules mandate a temporary hold or subject any financial institutions to liability for failing to impose a hold when warranted.

Second, reporting of suspicious activity by financial institutions has the potential to play a role in identifying fraudulent activities. The Department of the Treasury requires financial institutions to file a “Suspicious Activity Report” when transactions appear suspicious.<sup>77</sup> Red flags for elder

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consumer.ftc.gov/articles/0262-stopping-unsolicited-mail-phone-calls-and-email [https://perma.cc/H9NR-F9CP] (discussing ways to reduce solicitations, including the Federal Trade Commission’s Do Not Call Registry permitting consumers to register their number to block certain telemarketing calls (https://www.donotcall.gov), the Direct Mail Marketing Association’s opt-out service (www.DMAchoice.org), and the service offered by major credit bureaus to reduce unsolicited offers of insurance and credit cards (OptOutPrescreen.com)).

<sup>73</sup> See, e.g., N.Y. STATE ATT’Y GEN., SMART SENIORS 8-9 (last visited Aug. 4, 2020), https://ag.ny.gov/sites/default/files/smart\_seniors.pdf [https://perma.cc/UJ8N-C9TB].

<sup>74</sup> For example, the New York City Department of Finance has created a recorded document notification program where a property owner receives (or designates another to receive) electronic notifications when a deed or mortgage-related document is recorded that may affect their interest in the real property. See N.Y.C. DEP’T OF FIN., NOTICE OF RECORDED DOCUMENT PROGRAM DESCRIPTION, https://www1.nyc.gov/assets/finance/downloads/pdf/recorded\_documents/notice\_of\_rec\_descrip.pdf (last visited Aug. 4, 2020) [https://perma.cc/72N4-6GM8].

<sup>75</sup> CONSUMER FIN. PROT. BUREAU, REPORTING OF SUSPECTED ELDER FINANCIAL EXPLOITATION BY FINANCIAL INSTITUTIONS 6 (July 2019), https://files.consumerfinance.gov/f/documents/cfpb\_suspected-elder-financial-exploitation-financial-institutions\_report.pdf [https://perma.cc/77X7-PALP].

<sup>76</sup> Temporary holds on securities accounts are permitted by the Financial Institution Regulatory Authority (“FINRA”), which regulates broker-dealers. FINRA, RULE 2165 (2018). Under Rule 2165 (Financial Exploitation of Specified Adults), after the temporary hold is placed, the broker-dealer must provide notification of the hold and its reason to the trusted person and all other parties authorized to transact business on the account unless there is a suspicion that one of these parties was involved with the financial exploitation.

<sup>77</sup> See, e.g., 31 C.F.R. § 1020.320 (requiring reporting of transactions involving funds of \$5,000 or more where the bank knows, suspects, or has reason to believe that “[t]he transaction has no business or apparent lawful purpose or is not the sort in which the particular customer would normally be expected to engage, and the bank knows of no reasonable explanation for the transaction after examining the available facts, including the background and possible purpose of the transaction”); DEP’T OF THE TREASURY FIN. CRIMES ENF’T NETWORK, ADVISORY TO FINANCIAL INSTITUTIONS ON FILING SUSPICIOUS ACTIVITY REPORTS REGARDING ELDER FINANCIAL EXPLOITATION (2011), https://www.fincen.gov/sites/default/files/advisory/fin-2011-a003.pdf [https://perma.cc/V67F-F6TS].

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exploitation include out of the ordinary transactions, sudden increases in withdrawals, or transfers and unusual involvement by a caregiver in banking transactions.<sup>78</sup> In addition, many states require financial institutions to report suspected exploitation to state and/or local law enforcement or Adult Protective Services authorities.<sup>79</sup> Responding to concerns from financial institutions that they could violate customers' privacy rights by making such reports, recent federal legislation called the Senior Safe Act immunizes financial institutions who have trained employees to identify elder exploitation from liability when they make reports to law enforcement or Adult Protective Services.<sup>80</sup>

It is significant that these measures all stop short of requiring banks to take more aggressive action to prevent fraud perpetrated against older account holders. While credit card companies are incentivized to detect fraud due to the prospect of bills going unpaid, there is not a similar incentive structure for unauthorized transactions on checking and savings accounts. The customer, not the bank, is likely to bear the losses to their accounts from unauthorized withdrawals. In addition, the federal Fair Credit Billing Act limits consumer liability for unauthorized use of a credit card to \$50 if improper charges are reported within sixty days.<sup>81</sup> There is not a similar federal law for banking transactions. Although under the Uniform Commercial Code, banks are in theory strictly liable for forged checks, banks have limited their exposure for forgeries by inserting provisions such as increasingly short periods of time for the accountholder to report the forgery in their deposit agreements—in some cases as little as 14 days after receiving their statements—and courts have upheld these provisions.<sup>82</sup> Out of the ordinary cash withdrawals on a checking or savings account should trigger the filing of a suspicious activity report (SAR). However, the SAR may not be investigated and the failure to file a SAR or otherwise monitor for fraud does not give rise to a private right of action for an accountholder who has suffered losses.<sup>83</sup>

More vigorous fraud prevention measures, if implemented widely and enforced by regulators when required, could put a dent in elder financial exploitation before it happens, or at least at an early stage when the damage is less severe and there are assets to save. Such measures might have helped 84-year old Ms. P, a longtime customer of a large commercial bank, who found her bank to be unresponsive when she withdrew almost all her life savings through a “grandparent scam.” The perpetrators called Ms. P claiming to be the lawyer for her recently arrested grandson who needed immediate cash to get out of jail and pay for ongoing legal representation in the criminal matter. Over the course of one week, these perpetrators arranged to have Ms. P driven to her bank several times until she had withdrawn and paid them a total of \$93,000. Despite Ms. P's atypical withdrawal of tens of thousands of dollars on multiple occasions over a seven-day period, no one from the bank ever questioned the withdrawals, sent any alerts, or took any visible action to protect her assets. In addition, when the scam was discovered, the bank refused to take any financial responsibility for Ms.

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<sup>78</sup> *Id.*

<sup>79</sup> CONSUMER FIN. PROT. BUREAU, *supra* note 66, at 23.

<sup>80</sup> 12 U.S.C. § 3423.

<sup>81</sup> 15 U.S.C. § 1666. There is a similar limit on consumer liability for “unauthorized electronic transfers” such as those made through debit cards or via an ATM withdrawal under the Electronic Funds Transfer Act. 15 U.S.C. § 1693g(a).

<sup>82</sup> *See, e.g.,* Clemente Bros. Contracting Corp. v. Hafner-Milazzo, 14 N.E.3d 367, 373 (2014).

<sup>83</sup> *See In re Agape Litig.*, 681 F. Supp. 2d 352, 360 (E.D.N.Y. 2010) (noting that Bank Secrecy Act did not create private right of action or impose duty of care in fraud monitoring programs).

P's financial loss, nor would the bank agree to re-evaluate its practices or train its employees so that other depositors might avoid similar financial exploitation in the future. Until all financial institutions are required to do more in the face of extreme and atypical pattern of withdrawals, some older adults will suffer significant and avoidable financial losses.

### *B. Statutory and Common Law Measures to Redress Elder Financial Abuse*

The statutory and common law remedies discussed below provide mechanisms for ending and redressing exploitative or abusive financial transactions without infringing on the older person's autonomy or violating the legal and moral imperatives to avoid guardianship when there are less restrictive alternatives.<sup>84</sup> These remedies are appropriate when the older adult wishes to end or redress the financial exploitation. If the older adult is ambivalent about proceeding against the wrongdoer, the use of these remedies is more complicated. In such cases, third-party interventions may be legally permissible, but an advocate has to tread carefully so as not to act contrary to the older adult's wishes and/or deny them the dignity of a chosen risk.<sup>85</sup>

#### 1. State Elder Abuse Laws

Nearly all states have laws creating an independent civil claim for elder financial exploitation, though the various state laws differ in scope and available remedies.<sup>86</sup> These statutes are designed to specifically address questionable transactions with an individual of a specified age (usually 60 or 65),<sup>87</sup> or any person who is deemed to be "vulnerable" or to have "diminished capacity" as defined in the

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<sup>84</sup> State guardianship laws uniformly require that guardianship be imposed only when there are no available less restrictive alternatives. In addition, because guardianship infringes on liberty interests and fundamental rights, there are constitutional implications when guardianship is imposed despite the availability of less restrictive alternatives. *See* Leslie Salzman, *Using Domestic Law to Move Toward a Recognition of Universal Legal Capacity for Persons with Disabilities*, 39 CARDOZO L. REV. 521, 538–44 (2017).

<sup>85</sup> MODEL RULES OF PRO. CONDUCT r. 1.14 (AM. BAR ASS'N 2020). *Cf.* UGCOPAA, cmt. to §§ 503(d), (cautioning about the use of guardianship in a way that limits the older adult's contact with others and the older adult's liberty, "freedom of association and choices.").

<sup>86</sup> *See generally* U.S. DEP'T OF JUST., ELDER ABUSE AND ELDER FINANCIAL EXPLOITATION STATUTES, [https://www.justice.gov/elderjustice/prosecutors/statutes?field\\_statute\\_state=GA&field\\_statute\\_category=All](https://www.justice.gov/elderjustice/prosecutors/statutes?field_statute_state=GA&field_statute_category=All) [<https://perma.cc/5RZU-PNTM>] (listing state statutes regarding elder abuse and financial exploitation); *State Resources*, NAT'L CTR. ON ELDER ABUSE, <https://ncea.acl.gov/Resources/State.aspx> [<https://perma.cc/3S5U-7CNB>] (last visited Aug. 11, 2020) (listing resources for reporting elder abuse and financial exploitation by state). New York is an outlier in that it has not enacted an elder abuse statute providing a private civil remedy for elder financial exploitation. *See, e.g.*, *Huggins v. Randolph*, 45 Misc. 3d 521, 526 (Civ. Ct., Kings County 2014) (noting that New York lacks an independent civil cause of action for elder abuse). In addition to providing a civil claim for elder financial exploitation, some states also require certain actors to report elder financial exploitation. *See, e.g.*, CAL. WELF. & INST. CODE §§ 15630-15631, and some state laws provide penalties and/or a private right of action for the failure to report. *See, e.g.*, WIS. STAT. ANN. § 46.90. The propriety and efficacy of mandatory reporting requirements is beyond the scope of this report.

<sup>87</sup> *See, e.g.*, CONN. GEN. STAT. ANN. § 17b-450(1) (60 and older); GA. CODE ANN. § 30-5-3(6) (65 and older). The use of an age-specific rule simplifies the proof required to establish a claim but may also promote ageism.

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state law.<sup>88</sup> The best of these elder abuse laws broadly reach any fraudulent or wrongful taking or possession of the older person's real or personal property in a way that harms the older person.<sup>89</sup> They also allow claims against any person who has engaged in the prohibited conduct, regardless of the nature of the perpetrator's relationship to the older person.<sup>90</sup> The most effective laws permit actions not just by the older adult but also by other interested third parties (such as friends or family members) so that actions can proceed even when the older adult has such severe cognitive impairment that they are unable to provide counsel with necessary direction in the litigation,<sup>91</sup> and they empower state attorneys general to investigate and bring a civil action on behalf of the state seeking injunctive and monetary relief against any person who financially exploits an older adult.<sup>92</sup> In addition, well-crafted elder abuse statutes provide generous potential relief including enhanced

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<sup>88</sup> See, e.g., FLA. STAT. ANN. § 415.102(28) (covering an adult "whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging"); ARIZ. REV. STAT. ANN. § 46-451(A)(10) (covering a person "unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment").

<sup>89</sup> See, e.g., CAL. WELF. & INST. CODE § 15610.30 (prohibiting the taking, obtaining or retention of "real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud or both," or the taking or obtaining of assets when "the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult"); OR. REV. STAT. ANN. 124.110 (prohibiting the wrongful withholding or taking of money or property of a covered person). Some state laws require not only proof that the challenged transaction harmed the older adult, but also that it benefitted a third party. See, e.g., FLA. STAT. ANN. § 415.102(8)(a)(1)-(2) (prohibiting the "obtain[ing] or us[ing], or endeavor[ing] to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property *for the benefit of someone other than the vulnerable adult*") (emphasis added).

<sup>90</sup> See, e.g., OR. REV. STAT. ANN. 124.110 (prohibiting the wrongful taking or appropriating of a protected person's money or property "without regard to whether the person taking or appropriating the money or property has a fiduciary relationship with the vulnerable person"). In contrast, some state laws only prohibit financial exploitation by a professional care provider, caretaker, or fiduciary of the older adult, or only one who knows or should know that the older adult lacks the capacity to consent. See, e.g., MISS. CODE ANN. § 11-7-165(1) (addressing "[misuse] of a position of trust or confidential relationship with the owner"); ARIZ. REV. STAT. ANN. § 46-456(A), (J)(5) (prohibiting certain conduct by a person who has assumed a duty to provide care to the older adult, a joint tenant or a tenant in common with the older adult, or a person in a fiduciary relationship with the older adult); WASH. REV. CODE ANN. § 74.34.200 (prohibiting financial exploitation by a "corporation, trust, unincorporated association, partnership, administrator, employee, agent, officer, partner, or director of a facility, or of a home health, hospice, or home care agency . . . or an individual provider").

<sup>91</sup> Some states freely allow third party actions, other states permit third party actions only with consent of the older person or court authorization. See, e.g., ARIZ. REV. STAT. ANN. § 46-456(G) (allowing actions by the older adult or, with court permission, an interested third party); FLA. STAT. ANN. § 415.1111 (allowing actions by an older adult or third party or organization with the older adult's consent); WIS. STAT. ANN. § 813.123 (permitting petition to enjoin elder financial exploiter to be brought by any person, upon notice to the *person-at-risk*, and court appointment of a guardian ad litem to assess whether issuance of a restraining order would be in the best interest of the *person-at-risk*). When an action is brought by third parties, some courts will scrutinize the elder abuse action to be sure that it seeks recovery for the older person's benefit rather than that of the third party. See, e.g., *Martin v. Wood*, 648 Fed. App'x. 911 (11th Cir. 2016) (dismissing action brought by older adult's son where damages sought would benefit the son rather than his mother).

<sup>92</sup> See, e.g., OR. REV. STAT. ANN. §§ 124.110, 124.125 (authorizing actions by Attorney General, the Department of Human Services or District Attorney for elder financial exploitation).

compensatory damages, punitive damages, reasonable attorney’s fees, expert fees, and costs;<sup>93</sup> provide the court with broad injunctive powers to direct the return of misappropriated property and make the older adult whole, along with the power to issue protective orders when necessary to protect the older adult from further financial exploitation;<sup>94</sup> and provide a generous statute of limitations allowing a plaintiff to bring an action within several years of the date they discover, or through the exercise of reasonable diligence should have discovered, the facts constituting the financial exploitation.<sup>95</sup>

These elder abuse laws may offer an effective alternative to guardianship for addressing elder financial exploitation and may also be preferable to the common law actions discussed in the following subsection insofar as they provide broad coverage of most improper financial transactions with older persons and allow for injunctive and significant monetary relief and attorneys’ fees, with liberal procedural requirements, including limitations periods that run from discovery. Laws providing civil claims for financial exploitation based on a defined status such as age or “vulnerability/diminished capacity” have some potential to reinforce stereotypes. But because these laws address the targeting of older adults for exploitation, we believe they are important tools in combatting such exploitation.

## 2. Common Law Claims

The common law also provides numerous alternatives to guardianship to address elder financial exploitation, including actions for breach of contract, breach of fiduciary duty, undue influence, fraud, conversion, restitution, and constructive trust, to name a few.<sup>96</sup> These claims can be brought affirmatively for the older adult’s benefit but are often used defensively to address a problematic situation arising after financial exploitation. For example: an older adult may have been defrauded of property and the new owner seeks their eviction from their home; or the older adult is sued in a foreclosure proceeding after someone fraudulently obtained a mortgage on the older adult’s home or tricked the older adult into taking out a predatory mortgage on the home; or the older adult may have been persuaded to enter into an unfair consumer contract and the vendor sues the older adult for an unpaid balance. In such cases, the older adult might assert one of the claims discussed below as a defense in a legal proceeding brought against them.

<sup>93</sup> See, e.g., CAL. WELF. & INST. CODE § 15657.5 (directing courts to award “reasonable attorney’s fees and costs” “in addition to compensatory damages and all other remedies otherwise provided by law). Some state statutes also provide enhanced damages if the plaintiff can show that the defendant’s conduct rises to the level prohibited by state criminal laws. See, e.g., FLA. STAT. ANN. § 772.11(1) (allowing actions for violation of certain state statutes to result in “threefold the actual damages sustained”); 720 ILL. COMP. STAT. ANN. 5/17-56(g) (establishing civil liability for elder financial exploitation with potential damages “of treble the amount of the value of the property obtained, plus reasonable attorney fees and court costs”).

<sup>94</sup> See, e.g., OR. REV. STAT. ANN. § 124.120 (authority to issue protective orders, orders of attachment, and injunctive orders directing the return of any misappropriated property); CONN. GEN. STAT. ANN. § 17b-462(b) (empowering court to enjoin defendant from “transferring, depleting or otherwise alienating or diminishing any funds, assets or property”); Riley v. Riley, 898 N.W.2d 202 (Iowa Ct. App. 2017) (providing in action under elder abuse statute that son provide full accounting and return of all of his father’s properties and monies after improperly encouraging these transactions).

<sup>95</sup> See, e.g., CAL. WELF. & INST. CODE § 15657.7 (West 2009) (four-year statute of limitations); OR. REV. STAT. ANN. § 124.130 (West 1995) (seven-year statute of limitations).

<sup>96</sup> There are challenges to bringing these cases. See discussion *infra* Section II(B)(3). As noted there, these same challenges would apply when attempting to address the elder financial exploitation in the context of a guardianship proceeding.



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Courts hearing these claims have expansive remedial powers, from the general power of state trial courts to order equitable or injunctive relief<sup>97</sup> to the powers to award compensatory,<sup>98</sup> and in appropriate cases, punitive damages.<sup>99</sup> Thus, an older adult who can prove a common law claim based on financial exploitation can be restored to their position prior to the challenged improper act or acts.

When financial exploitation occurs because another party refuses to meet its obligations under an existing contract, the older person can sue for breach of contract and recover damages or obtain performance on the contract.<sup>100</sup> In other circumstances, an older adult may need to defend against an unfair or abusive contract. In such a case, the older adult may seek to void a contract or transaction and seek related pecuniary damages under a variety of legal theories. For example, an older adult might assert a *lack of contractual capacity* where they did not have capability or the requisite supports to act reasonably and make a knowing and voluntary decision in connection with a contract, and the other party was, or should have been, aware of these circumstances.<sup>101</sup> Or, where the contract or contractual provision at issue is deemed unconscionable and unenforceable because it is so one-sided and grossly unreasonable (based on existing circumstances and commercial conditions) that it suggests an “absence of meaningful choice on the part of one of the parties,” the contract can be voided.<sup>102</sup> Similarly, if the older adult can establish that the contract was obtained through fraud, i.e., that it was based on (1) a material false statement or omission, (2) made with knowledge of its falsity, (3) with an intent to defraud, and (4) reasonable reliance on the statement or omission (5) that causes damage to the individual,<sup>103</sup> that contract would not be enforced by the court. In addition, the court will void an unfavorable contract or transaction that an older adult entered into due to coercion or duress by someone with superior power.<sup>104</sup>

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<sup>97</sup> See, e.g., N.Y. CONST., art. VI, § 7(a). There is also a long-standing equitable principle of “forfeiture by wrongdoing,” i.e., that no one should be permitted to profit from their own fraud or wrongdoing. *Riggs v. Palmer*, 115 N.Y. 506, 511 (1889).

<sup>98</sup> See 36 N.Y. JUR. 2D DAMAGES § 6 (Courts will order defendant to repay plaintiff for the actual losses resulting from defendant’s improper or unlawful act).

<sup>99</sup> To award punitive damages the court must find that the defendant acted with extreme malice or gross recklessness without regard to the plaintiff’s rights. See, e.g., *Soucy v. Greyhound Corp.*, 27 A.D.2d 112, 113 (3d Dep’t 1967); 36 N.Y. JUR. DAMAGES § 185. Some courts will only award punitive damages where there is proof of an egregious tortious wrong that was also part of a pattern of similar conduct directed at the general public. See, e.g., *Rocanova v. Equitable Life Assurance Soc’y of U.S.*, 83 N.Y.2d 603 (1994).

<sup>100</sup> See, e.g., *Fink v. Friedman*, 78 Misc. 2d 429, 434–35 (Sup. Ct., Nassau County 1974) (rescission of contract permitted when breach goes to essence of contract). See generally *First Inv’rs. Corp. v. Liberty Mut. Ins. Co.*, 152 F.3d 162, 168 (2d Cir. 1998) (setting out elements of claim); *V.S. Int’l, S.A. v. Boyden World Corp.*, 90 Civ. 4091 (PKL), 1993 U.S. Dist. LEXIS 2586, at \*15–39 (S.D.N.Y. Mar. 4, 1993) (recognizing right to damages based on actual pecuniary losses).

<sup>101</sup> See, e.g., *Ortelere v. Teachers’ Ret. Bd. of City of N.Y.*, 25 N.Y.2d 196, 204 (1969); *In re Johanna C.*, 34 A.D.3d 465, 466 (2d Dep’t 2006) (noting that court can void a transaction by a person unable to understand the nature and consequences of their actions). For the importance of considering contractual capacity as one’s “capacity with support,” and remaining consistent with the injunction of the U.N. Convention on the Rights of Persons with Disabilities, Art. 12, to honor the legal capacity of persons with disabilities “on an equal basis with others in all aspects of life,” see GLEN, *supra* note 5, at 90–93.

<sup>102</sup> *King v. Fox*, 7 N.Y.3d 181, 191 (2006); see also U.C.C. § 2-302 (AM. LAW INST. & UNIF. LAW COMM’N 2010).

<sup>103</sup> See, e.g., *Joseph v. Mobileye, N.V.*, 225 F. Supp. 3d 210, 218 (S.D.N.Y. 2016).

<sup>104</sup> See, e.g., *In re Mason*, 300 B.R. 160, 165 (D. Conn. Bankr. 2003); *Lafferty v. Rhudy*, 878 S.W.2d 833, 837 (Mo. Ct.

An older person may also have a claim for conversion when someone assumes unauthorized control over their property<sup>105</sup> entitling them to damages or return of the property. Even when the older person cannot demonstrate that the person who acquired their money or property took it intentionally, there might be claims under the theories of unjust enrichment<sup>106</sup> or money had and received<sup>107</sup> when the recipient benefitted and it would be unfair or inequitable to permit the recipient to retain the subject money or property.

Where the older person seeks to challenge financial exploitation by a person with whom they have a trusted or special relationship, they can avail themselves of additional common law remedies. Most obvious is a claim for breach of fiduciary duty entitling the injured principal to seek an accounting of lost funds and recover damages for the consequential losses from that breach.<sup>108</sup> The theory of *constructive trust* permits an older adult to recover property that was transferred to or obtained by a trusted individual based on a fraudulent promise, threat, or abuse of confidence when the trusted person was unjustly enriched by the transfer.<sup>109</sup> In addition, an older adult could seek to void a transaction that resulted from undue influence, i.e., the exertion of significant persuasion by a trusted or more powerful person that effectively subverted the older adult's mind and caused them to enter into a transaction they would not have entered into absent that influence.<sup>110</sup> Finally, a court can void a transaction between parties in a relationship of trust and confidence based on a claim of constructive fraud where the defendant took advantage of that special relationship through a misrepresentation of material fact that the complaining party relied on to their detriment.<sup>111</sup> Claims of constructive fraud have the advantage of shifting the burden of proof to the defendant "to prove the transaction fair and free from undue influence,"<sup>112</sup> that is, the transaction will be deemed to be void

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App. 1994) (citations omitted).

<sup>105</sup> See, e.g., *Colavito v. New York Organ Donor Network, Inc.*, 8 N.Y.3d 43 (2006).

<sup>106</sup> In New York, for example, the elements of a claim of unjust enrichment are "(1) that the defendant benefitted; 2) at the plaintiff's expense; and 3) that 'equity and good conscience' require restitution." *Kaye v. Grossman*, 202 F. 3d 611, 616 (2d Cir. 2000) (citation omitted).

<sup>107</sup> The essential elements of a claim for money had and received under New York law are that "(1) defendant received money belonging to plaintiff; (2) defendant benefitted from the receipt of money; and (3) under principles of equity and good conscience, defendant should not be permitted to keep the money." *Aaron Ferer & Sons, Ltd. v. Chase Manhattan Bank, Nat'l Ass'n*, 731 F.2d 112, 125 (2d Cir. 1984).

<sup>108</sup> See RESTATEMENT (SECOND) OF TORTS § 874 (Am. Law Inst. 1979).

<sup>109</sup> See, e.g., *Martha Graham Sch. and Dance Found., Inc. v. Martha Graham Ctr. of Contemporary Dance, Inc.*, 380 F.3d 624, 646 (2d Cir. 2004); 106 N.Y. JUR. 2D TRUSTS § 162.

<sup>110</sup> See RESTATEMENT (SECOND) OF CONTRACTS § 177 (Am. Law Inst. 1981) (defining undue influence as the "unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.>").

<sup>111</sup> A defendant can be liable to a plaintiff for constructive fraud if there was: (1) a false misrepresentation; (2) in reference to a material fact; (3) for the purpose of inducing the other party to rely on such representation; 4) on which the other party did justifiably rely; (5) which resulted in damages or injury; and (6) a fiduciary relationship between the parties. 37 C.J.S. Fraud § 14 (Sept. 2020).

<sup>112</sup> See, e.g., *Aoki v. Aoki*, 27 N.Y.3d 32, 39 (2016) (noting "where a fiduciary relationship exists between the parties, the law of constructive fraud will operate to shift the burden to the party seeking to uphold the transaction to demonstrate the absence of fraud"); *In re Greiff*, 92 N.Y.2d 341, 345 (1998); *Gordon v. Bialystoker Ctr. & Bikur Cholim, Inc.*, 45 N.Y.2d 692,

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unless the stronger party can demonstrate the *absence* of fraud, mistake or undue influence and “that all was fair, open, voluntary and well understood.”<sup>113</sup>

In the case of Ms. J, constructive trust provided the remedy for financial exploitation by a spouse. Ms. J. lived in the same New York City apartment for forty years. Right before a late-in-life marriage, she arranged to buy the apartment with her fiancé for a below-market price as the building was converting to condominiums. Some years later, when they were living apart, her husband transferred the title to the apartment to his children without her knowledge. Those children later attempted to evict Ms. J from her home. Ms. J brought a lawsuit to stop the eviction and had a constructive trust declared in the apartment in her favor. The court granted a preliminary injunction ordering the stepchildren to stop all attempts to evict Ms. J, and she was ultimately able to settle the case and receive compensation for her interest in the apartment.

### 3. Consumer Protection Laws

In addition to common law claims and state elder abuse statutes, consumer protection laws may provide further alternatives for addressing or preventing further financial exploitation through private claims or enforcement actions by the state attorney general or other designated governmental body. These laws may provide monetary and injunctive relief to older adults who have been subjected to financial exploitation as a result of unfair or deceptive business practices,<sup>114</sup> improper debt collection practices,<sup>115</sup> fraudulent credit repair organization practices,<sup>116</sup> or the use of automated telephone scam practices.<sup>117</sup> Federal law grants consumers the right to dispute unauthorized debit

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698-99 (1978) (observing that in cases of constructive fraud the burden is shifted to the “stronger party . . . to show affirmatively that no deception was practiced. . . .”). *But see, e.g.*, Connelly v. Conneely, 4 Misc. 3d 1019(A), (Sup. Ct., Kings County, 2004) (collecting cases that suggest the inference of fraud or undue influence may not apply when the confidential relationship is with a close relative).

<sup>113</sup> Gordon v. Bialystoker Ctr. & Bikur Cholim, Inc., 385 N.E.2d 285, 289 (N.Y. 1978).

<sup>114</sup> Most states have Unfair and Deceptive Practices (UDAP) laws that provide a private right of action to challenge unfair or misleading trade practices and also empower the State Attorney General to bring an action for damages and injunctive relief for a violation of the state UDAP laws. The various state laws vary in scope of coverage, elements of the claim, and available remedies. *See, e.g.*, CAL. BUS. & PROF. CODE §§ 17000–17210 (West 2017); CAL. CIV. CODE §§ 1750-1784 (West 2019); N.Y. GEN. BUS. LAW § 349 (McKinney 2020). Generally, UDAP laws provide a mechanism for addressing certain acts perpetrated by strangers such as illicit or unscrupulous lending schemes, fraudulent health remedies, confidence games, investment scams, and illicit telemarketing that are deemed to cause some harm to the general public as well as to the individual consumer.

<sup>115</sup> For example, the Fair Debt Collection Practices Act (FDCPA), 15 U.S.C. §§ 1692-1692p (2018), requires that third party debt collectors provide timely and informative communications concerning the origins and details of the debts they are seeking to collect and prohibits misleading or harassing communications in relation to the collection of a debt. The FDCPA creates a private right to sue debt collectors for injunctive relief, limited damages and attorney’s fees, and vests the Federal Trade Commission (FTC) with authority to enforce compliance with the law.

<sup>116</sup> For example, the Credit Repair Organizations Act (CROA), 15 U.S.C. §§ 1679-1679j (2018), provides a private right of action against a credit repair organization that engages in deceptive or unjust advertisements or practices, and provides for recovery of actual damages, uncapped punitive damages (where appropriate) and fees and costs and vests the FTC with administrative enforcement authority.

<sup>117</sup> The Telephone Consumer Protection Act of 1991 (TCPA), 47 U.S.C. § 227 (2018), provides a private right of

card charges, electronic transfers of funds, and credit card charges.<sup>118</sup>

Many state laws empower law enforcement officials to investigate and pursue claims against the perpetrators of elder financial abuse. Some states criminalize elder financial exploitation by any party,<sup>119</sup> while some states do so only when the perpetrator stands in a position of trust, care, or confidence with the older adult.<sup>120</sup>

Many state prosecutors' offices have specialized units tasked with investigating and prosecuting elder exploitation crimes, both personal and financial. Despite the existence of these units, some prosecutors remain reluctant to pursue such a potential crime for reasons including the limited resources committed to these types of cases, the notion that this should be a civil, not a criminal matter, and the challenge of proving exploitation when the older victim has physical or cognitive limitations.<sup>121</sup> As a result, some prosecutors may still be unwilling to pursue such cases unless they involve very flagrant facts and/or significant losses.<sup>122</sup>

There are limits to the criminal prosecution of financial exploitation, however. First, the older adult may not want to involve the alleged perpetrator in the criminal legal process. In addition, a criminal prosecution may not provide the relief that the older adult needs. For example, a district attorney's office may successfully prosecute the perpetrator for deed fraud committed against an older person. But the prosecution does not necessarily restore title to the victim, who still will need civil legal assistance to unravel the mess created by the crime.

### III. USING LESS RESTRICTIVE ALTERNATIVES: MITIGATING THE CHALLENGES

By using these alternative options for redressing elder financial exploitation, we adhere more closely to the requirement of seeking less restrictive alternatives and in the process preserve the older adult's rights, dignity, and autonomy. At the same time, no one suggests that these alternatives are quick and easy. The recovery of monies and property improperly taken from an older adult is a time-consuming and often expensive process, whether recovery is sought in the context of a guardianship

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action for damages and injunctive relief for automated telemarketing (by phone, fax or text) for commercial solicitation without the express consent of the receiving party, with enhanced damages for knowing and willful violations. The federal law does not protect older adults from unsolicited commercial calls made by actual persons.

<sup>118</sup> See Fair Credit Billing Act, 15 U.S.C. §§ 1666–1666j (2018); Electronic Funds Transfer Act, 15 U.S.C. §§ 1693–1693r (2018).

<sup>119</sup> See, e.g., MINN. STAT. § 609.2335 (2019) (crime of financial exploitation of vulnerable adult).

<sup>120</sup> See, e.g., CAL. WELF. & INST. CODE § 15656(c)-(d) (West 2018) (creating criminal penalties for theft or embezzlement of an older adult's monies or property by a caretaker or person in a relationship of trust with the older adult); 720 ILL. COMP. STAT. 5/17-56 (2020) (criminalizing financial exploitation by one who stands in a position of trust or confidence with the older adult).

<sup>121</sup> See BRENDA K. UEKERT ET AL., NAT'L CTR. FOR STATE CTS., PROSECUTING ELDER ABUSE CASES: BASIC TOOLS AND STRATEGIES 29, 31-32 (2012), <https://bja.ojp.gov/sites/g/files/xyckuh186/files/Publications/NCSC-Prosecuting-Elder-Abuse-Cases-Basic-Tools-and-Strategies.pdf> [perma.cc/MD9E-P5JU] (discussing general reluctance of prosecutors to bring these cases because of the challenges of successful prosecution, including testimonial limitations, jury sympathy for caregiver defendants, and implicit ageism among juries and courts).

<sup>122</sup> See GAO-17-33, *supra* note 36, at 24-25 (noting that the forensic analysis required for one of these cases can cost \$20,000 and prosecutors are often reluctant to bring a case that does not exceed a certain monetary threshold).

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or one of these alternative proceedings. Nevertheless, as this Section explains, many of the challenges presented by these alternative legal actions can be addressed or mitigated.

### *Recovering Lost Funds*

Whether an older adult seeks relief through statutory or common law remedies or seeks injunctive relief from the guardianship court, as noted above, recovery of lost assets may be impossible because the abuser has spent the stolen funds, sold the stolen property to an innocent purchaser or is judgment-proof by the time any proceeding is commenced. For this reason, the older person should move for preliminary relief to freeze accounts or prevent the transfer of property from the perpetrator to a third party.

### *Older Person's Concern for and/or Dependence on the Perpetrator of the Abuse*

In some number of cases the older adult may be unwilling to pursue an action because the older adult has affection or concern for the likely perpetrator or is dependent upon this person for financial, material or emotional support.<sup>123</sup>

### *Availability of Counsel*

Because of their cost and complexity, it may be difficult to secure either publicly funded or private counsel for one of these matters. The federal Older Americans Act provides some general legal services funding that could be used for these cases and some local and state governments provide additional funding.<sup>124</sup> The availability of attorney's fees under state elder abuse statutes may also encourage representation by counsel in these cases. Expansion of this funding would enable advocates to develop relevant expertise and alternative strategies for assisting older adults to remedy the consequences of past financial exploitation and reduce the possibility of recurrence in the future. Best practices call for the use of interdisciplinary teams of lawyers, forensic accountants, and social workers for these cases. Some jurisdictions fund enhanced multidisciplinary teams to attempt to

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<sup>123</sup> See generally *Campbell v. Thomas*, 897 N.Y.S.2d 460, 462 (N.Y. App. Div. 2010) (observing that financial exploitation is often perpetrated by a member of the victim's family). One study concluded that in approximately 65% of substantiated elder abuse cases, the alleged offender was an adult child, other family member, or spouse/intimate partner of the victim. PAMELA B. TEASTER ET AL., NAT'L CTR. ON ELDER ABUSE, THE 2004 SURVEY OF STATE ADULT PROTECTIVE SERVICES: ABUSE OF ADULTS 60 YEARS OF AGE AND OLDER 20 (2006), <http://www.napsa-now.org/wp-content/uploads/2012/09/2-14-06-FINAL-60+REPORT.pdf> [perma.cc/Q868-H8JC]; UEKERT ET AL., *supra* note 121, at 32.

<sup>124</sup> For example, in New York City, JASA/Legal Services for Elder Justice receives funding from the local Department for the Aging for its Legal/Social Work Elder Abuse Program (LEAP) that uses specially trained teams of attorneys and social workers to identify, eliminate, and prevent abuse, including bringing litigation on behalf of older adults who are subjected to financial exploitation. The program also trains professionals, gatekeepers, and community members in the prevention, identification and reduction of elder exploitation and abuse. See generally *Legal Services*, JASA, <https://www.jasa.org/services/legal> [perma.cc/8NFS-ZZBV].

resolve complex cases of elder financial exploitation.<sup>125</sup>

*Misperceptions About Capacity to Retain Counsel*

Lawyers may have ethical concerns about whether an older adult with cognitive limitations has the capacity to retain a lawyer and make critical decisions within the litigation, though these concerns are often exaggerated or misplaced. The Model Rules of Professional Conduct recognize that: “a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. . . .”<sup>126</sup>

In addition, concerns about an older person’s capacity to retain counsel can also be overcome by the fact that many state elder abuse statutes explicitly authorize actions by third parties.<sup>127</sup> Older persons with mild or moderate limitations in decision-making abilities who are incapable of adequately prosecuting or defending litigation can also proceed with the assistance of a guardian *ad litem*<sup>128</sup> and, as recognized by the comments to the Model Rules of Professional Conduct, the client may receive assistance from family members or other persons in lawyer-client discussions and deliberations.<sup>129</sup>

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<sup>125</sup> Counties in New York State, like other states such as California, use Enhanced Multidisciplinary Teams (“EMDT”) that may include relevant actors, such as, lawyers (including assistant district attorneys), doctors, social workers, bankers, forensic accountants, Adult Protective Services, and police officers, to develop responses to difficult cases of elder abuse, including elder financial exploitation. Providing the advantage of multiple perspectives and areas of expertise, these teams work collaboratively to craft individualized plans to address the exploitation and “improve the health and quality of life for older adults.” Although these teams continue to seek guardianships as one solution, this EMDT model can be used to craft creative solutions that would avoid guardianships. *See, e.g., Enhanced Multidisciplinary Teams: Overview*, NYC ELDER ABUSE CENTER, <https://nyceac.org/clinical-services/mdts> [perma.cc/HM6W-8LAH]; *Enhanced Multidisciplinary Team (E-MDT)*, CENTER FOR ELDER LAW & JUSTICE, <https://elderjusticenyc.org/services/elder-abuse-prevention-unit/emdt> [perma.cc/24UC-VDA6].

<sup>126</sup> MODEL RULES OF PRO. CONDUCT r. 1.14 cmt. [1] (AM. BAR ASS’N 2020) (discussing the obligation to endeavor to maintain a normal lawyer-client relationship with a client who may have diminished decision-making capacity).

<sup>127</sup> *See, e.g., ARIZ. REV. STAT. ANN. § 46-456(G)* (2013); *FLA. STAT. ANN. § 415.1051* (West 2010); *WIS. STAT. ANN. § 813.123* (West 2018).

<sup>128</sup> The guardian *ad litem* (GAL) should not be making ultimate decisions regarding the representation. Rather, a GAL has the more limited, but often critical role of assisting a party incapable of adequately prosecuting or defending an action with litigation-related tasks such as applying for necessary social services or benefits, conducting factual investigation to support the person’s potential claims or defenses, or providing the court with a report or recommendation. *See Jeanette Zelfhof, Andrew Goldberg & Hina Shamsi, Protecting the Rights of Litigants with Diminished Capacity in the New York City Housing Courts*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 733, 762–64 (2006). *See generally* Kevin M. Cremin et al., *Ensuring a Fair Hearing for Litigants with Mental Illnesses: The Law and Psychology of Capacity, Admissibility, and Credibility Assessments in Civil Proceedings*, 17 J. L. & POL’Y 455 (2009). Outside the U.S., disability rights advocates have proposed the idea of an “access to justice intermediary” to ensure a person with a disability’s full participation in all legal proceedings in which they are a party by mediating between the person and the legal system, acting only with the consent of the person with a disability. *See Access to Justice Intermediaries: Role and Basic Operating Principles*, BIZCHUT (August 23, 2020), <https://www.bizchut.org.il/post/access-to-justice-intermediaries-role-and-basic-operating-principles> [https://perma.cc/44CB-KQKV].

<sup>129</sup> MODEL RULES OF PRO. CONDUCT r. 1.14, cmt. (3) (AM. BAR ASS’N 2020) (observing that while the client can

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### *Potential Proof Problems*

In a proceeding to recover monies or property that have been misappropriated from an older adult with cognitive limitations, testimony may be needed from the older adult regarding the challenged transaction, their understanding of the transaction at the time, and the contemporaneous actions and statements of the alleged wrongdoer. There may be some challenges in obtaining this evidence. The first is whether an older adult who may be frail or have physical or mental impairments will be willing and able to prepare for and attend a deposition and court hearing.<sup>130</sup> Even if the older adult is currently willing and able to testify, “[g]iven that complicated cases of fraud and financial exploitation may take years to go to trial, it is possible that a particularly frail victim’s cognitive or physical health will decline to the point that he or she cannot testify.”<sup>131</sup> This problem can be partially mitigated by depositions to preserve testimony and the trial scheduling preference generally available for cases involving persons of advanced age.<sup>132</sup>

Yet, even if the older adult is able and willing to actively participate in the litigation, there is the question of whether they will be able to recall and recount past events in sufficient detail to provide coherent and persuasive testimony supporting the claims. The modern evidentiary rule is that all adults are presumed competent to testify, with any questions regarding a witness’s mental capacity presenting an issue of the weight to be given to that testimony, not its admissibility.<sup>133</sup> Courts now recognize that persons with dementia retain memory and can provide reliable statements and testimony until their dementia has progressed to its most advanced stage.<sup>134</sup> While not insurmountable, the victim’s ability to testify effectively is a potential issue in these cases.

Lawyers and prosecutors are overcoming some of these potential evidentiary obstacles when pursuing or prosecuting these cases. First, lawyers use testimony from sources other than the older person. Medical experts testify regarding the victim’s mental capacity at the time of the challenged financial transaction based on personal knowledge of the victim’s cognitive abilities or a review of their medical records.<sup>135</sup> Moreover, lawyers use testimony from other third parties about the older

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receive this assistance, it is the client, not their family or friends, who must direct the representation and whose interests must always be paramount).

<sup>130</sup> KELLY DEDEL JOHNSON, U.S. DEPT. OF JUST. OFF. OF CMTY. ORIENTED POLICING SERVS., FINANCIAL CRIMES AGAINST THE ELDERLY 10–11 (2004), <https://cops.usdoj.gov/ric/Publications/cops-w0768-pub.pdf> [perma.cc/EQK5-P3LP] (“[C]ognitively and physically impaired seniors may feel overwhelmed at the prospect of traveling to the police station, district attorney’s office or court.”).

<sup>131</sup> *Id.* at 11.

<sup>132</sup> *See, e.g.*, N.Y. C.P.L.R. § 3403(4). (MCKINNEY 2019); *see also* FLA. STAT. ANN. § 772.11(5) (West 2014) (providing opportunity to request an early trial date in elder abuse action).

<sup>133</sup> Under modern evidentiary rules, the mental competency of every witness is presumed, and the trier of fact will determine the credibility of any given testimony and the weight they wish to give it. Henry Weihofen, *Testimonial Competence and Credibility*, 34 GEO. WASH. L. REV. 53, 53 (1965).

<sup>134</sup> *See, e.g.*, *Boyce v. Fernandes*, 77 F.3d 946, 949 (7th Cir. 1996) (discussing reliability and competency of statements by older adults with dementia, noting that dementia is progressive . . . may not significantly impair memory in earlier stages and that even “until the terminal stage . . . the severity of the dementia varies from day to day, even from hour to hour”).

<sup>135</sup> This medical evidence can come from a treating physician or other medical expert who has reviewed the victim’s medical records. UEKERT ET AL., *supra* note 121, at 10-11.

person's capabilities near the time of the transaction at issue or statements made by the alleged abuser regarding the transaction or the victim's mental capacity at the relevant time.

For example, in a criminal prosecution against the son of philanthropist Brooke Astor and the son's lawyer, third-party testimony was successfully employed to prove fraud and conspiracy by defendants in securing a signature on the Second Codicil to Ms. Astor's will. The prosecutors used testimony from Ms. Astor's doctor regarding her limited cognitive abilities around the time of the challenged incident and prior statements by the defendant-son demonstrating that he believed his mother's memory had significantly deteriorated prior to the incident. In addition, one of Ms. Astor's nurses testified that she saw the defendants drag Ms. Astor into a room for the signing of the codicil, which Ms. Astor had not seen prior to the date of the execution. The nurse explained that Ms. Astor entered and then quickly left the room, immediately asking the nurse what had just happened. All of this testimony was critical in proving that the defendants conspired to steal from the estate.<sup>136</sup>

Second, lawyers use financial documents and forensic accounting testimony effectively to prove these claims.<sup>137</sup> Forensic evidence showing significant changes in a client's pattern of withdrawals and payments from an account is helpful as is any evidence from the alleged abuser's accounts showing unusual deposits at or around the time of the financial exploitation. Forensic evidence proved critical in obtaining relief in the case of Mr. V, a legally blind man in his 80s who also had mild cognitive limitations. He sought legal assistance because he believed that a bank manager who had been assisting him with check-writing and maintenance of his accounts and safe deposit box had stolen more than \$100,000 of his money—essentially his life's savings. He attempted to report the losses to the bank, but after an internal investigation, the bank declined to compensate him for his losses. After significant efforts to find a lawyer, he secured pro bono counsel who agreed to bring an action against the bank employee and the banking institution based on common law claims of fraud, money had and received, and breach of fiduciary duty.

Counsel had concerns because the events that led to Mr. V's losses seemed somewhat odd and there were no witnesses: it would be Mr. V's word against the bank employee's. Mr. V's recounting of events, while always consistent, involved a bizarre story in which the bank employee had instructed him to withdraw funds from his account to purchase bank checks and store those in his safe deposit box that she helped him access. Despite this weakness, he ultimately obtained a settlement that compensated him for part of the money that had been taken from him. How did he manage this? Mr. V's imperfect testimony was consistent with banking records and other relevant forensic evidence identified by his lawyer. Records from the bank employee's personal account revealed suspicious deposits at the time in question. In addition, the challenged transactions were suspicious enough on their own to suggest that there would be no routine reason for him to engage in those transactions.

#### *Delays in Discovery Can Bar Relief*

Another challenge in bringing these actions is that elder financial exploitation may occur for some time before the older person or anyone else notices and after time limits to seek recovery may

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<sup>136</sup> *Id.* at 24, 26.

<sup>137</sup> *Id.* at 14.



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have lapsed. For example, banking institutions have imposed short time limitations for challenging suspicious transactions such as forged checks in their deposit agreements with account holders—time limits that courts have upheld even though they shorten the statutory period provided for in the Uniform Commercial Code.<sup>138</sup> These time limits are especially harsh for victims of elder financial exploitation, who often do not discover the improper transactions until months later. Similarly, statutes of limitations for certain common law claims may bar recovery. Victims of exploitation may attempt to circumvent these limits by proceeding under state elder abuse statutes, many of which have time limits that run from the time of discovery of the financial exploitation, but these statutes may not cover all the instances in which financial institutions acted negligently in permitting abuse. Alternatively, advocates should seek legislative reform to permit a longer time period for filing challenges, running from the point of discovery, when a bank has engaged in negligent conduct with respect to an older person's assets within the bank's control.

### IV. ENSURING THE RIGHT TO LEGAL CAPACITY REMAINS FRONT AND CENTER

Even with the best prevention and most robust advocacy, as long as guardianship exists, guardianship petitions will be brought against older adults. What can be done to ensure that the right to legal capacity remains front and center when a court is asked to impose a guardianship as a remedy for elder financial exploitation and related losses?

It is critical to ensure that alternatives are truly considered and that a guardianship is never imposed without a judicial determination that the assistance of a surrogate decision-maker would work better than any potential alternative or no assistance at all. Consideration of less restrictive alternatives has long been required by many state guardianship laws,<sup>139</sup> but it is widely acknowledged that the provisions are underenforced in practice.<sup>140</sup> In an effort to tighten these requirements, the Uniform Guardianship Act requires that the guardianship petition explain which less restrictive alternatives were considered by the petitioner and why they were inadequate.<sup>141</sup> In addition, the guardianship court must make specific findings about why the person's needs cannot be met by a less restrictive alternative.<sup>142</sup>

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<sup>138</sup> Under the U.C.C., a bank is strictly liable for any forged checks paid out on an account. *See* N.Y. U.C.C. LAW § 4-401(1) (McKinney 1962) (establishing the inference that since banks may only charge for items that are properly payable, and forged checks are not properly payable, such checks result in liability for banks). The U.C.C. sets an outer time limit of one year for a customer to discover unauthorized charges and report them to the bank. N.Y. U.C.C. LAW § 4-406(4) (McKinney 1962). But banks routinely modify this U.C.C. provision in their deposit agreements, thereby shortening significantly the period an account holder has to report forgeries. *See, e.g.,* Clemente Bros. Contracting Corp. v. Hafner-Milazzo, 23 N.Y.3d 277, 289 (2014) (permitting bank to modify the one-year time limit of U.C.C. 4-406(4) by contract to 14 days for sophisticated customers).

<sup>139</sup> For a roundup of state laws on less restrictive alternatives, *see generally* Haldan Blecher, *Least Restrictive Alternative References in State Guardianship Statutes*, reprinted by ABA COMM'N ON L. & AGING (June 23, 2018), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/06-23-2018-lra-chart-final.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/06-23-2018-lra-chart-final.pdf) [<https://perma.cc/MBZ7-3F8T>].

<sup>140</sup> *See* NAT'L COUNCIL ON DISABILITY, *supra* note 3, at 166 ("Courts often find that no suitable alternative exists when, in fact, supported decision making or another alternative might be appropriate.").

<sup>141</sup> UGCOPAA §§ 302, 402.

<sup>142</sup> UGCOPAA §§ 310, 411(b)(1) (order of appointment must "include a specific finding that clear-and-convincing

These provisions are important steps forward, but there are additional problems that need to be addressed. First, courts often take the explanation in the petition at face value and do not press the petitioner further on why any identified alternatives did not or could not work.<sup>143</sup> Nor do courts regularly consider potential alternatives that are not mentioned in the guardianship petition. Second, while statutes call for courts to make findings and the new uniform law goes one step further to require *specific* findings, template language nonetheless abounds.<sup>144</sup> Third, courts rarely look beyond alternatives already in place for the individual and consider whether alternatives that have not yet been attempted might suffice.<sup>145</sup> For example, when the petitioner is a local department of social services with authority over public benefit programs, a court might scrutinize whether that agency had attempted to provide the respondent with other services available through that agency, such as financial management assistance and home care. Finally, even when a court finds that less restrictive alternatives will not work, there is no obligation to explain why guardianship would work better to address that specific concern.<sup>146</sup> In many cases, less restrictive alternatives will not address the need, but neither will guardianship.<sup>147</sup>

Courts in the past have looked to the most traditional alternatives such as the existence of a power of attorney or health care proxy as the universe of alternatives considered. But the range of possible alternatives for addressing the needs of an older adult in financial distress is, in fact, far more varied. A comprehensive list of alternatives to guardianship is provided in Appendix A. Two alternatives that have garnered attention recently—approval of a single transaction and supported decision-making—would serve to address the older person’s needs in a large number of cases in which other alternatives do not suffice. For purposes of this Article, we argue that no court should impose guardianship without considering supported decision-making and/or approval of a single transaction.

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evidence has established that the identified needs of the respondent cannot be met by a protective arrangement . . . or other less restrictive alternative, including use of appropriate supportive services, technological assistance, or supported decision making”); *see also* CAL. PROB. CODE § 1800.3(b) (West 2008) (requiring express finding that granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee); *Cf.* UTAH CODE ANN. § 75-5-304(2)(a) (West 2017) (requiring specific finding that full guardianship is required).

<sup>143</sup> *See* NAT’L COUNCIL ON DISABILITY, *supra* note 3, at 166 (finding that “[m]ost state statutes require consideration of less-restrictive alternatives, but courts and others in the guardianship system often pay lip service to this requirement”).

<sup>144</sup> *See* UGCOPAA § 411(b)(1) (requiring court to specifically state its finding that “clear-and-convincing evidence has established that the identified needs of the respondent cannot be met by a protective arrangement instead of conservatorship or other less restrictive alternative”). *Cf.* cmt. to UGCOPAA § 411(c) (discussing need for court to provide specific findings regarding why it entered a full, rather than limited conservatorship and noting that this provision is designed to counter the “perverse incentives” of judicial economy and finality pushing courts to appoint a full, rather than limited conservators).

<sup>145</sup> *See* NAT’L COUNCIL ON DISABILITY, *supra* note 3, at 166 (finding that “[c]ourts often find that no suitable alternative exists when . . . another alternative might be appropriate”). For an example to the contrary, *see* Matter of Eli T., 89 N.Y.S.3d 844, 848-849 (Sur. Ct. Kings Cnty. 2018) (denying guardianship petition for adult with cognitive limitations on grounds that he had capacity to make decisions with the support of his family and noting that he could avail himself of power of attorney, health care proxy, and other alternatives if he needed more support).

<sup>146</sup> *See, e.g.*, N.Y. MENT. MENTAL HYG. LAW § 81.16(b) (McKinney 2016) (describing required findings that must be made on the record for appointment of a guardian under various circumstances).

<sup>147</sup> *See* Kristin Booth Glen & Rebekah Diller, *The Myth of Protection* (unpublished manuscript) (on file with authors).

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### *A. Authorize a Protective Arrangement or Approve a Single Transaction*

The Uniform Guardianship Act, as well as many state statutes, provide that courts may authorize a protective arrangement and/or approve a single transaction without stripping the older adult of their rights and appointing a guardian on an ongoing basis.<sup>148</sup> The new uniform guardianship statute commentary promotes these single-issue court orders as a valuable and important alternative that not only protects the rights of the individual but also offers efficiencies for courts because they do not require long-term oversight and monitoring.<sup>149</sup> Unfortunately, parties and courts have in the past rarely availed themselves of this option, missing a valuable and important opportunity to craft a less restrictive alternative to an ongoing guardianship.<sup>150</sup>

The following case illustrates the use of this mechanism. Mr. and Mrs. Q lived in their jointly owned home that had an outstanding mortgage in both their names. When Mrs. Q developed severe Alzheimer's disease and was moved to a nursing home, her entire income began going to pay for her care. Because of the loss of this income, the family was no longer able to pay their mortgage and the lender sued Mr. and Mrs. Q in a foreclosure proceeding. Mr. and Mrs. Q were in a position to resolve the foreclosure proceeding with a favorable re-financing arrangement, but the bank would not proceed with the case because it concluded that Mrs. Q, a party to the existing mortgage, lacked the legal capacity to authorize the settlement. The bank recommended that Mr. Q seek appointment of a guardian for his wife.

Mrs. Q, however, did not need an ongoing guardian. What she needed was a limited order from the guardianship court to resolve the foreclosure proceeding and enter into a re-financing agreement on her behalf. In this case, the opportunity for a single transaction order approving the refinancing agreement without appointing a guardian on an ongoing basis provided the perfect solution for the family.

### *B. The Emerging Alternative of Supported Decision-Making*

Supported decision-making ("SDM") is an emerging alternative to guardianship that ensures that individuals with disabilities retain final decision-making control over their lives.<sup>151</sup> The term has

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<sup>148</sup> See, e.g., N.Y. MENTAL HYG. LAW § 81.16(b) (McKinney 2016) (allowing protective arrangement or single transaction based on incapacity determination, but without appointment of guardian, to meet the personal and property needs of the incapacitated person); UGCOPAA § 503(c)(2), (d) (permitting the court, without appointing a conservator or guardian, to authorize or direct a single transaction to protect the financial or property interests of an individual meeting the standard for appointment or enter a protective arrangement on their behalf, and to enter a protective order in an appropriate case even where the individual does not meet the standard for appointment of a surrogate decision maker).

<sup>149</sup> UGCOPAA Prefatory Note.

<sup>150</sup> See Pamela B. Teaster et al., *Wards of the State: A National Study of Public Guardianship*, 37 STETSON L. REV. 193, 219 n.177 (2005) (noting that a 2005 national study of public guardianship programs revealed under several models that limited guardianships occurred in fewer than seven percent of cases); see also Lawrence A. Frolik, *Guardianship Reform: When the Best is the Enemy of the Good*, 9 STAN. L. & POL'Y REV. 347, 354 (1998) (stating that limited guardianship has not been widely used and noting that reformers must convince judges of the value of limited guardianship).

<sup>151</sup> See generally NAT'L RESOURCE CTR. FOR SUPPORTED DECISION-MAKING, <http://www.supporteddecision-making.org> [<https://perma.cc/3WAM-8QKA>] (last visited Nov. 20, 2020) (general information about supported decision-

been used to refer to a variety of arrangements in which an individual receives support to make decisions, often from select persons whom they trust such as friends or family members. These supporters, in turn, may assist the individual in making decisions by obtaining information, helping them weigh and assess options, communicating decisions, and providing other support. In the wake of the U.N. Convention on the Rights of Persons with Disabilities (“CRPD”),<sup>152</sup> which called for guardianship to be replaced by a system of supports that would permit all individuals to retain the right to make legally binding decisions, persons with disabilities have increasingly participated in SDM through pilot projects as well as under new state laws.<sup>153</sup>

A growing number of states have enacted legislation recognizing SDM as an alternative to guardianship. As of 2020, ten states and the District of Columbia have passed laws providing legal recognition of SDM agreements, whereby individuals set forth whom they authorize to serve as their supporters and what type of support they are authorized to provide.<sup>154</sup> While SDM may be used with or without an agreement and with or without a state statute on agreements, the statutes are important because they provide assurances to the participants and third parties that decisions made pursuant to the agreement will be legally recognized. The recent Uniform Guardianship Act and several other state statutes also recognize SDM as a less restrictive alternative that must be considered before guardianship can be imposed.<sup>155</sup> Even in states where there is not yet a statute, a number of court decisions have recognized SDM as a less restrictive alternative to guardianship.<sup>156</sup>

To date, SDM has been less widely used by older persons than by the intellectual and developmental disabilities (“I/DD”) community,<sup>157</sup> though advocates for the aging have increasingly recognized its potential. Whether or not a state has an SDM agreement statute, SDM should be

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making); SDMNY, <https://sdmny.hunter.cuny.edu> [<https://perma.cc/LS6R-ALLV>] (last visited Nov. 20, 2020) (highlighting a pilot project serving persons with intellectual and developmental disabilities).

<sup>152</sup> G.A. Res. 61/106, art. 12, ¶ 4, Convention on the Rights of Persons with Disabilities (Dec. 13, 2006).

<sup>153</sup> See generally Kristin Booth Glen, *Introducing A “New” Human Right: Learning from Others, Bringing Legal Capacity Home*, 49 COLUM. HUM. RTS. L. REV. 1 (2018) (describing international pilot projects).

<sup>154</sup> Zachary Allen & Dari Pogach, *More States Pass Supported Decision-Making Agreement Laws*, 41 BIFOCAL 159, 159-60 (2019); see also *Laws and Policies*, SDMNY, <https://sdmny.hunter.cuny.edu/downloads/laws-and-policies> [<https://perma.cc/746N-Z5TG>] (last visited Nov. 20, 2020) (providing links to statutes enacted in Texas, Delaware, Alaska, Wisconsin, District of Columbia, Nevada, North Dakota, Indiana, Rhode Island, Washington and Louisiana).

<sup>155</sup> See, e.g., UGCOPAA §§ 301, 411 (requiring demonstrations that a limited guardianship arrangement would be insufficient); ME. REV. STAT. ANN. tit. 18-C, § 5-301 (2019); MO. ANN. STAT. § 475.075 (West 2018).

<sup>156</sup> See, e.g., Proc. for the Appointment of a Guardian for Caitlin, 2017 NYLJ LEXIS 1043, at \*9-10 (Sur. Ct. Kings Cnty. April 24, 2017) (denying a father’s petition for guardianship of his 19-year-old daughter for failure to meet the burden of showing that his daughter is in need of a guardian and noting that there are other, less restrictive means of support available); *In re Guardianship of Dameris L.*, 956 N.Y.S.2d 848, 855-56 (Sur. Ct. N.Y. Cnty. 2012) (terminating guardianship for an adult with intellectual disabilities based on availability of support network to assist her with making and acting on her own decisions); 956 N.Y.S.2d 848 (Surr. Ct. N.Y. Cnty. 2012); *Ross v. Hatch*, No. CWF120000426P-03, slip op. at 5-6 (Va. Cir. Ct. 2013) (transferring guardianship of an adult with Down Syndrome from her mother to new guardians based on her preference and ordering that the new arrangement be “a limited guardianship of limited powers and limited duration, with the ultimate goal of transition to the supportive decision making model”).

<sup>157</sup> For a discussion of the differences between SDM in the I/DD and aging contexts, see Rebekah Diller, *Legal Capacity for All: Including Older Persons in the Shift from Adult Guardianship to Supported Decision-Making*, 43 FORDHAM URB. L.J. 495 (2016).

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considered as a less restrictive alternative before any guardianship is initiated against an older person.<sup>158</sup> In addition, SDM may be combined with other mechanisms; for example, language can be inserted into powers of attorney that instructs the agent to use an SDM process with the principal before making any decision on their behalf.<sup>159</sup>

Given the rates of exploitation of older persons, including by agents named in powers of attorney, some in the elder law bar have expressed concern about the potential for abuse by supporters. There is to date no data demonstrating that SDM arrangements are particularly subject to exploitation.<sup>160</sup> Nonetheless, in order to alleviate these concerns and also to be mindful of the CRPD's requirement that support arrangements safeguard against abuse and be free of undue influence and conflict of interest,<sup>161</sup> SDM pilot projects and legislation have instituted a number of safeguards. These mechanisms seek to ensure that a supporter who is identified by the decision-maker does not exert undue influence by manipulating the decision-maker for their own gain. In addition, they seek to guard against supporters exerting undue influence in a subtler way, by pushing decisions that the supporters believe are best instead of supporting the individual to reach the decision that reflects their will and preferences. For example, because most supporters in SDM arrangements tend to be friends and family members of the individual with a disability and may provide other necessities other than just assistance with decision-making, the individual can be reluctant to disagree with the supporter's advice for fear of alienating the supporter.

In light of the novelty and growing importance of SDM as an alternative, we flesh out some

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<sup>158</sup> On who is authorized to use SDM agreements under state laws, *see, e.g.*, ALASKA STAT. ANN. § 13.56.010 (West 2019) (authorizing “adult” to enter into SDM agreement); NEV. REV. STAT. § 162A.110 (defining “principal” as “an individual who grants authority to an agent in a power of attorney”). On the need to consider SDM as a less restrictive alternative, *see* ABA COMMISSION ON LAW AND AGING ET AL., PRACTICAL TOOL FOR LAWYERS: STEPS IN SUPPORTED DECISION-MAKING 5-9 (2016), [https://www.americanbar.org/content/dam/aba/administrative/law\\_aging/PRACTICALGuide.pdf](https://www.americanbar.org/content/dam/aba/administrative/law_aging/PRACTICALGuide.pdf) [<https://perma.cc/EN4C-H427>].

<sup>159</sup> Morgan Whitlatch and David Godfrey suggest that the following language might be included in powers of attorney: “I ask that my agent named in this document, before taking any actions using this document, always discuss with me what is being considered, what the options are, make a recommendation and seek my input. Even if it appears that I am unable to understand, I ask that my agent continue to explain to me what is happening and the choice you are making and why. Third parties can rely on my agent's representation that they have followed this request. A failure to follow this request shall not invalidate any transaction entered into by agent using this document.” Morgan K. Whitlatch and David Godfrey, *Supported Decision-Making Basics*, NATIONAL RESOURCE FOR SUPPORTED DECISION-MAKING 10 (Oct. 31, 2017), [http://www.supporteddecision-making.org/sites/default/files/event\\_files/ABA%202017%20SDM%20Basics%20Presentation%20%282017.10.25%29.pdf](http://www.supporteddecision-making.org/sites/default/files/event_files/ABA%202017%20SDM%20Basics%20Presentation%20%282017.10.25%29.pdf) [<https://perma.cc/D8SQ-G7UG>].

<sup>160</sup> Because SDM is relatively new, the availability of data is limited. The Center for Public Representation, a non-profit law firm focusing on disability rights in Massachusetts and across the United States, together with Nonotuck Resource Associates Inc., a service provider of communal living and adult family care residential supports, partnered to provide adults with intellectual and/or developmental disabilities principally living in Massachusetts an opportunity to trial SDM through its pilot program (the “Massachusetts Pilot Program”). An independent evaluation of the Nonotuck pilot project concluded that participants “did not experience abuse, neglect or financial exploitation as a consequence of SDM.” ELIZABETH PELL AND VIRGINIA MULKERN, SUPPORTED DECISION MAKING PILOT: PILOT PROGRAM EVALUATION YEAR 2 REPORT 5 (2016), <https://supporteddecisions.org/wp-content/uploads/2019/05/CPR-SDM-HSRI-Evaluation-Year-2-Report-2016.pdf> [<https://perma.cc/J8P6-6ATU>].

<sup>161</sup> G.A. Res. 61/106, Convention on the Rights of Persons with Disabilities, at 9 (Dec. 13, 2006).

of the steps that state statutes and pilot projects have taken to ensure that SDM is a meaningful alternative that assists the individual while ensuring that they remain at the center of the decision-making process without being subject to undue influence and exploitation. In presenting these steps, we do not seek to endorse them all—more information is needed on how some of them have operated—but rather we mean to survey the safeguards that have been attempted thus far.<sup>162</sup>

Voluntariness:

Legislation recognizing SDM agreements typically provides that the agreement must be entered into voluntarily and without coercion and undue influence.<sup>163</sup>

Termination at Any Time:

A principal, the “decision-maker,” may terminate a SDM agreement at any time and for any reason. In some states, termination may be done simply by verbal request, and in other states by written notice.<sup>164</sup> Some states provide that a third-party government agency may intervene and terminate the SDM agreement when abuse is found.<sup>165</sup>

Formalities in Execution:

SDM agreement statutes typically require similar levels of formality in execution as other advance planning documents such as wills, health care proxies and powers of attorneys. Many states require that the agreements be signed by both the individual with a disability and the supporter(s) in front of two witnesses or a notary.<sup>166</sup>

Eliminating Conflicts of Interest:

State laws on SDM agreements have also imposed measures to protect against conflict of interest. For example, in Delaware and Alaska, persons who are paid service providers, employers or employees of the decision-maker (with the

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<sup>162</sup> The authors wish to acknowledge the extensive research on SDM agreement statutes conducted by Supported Decision-Making New York, whose work helped inform this Section. *See Laws and Policies*, SDMNY, <https://sdmny.hunter.cuny.edu/downloads/laws-and-policies/> [<https://perma.cc/WXC4-HRRV>] (last visited Aug. 12, 2020) (providing links to state statutes).

<sup>163</sup> *See* Supported Decision-Making Agreements, DEL. CODE ANN. tit. 16, § 9405A(a)(1) (West 2016); Supported Decision-Making Agreement Act, TEX. EST. CODE ANN. § 1357.051 (West 2015).

<sup>164</sup> *See, e.g.*, WIS. STAT. § 53.14(3) (2017) (enabling an adult with a disability to terminate a SDMA via verbal instruction in the presence of two adult witnesses or by physically destroying the SDMA); *see* Supported Decision-Making Agreements, DEL. CODE ANN. tit. 16, § 9405A(h) (West 2016) (enabling principal to revoke a SDM Agreement at any time but only by providing written notice to the other parties to the SDMA).

<sup>165</sup> For example, in Texas, a SDMA terminates automatically if “the Department of Family and Protective Services finds that the adult with a disability has been abused, neglected, or exploited by the supporter.” Supported Decision-Making Agreement Act, TEX. EST. CODE ANN. § 1357.053(b)(1) (West 2015).

<sup>166</sup> *See, e.g.*, TEX. EST. CODE ANN. § 1357.055 (West 2015). (requiring that an agreement must either be signed in the presence of two witnesses or a public notary); ALASKA STAT. ANN. § 13.56.040 (West 2019) (same).

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exception of family members) may not serve as supporters.<sup>167</sup> The same restriction applies to a person against whom the individual with a disability has obtained an order of protection or other type of restraining order.<sup>168</sup> SDM agreements created under Delaware law require the supporter to sign a separate certification disclosing his or her relationship to the individual.<sup>169</sup>

### Involvement of Multiple Parties to Promote Accountability:

A common theme of SDM pilot projects is the involvement of several parties beyond just the individual with a disability and a single supporter so that there are multiple eyes on the relationship.<sup>170</sup> An individual with a disability may choose multiple supporters. In British Columbia, Canada, SDM for financial matters requires that either two or more representatives must be appointed and act jointly or a monitor must be appointed.<sup>171</sup> Monitors have authority to demand information and investigate how the arrangement is working.<sup>172</sup> In the Massachusetts pilot project, care managers visited participants on a monthly basis to check on how the arrangement was working.<sup>173</sup> More work is needed to provide options for older people who may not have social and family networks to draw

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<sup>167</sup> DEL. CODE ANN. tit. 16, § 9406A(b)(1) (West 2016); ALASKA STAT. ANN. § 13.56.020(1) (West 2019).

<sup>168</sup> DEL. CODE ANN. tit. 16, § 9406A(b)(3) (West 2016); ALASKA STAT. ANN. § 13.56.020(3) (West 2019).

<sup>169</sup> DEL. CODE ANN. tit. 16, § 9405A(f)(1), 9410A (West 2016). Unlike in some other states, in which the statutes set forth the required form, Delaware's statute delegated the creation of the form to the state Department of Health and Social Services.

<sup>170</sup> See HUM. SERVS. RSCH. INST., SUPPORTED DECISION MAKING PILOT: A COLLABORATIVE APPROACH 1 (Nov. 30, 2015) [hereinafter *Nonotuck Year 1 Report*], <https://supporteddecisions.org/wp-content/uploads/2019/05/CPR-SDM-HSRI-Evaluation-Year-1-Report-2015.pdf> [<https://perma.cc/8EWM-H2HK>] (highlighting that SDM adopters chose multiple decision-makers and people well-known to them). See also MILENA JOHNOVÁ, ET AL., QUIP, LEGAL CASES OF LEGAL CAPACITY RESTORATION AND THE USE OF SUPPORT IN DECISION MAKING 28, (2017), <https://www.kvalitavpraxi.cz/res/archive/033/004198.pdf> [<https://perma.cc/DZ3P-DEXC>] (noting, in description of Czech pilot project, that “[i]nvolving more people is a major safeguard against abuse”).

<sup>171</sup> See British Columbia Representation Agreement Act, R.S.B.C. 1996, c 405, § 12(1) (Can.) (explaining that exceptions are made if the representative is the “spouse, the public guardian and trustee, a trust company, or a credit union”). The “Section 7” representation agreement is more akin to a power of attorney than the supported decision-making agreements that have arisen in the U.S. but permits persons who would not be able to demonstrate the level of mental capacity necessary to enter a contract or power of attorney to enter a representation agreement based on a different test of capability. See British Columbia Representation Agreement Act, R.S.B.C. 1996, c 405, § 8 (Can.) (providing at least four factors that are considered when deciding whether someone can enter into a representation agreement). It should be noted, however, that under the British Columbia law, “dealing with real estate” cannot be done through a representation agreement. NIDUS PERS. PLAN. RES. CTR. & REGISTRY, DOES A REPRESENTATION AGREEMENT WITH SECTION 7 STANDARD POWERS FIT YOUR SITUATION? (2011), [http://www.nidus.ca/PDFs/Nidus\\_SHCourse\\_Do\\_Standard\\_Powers\\_Fit.pdf](http://www.nidus.ca/PDFs/Nidus_SHCourse_Do_Standard_Powers_Fit.pdf) [<https://perma.cc/HN9F-L92W>].

<sup>172</sup> British Columbia Representation Agreement Act, R.S.B.C. 1996, c 405, § 20. Relatedly, representatives must keep records related to financial matters handled under the agreement. See NIDUS PERS. PLAN. RES. CTR. & REGISTRY, Roles and Responsibilities of a Representative (2017), [http://www.nidus.ca/PDFs/Nidus\\_Info\\_Role\\_Representative.pdf](http://www.nidus.ca/PDFs/Nidus_Info_Role_Representative.pdf) [<https://perma.cc/C7BF-U3F8>] (describing representative responsibilities).

<sup>173</sup> See *Nonotuck Year 1 Report*, *supra* note 170, at 31.

from to involve multiple trusted people in the SDM process.

Facilitation of the SDM process:

One of the most significant safeguards that an SDM arrangement can have is a facilitation process whereby a trained facilitator works with the decision-maker to map and clarify concerns, identify who the decision-maker would like to have as supporters, and clarify the kinds of life decisions for which the individual is seeking assistance.<sup>174</sup> Following the initial process, the facilitator's focus shifts to training the supporter in SDM, as well as mediating discussions between the individual and the supporter about the SDM agreement.<sup>175</sup> The facilitator thus helps to ensure that the supporter is assisting the individual in making decisions rather than acting as the decision-maker herself. As an objective third-party trained in best practices for SDM, the facilitator can assess the ability of the supporter to fulfill her role, troubleshoot any issues with the supporter's approach to SDM, and, upon execution of the SDM agreement, intervene if the facilitator has reason to suspect coercion or undue influence on the part of the supporter.<sup>176</sup> Some SDM models assign duties for the facilitator after the execution of the SDM agreement. In the Supported Decision Making New York pilot, for example, facilitators check in with the participants on a monthly basis for the first six months after the agreement is executed.<sup>177</sup>

Education and training:

Whether or not facilitation is used, training of all parties involved in the SDM process can be another important mechanism to ensure adherence to SDM principles and respect for the individual's dignity, wishes, and desires.<sup>178</sup> To date,

<sup>174</sup> See, e.g., IEVA LEIMANE-VELDMEIJERE ET AL., HANDBOOK: FIRST STEPS IN IMPLEMENTATION OF SUPPORTED DECISION MAKING IN LATVIA 62 (Apr. 2016), [http://zelda.org.lv/wp-content/uploads/ZELDAS\\_brosura\\_EN\\_WEB.pdf](http://zelda.org.lv/wp-content/uploads/ZELDAS_brosura_EN_WEB.pdf) [<https://perma.cc/8JA7-GEK5>] for information about The Resource Centre for People with Mental Disability "ZELDA" (RC ZELDA), an NGO that established this program in Latvia under the title "Pilot Project for Introducing Supported Decision Making in Latvia" and operated it from September 1, 2014 until April 30, 2016. The project drew from related Czech and Bulgarian programs and included 28 individuals with disability, in addition to providing training for 55 supporters. See also Kristin Booth Glen, *Piloting Personhood: Reflections from the First Year of a Supported Decision-Making Project*, 39 CARDOZO L. REV. 495, 509–11 (2017) (describing Supported Decision-Making New York's development of a facilitation program for decision-makers and their supporters).

<sup>175</sup> LEIMANE-VELDMEIJERE ET AL., *supra* note 174, at 62.

<sup>176</sup> See, e.g., *id.*; NSW GOV'T, SUPPORTED DECISION MAKING: A HANDBOOK FOR FACILITATORS 21-22 (2015), <https://www.ideas.org.au/uploads/resources/1392/Supported%20Decision%20Making%20A%20handbook%20for%20Facilitators.pdf> [<https://perma.cc/K8XE-D8EB>] (describing what to do when supporters go outside their role).

<sup>177</sup> See *Frequently Asked Questions*, SDMNY, <http://sdmny.org/about-sdmny/faqs/> [<https://perma.cc/2MPP-R6AK>] (last visited Aug. 12, 2020) (explaining how facilitators in New York's pilot program check in on a monthly basis with the supporter and the individual after the parties execute the SDMA); see also NSW GOV'T, *supra* note 176, at 15 (describing the facilitator's role in New South Wales, Australia, shifting from sustained contact to intermittent depending on the exigencies of the particular individual-supporter relationship).

<sup>178</sup> See Pell and Mulkern, *supra* note 160, at 41-42 (recommending improvements to the education and training



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none of the SDM agreement statutes in the U.S. mandate training; however, a pending bill in Massachusetts would require it.<sup>179</sup>

### Supporter Obligations:

SDM agreement statutes have taken various approaches to setting forth supporters' obligations to decision-makers. In Alaska, for example, supporters are charged with acting "with the care, competence, and diligence ordinarily exercised by individuals in similar circumstances," must keep information confidential, and must sign declarations that they will not make decisions for the principal, not exert undue influence, and not sign for the principal.<sup>180</sup> In Texas, explicit language stating that supporters are considered fiduciaries was added following the initial legislation at the urging of the state's real estate, trust and probate bar section.<sup>181</sup> It is unclear whether such fiduciary language will effectively prevent exploitation in the SDM context or whether it is, on balance, more harmful than helpful due to its potential to deter prospective supporters from assuming the role.

### Access to Legal Advocacy:

In the Massachusetts Pilot Program, each SDM participant is provided legal representation by the Center for Public Representation (CPR) to assist with the adoption of an SDM agreement, changes to the agreement, and use of the agreement in the community.<sup>182</sup>

### Suspected Abuse Reporting Requirements:

Some states have explicit provisions concerning reporting of suspected abuse of the SDM arrangement by those who see or are aware of an agreement. The SDM law in Wisconsin states that anyone aware of suspected abuse may report it to the agencies designated to receive reports of abuse of older persons or "adults at risk."<sup>183</sup> In Texas, the SDM statute goes one step further to mandate that persons with reason to believe that the adult with a disability is being abused, neglected or exploited by his or her supporter "shall" report it to a state abuse hotline.<sup>184</sup>

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component of the Nonotuck SDM program, while also noting that "it was important not to overwhelm people with paper"); BIZCHUT, SUPPORTED DECISION-MAKING SERVICE FOR PERSONS WITH DISABILITIES 29-30 (Maya Johnston trans., 2016), <http://www.beitissie.org.il/kb/digital/decision/files/assets/common/downloads/publication.pdf> [https://perma.cc/K5X6-595Z].

<sup>179</sup> S.B. 2490 § 3, 191st Gen. Court, 1st Ann. Sess. (Mass. 2020) (requiring state health and human services agency to develop training program for supporters and decision-makers).

<sup>180</sup> ALASKA STAT. §§ 13.56.090 (2018) (duties of supporter), 13.56.180 (agreement form).

<sup>181</sup> For a description of the process that led to the amendment of the Texas law, see Eliana J. Theodorou, *Supported Decision-Making in the Lone-Star State*, 93 N.Y.U. L. REV. 973, 1003-04 (2018).

<sup>182</sup> *Nonotuck Year 1 Report*, *supra* note 170, at 26.

<sup>183</sup> WIS. STAT. § 52.32 (2020).

<sup>184</sup> Supported Decision-Making Agreement Act, TEX. EST. CODE ANN. § 1357.102 (West 2015) ("If a person who receives a copy of a supported decision-making agreement or is aware of the existence of a supported decision-making

Reporting requirements raise complicated questions based on the entities to which reports are made, including how well-resourced such entities are and whether they seek to address misconduct without limiting the rights of the older adult.

SDM provides an alternative to guardianship that preserves the principal's right to make decisions. With sufficient safeguards to ensure that the principal remains the central decision-maker, this new, legally recognized relationship provides a promising alternative model.

An informal SDM plan was successfully implemented in the case of Ms. K, a physically frail, 90-year old woman with mild to moderate cognitive impairment. Ms. K had relatively significant assets, as well as intellectual property rights that were part of her family legacy and whose royalties generated most of her moderate annual income. These resources made her a potential target of elder financial exploitation. A much younger man "befriended" Ms. K and began to escort her around town, while persuading her to transfer to him some of the intellectual property she relied on for living expenses. When the man ultimately persuaded Ms. K to transfer her co-op apartment to him, long-term family friends of Ms. K consulted counsel about petitioning for guardianship to address the exploitation. The lawyer convinced the friends that it would be better to speak to Ms. K about ending the relationship and, if she agreed, to try to take steps to sever her ties with the man to prevent further exploitation, while still ensuring that her life remained meaningful. The lawyer also confronted the exploiter to say that Ms. K would be forced to sue him for the return of her apartment unless he returned it voluntarily. He agreed to transfer the apartment back to Ms. K and to cease visiting her.

Working together, the lawyer, Ms. K, and some of her supporters developed a multi-pronged plan. First, they hired a retired bookkeeper to manage Ms. K's financial affairs for a modest fee. They created a bank account with funds that Ms. K could freely access for living expenses and discretionary spending. As part of her duties, the bookkeeper visited Ms. K on a regular basis to review all her bills, payments, and her overall financial status. Second, they hired personal care attendants who assisted Ms. K with daily activities, including hosting visitors and visiting friends nearby, and who refused to accept calls from the exploiting younger man. And finally, they solicited assistance from trusted doormen who denied the exploiter access to Ms. K's apartment building on the couple of occasions he tried to return to visit. While this community of supporters successfully enabled Ms. K to continue to have a fairly rich life without risk of financial exploitation, we recognize that Ms. K benefitted from having resources and friends in her community. The plan described here would be more difficult for an "unbefriended" older person with more limited resources. Nevertheless, it serves as an example of a creative system of legal and social support for an older person living alone.

## CONCLUSION

Consistent with the growing recognition of the human right to legal capacity, this Article recommends that we look beyond guardianship to address elder financial exploitation. Although elder financial exploitation and other financial harms are difficult and time-consuming to address, and lack

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agreement has cause to believe that the adult with a disability is being abused, neglected, or exploited by the supporter, the person shall report the alleged abuse, neglect, or exploitation to the Department of Family and Protective Services in accordance with Section 48.051, Human Resources Code.").

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a quick and easy “fix,” guardianship may be a particularly ineffective remedy. When guardianship is not needed, when there exist less restrictive alternatives to address the adult’s financial or property crisis, and when the older adult faces a financial crisis that guardianship cannot correct, the imposition of guardianship is a cure that is often at least as bad as the ill it purports to address.

An appropriate response to elder financial crises and exploitation requires action in multiple spheres. These include improving preventive measures, increasing the availability of trained legal, financial, and social services professionals to address the problem through other mechanisms, relying on existing and developing alternatives to guardianship, and providing essential housing, health, or income support benefits to meet the older adult’s needs.

To begin, further measures are needed to prevent or limit elder financial exploitation or distress. For example, policy makers and law enforcement agencies can standardize obligations for financial institutions to monitor for suspicious transactions, identify trusted contacts, and place holds on suspicious disbursements. For those older adults who might need and want ongoing support or assistance with financial management, alternatives to guardianship should be more readily available. Thoughtfully designed pilot programs will advance our understanding of how best to use SDM to assist older adults experiencing cognitive decline with financial management.

Government agencies should eliminate unnecessary bureaucratic burdens on individuals with cognitive limitations in public programs upon which older people rely for assistance with income support, health care, and housing. These agencies should also provide extensions of time to renew or recertify benefits and allowing trusted friends and family member to assist with benefit applications and recertifications. These accommodations will prevent the loss of essential benefits that can make older adults (inappropriately) vulnerable to guardianship. In addition, funding is needed to expand the pool of lawyers, financial professionals, and social workers trained to assist older adults harmed by financial exploitation. Expanded use of state elder abuse statutes, which typically provide for payment of attorney’s fees and costs, can provide additional remedies.

Next, at a minimum, guardianship laws and practices must be modified. Courts must conduct a genuine and robust inquiry to find less restrictive alternatives that could address the individual’s needs—including a single transaction, protective order, or SDM arrangement—before considering imposition of guardianship. Courts should not impose guardianship when it would not actually improve the older person’s circumstances. When guardianship is sought to provide housing, health care, social services, and other assistance that should be available through other means, courts should press petitioners to meet those needs rather than pursue guardianship. No guardianship should be deemed a lifetime order, and state laws and judicial and court practices must provide individuals with a realistic opportunity to terminate any existing guardianships. This would mean immediate termination of consent guardianships when the older adult withdraws that consent and when the guardianship is providing no actual assistance to the older adult. Courts must also consider current circumstances and not rely on prior findings or circumstances that had persuaded the court to appoint a guardian in the first instance. Further, courts should affirmatively notify persons under guardianship of their right to seek termination or modification of the guardianship, and court clerks must be trained to inform and assist pro se litigants with restoration of rights, including by providing plain language template forms (in multiple languages) to any person inquiring about termination or modification, or raising any concerns about the guardianship.

Adoption of these measures would help us move from a society that views elder financial exploitation as an unfortunate individual problem to a society that focuses on systemic changes to

limit significant financial exploitation and loss. In the process, we would go a long way in helping all older adults realize their human right to legal capacity.

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### APPENDIX: CHECKLIST OF ALTERNATIVES TO GUARDIANSHIP

*These alternatives to guardianship may apply in cases of elder financial exploitation and more generally.*

#### Alternatives with regard to decision-making

- Powers of attorney
- Health care proxies
- Living wills
- “Ulysses agreements” or psychiatric advance directives
- Medical Orders for Life-Sustaining Treatment (MOLST), also known as Physician Orders for Life-Sustaining Treatment (POLST)
- Supports in decision-making from friends, family and peers, either informally or through a supported decision-making agreement
- Accessible formats, assistive technology, and other accommodations
- Surrogate health care decision laws that designate family members, close friends or others to make medical decisions on behalf of the patient<sup>185</sup>

#### Assistance with activities of daily living

- Adult day care and multipurpose senior citizen centers
- Case management/geriatric care management
- Supported housing
- Assisted living
- Visiting nurses, home health aides, home attendants
- Housekeeping assistance

#### Alternatives for managing finances

- Joint accounts for when the older person seeks to make a trusted person a co-owner of an account
- Convenience accounts in which one person administers an account for the benefit of another without establishing ownership as in a joint account<sup>186</sup>
- Third-party monitoring systems such as EverSafe, which allow trusted parties to monitor financial accounts for irregularities without access to the assets held in the account<sup>187</sup>

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<sup>185</sup> For example, in New York, the Family Health Care Decisions Act sets forth a hierarchy of surrogate decision-makers to make decisions about medical care within hospitals and nursing homes when the patient is deemed unable to make those decisions herself. *See* N.Y. PUB. HEALTH LAW § 2994-b, -d (McKinney 2020).

<sup>186</sup> Convenience accounts permit another person to administer an account for the benefit of the older person without establishing co-ownership of the funds, as a joint account would. *See, e.g.*, UNIF. MULTIPLE-PERS. ACCOUNTS ACT § 11(d) (UNIF. LAW COMM’N 1989/1998), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9fd91e54-3201-92fc-d71a-40055df84591> [<https://perma.cc/73QV-2MVX>]; N.Y. BANKING LAW § 678 (McKinney 2019).

<sup>187</sup> EverSafe monitors bank and investment accounts, credit cards, and credit data for financial irregularities and suspected exploitation with seniors in mind. *See* EVERSAFE, <https://www.eversafe.com> [<https://perma.cc/H245-NJEB>] (last

- Voluntary account restrictions such as withdrawal limits, geographic limits, and limits on types of merchants with which transactions can be conducted<sup>188</sup>
- Direct deposit and bill-paying arrangements to keep finances on track and eliminate the risk of double-paying or missing a payment
- Money management/bill-paying assistance programs, sometimes offered by local aging offices
- Credit card limits that allow the user to set spending limits and designate locations where a card can be used
- Debit card connected to an account with limited funds or prepaid debit card with limits on both the amount and type of spending done
- Joint property arrangements
- Trusts, including supplemental needs trusts
- Representative payee programs for benefits or pensions from the Social Security Administration, Veterans Administration, Federal Office of Personnel Management and Railroad Retirement Board
- Some pension plans may permit the designation of a representative to assist with the management of pension benefits for an individual with limitations in mental capacity
- Adult Protective Services
- Fraud alerts on accounts
- Closing credit card and bank accounts that were targeted for exploitation
- Do Not Call Registry offered by the Federal Trade Commission
- Real property registry alerts<sup>189</sup>
- Plans developed by enhanced multidisciplinary teams

#### Alternatives in litigation

- Guardian *ad litem* to assist in prosecuting or defending a particular lawsuit<sup>190</sup>
- Ability to seek court approval of single transaction without the need for ongoing appointment of a guardian

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visited Aug. 9, 2020).

<sup>188</sup> See CONSUMER FIN. PROT. BUREAU, RECOMMENDATIONS AND REPORT FOR FINANCIAL INSTITUTIONS ON PREVENTING AND RESPONDING TO ELDER FINANCIAL EXPLOITATION 51 (Mar. 2016), [https://files.consumerfinance.gov/f/201603\\_cfpb\\_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf](https://files.consumerfinance.gov/f/201603_cfpb_recommendations-and-report-for-financial-institutions-on-preventing-and-responding-to-elder-financial-exploitation.pdf) [<https://perma.cc/JFR9-BXW8>].

<sup>189</sup> For example, the New York City Department of Finance permits homeowners to sign up for a deed alert. *Deed Fraud Alert*, NYC DEP'T OF FIN., <https://www1.nyc.gov/site/finance/taxes/deed-fraud.page> [<https://perma.cc/38RR-FWXL>] (last visited Aug. 9, 2020).

<sup>190</sup> See, e.g., N.Y. C.P.L.R. § 1201 (McKinney 2020) (requiring a guardian *ad litem* for “an adult incapable of adequately prosecuting or defending his rights”).

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### Assistance with health care matters

- HIPAA authorizations for trusted supporters
- Without an authorization, limited HIPAA disclosures permitted based on professional judgment<sup>191</sup>

### Assistance with public benefits

- Medicaid
  - Recipient may appoint an *authorized representative* to act on their behalf in interactions with agency such as assisting with application, renewal, and other ongoing communications.<sup>192</sup>
  - In addition, when applying for benefits, a family member, someone within the applicant's household, or, in cases of incapacity, "someone acting responsibly for the applicant" may submit the application.<sup>193</sup>
- Social Security
  - Application may be signed by relative or other person responsible for care of claimant. An adult applicant does not have to sign the application under certain circumstances including if she is "unable to understand what filing for benefits means," or "physically unable . . . or . . . not available to sign . . . and a loss of benefits would result."<sup>194</sup>
  - *Representative payee* may be appointed to receive benefits on behalf of individual if Social Security Administration believes the recipient is incapable of managing benefit payments and it appears that appointment of a payee will be in the best interest of the recipient.<sup>195</sup>
- Accommodations under the Americans with Disability Act
  - Benefits programs run by state and local governmental agencies are required to make reasonable modifications in policies, practices, or procedures when the modifications

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<sup>191</sup> See 45 C.F.R. § 164.510(b)(3) (2020) ("If the individual is not present, or the opportunity to agree or object to the use or disclosure cannot practicably be provided because of the individual's incapacity or an emergency circumstance, the covered entity may, in the exercise of professional judgment, determine whether the disclosure is in the best interests of the individual and, if so, disclose only the protected health information that is directly relevant to the person's involvement with the individual's care or payment related to the individual's health care or needed for notification purposes."). A health care provider also "may use professional judgment and its experience with common practice to make reasonable inferences of the individual's best interest in allowing a person to act on behalf of the individual to pick up filled prescriptions, medical supplies, X-rays, or other similar forms of protected health information." *Id.*

<sup>192</sup> 42 C.F.R. § 435.923(a)(1) (2020).

<sup>193</sup> 42 C.F.R. § 435.907(a) (2020).

<sup>194</sup> SOC. SEC., PROGRAM OPERATIONS MANUAL SYSTEM (POMS): GN 00204.003 PROPER APPLICANT (2015), <https://secure.ssa.gov/apps10/poms.nsf/lnx/0200204003> [<https://perma.cc/RHV6-2J64>] (noting that when an adult is unable to sign the application, a person "who is responsible for the care" of the applicant, such as a relative, may sign).

<sup>195</sup> See 20 C.F.R. § 416.610(a) (2020). The appointment of a representative payee is listed here as an alternative to guardianship because it is less restrictive than a court-ordered guardianship. However, it does raise issues with regard to an individual's rights to manage their own benefits.

are necessary to avoid discrimination on the basis of disability.<sup>196</sup> Such modifications may include providing additional time to meet program deadlines to renew or recertify benefits,<sup>197</sup> or permitting trusted family members or friends to submit recertification documents, request services, or, under certain circumstances, sign necessary documents to ensure that the older adult receives essential benefits.<sup>198</sup>

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<sup>196</sup> 42 U.S.C. § 12132 (2012); 45 C.F.R. § 35.130(a)(7) (2020) (requiring reasonable modifications when necessary to avoid disability-based discrimination unless public entity can demonstrate that modification would cause a fundamental program alteration).

<sup>197</sup> *See, e.g.*, NEW YORK CITY, N.Y., RULES tit. 19, § 52-01(d) (2017), <https://codelibrary.amlegal.com/codes/newyorkcity/latest/NYCrules/0-0-0-41507> [<https://perma.cc/7465-AZU9>] (providing extension of time to file renewal or other New York City rent freeze benefit program application as a reasonable accommodation of a person's disability); *see also* Pfeffer v. New York City Department of Finance et al., No. 15-Civ.-03547 (E.D.N.Y.) (approving of terms of settlement, including changing Department of Finance rules to allow for deadline extensions as an accommodation for disability).

<sup>198</sup> *See, e.g.*, NYCHA, STANDARD PROCEDURE MANUAL: SP 040:12:1, REASONABLE ACCOMMODATIONS IN HOUSING FOR APPLICANTS, PUBLIC HOUSING RESIDENTS, AND SECTION 8 VOUCHER HOLDERS 44-45, <https://www1.nyc.gov/assets/nycha/downloads/pdf/SP040121-Reasonable-Accommodation.pdf> [<https://perma.cc/TNC3-MK4F>] (discussing “Guidelines for Authorized Third Parties”).