

Abstract

Elder Abuse and Exploitation

Health and Human Services Legislative Committee

July 3, 2013 2:00 p.m.

The New Mexico Guardianship Association and the Senior Citizens' Law Office have joined in a collaborative effort to develop a proposal for civil legislation to address the financial exploitation and abuse of vulnerable adults, many of whom are senior citizens. Our three witnesses, Marsha Shasteen, Darryl Millet and Greg MacKenzie, are attorneys who will describe some of the specific challenges currently faced while dealing with these cases within the context of existing statutes and common law principles.

Vulnerable adults are those over eighteen years of age, who due to mental, developmental or physical impairment, including age related health problems, are unable to adequately protect themselves from physical abuse or financial exploitation. Of all vulnerable adults, seniors may be the most at risk for abuse and exploitation. The National Center on Elder Abuse estimates that 700,000 to 3.5 million elders are abused and exploited in America each year. Further, it is estimated that only one in six cases of elder abuse are identified and reported. Although there are no statistics regarding the incidence of elder abuse in New Mexico, which itself is a problem, there is no reason to think that New Mexico does not follow this national pattern. In fact, due to New Mexico's poverty and that, nationally, elders control at least seventy percent of net worth, the incidence may even be higher. Their unique frailty, combined with their assets, make them an attractive and easy target for exploitation.

While some states have moved toward specifically criminalizing financial exploitation of vulnerable adults, resorting to the criminal justice system often proves inadequate. Criminal prosecution of financial abuse is often too difficult and expensive given the unique impediments of such cases and creates additional stress on a system that is already overburdened. While there are existing civil remedies, these too are not often successfully pursued due to the difficulties in proving coercion or undue influence as an underlying condition of the asset transfer. Elderly and vulnerable persons make for fragile witnesses for their own case. This can be complicated by their relationships of reliance upon the perpetrators. Furthermore, when the perpetrators have gained control of their assets, they can be left with no resources to retain a lawyer. Even when access to legal representation is possible, the expense of proving coercion or undue influence can just be too great, in comparison to the value of the lost assets. The creation of a civil remedy, along with incentives for civil attorneys to pursue actions against exploiters, would be an effective and efficient method to address financial exploitation. In especially flagrant cases, the civil judgment might then pave the way for a smoother criminal prosecution.

Maine's "Improvident Transfer of Title Act" provides a template for such a civil remedy. Under the act, if a person transfers more than 10% of his or her estate to someone with whom the person has a dependent, confidential or fiduciary relationship for less than full consideration, a presumption arises that the transfer was the result of undue influence unless the person was represented by independent counsel. If the recipient of the transfer fails to rebut the presumption, the person is entitled to void the transfer. While the Maine statute is limited to the elderly, its provisions are equally applicable to transactions involving all vulnerable adults.

Coupling such a statute with provisions allowing the award of attorney's fees and the possibility of enhanced damages, such as found in Arizona's vulnerable adult statute, will create an incentive for lawyers in the private sector to pursue cases of financial abuse against vulnerable adults. Often the victim of financial abuse no longer has the assets to hire an attorney to pursue the abuser with the result that the abuser escapes liability. Currently, cases of financial abuse can only be litigated via public interest or pro bono representation which cannot meet the need. Financial incentives for assuming these cases are an important component to ensure that, whether the victims are wealthy or poor, there is an actionable cause to remedy what has happened to them.

three witnesses are attorneys who will describe some of the specific challenges currently faced while dealing with these cases within the context of pure contract and common law principles. Our testimony will demonstrate the need for this type of legislation due to the inadequacy of the criminal justice system and current civil remedies to address the problem of financial exploitation of vulnerable adults. By raising awareness of this issue and our efforts to address it, we hope to collaborate with other stakeholders and interested parties to develop effective legislation containing certain key elements such as those found in the Maine statute, attorneys fees, enhanced damages and the placement of at risk assets in the court registry until conclusion of the action.