

The Final Installment: Protecting Against Elder Abuse, Part Three

Faith and Julie have been neighbors and friends for over twenty years. They are both 75 years old and take daily walks together. Julie was recently diagnosed with dementia. Her daughter, Abby, lives a few hours away and is her [general guardian](#), but rarely visits her mother. Abby hired an in-home aide to assist Julie around the house. When Faith tries to visit Julie during the day, the aide tells Faith that Julie is no longer up for visits from her or anyone else. Faith noticed the aide often leaves for hours at a time during the day and locks Julie in the house while she is gone. A mutual friend told Faith she recently saw Julie and the aide at an estate lawyer's office and Julie mentioned she was changing her will. Faith grows worried about Julie and calls Abby to express her concerns. Abby is overwhelmed with stress in her own life and states that she trusts the aide, but will check in on her mother soon. Faith doesn't see Abby visit or any changes to the aide or the aide's behavior.

In my previous posts, available [here](#) and [here](#), I described elder abuse generally and how adult protective services (APS) through the county departments of social services and guardianship proceedings before the clerk of superior court can be tools to protect against elder abuse, neglect, and exploitation (hereinafter, referred to as "abuse"). However, just because someone has a guardian, it does not mean the risks of such abuse are eliminated. In fact, guardians, such as Abby, often create circumstances for such abuse by leaving the adult in vulnerable positions and failing to monitor the adult's care. In addition, guardians may be the source of such abuse by taking advantage of and exploiting the authority they are given. [One recent report](#) commissioned by the U.S. Senate Special Committee on Aging examined such abuse by guardians after growing concern of abusive practices by guardians. The study concluded the extent of such abuse is unknown nationally due to limited data but there is some evidence that financial exploitation by a guardian is one of the most common types of elder abuse, which frequently includes the guardian overcharging for services that were either not necessary or never performed or misusing the adult's money by incurring excessive dining and vehicle expenses. See [Elder Abuse Report](#), pg. 11 and 14.

The risk of the abuse of an adult under guardianship may be mitigated by (i) court screening of potential guardians through criminal and financial background checks and guardian training or certification requirements, and (ii) court oversight after a guardian is appointed through the filing with the court of status reports, which are reports on the care, comfort, and maintenance of the adult, and accountings, which are reports on the financial affairs of the adult. Even with effective screening and oversight, abuse may still occur when someone has a guardian.

So, what steps may someone, like Faith, who is concerned about abuse of someone under guardianship either by the guardian or a third-party take to protect the adult?

1. Make an Adult Protective Services Report

First, Faith should make an APS report. The [universal reporting requirement](#) in North Carolina does not change because an adult has a guardian. Any person who has reasonable cause to believe that a disabled adult is in need of protective services must make a report to the county department of social services (DSS) or consolidated human services agency in the [county where the disabled adult lives](#). [G.S. 108A-102\(a\)](#).

Once DSS receives a report, DSS will apply the [three APS screening criteria](#) to determine whether the adult is (i) a disabled adult, (ii) the subject of abuse, neglect, or exploitation, and (iii) in need of protective services. [G.S. 108A-101](#); [APS Manual, pg. III-7](#). Upon receipt of a report, DSS applies this criteria regardless of whether the adult already has a guardian.

DSS is the Guardian and Not the Alleged Perpetrator of the Abuse. It is possible that DSS may “screen out” the case and not conduct a formal APS evaluation if, unlike in Julie’s case where her daughter is her guardian, DSS is the adult’s guardian and not the alleged perpetrator of the abuse. This is true even if there is evidence of abuse, neglect, or exploitation as defined in G.S. 108A-101. DSS will screen the case out because DSS as the guardian is able to act in an able, willing, and responsible manner to perform or obtain essential services for the adult. Therefore, the adult does not need protective services and fails to meet the third criteria to be screened in as an APS report.

Where DSS as the guardian and the alleged abuse is by a third party, such as a family member or other caregiver, DSS has the obligation as the ward’s guardian to take necessary actions to protect the ward. As noted in the APS Manual, this may include making reports to the district attorney, state [Adult Home Specialists](#), or other agencies regarding violations of laws or regulations, reviewing financial and/or medical records, authorizing and facilitating health care or mental health treatment, assisting the adult with personal hygiene, removing health and safety hazards, implementing more effective monitoring tools, and, if necessary, removing the adult from a setting where abuse may be taking place. [APS Manual, pg. III-7](#).

DSS is the Guardian and Alleged Perpetrator of the Abuse. In some instances, DSS receives a report that meets all three screening criteria but DSS is the guardian and the director or a member of the director’s staff or other county personnel is the alleged perpetrator of the abuse. *Id.* This may occur, for example, when there are allegations that DSS as the guardian has allowed the adult to live in an unsafe environment or failed to authorize medical treatment. *Id.* In these cases, the allegations are to be screened in as an APS report. *Id.* However, the DSS who is appointed as guardian has a conflict of interest and may not conduct the evaluation. *Id.* Another county is then engaged to conduct the evaluation in accordance with the APS Reciprocal Protocol. See [APS Manual, Appendix U, pg. 91-92](#). APS evaluations by another county must include an assessment of the director’s performance of his or her duties as a guardian. *Id.*

DSS is Not the Guardian. If DSS is not the guardian, as is the case with Julie described at the beginning of this post, the actions that DSS takes in response to the APS report will depend in part on whether the guardian is the alleged perpetrator of the abuse.

- The Guardian is Not the Alleged Perpetrator. In Julie's case, her guardian is her daughter Abby and not the alleged perpetrator of the abuse. DSS may screen in the case as an APS report if it is determined that Julie is a disabled adult in need of protective services because there are concerns that there is not an able, responsible, and willing person to perform or obtain essential services for Julie and thus protect her from such abuse. The APS Manual offers definitions and guidance on what it means to be an able, willing, and responsible person. [APS Manual, pg. III-18-19.](#)

In Julie's case, it may be that Abby is willing and able, but not responsible in that she has poor judgment, is unreliable or does not demonstrate adequate oversight in making sure Julie's needs are met. By continuing to allow Julie to live in a possibly neglectful or exploitative situation and not taking the steps to remedy it, Abby is not an "able, responsible, and willing person." [G.S. 108A-101\(e\).](#)

If DSS screens in Faith's report and substantiates an evaluation, the protective services provided to Julie may include working with Abby to become an able, willing, and responsible person if Abby expresses a desire to do so and consents to protective services on Julie's behalf. This could include providing planning and counseling to Abby to assist her in identifying, remedying, and preventing circumstances which result in abuse. [APS Manual, pg. IV-1.](#) It is also possible that DSS may seek to remove Abby as the guardian and to be appointed as Julie's guardian. During the time period of DSS's appointment, DSS could work with Abby to improve her ability to serve as Julie's guardian and enable her to later file a motion to request the court to re-appoint her as guardian if she becomes qualified to serve at a later date.

However, in the event Abby does not consent to protective services on Julie's behalf and does not demonstrate a desire to become responsible, willing, and able, DSS may elect file a motion to remove Abby as the guardian before the clerk of superior court due to her failure to protect Julie from abuse and suitably exercise her duties to care for Julie. See [G.S. 35A-1290.](#)

- The Guardian is the Alleged Perpetrator. If Abby as Julie's guardian is the alleged perpetrator of the abuse and the report is screened in and an evaluation conducted by APS, the protective action taken by DSS may include filing a motion to remove Abby as guardian. See [G.S. 35A-1290.](#) This may be done on an emergency basis without a hearing if the clerk finds reasonable cause to believe an emergency exists that (a) threatens the well-being of the ward, or (b) constitutes a risk of substantial injury to the ward's estate. [G.S. 35A-1291.](#) If the clerk's revokes a guardian's authority based on this emergency jurisdiction, the clerk may enter orders as the clerk finds necessary to protect the adult, which may include appointing DSS as the guardian until such time another individual is determined to be appropriate to serve as Julie's guardian. *Id.*

2. File a Motion in the Cause to Modify the Guardianship or Remove the Guardian

It is important to note that while one of Faith's first steps in response to abuse of someone under guardianship should be to report the potential abuse to DSS, it is not the only course of action she could take. Faith could also file a [motion in the cause](#) in Julie's guardianship proceeding before the clerk of superior court to ask the court to consider any matter pertaining to the guardianship, such as the aide's actions that seem to isolate Julie, or a motion to remove Abby as guardian. [G.S. 35A-1207](#); [G.S. 35A-1290](#). Any interested person may file such a motion before the clerk in the existing guardianship proceeding and such a motion is appropriate, in particular, if the person believes the guardian is not effectively protecting the adult against abuse or is a perpetrator of such abuse. *Id.*

In Faith's case, it may be difficult and costly for her to gather evidence and present a case in court, as she does not have the same authority to conduct an evaluation of Julie's circumstances as an APS social worker would have in response to an APS report. However, it is an option available to Faith if the APS report is screened out because it does not meet the criteria for an APS report but Faith believes it is appropriate to remove Abby as a guardian or modify the guardianship to provide greater support and protection for Julie. For example, one response the court could take would be to order Abby to begin to file regular status reports with the court to document the care, comfort, and maintenance she is providing to Julie or anything else specifically requested by the court to be included in the report. See [G.S. 35A-1241\(a\)\(1\)](#); [G.S. 35A-1242\(a1\)\(8\)](#). This could potentially result in Abby taking more diligent steps to oversee her mother's care.

In sum, the risks of elder abuse exist even after a guardian is appointed. APS involvement in response to an APS report may be necessary to facilitate the investigation, removal, and/or rehabilitation of the guardian depending on the circumstances of each case. However, even without APS involvement, any interested person who has knowledge of potential abuse may file a motion to bring the issue to the court's attention overseeing the guardianship. The court can then enter orders removing the guardian or modifying the guardianship to ensure that the guardian or a successor guardian carries one of their most fundamental duties –protecting the adult against abuse.