

No. 65101-3-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

In re the Estate of James W. Haviland, Deceased.

DONALD HAVILAND, ELIZABETH HAVILAND, and MARTHA
CLAUSER,

Petitioners,

v.

MARY HAVILAND,

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY

OPENING BRIEF OF PETITIONERS

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I. INTRODUCTION

In 2009, the Legislature amended what was formerly known as the Slayer Statute, RCW 11.84, and related statutes,¹ to permit courts to prohibit individuals found to have financially exploited vulnerable adults from inheriting from their victims. The amendments apply to the estate of “[a]ny deceased person who, at any time during life in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser.” RCW 11.84.010(2). An abuser under RCW 11.84.010(1) is “any person who participates, either as a principal or an accessory before the fact, in the willful and unlawful financial exploitation of a vulnerable adult,” as those terms were previously defined by the Vulnerable Adult Protection Act, RCW 74.34.020. RCW 11.84.010(6). The amendments authorize the probate court to determine in its discretion the extent to which an abuser should be prohibited from inheriting the assets of his or her victim. RCW 11.84.170.

This case presents an issue of first impression regarding the application of the 2009 amendments to a petition that was filed after the effective date of the amendments based on alleged financial exploitation occurring prior to the effective date. Following a will contest in which

¹ Now known as the “Slayer and Abuser Statute,” Substitute House Bill 1103 amended RCW 11.84, RCW 41.04.273, RCW 26.16.120 and RCW 11.96A.030. A copy is in the Appendix at pages A-1 through A-14

Mary Haviland was found to have unduly influenced her elderly husband, the personal representative of the decedent's estate filed a petition in November 2009 to adjudicate whether Mary Haviland was an abuser under RCW 11.84 and if so whether she should be prohibited from inheriting Dr. Haviland's assets. The trial court denied the petition because the alleged exploitation occurred prior to the date that the amendments took effect. The Petitioners request that this Court reverse and remand.

II. ASSIGNMENT OF ERROR

The trial court erred in entering its January 26, 2010 Opinion Letter, ruling that RCW 11.84 *et seq.* cannot be applied to the present case because it would involve the impermissible retroactive application of the law. CP 137 - 139.

III. STATEMENT OF ISSUES

The 2009 amendments to RCW 11.84 allow courts to prohibit "abusers" who have engaged in the "financial exploitation" of a "vulnerable adult" from inheriting from their victims. "Vulnerable adult" and "financial exploitation" are defined by pre-existing provisions of the Vulnerable Adult Protection Act, RCW 74.34.020. RCW 11.84.010(3)(6).

A. Does application of the 2009 amendments to allow the disinheritance of an individual who engaged in conduct that was defined

as financial exploitation under RCW ch. 74.34 when the conduct occurred involve prospective application of the amendments, where the petition was filed after the amendments' effective date (Argument C)?

B. Is retroactive application of the amendments, which codified the authority of courts in probate proceedings to prohibit financial abusers from inheriting from their victims, permissible because the Legislature intended the statute to apply to persons engaging in financial exploitation before the amendments' effective date, and because the statutory amendments are remedial (Argument D)?

C. Does an individual who financially exploited a vulnerable adult before the amendments' effective date have a vested right to inherit from the vulnerable adult's estate at death such that they are immune from changes in the law that increased protections for vulnerable adults (Argument D, E)?

IV. STATEMENT OF THE CASE

The facts set forth below were established by the trial court in ruling that the will Dr. Haviland signed on January 19, 2006 was invalid for undue influence by Mary Haviland.²

A. Mary Haviland Financially Exploited Jim Haviland When He Was a Vulnerable Adult.

The respondent Mary Haviland (then Burden) met Dr. James

² The will contest is on appeal under case number 64303-7.

Haviland in 1996, three years after the death of his first wife Marion. CP 11, CP 13. At the time they met, Dr. Haviland was 85 years old and a patient at Providence Hospital, and Mary Burden was a nursing aide on his floor. CP 10, CP 13. She had been released from prison two years earlier after serving time for Conspiracy to Commit First Degree Theft and 14 counts of Possession of Stolen Property in the First Degree. CP 12. While Dr. Haviland was hospitalized, Mary Burden performed care-giving functions for him and began having social contact with him at the hospital. CP 13. Dr. Haviland was a vulnerable adult when Mary Haviland met him. Under the Vulnerable Adult Protection Act, a vulnerable adult includes anyone who is an inpatient at a nursing facility. RCW 74.34.020(16)(d). (A copy of RCW 74.34 is in the appendix at 113-130.)

Soon after Dr. Haviland's discharge, he and Mary Burden began dating. CP 13. Within three months from Dr. Haviland's discharge, Mary Burden was to receive \$100,000 for her education and a "nest egg" of \$300,000 - \$350,000. CP 13. Dr. Haviland and Mary Burden wed in August 1997. CP 15.

Dr. Haviland remained a vulnerable adult for much if not all of his marriage to Mary Haviland. In addition to individuals who are receiving care in nursing facilities, as Dr. Haviland was when he met Mary Burden, the definition of vulnerable adult includes any individual who is 60 years

old or older and who has “the functional, mental, or physical inability to care for himself or herself.” RCW 74.34.020(16)(a). Dr. Haviland was 86 at the time of the marriage in 1997. CP 10. By 2004, Dr. Haviland needed a full-time caregiver for basic tasks such as toileting. CP 23. By 2007, Dr. Haviland was so impaired that he did not recognize Mary Haviland 75% of the time and he could no longer perform simple tasks like brushing his teeth without prompting. CP 32. When Dr. Haviland was taken to the hospital on November 6, 2007, the doctor noted in the medical records that he had “advanced dementia,” was bed-ridden at home, and was exhibiting “confusion, agitation, abnormal behavior and changes in his mental state.” CP 34.

After the marriage, Mary Haviland started a “steady, systematic, and persistent pattern of depleting Dr. Haviland’s assets and the transfer of funds for the benefit of Mary Haviland and her designees.” FF 128 (CP 35; challenged on appeal).³ The trial court found that “Mary Haviland offered no credible evidence to explain the consumption and transfer of such large sums of money from Dr. Haviland’s assets, during the course of

³ See also FF 30 (CP 17), FF 31 (CP 17), FF 33 (CP 18), FF 41 (CP 19), FF 42 (CP 19), FF 43 (CP 19-20), FF 44 (CP 20), FF 45 (CP 20), FF 46 (CP 20), FF 48 (CP 21), FF 49 (CP 21), FF 50 (CP 21), FF 51 (CP 21), FF 52 (CP 21), FF 53 (CP 21), FF 54 (CP 22), FF 55 (CP 22), FF 57 (CP 22), FF 58 (CP 22), FF 59 (CP 22-23), FF 61 (CP 23), FF 62 (CP 23), FF 63 (CP 23), FF 64 (CP 23), FF 66 (CP 24), FF 68 (CP 24), FF 69 (CP 24), FF 70 (CP 24), FF 71 (CP 24-5), FF 88 (CP 28), FF 101 (CP 31), FF 103 (CP 31), FF 104 (CP 31), FF 106 (CP 31), FF 108 (CP 32), FF 110 (CP 32), FF 112 (CP 32), FF 113 (CP 32), FF 114 (CP 32), FF 116 (CP 33), FF 118 (CP 33), FF 120 (CP 33), FF 121 (CP 33), FF 122 (CP 33).

the marriage.” *Id.* The consumption and transfer of Dr. Haviland’s assets were inconsistent with his prior frugal habits. CP 33-4.

Most of the transfers occurred between 2004 and 2007, when Dr. Haviland clearly met the definition of vulnerable adult. While Mary Haviland was co-trustee over the Living Trust that held Dr. Haviland’s separate property, CP 17, CP 13-4, CP 16, she directly participated in the following transfers to a joint tenancy account in both their names, to her separate checking account and to her church:

Date	Source of Transfer	Destination of Transfer	Amount	Citation to Record
1/7/2004	Living Trust	Joint Account	\$197,793	FF 50;CP 21
9/21/2004	Living Trust	Joint Account	\$193,080	FF 53;CP 21-2
3/15/2005	Living Trust	Joint Account	\$477,601	FF 61;CP 23
4/25/2005	Living Trust	Mary Checking	\$157,000	FF 62;CP 23
5/11/2005	Living Trust	Joint Account	\$157,000	FF 63;CP 23
9/2005	Living Trust	Joint Account	\$223,200	FF 66;CP 24
1/5/2006	Living Trust	Mary Church	\$86,000	FF 71;CP 24-5
1/17/2006	Living Trust	Joint Account	\$200,000	FF 88;CP 28
4/25/2006	Living Trust	Joint Account	\$102,000	FF 103;CP 31
6/27/2006	Living Trust	Mary Church	\$30,000	FF 104;CP 31
9/18/2006	Living Trust	Joint Account	\$105,000	FF 106;CP 106
1/9/2007	Living Trust	Joint Account	\$96,201	FF 112;CP 32
4/3/2007	Living Trust	Joint Account	\$60,000	FF 113;CP32
6/13/2007	Living Trust	Joint Account	\$60,000	FF 116; CP 33

These figures do not include the automatic transfer of \$10,000 per month from Dr. Haviland’s Living Trust to the joint tenancy account for regular living expenses, which started in 2002. CP 18.

In addition to Dr. Haviland’s Living Trust, other separate property

he owned was transferred to the joint tenancy account shortly before he died. Dr. Haviland's Edward Jones account valued at \$30,000 was cashed in on November 2, 2007 and transferred to the joint tenancy account. CP 33. Another \$50,000 was transferred from Dr. Haviland's line of credit to the joint tenancy account on November 9, 2007. *Id.*

During the same timeframe (January 2004 – November 2007), the following transfers were made from the joint tenancy account to Mary Haviland's separate checking account and line of credit (LOC).

Date	Source	Destination	Amount	Finding/CP
1/9/2004	Joint Account	Mary LOC	\$130,000	51;CP 21
1/9/2004	Joint Account	Mary Checking	\$10,000	51;CP 21
7/19/2004	Joint Account	Mary LOC	\$150,000	52;CP 21
2004	Joint Account	Mary Checking	\$100,000	55;CP 22
3/16/2005	Joint Account	Mary LOC	\$206,574	61;CP 23
7/4/2005	Joint Account	Mary Checking	\$10,000	64;CP 23
4/20/2006	Joint Account	Mary Checking	\$40,000	103;CP 31
8/23/2006	Joint Account	Mary LOC	\$40,000	106;CP 31
9/25/2006	Joint Account	Mary LOC	\$80,000	106;CP 31
10/1/2006	Joint Account	Mary LOC	\$120,000	118;CP 33
10/4/2007	Joint Account	Mary LOC	\$5000	118;CP 33
11/8/2007	Joint Account	Mary LOC	\$19,000	118;CP 33

Six days before Dr. Haviland died, Mary Haviland had him sign a document requesting that all of his debt, including any debt jointly held with Mary, be paid by the principal of the trust that had been created by Dr. Haviland's first wife Marion and funded with Marion's separate property. CP 35, CP 11-2. The request was denied. CP 35. Dr. Haviland died at the age of 96 on November 14, 2007.

B. RCW 11.84 Authorizes Disinheritance for Financial Exploitation.

Washington's Legislature passed Substitute House Bill 1103 by unanimous votes of the House and Senate on April 22, 2009 and April 17, 2009, respectively. House Bill 1103 amended RCW 11.84, RCW 26.16.120, RCW 41.04.273, and RCW 11.96A.030. It took effect July 26, 2009. The effect of the amendments was to codify the authority of courts in probate proceedings to prohibit financial abusers from inheriting from their victims.

C. The Will that Dr. Haviland Signed on January 19, 2006 Was Found By The Trial Court To Be The Product Of Undue Influence by Mary Haviland.

The petitioners filed a will contest to challenge the last will that Dr. Haviland signed in January 2006. On September 14, 2009, the trial court invalidated the 2006 will, finding that it was the product of undue influence by Mary Haviland. CP 10 – 44. The trial court appointed an independent administrator of the estate, who has joined this appeal. CP 40.

D. The Independent Administrator Filed a Petition to Determine Whether Mary Haviland Should Be Disinherited under RCW 11.84; the Trial Court Ruled that the 2009 Amendments do not Apply to Financial Exploitation Occurring Before July 26, 2009.

On November 9, 2009, the personal representative of the Estate of James Haviland filed a petition to adjudicate whether Mary Haviland is an abuser as defined by amendments to RCW 11.84 and related statutes that

took effect July 26, 2009. CP 1 – 42. The Petitioners Donald Haviland, Martha Clauser, and Elizabeth Haviland (Dr. Haviland’s son and daughters) filed a joinder. CP 43 – 44. The trial court ruled that because the financial exploitation occurred prior to the effective date of the legislation, it would be “disadvantaging to the defendant to impose new consequences for actions she already committed,” CP 139, even though financial exploitation has been illegal under the Vulnerable Adult Protection Act, RCW 74.34, since 1984. After the trial court certified its ruling, CP 146-7, petitioners and the Personal Representative petitioned for discretionary review, which was granted.

E. Mary Haviland Has Not Complied With Two Court Orders Requiring Her to Provide an Accounting of Estate Assets.

On May 28, 2008, Mary Haviland was ordered to provide an accounting of Dr. Haviland’s assets for court approval as a condition for being discharged as personal representative. CP 36. On September 14, 2009, Mary Haviland was again ordered to provide an accounting. CP 41. Mary Haviland has not complied with these orders. Her breach is ongoing.

V. ARGUMENT

A. The Standard of Review is De Novo.

The meaning of a statute is a question of law subject to *de novo* review. *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006). The court's objective is to ascertain and carry out the legislature's

intent. *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002). If a statute's meaning is plain on its face, then the court must give effect to that plain meaning as the expression of legislative intent. *Id.* The plain meaning of a statute is derived from the ordinary meaning of its language, as well as the general context of the statute, the related statutory provisions, and the statutory scheme as a whole. *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

B. Statutory Background.

1. RCW 11.84: The Slayer and Abuser Statute

Washington is among the majority of states that have laws prohibiting individuals defined as slayers from inheriting assets from their victims. *See In re Estate of Kissinger*, 166 Wn.2d 120, 126, 206 P.3d 665 (2009). In 1955, Washington's Legislature enacted RCW 11.84 to prohibit any person who willfully and unlawfully kills another person from inheriting from his or her victim. *Id.* at 125 (discussing enactment of the statute). RCW 11.84 codifies the "fundamental common law rule rooted in principles of equity and public policy" that "no man shall be permitted to profit by his own wrongful act." *United States v. Kwasniewski*, 91 F. Supp. 847, 851 (E.D. Mich. 1950). Washington's Supreme Court first articulated the rule in *In re Estate of Tyler*, 140 Wash. 679, 684-5, 250 P. 456 (1926):

No one shall be permitted to profit by his own fraud, or take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime. These maxims are dictated by public policy, have their foundation in universal law administered in all civilized countries, and have nowhere been superseded by statutes. . . . **These maxims without any statute giving them force or operation, frequently control the effect and nullify the language of wills.** (Emphasis supplied.)

In 2009, Washington followed a handful of other states in enacting legislation that authorized courts to prohibit individuals who financially exploit vulnerable adults from inheriting from their victims.⁴ The amendments retained the equitable character of the original law by including a provision that allows persons found to be abusers to inherit as the court “deems equitable”. See RCW 11.84.170. The express purpose of RCW 11.84 also remains the same: to “reflect the policy of this state that no person shall be allowed to profit by his own wrong, wherever committed.” RCW 11.84.900. The statute is to be “construed broadly” to effectuate this purpose. *Id.*

2. Defining Financial Exploitation of a Vulnerable Adult: Reliance on Pre-Existing Law.

Effective July 26, 2009, RCW 11.84.020 provides: “No slayer or abuser shall in any way acquire any property or receive any benefit as the

⁴ The other states that have enacted legislation authorizing the disinheritance of individuals who financially exploit vulnerable adults are Oregon (2006), Arizona (1996), Illinois (2004), and California (1998). See Ore. Rev. Code §112.457, Cal. Prob. Code 259, Ill. Comp. Stat. 5/2-6.6 and Ariz. Rev. Code 46-456. In addition, Maryland’s criminal code includes a provision for mandatory disinheritance of individuals who are convicted of financial crimes against vulnerable adults. MD Code Ann. Crim. Law §8-801(c) (2009).

result of the death of the decedent, but such property shall pass as provided in the sections following.” The amendments expanded the definition of “decedent” to include “[a]ny deceased person who, at any time during life in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser.” RCW 11.84.010(2). “Abuser” is defined as “any person who participates, either as a principal or accessory before the fact, in the willful and unlawful financial exploitation of a vulnerable adult.” RCW 11.84.010(1).

To define “financial exploitation” and “vulnerable adult,” the 2009 amendments incorporated pre-existing law: Washington’s Vulnerable Adult Protection Act (RCW 74.34). *See* RCW 11.84.010(3)(6). Enacted in 1984, RCW 74.34 created a cause of action for damages and injunctive relief on behalf of vulnerable adults who are the victims of abuse, including financial exploitation. RCW 74.34.110; RCW 74.34.200. Financial exploitation is defined as “the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person’s profit or advantage other than the vulnerable adult’s profit or advantage.” RCW 74.34.020(6). “Vulnerable adult” is defined by RCW 74.34.020(16) as any person:

- (a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or

- (b) Found incapacitated under chapter 11.88 RCW; or
- (c) Who has a developmental disability as defined under RCW 71A.10.020; or
- (d) Admitted to any facility; or
- (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or
- (f) Receiving services from an individual provider.

3. The 2009 Amendments: Standards and Procedures for Determining Whether a Person is an Abuser.

The amendments set standards and procedures for determining whether a person is an abuser and whether a person found to be an abuser should be disinherited. RCW 11.84 is invoked by filing a petition under the Trust and Estate Dispute Resolution Act (TEDRA), RCW 11.96A. *See* RCW 11.96A.030(2)(e). The amendments clarified that petitions filed under RCW 11.84 are “matters” under TEDRA, *id.*; therefore, TEDRA’s procedural rules govern unless they are in conflict with more specific provisions of RCW 11.84. RCW 11.96A.090.

A person can be adjudicated an “abuser” based on (1) “a final judgment of conviction for conduct constituting financial exploitation against the decedent;” or (2) “a superior court finding by clear, cogent, and convincing evidence that a person participated in conduct constituting financial exploitation of the decedent[.]” RCW 11.84.150(1) (2). In determining whether a person is an abuser, the court must find by clear

cogent and convincing evidence that: “[t]he decedent was a vulnerable adult at the time the alleged financial exploitation took place”; and “[t]he conduct constituting financial exploitation was willful action or willful inaction causing injury to the property of the vulnerable adult.” RCW 11.84.160. “Any record of conviction ... for conduct constituting financial exploitation against the decedent ... shall be admissible in evidence against a claimant of property in any civil proceeding arising under this chapter [RCW 11.84].” RCW 11.84.130.

When an individual is adjudicated to be an abuser, the court is authorized to prevent the abuser from receiving assets that would otherwise be distributed to the abuser due to the vulnerable adult’s death. Unlike slayers, abusers are not automatically disinherited. An abuser may still receive benefits from their victim, if the court finds there was clear, cogent, and convincing evidence that the decedent knew of the financial exploitation and “subsequently ratified his or her intent to transfer the property interest or benefit to that person.” RCW 11.84.170(1). Courts also have discretion to “allow an abuser to acquire or receive an interest in property or any other benefit described in this chapter in any manner the court deems equitable.” RCW 11.84.170(2). To determine what is equitable, courts may consider among other things the decedent’s dispositive scheme, decedent’s likely intent, and the “degree of harm

resulting from the abuser's financial exploitation of the decedent." *Id.*

4. Legislative History of the 2009 Amendments.

The final bill report accompanying passage of the amendments reiterates the general remedial purpose underlying RCW 11.84: "Rather than being punitive, the slayer statute is broadly construed to enforce the state's policy that no person should be allowed to profit by his or her own wrongdoing." House Bill Report SHB 1103 p. 2 (Appendix at A-16).

5. The Amendments' Relationship to Prior Laws.

The amendments expressly state that they supplement existing remedies and proceedings. RCW 11.84.180.⁵ Since 1984, financial exploitation of a vulnerable adult has been actionable under the Vulnerable Adult Protection Act (VAPA), RCW 74.34, which created a cause of action for damages and injunctive relief to protect vulnerable adults from abuse, financial exploitation, and neglect. RCW 74.34.110; RCW 74.34.130; RCW 74.34.200; *Endicott v. Saul*, 142 Wn. App. 899, 919, 176 P.3d 560 (2008). In addition, Washington courts have long recognized common law actions for undue influence of vulnerable adults, *see McCutcheon v. Brownfield*, 2 Wn. App. 348, 467 P.2d 268 (1970), conversion (the unlawful taking and retention of another person's property

⁵ RCW 11.84.180 provides: "The provisions of this act are supplemental to, and do not derogate from, any other statutory or common law proceedings, theories, or remedies including, but not limited to, the common law allocation of the burden of proof or production among the parties."

or money), and restitution (where the transferee received the property of another under circumstances that result in the transferee's unjust enrichment). *See Davenport v. Wash. Educ. Ass'n*, 147 Wn. App. 704, 721-22, 726, 197 P.3d 686 (2008) (explaining the common law origins of actions for conversion, restitution, and unjust enrichment.) Claims for economic loss under RCW 74.34 and the common law survive to the personal representative of the decedent's estate. *See* RCW 4.20.046; RCW 74.34.210; RCW 11.48.010.

Prior to the amendments, courts were vested with broad authority to impose a variety of statutory and common law remedies to make victims and their estates whole, including the award of damages, interest, attorneys' fees, rescission, injunctive relief, constructive trusts, writs, and retainer. *See* RCW 74.34.130(7) (authorizing attorneys' fees and costs); RCW 11.96A.150 (authorizing attorneys' fees and costs); RCW 11.96A.060 (authorizing "all manner and kinds of orders, judgments, citations, notices, summons, and other writs and processes that might be considered proper or necessary in the exercise of the jurisdiction or powers"); RCW 74.34.130 (authorizing injunctive relief as the court deems necessary for the protection of the vulnerable adult); *Endicott v. Saul*, 142 Wn. App. 899, (prohibiting the recipients of an *inter vivos* gift from transferring or encumbering the property of a vulnerable adult);

McSorley v. Bullock, 62 Wash. 140, 145, 113 P. 279 (1911) (imposing constructive trust based on conversion and awarding damages equal to the market value of the converted property and interest dating from the time of the conversion); *McCutcheon v. Brownfield*, 2 Wn. App. 348 (setting aside a deed for undue influence); *Boyer v. Robinson*, 26 Wash. 117, 121, 66 P. 119 (1901) (recognizing the doctrine of retainer that permits the personal representative to withhold from the interest of an heir, legatee or devisee the amount of any indebtedness owed the estate by such heir, legatee or devisee); *In re Estate of Bailey*, 58 Wn.2d 685, 699, 364 P.2d 539 (1961) (applying doctrine of retainer).

C. **Applying the Amendments to this Case is a Prospective Application of the Law Because the Event That Triggers Application of the Amendments is the Filing of a Petition Under RCW ch. 11.84.**

The trial court held that applying the amendments to Mary Haviland's financial exploitation of Dr. Haviland would involve the retroactive application of the law because her acts of financial exploitation occurred before the amendments' effective date. This was error because the amendments in fact apply prospectively to the petition, which was filed after the amendments' effective date. The plain meaning of the statute reflects the Legislature's intent to apply the amendments to conduct occurring prior to July 26, 2009 that met the statutory definition of financial exploitation.

The trial court erred in holding that the amendments operated retroactively because the “triggering event” was not Mary Haviland’s acts of financial exploitation, as the trial court held, but the TEDRA petition, which was filed after the statute’s effective date. Statutes are presumed to apply prospectively and retroactive application is disfavored. But “[a] statute does not operate retrospectively merely because it is applied in a case arising from conduct antedating the statute’s enactment... or upsets expectations based in prior law.” *In re Estate of Burns*, 131 Wn.2d 104, 111, 928 P.2d 1094 (1997) (quoting *Landgraf v. USI Film Products*, 511 U.S. 244, 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994)). *See also Nelson v. Department of Labor and Indus.*, 9 Wn.2d 621, 115 P.2d 1014 (1941) (applying changes to workers compensation law to pending appeals was prospective); *State v. Thompson*, 153 Wn. App. 325, 223 P.3d 1165 (2009) (applying amendments to the DNA collection fee statute to offenses committed prior to enactment of the amendments was prospective). “A statute operates prospectively when the precipitating event for the application of the statute occurs after the effective date of the statute, even though the precipitating event had its origin in a situation existing prior to the enactment of the statute.” *Aetna Life Ins. Co. v. Wash. Life & Disability Ins. Guar. Ass’n.*, 83 Wn.2d 523, 535, 520 P.2d 162 (1974) (citing *State ex rel. Am. Sav. Union v. Whittlesey*, 17 Wash.

447, 50 P. 119 (1897)).

In determining the precipitating or triggering event, the Court should discern the Legislature's intent from the plain meaning of the statute. *In re Estate of Burns*, 131 Wn.2d at 112. The plain meaning of the amendments indicates that the Legislature intended the triggering event to be the petition under RCW 11.84 because (1) the amendments do not regulate the pre-petition conduct of the abuser, but the consequences of the abuser's financial exploitation; and (2) the language of the amendments indicates that they apply to all petitions.

- 1. The amendments do not “regulate abuse and exploitation,” but regulate the consequences of financial exploitation of a vulnerable adult, which was defined by reference to existing law.**

There is no textual support for the trial court's interpretation that the “language of the statute regulates abuse and exploitation.” CP 137. The amendments adopt the Vulnerable Adult Protection Act's pre-existing definitions of “financial exploitation” and “vulnerable adult,” and define “abuser” and “decedent” based on the VAPA definitions. RCW 11.84.010. They then specify the consequences for being found to be an abuser. RCW 11.84.120 (“No slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.”) The amendments then prescribe how the decedent's property shall pass if their

heir is determined to be an abuser (RCW 11.84.025 – RCW 11.84.120), the evidence and proof standards that apply in adjudicating whether someone is an abuser or slayer (RCW 11.84.130 – RCW 11.84.160), the equitable factors courts may consider in determining whether abusers should be permitted to receive property from their victims (RCW 11.84.170), and the procedures to be followed (RCW 11.96A.030)(2)(e)).

The amendments do not regulate financial exploitation of vulnerable adults, which is defined by reference to RCW 74.34, any more than the original slayer statute regulates unlawful killing, which is defined by the criminal code. In both instances, findings and evidence from other proceedings may be used as the basis for disinheritance under RCW 11.84, but RCW 11.84 and the amendments say nothing about how adjudications under RCW 74.34 or the criminal code function. *See* RCW 11.84.130 - .160. Furthermore, a finding of financial exploitation in an action commenced under RCW 74.34 does not trigger operation of the amendments. Findings under RCW 74.34 accompany the issuance of a vulnerable adult protection order during the vulnerable adult’s lifetime. *See* RCW 74.34.120, .130. Financial exploitation may and frequently does occur years before the death of a vulnerable adult.⁶ Thus there is not

⁶ For example in the present case, the systematic depletion of Dr. Haviland’s assets went on for years before he died. This is not uncommon. One of the hallmarks of elder abuse, particularly financial exploitation, is that it occurs in secret: “Like other

even a causal nexus between what the trial court deemed to be the triggering event and the application of RCW 11.84.

Unless there is a petition in the probate to disinherit pursuant to RCW 11.84, the amendments have no operational effect. For this reason, the amendments are unlike the Medicaid lien statute interpreted by the Court in *In re Estate of Burns*, 131 Wn.2d at 113-4, where the event that triggered the State's statutory right to be reimbursed from a decedent's estate was held to be the receipt of Medicaid benefits during the decedent's lifetime. The *Burns* Court reasoned that under the language of RCW 43.20B.140, the State's Medicaid lien attached automatically by operation of law, at the time the benefits were paid, to create a debt owed by the decedent's estate. *Id.*, at 113-4.

The present case is more analogous to *Rivard v. State*,⁷ 168 Wn.2d 775 (2010), where the Washington Supreme Court held that the date that the petition was filed determined the law that would apply. In *Rivard, id.* at 780, the law at issue was the unlawful possession statute, RCW 9.41, which regulates whether a convicted felon may possession a firearm. The unlawful possession statute was amended in 2001 and the petition relating

forms of abuse, financial abuse most often occurs in a private setting, which makes it very difficult to detect." Carolyn Dessin, "*Financial Abuse of the Elderly*," 36 IDAHO L. REV. 203, 222 (2000) (App. A-26-7). It is very difficult to detect and prove financial abuse because victims are frequently unaware of the abuse due to physical and mental impairments, and because the evidence is not readily visible, unlike bruises and other manifestations of physical abuse. *Id.* at 214 (App. A-23).

⁷ *Rivard* was decided after the trial court ruled.

to the possession of a firearm was filed in 2006. However, the felony that potentially disqualified Mr. Rivard from possessing a firearm was committed in 1993. Nevertheless, the Supreme Court held that the 2006 law in effect at the time of the RCW 9.41 petition applied to determine whether possession of a firearm was allowed, not the law in effect at the time of Mr. Rivard's crime: "We do apply the version of the unlawful possession statute in place in 2006, RCW 9.41.040, to Rivard's case because we must assess whether, at the time of his petition, it would be a crime for him to possess a firearm." *Rivard v. State*, 168 Wn.2d at 780.

Like the unlawful possession statute interpreted by *Rivard*, 168 Wn.2d. 775, the amendments do not regulate the conduct (financial exploitation) that gives rise to the potential consequence (disinheritance). Both cases involve the application of current law to determine whether prior conduct justifies imposition of consequences authorized by current law. As in *Rivard*, the law in effect at the time of Mary Haviland's conduct will determine whether her conduct is actionable under current law. *Rivard, id.* at 780-81, held that the law in effect at the time of the crime determined whether it was a class A or class B felony subject to disqualification under the current version of RCW 9.41. Similarly, in the present case, the law at the time of Mary Haviland's systemic depletion of Dr. Haviland's assets will determine whether her conduct constituted

financial exploitation subject to disinheritance under the current version of RCW 11.84. The law defining financial exploitation, RCW 74.34.020, is the same today as it was when Mary Haviland acted. Therefore, the case for prospective application is simpler here than in *Rivard*, where the law that classified the criminal conduct changed between the time of the crime and the time of the petition.

The amendments also do not regulate the probate of a decedent's estate. Thus, Dr. Haviland's death cannot be deemed the triggering event. Simply because a statute impacts the ultimate distribution of a decedent's estate does not mean that the death of the decedent is the triggering event for operation of the statute. For example, in *In re Estate of Burns*, 131 Wn.2d at 115, the Court rejected the State's argument that the date of the decedent's death was the triggering event that determined application of RCW 43.20B.140, authorizing DSHS to recover benefits paid during a decedent's lifetime from the decedent's estate. In the present case, RCW ch. 11.84 is not triggered by an application for probate under RCW 11.20, or by a petition for adjudication of intestacy under RCW 11.28. The amendments regulate who may be adjudicated as an abuser, how those adjudications occur, and whether there are equitable reasons for permitting abusers to inherit. To the extent the amendments affect distribution of a

decedent's estate, they do so only after an adjudication has occurred pursuant to the standards and procedures prescribed by RCW 11.84.

2. By their plain language, the amendments apply to all petitions.

The Legislature also indicated its intent that the amendments apply to all petitions commenced under RCW 11.84 after the effective date of the legislation by using language that indicates universal application.

First, the amendments apply to all abusers without exception. *See* RCW 11.84.020 (“No slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent, but such property shall pass as provided in the sections following.”) (emphasis supplied). Second, the amendments prescribe evidentiary standards that apply to all civil proceedings commenced under RCW 11.84 without exception. *See* RCW 11.84.130 (“Any record of conviction for having participated in the willful and unlawful killing of the decedent or for conduct constituting financial exploitation against the decedent, including but not limited to theft, forgery, fraud, identity theft, robbery, burglary, or extortion, shall be admissible in evidence against a claimant of property in any civil proceeding arising under this chapter.”) (emphasis added). Third, the amendments apply to all decedents without exception and to all financial exploitation occurring “at any time.” *See* RCW 11.84.010(2)(b) (“Decedent” means: ... Any deceased person who, at any time during life

in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser.”) (emphasis added).

By repeatedly using the modifier “any” to describe application of the amendments, the Legislature unambiguously indicated its intent that the amendments apply to all petitions. The court must construe a statute to give effect to all the language “so as to render no portion meaningless or superfluous.” *Rivard v. State*, 168 Wn.2d at 783. In *State v. Thompson*, 153 Wn. App. 325, the Court held that amendments to the DNA collection fee statute applied prospectively to offenses committed prior to enactment of the amendments based on the Legislature’s use of the phrase “every sentence.” “Washington courts have consistently interpreted the word ‘any’ to mean ‘every’ and ‘all.’” *Stahl v. Delicor*, 148 Wn.2d 876, 884-885, 64 P.3d 10 (2003). Use of this term connotes broad application. *Id.* The trial court ignored this plain language in ruling that the amendments could be applied prospectively only to (1) abusers who commit financial exploitation after July 26, 2009, (2) decedents who are financially exploited after July 26, 2009, and (3) civil proceedings arising from financial exploitation occurring after July 26, 2009. This restrictive interpretation conflicts with the Legislature’s use of the modifier “any.”

Under a “plain meaning” analysis, the law in effect at the time of the RCW 11.84 petition should apply. This is not a radical or disfavored

approach as courts frequently apply the law in effect at the time of adjudication to determine the legal consequence of prior conduct:

Although we have long embraced a presumption against statutory retroactivity, for just as long we have recognized that, in many situations, a court should apply the law in effect at the time it renders its decision, even though that law was enacted after the events that gave rise to the suit. (Internal quotations omitted.)

Landgraf v. USI Film Prods., 511 U.S. at 273-74.

Finally, if there is any question about whether application of the amendments is prospective, then the Court should be governed by RCW 11.84.900, which provides: “This chapter shall be construed broadly to effect the policy of this state that no person shall be allowed to profit by his own wrong, wherever committed.” The Legislature’s express intent is for the courts to broadly apply RCW 11.84. Consistent with this direction, this Court should find that applying the amendments to the present case would be prospective.

D. Applying the Amendments to this Case is Permissible Because the Plain Meaning of the Amendments Indicates that the Legislature Intended Them to Apply to All Petitions Regardless of when the Exploitation Occurred and Because the Amendments are Remedial.

This court may apply the amendments to Mary Haviland’s financial exploitation even if it concludes that to do so would entail retroactive application to conduct occurring before the amendments’ enactment. A statute may be applied retroactively, if the Legislature

indicated its intent to apply it retroactively, or if the amendments are remedial and do not impermissibly impair Mary Haviland's vested rights. Here, the Legislature indicated its intent to apply the statutory amendments to provide a remedy to conduct occurring before the amendments became effective.

1. The Legislature intended the amendments to apply to conduct that occurred prior to July 26, 2009.

The Legislature indicated its intent that the amendments apply to financial exploitation occurring prior to July 26, 2009 by the plain meaning of the words it used. The amendments apply to any decedent who was financially exploited "at any time" during his or her lifetime. RCW 11.84.010(2)(b) (emphasis added). Furthermore, "[a]ny record of conviction" without limitation as to when it occurred "shall be admissible" in "any civil proceeding arising under this chapter [RCW 11.84]." RCW 11.84.130 (emphasis added). Contrary to the trial court's ruling, these provisions are "express legislative guidance from the language of RCW 11.84" that the Legislature intended the amendments to apply to financial exploitation occurring prior to July 26, 2009. CP 138.

By failing to apply the plain language of the amendments, the trial court ignored both general and specific rules that govern interpretation of RCW 11.84. "[C]ourts are obliged to interpret a statute, if possible, so that no portion of it is superfluous, void, or insignificant." *Snow's Mobile*

Homes v. Morgan, 80 Wn.2d 283, 288, 494 P.2d 216 (1972). In the present case, the language used by the Legislature in defining decedent and directing that all records of conviction be admissible in any civil actions under RCW 11.84 would be rendered meaningless if the statute is construed to apply only to exploitation committed after July 26, 2009.

Under the trial court's narrow interpretation, the amendments cannot be applied to any financial exploitation occurring prior to July 26, 2009, because to do so would be "disadvantaging" to abusers who violated the law in effect at the time of their conduct. CP 139. It is impossible to reconcile the trial court's narrow application of the amendments with the plain language used by the Legislature to define material terms and procedures under RCW 11.84. It is also impossible to reconcile the trial court's interpretation with RCW 11.84.900, which states that RCW 11.84 is to be "construed broadly to effect the policy of this state that no person is to profit by his [or her] own wrong."

The Legislature's intent to apply the amendments retroactively can also be discerned from the purpose behind the legislation. "It is not necessary ... that the statute expressly state that it shall operate retrospectively, if such intention can be obtained from the purpose and method of its enactment." *Pape v. Dep't of Labor & Indus.*, 43 Wn.2d 736, 741, 264 P.2d 241 (1953) cited in *Burns*, 131 Wn.2d at 110, and

Snow's Mobile Homes v. Morgan, 80 Wn.2d at 291 (1972). In *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 562, 663 P.2d 482 (1983), the Court ruled that new provisions of the Tort Reform and Products Liability Act applied retroactively to accomplish the statutory purpose despite the absence of a provision for retroactivity. In the present case, the amendments were passed by unanimous votes of the house and senate to address the financial exploitation of vulnerable adults. Financial exploitation of vulnerable adults frequently goes on for years prior to the vulnerable adult's death because detection is so difficult.⁸ The amendments address this problem by applying to "[a]ny deceased person who, at any time during life in which he or she was a vulnerable adult, was the victim of financial exploitation by an abuser." RCW 11.84.010(2)(b). Due to the prolonged and secret nature of financial exploitation, the majority of cases for years to come will involve exploitation occurring prior to July 26, 2009. Thus, retroactive application is necessary to carry out the purpose of the legislation.

⁸ "Elderly abuse is often difficult to detect because the victim is frequently reluctant to report the abuse. ... {T}he circumstances surrounding financial abuse are further complicated because 'unlike the bruises that often accompany physical abuse, the signs of financial abuse may not be so obvious.' Elderly victims are more likely to report physical abuse, believing that bodily injury is more threatening than any material losses they suffer. Further, many senior citizens are embarrassed about being financially victimized, and there are rarely witnesses to report it. Sometimes the elderly simply do not realize that anything is amiss. Police officers and financial institutions are unlikely to recognize or understand financial abuse, leaving the abused undetected and the abusers unapprehended." Shelby Moore & Jeanette Schaefer, "*Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse*," 41 SAN DIEGO L. REV. 505, 509-512 (2004) (internal citations omitted). Appendix at A-40.

The trial court's limitation of the amendments to financial exploitation occurring after July 26, 2009 thwarts this legislative purpose. In *Godfrey v. State*, 84 Wn.2d 959, 967-8, 530 P.2d 630 (1975), the Court ruled that legislation abolishing contributory negligence as a bar to recovery must be applied retroactively to avoid creating "a dual system of recovery" for torts occurring prior to the effective date of the legislation that were not discovered until much later. In the present case, having a dual system of recovery for financial exploitation would present an even greater problem than having a dual system of recovery for torts. Because financial exploitation is frequently protracted and almost always hidden, applying the amendments only to financial exploitation occurring after July 26, 2009 would render the amendments ineffectual for years to come.

2. The amendments are remedial.

Applying the amendments as written to address Mary Haviland's prior conduct is also permissible because the amendments are remedial. When a statute is remedial and its remedial purpose is furthered by retroactive application, the presumption favoring prospective application is reversed. See *Haddenham v. State*, 87 Wn.2d 145, 148, 550 P.2d 9 (1976) (Crime Victim's Compensation Act was "patently remedial" legislation that applied retroactively "to compensate and assist the residents of Washington who are the innocent victims of criminal acts.");

Macumber v. Shafer, 96 Wn.2d 568, 570, 637 P.2d 645 (1981)

(amendment increasing the dollar amount of the homestead exemption was remedial and applied retroactively to further the statutory purpose of ensuring a shelter for each family even though it altered the vested contract rights of creditors); ***Marine Power Equipment v. Washington State Human Rights Comm. Hearing Tribunal***, 39 Wn. App. 609, 694 P.2d 697 (1985) (changes to the law against discrimination were remedial and retroactive because they supplemented the remedies available for enforcing an existing right to be free from illegal discrimination).

The amendments are remedial because they “afford a remedy, or forward or better remedies already existing for the enforcement of rights and the redress of injuries.” ***Haddenham***, 87 Wn.2d at 148. “Statutes and amendments which supplement or increase remedies are deemed remedial and are thus afforded retroactive application in Washington.” ***Bayless v. Community College District No. XIX***, 84 Wn. App. 309, 318, 927 P.2d 254 (1996) (1992 amendment to whistleblower statute that allowed recovery of actual damages applied retroactively to a complaint filed before the effective date of the amendment because it was remedial). The Legislature clearly intended the amendments to supplement and not derogate from existing law because it expressly said so:

The provisions of this act are supplemental to, and do not derogate from, any other statutory or common law proceedings, theories, or

remedies including, but not limited to, the common law allocation of the burden of proof or production among the parties.

See RCW 11.84.180. The amendments are patently remedial in the same way that statutes increasing homestead rights and providing for crime victim's compensation are remedial. They further public policy and provide innocent victims with a better remedy than they had under prior law. See RCW 11.84.900; House Bill Report SHB 1103 p. 2.

The fact that the amendments give victims and their estates another option to remedy financial exploitation does not prevent the amendments from being remedial – it makes them remedial. In *Miller Construction Co. v. Coltran*, 110 Wn. App. 883, 891, 43 P.3d 67 (2002), the Court held that “an amendment that created ‘a supplemental remedy for enforcement of a preexisting right’ was remedial.” *Id.* (quoting *Marine Power*, 39 Wn. App. at 617). In *Haddenham*, 87 Wn.2d at 148, the Crime Victim's Act was held to be remedial for the very reason that it was intended to remedy injury to innocent victims:

The intent of the crime victims compensation act is to compensate and assist the residents of Washington who are the innocent victims of criminal acts. RCW 7.68.010. Its purpose is patently remedial. See *Criminal Injuries Compensation Bd. v. Gould*, 273 Md. 486, 511, 331 A.2d 55 (1975). Prior to the enactment of the crime victims compensation act, the innocent victim of a criminal act had little chance of recovery for the physical injuries or disabilities and financial hardships which he or she, or his or her dependents, may innocently suffer as a consequence of the criminal act. The act is an attempt to remedy that situation. The presumption of retroactivity therefore applies.

The amendments did not create new substantive law or penalize conduct that was previously lawful. Financial exploitation was unlawful and actionable before July 26, 2009 under RCW 74.34 and common law, which provided a remedy for conversion, trover, restitution, and unjust enrichment. Neither abusers nor their inheritance interests were immune from liability prior to July 26, 2009. Prior to the amendments, remedies included damages, interest, attorneys' fees, constructive trusts, rescission, injunctive relief necessary to protect the vulnerable adult *and* retainer of inheritance. *Cf., Hammack v. Monroe St. Lumber Co.*, 54 Wn.2d 224, 231-232, 339 P.2d 684 (1959) (change to the immunity provisions of the workers compensation law was substantive and not remedial because prior to the change there was no cause of action that could have redressed or remedied the conduct.) Furthermore, by allowing an abuser to inherit as the court "deems equitable," RCW 11.84.170, the amendments comport with established law that subjects inheritance rights to the equitable claims of the estate and its personal representative.

The amendments also did not create a new liability or cause of action. "Washington courts have found that a statute or amendment which increases a party's monetary liability does not constitute a 'new liability'" or preclude retroactive application of changes in the law. *Bayless v. Community College District No. XIX*, 84 Wn. App. at 317. In the present

case, Washington courts have recognized the equitable remedy of retainer or detention for over 100 years. The doctrine of retainer or retention permits a personal representative to withhold from the inheritance interest of an heir, legatee or devisee the amount of any indebtedness owed the estate by such heir, legatee or devisee, including debts arising out of conversion and misappropriation of funds. See A. M. Swarthout, *Right of Retainer In Respect Of Indebtedness of Heir, Legatee, or Distributee*, 164 A.L.R. 717 § II (1946); *In re Estate of Bailey*, 58 Wn.2d at 699; *Boyer v. Robinson*, 26 Wash. 117. This remedy is premised on the equitable principle that “before the devisee can have a distributive interest in the estate his debt due the estate must be settled.” *Boyer*, 26 Wash. at 121. The remedy of retainer is so broad that it can be applied to reduce or eliminate an heir’s or devisee’s distributive share even if the underlying claims are time-barred. *Hamilton v. Kenton*, 190 Wash. 646, 70 P.2d 426 (1937); *In re Estate of Bowers*, 196 Wash. 79, 81 P.2d 813 (1938).

The fact that the remedy afforded by RCW 11.84 supplements these pre-existing remedies does not mean the amendments are substantive or bar retroactive application. Even though “the innocent victim of a criminal act had little chance of recovery” prior to passage of the Crime Victim’s Act, *Haddenham*, 87 Wn.2d at 148, the new law was remedial and not substantive because there was at least the potential for recovery

under the pre-existing tort claims act. This Court would have to find that there was “no chance of any recovery” against Mary Haviland under prior law to properly conclude that the amendments are not remedial. *Agency Budget Corp. v. Wash. Ins. Guar. Ass’n.*, 93 Wn.2d 416, 426, 610 P.2d 361 (1980) (change in law was not remedial because it created a new cause of action where claimants previously had “no chance of any recovery.”); *Hammack v. Monroe St. Lumber Co.*, 54 Wn.2d 224 (1959) (change in workers’ compensation law was not remedial because previously employers were immune from suit). Clearly there was a right to recover against Mary Haviland for financial exploitation under RCW 74.34 and common law, and there was a right to recover against her share of Dr. Haviland’s estate under the doctrine of retainer. The amendments merely apply the RCW 11.84 remedy of disinheritance to individuals whose conduct was already unlawful and allow recovery from inheritance interests that were always subject to collection for the type of unlawful conduct addressed by the amendments. The amendments are a continuation of the equitable doctrine of retainer applied to conduct that was previously actionable.

Finally, applying the amendments to conduct that predated July 26, 2009 would promote the remedial purpose of the amendments. If the purpose of the amendments is to remedy financial exploitation of

vulnerable adults and the broader purpose of RCW 11.84 is to prevent individuals from profiting from the abuse of vulnerable adults (*see* RCW 11.84.900), there is no justification for limiting application to conduct occurring after July 26, 2009. The financial abuse of vulnerable adults is difficult to detect and can occur for years without discovery. *See* ***“Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse,”*** 41 San Diego L. Rev. at 509-512. Vulnerable adults are by definition unable to protect themselves. *See* RCW 74.34.020(16). It would frustrate the remedial purpose of the amendments to arbitrarily restrict the remedy to financial exploitation occurring after July 26, 2009.

3. Mary Haviland does not have a vested interest that precludes retroactive application of the amendments.

The trial court incorrectly ruled that Mary Haviland acquired property interests at Dr. Haviland’s death that could not be affected by legislation that took effect after Dr. Haviland died without violating *ex post facto* prohibitions. CP 138. This analysis gives too much weight to Mary Haviland’s inheritance rights while undervaluing the State’s interest in protecting vulnerable adults, its plenary authority over inheritance rights, and the equitable limitations that apply to inheritance rights.

a. Mary Haviland’s inheritance rights are not vested against retroactive application of a remedial law.

The trial court held that Mary Haviland’s property interests

prevented retroactive application of the amendments without analyzing the nature of her interests. CP 138. The only interests affected by the amendments are those that would pass to Mary Haviland after Dr. Haviland died. Her one-half share of any community property would not be affected by operation of the original slayer statute or the amendments. *See Armstrong v. Bray*, 64 Wn. App. 736; 741, 826 P.2d 706 (1992). At this point, it is unknown whether Dr. Haviland died testate or intestate. His 2006 will was invalidated for undue influence. No prior will has been offered for probate and no adjudication of intestacy has occurred. Dr. Haviland's unprobated wills do not create a presently enforceable property right because they have no legal effect. *See Estate of O'Brien*, 13 Wn.2d 581, 590, 126 P.2d 47(1942). Nor can property interests pass to heirs at law before an adjudication of intestacy occurs. *See* RCW 11.04.015.

Mary Haviland's future interests in Dr. Haviland's estate are not absolute. Pursuant to RCW 11.04.250, title to real property vests in the decedent's heirs and devisees at death subject to adverse claims that may be raised by the personal representative. Under the prior version of this statute, title to real property did not vest until a decree of distribution was entered by the probate court. *Balch v. Smith*, 4 Wash. 497, 503, 30 P. 648 (1892) ("the intervention of the probate court and an adjudication and distribution thereunder are essential to the passing of the title of the

ancestor to the heir so perfected as to make it beneficial to him.”). As argued *infra*, because vesting is entirely a creation of the Legislature, it may be affected by retroactive application of laws. For instance, when the Legislature changed the law to make vesting occur at death instead of at the time of distribution, the Court applied the new law retroactively to the estates of decedents who had died prior to the new law’s enactment.

Murphy v. Murphy, 42 Wash. 142, 148, 84 P. 646 (1906).

Until final distribution, Mary Haviland’s interest in Dr. Haviland’s personal property is premised entirely on equity. Unlike real property, there is no statute indicating when title to personal property vests. Courts have determined that title to personal property passes to the personal representative of the estate at death. ***Murphy v. Murphy***, 42 Wash. at 149. The decedent’s heirs or beneficiaries have only a vested equitable right in the decedent’s personal property prior to entry of a decree of final distribution by the probate court. That equitable right vests “subject to the satisfaction of all debts, charged, and expenses of the administration, of the intestate's estate, and on final distribution of his estate the title of the distributees relates back to the intestate's death.” ***In re Estate of Verchot***, 4 Wn.2d 574, 582, 104 P.2d 490 (1940). Because it is premised on equity, Mary Haviland’s interest in Dr. Haviland’s personal property is subject to equitable limitations as argued *infra*.

If Mary Haviland's interests were as absolute as she claims, then the Slayer Statute in its entirety would be subject to constitutional challenge under Wash. Const. Art. 1, §15, which provides, "No conviction shall work corruption of blood, nor forfeiture of estate." Although many states have similar constitutional provisions, the majority of courts have rejected constitutional challenges to their slayer statutes, holding that slayers had no vested rights in the estates of their victims. *See* Mary Louise Fellows, "*The Slayer Rule: Not Solely a Matter of Equity*," 71 IOWA L. REV. 489, 540 (1986). Even prior to passage of RCW 11.84, Washington's Supreme Court held, as a matter of common law, that prohibiting a slayer from claiming an interest in the estate of his or her victim did not deprive the slayer of a vested right. *In re the Estate of Tyler*, 140 Wash. at 691. The trial court's interpretation is inconsistent with decades of case law interpreting and applying RCW 11.84, *see, e.g., Estate of Kissinger*, 166 Wn.2d at 131-2; *New York Life Insurance Co. v. Jones*, 86 Wn.2d 44, 47, 541 P.2d 989 (1975). It also contravenes the principle that "wherever possible, it is the duty of this Court to construe a statute so as to uphold its constitutionality." *State v. Reyes*, 104 Wn.2d 35, 41, 700 P.2d 1155 (1985).

b. Mary Haviland's inheritance rights are subject to limitation by the State exercising its police power.

It is well established that inheritance rights vest at death subject to

the exercise of the State's plenary power and may be affected by the retroactive application of new laws.

The right of the owner of property to direct what disposition shall be made of it after his death is not a natural right which follows from mere ownership. On the contrary, the right has its sanction in the laws of the state. . . . The state may, if it so chooses, take to itself the whole of such property, or it may take any part thereof less than the whole and direct the disposition of the remainder; and this without regard to the wishes or direction of the person who died possessed of it, **and without regard to the claims of those to whom he has directed that it be given.** Stated in another way, the state's power over such property is plenary, and its right to direct its disposition unlimited.

In re Estate of Sherwood, 122 Wash. 648, 654-55, 211 P. 734 (1922)

(affirming retroactive application of changes to inheritance tax law; emphasis added). “[T]he right of inheritance being a privilege, and not an inherent right, the authority which confers it, namely, the legislature, may impose any conditions thereto that it sees fit.” *In re Estate of Fotheringham*, 183 Wash. 579, 585, 49 P.2d 480 (1935) (increased estate tax rates applied retroactively). “[T]he legislature . . . may apply the law retroactively to estates still in process of distribution though the owner died prior to enactment of the statute, . . . and [it] may be enforced on the legatee's interest at any time before he actually receives the property.” *In re Estate of Button*, 190 Wash. 333, 340, 67 P.2d 876 (1937) (increased gift tax rate under 1935 amendment applied to estate where death occurred in 1933 and gift occurred in 1932). *See also In re Estate of Nogleberg*,

200 Wash. 652, 658, 94 P.2d 488 (1939) (approved retroactive application of estate tax to property distributed prior to enactment of new law).

In *In re Estate of Burns*, 131 Wn.2d at 113-14, the Court refused to allow retroactive application of the Medicaid lien law to decedents who received benefits prior to the effective date of the legislation based on two points of distinction that do not apply here. The Court held that the Medicaid law regulated debts, as opposed to inheritance rights, and therefore, was not based upon the plenary authority of the Legislature to “impose conditions” on the right to inherit. Here, however, the amendments directly impose conditions on the right of abusers to inherit from the estates of their victims. See RCW 11.84.020, .130, .170.

Burns, 131 Wn.2d at 113, also distinguished the Legislature’s authority to impose a lien from its “broad powers of taxation.” Here, while the amendments do not derive from the State’s broad tax powers, they result from the State’s police powers, which are no less broad:

[T]here is no doubt that the state, in the exercise of such power, may prescribe laws tending to promote the health, peace, morals, education, good order and welfare of the people. Police power is an attribute of sovereignty, an essential element of the power to govern, and a function that cannot be surrendered. It exists without express declaration, and the only limitation upon it is that it must reasonably tend to correct some evil or promote some interest of the state, and not violate any direct or positive mandate of the constitution.

Shea v. Olson, 185 Wash. 143, 153, 53 P.2d 615 (1936). In *Macumber v.*

Shafer, 96 Wn.2d 568, 637 P.2d 645 (1981), the Court upheld retroactive application of changes to the homestead statute, thereby modifying the contract rights of creditors, based on the Legislature’s “sovereign power implicitly reserved in the contract,” which was exercised to promote the public policy of giving relief to debtors.

In the present case, “the State has an interest in protecting vulnerable groups--including the poor, the elderly, and disabled persons--from abuse, neglect, and mistakes.” *Washington v. Glucksberg*, 521 U.S. 702, 731; 117 S. Ct. 2258; 138 L. Ed. 2d 772 (1997). The State had broad authority under its police powers to enact legislation addressing financial exploitation of vulnerable adults. The amendments are reasonably related to the State’s interest and address a particular feature of financial abuse – a sense of entitlement by the abuser:

There is one underlying cause of financial abuse that simply does not seem related to other types of abuse: the abuser may feel that he deserves the victim's money. If the financial abuser is a child or heir, he may view the elder's assets as his own. Thus, he may regard funds taken from the elder as informal advancements on his future inheritance. Similarly, if the abuser is a caregiver, she may feel entitled to the victim's assets in exchange for her services. If the abuser is both the caregiver and a potential heir, both motivations for taking funds may be present.

“Financial Abuse of the Elderly,” 36 IDAHO L. REV. at 213-214. Unlike the innocent receipt of public benefits which *Burns* ruled was not subject to retroactive legislation, Mary Haviland’s “steady, systematic, and

persistent pattern of depleting Dr. Haviland’s assets,” CP 35, in knowing violation of the law,⁹ justifies exercise of the State’s ample police powers.

c. Mary Haviland’s inheritance rights are subject to equitable claims.

Mary Haviland’s rights in Dr. Haviland’s estate are also subject to equitable claims that may be asserted by the personal representative and other interested parties. RCW 11.04.250 expressly states that an heir’s or devisee’s title to real property vests subject to adverse claims by the personal representative of the estate. Washington courts also recognize the equitable doctrine of retainer, which permits personal representatives to withhold from the interest of an heir, legatee or devisee the amount of any indebtedness owed the estate by such heir, legatee or devisee, including debts arising out of conversion and misapplication of funds. This doctrine reflects the established principle that inheritance rights do not vest *against the estate* until all debts owed to the estate have been paid, including debts owed based on the misappropriation of funds during the decedent’s lifetime. *See supra* at 33-4. As the Court observed in *Boyer v. Robinson*, 26 Wash. at 121: “It seems apparent that before the devisee can have a distributive interest in the estate his debt due the estate must be settled.”

Cases involving entry of *nunc pro tunc* orders to extinguish vested

⁹ As a registered nurse, Mary Haviland is a “mandated reporter” of vulnerable adult abuse including financial exploitation. *See* RCW 74.34.020(10); RCW 74.34.035.

inheritance rights also illustrate that the “vesting” that occurs at death may be subject to equitable limitation. The general rule is that a *nunc pro tunc* order may not be entered where “third persons have acquired interests or rights which will be injuriously affected by the entry.” *In re Estate of Carter*, 14 Wn. App. 271, 274, 540 P.2d 474 (1975). Nevertheless, an inheritance held by a third person does not constitute a vested interest that precludes entry of a *nunc pro tunc* judgment. *In re Estate of Carter*, 14 Wn. App. 271; *In re the Estate of Storer*, 14 Wn. App. 687, 691-2, 544 P.2d 95 (1975). The third parties whose inheritance rights were extinguished in *Storer* and *Carter* had the same claim to vesting as Mary Haviland. Moreover, unlike Mary Haviland, the third parties’ interests were extinguished based on conduct that was not their fault.

Mary Haviland’s interest in Dr. Haviland’s estate is not absolute. The estate has equitable claims against her share based on her systemic depletion of Dr. Haviland’s assets and her violation of RCW 11.28.290 and two court orders, which required her to account for Dr. Haviland’s assets. CP 36, 41. A fiduciary may be held liable for assets that she fails to account for. See *Gillespie v. Seattle-First Nat. Bank*, 70 Wn. App. 150, 173, 855 P.2d 680 (1993). The trial court’s ruling that Mary Haviland’s inheritance interests are immune from retroactive application of RCW 11.84 is based on an erroneous view of the law of vesting.

d. Application of the amendments would not violate ex post facto prohibitions or considerations of fairness.

The trial court erred in holding that it could not apply the amendments to financial exploitation occurring prior to July 26, 2009 without violating the *ex post facto* doctrine¹⁰ or “[e]lementary considerations of fairness [which] dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.” *In re Estate of Burns*, 131 Wn.2d at 110. The *ex post facto* clause applies only to laws that inflict criminal punishment. *State v. Ward*, 123 Wn.2d 488, 499, 869 P.2d 1062 (1994). Statutes are not classified as criminal or punitive merely because they expand remedies for the violation of existing laws.¹¹

Washington’s Supreme Court recently reiterated the equitable and non-criminal nature of RCW 11.84 in *In re Estate of Kissinger*, 166

¹⁰ Both the state and federal constitutions prohibit “*ex post facto*” laws. See Wash. Const. art. 1, §23; U.S. Const. art. 1, §10, cl. 1.

¹¹ Petitioners were unable to identify a single Washington case where the expansion of civil remedies was held to be criminal punishment for the purposes of the *ex post facto* clause. There are, on the other hand, many examples of cases holding that the expansion of remedies for violation of the law does not make a statute penal. See, e.g., *State v. Ralph Williams’ N.W. Chrysler Plymouth*, 82 Wn.2d 265, 278, 510 P.2d 233 (1973) (allowing fines does not convert a civil proceeding into a criminal or penal one); *State v. Shultz*, 138 Wn.2d 638, 643-44, 980 P.2d 1265 (1999) (amendments expanding the number of years the State could collect restitution from offender not punitive and did not violate *ex post facto* prohibition); *In re Personal Restraint of Metcalf*, 92 Wn. App. 165, 963 P.2d 911 (1998) (statutes allowing Department of Corrections to make deductions from money earned by prisoners for costs of incarceration, crime victims’ compensation fund, and personal savings accounts was remedial, not punitive, in purpose); *State v. Cole*, 128 Wn.2d 262, 278, 906 P.2d 925 (1995) (laws requiring forfeiture of proceeds from illegal drug transactions not punitive); *In re Personal Restraint of Young*, 122 Wn.2d 1, 18, 857 P.2d 989 (1993)(civil commitment of sexually violent predators does not trigger *ex post facto* clause).

Wn.2d at 131, which held that a killer’s acquittal by reason of insanity did not prevent a finding that the killing was willful under RCW 11.84.

“[T]he slayer statute is not a criminal statute. Its origins are in equity. Equity should not be used to work an injustice, either by allowing a person to benefit from an unlawful act or by depriving an innocent (such as a subsequent heir or a victim) of a source of recovery.”¹² The amendments retain the statute’s equitable character by including a provision that allows abusers to inherit as the court “deems equitable.” RCW 11.84.170.

Even broadly construing *ex post facto* protections and “considerations of fairness” in favor of abusers, the amendments nonetheless should be applied to financial exploitation occurring before July 26, 2009. Financial exploitation of vulnerable adults was illegal at the time Mary Haviland systemically depleted Dr. Haviland’s assets. Her conduct was as wrongful in 2004, 2005, 2006, and 2007 as it is today. The amendments did not expand the types of conduct that can be classified as financial exploitation. Abusers have never had a vested interest in profiting from their wrongdoing. At the time that Mary Haviland systemically depleted Dr. Haviland’s assets, there was no vested right to

¹² “[Once a statute has been construed by the state’s highest court, that construction operates as if it were originally written into the statute.” *Marine Power & Equip. Co. v. Wash. State Human Rights Com. Hearing Tribunal*, 39 Wn. App. at 613. Nevertheless, in ruling that the amendments to RCW 11.84 were “punitive,” the trial court distinguished *Kissinger* on the grounds that “the Washington Supreme Court did not discuss the punitive nature of the statute.” CP 139.

profit from financial exploitation of an elder, or as the U.S. Supreme Court once said, “there can be no vested right to do wrong.” *Randall v. Kreiger*, 90 U.S. 137, 149, 23 L.Ed. 124 (1874) (emphasis added).

E. The 2009 Amendments do not Violate Due Process.

Mary Haviland asserted in her response to the Petitioners’ motion for discretionary review that the amendments are unconstitutional because they violate her right to due process of law. A statute is presumed to be constitutional; the party attacking a statute “has the heavy burden of proving its unconstitutionality beyond a reasonable doubt.” *State v. Blank*, 131 Wn.2d 230, 235, 930 P.2d 1213 (1997).

1. Application of the amendments does not violate procedural due process.

The fundamental requirement of due process is the opportunity to be heard “at a meaningful time and in a meaningful manner.” *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006) (citing *Mathews, v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)). To determine what process is “due” under the circumstances, courts consider (1) the private interest at stake; (2) the risk of erroneous deprivation of that interest; and (3) the government interest, including the burden of additional procedures. *See id.* at 468.

Applying the 2009 amendments to Mary Haviland would not deprive her of procedural due process. The amendments provide more

than adequate procedural protections in light of the interests at stake. To justify disinheritance, there must either be a criminal conviction of a crime constituting financial exploitation, or a finding by clear cogent and convincing evidence from a civil proceeding that the individual willfully financially exploited a vulnerable adult. RCW 11.84.150; RCW 11.84.160. Even if the individual is found to be an abuser, there is a procedural safeguard allowing inheritance when the decedent knew of the abuse and subsequently ratified his decision to transfer his property to the abuser, or when there are other equitable reasons to allow inheritance. RCW 11.84.170. Given the strong government interest in addressing the financial exploitation of vulnerable adults, the procedural safeguards in place are more than constitutionally adequate.

2. Application of the amendments does not violate substantive due process.

Substantive due process protects against arbitrary and capricious government action, even when the action is taken pursuant to constitutionally adequate procedures. *See Amunrud v. Board of Appeals*, 158 Wn.2d 208, 218-19, 143 P.3d 511 (2006). The proper standard of review where, as here, there is no argument that a fundamental constitutional right is implicated, is merely rational basis review. *See id.* at 222. The law at issue must be rationally related to a legitimate government interest. *See id.* Under this deferential standard of review,

courts will uphold state action “unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.” *State v. Shawn P.*, 122 Wn.2d 553, 561, 859 P.2d 1220 (1993).

The 2009 amendments are rationally related to the legitimate government interest of protecting vulnerable adults. The Legislature has articulated a strong interest in protecting vulnerable adults. *See* RCW 74.34 (protecting vulnerable adults from abuse, financial exploitation and neglect); RCW 43.43.830 (requiring background checks for prospective employees who may have unsupervised access to vulnerable adults); RCW 9A.44 (imposing heightened penalties for sex crimes against vulnerable adults). In *Washington v. Glucksberg*, 521 U.S. at 731, Washington’s assisted-suicide ban passed the rational basis test because it was held to further the State’s interest in protecting vulnerable groups--including the poor, the elderly, and disabled persons--from abuse, neglect, and mistakes. The amendments at issue directly address one of the recognized causes of financial abuse, which is a sense of entitlement by abusers. *See* “*Financial Abuse of the Elderly*,” 36 IDAHO L. REV. at 213-214. App. A-23. They do not impose an arbitrary remedy or treat all abusers the same, as Mary Haviland argued in her opposition to discretionary review. RCW 11.84.170 expressly permits courts to consider ratification and other equitable grounds in deciding whether an abuser should be disinherited.

VI. CONCLUSION

This Court should reverse the trial court's ruling refusing to apply the amendments to Mary Haviland's pre-amendment financial abuse. The Court should (1) hold that amendments to RCW 11.84 and related laws which took effect July 26, 2009 apply to this case; (2) hold that financial exploitation occurring prior to July 26, 2009 may be the basis for disinheritance under RCW 11.84 and related laws; and (3) remand to the trial court to determine whether Mary Haviland is an abuser under RCW 11.84.010 and if so whether she should be disqualified from inheriting Dr. Haviland's estate under the amendments to RCW 11.84 and related laws.

Respectfully submitted this 24th day of June, 2010.

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DECLARATION OF SERVICE

CHRISTINE JAMES certifies as follows:

I am a legal assistant for the law firm of Thompson & Howle. I am over eighteen (18) years of age and make this declaration based on personal knowledge.

On June 24, 2010, I delivered by legal messenger the foregoing Opening Brief of Petitioners and Appendix to the law offices of Mary Haviland's attorneys Ladd Leavens and William Rasmussen, located at 1201 Third Avenue, Suite 2200, Seattle, WA 98101; to Richard Furman, Personal Representative of the Estate of James Haviland, located at 801 Second Avenue, Suite 1200, Seattle WA; and to Howard Goodfriend, located at 1101 First Avenue, Ste. 500, Seattle, WA 98101.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Seattle, Washington on June 24, 2010.


Christine James
Legal Assistant

FILED
COURT OF APPEALS DIV. #2
STATE OF WASHINGTON
2011 JUN 24 PM 4:00

APPENDIX

CERTIFICATION OF ENROLLMENT

SUBSTITUTE HOUSE BILL 1103

Chapter 525, Laws of 2009

61st Legislature
2009 Regular Session

VULNERABLE ADULTS--INHERITANCE--FINANCIAL EXPLOITATION

EFFECTIVE DATE: 07/26/09

Passed by the House April 22, 2009
Yeas 94 Nays 0

FRANK CHOPP

Speaker of the House of Representatives

Passed by the Senate April 17, 2009
Yeas 45 Nays 0

BRAD OWEN

President of the Senate

Approved May 18, 2009, 3:16 p.m.

CHRISTINE GREGOIRE

Governor of the State of Washington

CERTIFICATE

I, Barbara Baker, Chief Clerk of the House of Representatives of the State of Washington, do hereby certify that the attached is **SUBSTITUTE HOUSE BILL 1103** as passed by the House of Representatives and the Senate on the dates hereon set forth.

BARBARA BAKER

Chief Clerk

FILED

May 20, 2009

Secretary of State
State of Washington

SUBSTITUTE HOUSE BILL 1103

AS AMENDED BY THE SENATE

Passed Legislature - 2009 Regular Session

State of Washington 61st Legislature 2009 Regular Session

By House Judiciary (originally sponsored by Representatives Moeller,
Green, Morrell, and Kenney)

READ FIRST TIME 02/03/09.

1 AN ACT Relating to the estates of vulnerable adults; amending RCW
2 11.84.010, 11.84.020, 11.84.025, 11.84.030, 11.84.040, 11.84.050,
3 11.84.070, 11.84.080, 11.84.090, 11.84.100, 11.84.110, 11.84.120,
4 11.84.130, 26.16.120, 41.04.273, and 11.96A.030; and adding new
5 sections to chapter 11.84 RCW.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

7 **Sec. 1.** RCW 11.84.010 and 1965 c 145 s 11.84.010 are each amended
8 to read as follows:

9 As used in this chapter:

10 (1) "Abuser" means any person who participates, either as a
11 principal or an accessory before the fact, in the willful and unlawful
12 financial exploitation of a vulnerable adult.

13 (2) "Decedent" means:

14 (a) Any person whose life is taken by a slayer; or

15 (b) Any deceased person who, at any time during life in which he or
16 she was a vulnerable adult, was the victim of financial exploitation by
17 an abuser.

18 (3) "Financial exploitation" has the same meaning as provided in
19 RCW 74.34.020, as enacted or hereafter amended.

A-2

1 (4) "Property" includes any real and personal property and any
2 right or interest therein.

3 (5) "Slayer" ((shall)) means any person who participates, either as
4 a principal or an accessory before the fact, in the willful and
5 unlawful killing of any other person.

6 ~~((2) "Decedent" shall mean any person whose life is so taken.~~

7 ~~(3) "Property" shall include any real and personal property and any~~
8 ~~right or interest therein.))~~ (6) "Vulnerable adult" has the same
9 meaning as provided in RCW 74.34.020.

10 **Sec. 2.** RCW 11.84.020 and 1965 c 145 s 11.84.020 are each amended
11 to read as follows:

12 No slayer or abuser shall in any way acquire any property or
13 receive any benefit as the result of the death of the decedent, but
14 such property shall pass as provided in the sections following.

15 **Sec. 3.** RCW 11.84.025 and 1998 c 292 s 502 are each amended to
16 read as follows:

17 Proceeds payable to a slayer or abuser as the beneficiary of any
18 benefits flowing from one of the retirement systems listed in RCW
19 41.50.030, by virtue of the decedent's membership in the department of
20 retirement systems or by virtue of the death of decedent, shall be paid
21 instead as designated in RCW 41.04.273.

22 **Sec. 4.** RCW 11.84.030 and 2008 c 6 s 624 are each amended to read
23 as follows:

24 The slayer or abuser shall be deemed to have predeceased the
25 decedent as to property which would have passed from the decedent or
26 his or her estate to the slayer or abuser under the statutes of descent
27 and distribution or have been acquired by statutory right as surviving
28 spouse or surviving domestic partner or under any agreement made with
29 the decedent under the provisions of RCW 26.16.120 as it now exists or
30 is hereafter amended.

31 **Sec. 5.** RCW 11.84.040 and 1965 c 145 s 11.84.040 are each amended
32 to read as follows:

33 Property which would have passed to or for the benefit of the

1 slayer or abuser by devise or legacy from the decedent shall be
2 distributed as if he or she had predeceased the decedent.

3 **Sec. 6.** RCW 11.84.050 and 1965 c 145 s 11.84.050 are each amended
4 to read as follows:

5 (1) One-half of any property held by the slayer or abuser and the
6 decedent as joint tenants, joint owners or joint obligees shall pass
7 upon the death of the decedent to his or her estate, and the other half
8 shall pass to his or her estate upon the death of the slayer or abuser,
9 unless the slayer or abuser obtains a separation or severance of the
10 property or a decree granting partition.

11 (2) As to property held jointly by three or more persons, including
12 the slayer or abuser and the decedent, any enrichment which would have
13 accrued to the slayer or abuser as a result of the death of the
14 decedent shall pass to the estate of the decedent. If the slayer or
15 abuser becomes the final survivor, one-half of the property shall
16 immediately pass to the estate of the decedent and the other half shall
17 pass to his or her estate upon the death of the slayer or abuser,
18 unless the slayer or abuser obtains a separation or severance of the
19 property or a decree granting partition.

20 (3) The provisions of this section shall not affect any enforceable
21 agreement between the parties or any trust arising because a greater
22 proportion of the property has been contributed by one party than by
23 the other.

24 **Sec. 7.** RCW 11.84.070 and 1965 c 145 s 11.84.070 are each amended
25 to read as follows:

26 Any interest in property whether vested or not, held by the slayer
27 or abuser, subject to be divested, diminished in any way or
28 extinguished, if the decedent survives him or her or lives to a certain
29 age, shall be held by the slayer or abuser during his or her lifetime
30 or until the decedent would have reached such age, but shall then pass
31 as if the decedent had died immediately thereafter.

32 **Sec. 8.** RCW 11.84.080 and 1965 c 145 s 11.84.080 are each amended
33 to read as follows:

34 As to any contingent remainder or executory or other future

1 interest held by the slayer or abuser, subject to become vested in him
2 or her or increased in any way for him or her upon the condition of the
3 death of the decedent:

4 (1) If the interest would not have become vested or increased if he
5 or she had predeceased the decedent, he or she shall be deemed to have
6 so predeceased the decedent;

7 (2) In any case the interest shall not be vested or increased
8 during the period of the life expectancy of the decedent.

9 **Sec. 9.** RCW 11.84.090 and 1965 c 145 s 11.84.090 are each amended
10 to read as follows:

11 (1) Property appointed by the will of the decedent to or for the
12 benefit of the slayer or abuser shall be distributed as if the slayer
13 or abuser had predeceased the decedent.

14 (2) Property held either presently or in remainder by the slayer or
15 abuser, subject to be divested by the exercise by the decedent of a
16 power of revocation or a general power of appointment shall pass to the
17 estate of the decedent, and property so held by the slayer or abuser,
18 subject to be divested by the exercise by the decedent of a power of
19 appointment to a particular person or persons or to a class of persons,
20 shall pass to such person or persons, or in equal shares to the members
21 of such class of persons, exclusive of the slayer or abuser.

22 **Sec. 10.** RCW 11.84.100 and 1965 c 145 s 11.84.100 are each amended
23 to read as follows:

24 (1) Insurance proceeds payable to the slayer or abuser as the
25 beneficiary or assignee of any policy or certificate of insurance on
26 the life of the decedent, or as the survivor of a joint life policy,
27 shall be paid instead to the estate of the decedent, unless the policy
28 or certificate designate some person other than the slayer or abuser or
29 his or her estate as secondary beneficiary to him or her and in which
30 case such proceeds shall be paid to such secondary beneficiary in
31 accordance with the applicable terms of the policy.

32 (2) If the decedent is beneficiary or assignee of any policy or
33 certificate of insurance on the life of the slayer or abuser, the
34 proceeds shall be paid to the estate of the decedent upon the death of
35 the slayer or abuser, unless the policy names some person other than
36 the slayer or abuser or his or her estate as secondary beneficiary, or

1 unless the slayer or abuser by naming a new beneficiary or assigning
2 the policy performs an act which would have deprived the decedent of
3 his or her interest in the policy if he or she had been living.

4 **Sec. 11.** RCW 11.84.110 and 1965 c 145 s 11.84.110 are each amended
5 to read as follows:

6 Any insurance company making payment according to the terms of its
7 policy or any bank or other person performing an obligation for the
8 slayer or abuser as one of several joint obligees shall not be
9 subjected to additional liability by the terms of this chapter if such
10 payment or performance is made without written notice, at its home
11 office or at an individual's home or business address, of the killing
12 by a slayer or financial exploitation by an abuser.

13 **Sec. 12.** RCW 11.84.120 and 1965 c 145 s 11.84.120 are each amended
14 to read as follows:

15 The provisions of this chapter shall not affect the rights of any
16 person who, before the interests of the slayer or abuser have been
17 adjudicated, purchases or has agreed to purchase, from the slayer or
18 abuser for value and without notice property which the slayer or abuser
19 would have acquired except for the terms of this chapter, but all
20 proceeds received by the slayer or abuser from such sale shall be held
21 by him or her in trust for the persons entitled to the property under
22 the provisions of this chapter, and the slayer or abuser shall also be
23 liable both for any portion of such proceeds which he or she may have
24 dissipated and for any difference between the actual value of the
25 property and the amount of such proceeds.

26 **Sec. 13.** RCW 11.84.130 and 1965 c 145 s 11.84.130 are each amended
27 to read as follows:

28 ((The)) Any record of ((his)) conviction ((of)) for having
29 participated in the ((wilful)) willful and unlawful killing of the
30 decedent or for conduct constituting financial exploitation against the
31 decedent, including but not limited to theft, forgery, fraud, identity
32 theft, robbery, burglary, or extortion, shall be admissible in evidence
33 against a claimant of property in any civil ((action)) proceeding
34 arising under this chapter.

1 NEW SECTION. **Sec. 14.** A new section is added to chapter 11.84 RCW
2 to read as follows:

3 (1) A final judgment of conviction for the willful and unlawful
4 killing of the decedent is conclusive for purposes of determining
5 whether a person is a slayer under this section.

6 (2) In the absence of a criminal conviction, a superior court
7 finding by a preponderance of the evidence that a person participated
8 in the willful and unlawful killing of the decedent is conclusive for
9 purposes of determining whether a person is a slayer under this
10 section.

11 NEW SECTION. **Sec. 15.** A new section is added to chapter 11.84 RCW
12 to read as follows:

13 (1) A final judgment of conviction for conduct constituting
14 financial exploitation against the decedent, including but not limited
15 to theft, forgery, fraud, identity theft, robbery, burglary, or
16 extortion, is conclusive for purposes of determining whether a person
17 is an abuser under this section.

18 (2) In the absence of a criminal conviction, a superior court
19 finding by clear, cogent, and convincing evidence that a person
20 participated in conduct constituting financial exploitation against the
21 decedent is conclusive for purposes of determining whether a person is
22 an abuser under this section.

23 NEW SECTION. **Sec. 16.** A new section is added to chapter 11.84 RCW
24 to read as follows:

25 (1) In determining whether a person is an abuser for purposes of
26 this chapter, the court must find by clear, cogent, and convincing
27 evidence that:

28 (a) The decedent was a vulnerable adult at the time the alleged
29 financial exploitation took place; and

30 (b) The conduct constituting financial exploitation was willful
31 action or willful inaction causing injury to the property of the
32 vulnerable adult.

33 (2) A finding of abuse by the department of social and health
34 services is not admissible for any purpose in any claim or proceeding
35 under this chapter.

1 (3) Except as provided in subsection (2) of this section, evidence
2 of financial exploitation is admissible if it is not inadmissible
3 pursuant to the rules of evidence.

4 NEW SECTION. **Sec. 17.** A new section is added to chapter 11.84 RCW
5 to read as follows:

6 Notwithstanding the provisions of this chapter:

7 (1) An abuser is entitled to acquire or receive an interest in
8 property or any other benefit described in this chapter if the court
9 determines by clear, cogent, and convincing evidence that the decedent:

10 (a) Knew of the financial exploitation; and

11 (b) Subsequently ratified his or her intent to transfer the
12 property interest or benefit to that person.

13 (2) The court may consider the record of proceedings and in its
14 discretion allow an abuser to acquire or receive an interest in
15 property or any other benefit described in this chapter in any manner
16 the court deems equitable. In determining what is equitable, the court
17 may consider, among other things:

18 (a) The various elements of the decedent's dispositive scheme;

19 (b) The decedent's likely intent given the totality of the
20 circumstances; and

21 (c) The degree of harm resulting from the abuser's financial
22 exploitation of the decedent.

23 **Sec. 18.** RCW 26.16.120 and 2008 c 6 s 612 are each amended to read
24 as follows:

25 Nothing contained in any of the provisions of this chapter or in
26 any law of this state, shall prevent both spouses or both domestic
27 partners from jointly entering into any agreement concerning the status
28 or disposition of the whole or any portion of the community property,
29 then owned by them or afterwards to be acquired, to take effect upon
30 the death of either. But such agreement may be made at any time by
31 both spouses or both domestic partners by the execution of an
32 instrument in writing under their hands and seals, and to be witnessed,
33 acknowledged and certified in the same manner as deeds to real estate
34 are required to be, under the laws of the state, and the same may at
35 any time thereafter be altered or amended in the same manner. Such
36 agreement shall not derogate from the right of creditors; nor be

1 construed to curtail the powers of the superior court to set aside or
2 cancel such agreement for fraud or under some other recognized head of
3 equity jurisdiction, at the suit of either party; nor prevent the
4 application of laws governing the community property and inheritance
5 rights of slayers or abusers under chapter 11.84 RCW.

6 **Sec. 19.** RCW 41.04.273 and 1998 c 292 s 501 are each amended to
7 read as follows:

8 (1) For purposes of this section, the following definitions shall
9 apply:

10 (a) (~~("Slayer" means a slayer as defined)~~) "Abuser" has the same
11 meaning as provided in RCW 11.84.010.

12 (b) "Decedent" means any person (~~(whose life is taken by a slayer,~~
13 ~~and)~~) who is entitled to benefits from the Washington state department
14 of retirement systems by written designation or by operation of law:

15 (i) Whose life is taken by a slayer; or

16 (ii) Who is deceased and who, at any time during life in which he
17 or she was a vulnerable adult, was the victim of financial exploitation
18 by an abuser, except as provided in section 17 of this act.

19 (c) "Slayer" means a slayer as defined in RCW 11.84.010.

20 (2) Property that would have passed to or for the benefit of a
21 beneficiary under one of the retirement systems listed in RCW 41.50.030
22 shall not pass to that beneficiary if the beneficiary was a slayer or
23 abuser of the decedent and the property shall be distributed as if the
24 slayer or abuser had predeceased the decedent.

25 (3) A slayer or abuser is deemed to have predeceased the decedent
26 as to property which, by designation or by operation of law, would have
27 passed from the decedent to the slayer or abuser because of the
28 decedent's entitlement to benefits under one of the retirement systems
29 listed in RCW 41.50.030.

30 (4) (a) The department of retirement systems has no affirmative duty
31 to determine whether a beneficiary is, or is alleged to be, a slayer or
32 abuser. However, upon receipt of written notice that a beneficiary is
33 a defendant in a civil lawsuit or probate proceeding that alleges the
34 beneficiary is a slayer or abuser, or is charged with a crime that, if
35 committed, means the beneficiary is a slayer or abuser, the department
36 of retirement systems shall determine whether the beneficiary is a

1 defendant in such a civil ((~~suit~~)) proceeding or has been formally
2 charged in court with the crime, or both. If so, the department shall
3 withhold payment of any benefits until:

4 (i) The case or charges, or both if both are pending, are
5 dismissed;

6 (ii) The beneficiary is found not guilty in the criminal case or
7 prevails in the civil ((~~suit~~)) proceeding, or both if both are pending;
8 or

9 (iii) The beneficiary is convicted or is found to be a slayer or
10 abuser in the civil ((~~suit~~)) proceeding.

11 (b) If the case or charges, or both if both are pending, are
12 dismissed or if a beneficiary is found not guilty or prevails in the
13 civil ((~~suit~~)) proceeding, or both if both are pending, the department
14 shall pay the beneficiary the benefits the beneficiary is entitled to
15 receive. If the beneficiary is convicted or found to be a slayer or
16 abuser in a civil ((~~suit~~)) proceeding, the department shall distribute
17 the benefits according to subsection (2) of this section.

18 (5) ((~~The slayer's~~)) Any record of conviction for having
19 participated in the willful and unlawful killing of the decedent or for
20 conduct constituting financial exploitation against the decedent,
21 including but not limited to theft, forgery, fraud, identity theft,
22 robbery, burglary, or extortion, shall be admissible in evidence
23 against a claimant of property in any civil action arising under this
24 section.

25 (6) In the absence of a criminal conviction, a superior court may
26 determine:

27 (a) By a preponderance of the evidence whether a person
28 participated in the willful and unlawful killing of the decedent;

29 (b) By clear, cogent, and convincing evidence whether a person
30 participated in conduct constituting financial exploitation against the
31 decedent, as provided in chapter 11.84 RCW.

32 (7) This section shall not subject the department of retirement
33 systems to liability for payment made to a slayer or abuser or alleged
34 slayer or abuser, prior to the department's receipt of written notice
35 that the slayer or abuser has been convicted of, or the alleged slayer
36 or abuser has been formally criminally or civilly charged in court
37 with, the death or financial exploitation of the decedent. If the
38 conviction or civil judgment of a slayer or abuser is reversed on

1 appeal, the department of retirement systems shall not be liable for
2 payment made prior to the receipt of written notice of the reversal to
3 a beneficiary other than the person whose conviction or civil judgment
4 is reversed.

5 **Sec. 20.** RCW 11.96A.030 and 2008 c 6 s 927 are each amended to
6 read as follows:

7 The definitions in this section apply throughout this chapter
8 unless the context clearly requires otherwise.

9 (1) "Matter" includes any issue, question, or dispute involving:

10 (a) The determination of any class of creditors, devisees,
11 legatees, heirs, next of kin, or other persons interested in an estate,
12 trust, nonprobate asset, or with respect to any other asset or property
13 interest passing at death;

14 (b) The direction of a personal representative or trustee to do or
15 to abstain from doing any act in a fiduciary capacity;

16 (c) The determination of any question arising in the administration
17 of an estate or trust, or with respect to any nonprobate asset, or with
18 respect to any other asset or property interest passing at death, that
19 may include, without limitation, questions relating to: (i) The
20 construction of wills, trusts, community property agreements, and other
21 writings; (ii) a change of personal representative or trustee; (iii) a
22 change of the situs of a trust; (iv) an accounting from a personal
23 representative or trustee; or (v) the determination of fees for a
24 personal representative or trustee;

25 (d) The grant to a personal representative or trustee of any
26 necessary or desirable power not otherwise granted in the governing
27 instrument or given by law;

28 (e) An action or proceeding under chapter 11.84 RCW;

29 (f) The amendment, reformation, or conformation of a will or a
30 trust instrument to comply with statutes and regulations of the United
31 States internal revenue service in order to achieve qualification for
32 deductions, elections, and other tax requirements, including the
33 qualification of any gift thereunder for the benefit of a surviving
34 spouse who is not a citizen of the United States for the estate tax
35 marital deduction permitted by federal law, including the addition of
36 mandatory governing instrument requirements for a qualified domestic
37 trust under section 2056A of the internal revenue code, the

1 qualification of any gift thereunder as a qualified conservation
2 easement as permitted by federal law, or the qualification of any gift
3 for the charitable estate tax deduction permitted by federal law,
4 including the addition of mandatory governing instrument requirements
5 for a charitable remainder trust; and

6 ~~((+f+))~~ (g) With respect to any nonprobate asset, or with respect
7 to any other asset or property interest passing at death, including
8 joint tenancy property, property subject to a community property
9 agreement, or assets subject to a pay on death or transfer on death
10 designation:

11 (i) The ascertaining of any class of creditors or others for
12 purposes of chapter 11.18 or 11.42 RCW;

13 (ii) The ordering of a qualified person, the notice agent, or
14 resident agent, as those terms are defined in chapter 11.42 RCW, or any
15 combination of them, to do or abstain from doing any particular act
16 with respect to a nonprobate asset;

17 (iii) The ordering of a custodian of any of the decedent's records
18 relating to a nonprobate asset to do or abstain from doing any
19 particular act with respect to those records;

20 (iv) The determination of any question arising in the
21 administration under chapter 11.18 or 11.42 RCW of a nonprobate asset;

22 (v) The determination of any questions relating to the abatement,
23 rights of creditors, or other matter relating to the administration,
24 settlement, or final disposition of a nonprobate asset under this
25 title;

26 (vi) The resolution of any matter referencing this chapter,
27 including a determination of any questions relating to the ownership or
28 distribution of an individual retirement account on the death of the
29 spouse of the account holder as contemplated by RCW 6.15.020(6);

30 (vii) The resolution of any other matter that could affect the
31 nonprobate asset.

32 (2) "Notice agent" has the meanings given in RCW 11.42.010.

33 (3) "Nonprobate assets" has the meaning given in RCW 11.02.005.

34 (4) "Party" or "parties" means each of the following persons who
35 has an interest in the subject of the particular proceeding and whose
36 name and address are known to, or are reasonably ascertainable by, the
37 petitioner:

38 (a) The trustor if living;

- 1 (b) The trustee;
- 2 (c) The personal representative;
- 3 (d) An heir;
- 4 (e) A beneficiary, including devisees, legatees, and trust
5 beneficiaries;
- 6 (f) The surviving spouse or surviving domestic partner of a
7 decedent with respect to his or her interest in the decedent's
8 property;
- 9 (g) A guardian ad litem;
- 10 (h) A creditor;
- 11 (i) Any other person who has an interest in the subject of the
12 particular proceeding;
- 13 (j) The attorney general if required under RCW 11.110.120;
- 14 (k) Any duly appointed and acting legal representative of a party
15 such as a guardian, special representative, or attorney-in-fact;
- 16 (l) Where applicable, the virtual representative of any person
17 described in this subsection the giving of notice to whom would meet
18 notice requirements as provided in RCW 11.96A.120;
- 19 (m) Any notice agent, resident agent, or a qualified person, as
20 those terms are defined in chapter 11.42 RCW; and
- 21 (n) The owner or the personal representative of the estate of the
22 deceased owner of the nonprobate asset that is the subject of the
23 particular proceeding, if the subject of the particular proceeding
24 relates to the beneficiary's liability to a decedent's estate or
25 creditors under RCW 11.18.200.
- 26 (5) "Persons interested in the estate or trust" means the trustor,
27 if living, all persons beneficially interested in the estate or trust,
28 persons holding powers over the trust or estate assets, the attorney
29 general in the case of any charitable trust where the attorney general
30 would be a necessary party to judicial proceedings concerning the
31 trust, and any personal representative or trustee of the estate or
32 trust.
- 33 (6) "Principal place of administration of the trust" means the
34 trustee's usual place of business where the day-to-day records
35 pertaining to the trust are kept, or the trustee's residence if the
36 trustee has no such place of business.
- 37 (7) The "situs" of a trust means the place where the principal

1 place of administration of the trust is located, unless otherwise
2 provided in the instrument creating the trust.

3 (8) "Trustee" means any acting and qualified trustee of the trust.

4 (9) "Representative" and other similar terms refer to a person who
5 virtually represents another under RCW 11.96A.120.

6 (10) "Citation" or "cite" and other similar terms, when required of
7 a person interested in the estate or trust or a party to a petition,
8 means to give notice as required under RCW 11.96A.100. "Citation" or
9 "cite" and other similar terms, when required of the court, means to
10 order, as authorized under RCW 11.96A.020 and 11.96A.060, and as
11 authorized by law.

12 NEW SECTION. Sec. 21. A new section is added to chapter 11.84 RCW
13 to read as follows:

14 The provisions of this act are supplemental to, and do not derogate
15 from, any other statutory or common law proceedings, theories, or
16 remedies including, but not limited to, the common law allocation of
17 the burden of proof or production among the parties.

Passed by the House April 22, 2009.

Passed by the Senate April 17, 2009.

Approved by the Governor May 18, 2009.

Filed in Office of Secretary of State May 20, 2009.

HOUSE BILL REPORT

SHB 1103

As Passed Legislature

Title: An act relating to the estates of vulnerable adults.

Brief Description: Concerning the estates of vulnerable adults.

Sponsors: House Committee on Judiciary (originally sponsored by Representatives Moeller, Green, Morrell and Kenney).

Brief History:

Committee Activity:

Judiciary: 1/22/09, 1/29/09 [DPS].

Floor Activity:

Passed House: 2/20/09, 94-0.

Senate Amended.

Passed Senate: 4/17/09, 45-0.

House Concurred.

Passed House: 4/22/09, 94-0.

Passed Legislature.

Brief Summary of Substitute Bill

- Prevents an abuser from inheriting property or receiving any benefit from a vulnerable adult who was the victim of financial exploitation.

HOUSE COMMITTEE ON JUDICIARY

Majority Report: The substitute bill be substituted therefor and the substitute bill do pass. Signed by 11 members: Representatives Pedersen, Chair; Goodman, Vice Chair; Rodne, Ranking Minority Member; Shea, Assistant Ranking Minority Member; Flannigan, Kelley, Kirby, Ormsby, Roberts, Ross and Warnick.

Staff: Courtney Barnes (786-7194)

Background:

Financial Exploitation of Vulnerable Adults.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

The Abuse of Vulnerable Adults Act provides a number of protections for vulnerable adults, including authorizing the Department of Social and Health Services and law enforcement agencies to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults. A vulnerable adult who is suffering from abandonment, abuse, financial exploitation, or neglect may petition the superior court for an order for protection.

A vulnerable adult includes a person who:

- is age 60 years or older who has a functional, mental, or physical inability for self-care;
- has been found to be incapacitated;
- has a developmental disability;
- resides in a licensed facility such as a nursing home, adult family home, or residential habilitation center; or
- is receiving hospice or home health services.

Financial exploitation is defined as "the illegal or improper use of property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage."

Inheritance Rights.

Under certain circumstances, an individual who takes the life of another is not entitled to inherit property or receive any benefit from the person he or she killed. This rule, in statute as part of the state's estate distribution laws, is commonly referred to as the "slayer statute." A "slayer" is a person who participates, either as a principal or an accessory before the fact, in the willful and unlawful killing of any other person. Rather than being punitive, the slayer statute is broadly construed to enforce the state's policy that no person should be allowed to profit by his or her own wrongdoing.

Summary of Substitute Bill:

An abuser may not inherit property or any benefit from a deceased person who, at any time during life in which the decedent was a vulnerable adult, was the victim of financial exploitation by the abuser. An abuser is defined as "a person who participates, either as a principal or an accessory before the fact, in the willful and unlawful financial exploitation of a vulnerable adult."

Disposition of Property.

In most cases, the decedent's estate is distributed according to the same scheme provided in the slayer statute.

Ratification.

An abuser may inherit property or benefits from the vulnerable adult's estate if the vulnerable adult:

- knew of the financial exploitation; and

- subsequently ratified his or her intent to transfer the property interest or benefit to the abuser.

The court must find by clear, cogent, and convincing evidence that the decedent ratified the abuser's conduct.

Abuser Designation.

A criminal conviction for conduct constituting financial exploitation against a decedent, including but not limited to theft, forgery, fraud, identity theft, robbery, burglary, or extortion, is conclusive for the purposes of determining whether a person is an abuser. In the absence of a criminal conviction, a court may find by clear, cogent, and convincing evidence that:

- the decedent was a vulnerable adult at the time the alleged financial exploitation took place; and
- the conduct constituting financial exploitation was willful action or willful inaction causing injury to the property of the vulnerable adult.

Findings made by the court are conclusive for the purpose of determining whether a person is an abuser.

Department of Social and Health Services Findings.

Findings of abuse made by the Department of Social and Health Services are not admissible in any claim or proceeding to determine whether a person is an abuser for inheritance purposes.

Common Law Remedies.

The provisions of the bill are supplemental to, and do not derogate from, other statutory or common law proceedings, theories, or remedies, including the common law allocation of the burden of proof or production among the parties.

Statute Cross-References.

The bill amends statutes cross-referenced by the existing slayer statute related to:

- joint community property agreements;
- retirement benefits; and
- the Trust and Estate Dispute Resolution Act.

Slayer Designation.

A criminal conviction for the willful and unlawful killing of a decedent is conclusive for the purposes of determining whether a person is a slayer. In the absence of a criminal conviction, a court may find by a preponderance of the evidence that a person participated in the willful and unlawful killing of the decedent.

Findings made by the court are conclusive for the purpose of determining whether a person is a slayer.

Appropriation: None.

Fiscal Note: Not requested.

Effective Date: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) The bill deals with inheritance, which is a very complicated issue. A number of stakeholders were involved in the bill drafting process. In most of the cases involving the abuse of vulnerable adults, family members of the vulnerable adult are the perpetrators. Many of these cases are not investigated or prosecuted. There are tools to fight the financial exploitation of vulnerable adults, including protection orders, guardianship, and a civil recovery action under the Trust and Estate Dispute Resolution Act. If the person who commits financial exploitation against a vulnerable adult is named in the vulnerable adult's will, there is nothing under the current law to prevent the perpetrator from inheriting property under the will. This bill provides a mechanism to prevent the perpetrator from inheriting from the vulnerable adult he or she financially exploited.

(With concerns) The bill should be clarified because there are some interpretative problems. For example, the bill references a conviction of financial exploitation, but there is no crime of financial exploitation. Financial exploitation is defined in the Vulnerable Adult Act, which is incorporated by reference into this bill. The Attorney General has plans to amend the definition of financial exploitation in the Vulnerable Adult Act to include attempted financial exploitation. Thus, a person attempting financial exploitation against a vulnerable adult may be prevented from inheriting from the vulnerable adult. The bill should be clarified to focus on actual financial exploitation of a vulnerable adult.

(Opposed) None.

Persons Testifying: (In support) Representative Moeller, prime sponsor; Jim Senescu, Attorney; Detective Allen Cook, Washougal Police Department and Clark County Vulnerable Adult Task Force; and Sarah Flohr, Beacon Trustee Services.

(With concerns) Jeff Crollard, Washington State Bar Association.

Persons Signed In To Testify But Not Testifying: None.



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FINANCIAL ABUSE OF THE ELDERLY

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SUMMARY:

... One of the most frightening problems facing the elderly is the possibility of financial abuse. ... Virtually everyone who has considered the issue of financial abuse of the elderly sees reason for concern. ... Financial abuse of the elderly has been defined in a number of different ways. ... In addition to personal autonomy concerns, there is a societal interest in preventing and remedying financial abuse of the elderly. ... At the outset, it is important to note that there is no federal statute dealing directly with financial abuse of the elderly. ... Alternatively, there may be a specific penal statute aimed at abuse of the elderly in general or directed specifically at financial abuse of the elderly. ... The State of Idaho, on the other hand, has used penal statutes of general application to punish financial abuse. ... The threshold issue in preventing or remedying financial abuse of the elderly is defining what constitutes financial abuse. ... Indeed, undue influence might be present in some financial abuse of the elderly, and might provide a separate avenue for undoing abusive transfers. ... Rather, we should continue to examine existing remedies and explore new ones toward the end of ameliorating the pervasive problem of financial abuse of the elderly. ...

TEXT:

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I. INTRODUCTION

The American population is aging rapidly. Roughly thirty-five million Americans are now age sixty-five or older, and that number is projected to rise to forty million in 2010. n1 With this changing demographic comes an increasing awareness of the potential problems that face aging Americans.

It is estimated that the number of elderly adults abused each year is nearly one and a half million. n2 Most of the abusers are family members. n3 It is also estimated that five percent of elderly persons will suffer some form of abuse in the coming year, n4 and that one out of every four elderly persons will experience abuse or neglect at some [*204] time. n5 Sadly, a recent federal study shows a marked increase in incidences of abuse. n6

This disturbing trend has led to a number of calls for action to prevent elder abuse of all kinds. In October 1998, Health and Human Services Secretary Donna E. Shalala announced the creation of the National Center on Elder Abuse. n7 At the same time, President Clinton called for legislation reauthorizing the Older Americans Act. n8

Awareness of elder abuse has arisen fairly recently. Many cite the rising awareness of child abuse in the 1960s and spousal abuse in the 1970s as the genesis to the relatively recent recognition of elder abuse. n9 A number of studies suggest that the problem had previously gone unnoticed. n10

One of the most frightening problems facing the elderly is the possibility of financial abuse. For at least several decades, we have discussed and attempted to deal with the problem of physical abuse or neglect of the elderly. Only recently, however, have we begun to consider the issue of financial abuse. This is likely the case because the earlier dialogue on child abuse centered on physical and psychological abuse and because financial abuse is almost never an issue when a child is the victim and infrequently an issue when a spouse is the victim.

Although a recent national study of elder abuse indicates that financial abuse is somewhat less prevalent than physical abuse, there [*205] is still much cause for concern. n11 Financial abuse can be as devastating to the quality of life of an individual as physical abuse. n12 The likelihood that an elder person's income is relatively fixed may make it extremely difficult to recover from a financial loss. n13 Additionally, the difficulty of detecting financial abuse suggests that it may actually be more widespread than physical abuse.

The fact that approximately seventy percent of all funds deposited in financial institutions are controlled by persons age sixty-five and older makes senior citizens prime targets for those desiring to take financial advantage of someone. n14 Additionally, seniors may be isolated due to their lack of mobility. n15 As one conservator put it, "[i]t just seems like when times get tough, old people are easy money." n16

Virtually everyone who has considered the issue of financial abuse of the elderly sees reason for concern. n17 Tom Zlaket, Chief Justice [*206] of the Arizona Supreme Court, stated that there have been enough instances of financial abuse to merit concern, even though the practice is not widespread. n18 The practice, however, does appear to be spreading as indicated in Massachusetts, where almost one-half of the cases of elder abuse serious enough to require reporting to district attorneys involved financial exploitation. n19 The purpose of this article is to discuss the types of financial abuse and to examine various possible means of alleviating such abuse.

II. WHAT IS FINANCIAL ABUSE?

Financial abuse of the elderly has been defined in a number of different ways. n20 At its heart, it is the improper use of an elder's assets. This definition is, of course, overly simplistic without some reasoned interpretation of "improper." In attempts to flesh out the idea of impropriety, some states have defined exploitation to require benefit to a person other than the victim. n21 A state might also require either disadvantage to the victim or advantage to one other than the victim. The distinction may be an important one. A jurisdiction that requires benefit to someone other than the victim would not be criminalizing the wasting of the victim's assets.

Forms of activity that might be characterized as abusive run the gamut from intentional criminal acts to negligent mishandling of assets. This breadth of activity adds to the difficulty of crafting a prevention of and solution for financial abuse. Accordingly, it is not surprising that legislative measures for dealing with financial abuse can often be criticized as "piecemeal."

The range of potentially abusive activity can be broken down into four main categories: (1) theft, (2) fraud, (3) intentional breach of duty by a fiduciary or caregiver, and (4) negligence. Although there is some overlap between the categories, they provide a useful framework for examining the issue.

Some abuse is simply the outright theft of assets. Thus, traditional crimes including robbery and burglary could be characterized [*207] as financial abuse. This is probably the area with which the law enforcement community feels the most comfortable because there is no question that theft is an "improper" use of another's funds.

A second type of abuse occurs through fraud and scams. Within this category there is a broad range of activity. Acts that obtain money by fraudulent means are clearly "improper." There is, however, a level of activity that does not rise to the level of fraudulent that could be characterized as a "scam." The dictionary defines "scam" as "to cheat or swindle, as in a confidence game." n22 The primary difference, then, between fraud and scam is that the information given in a scam transaction is true, though perhaps misleading. Senior citizens seem particularly vulnerable targets to these attacks, either because diminished capacity may impair the ability to rationally evaluate proposed courses of action or because the difficulties of living on a fixed income may enhance one's willingness to try a "get-rich-quick" scheme.

Although the activity is neither a fraud nor a scam, the activity of the hard-selling salesman might be appropriately added to this category. The element of overreaching inherent in a scam is present in some hard-sell transactions as well. Many believe that older Americans are targeted by unscrupulous salespeople, including unscrupulous telemarketers, because older people are perceived as having significant disposable income or as being particularly susceptible to certain selling techniques. n23 A salesman who pushes an unneeded and overpriced product on an elderly buyer is arguably "improperly" using the elder's assets.

A third type of abuse is intentional misuse of an elder's assets by a fiduciary or caregiver. There is clearly an overlap between this and the first category, as these transactions include theft and embezzlement. There may also be overlap with the second category if fraud or overreaching are involved in the acquisition of the victim's assets. Thus, this category is the most amorphous because its parameters are defined by the relationship of the abuser and the victim rather than by the type of conduct involved. The fiduciary relationship may arise from a variety of contexts. In the most traditional relationship, the fiduciary is a trustee who owes a duty to the trust beneficiary. n24 Similarly, [*208] the guardian of the estate owes a fiduciary duty to his ward. n25 Third, an agent acting under a power of attorney is a fiduciary with respect to the principal. n26 The duty exists regardless of whether the power is durable or non-durable. n27 These three fiduciary relationships constitute the most likely breeding ground for financial abuse because the trustee holds legal title to the potential victim's assets, the agent has power to act with respect to the potential victim's assets, and the guardian has either title or power, depending on the state. n28

A fourth type of abuse occurs when someone negligently mishandles a senior's assets. This is perhaps the most difficult category to deal with because the abuser is not intentionally misusing funds. Thus, the question is whether such misuse should be addressed under criminal statutes at all since the required mens rea is lacking.

The following example aids in distinguishing the categories and in seeing the potential overlap. The example is also helpful in appreciating the difficulty of deciding whether conduct is abusive. Consider Mae, an eighty-six year-old woman who has recently moved into an assisted living community. Her assets consist of a home worth \$ 50,000 and cash and marketable securities worth \$ 100,000. Her only son, Jim, is her agent under a durable power of attorney. n29 Jim moves into Mae's house and lives there rent-free. He pays all expenses associated with the house from Mae's cash. In addition, he transfers \$ 3,000 each month from Mae's bank account to his own account.

This brief fact pattern suggests the possibility of all four categories of abuse. The act that seems most likely to be outright theft is the transfer of \$ 3,000 each month. Yet, perhaps Jim is paying his mother's assisted living bill with his credit card, leaving his mother's funds in her interest-bearing account until the credit card bill comes [*209] due, and making the transfer in time to pay the bill. Rather than financial abuse, the act may be sound financial treatment of Mae's assets.

Jim's move into the house and rent-free/expense-free life there could be viewed in several ways. It could be outright theft of assets. Alternatively, if Mae allowed the arrangement because Jim falsely told her that the house could not be profitably sold or rented because of a bad market for such real estate, then he might be committing the type of fraudulent abuse that falls into the second category. Another possibility is that Jim simply decided, as agent under the durable power, not to sell the house and to move in. This arguably could be abuse of either the third or fourth type depending on whether Jim's conduct was intentional or negligent. If he is acting under the durable power of attorney, then he owes a fiduciary duty to Mae. n30 Obviously, if he intentionally misappropriates Mae's assets, he has breached his fiduciary duty to her. Even if, however, he has merely unintentionally failed to act as a reasonably prudent fiduciary, he still could be liable for breach of fiduciary duty. n31

On the other hand, it is possible that none of Jim's acts with respect to Mae's house are abusive. It is entirely plausible that Mae wanted Jim to live in her home in the event that she could not. Perhaps the prospect of abandoning her home was particularly troubling to Mae, and the idea of a family member living there comforted her. She may simply have welcomed the opportunity to provide a home for her son. Perhaps real estate market conditions suggested that the best course of action was for Jim to move in to preserve the home for a future sale at a larger profit than could be currently obtained. Perhaps Jim plans to renovate the home in exchange for the right to live there rent-free.

In addition to categorizing the various actions, it is clear that there is some overlap between the categories. Intentional breach of fiduciary duty could also be characterized as some form of theft. Similarly, fraudulent acquisition of assets can be viewed as simply another modality for accomplishing a theft. Thus, it is important to bear in mind that if a solution to abuse relies on putting the underlying conduct into a particular category, such a process may prove very difficult.

Further, the range of justifications that Jim might offer for his actions suggests a further difficulty in defining the concept of impropriety. When compared to physical abuse, financial abuse seems far more complex. There is little justification for battery other than self-defense; [*210] a justification that seems unlikely to be present in most physical elder abuse scenarios. Similarly, it is virtually impossible to contend that a person desired and consented to physical abuse. With respect to alleged financial abuse, on the other hand, the example illustrates some of the many justifications available to the alleged abuser, including the important justification that the alleged victim consented to the act.

Thus, the task of defining "financial abuse" is a daunting one. This partially explains why the law enforcement community finds it such a challenge to prosecute suspected abuse.

III. SIMILARITIES AND DIFFERENCES OF PHYSICAL, PSYCHOLOGICAL, AND FINANCIAL ABUSE

It is also helpful to consider the similarities and differences between various types of abuse. Because awareness of physical and psychological abuse preceded awareness of financial abuse in most cases, a consideration of similarities and differences will help determine whether techniques for preventing and remedying physical and psychological abuse will be effective in the case of financial abuse. n32

One similarity between physical, psychological and financial abuse directed at the elderly is that each may be difficult to detect because the victim is frequently reluctant to report the abuse. n33 Although such statements are difficult to substantiate, virtually everyone who comments on the subject feels that elder abuse is grossly underreported. n34

Sometimes this reticence in reporting abuse is a result of the reliance of the victim on the abuser. n35 The victim may be afraid that his life will actually change for the worse if the abuse stops because the [*211] abuser is providing needed care along with the abuse. n36 Frequently, one suspects that this idea was planted in the victim's mind by the abuser. There are numerous reports of abusers threatening victims with suggestions that their lives would be worse without the support of the abuser. n37 Similarly, the victim may simply fear the change that will result from stopping the abuse. n38 Older adults often seem reluctant to make major life changes, and may even be fearful of potential change. n39 Thus, the comfort of maintaining the status quo may be more desirable to the victim than the prospect of major change, and may make a certain level of abuse tolerable to the victim.

Second, the victim may simply be embarrassed to admit that a loved one or even a trusted friend or employee is abusing her. n40 It is not difficult to imagine the loss of personal dignity that comes with undergoing such abuse, and similarly easy to empathize with the pain of relating that experience to others. n41 The victim will most likely feel a profound sense of betrayal as a result of the abuse and may simply seek to conceal the abuse to avoid looking like a person who was too trusting or too easily taken in by an abuser. n42

Third, the abuser may be reluctant to "turn in" a family member, friend or employee. Particularly in the case of a family member, the victim may feel some responsibility for the abuser's actions. Parents frequently feel responsible for the acts of their children, even their adult children. Thus, the victim may believe that some deficit in the abuser's upbringing turned the child into an abuser and that the victim is merely suffering the consequences of his own shortcomings. Additionally, there is often a feeling that problems arising in a family context should be kept within the family. n43 Accordingly, a victim may be reluctant to "air the family's dirty laundry." n44

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Fourth, the victim may be afraid of the abuser. n45 Thus, the victim may fear retaliation if he reports the abuse. This is perhaps the most troubling reason for not reporting abuse, because the more abusive the relationship, the less likely it is that the abuse will be reported.

Fifth, the victim may not know where to turn for help. n46 Even for those who have had prior contact with adult protective services, the framework for dealing with abuse can seem like an impenetrable mass. n47 In a related vein, even if the victim knows whom to contact, he may not have the mobility to go to someone who can help and may not have access to a telephone to call for help. n48 The stories of people who feel like prisoners in their own homes are frighteningly frequent, n49 and it is not implausible to suggest that a clever abuser would seek to maximize isolation to conceal his abuse.

Sixth, the victim may view some level of abuse as "normal." n50 A person who views herself as weak or underserving may expect to be taken advantage of by those around her. n51 A person who views himself as a burden might expect a certain amount of hostility by those he burdens. And finally, a person who lived in an abusive environment where she witnessed abuse, and perhaps was herself an abuser, may expect to be a victim at some point.

Finally, the victim may be too impaired to report the abuse, or, in some cases, to even realize that he is being abused. n52 In a similar vein, the victim may have difficulty in remembering some details of the abuse, or in making consistent statements about the abuse. The enormous proof problems suggested by these ideas are obvious. Because [*213] most abuse occurs in a private setting, the impairment of the victim may eradicate any chance of detecting the abuse. n53

Another similarity between the various types of abuse is that some of the underlying causes may be the same regardless of whether the resultant abuse is financial, physical, or emotional. Often, caregiver stress is noted as a cause. n54 The abuser may suffer from mental illness or chemical addiction. n55 The victim may also have been an abusive parent to the abuser, leading to a situation of "learned violence." n56

Recognizing these similarities in the problems of physical, psychological, and financial abuse, there are some important differences in the types of abuse. The differences are attributable to the unique nature of the financial abuser's conduct.

There is one underlying cause of financial abuse that simply does not seem related to other types of abuse: the abuser may feel that he deserves the victim's money. If the financial abuser is a child or heir, he may view the elder's assets as his own. Thus, he may regard funds taken from the elder as informal advancements on his future inheritance. Similarly, if the abuser is a caregiver, she may feel entitled to the victim's assets in exchange for her services. If the abuser is both the caregiver and a potential heir, both motivations for taking funds may be present.

Closely related to this issue of entitlement is the idea that if the alleged victim wants the questionable transaction to occur, then it probably is not "improper." Alleged abusers and victims are often parties to a relationship such that one might expect financial benefits to flow from the victim to the abuser. Unless one takes an extremely dim view of human relationships, one could not make a similar statement with respect to physical and psychological abuse.

When viewed in tandem, these last two points raise an interesting dilemma: in a relationship in which one person is likely to want to give and the other is likely to feel an entitlement to receive, how can the law identify improper transactions? In reviewing the existing case law, one is left with the distinct feeling that judges ratify transactions [*214] they view as "normal" and invalidate those they perceive as "abnormal."

Another attribute that distinguishes financial abuse from other types of abuse is the difficulty in detecting financial abuse. n57 When a person is physically abused or neglected, there are often readily apparent signs of the abuse. n58 A broken bone or a bruise is frequently noticeable by even a casual observer. Psychological abuse seems less likely to produce visible signs likely to be observed by a third party. Even with this type of abuse, however, there may be changes in personality that could be observed by a person outside the abusive relationship. In the case of either physical or psychological abuse, neighbors may notice that they simply stop seeing an elderly resident.

Financial abuse, on the other hand, occurs most often in secret. n59 The American model of rugged individualists controlling their own financial affairs has left us with a breeding ground for abuse by the unscrupulous. In general, we answer to no one about our financial dealings, so no one is examining our financial condition.

Closely related to this is the idea that talking about one's financial affairs is almost a social taboo. In most circumstances, it is still viewed as "bad form" to discuss one's finances. There are, of course, exceptions to this notion. Everyone seems to enjoy bragging about a bargain they have obtained. People seem far less likely, however, to volunteer information about overpaying for something. In a society in which everything appears to be sold for "drastically reduced" prices, it can feel like a stigma to admit paying the full or, even worse, an inflated price for anything. Thus, it seems reasonable that people would feel a similar reluctance to discuss a situation in which they may have suffered financial abuse.

Another difference between financial abuse and physical abuse, and perhaps the most insidious aspect of the former, is the fact that the victim of financial abuse may have no idea that he is being abused. n60 This phenomenon can occur for several reasons.

First, the victim may have simply turned over the management of all her financial affairs to an abuser. n61 Thus, she may have no idea [*215] what transactions the abuser is making. This can occur voluntarily or involuntarily. n62 For example, when a person creates an irrevocable trust for his own benefit and names someone other than himself as trustee, he voluntarily transfers the legal title of the assets he puts in trust to the trustee. n63 Although he retains beneficial title in the assets, he typically will take a less active role in managing the trust assets than he did when he owned them outright. Indeed, this desire for independent management is a primary motivation for setting up a trust. The settlor

can certainly retain the power to direct the management of the trust corpus, or can choose to take no part in the management. Further, the settlor can choose to carefully monitor the trustee's asset management or to sit back and wait for distributions. n64

The usual relationship created by a durable power of attorney involves a similar voluntary transfer of asset management. Although the principal typically retains the legal title to her assets, the agent frequently assumes full control of the asset management. As in the trust scenario, the principal may take an active role in the management or may take no role at all. One of the major difficulties when the principal ceases to take a role in managing her assets is that the contours of the agent's duties are largely undefined. n65

In the guardianship setting, the transfer of assets, or of the power to control the assets given to the guardian, is frequently involuntary. It is technically voluntary in the instance of a person who does not contest the guardianship petition, but if an involuntary transfer would have occurred without the consent, then it is a distinction without any difference.

In all three of these settings, there is a possibility of abusive conduct by the fiduciary. n66 It might seem as though abuse would be less [*216] likely in the voluntary transfers because the settlor or principal has presumably chosen a person he trusts to serve as trustee or agent. n67 The high level of court oversight of guardianships, however, probably makes that relationship the least likely to be abusive. n68

The phenomenon of the victim having no idea that he is being abused may also occur because the victim lacks the capacity to recognize the acts committed by the abuser as abuse. Certainly this could be said in some physical and psychological abuse cases as well, as in those cases of a victim who is seriously impaired. It seems, however, that this issue would arise much more often in instances of financial abuse. Perhaps the victim simply does not understand the implications of the financial acts performed by the abuser. For example, it takes some financial sophistication to appreciate that a transaction that appears to be a simple investment in a business is actually an inappropriate siphoning of funds into a sham enterprise controlled by the abuser. On a much simpler level, it would take a thorough review of bank statements and receipts for the victim to catch an abuser using the victim's ATM card to make purchases for the victim while at the same time purchasing items for himself and perhaps also getting cash in the transactions. In these examples, and in the myriad of similarly abusive transactions, it takes a much higher level of capacity to recognize financial abuse than to realize that harmful physical acts are improper.

A related difficulty in addressing the problem of financial abuse is that it is often extremely difficult to find and prove the abusive transactions. n69 Again, the same could be said in physical and psychological abuse cases as well, but the difficulty seems particularly strong in the financial abuse area. Take, for example, the abuser using the victim's ATM card with the victim's permission, but committing unpermitted acts for his own benefit. Neither the bank statements nor the checkbook register would disclose the abuse. As noted, only a careful reconciliation of statements and receipts would show the abusive transactions. Even then, it would have to be proven which items were for the abuser and that the cash was not used for the victim's benefit. Unless the abuser is greedy and stupid enough to act at a level of consumption impossible for the victim to miss, it is unlikely that the impropriety of the acts would ever be proven.

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Furthermore, many of the factors previously discussed add to the difficulty. This puts an added burden on those charged with alleviating and prosecuting financial abuse. n70 Thus, in cases of alleged financial abuse the law enforcement community is often faced with reviewing and evaluating complex records, frequently without the aid of any witness capable of testifying or willing to testify.

Unlike physical and psychological abuse, the effects of financial abuse may not end with the death of the victim. A victim's family members, who believe they are entitled to inherit the victim's assets, may themselves feel abused. It may, however, be even more difficult for them to find relief than it was for the victim because the victim is dead. n71

The Nebraska case of *Ford v. Jordan* n72 is a prime example of this difficulty. In this case, Mrs. Ford sought the help of her friends, the Jordans, in managing her finances. n73 She named Mr. Jordan as an agent under a durable power of attorney. n74 By the time of her death, most of Mrs. Ford's property had been placed in joint tenancy with the Jordans. n75 Despite the fact that the Jordans received two-thirds of Mrs. Ford's property, her relatives were unable to persuade the Nebraska court that there was enough evidence of abuse to impose a constructive trust on the assets that passed to the Jordans. n76

Ford teaches an important lesson; if abuse is not challenged until after the death of the victim, relief may be unavailable because the abusive nature of the transaction simply cannot be proven.

A. PERSONAL AUTONOMY AND COMPETENCY

Stepping back from the difficulties of detecting and remedying financial abuse, there is an often-overlooked aspect of the issue. The elderly victims are adults who previously had complete autonomy in their financial dealings. Any proposed solution to the problem that does not take this into account is seriously lacking.

One of the most fundamental rights in our legal system is the right to make our own choices as long as we are competent. The concept of competence is an imprecise one, and has a number of formulations. [*218] n77 For example, the Uniform Probate Code focuses on the ability to make choices by defining incompetence as "lacking sufficient understanding or capacity to make or communicate responsible decisions." n78 In the guardianship context, formulations often focus on the possibility of overreaching by unscrupulous third parties. n79

Even if we could agree on a definition of competence, an additional difficulty is that competence is not an all or nothing proposition. Barring some catastrophic event like a massive stroke or devastating head trauma, the passage from competence to incompetence is more like a tide going out than the turning off of a switch. There may well be significant ebb and flow with a person having "good" and "bad" days. n80

Further complicating the issue is the fact that the tide may never go out. Many scholars suggest that the model of aging as deterioration is false. n81 Thus, most older adults function at the same level as earlier in their lives. n82 Although a significant number of older adults suffer from some level of dementia, the percentages within the older population suffering from dementia are fairly small. n83

A threshold question, then, is where to strike the balance between the desire to protect against abuse and the desire to respect the personal autonomy of the potential victim. Crafting a legal principle that gives due deference to these seemingly competing principles is difficult, but necessary.

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As a society, we must decide how paternalistic we are going to be when it comes to protecting those we perceive as vulnerable. We see little difficulty in protecting children in special ways. For example, we take battered or sexually abused children from their homes. We do not let minors buy alcohol or tobacco. We place limits on the capacity of a child to enter into a contract. On the whole, we seem to have accepted age as a proxy for vulnerability at the beginning of life.

Some commentators suggest that the elderly, like children, should be protected as a group because they are vulnerable. n84 Although the connection between age and maturity is not a perfect one in the early years of life, it is much less perfect in the later years. Many conditions can affect an older person's competency. The most common are Alzheimer's Disease and arteriosclerosis. The onset of these conditions can occur at any time, or may never occur. Thus, it is possible to find a fully competent hundred-year-old and a fully incompetent fifty-five year old.

The idea that people do not become vulnerable to abuse at any particular age is certainly not a new one. Many scholars have commented on the dangers of stereotyping the elderly as frail beings in need of protection. n85

Some studies are drawing distinctions between those individuals formerly classified as simply "old." For example, the World Health Organization uses the terms "elderly" for persons aged 60-75, "old" for those aged 76-90 and "very old" for people over 90. n86 Others have used "less old" and "very old" or "young old" and "old old," drawing dividing lines at various ages. The distinctions may reflect a corollary awareness that the "young old" are relatively problem free. n87

This lack of clean correlation between age and incompetence in later years makes it especially difficult to craft protection from financial abuse. It is fair then to state that a rule making all transactions by persons over a certain age invalid would be inappropriate and inequitable. Similarly, the past approach of ignoring the financial health of a person until something goes critically wrong does not seem [*220] to work well either, as it appears to be leading to more widespread financial abuse. n88

Where then is the appropriate balance? The federal government has taken a sweeping approach to protection of the elderly in the Older Americans Act. n89 There, Congressional intent appears to be the protection of anyone sixty years of age or older. n90

Many states have drawn a similar line, protecting only those who have attained a specified age. n91 On the other hand, some states protect all vulnerable adults regardless of age. n92 Still other states take a hybrid approach, protecting vulnerable adults of any age and all adults over a certain age. n93

Beyond the difficult question of who the law should protect, there is an additional troubling issue of what should be done if a person declines protection. In Massachusetts, for example, approximately one-fifth of elders refuse the offer of state services that follows a report of abuse. n94 The Massachusetts position is to honor this refusal unless there appears to be coercion or lack of capacity to make an informed consent. n95 Similarly, in other states, social workers cannot force an elderly person to leave an abusive situation. n96

Unquestionably, there does come a point at which a person will not be permitted to refuse assistance. In every state, a person can be found incompetent over his own objection, a guardian can be appointed, and he can be stripped of the power to manage his own affairs. [*221] The potential for serious humiliation and psychological damage in such instances is apparent. n97

In addition to personal autonomy concerns, there is a societal interest in preventing and remedying financial abuse of the elderly. n98 It is reasonable to conclude that society should prevent, remedy or punish financial abuse, or perhaps do all three. n99 This concern may be strong enough to overcome certain aspects of personal autonomy, but such paternalism should not be undertaken without good reason. n100

B. THE GENDER FACTOR

Most elder abuse victims are women. n101 There are several possible reasons for this. The first is that an aging population becomes increasingly female. n102 Thus, simple arithmetic suggests that more women than men will be abused.

Second, women may be more likely to suffer abuse because they are perceived as weak. This idea has been suggested as a reason why more women than men suffer physical abuse, n103 and it may be a factor with respect to financial abuse as well.

There is also a third and less obvious reason for this gender disparity with respect to financial abuse. Many elder women have never handled their financial affairs. The overwhelming lifestyle pattern for these women was a long-term marriage, then widowhood, then having to learn to manage their own affairs. During the transition period from dependence to self-sufficiency, these women make particularly good targets for the unscrupulous who set themselves up as Good Samaritans. Perhaps the saddest of these situations involve widows who marry those who become their abusers.

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C. RECOGNIZING FINANCIAL ABUSE

The foregoing discussion suggests that it is extremely difficult to define, identify, and prove financial abuse. n104 Like other forms of abuse, financial abuse most often occurs in a private setting, which makes it very difficult to detect. Various organizations have, however, developed lists of warning signs of abuse that may aid in detection. n105

With respect to bank account statements, some warning signs include: (1) dramatic changes in the amounts of withdrawals; n106 (2) transfers to other accounts; n107 and (3) transactions at automatic teller machines when the account holder is home bound. n108 In checking accounts, one can look for: (1) unusual checks written to "Cash"; n109 (2) bounced checks; n110 and (3) signatures that do not appear genuine. n111

Changes in a senior's lifestyle may also give clues that financial abuse is occurring. For example, a decrease in a person's spending may indicate that money is being diverted away from that person, especially if the decrease coincides with an increase in the spending of someone close to that person. n112 Unpaid bills may also indicate that money is being diverted away from the elder's benefit. n113

Thus, it is almost impossible to detect financial abuse without a fairly high amount of knowledge of the victim's financial affairs. Bruises are apparent to even a casual observer; a declining savings account balance is not.

D. LEGISLATIVE RESPONSES TO FINANCIAL ABUSE

Each state has an Adult Protective Services agency designed to prevent and address problems of the elderly. n114 These programs were [*223] mandated by the Social Security Act in 1974. n115 The agencies focus on providing assistance to the abused, rather than punishing the abuser. n116 The actions of these agencies may stop the abuser from

committing the abusive acts, however, because the agencies can take action to put the victim beyond the reach of the abuser. n117 For example, a protective services agency may initiate a guardianship proceeding that culminates in placing the victim's assets in the hands of a guardian, thus ending the possibility of the former abuser continuing the abuse. n118

With respect to punishing the abuser, there are a wide variety of approaches in the various states. At the outset, it is important to note that there is no federal statute dealing directly with financial abuse of the elderly. n119 The issue, rather, is one of state law. n120

In the criminal law context, states have created two general categories of penalties to punish and deter those who financially abuse the elderly. n121 First, financial abuse may be criminally prosecuted under the state's theft or fraud statutes of general application. n122 In some states, the sentencing judge can treat the advanced age of the victim as an aggravating factor. n123 Alternatively, there may be a specific penal statute aimed at abuse of the elderly in general n124 or directed specifically at financial abuse of the elderly. n125

[*224]

Washington State provides one example of a state that expressly protects frail elders from financial abuse. n126 Washington has a statute protecting "vulnerable adults." n127 In 1995, the Washington Legislature amended the law to add the protection of "frail elders." n128 The legislature defined a "frail elder" as "a person sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself." n129 The Washington statute forbids "exploitation" of a frail elder, and defines exploitation as "the illegal or improper use of a frail elder or vulnerable adult or that person's income or resources, including trust funds, for another person's profit or advantage." n130

The State of Idaho, on the other hand, has used penal statutes of general application to punish financial abuse. For example, in 1992, an elderly man was abandoned by his daughter at a dog track. n131 His daughter was charged with first degree theft, illegally receiving welfare benefits, and unsworn falsification. n132

Additionally, there may be civil penalties for financial abuse. n133 These include traditional tort remedies for conversion and fraud as well as remedies for breach of fiduciary duty.

Another type of civil remedy that may be available is a protective order. Such protection could include an order to refrain from committing further financial abuse, an order to stay away from the victim, an order requiring an accounting by the abuser, and an order to pay the victim's costs associated with seeking protection. n134

In addition to criminal and civil penalties imposed on abusers of the elderly, forty-two states have enacted statutes calling for certain individuals to report abuse of the elderly. n135 These statutes may be mandatory n136 or permissive. n137 Some states, like Washington, make [*225] reporting mandatory for police officers, social workers, welfare and mental health workers, nursing home employees and licensed health care providers, including doctors, nurses, psychologists and pharmacists, n138 and permissive for all others, including employees of financial institutions and attorneys. n139

IV. FINDING A SOLUTION

The threshold issue in preventing or remedying financial abuse of the elderly is defining what constitutes financial abuse. In light of the complex and varied transactions that have been deemed abusive, it may be that the best we can come up with is a broad definition like "the use of an elder person's funds to benefit another without the consent of the elder person." n140

This type of definition is not without difficulty, however, as previously discussed, the abuser may feel some entitlement to the elder's assets. Indeed, the elder may share this feeling of entitlement. A person is likely to feel a desire to benefit his heirs as well as a wish to compensate those who render him care. At what point, then, does a transfer of assets from an elder to another go from being a transfer with consent of the elder to being an abusive transfer?

Many areas of the law provide the defense of consent to what would otherwise be deemed an unlawful activity, n141 and similar principles would be helpful in this context. The burden could be placed on the challenging party to prove that the elder did not consent to the transfers. This may be a difficult burden to meet, as the elder may well be dead or too impaired to testify about the transaction when the issue arises.

On the other hand, the burden could be placed on the alleged abuser to prove that the transaction was voluntary on the part of the elder. Again, this would be a difficult burden because the elder might not be able to testify. This difficulty

could prove to be a normative factor in shaping the behavior of those who take assets from older persons. [*226] If there is widespread knowledge that one may eventually be called on to prove that a receipt of funds was consensual, there might be a resulting decrease in non-consensual transfers.

This issue is analogous to the claim that a transaction was the product of undue influence. Indeed, undue influence might be present in some financial abuse of the elderly, and might provide a separate avenue for undoing abusive transfers. Although the jurisprudence of undue influence varies from state to state, the doctrine is generally available to set aside both inter vivos transfers and transfers at death.

The inevitable question is who will be given primary responsibility for preventing, investigating and dealing with elder abuse. Every agency attempting to address the problem appears overwhelmed. n142 Protective services agencies are frequently understaffed, leading to investigation of only the most serious allegations of abuse. n143 Commentators frequently lament the unwillingness of prosecutors to pursue cases of elder abuse. n144

Thus, one of the primary steps that needs to be taken is increased funding of whichever state office is given responsibility for addressing financial elder abuse. In addition to adequate funding, those charged with alleviating abuse need adequate education. In California, for example, 1997 legislation mandated that all California peace officers receive two hours of training in the detection and investigation of elder abuse. n145

The overwhelming difficulties of defining, identifying and remedying elder abuse might lead one to throw up one's hands and declare the problem incapable of solution. But the seriousness of financial abuse, coupled with the devastating effects of abuse, suggest that we cannot abdicate our societal duty to protect vulnerable members from abuse. Rather, we should continue to examine existing remedies and explore new ones toward the end of ameliorating the pervasive problem of financial abuse of the elderly.

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
Defenses
Consent
Family Law
Family Protection & Welfare
Children
Abuse, Endangerment & Neglect
Family Law
Family Protection & Welfare
Elderly Persons
Abuse, Endangerment & Neglect

FOOTNOTES:

n1 See Bureau of the Census, U.S. Dep't. of Commerce, Statistical Abstract of the United States 16, 37 (110th ed. 1990) (table no. 18, Projections of the Total Population by Age, Sex, and Race: 1989 to 2010).

n2 See House Subcomm. on Health Long Term Care, 101st Cong., 2d Sess., Elder Abuse: A Decade of Shame and Inaction, (Comm. Print 1990) [hereinafter 1990 House Report]. The 1990 House Report was the follow-up to a 1981 report: House Select Comm. on Aging, 97th Cong., 1st Sess., Elder Abuse: An Examination of a Hidden Problem (Comm. Print 1981) [hereinafter 1981 House Report].

n3 See REMINDER/IMPACT PSA Launches Anti Elder Abuse Campaign, Business Wire, Jan. 20, 1999.

n4 See id.

n5 See Ollie Owen, It's Time to Put an End to the Abuse of the Elderly, The Times Union, Nov. 30, 1998 at A6 (explaining that "elder abuse can be physical, financial or emotional, and it can take place in either a home or an institutional setting").

n6 See Melissa Grace, Elder Abuse at Issue in Case, The Times Union, Nov. 22, 1998, at D1 (reporting that these types of cases are difficult to uncover and difficult to prosecute).

n7 See HSS: HSS Announces New National Center on Elder Abuse, M2 Presswire, Oct. 9, 1998, available in 1998 WL 16527054.

n8 See *id.* The Older Americans Act (codified at 42 U.S.C. §§ 3022-3030 (1994)) was created to provide "all necessary supportive services . . . to assist individuals to better cope with their economic, health, and personal needs." *Id.*

n9 See Audrey S. Garfield, Note, Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California, 42 *Hastings L.J.* 861, 863-64 (1991) ("The British took note of the problem of elder abuse as early as 1975 and a British doctor christened it 'granny bashing.' By the late 1970s numerous American studies began to surface which indicated that elder abuse is a serious national problem in the United States as well.").

n10 See *id.* at 864 & n.16 (citing House Select Comm. On Aging, 97th Cong., 1st Sess., Elder Abuse: An Examination Of A Hidden Problem, (Comm. Print 1981); The Battered Elder Syndrome: An Exploratory Study (M. Block & J. Sinnott ed. 1979); Elizabeth E. Lau & Jordan I. Kosberg, Abuse of the Elderly by Informal Care Providers, AGING, Sept.-Oct. 1979, at 10; Legal Research And Services For The Elderly, Elder Abuse In Massachusetts: A Survey Of Professionals And Paraprofession-als (1979) (prepared by H. O'Malley, H. Segars, R. Perez, V. Mitchell & G. Kneupfel)).

n11 See National Center on Elder Abuse, Summaries of the Statistical Data on Elder Abuse in Domestic Settings: An Exploratory Study of State Statistics For FY 93 & FY 94 (visited Feb. 28, 2000) <<http://www.aoa.gov/abuse/report/Cexecsum.html>> (noting that 12% of substantiated abuse reports for 1993 and 1994 were reports of financial abuse); see also 1981 House Report, *supra* note 2, at XV. Cf. National Survey of Abuse of the Elderly in Canada, 4 J. Elder Abuse & Neglect (1/2), 5 (1992) (finding that financial abuse is the most common type of elder abuse in Canada).

n12 See, e.g., Marlowe Churchill, Experts Stress Need to Protect Elderly from Fraud, Abuse, *Press-Enterprise*, July 1, 1998, at B2 (noting that after a woman was tricked into signing her house over to someone, she stated that she wished that she could die because the fraud had "robbed her of all her assets and left her with nothing to live for").

n13 See Lois Haight Herrington, Crime Has a Devastating, Tragic Impact on the Nation's Elderly, *Just. Assistance News*, Aug. 1983, at 2 (including excerpts of a hearing before the Senate Subcommittee on Aging); see also Seymour Moskowitz, Saving Granny From the Wolf: Elder Abuse and Neglect - The Legal Framework, 31 *Conn. L. Rev.* 77 at 101 (1998) ("Older persons may have less ability to recover from financial exploitation because of fixed incomes or short remaining life spans.").

n14 See Jane Glenn Haas, Seminars Teach Seniors to Stay a Step Ahead of Financial Fraud, *CRIME PREVENTION: The Elderly's Large Savings Make Them a Prime Target for Phone and Mail Schemes*, *The Orange County Register*, Oct. 25, 1998 at B6. One commentator noted that the difficulty of living on a fixed income may also make elders susceptible to deception by those offering "get rich quick" schemes. See also Jack Goldsmith & Noel E. Thomas, Crimes Against the Elderly: A Continuing National Crisis, *Aging*, June-July 1974, at 10 ("Potential criminals are aware of the diminished physical capacity and the physical vulnerability of the elderly and are thus more likely to seek out an elderly target.").

n15 See Jordan I. Kosberg, Victimization of the Elderly: Causation and Prevention, 10 *Victimology: An International Journal* 376, 377 (1985).

n16 Tracy Wilson, Elder Abuse is a Tragedy on the Rise, *L.A. Times*, Aug. 9, 1998, at B1 (quoting Barbara Knight) ("Despite tough new laws aimed at protecting the elderly . . . seniors are being beaten and bilked,

starved and neglected with startling regularity in crimes that law enforcement officials say are vastly underreported.").

n17 See, e.g., Howard Fischer, Protecting the Elderly, State Regulates Fiduciaries; Hotline Offers Legal Advice, *Ariz. Daily Star*, Sept. 30, 1998 at B1 (reporting that a hotline for elder persons had been developed to give legal advice to anyone over the age of 60 because of numerous instances of financial abuse).

n18 See *id.*

n19 See Alice Hinkle, Reports of Elder Abuse on Rise, *Boston Globe*, Nov. 29, 1998, at 1.

n20 See, e.g., Lawrence Frolik & Richard Kaplan, Elder Law in a Nutshell 394 (1999) (defining financial abuse as the "repeated improper or illegal use" of assets).

n21 See Miss. Code. Ann. § 43-47-5(i) (West 1993) (defining exploitation as "the illegal or improper use of a vulnerable adult or his resources for another's profit or advantage").

n22 Webster's New Universal Unabridged Dictionary 1615 (1983).

n23 See Phone-answering Machine Thwarts Fraud, *The Columbian*, Oct. 16, 1999, at C4 (stating that "the elderly are especially vulnerable because they are more likely to be at home when the phone rings and can be more susceptible to high-pressure telemarketing").

n24 See *Restatement (Second) of Trusts* §§ 169-185 (1959) (describing the trustee's duties to the beneficiary).

n25 See *Glanville v. McDonnell Douglas Corp.*, No. 87-1980, 1988 WL 40547, at *6 (9th Cir. 1988) (stating that fiduciary duties extend to guardian and ward relationships).

n26 See Francis J. Collin, Jr., Durable Power of Attorney and Health Care Directives § 5:1 (3d ed. 1995).

n27 See *id.* A durable power of attorney is a device available throughout the United States by which a principal designates an agent empowered to take action on behalf of the principal. See *id.* Unlike traditional powers of attorney, durable powers do not terminate on the incompetence or incapacity of the principal. See *id.* The durable power can be general or limited, and can cover both financial and health care matters. See *id.* Furthermore, the power can either be immediately effective upon execution, or it can "spring" into effect upon the incompetence or incapacity of the principal. See *id.* Thus, durable powers are extremely flexible documents that can allow an agent to do virtually any act that the principal could have done, with some exceptions not relevant here. See *id.*

n28 See *Restatement (Second) of Trusts* § 7 cmt. a (1959). But see N.J. Stat. Ann. § 3B-12-38 (West 1983) (providing that title to ward's estate passes to guardian at appointment).

n29 See Collin, *supra* note 26 (explaining the durable power of attorney).

n30 See Collin, *supra*, note 26.

n31 See *id.*

n32 See generally Hinkle, *supra* note 19, at 1 (noting that financial exploitation was the main reason for nearly half the reported cases of abuse in Massachusetts in 1997).

n33 See 1981 House Report, *supra* note 2, at XIV (noting that elder abuse is less likely to be reported than child abuse). See generally Jordan I. Kosberg & Daphne Nahmiash, Characteristics of Victims and Perpetrators and Milieus of Abuse and Neglect, in *Abuse, Neglect, and Exploitation of Older Persons: Strategies for Assessment and Intervention* 31, 33, 42 (Lorin A. Baumhover & S. Colleen Beal eds., 1996); Joanne Steuer & Elizabeth Austin, Family Abuse of the Elderly, 28 *J. Am. Geriatric Soc'y* 372 (1980); Moskowitz, *supra* note 13, at 88 (noting that only a small portion of the estimated 1.5 to 2 million cases of abuse are reported).

n34 See 1990 House Report, *supra* note 2, at XIII (estimating that only one in eight cases of elder abuse is reported); see also Garfield, *supra* note 9, at 864.

n35 See Suzanne J. Levitt & Rebecca J. O'Neill, Essay: A Call for a Functional Multidisciplinary Approach to Intervention in Cases of Elder Abuse, Neglect, and Exploitation: One Legal Clinic's Experience, 5 *Elder L.J.* 195, 196 (1997).

n36 See, e.g., Marie R. Haug & Marcia G. Ory, Issues in Elderly Patient-Provider Interactions, 9 *Res. on Aging* 3, 14 (1987) (discussing the importance of providing a stable environment for the elderly).

n37 See Hinkle, *supra* note 19, at 1.

n38 See Churchill, *supra* note 12, at B2 (noting that many elderly fear that reporting the abuse results in being sent to nursing homes).

n39 See *id.*

n40 See Levitt & O'Neill, *supra* note 35, at 200.

n41 See *id.*

n42 See *id.*

n43 See Tracy Wilson, Seeking Eyes and Ears Senior's Reluctance to Report Abuse Makes Community Awareness Essential, *L.A. Times*, Aug. 10, 1998, at B1.

n44 *Id.* Wilson notes that "most people want to hide it" when retirees fall victim to abusive children. *Id.*

n45 See Churchill, *supra* note 12, at B2. ("Abuse cases go unreported because elderly victims fear they will be even more neglected or abused if they report physical or financial abuse from family members or home care providers, experts said.")

n46 See Moskowitz, *supra* note 13, at 100 (noting that the elderly may feel legal recourse is either ineffective or unavailable).

n47 See Wilson, *supra* note 16, at B1 (noting that social welfare systems suffer from underfunding and skeletal staffs, and thus investigate only the most egregious abuses).

n48 See K.A. Pillemer, *Social Isolation and Elder Abuse*, 8 *Response No. 4*, 2-4 (1984).

n49 See Wilson, *supra* note 16, at B1 (reporting the story of an 88-year-old who was abused by two caretakers, but had no way to get assistance).

n50 See Linner W. Griffin, *Elder Maltreatment Among Rural African-Americans*, 6 *J. of Elder Abuse & Neglect* 1 (1994).

n51 See *id.* at 21 (noting a "tendency for victims and perpetrators to neutralize, i.e. minimize or rationalize, what is happening to them").

n52 See Churchill, *supra* note 12, at B2 (describing an elderly woman in her late seventies who felt that being charged \$ 21,000 for repairs on a \$ 9,000 trailer was necessary).

n53 See Wilson, *supra* note 43, at B1 (reporting that elder abuse is a "seldom-reported crime that most often occurs behind closed doors").

n54 See Michael Kernan, *When it Comes to Age, the Mettle's With the Middle*, *Wash. Post*, Jan. 21, 1979, at F1.

n55 See Mark S. Lachs & Karl Pillemer, *Study Links Addiction to Cases of Elder Abuse*, *New Eng. J. Med.*, Feb. 16, 1995, at 437.

n56 See John J. Regan, *Planning for Aging or Incapacity 1994: Legal and Financial Issues*, in *Estate Planning and Administration*, PLI Tax Law & Estate Planning Course Handbook Series No. 231, 458-59 (1994); Mary J. Quinn & Susan K. Tomita, *Elder Abuse and Neglect* 76 (2d. ed. 1986) (noting that most elder abuse victims are women over the age of 75).

n57 See Moskowitz, *supra* note 13, at 79. Elder abuse usually occurs "in private residences against persons who have limited contact with outsiders." *Id.*

n58 See Wilson, *supra* note 43, at B1 (explaining that physical signs noteworthy of possible abuse include "bruises, in various stages of healing, dehydration or weight loss").

n59 See *id.* To assist in detecting financial abuse, bank tellers and loan officers need to be educated in the area of fiduciary duties. See *id.*

n60 See generally Hass, *supra* note 14, at B6 (reporting that an estimated \$ 20 billion annually is "scammed" from the elderly).

n61 See Moskowitz, *supra* note 13, at 102 (noting that there "are particularly useful civil tools where the abuser occupied a fiduciary status").

n62 See *id.* at 103 (noting that even absent a formal appointment, courts can find a fiduciary relationship where a person voluntarily undertakes the care of the elderly in which the caregiver is then required to safeguard the elder person's assets). See also *People v. Riggins*, 132 N.E.2d 519, 522 (1956) (stating that a fiduciary relationship is formed "where special confidence is reposed in one who is bound in equity and good conscience to act in good faith with due regard to the interest of the person reposing the confidence").

n63 See George T. Bogert, *Trusts* 3 (6th ed. 1987) (stating that "[i]n the great majority of trusts the trustee has the legal title to the trust property").

n64 Although the trustee has a duty to keep the trust beneficiary informed about trust transactions, the beneficiary has no corresponding duty to pay attention to the reports. See *Restatement (Second) of Trusts* § 173 (1959).

n65 See Carolyn L. Dessin, *Acting as Agent Under a Financial Durable Power of Attorney: An Unscripted Role*, 75 *Neb. L. Rev.* 574 (1996) (discussing the current lack of a standard by which to judge an agent's actions or inactions).

n66 See, e.g., Me. Rev. Stat. Ann. tit. 33, §§ 1021-1024 (West Supp. 1997). Maine presumes undue influence where real estate or at least 10% of the elderly individual's assets are transferred to a fiduciary. See *id.* Upon a finding of undue influence, the elderly victims can force the return of the property. See *id.*

n67 In some states, a person can nominate a guardian who will be appointed absent good cause not to appoint. See, e.g., *Cal. Prob. Code* § 1850 (West 1991).

n68 See, e.g., *Cal. Prob. Code* § 2102 (West 1991) (setting forth court control of conservator); *Ohio Rev. Code Ann.* § 2111.50 (Anderson 1994) (setting forth the role of a probate court in guardianships).

n69 See Levitt & O'Neill, *supra* note 35, at 209.

n70 See Churchill, *supra* note 12, at B2 (reporting experts as saying that "[f]inancial fraud cases are time-consuming and hard to prove").

n71 In some states the abused's death precludes recovery for family member for disfigurement, pain, or suffering. See Moskowitz, *supra* note 13, at 104-05 (citing Prosser & Keeton, on the Law of Torts § 126, at 942-43 (5th ed. 1984)).

n72 370 N.W.2d 714 (1985).

n73 See *id.* at 716-17.

n74 See *id.* at 717.

n75 See *id.* at 717-18.

n76 See *id.* at 718-19.

n77 See Bobbe Shapiro Nolan, *Functional Evaluation of the Elderly in Guardianship Proceedings*, in *Legal and Ethical Aspects of Health Care for the Elderly* 212, 217-21 (Marshall B. Kapp et al. eds., 1986) (reviewing various formulations of the concept of incompetence).

n78 Uniform Probate Code § 5-103(7), 8 U.L.A. 327 (1988).

n79 See *Guardianship of Walters*, 231 P.2d 473, 477 (Cal. 1951) (quoting Probate Code formulation of incompetence, which includes the phrase "likely to be deceived or imposed upon by artful or designing persons").

n80 Two psychiatrists noted: [t]he law has tended to address competency as a fixed attribute of an individual, a characteristic in itself with an inherent stability. The clinician, on the other hand, knows that what the law calls competency is, in fact, a set of deductions from a variety of clinical data that can be as subject to influence and change as the more basic mental attributes on which it is based. Paul S. Appelbaum & Loren H. Roth, *Clinical Issues in the Assessment of Competency*, 138 *Am. J. Psychiatry* 1462, 1466 (1981).

n81 See, e.g., H.B. Gibson, *The Emotional and Sexual Lives of Older People: A Manual for Professionals* 55 (1992); Marie R. Haug & Marcia G. Ory, *Issues in Elderly Patient- Provider Interactions*, 9 *Res. on Aging* 3, 6 (1987).

n82 See Gibson, *supra* note 81, at 56.

n83 See Office of Technology Assessment, *Losing a Million Minds: Confronting the Tragedy of Alzheimer's Disease and Other Dementias* 12-16 (1987) (noting that approximately 7% of persons aged 75-84 and 25% of those 85 or older suffer from dementia) [hereinafter *Losing a Million Minds*].

n84 See, e.g., Tracy L. Kramer, *Section 784.08 of the Florida Statutes: A Necessary Tool to Combat Elder Abuse and Victimization*, 19 *Nova L. Rev.* 735, 745 (1995).

n85 See, e.g., Linda S. Whitton, *Ageism: Paternalism and Prejudice*, 46 *DePaul L. Rev.* 453 (1997). See also Robert Rubinson, *Constructions of Client Competence and Theories of Practice*, 31 *Ariz. St. L.J.* 121 (1999) (discussing the impact of such stereotyping on the attorney-client relationship).

n86 Alexander P. Spence, *The Biology of Human Aging* 7 (1995).

n87 See *Losing a Million Minds*, *supra* note 83, at 16 (noting the prevalence of severe dementia among those ages 65 to 74 is rare - only 1% of those affected - while 25% of those older than 85 are affected).

n88 See *supra* note 6 and accompanying text.

n89 See 42 U.S.C. §§ 3022-3030(g) (1994).

n90 See *id.* §§ 3002 (38) (defining the term "older individual" as an individual 60 years of age or older).

n91 See *Conn. Gen. Stat. Ann. § 17b-450(1)* (West Supp. 1998) (defining elderly person as any person "sixty years of age or older"). See also 20 *Ill. Comp. Stat. § 15/1* (1987) (providing services for persons 55 and older).

n92 See *Ariz. Rev. Stat. Ann. § 46-451(A)(10)* (West 1997) (protecting any person "who is eighteen years of age or older who is unable to protect himself from abuse, neglect or exploitation by others because of a physical or mental impairment").

n93 See *Cal. Welf. & Inst. Code § 15610(a)* (West Supp. 1998) (defining elder as any person "65 years of age or older").

n94 See Hinkle, *supra* note 19, at 1. In approximately one-fifth of all cases, elderly individuals refuse all services. See *id.*

n95 See *Mass. Gen. Laws Ann. ch. 19A, § 20(b)* (West 1994). The statute provides that: If an emergency exists and the department, its designated agency, a member of the immediate family or a caretaker has reasonable cause to believe that an elderly person is suffering from abuse and lacks the capacity to consent to the provision of protective services, said department, designated agency, member of the immediate family or caretaker may petition the court for an emergency order of protective services. *Id.* See also *Tex. Code Ann. § 48.059(b)* (West 1998).

n96 See Wilson, *supra* note 16, at B1.

n97 This possibility of humiliation is one of the principal reasons why use of a durable power of attorney is generally regarded as more desirable than instituting a guardianship proceeding. See Collin, *supra* note 26, at § 1.01.

n98 See Haas, *supra* note 14, at B6 (noting that approximately 70% of the funds in American financial institutions are controlled by persons over age 65).

n99 See Levitt & O'Neill, *supra* note 35, at 196 (noting that elder abuse is increasingly recognized as a systemic problem).

n100 See generally Garfield, *supra* note 9, at 871 (noting that a state can intervene when there is reason to believe that an individual cannot competently make decisions). See also *20 Ill. Comp. Stat. 2435/5* (West 1999) (stating that the Illinois adult disability protective laws, which protect those over the age of 18 with mental or physical disabilities from abuse, recognizes "this State has a responsibility to protect those persons while not infringing on the individual's rights").

n101 See, e.g., Mary Joy Quinn & Susan K. Tomita, *Elder Abuse and Neglect* 4 (2d ed. 1997); see also Hinkle, *supra* note 19, at 1.

n102 See Lawrence Frolik & Alison P. Barnes, *Elder Law* 15-16 (1992).

n103 See 1 in 3 Female Cons is Victim of Child Abuse, *N.Y. Post*, Apr. 12, 1999, at 21 (stating that it is an "established fact that more women than men suffer physical or sexual abuse").

n104 See Moskowitz, *supra* note 13, at 79.

n105 See, e.g., John J. Regan, *Intervention Through Adult Protective Services Programs*, 18 *The Gerontologist* 250 (1978).

n106 Joel Dresang, *State Increase Efforts to Protect Older Consumers from Fraud*, *Milwaukee J. & Sentinel*, Sept. 5, 1998, at 2, available in *1998 WL 14034050*.

n107 See *id.*

n108 See *id.*

n109 See *id.*

n110 See *id.*

n111 See *id.*

n112 See *id.*

n113 See Wilson, *supra* note 16, at B1 (citing Ventura County District Attorney's Office and National Center on Elder Abuse).

n114 See Regan, *supra* note 105 and accompanying text.

n115 See Social Services Amendment of 1974, Pub. L. No. 93-647. 2001-2006, *88 Stat. 2337-48* (codified at *42 U.S.C.A. § 1397(a)-(e)* (West Supp. 1998)).

n116 See Garfield, *supra* note 9, at 870.

n117 See Levitt & O'Neill, *supra* note 35, at 198.

n118 See Regan, *supra* note 105, at 250.

n119 The Older Americans Act does, however, define exploitation as "the illegal or improper act or process of an individual, including a caregiver, using the resources of an older individual for monetary or personal benefit, profit, or gain." *42 U.S.C. § 3002(26)*(1994).

n120 See Garfield, *supra* note 9, at 869 (discussing that some states such as Georgia, Maine, California, and Illinois use domestic statutes to protect elderly victims).

n121 But see Levitt & O'Neill, *supra* note 35 (reporting that "clients who asked that such criminal statutes be enforced were usually told . . . that their problem was a 'civil' matter").

n122 See *supra* notes 103-06 and accompanying text.

n123 See, e.g., 730 Ill. Comp. Stat. 5/5-5.32 (1987).

n124 See, e.g., Ark. Code. § 5-28-103 ((a)- (b)(1)) (Michie 1997).

n125 See, e.g., 720 Ill. Comp. Stat. 5/16-1.3 (West 1998). The statute states that: A person commits the offense of financial exploitation of an elderly person when he stands in a position of trust and confidence with the elderly or disabled person and he knowingly and by deception or intimidation obtains control over the elderly or disabled person's property with the intent to permanently deprive the elderly or disabled person of the use, benefit, or possession of his property.

N126 d. See *Wash. Rev. Code* § 74.34.010 (1996). The Washington statute is also designed to "prevent or remedy the abuse, neglect . . . or abandonment" of frail elders. *Id.*

n127 See *id.*

n128 *Id.* § 74.34.015 (1996).

n129 *Id.* § 74.34.020(8) (1996).

n130 *Id.* § 74.34.020(5) (1996).

n131 See Lynn Steinberg, "Granny Dumping" on the Rise: Abandoned 82-Year-Old Puts Focus on Ugly Trend, *Seattle Post-Intelligencer*, Mar. 27, 1992, at A1.

n132 See *id.*

n133 See, e.g., 755 Ill. Comp. Stat. 5/11a-10-17(a), and 5112-21 (West 1993 & Supp. 1996) (imposing a civil duty of care on guardians, parents, spouses, adult children, or other relatives who live with an elderly person under certain circumstances).

n134 See *Wash. Rev. Code* §§ 74.34.110, 74.34.130 (Supp. 1996) (permitting all these types of relief).

n135 See 1990 House Report, *supra* note 2, at 66.

n136 See, e.g., *Ala. Code* § 38-9-8 (1992 & Supp. 1994); *Conn. Gen. State*. 17b-451(a) (1992 & Supp. 1995).

n137 See Marshall B. Kapp, Family Caregiving for Older Persons in the Home: Medical-Legal Implications, *16 J. Legal Med.* 1, 31 n.137 (1995) (listing Colorado, Illinois, New York, North Dakota, Pennsylvania, South Dakota, and Wisconsin among states with voluntary elder abuse and neglect reporting statutes).

n138 See *Wash. Rev. Code* § 74.34.030.

n139 See *id.*

n140 See, e.g., *Miss. Code. Ann.* § 43-47-5(i) (1993) (defining financial abuse as "the illegal or improper use of a vulnerable adult or his resources for another's profit or advantage"); see also Levitt & O'Neill, *supra* note 35, at 204 (defining financial exploitation as "the misuse or withholding of an older person's resources by another person to the disadvantage of the elder person and/or the profit or advantage of a person other than the older person").

n141 See, e.g., *Restatement (Second) of Torts* § 13(b) (1977) (providing consent as defense to battery).

n142 See, e.g., Wilson, *supra* note 16, at B1 (noting that agencies responsible for handling abuse reports are only able to respond to a fraction of complaints because of limited staff and funding).

n143 See *id.* (reporting experience of Ventura County, California's Adult Protective Services Agency).

n144 See, e.g., Levitt & O'Neill, *supra* note 35, at 207.

n145 See Wilson, *supra* note 43, at B1.



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ARTICLE: Remembering the Forgotten Ones: Protecting the Elderly from Financial Abuse

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SUMMARY:

... Ruth Crosson was the victim of a "Ponzi scheme" that offered her the "opportunity" to invest in a low risk, high pay investment. ... Federal laws currently attack telemarketing fraud in several arenas: Wire fraud legislation covers telemarketing fraud that crosses state lines, the Federal Sentencing Guidelines enhance punishment for crimes against the elderly, and the SCAMS Act further enhances the sentence for victims over age fifty-five. ... Regardless of the type of financial abuse, whether by fright mail, mail fraud, telemarketing fraud, or fraudulent charitable solicitations, names that are shared through mooch lists or "sucker lists" compound the problem. ... Term Used: Provides the term the state uses for elderly person is given and whether its definition is based on "age alone" or requires some impairment or infirmities. ... Physical abuse: Resulting harm required ... Crimes: If older person also has infirmities, abuse or exploitation is misdemeanor/felony (Id. 52-3-825) ... Crimes: Exploitation of vulnerable adult by one in position of trust or business relationship or one who knows the victim lacks capacity to consent - felony (Id. 12.1-31-07.1) ... Exploitation of an elder adult by one in position of trust or business relationship or one who knows the victim lacks capacity to consent - felony ...

TEXT:

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I. Introduction

Faye Shelby received a frightening letter warning that the Social Security system was on the verge of collapse and begging her for a donation to help rescue it from ruin. She sent \$ 75 and soon was besieged with a flood of letters, all seeking money from her. n1 Mary Ann Downs received a phone call that promised a "valuable" prize. In order to claim the prize, however, she would have to purchase cosmetics valued at over \$ 200. Anticipating the prize, she purchased the cosmetics only to be told that while the prize was still hers, she would have to make another purchase. She followed the bait, eventually losing \$ 74,000, never receiving the prize. n2 Ruth Crosson was the victim of a "Ponzi scheme" that offered her the "opportunity" to invest in a low risk, high pay investment. She borrowed \$ 100,000 to invest and lost it all. n3

People of all ages fall for such schemes. Some would argue that the [*507] victims are simply naive and should learn a lesson from the experience. n4 However, Shelby, Downs, and Crosson were between seventy-five and eighty-six years of age, and each was targeted for what is known as financial abuse. n5 When the elderly suffer financial victimization, they can lose their life savings or even the very funds they need for daily living. n6 There is also a financial loss to society when senior citizens no longer have money to invest legitimately, depriving the state of the taxes they would normally pay on those investments. n7 Far worse, the perpetrators [*508] of these scams usually do not pay taxes on the money they have stolen. n8

There is nothing new about fraudulently taking money from people, particularly the elderly. The elderly population is rapidly increasing, however, and is readily accessible by telephone and mail. As a result, the elderly are easy targets for financial abuse. Such abuse can emanate from several sources, including people the victims know and trust, particularly family and friends. n9 Perpetrators can be people upon whom the elderly depend for care. Abuse can also come from strangers with whom elderly victims have no direct contact. n10 This Article focuses primarily on the financial abuse of the elderly by strangers.

Telemarketing, mail, and charity solicitations are all potential means of fraud by strangers. As demonstrated by previous examples, solicitors ask victims to send money to purchase products, win prizes, or support worthy causes. The abuse occurs in three phases. It initially begins when a victim responds to fraudulent claims by sending money. The abuse continues when the victim's name is placed on a list of "easy targets" who will be contacted repeatedly. n11 The final abusive act occurs when the lists, known as "mooch lists," are sold to other potential abusers, culminating in an expanded web of abuse. n12

Financial abuse of the elderly is hidden and insidious. n13 Those who fraudulently jeopardize the life savings of the elderly are reprehensible [*509] and should be punished. n14 Targeting particularly vulnerable people renders the perpetrator's conduct even more criminally depraved. n15 Unfortunately, however, recent studies indicate that such abuse is pervasive. n16 With the use of mail and telephone, potential abusers almost always have readily available victims. And with the aid of mooch lists, victimizers are generally unseen, multiple, and elusive.

Physical and psychological abuse of the elderly is similar to financial abuse in a number of ways. Elderly abuse is often difficult to detect "because the victim is frequently reluctant to report the abuse." n17 A victim may be ashamed to admit that she is experiencing any sort of abuse. n18 The victim may be afraid of her abuser and may fear retaliation if she reports the behavior. n19 She may not know where to find help. n20 [*510] Ultimately, she "may be too impaired to report the abuse, or, in some cases, to even realize that [she] is being abused." n21 However, the circumstances surrounding financial abuse are further complicated because "unlike the bruises that often accompany physical abuse, the signs of financial abuse may not be so obvious." n22 Elderly victims are more likely to report physical abuse, believing that bodily injury is more threatening than any material losses they suffer. n23 Further, many senior citizens are embarrassed about being financially victimized, n24 and there [*511] are rarely witnesses to report it. n25 Sometimes the elderly simply do not realize that anything is amiss. n26 Police officers and financial institutions are unlikely to recognize or understand financial abuse, n27 leaving the abused undetected and the abusers unapprehended. n28 Even if the elderly [*512] were inclined to report financial abuse, there is presently no national reporting center or database designed to compile and analyze the reported cases. n29 As a result, no one can accurately estimate the number or types of financial abuse or its devastating impact on the elderly. n30

Some lawmakers and enforcement agencies have been creative in fighting financial abuse. n31 However, while both federal and state laws offer innovative and workable solutions, the laws vary widely, leaving gaps through which creative abusers can escape. Commentators and scholars have addressed this matter and suggest that a national system of comprehensive, uniform laws would not only punish offenders, but would also keep them from finding a safe jurisdiction in which to operate. n32

The U.S. Supreme Court has held that the state has an interest in protecting vulnerable groups from abuse, including the elderly. n33 However, in order for there to be effective laws to protect the elderly [*513] from financial abuse, there must be a collective effort to develop uniform policies that consider the unique plight of elderly citizens. These policies must encompass a recognition that the elderly constitute a significant and identifiable segment of the population who are subject to risks of abuse and are in need of special attention. n34 By virtue of age limitations and other disabilities, they are often vulnerable to abuse, whether physical, mental, or financial, and may not be capable of seeking help or protection. n35 To fashion protective rules for the elderly, it is critical to nationally recognize the following: The elderly are a disadvantaged class; in cases of abuse, the perpetrators are seldom prosecuted; due to problems of proof and

court delays, only a small number of civil cases are brought in connection with financial abuse; and, the lack of incentives for prosecutors to pursue these types of cases serves to perpetuate this cycle of abuse against the elderly. n36

The goal of this Article is to encourage legislators to strengthen the laws against all types of elder abuse, particularly financial abuse. Sample laws in various states demonstrate the different levels of protection and flexibility in current legislation. While the authors recognize the pervasiveness of physical and emotional abuse, the primary focus of this Article is the financial abuse of the elderly from telemarketers or similar sources where the abusers recognize the particular vulnerabilities of the elderly and seek to exploit them fully. n37 Part II explores why the elderly are [*514] [*515] particularly susceptible to this type of abuse and compares various protections available under current laws, which include laws providing protective services, civil law, criminal law, and criminal sentencing enhancement statutes. Part III begins with a discussion of the different types of financial abuse and explores current federal and state law as well as innovative programs designed to combat such abuse. Part IV suggests how a fully comprehensive system of strict laws could protect the elderly by criminalizing all forms of abuse, giving enough flexibility to allow both criminal and civil penalties, and providing restitution to aid the victims. It also suggests that for purposes of consistency, all laws protecting the elderly from abuse should either be listed or referenced in one central location in the code rather than scattered throughout the code. Part IV also looks at some of the present proposals, both on the federal and state level, and concludes that many of the present solutions have not been effective. We must continue to strive to close the existing gaps in criminal and civil laws to afford greater protection to the elderly. The concluding Appendix and Comparison Table give a comparison of laws in all states.

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II. An Assessment of the Problem

Senior citizens presently face two major problems. Not only is the aging population growing rapidly, but schemers recognize their vulnerability and readily victimize them. Public policy dictates that society should protect all of its vulnerable citizens, particularly the elderly. It is simply common sense to recognize that we may all face the same problems as we grow older if we do not remedy them now. To address these problems, current federal and state laws offer varying forms of protective services, civil remedies, and criminal punishment. For example, some laws enhance sentences for those who commit crimes against the elderly. However, these laws vary greatly depending on the type of abuse and the jurisdiction. As a result, the protection is often spotty, leaving the elderly population well protected in some states while completely exposed in others.

A. Vulnerability of the Aging Population

People age sixty and older are a rapidly growing segment of society. In 1996, 31 million senior citizens constituted approximately 12% of the population. n38 By the year 2030, their numbers will more than double to 89 million, constituting 25% of the population. n39 Nine million of those will be over age eighty-five. n40 As quickly as the elderly population grows, however, crime against the elderly is growing more rapidly. From 1985 to 1991, personal crimes increased by 90%, from 627,318 to 1,100,000. n41

The elderly who are institutionalized or who receive care at home are especially vulnerable to physical and mental abuse. The victim often depends on the abuser for daily needs and remains at the abuser's mercy. n42 Even if victims are physically or mentally able to communicate [*517] what is being done to them, they are often reluctant to report it. n43

While senior citizens living independently may not be as vulnerable to physical and mental abuse, they are especially vulnerable to financial abuse. They account for 60% of the \$ 60 billion annual loss due to fraud. n44 In an attempt to combat this growing problem, the Senate Committee on Aging conducted a survey in the early 1980s to determine the frequency of economic frauds against the elderly and the impact on the lives of victims. n45 The survey showed that consumer frauds are widespread, pervasive, and increasing at the rate of about 12% per year. n46 The elderly are considered prime targets for such fraud. n47 They are victimized more often than the younger population, n48 are likely to [*518] suffer greater losses, and are slower to recover. n49

By virtue of being senior citizens, they are vulnerable to abuse because they are both accessible and agreeable. They are typically retired, often live at home, and therefore are more available. n50 They have more time to open and read the letters that others throw away as junk mail. n51 Because they are less mobile, they depend on the telephone for contact with friends, family, and the outside world. n52 Also, because many of the elderly live alone, they have no one to consult about high-pressure salesmen or questionable transactions. n53 Widows are especially vulnerable because

their husbands often handled the family financial matters, and they consequently never gained practical experience in those areas. n54

One's vulnerability to abuse can be due to cognitive impairments, physical impairments, sensory impairments, or socioemotional vulnerabilities. n55 The concerns of daily living often cause elderly people [*519] to respond to any friendly voice, even an unscrupulous one. n56 Retirees concerned about living on fixed incomes become vulnerable to business and investment frauds. n57 Strained incomes leave them open to promises of big prizes, even if they have to spend money to receive them. n58 The desire to help others often makes them victims of bogus charities. n59 Their interest in politics and improving the country can leave them susceptible to vague promises to "change things." n60 Even the strain of facing their own mortality can make them vulnerable to certain types of fraud. n61

Elder financial abuse is a "difficult crime to detect and prosecute." n62 Once victimized, the elderly are less likely to report it because of personal shame. n63 They may fear losing control of their money if they appear [*520] unable to care for themselves. n64 Also, these victims are often unreliable witnesses because of limited mental capacity impaired by old age. n65

In contrast, the perpetrators of economic frauds are well organized and effective. n66 They have "schools for scoundrels" and sell "sucker lists" to each other. n67 They scan obituary notices and public real estate lists for potential victims. n68 Once they identify victims, they contact them by phone, by mail, or in person. n69 The tactics they use to sell their victims include the following: scare techniques involving the impending peril of Social Security, "rush deals" in which the victim must make an immediate decision, n70 and required "secrecy" surrounding the fraudulent offer. Secrecy not only induces the victim to agree because the deal is [*521] not available to everyone, but also affords protection for the scammer. n71 These forms of victimization are merciless and call for the strongest possible laws.

B. Protection of the Elderly Under Current Law

Every state has statutes against the abuse of elderly or vulnerable victims. The problem is that laws vary greatly from jurisdiction to jurisdiction. And while many attempts to protect the elderly are laudable, the efforts are generally inconsistent and sometimes almost nonexistent.

1. Protective Services

Senior citizens who are unable to care for themselves are either placed in institutions such as nursing homes or cared for at home by family or outside caregivers. All states have enacted protective statutes, n72 but these statutes generally do nothing to punish abusers. n73

Many state statutes are patterned after the Older Americans Act of 1965. n74 A typical statute authorizes some administrative department to investigate abuse and to provide protective services as needed. n75 It describes the responsibilities of the administration, such as providing [*522] services directly or contracting with private entities. n76 It often requires any person suspecting abuse to report it to the department, and some statutes place greater responsibilities on certain professionals such as doctors, clergy, and attorneys. n77 Florida has added banking personnel to the list of those specifically required to report suspicion of elder financial abuse. n78 When those specifically designated to report abuse fail to do so, they are subject to criminal sanctions. n79

In emergencies, the department is authorized to remove the abused from physically dangerous situations. n80 Statutes vary from state to state. n81 Those afforded protection also varies. For example, the Texas statute protects the entire elderly population because it defines "elderly person" by age alone: sixty-five or older. n82 Other state statutes require the abused to be physically or mentally disabled to the extent they are unable to care for themselves. n83

In addition, the definitions of proscribed conduct vary. Some states consider an act abusive only if it results in actual harm to the victim. n84 [*523] Others find abuse merely in the commission of the prohibited act. n85 A few states do incorporate criminal provisions into protective statutes. n86 California criminalizes any act that inflicts physical pain or mental suffering on victims sixty-five or older. n87 It also punishes caretakers who embezzle funds. n88

While elderly protective services are an invaluable tool in combating elder abuse, most serve a limited purpose. In order to be more effective, states could strengthen statutes by adding criminal penalties for abusive acts. Protective statutes, when used in a comprehensive system of laws, can help fight the fraud and exploitation that victimize the aging population.

2. Civil Law

Civil law permits the victims of abuse to sue the perpetrators, allowing compensation for losses due to injury. n89 Victims can bring suit for different torts, depending on whether the injury is physical, mental, or financial. For instance, suit for physical abuse can be brought as a battery. n90 Suit for emotional abuse can be designated as an assault n91 or [*524] intentional infliction of emotional distress. n92 Victims of financial abuse can sue for fraud under contract law or consumer protection laws. n93

A major difficulty in applying civil law to combat elder abuse is that the victims must bring the suit. n94 Those who are unable to do so receive no guidance in this area of the law. n95 Victims may be overwhelmed by the abusive situation and embarrassed to acknowledge it. n96 Even if shame and embarrassment would not prevent them from acting on their own behalf, they are unlikely to know how to sue or even that laws exist to help them. n97 The burden is even greater because they often lack the financial resources or emotional stamina to initiate an action, much less face the possibility of a lengthy court battle. n98 Civil law is also limited because it only affects the abuser financially. Even if the elderly bring suit, win, and receive compensation for injury, the abuser is still free to find another victim. n99

Like protective services, civil laws alone are severely limited in the [*525] war on elder abuse. Yet they are valuable tools when combined with other remedies. n100 A perpetrator who must compensate his victims as well as face other punishment may be dissuaded from abusing another victim.

3. Criminal Law

Society benefits if we criminalize abuse of the elderly. The criminal law's scope is broader than the sanctions offered by civil law. It not only punishes the perpetrator, but also protects the victim and society as a whole. Without criminal laws, the abuser rationalizes that society condones this predatory behavior, and victims feel powerless to seek help to stop the abuse. n101 By criminalizing elder abuse, society firmly denounces the notion that abuse is an effective and acceptable means of controlling others. n102 Unlike the measures necessary for the elderly to institute a civil action, the criminal justice system prosecutes on their behalf, so victims need not bring suit privately. n103 Criminal prosecution protects all of society as it punishes harmful conduct or situations likely to result in harm if allowed to continue. n104 Additionally, in some states a criminal record keeps the abuser from working in positions that put [*526] vulnerable victims within easy reach. n105

States have recently begun to criminalize acts directed against the elderly, but protection is often limited. n106 Florida, for example, has criminalized the abuse of elderly or disabled adults. n107 The statute criminalizes physical and psychological abuse n108 as well as financial abuse. n109 It imposes strict liability on the perpetrators because it does not provide for a defense that the accused did not know the victim's age. n110 The statute affords limited protection, however, because it defines "elderly adults" as persons who are physically or mentally disabled to the extent that they are unable to provide adequately for their own care or protection. n111 It does not clearly protect persons still able to live alone. n112

A more recent statute passed in Minnesota provides broader protection to elderly victims by criminalizing acts against the elderly who still live [*527] at home. n113 Its definition of victims is broad. It defines "vulnerable adults" as persons, regardless of residence, who because of physical or mental infirmity, are unable to care for themselves without assistance or have an "impaired ability to protect [themselves] from maltreatment." n114 The person to be punished varies depending on the type of abuse. Though physical or mental abuse is a crime only if the perpetrator is a caregiver, n115 the term "caregiver" is broad enough to include family members caring for the victim. n116 However, financial exploitation does not require a caregiver relationship to be a crime. It expands to reach any person exploiting a vulnerable adult. n117 The broadest protection is given by states that criminalize abusive acts based solely on the victim's age. n118

The trend in state law appears to be moving toward greater protection for the elderly. The legal system might more effectively combat the huge wave of elder abuse if all states drafted criminal statutes for elder abuse based on age alone, thus expanding protection to persons who are vulnerable to financial abuse even though they still are able to care for their daily needs. Currently, few states have statutes that fill this gap.

4. Criminal Sentencing Enhancement Statutes

Criminal sentencing enhancement statutes provide greater protection by allowing more severe sentences for any crime committed against elderly victims. n119 These statutes are advantageous in that they compliment laws already in exist-

tence. The federal government led the way in the 1980s with a general enhancement statute. n120 Other federal and state statutes have followed. n121

[*528] In 1984 the United States Sentencing Commission promulgated guidelines for appropriate sentencing of persons convicted of federal crimes. n122 The Federal Sentencing Guidelines are a clear, mathematical process and provide enhanced sentences for certain crimes. n123 They start with a base level of punishment for particular crimes. n124 They then add numerical units to increase the sentence. These can be based on specific characteristics of the offense, such as the amount of loss or whether more than minimal planning was involved. n125 They can also be based on the status of the victim, such as one's being particularly vulnerable. n126 They can also focus on the particulars of the perpetrator, including one's being in a position of trust. n127 Likewise, the sentence might be reduced if the perpetrator accepted responsibility. n128 After all units are added and subtracted, the resulting sentence level determines the final punishment. n129 Judges have discretion to further depart from the sentencing structure if they find that circumstances do not sufficiently fit within the guidelines. n130

A "vulnerable victim" crime allows sentence enhancement if the offender has actual or constructive knowledge that the victim of the offense was "unusually vulnerable due to age, physical or mental condition, or [was] otherwise particularly susceptible to the criminal conduct." n131 In some courts the age of the elderly victim alone can spark the enhancement. n132 Other courts require additional factors beyond age. [*529] However, even general factors, such as facing the inevitable physical or mental consequences of one's own mortality, can classify the elderly person as "unusually vulnerable." n133 The classification may also be supported by a "generalized finding that the members of a targeted group share a particular susceptibility." n134 An abuser who stands in a position of trust with the victim can be given even further enhancement. n135 A court must add two offense levels "if the defendant abused a position of public or private trust ... in a manner that significantly facilitated the commission or concealment of the offense." n136

For example, the court in *United States v. Stewart* applied both enhancements to increase the punishment for an insurance agent who fraudulently sold annuities to the elderly. n137 The agent promised that annuity funds would cover all future funeral expenses and that any additional money would build an estate for their heirs. n138 Three hundred [*530] sixteen people lost \$ 1,100,000 in this scheme. n139 The court increased the sentence by four levels because the agent's victims were elderly and because he abused a position of trust. n140

In the Second Circuit, a court imposed a sentence even beyond the enhancement guidelines because the victim suffered a great degree of harm. n141 When a stockbroker's great-aunt trusted him to invest her life savings of \$ 893,700 for her benefit, he completely depleted her assets while living extravagantly at her expense. n142 He left her "financially dependent on the generosity of others, quite possibly for the rest of her life." n143 The court determined that the devastating result of this crime had not been adequately considered by the Commission in setting enhancements. n144 It allowed the addition of five months to the maximum prison sentence permitted by the enhanced guidelines. n145

The recent SCAMS Act is another excellent example of protection through the enhancement of sentences. n146 In 1994, Congress enacted the Senior Citizens Against Marketing Scams Act, which affects telemarketers who violate federal fraud statutes. n147 If the offense targets persons over the age of fifty-five, up to fifteen additional years may be added to any sentence for fraud. n148 Another important feature of the statute requires mandatory restitution to the victim for all losses suffered by the victim determined to be a proximate result of the offense. n149 Some states have followed with their own enhancement statutes. For example, California's general enhancement statute states that any prison sentence may be enhanced by circumstances in aggravation. n150 One such circumstance in [*531] aggravation is committing a felony against a victim who is sixty-five or older. n151

Broad sentencing enhancement statutes, such as the Federal Sentencing Guidelines, may be the easiest and most immediate changes state legislatures can make to further protect the elderly. Because they piggyback onto existing criminal laws, they require no additional manpower or administration that would impact the judicial system. Most importantly, however, criminals cannot hide from their effect. Any crime that can be proven can be enhanced.

5. Restitution

Though criminalizing acts of elder abuse affords greater protection to abuse victims, criminal penalties do not afford complete protection because they often do not address the loss to the victim. The victim is often forgotten in criminal investigations. n152 This is particularly important as victims of elder abuse, in addition to being more vulnerable, are the least able to afford the loss. n153 In 1992, in response to this gap in protection, Congress enacted the Victim and Witness Protection Act (VWPA), which allows federal courts to order restitution to crime victims. n154 The SCAMS Act against telemarketing goes a step further and makes restitution mandatory. n155 Courts may not refuse to issue an

order because of the economic circumstances of the defendant or because the victim is entitled to receive compensation for injuries from an insurance company. n156 [*532] While ordering restitution is no guarantee the defendant can pay it, the threat of restitution is an important part of a comprehensive system of protection.

C. A Need for Uniform and Strict Laws Against Abuse

To effectively fight physical, emotional, and financial abuse, all states need a uniform system of strict, comprehensive laws. A system to protect the vulnerable and elderly would provide protection regardless of where victims live. n157 Under current laws, abusers can adapt their actions to circumvent a limited law, switch to types of abuse the laws fail to address, or simply move to a jurisdiction that is more amenable to their operations. n158 To eliminate financial abuse, uniform laws from state to state are especially needed. Richard A. Starnes notes the following:

The number of ways that the elderly can be defrauded by those looking for an easy target is staggering. Although the federal government and state governments have enacted legislation to both heighten enforcement and to increase the penalties for those who perpetrate consumer fraud on the elderly, different jurisdictions have inconsistent responses to these crimes. Without a comprehensive plan to attach these schemes, consumer fraud swindlers will create new scams to avoid the reach of the law. n159

III. Means of Financially Abusing the Elderly and the Government's Response

Present state and federal laws address financial, physical, and emotional abuse. Some states have even seen fit to criminalize such acts. Unfortunately, inconsistent laws and spotty protection allow far too many abusers to freely victimize the elderly. This Part addresses financial abuse and the devastation it has visited upon its elderly victims.

Financial abuse against the elderly includes schemes that, in effect, steal money or property from rightful owners. Perpetrators can be friends or strangers. Exploitation traditionally is abuse in which a trusted person uses the money for his own purpose; yet many current statutes extend the definition to cover any abuser as well. Total strangers can become abusers through fright mail, mail fraud, fraudulent telemarketing, or fraudulent charity solicitations. The abuse spreads even wider when names of potential victims are placed on mooch lists and sold to the highest bidder, another stranger.

This Part first looks at fright mail, a fairly recent form of solicitation [*533] that, at present, appears to fall into a gap in the laws. This Part also looks at exploitation, mail fraud, telemarketing, and charity solicitation laws and examines them to determine how a system of broad and uniform laws could be used to fight such abuse. Recent telemarketing laws provide an example of protection possible when far-reaching laws are in place. Finally, this Part addresses the heinous use of mooch lists. As was previously stated, if state and federal courts enact uniform criminal laws in addition to providing for enhanced sentences, we will more closely meet our public policy goals of protecting the vulnerable and elderly.

A.

"Fright Mail"

Fright mail is any letter that purports to give alarming information about some political matter, but is clearly designed to frighten the recipient into sending money. n160 These letters come from "self-proclaimed public policy organizations in mostly legal but controversial campaigns to raise cash." n161 Faye Shelby is one example of the millions of seniors nationwide who receive such mail. n162 She was eighty-six years old and living in a senior center when she received an envelope marked "urgent." n163 The letter inside warned that Social Security was on the verge of collapse and she must send \$ 75 to help this organization fight to save it. Faye sent the \$ 75 dollars, fearful that if she did not, she would not receive her Social Security checks. Within a week, a letter of thanks came but asked for another \$ 75. She was soon besieged by such mailings - 700 during a single four-month period. n164 The letters so distressed her that she often sat up nights, fretting over which crisis most deserved her help. n165 [*534] Fearful that her Social Security benefits might expire, she regularly responded with donations. n166 Due to her response to the initial fright letter, her name was placed on dozens of mailing lists that used her name repeatedly. n167

Society cannot underestimate the creativity of marketers who design such insidious promotions. n168 A marketer who receives only a small return on direct mail solicitations can generate profits. n169 The present computer generated

"personal letters" can be sent in mass to elderly recipients who see their names in print and believe the senders were thinking of them personally. n170 "Glitzy packaging" is designed to entice recipients to read what is inside. n171 Though the letters claim to be informative, the language is open-ended, misleading, and emotional enough to scare older Americans into giving their money to organizations that offer to help the situation. n172 The Social Security Administration frequently hears from seniors frightened that their benefits will be cut off if they do not answer such letters by sending contributions. n173 Some solicitation letters even use the names of U.S. Senators to lend credibility to their mail in the minds of the victims. n174 Many of the groups soliciting the elderly have nothing to do with influencing legislation. n175

[*535] Creative promoters manage to stay just outside the reach of the law. n176 Fright mail has escaped legislation against fraudulent charity solicitation because the letters do not make promises, such as to spend the money on particular programs. n177 They may simply say "Help me fight." n178 Public policy demands that victims be protected from a persistent barrage of letters containing thinly veiled falsehoods clearly designed to reach the pocketbooks of the elderly. Either new laws or the interpretation and application of existing laws to combat fright mail would meet these demands. Fright mail appears to escape prosecution, n179 but criminal laws against its harassing frequency could prohibit such abuse. Exploitation statutes, which will be addressed more thoroughly below, could criminalize these acts. Indeed, if a statute included "any abuser," those who send harassing mail from distant places would be violators. n180 A statute that protects victims based on age alone would protect the entire elderly population. n181 The federal mail fraud statute could also be expanded to include punishment for such mail sent with harassing frequency. n182

Financial abusers argue that their First Amendment right of free speech allows them to freely send their mail, including fright mail, without statutory restrictions and defend their behavior by claiming this constitutional authority. n183 However, a criminal statute that prohibits unreasonably frequent mailings of any type of solicitation to elderly or vulnerable citizens could conceivably meet a First Amendment challenge. Indeed, as the United States Supreme Court has held, in the privacy of one's home "the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder." n184 Further, in *Frisby v. Schultz* the Court considered one's right to picket. The Court held that people have a right to be protected in their own homes from speech they are [*536] presumptively unwilling to receive. n185 The Court noted the state's justification for banning such speech: that this picketing causes distress to the home's occupants and had "as its object the harassing of such occupants." n186

Speech concerning public issues has received great protection under the First Amendment, but it is not "equally permissible in all places and at all times." n187 The state may regulate the time, place, and manner of speech if the statute is content-neutral, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. n188 In *Frisby*, the Court determined that the challenged ordinance served a significant government interest because the state's interest in protecting privacy, tranquility, and well-being in one's home is of the highest importance. n189 People "are not required to welcome unwanted speech into their own homes." n190 Indeed, even speech that purports to inform the general public may become an intrusion against privacy when it targets specific residences. n191 As a result, the Court upheld the constitutionality of the ban on picketing a targeted residence. n192 Justice Stevens also argued that even protected speech should not be allowed to be constantly repeated simply to harm the recipient. n193 Based on similar reasoning, the U.S. Supreme Court has [*537] also upheld regulation of unwanted mail into one's home. n194

Clearly then, if the Supreme Court has recognized the necessity for limiting intrusive speech in these contexts, a statute designed to reduce the impact of fright mail that restricts the frequency of mail sent to a person or an address could be narrowly tailored to meet these constitutional standards. Such a statute would be content-neutral. Within reasonable limits, it would permit the sending of mail and other communication to the elderly. It would, however, protect them from offensive mail that targets particularly vulnerable citizens and repeatedly invades the privacy of their homes. Under such a statute, legitimate informative messages should not be permitted to be sent repeatedly with requests for more money; it can be convincingly argued that people are presumptively unwilling to receive such mail when it arrives with unreasonable frequency.

B. Exploitation

"Exploitation" is defined as "an unjust or improper use of another person for one's own profit or advantage." n195 However, present laws prohibiting exploitation address the improper use of another person's financial resources. n196 A Delaware chancery court addressed this issue almost fifty years ago when a young couple exploited a seventy-three year old man by befriending him and then accepting unusually large gifts from him. n197 The court determined that a fiduciary relationship had developed, and therefore, their acceptance of a large monetary gift was presumed to involve fraud.

n198 It held that "the relative position of parties may be such that a donor must be saved from himself, if not by the intended donee's refusal, then by court action." n199 The court ordered the money [*538] returned. n200

Federal law offers protection by criminalizing mail fraud and wire fraud and allowing the enhancement of sentences for crimes against "vulnerable victims." n201 For example, in *United States v. Caterino*, members of the Caterino family contacted victims by phone, sold them nearly worthless coins at outrageous prices, and used the postal system for payment and delivery. n202 They were convicted of mail fraud, wire fraud, and conspiracy. Their sentences were then enhanced because the victims were "elderly and vulnerable to a fraudulent scheme." n203

Protection in state law varies greatly depending on the statute. n204 While almost all states have statutes against exploitation, these statutes vary in their definitions of "exploitation," their criteria of perpetrators, their criteria of victims, and their degrees of protection. First, the definitions of exploitation vary. In most elder abuse statutes, exploitation refers to one's illegally or improperly "using the resources" of an elderly person for monetary or personal gain without that person's consent. n205 In most states, "using the resources" is broadly defined, n206 but a few states require "substantial monetary or property loss." n207 Second, the criteria defining a perpetrator vary. A few states require that the perpetrator be in a [*539] position of trust. n208 Fortunately, a large number of states apply the law to any person, regardless of relationship with the victim. n209 Third, the criteria for those persons who are protected vary. Some states protect the elderly based strictly on age, such as sixty-five or older. n210 Other states protect all persons over eighteen, but require them to have a physical or mental impairment that requires assistance to care for their needs or to protect them from abuse. n211 Fourth, the degree of protection varies. Though most protective services statutes cover exploitation and allow authorities to protect victims, the abusers are not punished. n212 Some states, however, punish exploitation as a separate crime. n213 Fifth, [*540] where the act is criminalized, sentences vary greatly. Some treat it as a misdemeanor with a maximum sentence of six months or \$ 300. n214 Others treat it as a felony with a maximum thirty-year sentence. n215

One concern in drafting criminal statutes is that they must be carefully drafted to withstand constitutional scrutiny for vagueness or overbreadth. n216 In Florida, for example, the state legislature attempted to fill the gap leading to the exploitation of the elderly. However, the court struck down the state's statute that established exploitation as a separate criminal offense. n217 The statute read as follows:

A person who knowingly or willfully exploits an aged person or disabled adult by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person or disabled adult for profit, commits a felony of the third degree, punishable as provided in s. 755.082, s. 775.083, or s. 775.084. n218

The Florida Supreme Court declared the statute unconstitutionally vague because it contained no clear explanation of the proscribed conduct, no explicit definition of terms, and no defense of good faith. n219 Though the definition was identical to those found in other states, the court noted that those states only provided protective services for the abused elderly and did not criminalize the act. n220 The court gave clear guidance for a new statute as it explained how an Illinois statute criminalizing elder exploitation would meet a constitutional challenge. n221 The Illinois statute required that the perpetrator stand in a position of trust and confidence with the victim and that the perpetrator knowingly and by deception or intimidation obtain control over the victim's property with the intent to permanently deprive the victim of the use, [*541] benefit, or possession of the victim's property. n222 The statute clearly defined its terms and allowed a defense if defendants acted in good faith to assist the elderly or disabled in managing their property. n223 The crime was punished as a felony, with sentences determined by the value of the property involved. n224 Though Florida struck down the original statute in 1995, the state adopted a new statute that criminalizes exploitation by either a caregiver n225 or by "a person who knows or reasonably should know that the elderly person ... lacks the capacity to consent." n226

As the number of elderly continues to grow, exploitation will also increase. At present, the laws among the various states allow a perpetrator who would be imprisoned in one state to go unpunished in another. If all states passed statutes that broadly and uniformly criminalize the exploitation of the elderly, society would send a clear message that it will not tolerate such acts. In addition, general sentence enhancement statutes would not only strengthen protection of the elderly, but would serve as a safety net to catch new types of crime the exploiters create. n227

C. Mail Fraud

Mail fraud includes any mail that deceives its victims into purchasing products or services to win a prize. Primary among these schemes are sweepstakes promotions that appear to promise that the recipient is a winner. n228 For example, an eighty-four year old California woman spent [*542] about \$ 1000 per year on magazines and other items just to enter sweepstakes. n229 To settle her accounts, her husband was forced to sell off their retirement investments. n230

Sweepstakes promotions are increasingly used by both "unscrupulous and legitimate members of the business community." n231 Even legitimate promoters send mailings "specifically designed by marketing experts ... to compel the recipient to open and examine the contents." n232 The most direct allurements are an assurance that a named person has won a substantial sum of money. For example, a solicitation might read, "Carl Levin, you have won \$ 10 million." n233 Most people throw away such mail because they recognize the deception and do not have the time to read it. n234 "Yet many of our citizens do have the time, and these are, disproportionately, our senior and disabled citizens." n235 Creative language lures these citizens to believe that they will definitely win the prize, but some letters also falsely lead them to believe their eligibility is directly related to how many goods and services they purchase. n236 Marketing experts who target these recipients know many of them will fall for the deception, and the harm can be devastating. n237 Even worse, victims are deliberately and knowingly set up to be victimized repeatedly when their names are sold on mooch lists. n238

[*543] Both the state and federal governments are beginning to address mail fraud. Under the Federal Mail Fraud Act, those who use the postal service to obtain money or property by false representations or promises are subject to a fine, five years imprisonment, or both. n239 In addition, sentence enhancement is available if the victim is a vulnerable adult. n240 State legislation generally protects against such fraud in consumer protection statutes. n241 Some states enhance penalties if perpetrated against senior citizens. n242 For instance, Minnesota adds up to \$ 10,000 to a fraud penalty if the victim is age sixty-two or older. n243

Mail fraud statutes could provide strong protection. As discussed below, the federal SCAMS Act could be adapted to include mail fraud. n244 Current laws could be amended to include restitution. Also, more states could pass effective legislation to protect the elderly from financial abuse through the mail.

D. Telemarketing Fraud

Comprehensive, uniform laws can clearly be effective in ending telemarketing fraud. Not only are the elderly hurt by telemarketing fraud, but the legitimate telemarketing industry is also damaged. n245 As telemarketing fraud has increased, so has pressure for the federal government to do something. n246 Federal laws currently attack telemarketing fraud in several arenas: Wire fraud legislation covers telemarketing fraud that crosses state lines, n247 the Federal Sentencing Guidelines [*544] enhance punishment for crimes against the elderly, n248 and the SCAMS Act further enhances the sentence for victims over age fifty-five. n249 In addition, some state statutes cover intrastate telemarketing fraud. n250 To encourage the elderly to take steps to help themselves, a massive governmental education program was launched to educate the elderly to just hang up. n251

Telemarketing fraud is similar to mail fraud. The major difference is that offers are given over the phone rather than by mail. n252 For instance, Mary Downs was willing to purchase \$ 200 worth of products in return for assurance she would win a prize worth thousands of dollars. Repeated calls and promises induced her to send over \$ 74,000 in hopes of a prize that never materialized. She later sent \$ 1950 to a "lawyer" who called and promised to recover her money. n253

Telemarketing scams include fraudulent investments, "free prizes" that require a payment to "cover taxes," and sales of worthless products at high prices in order to win a free prize. n254 Telemarketing has become a more than \$ 400 billion per year industry. n255 Though most of the industry operates legitimately, swindlers also recognize they can be nameless and invisible while having easy access to victims of their schemes. n256 Many [*545] telemarketers work in "boiler rooms," where people with lists of names contact potential victims by telephone. n257 They rarely call victims in their own state. n258 By calling across state lines or from Canada, they elude state prosecution because the caller and the victim are in different jurisdictions. n259 Also, boiler rooms are easy to close and move in order to stay one step ahead of law enforcement officials. n260 Elderly citizens, especially those in failing health and with minimal income, are easy prey because they are at home to receive the calls and are susceptible to the promises of easy money. n261 Names of persons who send money are "reloaded" onto mooch lists and contacted repeatedly with more promises and more requests for money. n262

[*546] As telemarketing fraud grew, the telemarketing industry and the victims needed protection from fraudulent practices. n263 Legitimate businesses were not only suffering from public distrust, but also from fear and distrust in the

banking community. n264 Both the American Telemarketing Association and the Direct Marketing Association became active in self-regulation and also spoke at congressional hearings. n265

As previously indicated, the federal government has been responsive. Congress responded to this pressure by passing SCAMS, a statute that both protects elderly from fraud and provides restitution to victims. It incorporates provisions from the Mail Fraud Act and dramatically strengthens the sentences of those convicted under its provisions. n266 The Mail Fraud Act provides for fines and imprisonment up to five years. n267 SCAMS also adds five years to any prison sentence if the fraud is perpetrated through telemarketing, regardless of victim. n268 However, if the victim is fifty-five or older, the act adds up to ten more years to any imprisonment term otherwise imposed. n269 SCAMS goes an important step further, as it imposes mandatory restitution to victims for the full amount of losses proximately caused by the offense. n270 The federal court has almost no discretion in issuing this order. The only duty the court has is to determine how the order will be administered. n271 SCAMS is a model statute for both federal and state legislators fighting elderly abuse because it not only criminalizes the abusive acts, but also provides restitution to help the victim who could least afford to lose the money in the first place.

State statutes attempt to control telemarketing fraud under communication or consumer protection statutes, or with independent [*547] statutes, but again, they are inconsistent. n272 For example, Florida's statute requires telephone sales companies to register with the Secretary of State and imposes criminal as well as civil penalties against a company that operates within the state without such registration. n273 Nevada law requires a \$ 50,000 bond be posted. n274 Texas statutes regulate the telemarketer's activities and apply to any person making a consumer telephone call: n275 The sellers must give the name of the company and their own name and may only call within certain hours; n276 no credit card charges may be made unless the seller provides for refund of returned items, or receives a signed written contract from the consumer; n277 the attorney general may issue an injunction to enforce the statute and may seek civil penalties and restitution; n278 in addition, consumers may seek their own remedies. n279 Georgia has enacted a powerful statute that criminalizes deceptive, fraudulent, or abusive telemarketing, n280 allowing for felony prosecution and civil remedies for violation of the statute. n281 Acts that target the elderly bring double penalties. n282 However, not all states offer strong protection, and telemarketers simply move their operations to states with more favorable laws. n283

In addition to enacting legislation, some states use creative techniques to combat telemarketing fraud. Iowa, for example, has successfully tried a new measure to protect the elderly. In 1993, the state asked victims to transfer their phone numbers to state investigators. n284 When telemarketers [*548] called, their deceptive sales pitches were recorded and ultimately used as evidence in court. n285 The FBI, Nevada, and Ohio have followed similar approaches in trapping fraudulent telemarketers. n286 AARP joined the attorneys general in many states for a massive telephone campaign to warn elderly citizens of the dangers of telemarketing fraud, educating them to hang up. n287

The fight against telemarketing fraud uses the SCAMS Act, strong state statutes, enforcement creativity, and public education to protect against financial abuse. States could either strengthen their own telemarketing laws or use the current statutes against fraud and add a general sentence enhancement statute for elderly victims.

E. Fraudulent Charity Solicitation

Many state laws regulate charity solicitation. n288 Michigan's law requires the charity or fundraising organization to register with the state before attempting any solicitation. n289 The charity must disclose information such as the purpose for which the charity is organized and the methods by which it intends to make solicitations. n290 Professional fundraisers must acquire licenses and post bonds to cover future actions against them. n291 Grounds for license revocation include violations of the statute or fraudulent activity. n292 Anyone who solicits funds under a license and then diverts them for purposes other than that for which the funds were contributed is guilty of a misdemeanor punishable by a maximum fine of [*549] \$ 500, six months imprisonment, or both. n293 Simply put, if one can demonstrate that the funds were not used as indicated, the solicitor is subject to both civil and criminal penalties. n294

F. Mooch Lists

Regardless of the type of financial abuse, whether by fright mail, mail fraud, telemarketing fraud, or fraudulent charitable solicitations, names that are shared through mooch lists or "sucker lists" compound the problem. Not only is the elderly victim known to the defrauder, the victim's name is sold to others, causing the calls, letters, and personal contacts to proliferate. n295

Potential customer lists are a legitimate marketing tool for advertisers. n296 Personal data is collected every time one applies for a credit card or answers questions about lifestyle on a warranty card. Marketing firms compile informa-

tion into lists that legitimate companies can buy to create advertising campaigns. n297 For less than \$ 500, anyone can go into almost any marketing firm and obtain, for example, a list of retired adults living in a targeted area who have at least \$ 50,000 in savings. n298 Telemarketers also build their own "lead lists" from sources such as postcards filled out at malls offering the opportunity to win a new car. n299

However, mooch lists are used fraudulently. The lists can command from \$ 10 to \$ 100 per name and generally include addresses and phone [*550] numbers in addition to a history of a person's financial dealings with other telemarketers. n300 The lists are used in two ways. First, a telemarketing firm purchases the list to get the names of people likely to fall for a particular type of sales pitch. n301 Second, the names of victims who send money are reloaded to the list for repeated contact by a more experienced telemarketer, who attempts to obtain more money by telling the victim she has won more prizes but that additional taxes and expenses must be paid before shipment can be made. n302 Once victimized, a person is more likely to be targeted again. n303

The main attack on mooch lists has been public education. The nationwide telephone campaign against telemarketing fraud called the persons named on mooch lists not to defraud them, but to warn them that their names were being sold and to educate them on how to avoid becoming victims again. n304 However, much more is needed. If state or federal statutes criminalized the sale or purchase of mooch lists for fraudulent purposes, especially if victims were elderly, prosecutors could more easily fight the lists' proliferation. Additionally, a federal statute would automatically carry with it the enhancement penalties for lists that contain the names of elderly persons. n305

Abusers of mooch lists argue that their First Amendment right of free speech allows them to freely send mail with no statutory restrictions. However, a criminal statute that prohibited unreasonably frequent mailing of any type of solicitation to elderly or vulnerable persons could conceivably meet a First Amendment challenge. In the privacy of the home, the individual's right to be left alone clearly outweighs the First Amendment rights of an intruder. n306 As previously noted in the context of [*551] fright mail, the *Fisby* Court recognized one's right to be protected from unwanted speech, n307 including speech designed to harass its recipients. n308 It is worth emphasizing that the Constitution does not require speech to enter the marketplace unregulated n309 as long as the government provides alternate channels of communication. The state may regulate the time, place, and manner of speech if the statute is content-neutral, narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication. n310 In *Frisby*, the Court determined that ordinances serve a significant government interest because the state's interest in protecting privacy, tranquility, and well-being in one's home is paramount. n311 If the Court is willing to regulate unwanted mail to prevent it from entering the intended recipients' homes, n312 it should be willing to regulate the use of mooch lists.

A statute designed to reduce the impact of fright mail that restricts the frequency of mail sent to a person or address could meet these conditional standards. It would be content-neutral. It would permit mail and other communication to be sent, within reasonable limits, to elderly persons. It would, however, protect them from offensive mail that targets particular individuals and repeatedly invades the privacy of their homes. Even legitimate informative messages should not be allowed to be sent repeatedly with requests for more money. Recipients are presumptively unwilling to receive such mail when it arrives with unreasonable frequency. The source of the unwanted speech should not be an impediment to protection of the elderly.

IV. Proposed Solutions

There have been a number of proposed solutions aimed at preventing fraudulent telemarketers from targeting the elderly for abuse. [*552] Unfortunately, these proposals continue to leave many elderly citizens without protection. Industry self-regulation has been suggested as a means of curtailing fraudulent telemarketing practices. n313 It is not truly a viable option, however. n314 As previously indicated, the American Telemarketing Association (ATA) has taken steps to establish industry standards, but this endeavor will have little impact. n315 Fraudulent telemarketers are simply unlikely to participate in self-policing groups such as the ATA. n316

The federal government's efforts to protect the elderly from telemarketing fraud appear to be making some headway, however. n317 For example, through the passage of the Telemarketing Abuse and Prevention Act of 1994 (Telemarketing Act), an act that considerably expanded Federal Trade Commission's (FTC) power to regulate telemarketing fraud, the Department of Justice (DOJ) along with the FTC have been empowered to combat illegal telemarketing. n318 One of the DOJ's most powerful tools in fighting fraudulent telemarketing is the wire fraud statute. n319 A telemarketer who is convicted under this statute can be sentenced to a maximum of five years in prison. n320 The DOJ may also charge telemarketers with violating money laundering n321 and lottery statutes. n322 In addition, depending on the cir-

cumstances surrounding the violations, they may also face charges for financial institution fraud. n323 Along with criminal sanctions, the FTC is authorized to sue "telemarketers in federal court for damages on behalf of telemarketing fraud victims." n324

[*553] The Telemarketing Act is not the only useful tool, however. As previously indicated, by passing the SCAMS Act, Congress strengthened the Telemarketing Act's protection for the elderly, n325 providing, in part, for enhanced penalties for violations and restitution for elderly victims. n326 By congressional directive for telemarketing regulation, the FTC has also promulgated the Telemarketing Sales Rules (Sales Rules). n327 The Sales Rules specifically control telephone sales practices and generally govern how telemarketers conduct business. n328 They prohibit abusive sales tactics, n329 require telemarketers to accurately convey the value of a prize or investment, n330 and limit when telemarketers may call customers. n331 As important, however, is that under the Sales Rules, telemarketers must make certain disclosures, including "the true odds of winning a prize, the total costs involved, and the telemarketer's cancellation policy." n332 The Sales Rules also provide for a maximum of \$ 10,000 per violation and require full restitution to telemarketing victims. n333 Congress did not seek to tie the hands of those charged with instituting the Telemarketing Act, Sales Rules, and SCAMS Act and instead left open the direction these regulations will take in the future. n334

One act touted as a comprehensive legislative solution to the problems facing the elderly is the Seniors Safety Act (SSA). n335 The SSA addresses the adverse impact telemarketing fraud has on the elderly as [*554] well as the interconnection between healthcare fraud, nursing home care, and abuse of the elderly. n336 As one commentator notes, the SSA would impact the present telemarketing regulatory and enforcement scheme in two ways. n337 First, it "centralizes telemarketing fraud information-gathering and educational efforts." n338 The SSA directs the FTC to "establish a centralized telemarketing complaint and consumer education center for seniors." n339 Second, the SSA amends the SCAMS Act and expands its scope by adding the phrase "wire communication utilizing a telephone service" and striking the phrase "telephone calls." n340 Arguably, this change will expand the scope of the SCAMS Act to include Internet and facsimile transmission accomplished through the telephone wire. n341

Unfortunately, the protections the SSA will provide to the elderly are merely speculative. n342 Indeed, the record keeping required under the SSA will be repetitive as the FTC and DOJ presently gather and maintain the same information. n343 Further, the language change designed to include punishment of fraud accomplished through Internet or electronic transactions will be ineffective because the technological advances are simply too rapid to control. n344 More importantly, however, as of May 10, 2004, the SSA had not been enacted into law. And it appears unlikely that the SSA will be enacted in the foreseeable future.

Finally, education has been suggested as the most effective means of reducing the impact of telemarketing fraud against the elderly and, ultimately, preventing its occurrence. Indeed, national efforts could significantly reduce the number of elderly telemarketing fraud victims. As one commentator so poignantly indicates, education also respects the elderly's "autonomy and decision-making ability," n345 and gives elderly citizens a sense of power over their own well-being. Education will be of minimal benefit, however, if it is not precisely designed to reach the group it is targeting. Specifically, much of the present effort to educate the elderly on the dangers of telemarketing focus on using the World [*555] Wide Web to disseminate the information. n346 Many organizations, including the AARP, FBI, DOJ, and FTC, offer antitelemarketing fraud information via websites. n347 The use of the Internet to reach the elderly is laudable, yet it cannot be the primary means of seeking to reach them. There is presently a technological divide. Many seniors do not have access to computers, let alone the Internet. Others may not have gained minimum proficiency with their computers, leaving the necessary information temporarily, and perhaps permanently, inaccessible.

While Internet use to inform the elderly should continue, other measures must also be taken. For example, soliciting community aid can also effectively reach the elderly. As mentioned previously, law enforcement agencies can take an active role by holding community meetings or regularly speaking to the elderly at senior centers. n348 These local educational efforts have the potential for great success if they are undertaken on a regular basis and if they seek to reach diverse segments of the community, including the elderly. n349 As one commentator aptly notes, the combination of both "public and private agencies into one comprehensive and coordinated effort appears to work more effectively." n350 The banking industry can also play a major role in protecting the elderly from abuse by becoming aware of any irregularities in their banking habits. Local banks might consider establishing a centralized division for the elderly to effectively and efficiently protect and oversee their assets. However, cooperation among state and federal agencies is the first step. Centralized reporting of telemarketer abuse of the elderly is another. Finally, there should be consistent state and federal regulations that close the gaps presently allowing fraudulent telemarketers to escape from one jurisdiction and safely reopen shop in another.

V. Conclusion

Senior citizens are a growing segment of our population, but the vulnerability that accompanies aging should not make these citizens easy targets for abuse, whether financial, physical, or emotional. Public policy demands protection so their lives can be spent in dignity and without unnecessary fear.

[*556] Laws do provide protection, but at the present time they are scattered in various statutes and vary significantly from state to state. If the strongest and most effective of such laws were adopted by all jurisdictions, a comprehensive, uniform system would protect our elderly more effectively from schemers, scammers, and bullies.

The simplest change states could make is to adopt a law that enhances sentences for crimes committed against elderly persons. This comprehensive change would cover crimes under current statutes as well as new crimes under future statutes. Separate statutes would criminalize abusive acts against the elderly, include any abuser, and punish the act without requiring certain results and with stiff penalties for crime. It would also make strong civil penalties available and provide for restitution and attorney fees to the victim.

Other practical issues could also be addressed. The sale or purchase of mooch lists used for fraudulent purposes should be criminalized. Statutes against fright mail, solicitation, and telemarketing should be enacted to limit the frequency of contact with elderly persons to a reasonable level. All solicitation forms should be required to include a space for "age" so the solicitor would know the age of the person contacted. Though the mere presence of strong, comprehensive, and uniform laws will not stop elder abuse, their enactment will provide the tools each person or agency needs to fight against such predatory acts. n351

[*557]

VI. Appendix

State Statutes Against Physical, Emotional, and Financial Abuse of Elderly Persons

This Appendix lists state statutes that specifically target elder abuse under the protective services statutes, civil statutes, and criminal statutes. It also covers general statutes concerning telemarketing and charity solicitation.

sample state

Protective Services Statutes: Most Protective Services Statutes are patterned after Older Americans Act of 1965, 42 U.S.C. 3058i (1994). The guidelines required a response to reports of adult abuse including report investigation, determination of services needed to protect the person from further abuse, and reporting criminal acts to appropriate law enforcement agencies.

Term Used: Provides the term the state uses for elderly person is given and whether its definition is based on "age alone" or requires some impairment or infirmities. All ages given are minimum ages.

"Impairments" or "infirmities," as most states define them, are physical or mental conditions, including advancing age, that render the person incapable of either caring for themselves without assistance or protecting themselves without assistance.

Definitions

Physical and Emotional/Mental Abuse: Does not provide the entire definition, but only whether the act require resulting harm or whether the abusive act alone is sufficient. If the act alone is sufficient, the state can prosecute abusers even if the victim is unable to participate. Many definitions of physical and emotional abuse require a "caretaker" to be the perpetrator.

Caregiver/Caretaker: Most statutes define "caregiver" or "caretaker" broadly enough to include any person who is responsible for the care of the victim either through blood relationship, by contract, by court order, or even volunteers. Different definitions are noted.

Exploitation: Same as for "Physical and Emotional/Mental Abuse." Most definitions of exploitation or financial abuse include any person as the perpetrator and include any action that improperly or [*558] illegally uses the victim's person or money for the advantage or profit of another without the victim's consent.

Report Required: Indicates who has a duty to report and who may report abuse. Most statutes include a detailed list of those professionals and caretakers who "shall" report abuse if they have "reason to believe" it is occurring; failure to

report is often a misdemeanor. If banks and financial institutions are included in the list, it is so noted. Most statutes also state that any person "may" report such abuse.

Crimes: Next, for those states that list criminal penalties for abuse under the protective services statutes, the crimes are listed.

Civil Law: Provides those civil statutes specifically directed at abuse of elderly persons are listed. All ages given are minimum ages.

Criminal Law: Some states list crimes against the elderly as separate statutes, while others add enhancements (extra fines or jail time) to the penalties listed in the standard statute. A few states have a general enhancement statute for all crimes. Where sentences for crimes are given, they are the maximum allowed unless otherwise specified. All ages given are minimum ages.

Telemarketing and Charitable Solicitation Statutes: Generally, statutes provide for civil penalties and some enhance penalties when victims are elderly. However, this Appendix shows whether the statutes are separate or included in other statutes and also whether they include criminal penalties for fraudulent acts against the customer. The statutes are often linked with deceptive trade practices statutes. All ages given are minimum ages.

[*559] ALABAMA (Code of Alabama)

Protective Services: (*Ala. Code 38-9-1 to 11* (1992 & Supp. 2002))

Term Used: "Adult in Need of Protective Services" - Age 18; plus impairment.

Definitions: (*Id.* 38-9-2)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad definition

Exploitation: Act alone

Report Required: Listed persons "shall" (*Id.* 38-9-8 (Supp. 1999))

Crimes: (*Id.* 38-9-7)

1. Physical abuse: felony or misdemeanor

2. Mental abuse: misdemeanor

3. Exploitation: felony or misdemeanor

Civil Law: "Civil Action for Deceptive Sweepstakes Solicitations" (*Id.* 8-19D-1 to 8-19D-2). Total damages up to three times compensatory damages.

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: "Alabama Telemarketing Act" (*Id.* 8-19A-1 to 24) [Note: This act is extensive]

Penalties: Criminal: Felony (*Id.* 8-19A-21)

Charity Solicitation: "Unlawful Charitable Solicitation" (*Id.* 13A-9-80 to 84)

Penalties: Criminal: Misdemeanor (*Id.* 13A-9-82)

ALASKA (Alaska Statutes)

Protective Services: (*Alaska Stat. 47.24.010 to 47.24.900* (Michie 2002))

Term Used: "Vulnerable Adult" - Age 18; plus impairment

Definitions: (*Id.* 47.24.900)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad definition

Exploitation: Act alone

Report Required: Listed persons "shall"; others "may" (Id. 47.24.010)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

[*560] Enhancement: n/a

Telemarketing: "Telephonic Solicitations" (Id. 45.63.010-45.63.100)

Penalties: Criminal - Felony (Id. 45.63.060)

Charity Solicitation: "Charitable Solicitations" (Id. 45.68.010-45.68.900)

Penalties: Criminal - misdemeanor (Id. 45.68.100)

ARIZONA (Arizona Revised Statutes)

Protective Services: (*Ariz. Rev. Stat. 46-451 to 56* (1997 & Supp. 2003))

Term Used: "Vulnerable Adult" - age 18; with infirmities (Id. 46-451)

Definitions:

Physical/Mental abuse: Resulting harm required (Id. 46-451)

Exploitation: Act alone (Id. 46-456)

Report Required: Listed persons "shall" (includes person concerned with "the use or preservation of" property); others "may" (Id. 46-454)

Crimes:

Exploitation - must be by person in position of trust and confidence (Id. 46-456)

Civil Law:

1. Either victim or the state on behalf of the victim can bring the cause of action (Id. 46-455). Remedies: compensatory and punitive damages, attorney fees. Seven-year statute of limitations

2. Damages for acts against elderly victims: treble damages awards (Id. 46-456)

Criminal Law:

Crimes:

1. Theft by fiduciary (Id. 13-1802)

2. Fraud (Id. 13-2310)

3. Physical abuse requires actual harm or victim's health to be "endangered" (Id. 13-3623)

4. Emotional abuse only requires intentional or knowing act (Id. 13-3623)

5. Penalties of 1-4: Felony offenses (Id. 13-1802, 13-2310, 13-3623)

Enhancement: n/a

Telemarketing: "Telephone Solicitations" (Id. 44-1271 to 79)

Penalties: Criminal - felony (Id. 44-1277)

Charity Solicitation: "Solicitation of Funds for Charitable Purposes" (Id. 44-6551 to 61)

Penalties: Criminal - felony; Civil (Id. 44-6561)

[*561] ARKANSAS (Arkansas Code Annotated)

Protective Services: addressed under Criminal Code (*Ark. Code Ann. 5-28-101* to 5-28-310 (Michie 1997 & Supp. 2003)

Term Used:

"Impaired adult" - age 18; plus impairment (Id. 5-28-101)

Definitions: (Id. 5-28-101)

Physical abuse: Resulting harm required

Caregiver: Broad definition

Emotional abuse: Act alone

Report Required: Listed persons "shall"; others "may" (Id. 5-28-203)

Crimes: n/a

Civil Law:

Deceptive Trade Practices

Definition: "Elder person": age alone: 60 (Id. 4-88-201)

Additional penalty for deception against elder person: \$ 10,000 per violation, applied to state fund to fight such crimes.

Criminal Law: see Protective Services above

Crimes: n/a

Enhancement: n/a

Telemarketing: "Regulation of Telephonic Sellers" (Id. 4-99-201 to 4-99-408)

Charity Solicitation: "Charitable Solicitation" (Id. 4-103-201 to 05)

CALIFORNIA (Annotated California Code)

Protective Services (*Cal. Welf. & Inst. Code 15600-60* (West 2001 & Supp. 2003))

Term Used: "Elder" - Age alone: 65 (Id. 15610.27)

Definitions:

Physical abuse: as per definitions of crimes (Id. 15610.63)

Mental abuse: resulting harm required (Id. 15610.53)

Caregiver: Care Custodian - official caregiver (Id. 15610.17)

Exploitation: "Financial Abuse" - Any person - act alone (Id. 15610.30)

Report Required: Listed persons "shall"; others "may" (Id. 15630-31)

Crimes: (Id. 15656); Note: Identical to *Cal. Penal Code 368* (West 1999 & Supp. 2003)

1. Physical abuse by any person: felony or misdemeanor
2. Theft or embezzlement by caretaker: felony

[*562] Civil Law: Plaintiff can receive attorney fees (*Cal. Welf. & Inst. Code 15657*)

Criminal Law:

Crimes: (*Cal. Penal Code 368*); Note: Identical to *Cal. Welf. & Inst. Code 15656*

1. Definition of "elder" - age alone: 65.
2. Physical/mental abuse by any person: felony or misdemeanor
3. Theft or embezzlement by caretaker: felony

Enhancement:

1. General enhancement statute (*Cal. Penal Code 1170, 1170.85*)

Law gives three possible sentences for each crime. Middle sentence is chosen unless circumstances dictate higher or lower sentence. (Id. 1170)

A victim who is particularly vulnerable due to age and unable to defend himself is an aggravating circumstance allowing a higher sentence. (Id. 1170.85)

2. Listing of specific crimes that carry sentence enhancement; includes corresponding codes for the crimes (Id. 666.7)

- a. Any specified offense against victim 65 yrs of age - add 1 year
- b. Prior conviction of such - add 2 years
- c. Result is great bodily injury - add 3 years
- d. Result is death - add 5 yrs
- e. Great bodily injury of victim 70 yrs of age - add 5 yrs
- f. Death of victim 70 yrs of age - add 7 yrs

3. Special enhancement for crimes against the elderly (Id. 667.9)

a. Court can add up to 7 years for the following crimes if the perpetrator is a repeat offender (Id. 667, 667.9) and the victim is 65 or older:

1. Robbery
2. Kidnapping
3. Sexual crimes
4. Mayhem
5. Carjacking
6. Burglary

Telemarketing: "Telephonic Sellers" (*Cal. Bus. & Prof. Code 17511.1* (West 1997 & Supp. 2003))

Charity Solicitation: "Charitable Solicitations" (Id. 17510-17510.9)

Penalties: Criminal - misdemeanor (*Cal. Penal Code 532d*)

[*563] COLORADO (Colorado Revised Statutes)

Protective Services: (*Colo. Rev. Stat. 26-3.1-101 to 06* (Supp. 1999))

Term Used: "At risk adult" - Age 18; with impairments (Id. 26-3.1-101)

Definitions: (Id. 26-3.1-101)

Physical/Mental abuse: "Mistreatment" - act alone

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Listed persons "should" (including financial institutions); others "may" (Id. 26-3.1-102)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Definition: "At risk adult" - Age alone: 60 (Id. 18-6.5-102)

Crimes: n/a

Enhancement:

1. Enhanced penalties against certain crimes: criminal negligence; assault; robbery; theft; neglect; sexual assault; attempt, solicitation, or conspiracy in any of the above. (Id. 18-6.5-103)

2. Mandatory sentencing for any crime against "at risk adult" (Id. 16-11-309); Note: repealed Oct. 1, 2002)

Telemarketing:

"Consumer Protection Act: Prevention of Telemarketing Fraud" (Id. 6-1-301 to 05)

Penalties: Criminal - misdemeanor (Id. 6-1-305)

Charity Solicitation: "Charitable Solicitations Act" (Id. 6-16-101 to 13)

Penalties: Criminal - felony/misdemeanor (Id. 6-16-111)

CONNECTICUT (Connecticut General Statutes Annotated)

Protective Services: (*Conn. Gen. Stat. Ann. 17b-450* to 61 (West 1998))

Term Used: "Elderly Person" - Age 60; with impairments (Id. 17b-450)

Definitions: (Id. 17b-450)

Physical/Mental abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

[*564] Report Required: Listed persons "shall"; others "may" (Id. 17b-451)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: Assault against victim 60 years of age brings enhanced penalty

Class B felony: 5 years of sentence given is not suspendable (*Conn. Gen. Stat. Ann. 53a-59a* (West Supp. 1999))

Class D felony: 2 years of sentence given is not suspendable (Id. 53a-60b)

Telemarketing: n/a

Charity Solicitation: "Solicitations of Charitable Funds Act" (*Conn. Gen. Stat. Ann. 21a-175* to 901 (West 1994))

Penalties: Criminal - misdemeanor (Id. 21a-1901)

DELAWARE (Delaware Code Annotated)

Protective Services: (*Del. Code Ann. tit. 31, 3901-13* (2001 & Supp. 2002))

Term Used: Infirm Adult - Age 18; with impairments (Id. 3902)

Definitions: (Id. 3902)

Physical abuse: Resulting harm required

Emotional abuse: Act alone

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person "shall" (Id. 3910)

Crimes: Physical or emotional abuse or exploitation - misdemeanor/ felony (Id. 3913)

Civil Law: Prohibited Trade Practices Against Elder Person

1. "Elder Person" - age alone: 65 (*Del. Code Ann. tit. 6, 2580* (1999 & Supp. 2002))

2. Remedies: actual damages, attorney fees, restitution (Id. 2583)

3. Extra fine beyond civil penalty up to \$ 10,000 for each act - to be paid into state fund (Id. 2581)

Criminal Law:

Crimes: n/a

Enhancement:

1. For certain crimes against victims age 65, the sentence is raised to next level:

Intentional or reckless assault causing bodily injury (*Del. Code Ann. tit. 11, 612* (2001 & Supp. 2002))

[*565] Intentional or reckless assault causing serious bodily injury (Id. 613)

Robbery (Id. 832)

2. Theft against victims age 62

Sentence is enhanced and restitution required (Id. 841)

Telemarketing: n/a

Charity Solicitation: "Prohibited Trade Practices: Charitable/Fraternal Solicitation" (*Del. Code Ann. tit. 6, 2591-98*)

Penalties: Criminal - as per 2513 and/or 2581 (Id. 2597)

DISTRICT OF COLUMBIA (District of Columbia Code Annotated)

Protective Services: (*D.C. Code Ann. 7-1901* to 13 (2001 & Supp. 2002))

Term Used: "Adult in need of protective services" - Age 18; with impairments (Id. 7-1901)

Definitions: (Id. 7-1901)

Physical/Mental abuse: Act alone

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Listed persons "shall"; others "may" (Id. 7-1903)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: If victim is 60 yrs of age, in addition to the standard penalty, add up to 1.5 times the fine or term in prison for the following crimes: robbery; attempted robbery; theft; attempted theft; extortion; fraud (Id. 22-3601)

Telemarketing: n/a

Charity Solicitation: "Charitable Solicitations" (Id. 44-1701 to 14)

Penalties: Criminal - misdemeanor (Id. 44-1712)

FLORIDA (Florida Statutes Annotated)

Protective Services: (*Fla. Stat. Ann. 415.101-13* (West 1998 & Supp. 1999))

Term Used: "Vulnerable Person" - age 60; plus impairments (Id. 415.102)

Definitions: (Id. 415.102)

Physical abuse: Result, OR act alone, OR encouragement

[*566] Psychological abuse: Resulting injury required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person "shall" - specifically includes banks (Id. 415.1034)

Crimes: n/a

Civil Law:

Deceptive Trade Practices (Id. 501.201)

a. Violation Against Senior Citizens (age 60) - add \$ 15,000 additional penalty paid into state fund for each willful act (Id. 501.2077)

b. Restitution to victim (Id. 501.2077)

Criminal Law:

Crimes:

1. Assault/Battery against age 65, mandatory restitution (Id. 784.08)

2. Abuse, Neglect, Exploitation of Elderly Persons (Id. 825.101-06)

Definitions - see id. 415.102 (Id. 825.101)

Abuse/Aggravated abuse - felonies (Id. 825.102)

Lewd/Lascivious Offenses - felonies (Id. 825.1025)

Exploitation - felonies (Id. 825.103)

3. Racketeering includes section 825 crimes (Id. 895.02)

Enhancement: If victim over age 65 (Id. 775.082-89)

1. "Aggravated abuse" of elderly person enacts "habitual violent felony offender" and "violent career criminal" enhancements (Id. 775.084)

2. Prisoners do not get "gain time" or "early release" (Id. 775.087)

3. Sentencing guidelines and offense levels - cross reference to 784, 825. (Id. 921.0012, 921.0022)

Telemarketing: "Florida Telemarketing Act" (Id. 501.601-26)

Penalties: Criminal - felony (Id. 501.623)

Charity Solicitation: "Solicitation of Contributions Act" (Id. 496.401-26)

GEORGIA (Official Code of Georgia)

Protective Services: (*Ga. Code Ann. 30-5-1 to -8* (2003))

Term Used: "Elder Person" - Age alone: 65 (Id. 30-5-3)

Definitions: (Id. 30-5-3)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Listed persons "shall" (includes financial institutions); others "may" (Id. 30-5-4)

Crimes: Abuse and exploitation are misdemeanors (Id. 30-5-8)

Civil Law: Deceptive trade practices

1. "Elder person": age 60 (Id. 10-1-850)
2. Add up to \$ 10,000 each violation to go into state fund (Id. 10-1-851)
3. Remedies: Actual and punitive damages, attorney fees, restitution (Id. 10-1-853)

Criminal Law:

Crimes: n/a

Enhancement: If victim is age 65, penalties are increased for

1. Simple assault (Id. 16-5-20)
2. Simple battery (Id. 16-5-23)
3. Battery (Id. 16-5-23.1)
4. Aggravated battery (Id. 16-5-24)
5. Robbery (Id. 16-8-40)
6. Theft greater than \$ 500 (Id. 16-8-12)

Telemarketing: Deceptive Trade Practices: Criminal penalties (Id. 10-1-393.5)

"Deceptive, Fraudulent, or Abusive Telemarketing" (Id. 10-5B-1 to 8)

Penalties: Criminal - misdemeanor (Id. 16-9-54)

"Telecommunications Marketing Act of 1998" (Id. 46-5-180, 46-5-187)

Charity Solicitation: "Charitable Solicitations" (Id. 43-17-12)

HAWAII (Hawaii Revised Statutes Annotated)

Protective Services: (*Haw. Rev. Stat. Ann. 346-221 to 53* (Michie 1999))

Term Used: "Dependent Adult" - any adult; with impairments (Id. 346-222)

Definitions: (Id. 346-222)

Physical abuse: resulting harm required

Exploitation: Act alone

Report Required: Listed persons "shall"; others "may" (Id. 346-224)

Crimes: n/a

Civil Law: n/a

[*567] Criminal Law:

Crimes: n/a

Enhancement:

1. No probation (Id. 706-620)

2. Mandatory sentence without parole if victim age 60 for the following crimes: death; serious bodily injury, substantial bodily injury (Id. 706-660.2)

Telemarketing: n/a

Charity Solicitation: Addressed under Professions and Occupations (Id. 467B-1 to 13)

IDAHO (Idaho Code)

Protective Services: (Idaho Code 39-5301 to 12 (Michie 2002))

Term Used: "Vulnerable Adult": age 18; with impairments (Id. 18-1505)

Definitions: (Id. 39-5302)

Physical/Mental Abuse: resulting harm required

Caretaker: person responsible by family relationship, contract, or court order.

Exploitation: act alone

Report Required: Listed persons "shall"; others "may" (Id. 39-5303)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: Abuse against vulnerable adult by any person which results in physical or mental injury or any act of exploitation is a misdemeanor (Id. 18-1505)

Enhancement: n/a

Telemarketing: "Idaho Telephone Solicitation Act" (Id. 48-1001 to 10)

Charity Solicitation: "Idaho Charitable Solicitation Act" (Id. 48-1201 to 06)

ILLINOIS (Illinois Compiled Statutes Annotated)

Protective Services: (320 Ill. Comp. Stat. Ann. 20/2-13 (West 2001))

Term Used: "Eligible Adult": Age alone: 60 (Id. at 20/2)

Definitions: (Id. at 20/2)

Physical/Mental Abuse: Resulting harm required

Exploitation: Act alone

Report Required: Anyone "may" (Id. at 20/4.2)

Crimes: n/a

Civil Law: (720 Ill. Comp. Stat. 5/16-1.3 (2003))

Term Used: "Elderly Person": Age 60; plus impairments

[*568] Remedies: treble damages for value of property, plus attorney fees and court costs.

Criminal Law:

Crimes:

1. Aggravated Assault against victim age 60 (Id. at 5/12-2)

Class A misdemeanor

2. Aggravated Battery against victim age 60 (Id. at 5/12-4)

Class 3 felony

3. Financial Exploitation (Id. at 5/16-1.3)

- a. Term used: "Elderly Person": Age 60; plus impairments
- b. "Perpetrator": Person in position of trust as relative or fiduciary relationship
- c. Intentional exploitation is a felony

Enhancement:

General Statute: enhanced sentences for crimes against victims age 60

(730 Ill. Comp. Stat. Ann. 5/5-5-3.2 (West 1997 & Supp. 2003))

Telemarketing: "Telephone Solicitations Act" (815 Ill. Comp. Stat. Ann. 413/1-25 (West 1999 & Supp. 2003))

Charity Solicitation: "Solicitation for Charity Act" (225 Ill. Comp. Stat. Ann. 460/1-23 (West 1998 & Supp. 2003))

Penalties: Criminal - misdemeanor (Id. at 460/11)

Criminal - felony (Id. at 460/19)

INDIANA (Annotated Indiana Code)

Protective Services: (*Ind. Code Ann. 12-10-3-1* to 31 (Michie 2001))

Term Used: "Endangered Adult" - Age 18 plus impairments; plus abuse or threat of abuse (Id. 12-10-3-2)

Definitions: (Id. 12-10-3-2)

Abuse: Battery

Exploitation: Act alone

Report Required: Any person "shall" (Id. 12-10-3-9)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes:

1. Exploitation of endangered adult - Class A misdemeanor (*Ind. Code Ann. 35-46-1-12* (Michie 1998))

[*569] 2. Battery of endangered adult - Class D felony (Id. 35-42-2-1)

Enhancement:

Victim age 65 is "aggravating circumstance" for enhanced penalty (Id. 35-38-1-7.1)

Telemarketing: "Telephone Solicitations" State registration required (*Ind. Code Ann. 24-5-12-9* (Michie 1996))

Charity Solicitation: n/a

IOWA (Iowa Code Annotated)

Protective Services: (*Iowa Code Ann. 235B.1-20* (West 2000 & Supp. 2003))

Term Used: "Dependent Adult" - Age 18; plus impairment (Id. 235B.2)

Definitions: (Id. 235B.2)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone (Id. 235B.2)

Report Required: Listed persons "shall"; others "may" (Id. 235B.3)

Crimes: (Id. 235B.20)

Physical abuse by caretaker - felony or misdemeanor

Exploitation - felony or misdemeanor

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: Addressed under Criminal Law "Consumer Frauds" (Id. 714.16)

Charity Solicitation: n/a

KANSAS (Kansas Statutes Annotated)

Protective Services: (*Kan. Stat. Ann. 39-1430 to 42 (2000 & Supp. 2002)*)

Term Used: "Adult" - Age 18; plus impairments (Id. 39-1430)

Definitions: (Id. 39-1430)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone (Id. 39-1430)

Report Required: Listed persons "shall"; others "may" (Id. 39-1431)

Crimes: n/a

Civil Law: Court may impose an additional civil penalty of \$ 10,000 for any consumer protection violation against an "elder person" age [*570] 60 or more (Id. 50-676 to 78)

Criminal Law:

Crimes:

Mistreatment of Dependent Adult (Id. 21-3437)

a. "Dependent Adult" - Age 18; plus impairments

b. Physical injury - felony

c. Exploitation - misdemeanor

Enhancement: n/a

Telemarketing: Addressed under "Consumer Protection" (Id. 50-670 to 73)

Charity Solicitation: n/a

KENTUCKY (Kentucky Revised Statutes Annotated)

Protective Services: (*Ky. Rev. Stat. Ann. 209.005 to 209.160 (Banks-Baldwin 2001)*)

Term Used: "Adult" - age 18; plus impairments (Id. 209.020)

Definitions: (Id. 209.020)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: "Shall" report (Id. 209.030)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: Addressed under Consumer Protection (Id. 367.46951-99)

Penalties: Criminal - felony/misdemeanor (Id. 367.46999)

Charity Solicitation: n/a

LOUISIANA (Louisiana Revised Statutes)

Protective Services: addressed under Criminal Law (*La. Rev. Stat. Ann. 14:403.2* (West 1986 & Supp. 2003))

Term Used: "Adult" - Age alone: 60 (Id. 14:403.2)

Definitions:

Physical/Mental Abuse: Resulting harm required (Id. 14:403.2)

Exploitation: n/a

Report Required: n/a

Crimes: n/a

[*571] Civil Law: n/a

Criminal Law:

Crimes:

1. Abuse and Neglect of Adults (Id. 14:403.2)

a. "Adult" - age 60

b. Physical/Mental Abuse: Resulting harm required

c. Exploitation: Act alone

d. Report required of any person suspecting abuse

2. Aggravated rape of victim age 65: life in prison without parole (Id. 14.42)

3. Cruelty to the infirm (Id. 14:93.3)

a. Victim is "aged person" - age 60

b. By caregiver - broad definition

c. Sentence: 10 years/\$ 10,000

4. Exploitation of the infirm (Id. 14:93.4)

a. Victim is "aged person" - age 60

b. By caregiver - broad definition

c. Sentence: 10 years/\$ 10,000

Enhancement:

1. If victim of the following crimes or attempts of such is age 65: (Id. 14.50.1)

a. Crimes

1. Manslaughter
2. Rape
3. Aggravated assault
4. Battery
5. Kidnapping
6. False imprisonment

b. Enhancement: additional five years without parole

2. Aggravating Circumstances in Capital Sentencing (Id. 905.4)

Victim: age 65.

Telemarketing: "Consumer Telemarketing Protection Act of 1991" (Id. 45:810-17)

Penalties: Criminal - fine/Imprisonment (Id. 45.817)

Charity Solicitation: n/a

MAINE (Maine Revised Statutes Annotated)

Protective Services: (Me. Rev. Stat. Ann. tit. 22, 3470-87 (West 1992 & Supp. 2002))

Term Used: "Dependent Adult" - Age 18; plus impairments (Id. 3472)

Definitions: (Id. 3472)

[*572] Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Resulting harm required

Report Required: Listed professionals "shall" report (Id. 3477)

Crimes: n/a

Civil Law: Violation of Protective Services (Id. 3475)

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: "Charitable Solicitations Act" (Me. Rev. Stat. Ann. tit. 9, 5001-16 (West 1997 & Supp. 2002))

Penalties: Criminal - "Class D crime" (Id. 5014)

MARYLAND (Annotated Code of Maryland)

Protective Services: (*Md. Code Ann., Fam. Law 14-101 to 04* (1999))

Term Used: "Vulnerable Adult" - adult; plus infirmities (Id. 14-101)

Definitions: (Id. 14-101)

Physical/Mental Abuse - Resulting harm required

Exploitation - Act alone

Report Required: Listed persons "shall"; others "may" (Id. 14-302)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes:

Enhancement: Abuse - penalty in addition to others: misdemeanor/ felony

(Md. Ann. Code art. 27, 35D (2003); Note: repealed Oct. 1, 2002)

Caregiver: Broad Definition

Telemarketing: n/a

Charity Solicitation: "Maryland Charitable Solicitations Act"

(*Md. Code Ann., Bus. Reg. 6-201 to 6-701* (1998 & Supp. 2003))

MASSACHUSETTS (Massachusetts General Laws Annotated)

Protective Services: (*Mass. Gen. Laws Ann. ch. 19A, 14-36* (West 2002))

[*573] Term Used: "Elderly Person" - Age alone: 60 (Id. 14)

Definitions:

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Result - substantial loss required

Report Required: Listed persons "shall"; others "may" (Id. 15)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: Sentences are longer dependant on status of victim

Assault/Battery: longer sentence if caretaker is perpetrator (*Mass. Gen. Laws Ann. ch. 265, 13K, 15A, 18* (West 2000))

Robbery: possible life sentence if victim 60 years old or older (Id. 19)

Abuse of patients in facilities: up to 2 years imprisonment or up to \$ 5000 fine (Id. 38)

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: "Charitable Solicitation" (*Mass. Gen. Laws Ann. ch. 68, 18-35* (West 2001))

Penalties: Criminal - fine/imprisonment (Id. 32)

MICHIGAN (Michigan Compiled Laws Annotated)

Protective Services: (*Mich. Comp. Laws Ann. 400.11-11f* (West 1997))

Term Used: "Adult in need of protective services" or "Vulnerable person" - Age 18; plus infirmities (Id. 400.11)

Definitions: (Id. 400.11)

Physical/Mental Abuse: Resulting harm or threats

Exploitation: Act alone

Report Required: Listed persons "shall"; others "may" (Id. 400.11a)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: Vulnerable Adult Abuse by Caregiver (Id. 750.145n)

Term Used: "Vulnerable Adult" - Age 18; plus infirmities (Id. 750.145m)

Definitions: (Id. 750.145m)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: n/a

[*574] Penalties: Felony or misdemeanor offenses (Id. 750.145n)

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: "Charitable Organizations and Solicitations Act" (Id. 400.271-93 (West 1997))

Penalties: Criminal - misdemeanor (Id. 400.293)

MINNESOTA (Minnesota Statutes Annotated)

Protective Services: Addressed under Criminal Law (*Minn. Stat. Ann. 626.557, 626.5571-72* (West 2003))

Civil Law: Penalties under consumer protection statute enhanced if victim is age 62 - up to \$ 10,000 additional penalty (Id. 325F.71)

Criminal Law:

Term used: "Vulnerable Adult" - Age 18; plus infirmities (Id. 609.232, 626.5572)

Definitions:

Physical/Mental Abuse: Act alone (Id. 609.2325, 626.5572)

Caregiver: Broad Definition (Id. 609.232, 626.5572)

Exploitation: Act alone (Id. 609.2335)

Report Required: Listed persons "shall"; others "may" (Id. 626.557, 626.5572)

Crimes: Criminal abuse by caregiver - felony (Id. 609.2325)

Deceptive trade practices - gross misdemeanor (Id. 609.2336)

Enhancement: n/a

Telemarketing: Addressed under Consumer Protection (Id. 325G)

Charity Solicitation: Addressed under Criminal Law: deceptive trade practices - see above

MISSISSIPPI (Mississippi Code Annotated)

Protective Services: (*Miss. Code Ann. 43-47-1 to 37* (2000 & Supp. 2003))

Term Used: "Vulnerable Adult" - Age 18; plus infirmities (Id. 43-47-5)

Definitions: (Id. 43-47-5)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person "shall" (Id. 43-47-7)

[*575] Crimes: Acts alone

Acts that contribute or tend to contribute to abuse, neglect or exploitation of any vulnerable adult - misdemeanor/felony (Id. 43-47-19)

Civil Law: n/a

Criminal Law: n/a

Crimes: n/a - under Protective Services

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: "Regulation of Charitable Solicitations" (Id. 79-11-501 to 29)

Penalties: Criminal - misdemeanor (Id. 79-11-529)

MISSOURI (Annotated Missouri Statutes)

Protective Services: (*Mo. Ann. Stat. 660.250-.320* (West 2000))

Term used: "Eligible Adult" - Age alone: 60 (Id. 660.250)

Definitions:

Physical/Mental Abuse: Resulting harm required (Id. 660.250)

Exploitation: n/a

Report Required: Listed persons "shall"; others "may" (Id. 660.300)

Crimes: Abuse - felony (Id. 600.250)

Civil Law: n/a

Criminal Law:

Crimes: Elder abuse - age 60 (Id. 565.180, 565.182, 565.184)

Penalties: felony/misdemeanor

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: "Charitable Organizations and Solicitations Law" (Id. 407.450-78)

MONTANA (Montana Code Annotated)

Protective Services: (*Mont. Code Ann. 52-3-800 to 25* (2001))

Term Used: "Older Person" - Age alone: 60 (Id. 52-3-803)

Definitions:

Physical/Mental Abuse: Resulting harm required (Id. 52-3-803)

Exploitation: Act alone (Id. 52-3-803)

Report Required: Listed persons "shall"; others "may" (Id. 52-3-811)

Crimes: If older person also has infirmities, abuse or exploitation is misdemeanor/felony (Id. 52-3-825)

Civil Law: n/a

[*576] Criminal Law: n/a

Crimes: n/a - under Protective Services

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: n/a

NEBRASKA (Revised Statutes of Nebraska)

Protective Services: (*Neb. Rev. Stat. 28-348 to 87* (1995 & Supp. 2002))

Term Used: "Vulnerable Adult" - Age 18; plus impairments (Id. 28-371)

Definitions:

Physical/Mental Abuse: Resulting harm required (Id. 28-351)

Caregiver: Broad Definition (Id. 28-353)

Exploitation: Resulting loss required (Id. 28-358)

Report Required: Listed persons "shall"; others "may" (Id. 28-372)

Crimes: Knowing and Intentional Abuse - felony (Id. 28-386)

Civil Law: n/a

Criminal Law:

Crimes: n/a - under Protective Services

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: n/a

NEVADA (Nevada Revised Statutes)

Protective Services: (*Nev. Rev. Stat. 200.5091-200.750* (2001 & Supp. 2001)) - Listed under Criminal Law

Civil Law:

Deceptive Trade Practices

Term Used: "Elderly Person" - Age alone: 65 (Id. 598.0933)

Actual and punitive damages plus attorney fees (Id. 598.0977)

Additional penalty: \$ 10,000 to be added to state fund (Id. 598.0973)

Cause of Action for Abuse (Id. 41.1395)

Term Used: "Older Person" - age alone: 60

Definitions:

[*577] Physical/Mental Abuse: Resulting harm required

Exploitation: Act alone by person in position of trust and confidence

Penalties: Double damages

Attorney Fees and Costs: Court can award if find recklessness, fraud or malice

Cause of action if perpetrator motivated by characteristics of victim (Id. 41.690)

Actual and punitive damages plus attorney fees

Criminal Law:

Crimes: (Id. 200.5091-55)

Term Used: "Older Person" - age alone: 60 (Id. 200.5092)

Definitions: (Id. 200.5092)

Physical/Mental Abuse: Resulting harm required

Exploitation: Act alone by person in position of trust and confidence

Penalties: Abuse - felony (Id. 200.5099)

Exploitation - felony/gross misdemeanor (Id. 200.5099)

Report Required: Listed persons "shall"; others "may" (Id. 200.5093)

Protective Services Provided (Id. 200.5098)

Enhancement: (Id. 193.167)

Double the sentence for the following crimes if victim age 65 or older

Assault/Battery

Kidnapping

Robbery

Embezzlement/False Pretenses if amount is \$ 250 or more

Telemarketing: n/a

Charity Solicitation: "Solicitation by Telephone" (Id. 599B.005-599B.300)

Additional penalty if against elderly person - age 65 (Id. 599B.270, 599B.280)

NEW HAMPSHIRE (New Hampshire Revised Statutes Annotated)

Protective Services: (N.H. Rev. Stat. Ann. 161-F:43-57 (Supp. 2002))

Term Used: "Adult" - Age 18; plus impairments (Id. 161-F:43)

Definitions: (Id. 161-F:43)

Physical/Mental Abuse: Act alone

Exploitation: Act alone

Report Required: Listed persons "shall" (Id. 161-F:46)

Crimes: n/a

[*578] Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: Addressed under "Attorneys general, Director of Charitable Trusts" (Id. 7:19-32a)

Unlawful Acts (Id. 7:28f)

NEW JERSEY (New Jersey Statutes Annotated)

Protective Services: (*N.J. Stat. Ann. 52:27D-406 to 25* (West 2001 & Supp. 2003))

Term Used: "Vulnerable Adult" - Age 18; plus infirmities (Id. 52:27D-407)

Definitions: (Id. 52:27D-407)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: A person "may" (Id. 52:27D-409)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: If perpetrator knew or should have known victim was age 60 or older (Id. 2C:44-1)

Telemarketing: n/a

Charity Solicitation: "Charitable Fund Raising" (*N.J. Stat. Ann. 45:17A-18 to 40* (West 1995 & Supp. 2003))

NEW MEXICO (New Mexico Statutes Annotated)

Protective Services: (*N.M. Stat. Ann. 27-7-14 to 31* (Michie 2000 & Supp. 2001))

Term Used: "Incapacitated Adult" - Age 18; plus impairment (Id. 27-7-16)

Definitions: (Id. 27-7-16)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any persons "shall" (Id. 27-7-30)

Crimes: n/a

[*579] Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: If victim is age 60 or more: sentence increase of 1 year for physical injury and 2 years for great bodily harm (Id. 31-18-16.1)

Telemarketing: "Fraudulent Telemarketing Act" (Id. 30-50-1 to 4)

Charity Solicitation: "Charitable Solicitations Act" (Id. 57-22-1 to 11)

NEW YORK (Consolidated Laws of New York Annotated)

Protective Services: (*N.Y. Soc. Serv. Law 473-a to 473-c* (McKinney 2003))

Term Used: "Elderly Person" - Age alone: 60 (*N.Y. Exec. Law 541* (McKinney 1996 & Supp. 2003))

Definitions: (*N.Y. Soc. Serv. Law 473-a*)

Physical/Mental Abuse: Resulting harm required

Exploitation: Act alone

Report Required: n/a

Crimes: n/a

Triad Program: (*N.Y. Exec. Law 844-b*)

Civil Law: Additional civil penalty for fraud against victim age 65: Up to \$ 10,000 into state fund

(*N.Y. Gen. Bus. Law 349-c* (McKinney Supp. 2003))

Criminal Law:

Crimes: (*N.Y. Penal Law 260.30-34* (McKinney 2000 & Supp. 2003))

Definition of "elder": age 60; plus infirmities (Id. 260.30)

Physical abuse - felony (Id. 260.32-34)

Enhancement: n/a

Telemarketing: "Telephone Sales Protection Act" (*N.Y. Pers. Prop. Law 441* (McKinney Supp. 2003))

Charity Solicitation: "Solicitation and Collection of Funds for Charitable Purposes"

(*N.Y. Exec. Law 172-d*)

NORTH CAROLINA (General Statutes of North Carolina)

Protective Services: (*N.C. Gen. Stat. 108A-99 to 108A-111* (2002))

Term Used: "Disabled Adult" - Age 18; plus infirmities (Id. 108A-101)

Definitions: (Id. 108A-101)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

[*580] Report Required: Any person "shall" (Id. 108A-102)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes:

Term used: "Elder" - Age 60; plus infirmities (Id. 14-32.3)

Abuse by caretaker with resulting physical/mental injury - felony (Id. 14-32.3)

Exploitation - felony/misdemeanor (Id. 14-32.3)

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: "Solicitation of Contributions" (Id. 13IF-1 to 33). Also addressed under Criminal Law (Id. 14-401.12) and Commerce and Business (Id. 66-260)

Penalties: Criminal - misdemeanor (Id. 14-401.12)

NORTH DAKOTA (North Dakota Century Code Annotated)

Protective Services: (*N.D. Cent. Code 50-25.2-01 to 14* (1999 & Supp. 2003))

Term Used: "Vulnerable Adult" - Adult with substantial impairment (Id. 50-25.2-01)

Definitions: (Id. 50-25.2-01)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Persons "may" (Id. 50-25.2-03)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: Exploitation of vulnerable adult by one in position of trust or business relationship or one who knows the victim lacks capacity to consent - felony (Id. 12.1-31-07.1)

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: "Charitable Organizations Soliciting Contributions" (Id. 50-22-01 to 05)

[*581] OHIO (Baldwin's Ohio Revised Code)

Protective Services: (*Ohio Rev. Code Ann. 5101.60 to 72* (West 2001))

Term Used: "Adult" - Age 60; plus infirmities (Id. 5101.60)

Definitions: (Id. 5101.60)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Listed persons "shall"; others "may" (Id. 5101.61)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement:

1) When imposing penalties for misdemeanor crimes, if victim is over age 65, the court should consider restitution (Id. 2929.21)

2) When imposing sentences for misdemeanor crimes, if victim is over age 65, the court should favor imposing imprisonment (Id. 2929.22)

Telemarketing: "Telephone Solicitors" (Id. 4719.01-18)

Charity Solicitation: Addressed under "Charitable Organizations" (Id. 1716.01-99)

Penalties: Criminal - felony (Id. 1716.99)

OKLAHOMA (Oklahoma Statutes Annotated)

Protective Services: (*Okl. Stat. Ann. tit. 43A, 10-101 to 11* (West 2001 & Supp. 2003))

Term Used: "Vulnerable Adult" - Substantial impairment required (Id. 10-103)

Definitions: (Id. 10-103)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person "shall," but also lists persons required to report (Id. 10-104)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: Abuse under title 43, section 10-103 is a felony (*Okla. Stat. Ann. tit. 21, 843.1* (West 2002))

[*582] Enhancement: "Elderly and Incapacitated Victim's Protection Program"

(*Okla. Stat. tit. 22, 991a-13* to 20 (Supp. 2003))

Term used: "Elderly Person" - Age alone: 62 (Id. 991a-15)

Offenses included: Assault/battery; burglary; grand larceny; extortion; fraud; embezzlement (Id. 991a-16)

Enhancement of Sentence: (Id. 991a-17)

Mandatory confinement - 30 days

Restitution/Community service

In addition to other sentence

Restitution: Can seize property of criminal to pay restitution (Id. 991a-19)

Repeat Offenders: (Id. 991a-20)

Telemarketing: Addressed under Consumer Protection (*Okla. Stat. Ann. tit. 15, 775A.1-5* (West Supp. 2003)) and Criminal law (*Okla. Stat. Ann. tit. 21, 1861*)

Penalties: Criminal - Misdemeanor (Id. 1861)

Charity Solicitation: "Oklahoma Solicitation of Charitable Contributions Act (1959)" (*Okla. Stat. Ann. tit. 18, 552.02-18* (West 1998 & Supp. 2003))

Penalties: Criminal - fine/imprisonment (Id. 552.18);

See also id. 553.3 and *Okla. Stat. Ann. tit. 21, 1861*

OREGON (Oregon Revised Statutes)

Protective Services: (*Or. Rev. Stat. 124.005-124.140* (2001))

Term Used: "Elderly Person" - age alone: 65 (Id. 124.005)

Definitions: (Id. 124.005)

Physical/Mental Abuse: Resulting harm required; Note: words that cause significant emotional harm are included

Abuser need not be a caregiver; can be any person

Exploitation: "Fiduciary Abuse" - act alone (Id. 124.110)

Report Required: Listed persons "shall" - includes "any public or private official while acting in an official capacity" (Id. 124.060)

Elderly person must bring petition for relief (Id. 124.010)

Crimes: n/a

Civil Law: Cause of Action for physical or fiduciary abuse (Id. 124.100)

Relief: Economic and noneconomic damages; attorney fees; guardian fees

[*583] Criminal Law:

Crimes: "Criminal Mistreatment in First Degree" - felony (Id. 163.205)

Caregiver who causes physical or financial injury or fraud

Enhancement: n/a

Telemarketing: Addressed under "Crimes" (Id. 165.555) and "Trade Regulations" (Id. 646.563)

Charity Solicitation: "Charitable Solicitations Act" (Id. 128.801-98)

Penalty: Criminal - misdemeanor (Id. 165.555)

PENNSYLVANIA (Pennsylvania Statutes Annotated)

Protective Services: (Pa. Stat. Ann. tit. 35, 10225.101-03, 10225.301-12 (West 2003))

Term Used: "Older Adult" - Age alone: 60 (Id. 10225.103)

Definitions: (Id. 10225.103)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person "may" (Id. 10225.302)

Crimes:

Civil Law: Addressed in Deceptive Trade Practices (Pa. Stat. Ann. tit. 73, 201.8 (West Supp. 2003))

Criminal Law:

Crimes: n/a

Enhancement: (Pa. Stat. Ann. tit. 42, 9717 (West 1998))

Term used: "Elderly Person" - Age alone: 60

Mandatory Imprisonment terms for aggravated assault, rape, and theft by deception

Telemarketing: "Telemarketer Registration Act" (Pa. Stat. Ann. tit. 73, 2242-49)

Charity Solicitation: "Solicitation of Funds for Charitable Purposes Act" (Pa. Stat. Ann. tit. 10, 162.2-.18 (West 1999 and Supp. 2003))

Penalties: Criminal - misdemeanor (Id. 162.18)

RHODE ISLAND (General Laws of Rhode Island)

Protective Services: (R.I. Gen. Laws 42-66-1 to 17 (1998 & Supp. 2002))

Term Used: "Elderly Persons" - Age alone: 60 (Id. 42-66-8)

Definitions: (Id. 42-66-4.1)

Physical/Mental Abuse: Resulting harm required

Abuser can be any person with a duty of care to the victim

Exploitation: Resulting harm required

[*584] Report Required: Any person "shall" (Id. 42-66-8)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: For crimes against victims age 60

Assault (Id. 11-5-10); also (Id. 11-5-10.4)

Restitution (Id. 11-5-10.1)

Burglary when person age 60 is on the premises (Id. 11-8-2.3)

Robbery (Id. 11-39-1)

Larceny (Id. 11-41-5); Note: enhancement for victims 65 years or older)

Telemarketing: "Telephone Sales Solicitation Act" (Id. 5-61-1 to 6)

Penalties: Criminal - Fine/imprisonment (Id. 5-61-5)

Charity Solicitation: Solicitation by Charitable Organizations (Id. 5-53.1-1 to 18)

Penalties: Criminal - misdemeanor (Id. 5-53.1-15)

SOUTH CAROLINA (Code of Laws of South Carolina)

Protective Services: (*S.C. Code Ann. 43-35-5 to 90* (Law. Co-op. Supp. 2002))

Term Used: "Vulnerable Adult" - Age 18; plus infirmities (Id. 43-35-10)

Definitions: (Id. 43-35-10)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Resulting harm required

Report Required: Listed persons "shall"; others "may" (Id. 43-35-25)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: Addressed under "Crimes" (*S.C. Code Ann. 16-17-445* (Law. Co-op. 2003))

Charity Solicitation: "Solicitation of Charitable Funds" (*S.C. Code Ann. 33-56-10 to 33-56-200* (Law. Co-op. Supp. 2002))

Penalties: Criminal - misdemeanor (Id. 33-56-145)

[*585] SOUTH DAKOTA (South Dakota Codified Laws)

Protective Services: Listed under Criminal Law (*S.D. Codified Laws 22-46-1 to 6* (Michie 1998))

Civil Law: n/a

Criminal Law:

Crimes:

Term Used: "Disabled Adult" - Age 18; plus infirmities (Id. 22-46-1)

Definitions:

Physical Abuse: Act alone (Id. 22-46-1)

Exploitation: Act alone - by a caretaker (Id. 22-46-3)

Penalties: felonies (Id. 22-46-2 to 3)

Enhancement: n/a

Telemarketing: Addressed under Trade Regulation "Telemarketing" (*S.D. Codified Laws 37-30A-1 to 17* (Michie 2003))

Charity Solicitation: "Telephone Solicitation" (Id. 37-30-1 to 29)

Penalties: Criminal - misdemeanor (Id. 37-30-17)

TENNESSEE (Tennessee Code Annotated)

Protective Services: (*Tenn. Code Ann. 71-6-101* to 19 (1995 & Supp. 2003))

Term Used: "Adult" - Age 18; plus impairments (Id. 71-6-102)

Definitions: (Id. 71-6-102)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person "shall" (Id. 71-6-103)

Crimes: Willful abuse/exploitation - Misdemeanor (Id. 71-6-117)

Willful physical abuse resulting in serious bodily or mental harm - felony (Id. 71-6-119)

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: Factor in enhancement - victim "vulnerable due to age" (*Tenn. Code Ann. 40-35-114* (Supp. 2002))

Telemarketing: "Consumer Telemarketing Protection Act of 1990" (*Tenn. Code Ann. 47-18-1501* to 27 (2001))

Penalties: Criminal - misdemeanor (*Tenn. Code Ann. 47-18-1526* (2001))

Charity Solicitation: "Solicitation of Charitable Funds" (*Tenn. Code Ann. 48-101-501* to 21 (2002 & Supp. 2003))

Penalties: Criminal - misdemeanor/felony (Id. 48-101-515)

[*586] TEXAS (Texas Codes Annotated)

Protective Services: (*Tex. Hum. Res. Code Ann. 48.001-48.357* (Vernon 2001 & Supp. 2003))

Term Used: "Elderly Person" - Age alone: 65 (Id. 48.002)

Definitions: (Id. 48.002)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition - requires ongoing relationship with the victim

Exploitation: Act alone

Report Required: Any person "shall" (Id. 48.051)

Crimes: n/a

Rights of the Elderly: (Id. 102.001-102.105)

Term used: "Elderly Individual" - Age alone: 60 (Id. 102.001)

Civil Law: n/a

Criminal Law:

Crimes: Physical or mental injury to elderly person - felony (*Tex. Penal Code Ann. 22.04* (Vernon 2003))

Enhancement: If victim is 65:

Assault (Id. 22.01(c))

Robbery (Id. 29.03)

Telemarketing: "Telephone Solicitation" (*Tex. Bus. & Com. Code Ann. 37.01-05* (Vernon 2002))

Penalties: Criminal - misdemeanor (*Tex. Penal Code Ann. 38.251*)

Charity Solicitation: "Telephone Solicitations by Charitable Organizations" (*Tex. Occ. Code Ann. art. 9023e* (Vernon Supp. 2003))

UTAH (Utah Code Annotated)

Protective Services: (*Utah Code Ann. 62A-3-301 to 12* (2000 & Supp. 2003))

Term Used: "Elder Adult" - Age alone: 65 (Id. 62A-3-301)

Definitions: (Id. 62A-3-301)

Physical Abuse: Act alone

Emotional Abuse: Resulting harm required

Caretaker: person responsible by family relationship, contract, or court order.

Exploitation: Act alone

Report Required: Any person "shall" (Id. 62A-3-302)

Crimes: n/a

Civil Law: n/a

[*587] Criminal Law:

Crimes: Physical injury - felony/misdemeanor (Id. 76-5-111.1)

Exploitation of an elder adult by one in position of trust or business relationship or one who knows the victim lacks capacity to consent - felony

Report Required: Any person "shall" (Id. 76-5-111.1)

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: n/a

VERMONT (Vermont Statutes Annotated)

Protective Services: (*Vt. Stat. Ann. tit. 33, 6901-41* (2001 & Supp. 2003))

Term Used: "Vulnerable Adult" - Age 18 plus infirmities (Id. 6902)

Definitions: (Id. 6902)

Physical Abuse: Act alone

Emotional Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Listed persons "shall"; others "may" (Id. 6903)

Crimes: Penalty - fine/imprisonment (Id. 6913)

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: n/a

Charity Solicitation: Addressed under Consumer Fraud - "Charitable Solicitations"

(*Vt. Stat. Ann. tit. 9, 2479* (Supp. 2003))

VIRGINIA (Code of Virginia Annotated)

Protective Services: (*Va. Code Ann. 63.2-1603* to 10 (Michie 2002))

Term Used: "Adult" - Age 18 plus infirmities (Id. 63.2-1603)

Definitions: (Id. 63.2-1603)

Physical/Mental Abuse: not defined

Exploitation: n/a

Report Required: Listed persons "shall"; others "may" (Id. 63.2-1606)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

[*588] Telemarketing: "Prizes & Gifts Act" (*Va. Code Ann. 59.1-415* to 23 (Michie 2001))

Charity Solicitation: "Solicitation of Contributions" (*Va. Code Ann. 57-48* to 69 (Michie 2003))

Penalties: Criminal - misdemeanor (Id. 57-59)

WASHINGTON (Revised Code of Washington Annotated)

Protective Services: (*Wash. Rev. Code Ann. 74.34.005-.901* (West 2001 & Supp. 2003))

Term used: "Vulnerable Adult" - Age 60; plus infirmities (Id. 74.34.020)

Definitions: (Id. 74.34.020)

Physical/Mental Abuse: Resulting harm required

Abuser can be any individual

Exploitation: Act alone

Report Required: "Mandated reporters" shall; "permissive reporters" may (Id. 74.34.035)

"Permissive reporters" includes financial institutions

See 74.34.020 for definitions

Crimes: n/a

Civil Law: Cause of action for abuse/exploitation if resides in a facility or is cared for at home by a licensed agency - actual damages, attorney fees, and cost of suit (Id. 74.34.200)

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: "Commercial Telephone Solicitation" (*Wash. Rev. Code Ann. 19.158.010-.901* (West 1999 & Supp. 2003))

Penalties: Criminal - felony/misdemeanor (Id. 19.158.160)

Charity Solicitation: "Charitable Solicitations" (Id. 19.09.010-.915)

Penalties: Criminal - misdemeanor/gross misdemeanor (Id. 19.09.275)

WEST VIRGINIA (West Virginia Code Annotated)

Protective Services: (*W. Va. Code Ann. 9-6-1* to 15 (Michie 1998 & Supp. 2003))

Term used: "Incapacitated Adult" - Any age; plus infirmities (Id. 9-6-1)

Definitions: (Id. 9-6-1)

Physical/Mental Abuse: Act alone - includes threats

[*589] Exploitation: n/a

Report Required: Listed persons "shall"; others "may" (Id. 9-6-9)

Crimes: n/a

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: (*W. Va. Code 61-2-10a* (2000))

Term used: "Elderly" - Age alone: 65

Crimes: Assault/batter: assault during commission of felony

Penalty: Sentence is mandatory - no subject to suspension or probation

Telemarketing: Addressed under "Consumer Credit and Protection Act - Telemarketing"

(*W. Va. Code Ann. 46A-6F-102* to -703 (Michie 1999))

Penalties: Criminal - felony for claiming to offer criminal recovery service - (Id. 46A-6F-503)

Charity Solicitation: "Solicitation of Charitable Funds Act" (*W. Va. Code Ann.29-19-1* to 16 (Michie 2001 & Supp. 2003))

Penalties: Criminal - misdemeanor (Id. 29-19-15)

WISCONSIN (Wisconsin Statutes Annotated)

Protective Services: (*Wis. Stat. Ann. 55.001-07* (West 2003); see also id. 46.90)

Term Used: "Vulnerable Adult" - Age 18; plus infirmities (Id. 55.01)

Definitions: (Id. 55.01)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: "Misappropriation of property" - act alone

Report Required: Any person "may" (Id. 46.90)

Crimes: n/a

Civil Law: Trade practices - if victim is "elderly person" (age 62), extra fine of \$ 10,000 to go into state fund, plus restitution (Id. 100.264)

Criminal Law:

Crimes: Abuse of Vulnerable Adults (Id. 940.285)

Term used: "Vulnerable Adult" - Age 18; plus infirmities

"Maltreatment" - act alone

Penalties - felony/misdemeanor

Enhancement:

Term used: "Elder Person" - Age alone: 62 (each statute)

Crimes

Battery (Id. 940.19)

[*590] Violent felony (Id. 939.647)

Sexual Assault (Id. 940.225)

Reckless Injury (Id. 940.23)

Stalking (Id. 940.32)

Telemarketing: Addressed under Trade Regulations (Id. 34.72) and Consumer Transactions (Id. 423.101-.402)

Charity Solicitation: "Solicitation of Funds for Charitable Purposes" (Id. 440.41-48)

WYOMING (Wyoming Statutes Annotated)

Protective Services: (*Wyo. Stat. Ann. 35-20-101 to 09* (Michie 2003))

Term Used: "Vulnerable Adult" - Age 18; plus infirmities (Id. 35-20-102)

Definitions: (Id. 35-20-102)

Physical/Mental Abuse: Resulting harm required

Caregiver: Broad Definition

Exploitation: Act alone

Report Required: Any person "shall" (Id. 35-20-103)

Crimes: Abuse - misdemeanor (Id. 35-20-109; Note: repealed 2002)

Exploitation - fine/imprisonment

Civil Law: n/a

Criminal Law:

Crimes: n/a

Enhancement: n/a

Telemarketing: Addressed under Consumer Protection (Id. 40-12-101 to -404)

Charity Solicitation: n/a

Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure
 Defenses
 Consent
 Family Law
 Family Protection & Welfare
 Elderly Persons
 Abuse, Endangerment & Neglect
 Public Health & Welfare Law
 Healthcare
 Services for Disabled & Elderly Persons
 Protection From Abuse & Neglect

FOOTNOTES:

n1. Diana Walsh, "Fright Mail" Fund-Raisers, Targeting Elderly with Scare Tactics? The Fear Merchants, S.F. Examiner, Feb. 8, 1998, at A1. "A child of the Depression, Shelby spends almost nothing on herself. She is a self-described "cheerful giver," donating to her church, the Red Cross and veterans groups. She says she responded to the barrage of fright mailings because she felt she had no choice." Id.

n2. See George J. Church, Elderscam: Reach Out and Bilk Someone, Time, Aug. 25, 1997, at 54, available at 1997 WL 13375646. Downs was a former real estate saleswoman and widow of a judge. However, when her ordeal started, she was seventy-seven, recently widowed, recently diagnosed with breast cancer, and lonely. "Right there is a combination that screams "victim.'" Id.

n3. Id. at 55. Seniors such as Ruth Crosson have some money from Social Security, savings, or life insurance from a late spouse. Their desire never to become a burden to their children makes them easy prey for phony investment schemes. Id.; see also Richard L. Douglass, Domestic Mistreatment of the Elderly - Toward Prevention 9 (1995). Douglass notes that most authorities agree that greed is the primary cause of financial abuse or exploitation. Id. Stealing or mismanaging an elder person's resources is clearly motivated behavior. Id. Older people do not have to be wealthy to be financially victimized; however, evidence suggests that the elderly who are affluent are more likely to be exploited. Id. A number of cases in literature indicate that whether victims are affluent or marginally poor, their resources are stolen or used for the benefit of others. Id. In addition to being exploited, less affluent victims are also more likely to be psychologically or physically abused. Id.; see also Johnny Coker & Bobby Little, Investing in the Future: Protecting the Elderly from Financial Abuse, FBI L. Enforcement Bull., Dec. 1997, at 1, 3 (noting that the scant research indicates that over sixty percent of abuse victims are likely to be elderly white females over the age of seventy).

n4. See Use of Mass Mail to Defraud Consumers: Hearing Before the U.S. Senate Subcomm. on International Security, Proliferation and Federal Services, Comm. on Governmental Affairs, 105th Cong. 62 (1998) (remarks of Attorney General Bob Butterworth) [hereinafter Mass Mail]. "These are people who could be our neighbors, our parents, our grandparents ... good people who fell victim to companies that have sacrificed decency and ethics on the altar of the bottom line." Id.

n5. Douglass, *supra* note 3, at 4. Dr. Douglass defines material or financial abuse as the following: "The illegal, or unethical exploitation and/or use of funds, property, or other assets belonging to the older person." Id. Unfortunately, the definitions for financial elder abuse vary, causing confusion and a lack of understanding as to the different forms of abuse. See A. Paul Blunt, Financial Exploitation: The Best Kept Secret of Elder Abuse, *Aging Mag.*, 1996, at 62-63; Margaret F. Hudson, Analyses of the Concepts of Elder Mistreatment: Abuse and Neglect, 1 *J. Elder Abuse & Neglect* 5, 7-14 (1989); Jerry A. Hyman, From the Frontlines: Financial Abuse and Legal Assistance, NARCEA Exchange (Nat'l Center on Elder Abuse, Dover, Auburn, 1990); Ida M. Johnson, Family Members' Perspective of and Attitudes Toward Elder Abuse, 76 *Fams. Soc'y* 220, 220-22 (1995).

n6. See Patrick E. Michela, Comment, "You May Have Already Won ...": Telemarketing Fraud and the Need for a Federal Legislative Solution, 21 *Pepp. L. Rev.* 553, 575 (1994). A ninety-year-old widow's assets plummeted from over \$ 800,000 to about \$ 40,000 from investments with a financial group that promised profits up to \$ 1,000,000. *Id.* at 553-54. She testified before a congressional subcommittee that they took advantage of her loneliness by constantly calling her on the phone and talking to her about her need for financial security, which they promised to achieve for her by their "hot investments." *Id.* at 554. Bratkiewicz notes the following:

The emerging legislative and educational response to the impact of telemarketing fraud on seniors has been precipitated by the realization that Americans can not afford to have the elderly lose their life savings. Because senior citizens typically rely on unearned income for maintenance and support, there is no way for them to earn back the money they lose to telemarketing schemes. By draining the elderly victim's financial resources, fraudulent telemarketers are effectively forcing the victim to become reliant on social welfare programs. Thus, the eld-

erly do not shoulder the economic burden caused by telemarketing fraud alone; rather, this burden is shifted on to all of society.

Jeffrey L. Bratkiewicz, "Here's a Quarter, Call Someone Who Cares"; Who Is Answering the Elderly's Call for Protection from Telemarketing Fraud?, *45 S.D. L. Rev.* 586, 592 (2000).

n7. Michela, *supra* note 6, at 574.

n8. *Id.*

n9. See Special Comm. on Aging, 98th Cong., *Consumer Frauds and Elderly Persons: A Growing Problem* 12 (Comm. Print 1983) ("Abuse of trust schemes involve the exploitation of a position of authority and/or trust such as misuse of funds by bankers, trustees, relatives, or attorneys, who may control an older person's funds."); see also Douglass, *supra* note 3, at 2-3; Candace J. Heisler & Jane E. Tewksbury, *Fiduciary Abuse of the Elderly: A Prosecutor's Perspective*, 3 *J. Elderly Abuse & Neglect* 23, 26 (1991) (noting that friend and family abusers are often financially dependent on the victim).

n10. See Michela, *supra* note 6, at 574 (noting the elderly are targeted because they are easily accessible by phone, at home during the day, intent on enlarging their nest eggs for themselves and their grandchildren, their memories are poor, and, most notably, once they recognize the deceit, they are too embarrassed to relay the events to local law enforcement).

n11. See Bob Trebilcock, *Robbed by Phone*, *Good Housekeeping*, Jan. 1, 1998, at 88, 89, available at 1998 *WL* 9927973.

n12. See Church, *supra* note 2, at 54. "Prices range from \$ 10 for an untested 'lead' to \$ 200 for the name of someone who has fallen for a whole series of scams." *Id.* For a detailed discussion of the process telemarketers used to abuse the elderly, see Bratkiewicz, *supra* note 6, at 590-92.

n13. Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 *Idaho L. Rev.* 203, 214 (2000). "The American model of rugged individualists controlling their own financial affairs has left us with a breeding ground for abuse by the unscrupulous. In general, we answer to no one about our financial dealings, so no one is examining our financial condition." *Id.*; see also Tracy Wilson, *Seeking Eyes and Ears: Seniors' Reluctance to Report Abuse Makes Community Awareness Essential*, *L.A. Times*, Aug. 10, 1998, at B1.

n14. *Parsons v. First Investors Corp.*, 122 *F.3d* 525, 530 (8th Cir. 1997). In this case, the Eighth Circuit affirmed a large punitive award against an experienced financial investor who took advantage of an elderly retired couple and deprived them of their life savings. *Id.*

n15. See *United States v. Paige*, 923 *F.2d* 112, 113 (8th Cir. 1991).

n16. Beletshachew Shiferaw et al., *The Investigation and Outcome of Reported Cases of Elder Abuse: The Forsyth County Aging Study*, 34 *Gerontologist* 123, 124-25 (1994). This relatively recent study of various forms of elder abuse that occurred in Forsyth County, North Carolina, found financial abuse to be the most prevalent form, accounting for forty-six percent of the total abuse cases. *Id.*; see also Bratkiewicz, *supra* note 6, at 590-91 & n.42 (noting that the types of scams telemarketers use to defraud the elderly are too numerous to list); Coker & Little, *supra* note 3, at 1 (noting that recent academic research confirms the existence of significant amounts of financial abuse against the elderly). There are, however, a small number of schemes that have been identified as the most common: "(1) prize promotions, (2) advance-fee loan or credit-repair schemes, (3) magazine schemes, (4) investment schemes, (5) foreign lotteries, (6) travel schemes, and (7) office supply schemes." *Id.* at

590-91 (footnotes omitted); see also Jeffrey Hines, Telemarketing Fraud upon the Elderly: Minimizing Its Effects Through Legislation, Law Enforcement and Education, *12 Alb. L.J. Sci. & Tech.* 839, 845-46 (2002); Sarah Reznick, Fraudulent Telemarketing: Crime and Punishment, *77 Mich. B.J.* 1210, 1210-12 (1998).

n17. Dessin, *supra* note 13, at 210 (indicating the general belief that abuse of the elderly is grossly underreported); see also Audrey S. Garfield, Note, Elder Abuse and the States' Adult Protective Services Response: Time for a Change in California, *42 Hastings L.J.* 859, 864-65 (1991).

n18. Dessin, *supra* note 13, at 211 (noting that "it is not difficult to imagine the loss of personal dignity" that accompanies abuse as well as the pain in having to relate the abuse to others); see also Hines, *supra* note 16, at 842; Suzanne J. Levitt & Rebecca J. O'Neill, A Call for a Functional Multidisciplinary Approach to Intervention in Cases of Elder Abuse, Neglect, and Exploitation: One Legal Clinic's Experience, *5 Elder L.J.* 195, 200 (1997).

n19. Dessin, *supra* note 13, at 212 ("The more abusive the relationship, the less likely it is that the abuse will be reported."); see also Marlowe Churchill, Experts Stress Need to Protect Elderly from Fraud, Abuse, *Press-Enterprise*, July 1, 1998, at B2 (stating that elderly victims do not report abuse, fearing they will experience greater abuse or neglect).

n20. See Seymour Moskowitz, Saving Granny from the Wolf: Elder Abuse and Neglect - The Legal Framework, *31 Conn. L. Rev.* 77, 100 (1998); see also Dessin, *supra* note 13, at 212 (indicating that not only might the elderly view available adult protective services as "an impenetrable mass," but even if they know whom to contact, they "may not have the mobility to go to someone who can help and may not have access to a telephone to call for help").

n21. Dessin, *supra* note 13, at 212; see also Churchill, *supra* note 19. Compare Richard A. Starnes, Consumer Fraud and the Elderly: The Need for a Uniform System of Enforcement and Increased Civil and Criminal Penalties, *4 Elder L.J.* 201, 205 (1996) (noting that because the elderly are members of a more trusting generation, they are more likely to accept the representations of telemarketers, making it hard for older citizens to recognize when they are being swindled), and Hines, *supra* note 16, at 841, with Trent M. Murch, Revamping the Phantom Protections for the Vulnerable Elderly: Section 3A1.1(b), New Hope for Old Victims, *6 Elder L.J.* 49, 54-55 (1998) (challenging the notion that the elderly are more often victimized by fraudulent telemarketing due to their frailty or declining capacities). Rather, the American Association of Retired Persons (AARP) suggests that anyone can be victimized by telemarketers, regardless of age. Bratkiewicz, *supra* note 6, at 590. In fact, the AARP conducted research which demonstrates that most elderly victims are well-educated, affluent, and socially active. Murch, *supra*, at 55. Further, only twenty-eight percent of the fraud victims live alone. *Id.* Eighty percent of the victims of telemarketing fraud had family living nearby. *Id.*; see also Mark Allan Baginskis, Telemarketing Fraud upon the Elderly Shows No Signs of Slowing, *11 Loy. Consumer L. Rev.* 4, 7 (citing Princeton Survey Research Assocs., Telemarketing Fraud and Older Americans, An AARP Survey 9 (1996)).

n22. Coker & Little, *supra* note 3, at 1-2; see also Dessin, *supra* note 13, at 214 (asserting that an attribute distinguishing financial abuse from psychological and physical abuse is the difficulty in detecting financial abuse); Moskowitz, *supra* note 20, at 79.

n23. See Coker & Little, *supra* note 3, at 1; Dessin, *supra* note 13, at 214. With physical abuse,

[a] broken bone or a bruise is frequently noticeable by even a casual observer. Psychological abuse seems less likely to produce visible signs likely to be observed by a third party. Even with this type of abuse, however, there may be changes in personality that could be observed by a person outside the abusive relationship.

Id.

n24. Dessin, *supra* note 13, at 214; see also Michela, *supra* note 6, at 574-75. The reluctance to report financial abuse is a boon to the perpetrator not only because it hampers efforts to enforce the law, but also because underreporting results in the devotion of fewer federal and state resources to eliminating the problem. *Id.* at 575; see also Dessin, *supra* note 13, at 214. While people are inclined to brag about finding a bargain, they are far less likely to admit having paid an inflated price. *Id.* Therefore, people may be similarly reluctant to discuss a situation where they may have been financially abused. *Id.*; see Hebe R. Smythe, Note, *Fighting Telemarketing Scams*, 17 *Hastings Comm. & Ent. L.J.* 347, 367 (1994) (noting that feelings of guilt and foolishness prevent consumers from reporting fraud in the first place); see also Bratkiewicz, *supra* note 6, at 590 (indicating that there is no debating how painful telemarketing fraud can be to its older victims). The adverse psychological impact is particularly intense when sweepstakes or phony investment schemes are used on them. *Id.* Ultimately, when elderly victims realized they have been tricked, they feel a sense of shame and betrayal, which are exacerbated by their intentions to use the scammer's offers as a tool for maintaining financial independence. *Id.*

n25. See Church, *supra* note 2, at 57 ("Often there are no witnesses to a phone con except the scammer and the victim."). Furthermore, if such a con artist is convicted, the typical prison term is only one to three years. *Id.*

n26. See Coker & Little, *supra* note 3, at 1; Jane Glenn Hass, *Seminars Teach Seniors to Stay a Step Ahead of Financial Fraud*, Orange County Reg., Oct. 25, 1998, at B6; see also Consumer Fraud Prevention Act of 1995, Hearing Before the House Comm. on the Judiciary, Subcomm. on Crime, 104th Cong. 95 (1996) (statement of John F. Barker, Vice President, National Consumers League; Director, National Fraud Information Center) [hereinafter *Consumer Fraud*]. Barker states that senior citizens must be convinced "that the person on the other end of the phone ... is not just a clever con artist, but a crook." *Id.* Also, families must be provided "with the tools to understand and work together to deal with the behavioral patterns [of the elderly] which contribute to vulnerability." *Id.*

n27. See Heisler & Tewksbury, *supra* note 9, at 29. Law Enforcement Officials and financial institutions have some clues to suspected financial abuse of the elderly. Some indicators include the following:

(1) Unusual activity in a bank account, including bank activity inconsistent with the victim's ability, e.g., bedridden senior making automatic teller machine (ATM) withdrawals; (2) recent, new acquaintances expressing affection for or residing with an elder who has assets; (3) lack of amenities when the victim can afford such items, disconnected utilities, and/or eviction notices; (4) new authorized signer on credit cards or unusual activity on credit card accounts, especially if the purchases are not for the victim or occur when the senior is confused or incompetent; (5) forged or suspicious signatures on documents when the elder cannot write ...

Id. It should be noted that many of these indicators focus on abuse by relatives and do not begin to address material abuse of the elderly by strangers.

n28. See, e.g., Coker & Little, *supra* note 3, at 2. The Louisiana Sheriff's Department instituted an Adopt-a-Senior Program. *Id.* at 4. Deputies are encouraged to adopt at least two senior citizens in their jurisdictions and visit them regularly to check on their welfare. *Id.* As part of their responsibilities, the deputies inquire as to any unusual mail, telephone calls, visits, or solicitations the seniors may have received. *Id.*; see also Betsy Cantrell, *Triad: Reducing Criminal Victimization of the Elderly*, FBI L. Enforcement Bull., Feb. 1994, at 19, 20-23. Local police and sheriff's departments form cooperatives with senior citizens to prevent the victimization of the elderly in the community; these programs are known as triads. *Id.* at 19. The three groups share ideas and resources to provide programs and training for vulnerable citizens who are often fearful. *Id.* The programs are "most successful when a cooperative spirit exists between the involved law enforcement agencies and when seniors volunteer their time and expertise" and when the groups are properly trained. *Id.*

n29. See Coker & Little, *supra* note 3, at 1; see also Janet Beighle French, On the Trail of Fraud by Telephone, *Plain Dealer*, July 26, 1998, at 1J. But see Hines, *supra* note 16, at 857 (indicating that the National Consumers League has established a hotline where consumers can report incidents of fraud).

n30. See French, *supra* note 29; see also Kathleen H. Wilber & Sandra L. Reynolds, Introducing a Framework for Defining Financial Abuse of the Elderly, 8 *J. Elder Abuse & Neglect* 61, 62-63 (1996). Detection and investigation of financial abuse may interfere with legally guaranteed rights of adults to direct their own finances. *Id.* at 63. The authors offer a framework that can be applied to suspected abuse situations to determine whether financial abuse has occurred. *Id.* at 62. The framework includes four criteria:

1. Characteristics of the older person that suggest vulnerability to abuse.
2. The nature of the relationship between the older person and the suspected wrongdoer.
3. The reasonableness and comparative costs and benefits of the transaction(s) to the older person and the party suspected of abuse.
4. The nature of the influence used to obtain the elder's participation in the transaction(s).

Id. at 64; see Bratkiewicz, *supra* note 6, at 597 (indicating that education of the elderly is the best way to prevent financial abuse, primarily because it "respects the senior's autonomy and decision-making ability").

n31. See Douglass, *supra* note 3, at 9; Coker & Little, *supra* note 3, at 3.

n32. See Starnes, *supra* note 21, at 222; see also Michela, *supra* note 6, at 614-15. Uniform definitions in state and federal telemarketing laws would allow the sharing of information and evidence concerning violations of the law. *Id.*; see also Starnes, *supra* note 21, at 212. Though the elderly may be protected against fraud by general consumer protection laws, specific types of fraud against the elderly, such as telemarketing, may be tailored to avoid violating those statutes. *Id.*

n33. *Washington v. Glucksberg*, 521 U.S. 702, 731-32 (1997) (upholding Washington's state statute banning assisted suicide and indicating that the state has an interest in protecting vulnerable groups - including the poor, the elderly, and disabled persons - from abuse, neglect, and mistakes).

n34. The New York Task Force warned against legalizing physician-assisted suicide because it would present profound risks to many in our society who are ill and vulnerable. The Court also noted that "the risk of harm is greatest for the many individuals in our society whose autonomy and well-being are already compromised by poverty, lack of access to good medical care, advanced age, or membership in a stigmatized group." *Id.* at 732 (citing New York State Task Force on Life and the Law, *When Death is Sought: Assisted Suicide and Euthanasia in the Medical Context* 77-82 (1994)). While the task force expressed this sentiment in the context of physician-assisted suicide, it is no less pertinent when applied to protecting the elderly, who are targeted for financial abuse because of vulnerabilities attendant with age.

n35. See *id.*

n36. See *id.*

n37. Physical and emotional abuse of the elderly is beyond the scope of this Article. It is important to note, however, that while both types of abuse have received greater societal recognition, neither has garnered the type of attention necessary to protect the elderly from this type of abuse, which could lead to death or serious bodily injury. For example, physical injury to another is a crime in all states. Yet protection varies depending on

whether the statute follows the common law, the Model Penal Code, or a variation of either. Common law uses the term "battery" to include both bodily injury and offensive touching. See Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* 7.15, at 685 (2d ed. 1986) (defining battery as the unlawful application of force to the person of another). The Model Penal Code uses the term "assault" to include behavior that actually causes injury and includes attempts and threats of imminent bodily injury, but omits offensive touching. See Model Penal Code 211.1 (1985) (indicating that these acts are punished as a misdemeanor). More serious injury is covered under aggravated assault and is a second-degree felony. *Id.*; see also *York v. State*, 833 S.W.2d 734, 736 (Tex. App. 1992) (noting that the definition of bodily injury is broad and encompasses even relatively minor physical contacts); *infra* Appendix & Comparison Table. Other states protect the elderly by enhancing punishments in existing statutes or creating statutes specifically designed to protect them. Texas and California, for example, do both. Texas's assault statute includes an enhancement clause for crimes of offensive physical contact if the victim is sixty-five or older. A separate criminal statute addresses crimes that result in actual injury. See *Tex. Penal Code Ann. 22.01(c)* (Vernon 2003). The 1995 amendment increases the punishment from a class C misdemeanor that carries a fine of \$ 500 for ordinary victims, *id.* 12.23, to a class A misdemeanor that carries a fine of up to \$ 4000, confinement in jail up to one year, or both. *Id.* 12.21; see also *id.* 22.04(a)-(e); *id.* 22.02, 12.32.35. Under these statutes:

(1) An intentional act causing serious bodily or mental injury to elderly victims is a first-degree felony, *id.* 22.04, which carries a sentence of five to ninety-nine years in prison and a possible fine of up to \$ 10,000. *Id.* 12.32. Such injury against other victims would be a second-degree felony. *Id.* 22.02.

(2) A reckless act causing serious bodily or mental injury to an elderly victim is a second-degree felony, *id.* 22.04, which carries a sentence of two to twenty years in prison and a possible fine of up to \$ 10,000. *Id.* 12.33. Such injury against other victims would also be a second-degree felony. *Id.* 22.02. (3) Intentional "bodily injury" to elderly victims is a third degree felony, *id.* 22.04, which is punishable by a prison term from two and ten years and a possible fine of up to \$ 10,000. *Id.* 12.34. (4) If "bodily injury" is committed recklessly, it is a jail felony, *id.* 22.04, which is a jail term from 180 days to two years with a possible fine of up to \$ 10,000. *Id.* 22.04. Intentional or reckless bodily injury against other victims is a class A misdemeanor, *id.* 22.01(b), which carries a fine of up to \$ 4,000 and a jail term of up to one year. *Id.* 12.21.

A California statute includes additional sentence enhancement for repeat offenders who victimize citizens sixty-five or older. A separate statute protects the elderly from intentional acts that inflict physical pain or mental suffering. See *Cal. Penal Code 667.9* (West Supp. 2003) (indicating a court can enhance a sentence by two years if the perpetrator is a repeat offender and the victim is sixty-five or older, and including robbery, kidnapping, sexual crimes, mayhem, carjacking, and burglary); see also *id.* 368. Acts committed under circumstances likely to produce great bodily harm or death are punishable by imprisonment from one to four years. *Id.* Acts committed under less grave circumstances are punished as a misdemeanor. *Id.* At present, there are no uniform statutes that would protect the elderly from physical abuse. Statutes similar to those enacted in California that enhance all criminal sentences would provide the elderly with additional protection. Tough, uniform laws enacted in every state would establish a unified public policy indicating that society will not tolerate such acts. In addition to physical abuse, the elderly suffer mental and emotional abuse. Such abuse can have a devastating impact on the elderly, sometimes pushing a victim to insanity or suicide. Robert A. Polisky, *Criminalizing Physical and Emotional Elder Abuse*, 3 *Elder L.J.* 377, 378 (1995). States generally address psychological abuse in their protective services statutes. Statutes vary, however, in the people they protect, whether or not they must live in an institution, and the measures taken to protect them. Indeed, fewer states criminalize emotional abuse, and criminal statutes must be carefully drafted to withstand constitutional attacks. While this sort of abuse is not uncommon, only a few states, including Delaware, criminalize emotional abuse. See *Robinson v. State*, 600 A.2d 356, 358 (Del. 1991) (affirming the defendant housekeeper's emotional abuse guilty conviction where the defendant shouted derogatory remarks at an eighty-five year old nursing home resident for fifteen minutes, pretended to spit on the resident, shook her rear-end in her face, and placed a flower pot on her head, all while the defendant and two other housekeepers laughed derisively); see also *Del. Code Ann. tit. 31, 3901-13* (1997); *Frisby v. Schultz*, 487 U.S. 474, 484 (1988) (holding that the state's interest in protecting the "well-being, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society") (quoting *Carey v. Brown*, 447 U.S. 455, 471 (1980)). The statute broadly defines emotional abuse as a pattern of abuse that encompasses

ridiculing or demeaning an infirm adult, making derogatory remarks to an infirm adult, or cursing or threatening to inflict physical or emotional harm on an infirm adult, making it a class A misdemeanor. *Del. Code Ann. tit. 31, 3902(16)*. The statute provides strong protection for the elderly because it criminalizes an act solely because of its abusive nature rather than its impact on the victim, both relieving the prosecutor from having to prove emotional injury to the victim and from having to place the elderly victim on the stand. Also, the elderly victim does not have to live in a care facility; any abusive person falls within the grasp of the statute, and the prosecutor has greater discretion in sentencing. *Id.* 3902(1), 3902(16), 3913. As more elderly people require in-home or institutional care, the need for protection from emotional abuse becomes greater. The Delaware statute provides a strong example that all other states should enact to protect elderly citizens. Protection should not be afforded to the fortunate few who happen to live in states that value the contributions of the elderly and that have genuine concern for their quality of life.

n38. See Starnes, *supra* note 21, at 202.

n39. See Labor Health and Human Services Appropriations: Hearings on 1997 President's Budget, 104th Cong. 895 (1996) (statement of Fernando M. Torres-Gil, Assistant Secretary for Aging).

n40. *Id.*; see also Moskowitz, *supra* note 20, at 86. Two notable factors are that (1) the number of people over eighty-five is growing faster than the elderly population in general, and (2) the elderly population is predominantly female. *Id.*

n41. See Murch, *supra* note 21, at 53; see also Starnes, *supra* note 21, at 202. Starnes indicates the elderly account for at least thirty percent of the nation's victims of fraud. *Id.*

n42. See *Robinson*, 600 *A.2d* at 362 (noting that when confronted with abusive language, the resident may have "no choice but to sit and listen, or perhaps to sit and try not to listen") (quoting *Lehman v. City of Shaker Heights*, 418 *U.S.* 298, 307 (1974) (Douglas, J., concurring)); see also Polisky, *supra* note 37, at 386 (noting that abuse often occurs "where care givers are placed in extremely difficult situations and lack the necessary skills to deal effectively with those situations").

n43. See *Robinson*, 600 *A.2d* at 362; see also Polisky, *supra* note 37, at 381. Elder abuse is significantly less likely to be reported than child abuse: one in three cases are reported for child abuse, but only one in eight cases are reported for elder abuse. *Id.*

n44. See Consumer Fraud, *supra* note 26, at 97. Elderly fraud victims are not isolated cases, but a widespread social problem that takes an unacceptably heavy toll on the victims' resources and self-esteem. Elder abuse is serious, pervasive, intrusive, and psychologically destructive to its victims. *Id.*; see also Terrie Lewis, Comment, Fifty Ways to Exploit Your Grandmother: The Status of Financial Abuse of the Elderly in Minnesota, 28 *Wm. Mitchell L. Rev.* 911, 927 & n.101 (2001) (noting that when reporting on telemarketing fraud and cyber-scams, Senator Ron Wyden stated that \$ 40 billion is "enough to pay for a full year of nursing home care for more than a million elderly") (quoting Elder Fraud and Abuse: New Challenges in the Digital Economy: Hearing Before the Senate Special Comm. on Aging, 106th Cong. 1 (2000) (statement of Sen. Ron Wyden); see also Seniors Safety Act of 1999, S. 751, 106th Cong. 2(a)(7) (1999); Bratkiewicz, *supra* note 6, at 587 (noting that Americans over the age of fifty lose more than \$ 14.8 billion each year to fraudulent telemarketing); Randy Fitzgerald, *Sitting Ducks*, Reader's Digest, Aug. 2000, at 197, 198.

n45. See Special Comm. on Aging, *supra* note 9, at 1. The nationwide survey was sent to state and local officials such as state consumer affairs offices, city police chiefs, and attorneys. *Id.*

n46. See *id.* at 2; see also Polisky, *supra* note 37, at 380 (stating this is "the problem" of the next decade and century).

n47. See Special Comm. on Aging, *supra* note 9, at 2. Eighty-three percent of the police chiefs in large metropolitan areas reported that the elderly were the most frequent victims of consumer and economic frauds. *Id.*; Moskowitz, *supra* note 20, at 99 (noting that "perceived wealth and physical weakness combine to make the elderly likely targets"); see also *United States v. Castellanos*, 81 F.3d 108, 110 (9th Cir. 1996). The Ninth Circuit suggests that age or physical or mental condition "may per se render a victim worthy of ... special protection." *Id.* The court also noted that an enhanced criminal sentence may be supported by a generalized finding that members of a target group share a particular susceptibility. *Id.*; see also *United States v. Paige*, 923 F.2d 112, 113 (8th Cir. 1991) (noting that when vulnerable persons are targeted by schemers, the conduct rendered is more depraved).

n48. See Special Comm. on Aging, *supra* note 9, at 1; see also Am. Ass'n of Retired Pers., *Telemarketing Fraud Victimization of Older Americans: An AARP Survey 4* (1996). The AARP survey was sent to persons age fifty or older who were known to have been the victims of telemarketing fraud. The survey showed that fifty-six percent of such victims were age fifty or older, yet census figures show this age group to be only thirty-six percent of the adult population.

n49. See Special Comm. on Aging, *supra* note 9, at 1; see also Coker & Little, *supra* note 3, at 2. Elderly citizens who can no longer work "may not be able to recoup their economic losses." *Id.* As a result, they become dependent upon family members or social welfare agencies for survival and "their quality of life suffers tremendously." *Id.* Today's crooks no longer deal only in cash, checks, or credit cards. The new electronic and paper debit technologies, such as electronic funds transfers, allow the con artist to extract payment from the victims at record speed. Consumer Fraud, *supra* note 26, at 97.

n50. See Bratkiewicz, *supra* note 6, at 588; Starnes, *supra* note 21, at 204; see also 145 Cong. Rec. S3499 (daily ed. Mar. 25, 1999) (statement of Sen. Tom Daschle) (discussing the 1999 Senior Safety Act and indicating that the elderly are frequently targeted by criminals because they lack mobility, they are isolated, and they are dependent on others); Hines, *supra* note 16, at 841.

n51. See Mass Mail, *supra* note 4, at 17-19 (statement of Stanley F. Pruss, Assistant Attorney Gen. in Charge, Consumer Protection Div., Mich. Dep't of Attorney Gen.).

Many people, fortunately, recognize this calculated deception to sell goods or services and, most notoriously, magazines. Many of us simply don't have the time to unfold the numerous papers inside, to choose between the Jaguar or Mercedes Benz from the colored, adhesive-backed perforated stamps to affix to the return card. Yet many of our citizens do have the time, and these are, disproportionately, our senior and disabled citizens.

Id.

n52. See Lewis, *supra* note 44, at 927; see also *United States v. Kembitskey*, No. 97-50387, 1998 WL 231057, at 2-3 (9th Cir. 1998) (upholding an enhanced sentence against a telemarketer who targeted victims residing in nursing homes or who had "repeatedly fallen victim to scams (perhaps because they [could not] remember recently suffered losses)").

n53. See *Kembitskey*, 1998 WL 231057, at 3; Starnes, *supra* note 21, at 204; see Am. Ass'n of Retired Pers., *supra* note 48, at 4. The great majority of elderly people age fifty or more have family living nearby, but the common thread of vulnerability appears to include a tendency to trust strangers, an inability to recognize such fraud when it is happening, and a tendency to blame themselves when it does happen.

n54. See Starnes, *supra* note 21, at 204.

n55. See Wilber & Reynolds, *supra* note 30, at 64. Cognitive impairments include decisionmaking capacity, judgment, and memory. *Id.* Physical impairments include illnesses such as Alzheimers, dementia, or other diseases. *Id.* at 65. Sensory impairments include vision and hearing problems. *Id.* at 66. Socioemotional vulnerabilities include loneliness and dependence on others. *Id.*; see also *Cal. Penal Code 368* (West 1999). Because of such impairments, the elderly are less able to protect themselves, to understand or report criminal conduct, or to testify in court proceedings on their own behalf. *Id.*; see also Baginskis, *supra* note 21, at 4; Bratkiewicz, *supra* note 6, at 589 (noting that feelings of loneliness, along with a possible deterioration in physical and mental capabilities, make the elderly attractive victims for telemarketers).

n56. See Starnes, *supra* note 21, at 205. Physical incapacity can make a person grateful for any attention given and thus more vulnerable to schemes. "Many elderly victims do not believe that someone who takes the time to visit with them is trying to defraud them." *Id.*; see also Polisky, *supra* note 37, at 379-80 (indicating that increased frailty, impaired hearing or vision, slowed motor and mental response, decreased coordination, and the anxiety they cause all lend to vulnerability, especially in elders over the age of seventy-five).

n57. See Special Comm. on Aging, *supra* note 9, at 10.

n58. See Michela, *supra* note 6, at 574 ("We found the elderly intent on enlarging their nest egg ... and often interested in generating money for their grandchildren ...") (quoting *The Nature and Extent of Telemarketing Fraud and Federal and State Law Enforcement Efforts to Combat It: Hearings Before the Commerce, Consumer and Montary Affairs Subcomm. of the House Comm. on Government Operations, 101st Cong. 87* (1990)).

n59. See Special Comm. on Aging, *supra* note 9, at 8.

n60. See Walsh, *supra* note 1.

n61. See *United States v. Stewart*, 33 F.3d 764, 771 (7th Cir. 1994). An insurance agent promised elderly victims their money would create annuities to fund the victims' funeral expenses; unused funds would go to heirs. *Id.*

n62. See *Boyce v. Fernandes*, 77 F.3d 946, 948. (7th Cir. 1996).

n63. See Murch, *supra* note 21, at 55. Fraudulent telemarketers will threaten that children will take control over bank accounts and credit cards if the elderly tell them about the fraud. *Id.* at 55-56; see also Polisky, *supra* note 37, at 381-82. Reasons for which the elderly do not report abuse include the fear of retaliation from abusers and self-blame that they are the major cause of the abuse. *Id.*; see also Moskowitz, *supra* note 20, at 100; Starnes, *supra* note 21, at 204.

n64. See Starnes, *supra* note 21, at 204; see also Murch, *supra* note 21, at 55-56.

n65. See *Boyce*, 77 F.3d at 948. The victim was a seventy-five-year-old woman afflicted by senile dementia. Her granddaughter alerted authorities, and they discovered that the elderly woman's caretaker had abused her, tricked her into signing a power of attorney, taken her car and furniture, and then placed her, confused and disheveled, in a nursing home. *Id.*; see also *Mass Mail*, *supra* note 4, at 78-79 (statement of Stanley F. Pruss, Assistant Attorney Gen. in Charge, Consumer Protection Div., Mich. Dep't of Attorney Gen.). An elderly gentleman who suffers from dementia spent \$ 30,000 with Publishers Clearinghouse in only eighteen months. *Id.*

n66. See Special Comm. on Aging, *supra* note 9, at 4. This information came from a survey of police chiefs of different sized cities, consumer affairs offices, and district attorney fraud units. *Id.* at 3; see also Starnes, *supra* note 21, at 206-11. Common types of fraud include telemarketing, investment schemes, false charity solicitation, health care fraud, home repair fraud, mail fraud, and bank fraud. *Id.*

n67. See Special Comm. on Aging, *supra* note 9, at 4; see also Bratkiewicz, *supra* note 6, at 591-92. Bratkiewicz details the phases through which telemarketers work, using as many as four employees to work on one customer. *Id.* First, they use a "fronter" to make the initial contact. Next, when the deal is imminent, the elderly victim is referred to a "closer," who methodically and systematically work together to drain the elderly victim's financial resources. *Id.* This process is known as reloading to telemarketing insiders. *Id.* at 592. Finally, in an effort to strip the elderly of all of their resources, the telemarketer uses what is known as the "recovery room tactic." *Id.* Here, the telemarketer calls the elderly victim and, for a small fee, offers to recover the money lost to the telemarketing scams. *Id.* Unfortunately, the "recovery room" is simply a part of the scam. *Id.* The money is never recovered, and the financial loss has increased because the victim has often sold personal property or taken out bank loans to finance the bogus recovery effort. *Id.*; see also Hines, *supra* note 16, at 844-46 (describing in detail the process by which telemarketers fraudulently financially abuse the elderly).

n68. See Starnes, *supra* note 21, at 210 (indicating that when looking for people to victimize in home repair scams, perpetrators check the obituaries looking for widows as targets because they may not be "knowledgeable about the types of repairs and the necessity of having them preformed"). The Internet is another source of names because many elderly are online. See Consumer Fraud, *supra* note 26, at 97.

n69. See Special Comm. on Aging, *supra* note 9, at 4.

n70. See *id.*; see also Kate Santich, Gotcha! Fraud Hits the Elderly More than Any Other Crime, Orlando Sentinel, Feb. 23, 1997, at 7, 8, available at 1997 WL 2757753. Victims are told they have won \$ 10,000, but the caller needs their bank account number so they can deposit the money. "Hurry, all prize money must be distributed by midnight tonight!" *Id.*

n71. See Special Comm. on Aging, *supra* note 9, at 4; see also Consumer Fraud, *supra* note 26, at 97. The elderly may know not to give credit card numbers over the phone, but few translate this into a general warning that they should not give out any financial information. *Id.*

n72. See *infra* Appendix & Comparison Table; see also Moskowitz, *supra* note 20, at 89-97. This Article gives a comprehensive examination of state protective statutes and includes helpful comparison tables.

n73. See Moskowitz, *supra* note 20, at 78; Polisky, *supra* note 37, at 378. Though the laws are in place, financial support may be lacking. "In 1989, \$ 43.03 per child was spent for protective services, as compared to \$ 3.80 per elderly resident for protective services." *Id.* at 89.

n74. 42 U.S.C. 3001-56 (2000). Definitions in this act are found in many state statutes. "The term 'elder abuse, neglect, and exploitation' means abuse, neglect, and exploitation, of an older individual." *Id.* 3002(25). "The term 'exploitation' means the illegal or improper act or process of an individual, including a caregiver, using the resources of an older individual for monetary or personal benefit, profit, or gain." *Id.* 3002(26). "The term 'caregiver' means an individual who has the responsibility for the care of an older individual, either voluntarily, by contract, by receipt of payment for care, or as a result of the operation of law." *Id.* 3002(20).

n75. E.g., *Tex. Hum. Res. Code Ann. 48.001-57* (Vernon 2001 & Supp. 2003). The Texas statute is typical, as it authorizes the human resources department to carry out these responsibilities. "The purpose of this [statute] is to provide for the authority to investigate the abuse, neglect, or exploitation of an elderly or disabled person and to provide protective services to that person." *Id.* 48.001.

n76. E.g., *id.* 48.205.

n77. E.g., *id.* 48.051(c). "The duty ... applies without exception to a person whose professional communications are generally confidential, including an attorney, clergy member, medical practitioner, social worker, and mental health professional." *Id.*; see also Moskowitz, *supra* note 20, at 80 (contending that reporting statutes have not met the goal of protecting elderly from abuse).

n78. *Fla. Stat. Ann. 415.1034(1)(a)(7)*, 415.111(1) (West 1998 & Supp. 2003).

n79. E.g., *Tex. Hum. Res. Code Ann. 48.052*. Failure to report suspected abuse, exploitation, or neglect is a class A misdemeanor. *Id.* The department must investigate the situation. *Id.* 48.151.

n80. E.g., *id.* 48.208 (authorizing the state's protective services agency to petition the court for a protective order, and further authorizing the agency to remove the elderly person from the dangerous situation if the court is not available to rule on the motion). Guardianships may be provided for persons who, because of physical or mental conditions, are unable to care for themselves. *Id.* 48.209.

n81. See Moskowitz, *supra* note 20, at 90. The statutes are extremely diverse, with varying definitions, prohibited conduct, and even placement. *Id.*; see also *infra* Appendix & Comparison Table.

n82. See *Tex. Hum. Res. Code Ann. 48.002(a)(1)*. "'Elderly person' means a person 65 years of age or older." *Id.*

n83. See, e.g., *Alaska Stat. 47.24.900(16)* (Michie 2002) ("'Vulnerable adult' means a person 18 years of age or older who, because of physical or mental impairment, is unable to meet the person's own needs or to seek help without assistance."). The Older Americans Act defines "older individual" as "an individual who is 60 years of age or older." See *42 U.S.C. 3002(38)* (2000); see also *id.* 3002(8). Where disability is required for protection, the Older Americans Act defines "disability" as:

a disability attributable to mental or physical impairment ... that results in substantial functional limitations in 1 or more of the following areas of major life activity: (A) self-care, (B) receptive and expressive language, (C) learning, (D) mobility, (E) self-direction, (F) capacity for independent living, (G) economic self-sufficiency, (H) cognitive functioning, and (I) emotional adjustment.

Id.

n84. E.g., *Tex. Hum. Res. Code Ann. 48.002(2)(A)* ("'Abuse' means: ... the negligent or wilful [sic] infliction of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical or emotional harm or pain to an elderly or disabled person"); see also *42 U.S.C. 3002(13)*. The Older Americans Act defines "abuse" to include the "willful infliction ... of injury, unreasonable confinement, intimidation, or cruel punishment with resulting physical harm, pain, or mental anguish" *Id.* "The term 'physical harm' means bodily injury, impairment, or disease." *Id.* 3002(39).

n85. E.g., *Fla. Stat. Ann. 415.102(1)* (West 1998 & Supp. 2003) ("'Abuse' means ... an action ... which could reasonably be expected to result in physical or psychological injury ... of a disabled adult or an elderly person by any person.").

n86. See *infra* Appendix & Comparison Table; see also Moskowitz, *supra* note 20, at 91-92. The penalties vary from misdemeanor to felony. The tables give detailed comparisons.

n87. *Cal. Welf. & Inst. Code 15656(a)-(b)* (West 2001). Acts committed in circumstances likely to produce great bodily harm or death are punishable by imprisonment from one to four years. *Id.* Acts under other circumstances are punished as a misdemeanor. *Id.* This section is identical to *Cal. Penal Code 368* (West Supp. 2004).

n88. *Cal. Welf. & Inst. Code 15656(c)*. Acts of embezzlement by caretakers carry prison time from one to four years for losses over \$ 400. *Id.* For losses less than \$ 400, fines of up to \$ 1000 and jail time up to one year can be imposed. *Id.*

n89. See LaFave & Scott, *supra* note 37, 1.3, at 12-13; see also Stuart M. Speiser et al., *The American Law of Torts* 1:3, at 12-13 (1983). The court determines who is at fault and the amount of damages, and renders judgment directing the party at fault to pay. *Id.*

n90. See *Restatement (Second) of Torts 13* (1965). A tortious battery is harmful or offensive contact with a person that results from an act intended to cause the victim to suffer from such contact, or an act that causes apprehension of imminent harmful contact. *Id.*

n91. *Id.* 21, 24, 29 (1965). "Assault" requires a threat of force against the victim accompanied by an apparent ability to immediately carry out the threat. *Id.* But see Polisky, *supra* note 37, at 387. Many forms of elder abuse are not included in the statutory definitions of tort crimes. For instance, emotional abuse may not meet the definition of a legal assault if it merely causes humiliation, embarrassment, or depression rather than constituting a threat of force against the victim. *Id.*

n92. *Restatement (Second) of Torts 46* (1965) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress"); see also Polisky, *supra* note 37, at 387 (noting that some courts have been reluctant to consider the infliction of emotional distress as a tort, reasoning that mental consequences are difficult to anticipate as a reasonable proximate cause of harm; however, other courts have recognized it as a separate cause of action).

n93. See *Restatement (Second) of Contracts 164* (1981). Contracts induced by fraudulent misrepresentation are voidable by the recipient. *Id.*; see also Special Comm. on Aging, *supra* note 9, at 15 (noting that all states have consumer protection statutes against fraud).

n94. See Polisky, *supra* note 37, at 387-88.

n95. *Id.* at 388.

n96. *Id.* "The victim may [also] fear retaliation and consequently may not want to be subjected to the trauma of confronting the abuser." *Id.*

n97. *Id.* Dementia may keep the victim from remembering details of the offense. *Id.*; see also Seymour Moskowitz, *New Remedies for Elder Abuse and Neglect*, *Prob. & Prop.*, Jan./Feb. 1998, at 52, 55-56. Litigation is infrequent because (1) elder persons simply do not file many lawsuits, (2) they fear retaliation, (3) memory or communication problems make them poor witnesses or advocates, (4) the litigation process with unfamiliar surroundings is often uncomfortable or even traumatic, or (5) they fear it will make the situation worse. *Id.*

n98. See Polisky, *supra* note 37, at 388.

n99. *Id.* at 388-89. Because tort law does not impose a criminal record, the worst punishment the abuser faces is being fired; he can be hired elsewhere and more victims are put at risk. *Id.*

n100. See Moskowitz, *supra* note 20, at 101-04. Finding a fiduciary relationship between the abuser and victim gives greater legal protection. *Id.* This fiduciary relationship can even be "imposed" when a person has voluntarily undertaken the care of an elderly person, particularly if the person is disabled. *Id.* at 103. Where the elderly person is dependent and has allowed a third party to handle assets, a "constructive trust" requires the fiduciary to use resources only for the benefit of the older person. *Id.* at 103-04.

n101. See Candace J. Heisler, *The Role of the Criminal Justice System in Elder Abuse Cases*, 3 *J. Elder Abuse & Neglect* 5, 7 (1991). Historically, when violence occurred in the home, society either did not get involved or restricted the involvement to mediation or counseling. *Id.* Law enforcement officials, prosecutors, judges, and community professionals all have critical roles to play. *Id.* at 8; see also Moskowitz, *supra* note 20, at 101-02. Tort law at one time blocked civil remedies against family members. *Id.* However, modern law allows damages in such suits. *Id.*

n102. See Heisler, *supra* note 101, at 8 (discussing how law enforcement, prosecutors, judges, and community professionals all have critical roles to play); see also Polisky, *supra* note 37, at 410. Criminalizing elder abuse serves not only as a means to give penalties of imprisonment and fines but also as a means to (1) deter such crimes, (2) create a criminal record for convicted abusers, and (3) keep abusers out of care-giving situations.

n103. See Heisler, *supra* note 101, at 8. To be effective, court processes must be sensitive to the fears and needs of elderly victims and give the victims sufficient support. *Id.* at 6.

n104. See Wayne R. LaFare & Austin W. Scott, Jr., *Substantive Criminal Law* 1.3(a), at 16 (1986).

n105. E.g., *Del. Code Ann. tit. 16, 1137* (1995). Licensed or registered professionals found to have caused abuse will have their licenses revoked or suspended. *Id.* A facility can also have its license revoked if management knew of the abuse and failed to take prompt corrective action. *Id.* 1138.

n106. See *infra* Appendix & Comparison Table.

n107. *Fla. Stat. Ann. 825.101-.106* (West 2000 & Supp. 2003). This chapter is entitled "Abuse, Neglect, and Exploitation of Elderly Persons and Disabled Adults." *Id.*

n108. *Id.* 825.102(1). "Abuse of an elderly person" means:

(a) Intentional infliction of physical or psychological injury upon an elderly person ... ;

(b) An intentional act that could reasonably be expected to result in physical or psychological injury to an elderly person ... ; or

(c) Active encouragement of any person to commit an act that results or could reasonably be expected to result in physical or psychological injury to an elderly person

Id. Such abuse is a felony of the third degree. Id. Aggravated abuse is a felony of the second degree. Id.; see also *Idaho Code 18-1505* (Michie 1997) ("Any person who abuses, exploits or neglects a vulnerable adult is guilty of a misdemeanor.").

n109. *Fla. Stat. Ann. 825.103* (West 2000). "Exploitation of an elderly person" means:

knowingly, by deception or intimidation, obtaining or using, or endeavoring to obtain or use, an elderly person's ... funds, assets, or property with the intent to temporarily or permanently deprive the elderly person ... of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person ...

Id. The abuse must be by a person in a position of trust or business relationship with the elderly person or who "knows or reasonably should know that the elderly person ... lacks the capacity to consent." Id.

n110. Id. 825.104.

n111. Id. 825.101(5).

"Elderly person" means a person 60 years of age or older who is suffering from the infirmities of aging as manifested by advanced age or organic brain damage, or other physical, mental, or emotional dysfunctioning, to the extent that the ability of the person to provide adequately for the person's own care or protection is impaired.

Id.

n112. See id.

n113. See *Minn. Stat. Ann. 609.232, 609.234* (West 2003).

n114. Id. 609.232(11)(4).

n115. Id. 609.2325.

n116. Id. 609.232(2). "'Caregiver' means an individual or facility who has responsibility for the care of a vulnerable adult as a result of a family relationship, or who has assumed responsibility for all or a portion of the care of a vulnerable adult voluntarily, by contract, or by agreement." Id.

n117. Id. 609.2335(1)(2)(i). "Whoever does any of the following acts commits the crime of financial exploitation: ... In the absence of legal authority ... acquires possession or control of an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, or duress" Id.

n118. E.g., *Cal. Welf. & Inst. Code 15610.27* (West 2001) (sixty-five or older).

n119. See *infra* Appendix & Comparison Table.

n120. 18 U.S.C.S. app. ch. 1 (Law. Co-op. 2003).

n121. See *18 U.S.C. 2325-27* (2000) (SCAMS Act); see also *Cal. Penal Code 1170* (West Supp. 2003); *Tex. Bus. & Com. Code Ann. 17.47(c)(2)* (Vernon 2002). Under Texas's Deceptive Trade Practices Act, acts that would otherwise carry a \$ 2000 fine elicit a \$ 10,000 fine if the consumer is sixty-five or older. *Id.* Fines normally may not exceed \$ 2000 per violation or \$ 10,000 total. *Id.* However, action calculated to defraud consumers sixty-five or older raises the fine to \$ 10,000 per violation or \$ 100,000 total. *Id.*

n122. 18 U.S.C.S. app. ch. 1, pt. A.1 (created by the Comprehensive Crime Control Act).

n123. *Id.* app. 1B1.1.

n124. *Id.*

n125. *Id.*

n126. *Id.* 3A1.1.

n127. *Id.* 3B1.3.

n128. *Id.* 1B1.1.

n129. See *United States v. Calozza*, 125 F.3d 687, 689 (9th Cir. 1997) (providing a detailed example of how to apply the sentencing guidelines to specific facts); see also *id.* at 691 (determining the sentence enhancement guidelines cannot be applied to statutes that already set sentences based on crimes against the elderly because of constitutional protections against double jeopardy).

n130. *18 U.S.C. 3553(b)* (1988); see also 18 U.S.C.S. app. ch. 1, pt. A, intro. cmt. 4(b). The aggravating or mitigating circumstances must be "of a kind, or to a degree, not adequately taken into consideration [by the Commission] ... that should result in a sentence different from that described." *Id.* (quoting *18 U.S.C. 3553(b)*).

n131. *18 U.S.C.S. app. 3A1.1(b)* & cmt. 2 (providing that courts may adjust the sentence upward by two levels); see also *United States v. Stewart*, 33 F.3d 764, 770 (7th Cir. 1994) (stating there is no requirement that the victim must suffer financial loss).

n132. *United States v. Castellanos*, 81 F.3d 108, 110 (9th Cir. 1996) (observing that the plain language of the guideline suggests that vulnerability due to age per se was intended); see also *United States v. Kembitskey*, No. 97-50387, 1998 WL 231057, at 2 (9th Cir. 1998) (upholding an upward adjustment under 3A1.1(b) because the defendant knew or should have known the victims were unusually vulnerable due to their age); *United States v. Stover*, 93 F.3d 1379, 1386 (8th Cir. 1996) (stating that age is an expressly enumerated type of victim vulnerability).

n133. *Stewart*, 33 F.3d at 771. "The evidence supports an inference that Stewart targeted the elderly because he was aware of their concern about providing for their own terminal expenses without burdening their families." *Id.*

n134. *Castellanos*, 81 F.3d at 110. A real estate investment company targeted Hispanic investors. The court said that just because the victims were Hispanic they were not "vulnerable adults," but stated that the comments and case law make clear that the vulnerable adult classification may be supported by a generalized finding that members of a target group share a particular susceptibility. *Id.*

n135. See *18 U.S.C.S. app. 3B1.3*.

n136. *Id.*; see also *Stewart, 33 F.3d at 768*. A defendant occupies a position of public or private trust if he or she holds a professional or managerial position and has access to or authority over valuable things. *Id.* That position of trust "significantly facilitated the crime" if the position made it significantly easier to commit or conceal the crime. *Id.*

n137. *Stewart, 33 F.3d at 771*.

n138. *Id. at 766*. "Stewart was president and the operator of Pre-Need Services, Inc., an insurance firm specializing in the sale of annuities to the elderly." *Id. at 765*. He organized funeral directors to act as his agents to sell annuities to elderly persons to pay for their funeral expenses. *Id. at 766*. The victims were advised they could purchase an annuity that would pay the future expenses of their funerals while at the same time reducing their estate in order to qualify for Medicaid funds for nursing home expenses. *Id.* The elderly were informed the cost of the annuity would be less than the actual price of the funeral services, and any excess amount could go to their heirs. *Id.* Stewart used a pyramid scheme in which he used money from new clients to pay the expenses of previous clients. *Id.* Stewart induced 316 elderly persons to forward \$ 1.1 million into his scheme. *Id. at 765*. Instead of purchasing annuities, he converted the money for his own use. *Id. at 766*.

n139. *Id. at 765*.

n140. *Id. at 771*.

n141. *United States v. Kaye, 23 F.3d 50, 53 (2d Cir. 1994)*.

n142. *Id. at 51-52*. Though the victim became concerned and questioned her abuser about the finances, he continually assured her that she would get her money. *Id.*

n143. *Id. at 52, 53*.

n144. *Id. at 53*.

We conclude that an upward departure was warranted because (1) in formulating the fraud guideline, the Commission did not fully consider the degree of harm inflicted upon Annette Zabohonski; and (2) in formulating the vulnerable victim enhancement and the abuse of position of trust or use of special skill enhancement, the Commission did not fully consider the kind or degree of harm inflicted upon her.

Id. at 54.

n145. *Id. at 55*.

n146. *18 U.S.C. 2325-27 (2000)*. For a more detailed discussion of the SCAMS Act, see "Telemarketing" discussion, *infra* Part III.A.4.

n147. *18 U.S.C. 2326*.

n148. Id.

n149. Id. 2327.

n150. See *Cal. Penal Code 1170(b)* (West Supp. 2004). Any statute that specifies three possible terms of imprisonment shall order the imposition of the middle term. Id. However, if there are circumstances in aggravation of the crime, the court may impose the higher sentence. Id.

n151. See *id.* 1170.85(b) ("Upon conviction of any felony it shall be considered a circumstance in aggravation in imposing a term under subdivision (b) of Section 1170 if the victim of an offense is particularly vulnerable, or unable to defend himself or herself, due to age or significant disability."); see also *id.* 368(g). In this statute defining crimes against the elderly, "elder" means any person who is sixty-five years of age or older. Id.

n152. Robert G. Morvillo, *White-Collar Crime: Restitution for Victims*, N.Y. L.J., Apr. 5, 1994, at 3.

n153. Michela, *supra* note 6, at 575.

n154. See *18 U.S.C. 3663(a)(1)(A)* ("The court, when sentencing a defendant convicted of an offense under this title ... may order, in addition to ... any other penalty authorized by law, that the defendant make restitution to any victim of such offense."). In cases where the victim is deceased, the statute also authorizes the reimbursement of the victim's estate. Id. 3663(b)(5).

n155. Id. 2327. "In addition to any other civil or criminal penalty authorized by law, the court shall order restitution for any offense under this chapter." Id.

n156. Id. 2327(b)(4)(B).

n157. Starnes, *supra* note 21, at 223-24. "[A] key problem in fighting many types of fraud is finding the correct statute that covers the fraudulent activity." Id. at 211.

n158. Id. at 222; see also Hines, *supra* note 16, at 847-48.

n159. Starnes, *supra* note 21, at 211.

n160. Walsh, *supra* note 1. "[Many solicitors] are far more interested in scaring these seniors than they are in providing them with the facts." Id.

n161. Id.

n162. Id. Greg Marchildon, spokesman for the American Association of Retired Persons, stated, "Seniors are a top target of these folks" Id.

n163. Id.

n164. Id.; see also Editorial, *Seniors Targeted; Don't Believe the Fright Pitches*, *Syracuse Herald-J.*, Feb. 11, 1998, at A12, available at 1998 WL 4338476. "Important-sounding words are splashed across the envelopes ... [and] the letters always come with a coupon [to return donations]." Id.

n165. Walsh, *supra* note 1; see also Genevieve Fujimoto, Letters to the Editor, S.F. Examiner, Feb. 15, 1998, at C14, available at 1998 WL 5178653. In response to Diana Walsh's article about fright mail, see Walsh, *supra* note 1, this writer shared a similar story about her mother who lived at home, with minimal income from Social Security and small retirement benefits, but gave more than \$ 1000 per year to a deluge of such mail. Fujimoto, *supra*.

n166. Walsh, *supra* note 1. "'I didn't know that I could just turn them down,' Shelby said. 'I was thinking it was something I had to do.'" *Id.*

n167. *Id.*; see also Postal Assault on Old Folks, S.F. Examiner, Feb. 15, 1998, at C14, available at 1998 WL 5178654. The use of mooch lists is "distressingly effective in moving the susceptible to contribute." *Id.* The editorial notes that to remove themselves from commercial and nonprofit mailing lists, individuals can send their request to: Mailing Preference Service, DMA, P.O. Box 9008, Farmingdale, N.Y. 11738-9008. *Id.*

n168. Mass Mail, *supra* note 4, at 81.

n169. Walsh, *supra* note 1 (quoting Marsha Goldberger, Director of Ethics and Consumer Affairs in the Direct Marketing Association's Washington office).

n170. *Id.* One solicitor admitted to sending donors up to a dozen major pitches a month on four different letterheads. *Id.*

n171. *Id.* (quoting Belinda Johns, a deputy attorney general in California); see also Kevin Demarrais, Your Money's Worth: Make Your Charitable Gifts Count, Record (North N.J.), Dec. 7, 1997, at B1, available at 1997 WL 6913599. Some charities, including for-profit companies have sympathetic-sounding names, or names that closely resemble those of well-known charities. For instance, the American Cancer Society could be easily confused with the Cancer Fund of America. *Id.*

n172. Walsh, *supra* note 1. The president of the National Center for Public Policy Research justified the frightening approach by stating they "used to write explicit letters about her plans for the donations, but the pleas went unanswered." *Id.* In an unapologetic statement she said, "We assume most people are capable of taking care of themselves, and if there is something they have a desire about, they will let us know." *Id.*

n173. *Id.*

n174. *Id.*

n175. *Id.* (quoting U.S. Rep. Pete Stark, D-Hayward, "who for years has been trying to warn the public about fright mail").

n176. *Id.* (quoting Rep. Stark that "short of class-action suits against the groups, little can be done to stop them").

n177. *Id.*

n178. *Id.*

n179. See *supra* notes 168-78.

n180. E.g., *Fla. Stat. Ann.* 825.103(a), (b) (West 2000).

n181. E.g., *Cal. Penal Code* 368 (West 1999 & Supp. 2003); *Cal. Welf. & Inst. Code* 15610.27 (West 2001).

n182. See *supra* Part III.C.

n183. See Walsh, *supra* note 1 (quoting Rep. Stark stating, "It's a tenuous legal argument that frightening senior citizens is not allowable under the First Amendment").

n184. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (determining that a statute prohibiting radio broadcasting of indecent material into a person's home in the early afternoon did not merit First Amendment protection).

n185. *Frisby v. Schultz*, 487 U.S. 474, 488 (1988). A local ordinance stated, "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." *Id.* at 477.

n186. *Id.* at 477.

n187. *Id.* at 479. In her opinion, Justice O'Connor reiterated that an antipicketing ordinance operates at the core of the First Amendment by prohibiting picketing on an issue of public concern. *Id.* However, "even protected speech is not equally permissible in all places and at all times." *Id.* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985)) (alteration in original).

n188. *Id.* at 481 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). The Court determined that ample alternative channels of communication remained open to the picketers even if they were banned from picketing particular residences. *Id.* at 483. Picketers could go door-to-door, distribute literature, or even contact residents by telephone, short of harassment. *Id.* at 484.

n189. *Id.* "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Id.* at 484-85.

n190. *Id.* at 485.

n191. *Id.* at 486. The Court observed that even when picketers seek to disseminate a message to the general public, but target a specific resident, "their activity nonetheless inherently and offensively intrudes on residential privacy." *Id.*

n192. *Id.* at 488. The Court held: "Because the picketing prohibited by the Brookfield ordinance is speech directed primarily at those who are presumptively unwilling to receive it, the State has a substantial and justifiable interest in banning it." *Id.*

n193. *Id.* at 498-99 (Stevens, J., dissenting). Justice Stevens stated the following:

The picketers have a right to communicate their strong opposition to abortion to the doctor, but after they have had a fair opportunity to communicate that message, I see little justification for allowing them to remain in front of his home and repeat it over and over again simply to harm the doctor and his family.

Id. at 498.

n194. See *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 740 (1970). The regulation required the Postmaster General to order names removed permanently from mailing lists if the recipients determined the mail was sexually provocative and requested such removal. Id.

n195. Webster's Ninth New Collegiate Dictionary 438 (1989).

n196. E.g., *Tex. Hum. Res. Code Ann. 48.002* (Vernon 2001); see also Church, *supra* note 2, at 55. Ruth Crosson, age seventy-nine, was exploited when she trusted an insurance agent who promised low risk investments with a thirteen percent return. She invested \$ 100,000 of her life savings, plus additional money borrowed on a life insurance policy. The agent's Ponzi scheme (using money from new victims to make payments - for a brief time - to earlier ones) took it all. She now works to support a meager pension. Id.

n197. See *Swain v. Moore*, 71 A.2d 264, 267 (Del. Ch. 1950).

n198. Id.

n199. *Id. at 268*.

n200. Id.

n201. *18 U.S.C. 1341* (2000). Under the Federal Mail Fraud Act, persons who use the postal service to obtain money or property by false representations or promises shall be fined or imprisoned up to five years or both. Id.; see also id. 1343. False representations or promises transmitted by wire, radio, or television communication in interstate or foreign commerce are punishable by fines or imprisonment for up to five years or both. Id.; see also *18 U.S.C.S. app. 3A1.1* (Law. Co-op. 2003) (enhancement of two levels for crimes against vulnerable adult).

n202. *United States v. Caterino*, 957 F.2d 681, 682-83 (9th Cir. 1992).

n203. *Id. at 683*; see also *United States v. Kaye*, 23 F.3d 50, 51 (2d Cir. 1994) (prosecuting a stockbroker for mail fraud who defrauded his great aunt of the \$ 893,700 life savings she entrusted to him to invest on her behalf and enhancing his sentence based on vulnerable victim status plus an additional five months because of the degree of harm).

n204. See *infra* Appendix & Comparison Table.

n205. E.g., *Tex. Hum. Res. Code Ann. 48.002(3)* (Vernon 2001).

"Exploitation" means the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with the elderly or disabled person using the resources of an elderly or disabled

person for monetary or personal benefit, profit, or gain without the informed consent of the elderly or disabled person.

Id.

n206. E.g., id.

n207. E.g., *Mass. Ann. Laws ch. 19A, 14* (Law. Co-op. 2002). "Financial exploitation" means:

an act or omission by another person, which causes a substantial monetary or property loss to an elderly person, or causes a substantial monetary or property gain to the other person, which gain would otherwise benefit the elderly person but for the act or omission of such other person

n208. E.g., *Ariz. Rev. Stat. Ann. 46-456* (West Supp. 2002).

A person who is in a position of trust and confidence and who by intimidation or deception knowingly takes control, title, use or management of an incapacitated or vulnerable adult's asset or property with the intent to permanently deprive that person of the asset or property is guilty of theft

Id. 46-456(B). People are in positions of trust and confidence with an incapacitated or vulnerable person if they have assumed a duty to provide care to the person, are a joint tenant or tenant in common with the person, or have a fiduciary relationship with the person, such as being a guardian or conservator. Id. 46-456(G)(3); see also *Cal. Welf. & Inst. Code 15610.30* (West 2001).

n209. E.g., *Idaho Code 18-1505* (Michie 1997) ("'Exploitation' means an action which may include, but is not limited to, the misuse of a vulnerable adult's funds, property or resources by another person for profit or advantage."); *Minn. Stat. Ann. 609.2335* (West 2003) ("Whoever ... in the absence of legal authority ... acquires possession or control of an interest in funds or property of a vulnerable adult through the use of undue influence, harassment, or duress"); *Cal. Welf. & Inst. Code 15610.30*.

n210. E.g., *Ga. Code Ann. 30-5-3* (2003) ("'Elder person' means a person 65 years of age or older who is not a resident of a long-term care facility"); *Cal. Welf. & Inst. Code 15610.27* ("'Elder' means any person residing in this state, 65 years of age or older.").

n211. E.g., *Fla. Stat. Ann. 825.101, 825.103* (West 2000) ("'Disabled adult' means a person 18 years of age or older who suffers from a condition of physical or mental incapacitation ... or who has one or more physical or mental limitations that restrict the person's ability to perform the normal activities of daily living."); *Ind. Code Ann. 12-10-3-2* (Michie 2001) (defining "endangered adult" as individual at least eighteen years old and "incapable ... of managing or directing the management of the individual's property or providing or directing the provision of self-care" and either harmed or threatened with harm due to neglect, battery, or exploitation of the individual's personal services or property); *Kan. Crim. Code Ann. 21-3437(c)* (West 1995) (defining "dependent adult" as an individual eighteen years of age or older who is unable to protect their own interest, including a person cared for in an adult care home or in a private residence); see also *infra* Appendix & Comparison Table.

n212. See *supra* Part II.C.1.

n213. E.g., *Miss. Code Ann. 43-47-19(2)* (2000) (stating that any act or omission that "contributes to, tends to contribute to or results in" exploitation is a misdemeanor punishable by a fine up to \$ 1000, imprisonment for up to one year, or both); *Idaho Code 18-1505* (Michie 1997) ("Any person who abuses, exploits or neglects a vulnerable adult is guilty of a misdemeanor."); *720 Ill. Comp. Stat. 5/16-1.3* (2003) (defining the crime of "financial exploitation" of an elderly person as a person in a "position of trust or confidence" with an elderly person who knowingly uses deception or intimidation to gain permanent control of the elderly person's property and deprives them of the use, benefit, or possession of the property); see also *infra* Appendix & Comparison Table.

n214. E.g., *Idaho Code 18-1505*, 18-113 (Michie 1997).

n215. E.g., *Fla. Stat. Ann. 825.103* (West 2000). If more than \$ 100,000 is involved, the crime is a first degree felony with punishment of a prison term of up to thirty years and fine of up to \$ 10,000. *Id.* If an amount from \$ 20,000 to \$ 100,000 is involved, the crime is a second degree felony with punishment of a prison term of up to fifteen years and fine of up to \$ 10,000. *Id.* If less than \$ 20,000 is involved, the crime is a third degree felony with punishment of a prison term of up to five years and fine of up to \$ 5000. *Id.*

n216. See, e.g., *Cuda v. State*, 639 So. 2d 22, 23 (Fla. 1994).

n217. *Id.*

n218. *Fla. Stat. Ann. 415.111(5)* (West 1991).

n219. *Cuda*, 639 So. 2d at 25.

n220. *Id.* at 24.

n221. *Id.* at 24-25.

n222. *720 Ill. Comp. Stat. 5/16-1.3* (2003); see also *Cuda*, 639 So. 2d at 24-25.

n223. *Cuda*, 639 So. 2d at 24.

n224. *Id.*

n225. See *supra* note 109.

n226. *Id.* 825.103(1)(b).

Obtaining or using, endeavoring to obtain or use, or conspiring with another to obtain or use an elderly person's ... funds, assets, or property with the intent to temporarily or permanently deprive the elderly person ... of the use, benefit, or possession of the funds, assets, or property, or to benefit someone other than the elderly person ... by a person who knows or reasonably should know that the elderly person ... lacks the capacity to consent.

Id.

n227. See, e.g., *supra* Part II.B.4.

n228. Mass Mail, supra note 4, at 60; see also Smythe, supra note 24, at 367. Attorney General Bob Butterworth indicated that in February 1998, his office filed a civil complaint against American Family Publishers, a sweepstakes marketer, for tactics used in the solicitations which made false suggestions "that recipients were one of only two winning ticket holders competing for an \$ 11 million prize." Butterworth, supra note 4, at 61. The purpose for these type of deceptive solicitations is to place tight deadlines on the recipients in claiming the prize, convincing consumers they must act quickly by purchasing magazine to claim the prize. Those most often victimized are vulnerable individuals including the elderly. See also Smythe, supra note 24, at 355. Smythe indicates that fraudulent telemarketers tell their victims that they are guaranteed to win one of several prizes, including vacation packages, large-screen televisions, and cash awards. "Victims are then informed that receipt of the prize is conditional - they must pay money or buy merchandise in order to claim the award." Id. at 356.

n229. Mass Mail, supra note 4, at 61.

n230. Id. An elderly Florida gentlemen who suffers from dementia spent \$ 30,000 in eighteen months on a magazines sweepstakes, and his apartment was full of his purchases, but he never received the prize. Id.

n231. Mass Mail, supra note 4, at 77 (statement of Stanley F. Pruss, Assistant Attorney Gen. in Charge, Consumer Protection Div., Mich. Dep't of Attorney Gen.); see also Bratkiewicz, supra note 6, at 590-91.

n232. Mass Mail, supra note 4, at 77 (statement of Stanley F. Pruss, Assistant Attorney Gen. in Charge, Consumer Protection Div., Mich. Dep't of Attorney Gen.). Persons of all ages receive these mailings, and they are almost always unsolicited, unwanted, annoying, and frustrating. Id.

n233. Id. The words are usually in large bold print. Id.

n234. Id.

n235. Id. at 78.

n236. Id.; see also id. at 63 (remarks of Attorney General Bob Butterworth). Entry applications are purposely made extremely complex. Also, the message "no purchase is necessary to enter the sweepstakes [is] ... obscured or given little or no prominence, [and] often contradicted by the content of the solicitation piece." Id.

n237. Id. at 78.

n238. Id.; see also Newman Flanagan, Message from the Executive Director, Prosecutor, July/Aug. 1998, at 6, 6. "In some respects 'fiscal abuse' can be more devastating than the physical or psychological abuse" when people lose their life savings to slick scam artists or even family members. Id. "They've lost everything, including their pride." Id.

n239. 18 U.S.C. 1341 (2000); see also id. 1342. Fraud by the use of mail service and a fictitious name or address is also punished by fines and imprisonment for up to five years or both. Id.

n240. See supra Part II.B.4.

n241. See, e.g., *Fla. Stat. Ann. 817.034* (West 1994).

n242. E.g., *Minn. Stat. Ann. 325F.71* (West 1995 & Supp. 2000); see also *Ala. Code 8-19D-1, 2* (Supp. 2001). Alabama's recent Civil Action for Deceptive Sweepstakes Solicitations law allows punitive damages of up to three times compensatory damages. *Id.*

n243. *Minn. Stat. Ann. 325F.71*. "Restitution ordered ... shall be given priority over imposition of civil penalties" and the victim may bring civil action and receive damages plus costs and reasonable attorney's fees. *Id.*

n244. *18 U.S.C. 2325-27*.

n245. Michela, *supra* note 6, at 578-79. Because of the deteriorating reputation of the industry, banks became very cautious about doing business with telemarketers. *Id.*

n246. *Id.* at 580.

n247. *18 U.S.C. 1343*. False representations or promises transmitted by wire, radio, or television communication in interstate or foreign commerce are punishable by fines or imprisonment or both. *Id.*

n248. *18 U.S.C.S. app. 3A1.1* (Law. Co-op. 1998).

n249. *18 U.S.C. 2326(2)*.

n250. E.g., *Fla. Stat. Ann. 501.603-.626* (West 1997 & Supp. 2000); see also *Tex. Bus. & Com. Code Ann. 37.01-.05* (Vernon 2002).

n251. See Nat'l Ass'n of Attorneys Gen., NAAG, AARP, FBI, & Others Announce "Operation Unload," NAAG Consumer Protection Rep., Dec. 1996, at 4 [hereinafter Operation Unload]. In a program begun in 1996 volunteers phoned people who had been specifically targeted by fraudulent telemarketers to give warnings and to help consumers protect themselves from such scam artists. See also Nat'l Ass'n of Attorneys Gen., New York - Reverse Boiler Room, NAAG Consumer Protection Rep., July 1997, at 25 [hereinafter Reverse Boiler Room]. Volunteers warned senior citizens whose names appeared on telemarketers' mooch lists of likely victims that "they are more likely to be targeted for fraud and to use extra caution when answering the phone."

n252. See Michela, *supra* note 6, at 556-58 (discussing how customers purchase services and products in response to offers given over the phone).

n253. Church, *supra* note 2, at 54. Mary Ann Downs, seventy-seven, former real estate saleswoman and widow of a judge, was grieving and ill when a telemarketer's voice sympathized with her troubles. The voice then cheered her up with news she had won a prize worth thousands of dollars. However, to collect it she had to buy something from a marketing company. She sent \$ 200 for cosmetics. News came that she had surely won the prize, but had to purchase a few more products first. The prize remained illusive. Soon calls began coming from similar companies with similar stories of prizes. Seventy-four thousand dollars later, her children discovered the situation. To escape the calls she moved to another city and had an unlisted phone number. There she received a call from a lawyer who sympathized with her losses and promised he could recover her \$ 74,000; it would only cost her \$ 1950. She sent the money and never heard from him again. *Id.*

n254. Starnes, *supra* note 21, at 206-07.

n255. Michela, *supra* note 6, at 554.

n256. *Id.* at 555 (stating that the "number and complexity of fraudulent telemarketing scams have continued to increase and have touched literally every geographical region of the country and every segment of society").

n257. See Church, *supra* note 2, at 56-57.

In bigger boiler rooms, jobs are specialized. "Fronters" make the initial call, working from lists of entrants into legitimate prize contests or from obituaries, or sometimes just looking through the phone books for "elderly-sounding" names like Viola or Henrietta... "Closers" make follow-up calls to likely marks; "reload men" make them to victims who have succumbed to previous scams. "No-sales men" make a pitch to the suspicious.

Id.; see also Michela, *supra* note 6, at 558-59 (discussing how telemarketers look for potential customers very similar to existing customers or who fit a specific target group for the particular product). New customer sources include phone books, magazine subscriber lists, list brokers, and club rosters. *Id.*; see also Bratkiewicz, *supra* note 6, at 591-92 (discussing telemarketing practices and sources for target customers).

n258. See Church, *supra* note 2, at 56; see also Bratkiewicz, *supra* note 6, at 591-92 (discussing the transient nature of boiler room operations, which makes "the imposition of criminal and civil sanctions against illicit telemarketers especially difficult").

n259. *Id.*; see also Consumer Fraud, *supra* note 26, at 96 (noting that callers from Canada often do not make it clear the calls originate outside the United States, and people are unaware that U.S. rules concerning credit card dispute resolution procedures, criminal enforcement, and three-day cooling off periods do not always apply abroad).

n260. See Trebilcock, *supra* note 11, at 88; see also Bratkiewicz, *supra* note 6, at 591 (indicating that boiler rooms are designed to be quickly dismantled and relocated so the telemarketer can avoid detection by law enforcement).

n261. Starnes, *supra* note 21, at 204-05; see also Am. Ass'n of Retired Pers., *supra* note 48, at 9 (finding that forty-two percent of persons over the age of fifty had received twenty or more calls over the past six months from telemarketers who tried to sell them something, talked to them about a contest or sweepstakes, or asked for a contribution to a charity).

n262. See Am. Ass'n of Retired Pers., *supra* note 48, at 9; see also *United States v. Williams*, No. 96-CR-184, 1997 WL 573379, at 1-2 (N.D. Ill. Sept. 10, 1997). Williams purchased lists with the names and phone numbers of individuals who had responded to sweepstakes entry forms. He telephoned them, telling them that they had won a cash prize in the sweepstakes. However, he told them that before he could send it, they would have to send him money for income tax purposes. If they sent money, he would reload their names and contact them again to send more money. If they sent more money, the process would be repeated over and over again; but the prize never materialized. He told one victim she had won \$ 1 million but "not to tell anyone about the prize, because it would be better if she could surprise her family and friends." In all, he was able to swindle victims of over \$ 120,000 before getting caught. *Id.*; see also Bratkiewicz, *supra* note 6, at 591-92.

n263. See Michela, *supra* note 6, at 579-80. Three hundred thousand legitimate telemarketers generate \$ 435,000,000 in sales nationwide each year. *Id.* at 578.

n264. *Id.* at 578.

n265. *Id.* at 579-80.

n266. *18 U.S.C. 2325-27* (2000).

n267. *Id.* 1342. False representations or promises transmitted by wire, radio, or television communication in interstate or foreign commerce are punishable by fines or imprisonment for up to five years or both. *Id.*

n268. *Id.* 2326(1).

n269. *Id.* 2326(2). Offenders that victimize ten or more persons over the age of fifty-five, or who target persons over the age of fifty-five, are subject to enhanced penalties. *Id.*

n270. *Id.* 2327.

n271. See *id.* The court may not decline to issue an order because of the economic circumstances of the defendant or because the victim is entitled to receive compensation for injuries from an insurance company. *Id.*

n272. See *infra* Appendix & Comparison Table.

n273. *Fla. Stat. Ann. 501.605, 501.623* (West 2002); see also *Ala. Code 8-19A-1 to 8-19A-24* (Supp. 2001). Alabama's Telemarketing Act is very extensive.

n274. *Nev. Rev. Stat. 599B.100(2)* (Supp. 2001).

n275. *Tex. Bus. & Com. Code Ann. 37.01* (Vernon 2002). "'Telephone solicitor' means a person who makes or causes to be made a consumer telephone call, including a call made by an automated dialing device." *Id.*

n276. *Id.* 37.02. Calls can only be made between the hours of 9 a.m. and 9 p.m. on weekdays and Saturdays, and between noon and 9 p.m. on Sundays. *Id.*

n277. *Id.* 37.03.

n278. *Id.* 37.04.

n279. *Id.* 37.05. "A consumer injured by a violation of this chapter may bring any action for recovery of damages. The damages awarded may not be less than the amount paid by the buyer to the telephone solicitor, plus reasonable attorney fees and court costs." *Id.*

n280. See *Ga. Code Ann. 10-5B-1 to 10-5B-8* (2000).

n281. *Id.* 10-5B-6. Punishment for a first offense is one to ten years; for subsequent offenses, punishment is one to twenty years. *Id.*

n282. *Id.*

n283. See Michela, *supra* note 6, at 561-62; see also Starnes, *supra* note 21, at 207.

n284. Trebilcock, *supra* note 11, at 91.

n285. *Id.*; see also Dawn Bormann, Phone Sharks Hang Up on Iowa, Des Moines Reg., Jan. 29, 1998, at 1A, available at 1998 WL 3191699. Iowa has won over thirty convictions with recorded evidence. *Id.* Iowa officials sent warning signs to suspicious phone operations across the country to put on their walls. The signs say "Do not call Iowa!" *Id.*

n286. Trebilcock, *supra* note 11, at 91; see also Consumer Fraud, *supra* note 26, at 93-98. The National Fraud Information Center receives calls and reports of fraud. It immediately forwards the information to appropriate jurisdictions and agencies, usually within three minutes of receiving the call. In 1996, a Florida woman reported that she had just sent money by overnight carrier to Toronto, Canada. Toronto police seized the money the next morning as it was being delivered. *Id.*

n287. See Operation Unload, *supra* note 251, at 4 (noting that volunteers phoned people who had been specifically targeted by fraudulent telemarketers to give warnings and to help consumers protect themselves from such scam artists); see also Reverse Boiler Room, *supra* note 251, at 25 (indicating that volunteers warned senior citizens whose names appeared on telemarketers' mooch lists of likely victims that "they are more likely to be targeted for fraud and to use extra caution when answering the phone").

n288. See *infra* Appendix & Comparison Table.

n289. See *Mich. Comp. Laws 400.273* (1997).

n290. *Id.*

n291. *Id.* 400.287.

n292. *Id.* 400.290.

n293. *Id.* 400.293. Other acts carrying the same penalty include any violation of the statute or soliciting for any organization that is not properly licensed. *Id.* Also, prosecution under the statute does not limit or restrict prosecution under the general criminal statutes of the state. *Id.*

n294. *Id.* 400.290, 400.293.

n295. See Bryan Clark & Brent Willey, Don't Be Taken in by the Phony Investing Pitches, *Money Mag.*, Mar. 1, 1997, available at 1997 WL 2490612; see also Church, *supra* note 2, at 54. AARP figures that while anyone sixty or older is likely to be on at least one mooch list, a woman seventy-five or older is virtually guaranteed to be. *Id.*; see also Trebilcock, *supra* note 11, at 90. Mooch lists include not only your name, address, and phone number, but also a history of your financial dealings with other telemarketers. *Id.*; see also Mass Mail, *supra* note 4, at 78 (statement of Stanley F. Pruss, Assistant Attorney Gen. in Charge, Consumer Protection Div., Mich. Dep't of Attorney Gen.). Legislation should prohibit selling, exchanging, or trading certain confidential personal information. *Id.* at 80.

n296. See Trebilcock, *supra* note 11, at 89.

n297. *Id.*; see also Michela, *supra* note 6, at 558. "The first and most important task every telemarketing operation must perform is to locate potential customers." *Id.*

n298. See Trebilcock, *supra* note 11, at 89-90.

n299. *Id.* at 90.

n300. *Id.*; see also Mass Mail, *supra* note 4, at 64. "'Mooch lists' are pure gold to disreputable marketers who zero in on those most vulnerable to deceptive sweepstakes pitches." *Id.*; see also Tresa Baldas, Seniors Get Help to Avoid Phone Scams, *Chi. Trib.*, Aug. 20, 1998, at 4, available at 1998 WL 2887599. The lists can fetch thousands of dollars on the black market, with a single name and phone number being worth up to \$ 200. *Id.*; see also A.P. News, Iowa Makes Inroads Against Scams; Telephone, Mail Fraud Costs Victims - Many Elderly - \$ 44 Billion a Year, *Omaha World-Herald*, Oct. 12, 1997, at 1B, available at 1997 WL 6316453. Persons on mooch lists are branded as easy marks and can count on getting a call. *Id.*

n301. See Trebilcock, *supra* note 11, at 90.

n302. *United States v. O'Neil*, 118 F.3d 65, 69, 75-76 (2d Cir. 1997).

n303. See Trebilcock, *supra* note 11, at 90 (noting that people either learn their lesson after the first time or get hooked and lose thousands); see also Erick Schonfeld, Caution: They're Out to Steal Your Money, *Fortune Mag.*, Aug. 18, 1997, at 142, 146. Names from mooch lists are circulated so con artists can contact them and offer to help get the victims' money back. *Id.*

n304. Michela, *supra* note 6, at 608-09.

n305. See *supra* Part II.C.4.

n306. *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978) (determining that a statute prohibiting radio broadcasting of indecent material into a person's home in the early afternoon does not merit First Amendment protection).

n307. *Frisby v. Schultz*, 487 U.S. 474, 488 (1988). The purpose of the ban was to protect and preserve the home and allow a feeling of well-being, tranquility, and privacy. *Id.* at 477. For a detailed discussion of the courts' right to protect one's privacy in one's home, see *infra* Part III.A.

n308. *Id.*

n309. *Id.* at 479.

n310. *Id.* at 481 (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

n311. *Id.* at 484 (citing *Carey v. Brown*, 447 U.S. 455, 471 (1980)). "[A] special benefit of the privacy all citizens enjoy within their own walls, which the State may legislate to protect, is an ability to avoid intrusions." *Id.* at 484-85.

n312. *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 740 (1970).

n313. Bratkiewicz, *supra* note 6, at 593.

n314. *Id.*

n315. See *id.* at 593 n.67 (citing Tracy Roth, *The ATA in Trouble*, *Telemarketing & Call Center Solutions Mag.*, Jan. 1, 2000, at 6, available at 2000 WL 16002139). "Telewatch, an independent regulatory group established by the ATA to set industry standards for telemarketing, has been plagued by a 'lack of forward momentum' and was re-absorbed by the fiscally troubled ATA." *Id.*

n316. *Id.* at 593.

n317. *Id.* at 593-97 (providing a detailed account of the federal government's efforts to protect the elderly from abuse).

n318. *Id.* at 593.

n319. *Id.*; see also 18 U.S.C. 1343 (1952); 18 U.S.C. 371 (1909).

n320. Bratkiewicz, *supra* note 6, at 594 n.71.

n321. See 18 U.S.C. 1956-57 (1986).

n322. See *id.* 1301-02.

n323. See *id.* 1344.

n324. Bratkiewicz, *supra* note 6, at 594 (citing 15 U.S.C. 6103(a) (1994)). Bratkiewicz notes that the Telemarketing Sales Rule also aids the FTC in fighting fraud by regulating the business practices of telemarketers. *Id.* The Act prohibits abusive sales tactics, requires that telemarketers reveal the value of a prize or investment, and limits when telemarketers may call customers. *Id.* They must also disclose the actual odds of winning a prize, the costs involved, and the telemarketer's cancellation policies. *Id.* at 594-95. The Sales Rule subjects its violators to a maximum of \$ 10,000 per violation. *Id.* at 595.

n325. Bratkiewicz, *supra* note 6, at 595.

n326. 18 U.S.C. 2326 (1994). For a detailed discussion of the SCAMS Act, see *supra* Part II.

n327. 16 C.F.R. pt. 310 (2003); see also Bratkiewicz, *supra* note 6, at 594.

n328. 16 C.F.R. 310.4. For a detailed discussion of the Sales Rules provision, see Bratkiewicz, *supra* note 6, at 594-95.

n329. 16 C.F.R. 310.4.

n330. *Id.* 310.3(a)(2)(v).

n331. *Id.* 310.4(c).

n332. Bratkiewicz, *supra* note 6, at 594-95 (footnotes omitted); see also *16 C.F.R. 310.3 (a)(1)(i)-(iv)*.

n333. *15 U.S.C. 45(m)(1)(A)* (2000).

n334. See Bratkiewicz, *supra* note 6, at 595. Bratkiewicz notes the following:

The Telemarketing Act requires the FTC to conduct a comprehensive evaluation of the Telemarketing Act's effectiveness five years after the adoption of the Sales Rules, and the FTC will then recommend possible modifications. Pursuant to the Telemarketing Act's directive, the FTC's evaluation should occur in the summer of 2000. The role that the Telemarketing Act and SCAMS Act will play in protecting seniors from telemarketing fraud also depends upon whether the currently pending Seniors Safety Act of 1999 ... is enacted into law.

Id. (footnotes omitted).

n335. Seniors Safety Act of 1999, S. 751, 106th Cong. (1999).

n336. *Id.*

n337. See Bratkiewicz, *supra* note 6, at 596.

n338. *Id.*

n339. *Id.* (indicating that in addition to the FTC's responsibilities, the DOJ would also maintain a computerized database of all companies found guilty of engaging in illegal telemarketing practices and provide state law enforcement agencies access to the information); see also Seniors Safety Act of 1999, S. 751, 106th Cong. 301(a)-(b) (1999).

n340. Bratkiewicz, *supra* note 6, at 596.

n341. *Id.*

n342. *Id.*

n343. *Id.*

n344. *Id.*

n345. *Id.* at 597.

n346. *Id.* at 597-98.

n347. *Id.* at 597 & n.106-11.

n348. See Hines, *supra* note 16, at 857.

n349. *Id.* at 858.

n350. *Id.*

n351. Whether a lawmaker or researcher can find appropriate state laws depends on how they are organized. The age of computers requires searches by "terms." Connecting all laws by using a common term such as "elderly person" or "vulnerable adult" facilitates such searches. Some states do this. However, other states use such different terms that a search can leave many protective laws hidden. For instance, one state that has major protective laws uses different terms in different statutes. Enhancements for physical crimes against the elderly use three different ages for three different crimes, and no common term facilitates finding them. Helpful steps in some states include sections that cross reference laws in separate codes. The strongest suggestion would be to choose a term commonly used among states and use that term in every law applicable to elderly persons. Thus a computer word search would instantly identify all the protection a state affords its citizens.

Chapter 74.34 RCW
Abuse of vulnerable adults

RCW Sections

- 74.34.005 Findings.
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- 74.34.140 Protection of vulnerable adults -- Execution of protective order.
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- 74.34.200 Abandonment, abuse, financial exploitation, or neglect of a vulnerable adult -- Cause of action for damages -- Legislative intent.
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- 74.34.210 Order for protection or action for damages -- Standing -- Jurisdiction.
- 74.34.300 Vulnerable adult fatality reviews.
- 74.34.900 Severability -- 1984 c 97.
- 74.34.901 Severability -- 1986 c 187.

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74.34.902 Construction -- Chapter applicable to state registered domestic partnerships -- 2009 c 521.

Notes:

Domestic violence prevention, authority of department of social and health services to seek relief on behalf of vulnerable adults: RCW 26.50.021.

Patients in nursing homes and hospitals, abuse: Chapter 70.124 RCW.

**74.34.005
Findings.**

The legislature finds and declares that:

- (1) Some adults are vulnerable and may be subjected to abuse, neglect, financial exploitation, or abandonment by a family member, care provider, or other person who has a relationship with the vulnerable adult;
- (2) A vulnerable adult may be home bound or otherwise unable to represent himself or herself in court or to retain legal counsel in order to obtain the relief available under this chapter or other protections offered through the courts;
- (3) A vulnerable adult may lack the ability to perform or obtain those services necessary to maintain his or her well-being because he or she lacks the capacity for consent;
- (4) A vulnerable adult may have health problems that place him or her in a dependent position;
- (5) The department and appropriate agencies must be prepared to receive reports of abandonment, abuse, financial exploitation, or neglect of vulnerable adults;
- (6) The department must provide protective services in the least restrictive environment appropriate and available to the vulnerable adult.

[1999 c 176 § 2.]

Notes:

Findings -- Purpose--1999 c 176: "The legislature finds that the provisions for the protection of vulnerable adults found in chapters 26.44, 70.124, and 74.34 RCW contain different definitions for abandonment, abuse, exploitation, and neglect. The legislature finds that combining the sections of these chapters that pertain to the protection of vulnerable adults would better serve this state's population of vulnerable adults. The purpose of chapter 74.34 RCW is to provide the department and law enforcement agencies with the authority to investigate complaints of abandonment, abuse, financial exploitation, or neglect of vulnerable adults and to provide protective services and legal remedies to protect these vulnerable adults." [1999 c 176 § 1.]

Severability -- 1999 c 176: "If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected." [1999 c 176 § 36.]

Conflict with federal requirements -- 1999 c 176: "If any part of this act is found to be in conflict with federal requirements that are a prescribed condition to the allocation of federal funds to the state, the conflicting part of this act is inoperative solely to the extent of the conflict and with respect to the agencies directly affected, and this finding does not affect the operation of the remainder of this act in its application to the agencies concerned. Rules adopted under this act must meet federal requirements that are a necessary condition to the receipt of federal funds by the state." [1999 c 176 § 37.]

**74.34.020
Definitions.**

*** CHANGE IN 2010 *** (SEE 6202-S.SL) ***

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

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(1) "Abandonment" means action or inaction by a person or entity with a duty of care for a vulnerable adult that leaves the vulnerable person without the means or ability to obtain necessary food, clothing, shelter, or health care.

(2) "Abuse" means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:

(a) "Sexual abuse" means any form of nonconsensual sexual contact, including but not limited to unwanted or inappropriate touching, rape, sodomy, sexual coercion, sexually explicit photographing, and sexual harassment. Sexual abuse includes any sexual contact between a staff person, who is not also a resident or client, of a facility or a staff person of a program authorized under chapter 71A.12 RCW, and a vulnerable adult living in that facility or receiving service from a program authorized under chapter 71A.12 RCW, whether or not it is consensual.

(b) "Physical abuse" means the willful action of inflicting bodily injury or physical mistreatment. Physical abuse includes, but is not limited to, striking with or without an object, slapping, pinching, choking, kicking, shoving, prodding, or the use of chemical restraints or physical restraints unless the restraints are consistent with licensing requirements, and includes restraints that are otherwise being used inappropriately.

(c) "Mental abuse" means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.

(d) "Exploitation" means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.

(3) "Consent" means express written consent granted after the vulnerable adult or his or her legal representative has been fully informed of the nature of the services to be offered and that the receipt of services is voluntary.

(4) "Department" means the department of social and health services.

(5) "Facility" means a residence licensed or required to be licensed under chapter 18.20 RCW, boarding homes; chapter 18.51 RCW, nursing homes; chapter 70.128 RCW, adult family homes; chapter 72.36 RCW, soldiers' homes; or chapter 71A.20 RCW, residential habilitation centers; or any other facility licensed by the department.

(6) "Financial exploitation" means the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage other than for the vulnerable adult's profit or advantage.

(7) "Incapacitated person" means a person who is at a significant risk of personal or financial harm under RCW 11.88.010 (1) (a), (b), (c), or (d).

(8) "Individual provider" means a person under contract with the department to provide services in the home under chapter 74.09 or 74.39A RCW.

(9) "Interested person" means a person who demonstrates to the court's satisfaction that the person is interested in the welfare of the vulnerable adult, that the person has a good faith belief that the court's intervention is necessary, and that the vulnerable adult is unable, due to incapacity, undue influence, or duress at the time the petition is filed, to protect his or her own interests.

(10) "Mandated reporter" is an employee of the department; law enforcement officer; social worker; professional school personnel; individual provider; an employee of a facility; an operator of a facility; an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency; county coroner or medical examiner; Christian Science practitioner; or health care provider subject to chapter 18.130 RCW.

(11) "Neglect" means (a) a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

(12) "Permissive reporter" means any person, including, but not limited to, an employee of a financial institution, attorney, or volunteer in a facility or program providing services for vulnerable adults.

(13) "Protective services" means any services provided by the department to a vulnerable adult with the consent of the vulnerable adult, or the legal representative of the vulnerable adult, who has been abandoned, abused, financially exploited, neglected, or in a state of self-neglect. These services may include, but are not limited to case management, social casework,

home care, placement, arranging for medical evaluations, psychological evaluations, day care, or referral for legal assistance.

(14) "Self-neglect" means the failure of a vulnerable adult, not living in a facility, to provide for himself or herself the goods and services necessary for the vulnerable adult's physical or mental health, and the absence of which impairs or threatens the vulnerable adult's well-being. This definition may include a vulnerable adult who is receiving services through home health, hospice, or a home care agency, or an individual provider when the neglect is not a result of inaction by that agency or individual provider.

(15) "Vulnerable adult" includes a person:

- (a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or
- (b) Found incapacitated under chapter 11.88 RCW; or
- (c) Who has a developmental disability as defined under RCW 71A.10.020; or
- (d) Admitted to any facility; or
- (e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or
- (f) Receiving services from an individual provider.

[2007 c 312 § 1; 2006 c 339 § 109; 2003 c 230 § 1; 1999 c 176 § 3; 1997 c 392 § 523; 1995 1st sp.s. c 18 § 84; 1984 c 97 § 8.]

Notes:

Intent -- Part headings not law -- 2006 c 339: See notes following RCW 70.96A.325.

Effective date -- 2003 c 230: "This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately [May 12, 2003]." [2003 c 230 § 3.]

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Short title -- Findings -- Construction -- Conflict with federal requirements -- Part headings and captions not law -- 1997 c 392: See notes following RCW 74.39A.009.

Conflict with federal requirements -- Severability -- Effective date -- 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.

74.34.021

Vulnerable adult — Definition.

For the purposes of this chapter, the term "vulnerable adult" includes persons receiving services from any individual who for compensation serves as a personal aide to a person who self-directs his or her own care in his or her home under chapter 336, Laws of 1999.

[1999 c 336 § 6.]

Notes:

Finding -- Intent -- 1999 c 336: See note following RCW 74.39.007.

74.34.025

Limitation on recovery for protective services and benefits.

The cost of benefits and services provided to a vulnerable adult under this chapter with state funds only does not constitute an obligation or lien and is not recoverable from the recipient of the services or from the recipient's estate, whether by lien,

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adjustment, or any other means of recovery.

[1999 c 176 § 4; 1997 c 392 § 304.]

Notes:

Findings – Purpose – Severability – Conflict with federal requirements – 1999 c 176: See notes following RCW 74.34.005.

Short title – Findings – Construction – Conflict with federal requirements – Part headings and captions not law – 1997 c 392: See notes following RCW 74.39A.009.

74.34.035

Reports — Mandated and permissive — Contents — Confidentiality.

***** CHANGE IN 2010 *** (SEE 6202-S.SL) *****

(1) When there is reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect of a vulnerable adult has occurred, mandated reporters shall immediately report to the department.

(2) When there is reason to suspect that sexual assault has occurred, mandated reporters shall immediately report to the appropriate law enforcement agency and to the department.

(3) When there is reason to suspect that physical assault has occurred or there is reasonable cause to believe that an act has caused fear of imminent harm:

(a) Mandated reporters shall immediately report to the department; and

(b) Mandated reporters shall immediately report to the appropriate law enforcement agency, except as provided in subsection (4) of this section.

(4) A mandated reporter is not required to report to a law enforcement agency, unless requested by the injured vulnerable adult or his or her legal representative or family member, an incident of physical assault between vulnerable adults that causes minor bodily injury and does not require more than basic first aid, unless:

(a) The injury appears on the back, face, head, neck, chest, breasts, groin, inner thigh, buttock, genital, or anal area;

(b) There is a fracture;

(c) There is a pattern of physical assault between the same vulnerable adults or involving the same vulnerable adults; or

(d) There is an attempt to choke a vulnerable adult.

(5) Permissive reporters may report to the department or a law enforcement agency when there is reasonable cause to believe that a vulnerable adult is being or has been abandoned, abused, financially exploited, or neglected.

(6) No facility, as defined by this chapter, agency licensed or required to be licensed under chapter 70.127 RCW, or facility or agency under contract with the department to provide care for vulnerable adults may develop policies or procedures that interfere with the reporting requirements of this chapter.

(7) Each report, oral or written, must contain as much as possible of the following information:

(a) The name and address of the person making the report;

(b) The name and address of the vulnerable adult and the name of the facility or agency providing care for the vulnerable adult;

(c) The name and address of the legal guardian or alternate decision maker;

(d) The nature and extent of the abandonment, abuse, financial exploitation, neglect, or self-neglect;

(e) Any history of previous abandonment, abuse, financial exploitation, neglect, or self-neglect;

(f) The identity of the alleged perpetrator, if known; and

(g) Other information that may be helpful in establishing the extent of abandonment, abuse, financial exploitation, neglect, or the cause of death of the deceased vulnerable adult.

(8) Unless there is a judicial proceeding or the person consents, the identity of the person making the report under this section is confidential.

[2003 c 230 § 2; 1999 c 176 § 5.]

Notes:

Effective date -- 2003 c 230: See note following RCW 74.34.020.

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.040

Reports — Contents — Identity confidential.

The reports made under *RCW 74.34.030 shall contain the following information if known:

- (1) Identification of the vulnerable adult;
- (2) The nature and extent of the suspected abuse, neglect, exploitation, or abandonment;
- (3) Evidence of previous abuse, neglect, exploitation, or abandonment;
- (4) The name and address of the person making the report; and
- (5) Any other helpful information.

Unless there is a judicial proceeding or the person consents, the identity of the person making the report is confidential.

[1986 c 187 § 2; 1984 c 97 § 10.]

Notes:

***Reviser's note:** RCW 74.34.030 was repealed by 1999 c 176 § 35.

74.34.050

Immunity from liability.

(1) A person participating in good faith in making a report under this chapter or testifying about alleged abuse, neglect, abandonment, financial exploitation, or self-neglect of a vulnerable adult in a judicial or administrative proceeding under this chapter is immune from liability resulting from the report or testimony. The making of permissive reports as allowed in this chapter does not create any duty to report and no civil liability shall attach for any failure to make a permissive report as allowed under this chapter.

(2) Conduct conforming with the reporting and testifying provisions of this chapter shall not be deemed a violation of any confidential communication privilege. Nothing in this chapter shall be construed as superseding or abridging remedies provided in chapter 4.92 RCW.

[1999 c 176 § 6; 1997 c 386 § 34; 1986 c 187 § 3; 1984 c 97 § 11.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

Application -- Effective date -- 1997 c 386: See notes following RCW 13.50.010.

74.34.053**Failure to report — False reports — Penalties.**

(1) A person who is required to make a report under this chapter and who knowingly fails to make the report is guilty of a gross misdemeanor.

(2) A person who intentionally, maliciously, or in bad faith makes a false report of alleged abandonment, abuse, financial exploitation, or neglect of a vulnerable adult is guilty of a misdemeanor.

[1999 c 176 § 7.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.063**Response to reports — Timing — Reports to law enforcement agencies — Notification to licensing authority.**

(1) The department shall initiate a response to a report, no later than twenty-four hours after knowledge of the report, of suspected abandonment, abuse, financial exploitation, neglect, or self-neglect of a vulnerable adult.

(2) When the initial report or investigation by the department indicates that the alleged abandonment, abuse, financial exploitation, or neglect may be criminal, the department shall make an immediate report to the appropriate law enforcement agency. The department and law enforcement will coordinate in investigating reports made under this chapter. The department may provide protective services and other remedies as specified in this chapter.

(3) The law enforcement agency or the department shall report the incident in writing to the proper county prosecutor or city attorney for appropriate action whenever the investigation reveals that a crime may have been committed.

(4) The department and law enforcement may share information contained in reports and findings of abandonment, abuse, financial exploitation, and neglect of vulnerable adults, consistent with RCW 74.04.060, chapter 42.56 RCW, and other applicable confidentiality laws.

(5) The department shall notify the proper licensing authority concerning any report received under this chapter that alleges that a person who is professionally licensed, certified, or registered under Title 18 RCW has abandoned, abused, financially exploited, or neglected a vulnerable adult.

[2005 c 274 § 354; 1999 c 176 § 8.]

Notes:

Part headings not law -- Effective date -- 2005 c 274: See RCW 42.56.901 and 42.56.902.

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.067**Investigations — Interviews — Ongoing case planning — Conclusion of investigation.**

(1) Where appropriate, an investigation by the department may include a private interview with the vulnerable adult regarding the alleged abandonment, abuse, financial exploitation, neglect, or self-neglect.

(2) In conducting the investigation, the department shall interview the complainant, unless anonymous, and shall use its best efforts to interview the vulnerable adult or adults harmed, and, consistent with the protection of the vulnerable adult shall interview facility staff, any available independent sources of relevant information, including if appropriate the family members of the vulnerable adult.

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(3) The department may conduct ongoing case planning and consultation with: (a) Those persons or agencies required to report under this chapter or submit a report under this chapter; (b) consultants designated by the department; and (c) designated representatives of Washington Indian tribes if client information exchanged is pertinent to cases under investigation or the provision of protective services. Information considered privileged by statute and not directly related to reports required by this chapter must not be divulged without a valid written waiver of the privilege.

(4) The department shall prepare and keep on file a report of each investigation conducted by the department for a period of time in accordance with policies established by the department.

(5) If the department has reason to believe that the vulnerable adult has suffered from abuse, neglect, self-neglect, abandonment, or financial exploitation, and lacks the ability or capacity to consent, and needs the protection of a guardian, the department may bring a guardianship action under chapter 11.88 RCW.

(6) When the investigation is completed and the department determines that an incident of abandonment, abuse, financial exploitation, neglect, or self-neglect has occurred, the department shall inform the vulnerable adult of their right to refuse protective services, and ensure that, if necessary, appropriate protective services are provided to the vulnerable adult, with the consent of the vulnerable adult. The vulnerable adult has the right to withdraw or refuse protective services.

(7) The department may photograph a vulnerable adult or their environment for the purpose of providing documentary evidence of the physical condition of the vulnerable adult or his or her environment. When photographing the vulnerable adult, the department shall obtain permission from the vulnerable adult or his or her legal representative unless immediate photographing is necessary to preserve evidence. However, if the legal representative is alleged to have abused, neglected, abandoned, or exploited the vulnerable adult, consent from the legal representative is not necessary. No such consent is necessary when photographing the physical environment.

(8) When the investigation is complete and the department determines that the incident of abandonment, abuse, financial exploitation, or neglect has occurred, the department shall inform the facility in which the incident occurred, consistent with confidentiality requirements concerning the vulnerable adult, witnesses, and complainants.

[2007 c 312 § 2; 1999 c 176 § 9.]

Notes:

Findings -- Purpose -- Severability -- Conflict with federal requirements -- 1999 c 176: See notes following RCW 74.34.005.

74.34.068

Investigation results — Report — Rules.

(1) After the investigation is complete, the department may provide a written report of the outcome of the investigation to an agency or program described in this subsection when the department determines from its investigation that an incident of abuse, abandonment, financial exploitation, or neglect occurred. Agencies or programs that may be provided this report are home health, hospice, or home care agencies, or after January 1, 2002, any in-home services agency licensed under chapter 70.127 RCW, a program authorized under chapter 71A.12 RCW, an adult day care or day health program, regional support networks authorized under chapter 71.24 RCW, or other agencies. The report may contain the name of the vulnerable adult and the alleged perpetrator. The report shall not disclose the identity of the person who made the report or any witness without the written permission of the reporter or witness. The department shall notify the alleged perpetrator regarding the outcome of the investigation. The name of the vulnerable adult must not be disclosed during this notification.

(2) The department may also refer a report or outcome of an investigation to appropriate state or local governmental authorities responsible for licensing or certification of the agencies or programs listed in subsection (1) of this section.

(3) The department shall adopt rules necessary to implement this section.

[2001 c 233 § 2.]

Notes:

Finding -- 2001 c 233: "The legislature recognizes that vulnerable adults, while living in their own homes, may be abused, neglected, financially exploited, or abandoned by individuals entrusted to provide care for them. The individuals who abuse, neglect, financially exploit, or abandon vulnerable adults may be employed by, under contract with, or volunteering for an agency or program providing care for vulnerable adults. The legislature has given the department of social and health services the responsibility to investigate complaints of

abandonment, abuse, financial exploitation, or neglect of vulnerable adults and to provide protective services and other legal remedies to protect these vulnerable adults. The legislature finds that in order to continue to protect vulnerable adults, the department of social and health services be given the authority to release report information and to release the results of an investigation to the agency or program with which the individual investigated is employed, contracted, or engaged as a volunteer." [2001 c 233 § 1.]

74.34.070**Cooperative agreements for services.**

The department may develop cooperative agreements with community-based agencies providing services for vulnerable adults. The agreements shall cover: (1) The appropriate roles and responsibilities of the department and community-based agencies in identifying and responding to reports of alleged abuse; (2) the provision of case-management services; (3) standardized data collection procedures; and (4) related coordination activities.

[1999 c 176 § 10; 1997 c 386 § 35; 1995 1st sp.s. c 18 § 87; 1984 c 97 § 13.]

Notes:

Findings – Purpose – Severability – Conflict with federal requirements – 1999 c 176: See notes following RCW 74.34.005.

Conflict with federal requirements – Severability – Effective date – 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.

74.34.080**Injunctions.**

If access is denied to an employee of the department seeking to investigate an allegation of abandonment, abuse, financial exploitation, or neglect of a vulnerable adult by an individual, the department may seek an injunction to prevent interference with the investigation. The court shall issue the injunction if the department shows that:

(1) There is reasonable cause to believe that the person is a vulnerable adult and is or has been abandoned, abused, financially exploited, or neglected; and

(2) The employee of the department seeking to investigate the report has been denied access.

[1999 c 176 § 11; 1984 c 97 § 14.]

Notes:

Findings – Purpose – Severability – Conflict with federal requirements – 1999 c 176: See notes following RCW 74.34.005.

74.34.090**Data collection system — Confidentiality.**

The department shall maintain a system for statistical data collection, accessible for bona fide research only as the department by rule prescribes. The identity of any person is strictly confidential.

[1984 c 97 § 15.]

74.34.095**Confidential information — Disclosure.**

(1) The following information is confidential and not subject to disclosure, except as provided in this section:

- (a) A report of abandonment, abuse, financial exploitation, or neglect made under this chapter;
- (b) The identity of the person making the report; and
- (c) All files, reports, records, communications, and working papers used or developed in the investigation or provision of protective services.

(2) Information considered confidential may be disclosed only for a purpose consistent with this chapter or as authorized by chapter 18.20, 18.51, or 74.39A RCW, or as authorized by the long-term care ombudsman programs under federal law or state law, chapter 43.190 RCW.

(3) A court or presiding officer in an administrative proceeding may order disclosure of confidential information only if the court, or presiding officer in an administrative proceeding, determines that disclosure is essential to the administration of justice and will not endanger the life or safety of the vulnerable adult or individual who made the report. The court or presiding officer in an administrative hearing may place restrictions on such disclosure as the court or presiding officer deems proper.

[2000 c 87 § 4; 1999 c 176 § 17.]

Notes:

Findings – Purpose – Severability – Conflict with federal requirements – 1999 c 176: See notes following RCW 74.34.005.

74.34.110

Protection of vulnerable adults — Petition for protective order.

An action known as a petition for an order for protection of a vulnerable adult in cases of abandonment, abuse, financial exploitation, or neglect is created.

(1) A vulnerable adult, or interested person on behalf of the vulnerable adult, may seek relief from abandonment, abuse, financial exploitation, or neglect, or the threat thereof, by filing a petition for an order for protection in superior court.

(2) A petition shall allege that the petitioner, or person on whose behalf the petition is brought, is a vulnerable adult and that the petitioner, or person on whose behalf the petition is brought, has been abandoned, abused, financially exploited, or neglected, or is threatened with abandonment, abuse, financial exploitation, or neglect by respondent.

(3) A petition shall be accompanied by affidavit made under oath, or a declaration signed under penalty of perjury, stating the specific facts and circumstances which demonstrate the need for the relief sought. If the petition is filed by an interested person, the affidavit or declaration must also include a statement of why the petitioner qualifies as an interested person.

(4) A petition for an order may be made whether or not there is a pending lawsuit, complaint, petition, or other action pending that relates to the issues presented in the petition for an order for protection.

(5) Within ninety days of receipt of the master copy from the administrative office of the courts, all court clerk's offices shall make available the standardized forms and instructions required by RCW 74.34.115.

(6) Any assistance or information provided by any person, including, but not limited to, court clerks, employees of the department, and other court facilitators, to another to complete the forms provided by the court in subsection (5) of this section does not constitute the practice of law.

(7) A petitioner is not required to post bond to obtain relief in any proceeding under this section.

(8) An action under this section shall be filed in the county where the vulnerable adult resides; except that if the vulnerable adult has left or been removed from the residence as a result of abandonment, abuse, financial exploitation, or neglect, or in order to avoid abandonment, abuse, financial exploitation, or neglect, the petitioner may bring an action in the county of either the vulnerable adult's previous or new residence.

(9) No filing fee may be charged to the petitioner for proceedings under this section. Standard forms and written instructions shall be provided free of charge.

[2007 c 312 § 3; 1999 c 176 § 12; 1986 c 187 § 5.]

Notes:

Findings – Purpose – Severability – Conflict with federal requirements – 1999 c 176: See notes following RCW 74.34.005.

74.34.115**Protection of vulnerable adults — Administrative office of the courts — Standard petition — Order for protection — Standard notice — Court staff handbook.**

(1) The administrative office of the courts shall develop and prepare standard petition, temporary order for protection, and permanent order for protection forms, a standard notice form to provide notice to the vulnerable adult if the vulnerable adult is not the petitioner, instructions, and a court staff handbook on the protection order process. The standard petition and order for protection forms must be used after October 1, 2007, for all petitions filed and orders issued under this chapter. The administrative office of the courts, in preparing the instructions, forms, notice, and handbook, may consult with attorneys from the elder law section of the Washington state bar association, judges, the department, the Washington protection and advocacy system, and law enforcement personnel.

(a) The instructions shall be designed to assist petitioners in completing the petition, and shall include a sample of the standard petition and order for protection forms.

(b) The order for protection form shall include, in a conspicuous location, notice of criminal penalties resulting from violation of the order.

(c) The standard notice form shall be designed to explain to the vulnerable adult in clear, plain language the purpose and nature of the petition and that the vulnerable adult has the right to participate in the hearing and to either support or object to the petition.

(2) The administrative office of the courts shall distribute a master copy of the standard forms, instructions, and court staff handbook to all court clerks and shall distribute a master copy of the standard forms to all superior, district, and municipal courts.

(3) The administrative office of the courts shall determine the significant non-English-speaking or limited-English-speaking populations in the state. The administrator shall then arrange for translation of the instructions required by this section, which shall contain a sample of the standard forms, into the languages spoken by those significant non-English-speaking populations, and shall distribute a master copy of the translated instructions to all court clerks by December 31, 2007.

(4) The administrative office of the courts shall update the instructions, standard forms, and court staff handbook when changes in the law make an update necessary. The updates may be made in consultation with the persons and entities specified in subsection (1) of this section.

(5) For purposes of this section, "court clerks" means court administrators in courts of limited jurisdiction and elected court clerks.

[2007 c 312 § 4.]

74.34.120**Protection of vulnerable adults — Hearing.**

(1) The court shall order a hearing on a petition under RCW 74.34.110 not later than fourteen days from the date of filing the petition.

(2) Personal service shall be made upon the respondent not less than six court days before the hearing. When good faith attempts to personally serve the respondent have been unsuccessful, the court shall permit service by mail or by publication.

(3) When a petition under RCW 74.34.110 is filed by someone other than the vulnerable adult, notice of the petition and hearing must be personally served upon the vulnerable adult not less than six court days before the hearing. In addition to copies of all pleadings filed by the petitioner, the petitioner shall provide a written notice to the vulnerable adult using the standard notice form developed under RCW 74.34.115. When good faith attempts to personally serve the vulnerable adult have been unsuccessful, the court shall permit service by mail, or by publication if the court determines that personal service and service by mail cannot be obtained.

(4) If timely service under subsections (2) and (3) of this section cannot be made, the court shall continue the hearing date until the substitute service approved by the court has been satisfied.

(5)(a) A petitioner may move for temporary relief under chapter 7.40 RCW. The court may continue any temporary order for protection granted under chapter 7.40 RCW until the hearing on a petition under RCW 74.34.110 is held.

(b) Written notice of the request for temporary relief must be provided to the respondent, and to the vulnerable adult if someone other than the vulnerable adult filed the petition. A temporary protection order may be granted without written notice to the respondent and vulnerable adult if it clearly appears from specific facts shown by affidavit or declaration that immediate and irreparable injury, loss, or damage would result to the vulnerable adult before the respondent and vulnerable adult can be served and heard, or that show the respondent and vulnerable adult cannot be served with notice, the efforts made to serve them, and the reasons why prior notice should not be required.

[2007 c 312 § 5; 1986 c 187 § 6.]

74.34.130

Protection of vulnerable adults — Judicial relief.

The court may order relief as it deems necessary for the protection of the vulnerable adult, including, but not limited to the following:

(1) Restraining respondent from committing acts of abandonment, abuse, neglect, or financial exploitation against the vulnerable adult;

(2) Excluding the respondent from the vulnerable adult's residence for a specified period or until further order of the court;

(3) Prohibiting contact with the vulnerable adult by respondent for a specified period or until further order of the court;

(4) Prohibiting the respondent from knowingly coming within, or knowingly remaining within, a specified distance from a specified location;

(5) Requiring an accounting by respondent of the disposition of the vulnerable adult's income or other resources;

(6) Restraining the transfer of the respondent's and/or vulnerable adult's property for a specified period not exceeding ninety days; and

(7) Requiring the respondent to pay a filing fee and court costs, including service fees, and to reimburse the petitioner for costs incurred in bringing the action, including a reasonable attorney's fee.

Any relief granted by an order for protection, other than a judgment for costs, shall be for a fixed period not to exceed five years. The clerk of the court shall enter any order for protection issued under this section into the judicial information system.

[2007 c 312 § 6. Prior: 2000 c 119 § 27; 2000 c 51 § 2; 1999 c 176 § 13; 1986 c 187 § 7.]

Notes:

Application – 2000 c 119: See note following RCW 26.50.021.

Findings – Purpose – Severability – Conflict with federal requirements – 1999 c 176: See notes following RCW 74.34.005.

74.34.135

Protection of vulnerable adults — Filings by others — Dismissal of petition or order — Testimony or evidence — Additional evidentiary hearings — Temporary order.

(1) When a petition for protection under RCW 74.34.110 is filed by someone other than the vulnerable adult or the vulnerable adult's full guardian over either the person or the estate, or both, and the vulnerable adult for whom protection is sought advises the court at the hearing that he or she does not want all or part of the protection sought in the petition, then the court may dismiss the petition or the provisions that the vulnerable adult objects to and any protection order issued under RCW 74.34.120 or 74.34.130, or the court may take additional testimony or evidence, or order additional evidentiary hearings to

determine whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order. If an additional evidentiary hearing is ordered and the court determines that there is reason to believe that there is a genuine issue about whether the vulnerable adult is unable to protect his or her person or estate in connection with the issues raised in the petition or order, the court may issue a temporary order for protection of the vulnerable adult pending a decision after the evidentiary hearing.

(2) An evidentiary hearing on the issue of whether the vulnerable adult is unable, due to incapacity, undue influence, or duress, to protect his or her person or estate in connection with the issues raised in the petition or order, shall be held within fourteen days of entry of the temporary order for protection under subsection (1) of this section. If the court did not enter a temporary order for protection, the evidentiary hearing shall be held within fourteen days of the prior hearing on the petition. Notice of the time and place of the evidentiary hearing shall be personally served upon the vulnerable adult and the respondent not less than six court days before the hearing. When good faith attempts to personally serve the vulnerable adult and the respondent have been unsuccessful, the court shall permit service by mail, or by publication if the court determines that personal service and service by mail cannot be obtained. If timely service cannot be made, the court may set a new hearing date. A hearing under this subsection is not necessary if the vulnerable adult has been determined to be fully incapacitated over either the person or the estate, or both, under the guardianship laws, chapter 11.88 RCW. If a hearing is scheduled under this subsection, the protection order shall remain in effect pending the court's decision at the subsequent hearing.

(3) At the hearing scheduled by the court, the court shall give the vulnerable adult, the respondent, the petitioner, and in the court's discretion other interested persons, the opportunity to testify and submit relevant evidence.

(4) If the court determines that the vulnerable adult is capable of protecting his or her person or estate in connection with the issues raised in the petition, and the individual continues to object to the protection order, the court shall dismiss the order or may modify the order if agreed to by the vulnerable adult. If the court determines that the vulnerable adult is not capable of protecting his or her person or estate in connection with the issues raised in the petition or order, and that the individual continues to need protection, the court shall order relief consistent with RCW 74.34.130 as it deems necessary for the protection of the vulnerable adult. In the entry of any order that is inconsistent with the expressed wishes of the vulnerable adult, the court's order shall be governed by the legislative findings contained in RCW 74.34.005.

[2007 c 312 § 9.]

74.34.140
Protection of vulnerable adults — Execution of protective order.

When an order for protection under RCW 74.34.130 is issued upon request of the petitioner, the court may order a peace officer to assist in the execution of the order of protection.

[1986 c 187 § 8.]

74.34.145
Protection of vulnerable adults — Notice of criminal penalties for violation — Enforcement under RCW 26.50.110.

(1) An order for protection of a vulnerable adult issued under this chapter which restrains the respondent or another person from committing acts of abuse, prohibits contact with the vulnerable adult, excludes the person from any specified location, or prohibits the person from coming within a specified distance from a location, shall prominently bear on the front page of the order the legend: VIOLATION OF THIS ORDER WITH ACTUAL NOTICE OF ITS TERMS IS A CRIMINAL OFFENSE UNDER CHAPTER 26.50 RCW AND WILL SUBJECT A VIOLATOR TO ARREST.

(2) Whenever an order for protection of a vulnerable adult is issued under this chapter, and the respondent or person to be restrained knows of the order, a violation of a provision restraining the person from committing acts of abuse, prohibiting contact with the vulnerable adult, excluding the person from any specified location, or prohibiting the person from coming within a specified distance of a location, shall be punishable under RCW 26.50.110, regardless of whether the person is a family or household member as defined in RCW 26.50.010.

[2007 c 312 § 7; 2000 c 119 § 2.]

Notes:

Application – 2000 c 119: See note following RCW 26.50.021.

74.34.150**Protection of vulnerable adults — Department may seek relief.**

The department of social and health services, in its discretion, may seek relief under RCW 74.34.110 through 74.34.140 on behalf of and with the consent of any vulnerable adult. When the department has reason to believe a vulnerable adult lacks the ability or capacity to consent, the department, in its discretion, may seek relief under RCW 74.34.110 through 74.34.140 on behalf of the vulnerable adult. Neither the department of social and health services nor the state of Washington shall be liable for seeking or failing to seek relief on behalf of any persons under this section.

[2007 c 312 § 8; 1986 c 187 § 9.]

74.34.160**Protection of vulnerable adults — Proceedings are supplemental.**

Any proceeding under RCW 74.34.110 through 74.34.150 is in addition to any other civil or criminal remedies.

[1986 c 187 § 11.]

74.34.163**Application to modify or vacate order.**

Any vulnerable adult who has not been adjudicated fully incapacitated under chapter 11.88 RCW, or the vulnerable adult's guardian, at any time subsequent to entry of a permanent protection order under this chapter, may apply to the court for an order to modify or vacate the order. In a hearing on an application to dismiss or modify the protection order, the court shall grant such relief consistent with RCW 74.34.110 as it deems necessary for the protection of the vulnerable adult, including dismissal or modification of the protection order.

[2007 c 312 § 10.]

74.34.165**Rules.**

The department may adopt rules relating to the reporting, investigation, and provision of protective services in in-home settings, consistent with the objectives of this chapter.

[1999 c 176 § 18.]

Notes:

Findings – Purpose – Severability – Conflict with federal requirements – 1999 c 176: See notes following RCW 74.34.005.

74.34.170**Services of department discretionary — Funding.**

The provision of services under RCW *74.34.030, 74.34.040, 74.34.050, and **74.34.100 through 74.34.160 are discretionary and the department shall not be required to expend additional funds beyond those appropriated.

[1986 c 187 § 10.]

Notes:

Reviser's note: *(1) RCW 74.34.030 was repealed by 1999 c 176 § 35.

** (2) RCW 74.34.100 was recodified as RCW 74.34.015 pursuant to 1995 1st sp.s. c 18 § 89, effective July 1, 1995. RCW 74.34.015 was subsequently repealed by 1999 c 176 § 35.

74.34.180

Retaliation against whistleblowers and residents — Remedies — Rules.

(1) An employee or contractor who is a whistleblower and who as a result of being a whistleblower has been subjected to workplace reprisal or retaliatory action, has the remedies provided under chapter 49.60 RCW. RCW 4.24.500 through 4.24.520, providing certain protection to persons who communicate to government agencies, apply to complaints made under this section. The identity of a whistleblower who complains, in good faith, to the department or the department of health about suspected abandonment, abuse, financial exploitation, or neglect by any person in a facility, licensed or required to be licensed, or care provided in a facility or in a home setting, by any person associated with a hospice, home care, or home health agency licensed under chapter 70.127 RCW or other in-home provider, may remain confidential if requested. The identity of the whistleblower shall subsequently remain confidential unless the department determines that the complaint was not made in good faith.

(2)(a) An attempt to expel a resident from a facility, or any type of discriminatory treatment of a resident who is a consumer of hospice, home health, home care services, or other in-home services by whom, or upon whose behalf, a complaint substantiated by the department or the department of health has been submitted to the department or the department of health or any proceeding instituted under or related to this chapter within one year of the filing of the complaint or the institution of the action, raises a rebuttable presumption that the action was in retaliation for the filing of the complaint.

(b) The presumption is rebutted by credible evidence establishing the alleged retaliatory action was initiated prior to the complaint.

(c) The presumption is rebutted by a review conducted by the department that shows that the resident or consumer's needs cannot be met by the reasonable accommodations of the facility due to the increased needs of the resident.

(3) For the purposes of this section:

(a) "Whistleblower" means a resident or a person with a mandatory duty to report under this chapter, or any person licensed under Title 18 RCW, who in good faith reports alleged abandonment, abuse, financial exploitation, or neglect to the department, or the department of health, or to a law enforcement agency;

(b) "Workplace reprisal or retaliatory action" means, but is not limited to: Denial of adequate staff to perform duties; frequent staff changes; frequent and undesirable office changes; refusal to assign meaningful work; unwarranted and unsubstantiated report of misconduct under Title 18 RCW; letters of reprimand or unsatisfactory performance evaluations; demotion; denial of employment; or a supervisor or superior encouraging coworkers to behave in a hostile manner toward the whistleblower. The protections provided to whistleblowers under this chapter shall not prevent a facility or an agency licensed under chapter 70.127 RCW from: (i) Terminating, suspending, or disciplining a whistleblower for other lawful purposes; or (ii) for facilities licensed under chapter 70.128 RCW, reducing the hours of employment or terminating employment as a result of the demonstrated inability to meet payroll requirements. The department shall determine if the facility cannot meet payroll in cases in which a whistleblower has been terminated or had hours of employment reduced because of the inability of a facility to meet payroll; and

(c) "Reasonable accommodation" by a facility to the needs of a prospective or current resident has the meaning given to this term under the federal Americans with disabilities act of 1990, 42 U.S.C. Sec. 12101 et seq. and other applicable federal or state antidiscrimination laws and regulations.

(4) This section does not prohibit a facility or an agency licensed under chapter 70.127 RCW from exercising its authority to terminate, suspend, or discipline any employee who engages in workplace reprisal or retaliatory action against a whistleblower.

(5) The department shall adopt rules to implement procedures for filing, investigation, and resolution of whistleblower complaints that are integrated with complaint procedures under this chapter.

(6)(a) Any vulnerable adult who relies upon and is being provided spiritual treatment in lieu of medical treatment in accordance with the tenets and practices of a well-recognized religious denomination may not for that reason alone be considered abandoned, abused, or neglected.

(b) Any vulnerable adult may not be considered abandoned, abused, or neglected under this chapter by any health care provider, facility, facility employee, agency, agency employee, or individual provider who participates in good faith in the withholding or withdrawing of life-sustaining treatment from a vulnerable adult under chapter 70.122 RCW, or who acts in accordance with chapter 7.70 RCW or other state laws to withhold or withdraw treatment, goods, or services.

(7) The department, and the department of health for facilities, agencies, or individuals it regulates, shall adopt rules designed to discourage whistleblower complaints made in bad faith or for retaliatory purposes.

[1999 c 176 § 14; 1997 c 392 § 202.]

Notes:

Findings – Purpose – Severability – Conflict with federal requirements – 1999 c 176: See notes following RCW 74.34.005.

Short title – Findings – Construction – Conflict with federal requirements – Part headings and captions not law – 1997 c 392: See notes following RCW 74.39A.009.

74.34.200

Abandonment, abuse, financial exploitation, or neglect of a vulnerable adult — Cause of action for damages — Legislative intent.

(1) In addition to other remedies available under the law, a vulnerable adult who has been subjected to abandonment, abuse, financial exploitation, or neglect either while residing in a facility or in the case of a person residing at home who receives care from a home health, hospice, or home care agency, or an individual provider, shall have a cause of action for damages on account of his or her injuries, pain and suffering, and loss of property sustained thereby. This action shall be available where the defendant is or was 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 licensed or required to be licensed under chapter 70.127 RCW, as now or subsequently designated, or an individual provider.

(2) It is the intent of the legislature, however, that where there is a dispute about the care or treatment of a vulnerable adult, the parties should use the least formal means available to try to resolve the dispute. Where feasible, parties are encouraged but not mandated to employ direct discussion with the health care provider, use of the long-term care ombudsman or other intermediaries, and, when necessary, recourse through licensing or other regulatory authorities.

(3) In an action brought under this section, a prevailing plaintiff shall be awarded his or her actual damages, together with the costs of the suit, including a reasonable attorney's fee. The term "costs" includes, but is not limited to, the reasonable fees for a guardian, guardian ad litem, and experts, if any, that may be necessary to the litigation of a claim brought under this section.

[1999 c 176 § 15; 1995 1st sp.s. c 18 § 85.]

Notes:

Findings – Purpose – Severability – Conflict with federal requirements – 1999 c 176: See notes following RCW 74.34.005.

Conflict with federal requirements – Severability – Effective date – 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.

74.34.205

Abandonment, abuse, or neglect — Exceptions.

(1) Any vulnerable adult who relies upon and is being provided spiritual treatment in lieu of medical treatment in accordance with the tenets and practices of a well-recognized religious denomination may not for that reason alone be considered abandoned, abused, or neglected.

(2) Any vulnerable adult may not be considered abandoned, abused, or neglected under this chapter by any health care provider, facility, facility employee, agency, agency employee, or individual provider who participates in good faith in the withholding or withdrawing of life-sustaining treatment from a vulnerable adult under chapter 70.122 RCW, or who acts in accordance with chapter 7.70 RCW or other state laws to withhold or withdraw treatment, goods, or services.

[1999 c 176 § 16.]

Notes:

Findings – Purpose – Severability – Conflict with federal requirements – 1999 c 176: See notes following RCW 74.34.005.

74.34.210

Order for protection or action for damages — Standing — Jurisdiction.

A petition for an order for protection may be brought by the vulnerable adult, the vulnerable adult's guardian or legal fiduciary, the department, or any interested person as defined in RCW 74.34.020. An action for damages under this chapter may be brought by the vulnerable adult, or where necessary, by his or her family members and/or guardian or legal fiduciary. The death of the vulnerable adult shall not deprive the court of jurisdiction over a petition or claim brought under this chapter. Upon petition, after the death of the vulnerable adult, the right to initiate or maintain the action shall be transferred to the executor or administrator of the deceased, for recovery of all damages for the benefit of the deceased person's beneficiaries set forth in chapter 4.20 RCW or if there are no beneficiaries, then for recovery of all economic losses sustained by the deceased person's estate.

[2007 c 312 § 11; 1995 1st sp.s. c 18 § 86.]

Notes:

Conflict with federal requirements – Severability – Effective date – 1995 1st sp.s. c 18: See notes following RCW 74.39A.030.

74.34.300

Vulnerable adult fatality reviews.

(1) The department may conduct a vulnerable adult fatality review in the event of a death of a vulnerable adult when the department has reason to believe that the death of the vulnerable adult may be related to the abuse, abandonment, exploitation, or neglect of the vulnerable adult, or may be related to the vulnerable adult's self-neglect, and the vulnerable adult was:

(a) Receiving home and community-based services in his or her own home, described under chapters 74.39 and 74.39A RCW, within sixty days preceding his or her death; or

(b) Living in his or her own home and was the subject of a report under this chapter received by the department within twelve months preceding his or her death.

(2) When conducting a vulnerable adult fatality review of a person who had been receiving hospice care services before the person's death, the review shall provide particular consideration to the similarities between the signs and symptoms of abuse and those of many patients receiving hospice care services.

(3) All files, reports, records, communications, and working papers used or developed for purposes of a fatality review are confidential and not subject to disclosure pursuant to RCW 74.34.095.

(4) The department may adopt rules to implement this section.

[2008 c 146 § 10.]

Notes:

Findings – Intent – Severability – 2008 c 146: See notes following RCW 74.41.040.

74.34.900**Severability — 1984 c 97.**

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1984 c 97 § 18.]

74.34.901**Severability — 1986 c 187.**

If any provision of this act or its application to any person or circumstance is held invalid, the remainder of the act or the application of the provision to other persons or circumstances is not affected.

[1986 c 187 § 12.]

74.34.902**Construction — Chapter applicable to state registered domestic partnerships — 2009 c 521.**

For the purposes of this chapter, the terms spouse, marriage, marital, husband, wife, widow, widower, next of kin, and family shall be interpreted as applying equally to state registered domestic partnerships or individuals in state registered domestic partnerships as well as to marital relationships and married persons, and references to dissolution of marriage shall apply equally to state registered domestic partnerships that have been terminated, dissolved, or invalidated, to the extent that such interpretation does not conflict with federal law. Where necessary to implement chapter 521, Laws of 2009, gender-specific terms such as husband and wife used in any statute, rule, or other law shall be construed to be gender neutral, and applicable to individuals in state registered domestic partnerships.

[2009 c 521 § 181.]