

Quick Reference: Legal Framework for the Role of Financial Institutions in Elder Protection

Background

Financial institutions are essential components of the elder protection system. They are uniquely situated to detect potential financial exploitation and prevent further harm. Several bodies of law address how these institutions are required and allowed to make reports, share information, and freeze assets. In order to provide all components of the system with an overview of this body of law, four Quick Reference Guides were developed that summarize laws in the following four areas:

- Reporting
- Sharing Information with Departments of Social Services
- Sharing Information with Law Enforcement
- Freezing Assets

These Quick Reference Guides are intended to provide a quick snapshot of the law and therefore should serve only as a starting point for legal analysis. The guides are also not comprehensive. Specifically:

- Other state and federal laws apply to financial institutions and may be implicated in some circumstances.
- The legal analysis is not detailed. Many of the laws identified include conditions, exceptions, and qualifications that must be considered. The legal citations are included so that the applicable laws can be reviewed directly when developing policies or making decisions in specific cases.

Reporting

Type of Report	General Rule
Trusted Person¹	Under state law, financial institutions are encouraged to offer disabled adults and older adults an opportunity to submit to the institutions a list of “trusted persons” and to update the lists periodically. If the institution has reasonable cause to believe that the adult is the victim or target of financial exploitation, it must report the suspicion to any “trusted person” identified by the customer, unless the institution “suspects that [the trusted person is] financially exploiting the disabled adult or older adult.”
Suspicious Activity Reports (SARs)²	<p>Under federal law, financial institutions are required to submit “Suspicious Activity Reports” (SARs) to the Financial Crimes Enforcement Network (FinCEN). With these reports, federal and state law enforcement officials are able to both investigate individual cases and identify trends.</p> <ul style="list-style-type: none">■ A financial institution may be required to file a SAR if it knows, suspects, or has reason to suspect that a transaction conducted or attempted by, at, or through the financial institution<ul style="list-style-type: none">□ involves funds derived from illegal activity or attempts to disguise funds derived from illegal activity,□ is designed to evade regulations promulgated under the Bank Secrecy Act (BSA),□ lacks a business or apparent lawful purpose, or□ involves the use of the financial institution to facilitate a criminal activity.
Report to Law Enforcement³	If a financial institution (including officers and employees) has reasonable cause to believe that a disabled adult or older adult (65 years and older) is the victim or target of financial exploitation, the institution must make a report to local law enforcement.
Report to DSS⁴	If a financial institution (including officers and employees) has reasonable cause to believe that a disabled adult is in need of services to protect the adult from abuse, neglect, or exploitation (which includes financial exploitation), the institution must make a report to DSS.

1. Chapter 108A, Section 114 of the North Carolina General Statutes (hereinafter G.S.); G.S. 108A-115(a)(1).

2. 31 C.F.R. §§ 1020.320, 1021.320, 1022.320, 1023.320, 1024.320, 1025.320, 1026.320, 1029.320, and 1030.320.

3. G.S. 108A-115(a)(2).

4. G.S. 108A-102; -115(a)(3).

Sharing Information with DSS

Situation	General Rule
Financial institution identifies signs of potential financial exploitation⁵	<ul style="list-style-type: none">▪ Disabled adult: If the institution (or an officer or employee) has reasonable cause to believe that a disabled adult is the victim or target of financial exploitation, it/he/she is required to make a report to DSS. Financial privacy laws allow financial institutions to comply with this reporting requirement.▪ Older adult: If the adult is older (65+), whether disabled or not, a report must be made to local law enforcement.
DSS presents an order to freeze and inspect financial information⁶	<ul style="list-style-type: none">▪ DSS may request a district court order to freeze a disabled adult's account and inspect records related to that account. There are some limitations on such orders. A financial institution must comply with such an order.
DSS presents a subpoena to the financial institution⁷	<ul style="list-style-type: none">▪ DSS may petition a district court for a subpoena for financial records of a disabled adult when investigating a credible report of exploitation.▪ If the court issues the subpoena, a financial institution may ask the court to either modify or quash it.▪ Once any challenge is resolved, the financial institution must comply with the subpoena by producing the requested records.▪ DSS is required to notify the customer about the subpoena immediately but may ask the court to delay the notice under certain circumstances.
DSS, serving as guardian, requests access to financial information⁸	<ul style="list-style-type: none">▪ If DSS is appointed interim guardian, general guardian, or guardian of the estate, the financial institution must provide access to the adult's financial information if authorized by the guardianship order.▪ If DSS is appointed guardian of the person, the financial institution is not required to provide access.

5. G.S. 108A-115.

6. G.S. 108A-106.

7. G.S. 108A-116; -117.

8. G.S. 35A-1114(e); -1251; -1241.

Sharing Information with Law Enforcement

Situation	General Rule
Financial institution identifies signs of potential financial exploitation⁹	<ul style="list-style-type: none">▪ If the institution (or an officer or employee) has reasonable cause to believe that a disabled or older adult (65+) is the victim or target of financial exploitation, a report must be made to local law enforcement. Note that if the potential victim is a disabled adult (18+), a report must also be made to DSS (see above).▪ Financial privacy laws allow financial institutions to comply with this reporting requirement.
Law enforcement official presents a subpoena to financial institution¹⁰	<ul style="list-style-type: none">▪ Law enforcement may petition a district court for a subpoena for financial records of a disabled or older adult (65+) when investigating a credible report of exploitation.▪ If the court issues the subpoena, a financial institution may ask the court to either modify or quash it.▪ Once any challenge is resolved, the financial institution must comply with the subpoena by producing the requested records.▪ Law enforcement is required to notify the customer about the subpoena immediately but may ask the court to delay the notice under certain circumstances.
Law enforcement official presents search warrant to financial institution¹¹	<ul style="list-style-type: none">▪ The financial institution must comply with the search warrant.

9. G.S. 108A-115; 53B-4(13).

10. G.S. 108A-116; -117.

11. G.S. 53B-4(3).

Freezing, Securing, or Providing Access to Assets

Source of Assets	General Rule
Assets of an older adult¹²	<ul style="list-style-type: none"> ■ In the course of investigating potential financial exploitation, DSS is authorized to petition a district court judge to issue an order (1) freezing the assets of a disabled adult who is a suspected victim of financial exploitation and (2) directing a financial institution to provide access to the adult’s financial records ■ Judges may issue this type of order when they find that (1) the adult is in need of protective services, (2) the adult lacks the capacity to consent to the release of financial records, and (3) the alleged exploitation was committed by the adult’s caretaker.
Assets of an older adult under guardianship¹³	<p>If an older adult has a guardian of the estate (GOE) or a general guardian (GG), that guardian has the authority to “take possession . . . of all the ward’s estate” for the purpose of preserving and managing the estate in the best interest of the ward. In addition, an interim GOE or GG may also be granted this authority by the court.</p>
Assets subject to a power of attorney executed by the older adult as principal¹⁴	<p>If the older adult (principal) executed a power of attorney (POA), the agent authorized in the POA to act on the older adult’s behalf may have authority to modify, terminate, or establish bank accounts; access a safe deposit box; or take other action with respect to services offered by a bank or financial institution. The extent of the agent’s authority depends on the terms of the POA.</p>
Assets of a criminal defendant¹⁵	<p>If a person is charged with either of the two exploitation crimes listed in G.S. 14-112.2 and the amount involved is valued at more than \$5,000, the prosecutor may ask the court to freeze or seize enough of the defendant’s assets to preserve them for potential restitution to the victim.</p> <ul style="list-style-type: none"> ■ Procedurally, the prosecutor must file a petition in the pending criminal proceeding consistent with state rules governing injunctions as well as the specific rules governing these particular types of orders. In order to succeed, the prosecutor must prove by clear and convincing evidence that the defendant is about to or intends to “divest himself or herself of assets in a manner that would render the defendant insolvent for purposes of restitution.” ■ The court may issue an order affecting the defendant’s assets in an amount equal to up to 150 percent of the value of the victim’s potentially exploited assets.

12. G.S. 108A-106(f).

13. G.S. 35A-1251(1) (guardian of the estate); -1253(1) (guardian of the estate); -1114(e) (interim).

14. G.S. 32C-2-208 (banks and other financial institutions); 32C-2-201 (authority).

15. G.S. 14-112.2(f); -112.3.