

## 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 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.

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.

## Elder/Adult Abuse in New Mexico in a Nutshell

### *Who are victims of Adult Abuse?*

- Reports received: 10,194
- Reports investigated: 5,524
- Victims over age 60: 63%
- Victims over age 80: 24%

**Bottomline: 87% of victims of elder abuse in NM in 2012 were over the age of 60.**

### *Where does abuse occur?*

- Abuse occurs primarily in victim's own home, as opposed to nursing facilities.
- 97% of seniors live at home.

### *Who are the abusers?*

- Most perpetrators are under 60 years of age.
- Family members comprise 43% of substantiated perpetrators.

### *What type of abuse is reported?*

- Self neglect: 33.4%
- Caregiver neglect: 25.2%
- Exploitation: 22.3%
- Abuse (physical or sexual): 19.1%

### *Trends*

- 18% more referrals in 2012, than 2008
- Financial exploitation cases grew from 16.2% to 22.3% between 2008-2012

### *Keep in mind...*

- Only 6% of referrals were made by the victims themselves

**Bottomline: Statistics only tell part of the story. It is estimated that fewer than 1 in 24 cases of abuse are reported. Reasons given for not reporting:**

- Humiliation and shame
- Fear of getting a family member/perpetrator in trouble
- Isolation/inability to report
- Fear of the guardianship process

Source: NM Aging and Long-Term Services Department, 2012 Statistics  
[www.nmaging.state.nm.us/Adult\\_Abuse\\_Awareness.aspx](http://www.nmaging.state.nm.us/Adult_Abuse_Awareness.aspx)

*Elder Abuse and Exploitation*

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*July 3, 2013*

*Testimony Outline for Witness Marsha Shasteen,*

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**I. How to Better Address Prevention and Recovery in Cases of Financial Exploitation and Abuse of Vulnerable Adults:** Statutory Proposals to better track the prevalence of these incidents, to support successful civil recovery actions by easing the burden of proof for coercion, allowance for attorneys fees in civil actions and with enhanced criminal penalties for physical abuse.

**A. Who is a Vulnerable Adult:** Anyone over the age of eighteen, unable to protect him or herself, due to physical ,emotional, mental impairment, and is in a position of reliance on other adults for help meeting basic physical, medical, or nutritional needs.

**B. Problems with the current state of the law:**

1. Civil Plaintiff must prove coercion or undue influence as reason for having transferred the asset to the Defendant, the vulnerable or elderly adult-Plaintiff typically may not perform well as a witness up against a more physically able, mentally alert and articulate Defendant.
2. Especially following financial exploitation, Civil Plaintiffs can lack for financial resources to retain counsel to file a recovery action against the perpetrator.
3. Perpetrators often spend or lose control over wrongfully obtained assets before a filed legal case can produce a judgment.
4. Criminal Prosecutors do not currently utilize a consistent reporting system to track the prevalence of physical abuse or financial exploitation of vulnerable adults, as a class of crime unto itself, so we lack for accurate statistics on the prevalence of these reports of abuse and exploitation.

**C. Proposed Remedy: Enact a statute or statutes to accomplish the following legislative objectives:**

1. Create a presumption of coercion or undue influence for transfers that involve a significant portion of the vulnerable adult's total net worth, and when the recipient is a person upon whom the vulnerable adult has a relationship of reliance for meeting basic physical, medical or social needs. (*Improvudent Transfer of Title Act, State of Maine*).
2. Create an allowance for award of attorneys fees to the Plaintiff, when a civil judgment for exploitation or abuse is entered. Treble damages to be allowed when intent to coerce or apply

undue influence, as opposed to recklessness or mere negligence is shown against the perpetrator. (*Duty to a Vulnerable Adult Act, State of Arizona*).

3. Create a Court Registry for title to the assets in question to be escrowed while the litigation is in progress.
4. Require prosecutors to consistently document both the numbers and types of phone calls, and complaints from the public concerning specific allegations of exploitation and physical abuse allegedly committed against vulnerable adults, with a goal to create more awareness of common threads in these cases, and to motivate more prosecutions.

Outline of testimony from Darryl W. Millet, an Albuquerque attorney who serves as Conservator and/or Trustee for elderly persons with dementia, and Conservator/Trustee for persons with diminished capacity due to medical conditions:

The following are actual case histories of elder abuse of Albuquerque seniors from my Conservator files. No names will be revealed. The Maine statute, if made into law in New Mexico, would be a useful tool for those of us who deal with cases of elder exploitation.

(1) Case involving elderly woman with dementia whose caregiver forged dozens of checks over a three year period, leading to a loss in excess of \$125,000:

- Initially live-in caregiver wrote pay checks for woman to sign on weekly basis
- Caregiver began telling elderly woman she had not been paid, and had woman pay her twice each week for same hours. Elderly woman signed checks without question.
- After a while, caregiver began asking for "reimbursement" checks for money caregiver claimed was owed to third parties. Elderly woman was told caregiver would pay the "expenses". It was later learned that the "expenses" were invented by the caregiver.
- Eventually, caregiver started signing checks for the elderly woman by forging her signature.
- Caregiver added a "1" to the front of a particular check amount, thus giving herself an extra \$1000.00 she was not entitled to.
- Caregiver forged a \$6800.00 check to herself and signed it. When caught, caregiver "repaid" the funds, then forged new checks to gradually get \$6800.00 back for herself. Family failed to fire caregiver, due to internal bickering and desire to avoid responsibility for elderly woman's care if caregiver fired. Caregiver fired by Conservator on first day of Conservator appointment.
- DA was sent letter outlining case. DA referred to APD for investigation. GAL and Conservator of elderly woman met with detective several times.
- Conservator supplied police with copies of front and back of all checks, plus table showing illicit payments.
- Detective stated he needed time to investigate, but after several months without action taken, Conservator began calling to get updates. The detective eventually stopped returning Conservator's calls, and the case was never prosecuted. Calls to DA also unanswered.
- The elderly woman is now deceased, and no recovery of the funds was ever obtained.
- The DA's office and the police receive many complaints of elder exploitation, and have very limited resources. They tend to prosecute "pattern" cases, where there are multiple victims and a single perpetrator.

(2) Case involving second elderly woman whose daughter attempted to obtain a deed to the mother's house in exchange for moving in and taking care of the mother:

- Mother and daughter come to my office regarding getting a deed executed.
- Daughter leads mother by pulling on mother's arm.

- Mother never says a word during meeting.
- Daughter says she wants \$200,000 + house (free and clear of mortgages) deeded to her and her husband, who intend to move in with elderly mother to take care of her.
- When asked if they have considered the possibility that the deed could disqualify the mother from Medicaid, the daughter says she isn't worried, as they can take care of the mother's needs.
- When asked if she understood how expensive a non-Medicaid nursing facility would be if needed, the daughter became agitated, and responded that I should not worry about that.
- When I told the daughter that I needed to talk to the mother alone to determine her ability to understand the proposed transaction and determine if it was to be done with mother's informed consent and without duress, daughter became very agitated. Daughter grabbed mother by arm and pulled her out of the office.
- Thirty minutes later a police officer arrived and said the daughter wanted the original sign-in sheet the daughter filled out, which contained mother and daughter's names, addresses, and phone numbers.
- I made a photocopy of the sign-in sheet, and gave the original to the officer. I then called Adult Protective Services and made a referral regarding possible financial exploitation of an elderly person.
- I do not know if the daughter ever took title to the house or if APS took any action regarding my referral.

(3) Case involving elderly man with dementia whose adult children took over \$3 million from his assets using POAs over a several year span.

- Kids gave father a few promissory notes (unsecured), but simply liquidated retirement and investment accounts and split the funds in most instances.
- Kids claimed their father, suffering from dementia, wanted to have "gifting program".
- Longtime CPA says father only loaned money, never gifts.
- Most of the funds have been spent, and the kids have few assets (or jobs).
- As father was incompetent, and had no legal advisor involved in the "gifting program" a presumption of fraud and duress would be appropriate, as set out in the Maine statute.

(4) Elderly woman with dementia frequently withdrew large amounts of cash from her bank.

- Bank teller noticed she was still in the car in the bank parking lot an hour after making a withdrawal. When the teller checked on the woman, the elderly woman stated she did not remember where she lived. The elderly woman's home was one block from bank.
- The woman had no relatives in New Mexico.
- Thousands of dollars she withdrew could never be accounted for.
- Repair person was billing unreasonable amounts for "repairs" to house.

## **STATEMENT TO HHS COMMITTEE BY GREGORY W. MACKENZIE, ESQ.**

### **1. SPEAKER INTRODUCTION**

### **2. TYPES OF FINANCIAL ABUSE EXPERIENCED**

- TRANSFERS TO FAMILY MEMBER (REAL OR PERSONAL PROPERTY, CASH, INCOME)
- TRANSFERS TO THIRD PARTIES (REAL OR PERSONAL PROPERTY, CASH, INCOME)
- ABUSES BY FIDUCIARIES (POA, TRUSTEE) USUALLY INVOLVING SELF-DEALING AND FAILURE TO ACCOUNT
- MANIPULATION OF ESTATE PLANNING DOCUMENTS (WILLS, TRUSTS, POA, ETC.)

### **3. CIVIL ACTION BY ELDER AS ONE AVENUE OF REDRESS**

- NOT TYPICAL
- ELDER OFTEN RELUCTANT OR UNABLE TO ACT
  - MAY BE DOMINATED BY PERPETRATOR
  - MAY IDENTIFY WITH PERPETRATOR
  - MAY BE DEPENDENT ON PERPETRATOR FOR CARE NEEDS
  - PERPETRATOR MAY HAVE INTELLECTUAL SUPERIORITY
  - MAY BE MULTIPLE PERPETRATORS
  - MAY BE IMPOVERISHED AS A RESULT OF TRANSFERS
  - AFRAID OF PERPETRATOR AND/OR CONFLICT
  - ISOLATED FROM FAMILY DUE TO ACTIONS BY PERPETRATOR
  - MAY BE GEOGRAPHICALLY ISOLATED
  - MAY BE ISOLATED FROM INDEPENDENT ADVICE DUE TO MEDICAL CONDITION
  - MAY BE ISOLATED DUE TO LACK OF ABILITY TO COMMUNICATE
  - MAY BE ISOLATED DUE TO DEMENTIA
- LITIGATION IS TIME CONSUMING, EXPENSIVE AND COLLECTABILITY IS OFTEN AN ISSUE
- LIMITATIONS ON GOVERNMENTAL RESOURCES

### **4. CIVIL ACTION BY FAMILY**

- MORE COMMON
- COMMON IMPEDIMENTS
  - FAMILY OFTEN ALIENATED DUE TO ACTIONS BY PERPETRATOR
  - FAMILY MAY NOT LIVE LOCALLY AND IS IN A POOR POWER POSITION VIS-A-VIZ PERPETRATOR
  - FAMILY MAY NOT HAVE RESOURCES
  - OFTEN SURROGATE DECISION-MAKING NOT IN PLACE OR NOT EFFECTIVE
  - FEAR OF FAMILY DIVISION
  - FEAR OF PERPETRATOR



- FAMILY USUALLY MUST HAVE SURROGATE DECISION MAKING POWER TO ACHIEVE RELIEF
  - AGENT OR TRUSTEE MAY PURSUE RELIEF
- CONSERVATORSHIP PROCEEDINGS OFTEN USED TO OBTAIN RELIEF WHILE VICTIM ALIVE
  - CAN BE EXTREMELY EXPENSIVE AND INTRUSIVE DUE TO ARCHITECTURE OF PROCEEDINGS
  - WILL NOT WORK IN ALL CASES DUE TO IMPAIRMENT LEVELS
  - UNDUE INFLUENCE IS DIFFICULT TO PROVE, ESPECIALLY IF VICTIM HAS IDENTIFIED WITH PERPETRATOR
    - DURÉSS ("OVERT UNDUE INFLUENCE") IS EASIER TO PROVE, BUT NOT AS COMMON
    - SWEETHEART SCAMS OR MISUSE OF A POSITION OF TRUST/AUTHORITY ("COVERT UNDUE INFLUENCE") IS MORE COMMON, BUT HARDER TO PROVE
    - PERPETRATORS MAY PERFORM OCCASIONAL ACTS OF KINDNESS AS PART OF THEIR UNDUE INFLUENCE PLAN, MAKING IT MORE DIFFICULT TO LATER PROVE IN COURT.
  - PROCEEDINGS NOT NECESSARILY DESIGNED TO BE SENSITIVE TO UNDUE INFLUENCE
  - UNDUE INFLUENCE IS FACT DRIVEN (HIGH LITIGATION COSTS) AND OFTEN REQUIRES EXPERTS
    - LOW DOLLAR ESTATES TYPICALLY CANNOT AFFORD RELIEF
    - LOW DOLLAR TRANSACTIONS OFTEN GO UNADDRESSED
  - NOT ALL COURTS ARE RECEPTIVE TO UNDUE INFLUENCE CLAIMS
    - ESPECIALLY SWEETHEART SCAMS AND OTHER FORMS OF COVERT UNDUE INFLUENCE
- FAMILY MAY DECIDE TO WAIT UNTIL VICTIM'S DEATH TO INITIATE ACTION
  - HEIGHTENED BURDEN OF PROOF
  - OFTEN VERY EXPENSIVE TO PURSUE
  - VICTIM DOES NOT BENEFIT FROM POST-MORTEM LITIGATION

## 5. STORY OF JOSE M. (VERY COMMON FACT PATTERN)

- ELDERLY KOREAN WAR VET.
- MET FRIENDS AT CASINO; BEGAN TO GIVE THEM MONEY AND THINGS
- PERPETRATOR TOLD JOSE'S SISTER: YOU ARE TOO OLD TO DO ANYTHING ABOUT IT, AND HIS DAUGHTER LIVES IN DENVER!
- REQUIRED EXPENSIVE PROTECTIVE PROCEEDING AND LITIGATION TO RECOVER VEHICLE
- STATE SHOULD SEND A STRONG MESSAGE