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Exploitation and Abuse of the Elderly During the Great Recession: A Maine Practitioner's Perspective

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EXPLOITATION AND ABUSE OF THE ELDERLY DURING THE GREAT RECESSION: A MAINE PRACTITIONER'S PERSPECTIVE

Denis Culley & Hanna Sanders

- I. INTRODUCTION
- II. WHAT IS ELDER ABUSE?
- III. WHAT DRIVES ELDER ABUSE IN MAINE NOW?
- IV. IDENTIFYING ELDER ABUSE—TIPS FOR THE LEGAL PRACTITIONER
- V. THE LEGAL PRACTITIONER'S DILEMMA(S)
 - A. *The Role of MaineCare Planning in Exploitation of Elders*
 - 1. *MaineCare Framework for Asset Transfers and Penalties*
 - 2. *The Double and Triple Whammies of MaineCare Planning Gone Awry*
 - B. *Powers of Attorney—Misconceptions and Abuse*
 - C. *The Protection from Abuse vs. Protection from Harassment Conundrum*
- VI. LEGAL AND PRACTICAL APPROACHES TO ELDER ABUSE FOR THE PRACTITIONER
 - A. *The Value of Maine's Improvident Transfer of Title Act*
 - B. *Additional Civil Remedies*
 - C. *Alternative Approaches to Elder Abuse*
 - 1. *Revocation of Powers of Attorney*
 - 2. *Criminal Trespass Notice*
 - 3. *Eviction*
 - 4. *Reporting to Adult Protective Services*
- VII. CONCLUSION

EXPLOITATION AND ABUSE OF THE ELDERLY DURING THE GREAT RECESSION: A MAINE PRACTITIONER'S PERSPECTIVE

*Denis Culley & Hanna Sanders**

VERNON

The call came in to our legal services helpline from Vernon's eldest son. The son had seen bruises on his eighty-nine-year-old father's face and arms and suspected that his brother may have caused them. When I asked Vernon about the bruises, he confirmed that his own child had inflicted them. "He gets upset," he said, and wept. Vernon also recounted how his youngest son had barred him from visiting his own house to see his wife and, instead, had forced him to shovel deep snow in very cold weather before allowing him inside.

FLORA

Flora, a seventy-one-year-old widow living on a fixed income, fell behind on her taxes. Her son, a convicted drug dealer with a history of violence, offered to pay his mother's back taxes (over \$2,000) in exchange for one acre of the two acre lot on which her home is situated. Flora agreed to this deal, but made it very clear that she was willing to transfer one acre only and specifically not the acre her home is on.

Flora's son took her to a local attorney and asked the attorney to draw up a deed. The attorney said that without a property description he could not draft a deed. On a subsequent visit to this attorney—and at a time when our client was experiencing ongoing medical difficulties including bronchitis (with a fever), chronic obstructive pulmonary disease, diabetes, and very high blood pressure—her son supplied the attorney a property description that the attorney used to draw up a deed, which Flora then signed. Unbeknownst to Flora and to the local attorney, the property description described all of her land and effectively transferred the entirety of her worldly assets—and her home—to her son.

Flora became aware of the true scope of the transfer when she was greeted at her home after a shopping trip by her son and a sheriff's deputy. Relying on the deed supplied by her son, the sheriff's deputy informed Flora that she had to leave the property because the owner—her son—did not want her there. Flora then began a period of quasi-homelessness during which her health suffered, in part, because she spent more than half of her income on renting a room and could not afford medications and foods her diabetic condition required.

LEON

Leon, a recently widowed, eighty-four-year-old World War II veteran, was being discharged from the nursing facility due to Medicaid ineligibility for

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monetary transfers made to his “trusted” friend and former caregiver.

Approximately eighteen months prior to the discharge action—and within months of his wife’s death—his “trusted” friend urged Leon to sell his home and convert the proceeds from the sale into cash—\$42,000. This friend urged Leon to move into her home with a promise that she would take care of him “for the rest of his life.” Leon then moved into an 11’x 13’ room attached to his friend’s home, which he was forced to share with a mentally disabled man. In exchange for monthly room and board, Leon was provided one meal per day, housekeeping services, and transportation to the local store and doctor’s office. During the time that Leon lived in his friend’s home, he was persuaded to pay off his friend’s truck (\$10,000), assist with the purchase of a motorcycle (\$3,000), replace windows in the main house (\$5,000), and give large amounts of cash to his friend and her family as Christmas and birthdays gifts.

Less than one year after he moved into his friend’s home, Leon landed in the hospital after a medical episode. Hospital staff reported that he was malnourished and had been physically neglected. Despite Leon’s pleading with his friend, she refused to let him return to the home and also refused to return his personal items—including his address book, ID cards, marriage and birth certificates—and the lockbox with what little money remained of his \$42,000 nest egg. Leon was placed at a nursing facility against his wishes. When he applied for Medicaid to cover the cost of his expenses at the facility, he was denied due to the “gifts” he had previously made to his friend.

...

*A narrow Fellow in the Grass
Occasionally rides
You may have met Him
Did you not
His notice sudden is¹*

I. INTRODUCTION

The practitioner often cringes on first exposure to elder abuse. Beating, cheating, or cynically misusing a parent or other beloved elder not only shocks and disheartens those who stumble upon it, but often leaves the practitioner, like the poet, with “a tighter breathing and Zero at the bone.”² Nothing in our culture prepares us to behold the abused elder.

The elder herself is often similarly shocked and ashamed. Many times, an abused elder is in denial and may feel that she has somehow allowed the abuse to occur. Or the elder may feel that the abuser—oftentimes a family member, trusted neighbor, or caregiver—is somehow entitled to their share of the financial pie for providing companionship or performing basic physical care or household tasks.

Approximately 700,000 to 3.5 million elders are abused, exploited, or

1. EMILY DICKINSON, *A Narrow Fellow in the Grass*, in POEMS, POETS, POETRY: AN INTRODUCTION AND ANTHOLOGY 17, 17 (Helen Vendler ed., 1997).

2. *Id.*

neglected in America each year.³ In Maine, an estimated 5 percent of the elderly were victims of abuse in 2009.⁴ Further, it is estimated that about 84 percent of elder abuse cases in Maine go unreported.⁵ National estimates echo this trend; the National Center on Elder Abuse indicates that only one in six cases of elder abuse are identified and reported each year.⁶ Much of the underreporting and outright denial of elder abuse can be attributed to the shock and shame felt by the victim and the subsequent rationalization of her abusive situation.

The purpose of this Article is to explore the roots, nature, and prevalence of elder abuse, and exploitation in Maine from the perspective of a legal services practitioner, with an emphasis on the remedies currently available and the real—and perceived—barriers faced by the elderly and their advocates as they pursue justice against their exploiters during the current economic crisis.

II. WHAT IS ELDER ABUSE?

According to the National Center on Elder Abuse, “elder abuse” refers to the intentional or negligent acts by a caregiver or trusted individual that causes—or potentially causes—harm to a vulnerable elder.⁷ Financial exploitation, neglect, physical and sexual abuse, abandonment, and emotional or psychological abuse—including verbal assault and threats—are all types of elder abuse. Current statistics show that women and elders over the age of eighty are more likely to become victimized, and mistreatment is most often perpetrated by the victim’s own family members.⁸

In 2008, there were more than 14,000 reported cases of elder abuse in Maine.⁹ However, Maine statutes do not define “elder abuse.”¹⁰ While some other states

3. National Center on Elder Abuse, *Why Should I Care About Elder Abuse?* http://www.ncea.aoa.gov/ncearod/main_site/pdf/publication/HowToAnswerToughQuestionsAboutElderAbuse_final.doc (last visited Feb. 20, 2010) [hereinafter *Why Should I Care About Elder Abuse?*].

4. THE ELDER JUSTICE PROJECT, *ABUSE AGAINST THE ELDERLY AND VULNERABLE ADULTS: POTENTIAL LEGAL REMEDIES* 3 (2009).

5. *Id.* (“Victims are often unable to report the crime, make a safety plan for themselves or are too afraid to tell someone else.”).

6. *Why Should I Care About Elder Abuse?*, *supra* note 3.

7. National Center on Elder Abuse, *Frequently Asked Questions*, http://www.ncea.aoa.gov/NCEARoot/main_site/FAQ/Questions.aspx (last visited Feb. 20, 2010). Similarly, the American Medical Association definition of elder abuse reads, “Abuse shall mean an act or omission which results in harm or threatened harm to the health or welfare of an elderly person. Abuse includes intentional infliction of physical or mental injury; sexual abuse; or withholding of necessary food, clothing, and medical care to meet the physical and mental needs of an elderly person by one having the care, custody or responsibility of an elder person.” KELLY PYREK, *FORENSIC NURSING* 278-79, § 8.4.6.3 (2006).

8. NATIONAL CENTER ON ELDER ABUSE, *HOW TO ANSWER THOSE TOUGH QUESTIONS ABOUT ELDER ABUSE*, <http://www.fchcc.org/resourceslinks/HowToAnswerToughQuestionsAboutElderAbuse.doc> (last visited May 12, 2010).

9. Jason C. Charland, *Elder Abuse, Neglect and Exploitation* (2006) (for Blaine House Conference on Aging), available at <http://www.umaine.edu/mainecenteronaging/documents/issuebriefelderabuse.pdf> (last visited Feb. 20, 2010).

10. See, e.g., Adult Protection Services Act, ME. REV. STAT. ANN. tit. 22, § 3472 (2004). For other state law definitions of elder abuse and neglect, see *ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA* (Richard J. Bonnie & Robert B. Wallace eds., 2003).

have moved toward specifically criminalizing financial abuse of the elderly,¹¹ Maine has not.¹² As it stands now, “Under Maine law, elder abuse of a competent adult is not a unique crime or civil cause of action.”¹³ In Maine, the age of the victim is not relevant to any criminal action taken on behalf of a victim and—aside from the Improvident Transfer of Title statute¹⁴—is not relevant to civil actions.

The State of Missouri offers a workable definition of *financial* abuse of an elder in its criminal code:

A person commits the crime of financial exploitation of an elderly or disabled person if such a person knowingly and by deception, intimidation, or force 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 or her property thereby benefiting such person or detrimentally affecting the elderly or disabled person.¹⁵

As staff attorneys with Legal Services for the Elderly, the vast majority of elder abuse cases that we deal with involve financial exploitation with close relatives defrauding, diverting, or baldly stealing money from their mothers, fathers, aunts and uncles, or grandparents. The methods of removing money from the elder vary from subtle to brutally simple—and sometimes quite brutal—but the constants of an emotionally or physically vulnerable elder, a degree of isolation, and a sense of entitlement within the financial abuser remain. Another disheartening constant is the utter lack of contrition among abusers.¹⁶

We have routinely witnessed elders who deed over their home or parcels of property (with or without the retention of a life estate), make gifts of large sums of cash, make loans with no written promise of repayment, co-sign a promissory note when the borrower has no source of income, mortgage their property up to—or over—fair market value, or add a joint holder to bank accounts. These transactions are often contemplated and completed based on the elder’s emotions and fear¹⁷ and are usually not accompanied by any counsel or legal advice.

The elder may experience the loss of their home or financial ruin at the hands of an exploiter. Due to the fact that the elderly population is typically retired and lives on a fixed income, it is nearly impossible to bootstrap up again once an

11. See, e.g., MO. REV. STAT. § 570.145 (West 2009); FLA STAT. § 825 (West 2009); MINN. REV. STAT. §609.2335 (West 2009).

12. Maine’s Improvident Transfer of Title Act, ME. REV. STAT. ANN. tit. 22 §§ 1021-1024, provides civil relief, including rescission or reformation of a deed, the imposition of a constructive trust, an order enjoining use of the property and may refuse to enforce a contract if there is a finding of undue influence. In addition, nothing in the Improvident Transfer of Title Act “abrogate[s] any other causes of action or relief at law or equity to which elderly dependent persons are entitled under other laws or at common law. ME. REV. STAT. ANN. tit. 33, §1024.

13. THE ELDER JUSTICE PROJECT, ABUSE AGAINST THE ELDERLY AND VULNERABLE ADULTS: POTENTIAL LEGAL REMEDIES 7 (2006).

14. ME. REV. STAT. ANN. tit. 33, §§1021-1025.

15. MO. REV. STAT. § 570.145 (West 2009).

16. An internal survey of the seven currently serving LSE staff attorneys of 2009 revealed no recollection of a single case in which an exploiter (whether defined by judgment from a court or via agreement in settlement) expressed remorse for their acts.

17. See *infra* Section IV. A, including fears related to property recapture by the State of Maine’s Medicaid program.

elder's life savings or nest egg has been wiped out. Although the monetary figure could range from a couple of thousand dollars for the very-low income to hundreds of thousands of dollars for the wealthy, the results of financial exploitation are the same: shame, embarrassment, emotional anguish, depression, and always abandonment by the exploiter once the last of the accessible money has been stripped from the elder. The elder victim may also experience physical manifestations from the experience of exploitation. Statistics show an increase in morbidity and mortality rates among the victims of elder abuse.¹⁸ Former Maine Attorney General Steven Rowe referred to such abuse as "financial violence."¹⁹ Facing such an experience towards the end of life seems to drain all the hope and vitality, as well as the financial resources, out of an elderly person. Relationships are compromised, the ego is severely battered, and the elder's personal judgment will forever be questioned by the elder herself and by others.

III. WHAT DRIVES ELDER ABUSE IN MAINE NOW?

The latest estimates project that by the year 2030, when the "baby boom" generation reaches age sixty-five, the elderly will comprise approximately 20 percent of the total population in the United States—almost twice the number that they do today.²⁰ "[P]ersons over the age of fifty-five control at least seventy percent of the nation's household net worth."²¹ And, in our experience, persons under the age of fifty-five tend to be stressed out, financially maxed out, and strung out on debt.²²

Not only does Maine have the oldest population in the country,²³ it also has one of the highest homeownership rates in America.²⁴ With the disproportionate rise in real estate values during the past decade, this intersection of circumstances has created an almost "perfect storm" of financial abuse of the elderly in Maine. Family members and other predators have recognized a new target-rich category of elderly victims with assets that are particularly ripe for the plucking.

The elderly also present a unique category of victims. With advancing age comes deterioration of the body, the mind, and an increased dependence on other

18. ELDER MISTREATMENT: ABUSE, NEGLECT, AND EXPLOITATION IN AN AGING AMERICA, *supra* note 10, at 340.

19. Steven Rowe, then-Attorney General, State of Maine, Address to the Statewide Conference on Elder Abuse, Neglect and Exploitation at the Augusta Civic Center (May 3, 2004).

20. Why Should I Care About Elder Abuse?, *supra* note 3.

21. John B. Breaux & Orrin G. Hatch, *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*, 11 ELDER L.J. 207, 221 (2003).

22. Credit card delinquency in the United States was up 9.1 percent over the previous quarter and 11 percent over last year, with an average debt of \$5,729.00. Credit Card Delinquency on the Rise (June 8, 2009), http://money.cnn.com/2009/06/08/pf/credit_card_delinquency/index.htm (last visited Feb. 20, 2010).

23. Kevin Miller, *Census: Maine Oldest, Whitest State in Nation*, BANGOR DAILY NEWS, May 14, 2009, at A1.

24. According 2009 census figures, Maine's home ownership rate was 71.6 percent. Maine Demographics & Population, http://www.maine.gov/portal/facts_history/stats_population.html (last visited Feb. 20, 2010). In comparison, the national home ownership rate is now just above 67 percent. U.S. Census Bureau, Housing Vacancies and Home Ownership, <http://www.census.gov/hhes/www/housing/hvs/qtr209/graph209.html> (last visited Feb. 20, 2010).

people for routine tasks such as housework, driving, cooking, and personal health maintenance. This reliance on others brings about a heightened sense of vulnerability and elders often experience increased anxiety and depression as they face a loss of independence. In turn, this gives rise to fears of isolation and abandonment, fear of losing the family home or life savings, and fear of total physical dependency or placement in a nursing facility.

From our experience as legal practitioners dealing with elderly victims and their exploiters, the tragic breakdown of the social compact between the generations is obvious. Far from being revered as repositories of wisdom, the elders in our society are increasingly marginalized and are becoming the butt of cruel stereotypes.

In our experience the savvy perpetrator—whether family member, neighbor, trusted friend, unlicensed caregiver, telephone marketer, or the “evil” handyman—will take full advantage of the elder’s emotional crises and prey upon their fears and insecurity. Promises are often made that the perpetrator will provide personal services or household repairs that will allow the elder to remain independent and remain in their own home. Promises of physical care, transportation, meal preparation, assistance with doctors and medications and, most of all, companionship, entice the elders to place their trust, their assets, and often their physical well-being in the hands of another.

IV. IDENTIFYING ELDER ABUSE—TIPS FOR THE LEGAL PRACTITIONER

Elderly clients are often accompanied by a spouse or younger family member when meeting with an attorney. Therefore, during the interview process with a potential elderly client some preliminary steps should be taken by the legal practitioner:²⁵ (1) determine who your client is, if not immediately obvious; (2) make an initial determination of client’s capacity; and (3) interview the potential client alone.

Legal practitioners should meet with the elder *alone* early on, and inquire into the elder’s financial and physical well-being. Be aware that an elder will not likely respond to a direct query as to whether she is a victim of elder abuse because she is unlikely to associate her particular situation with the terms “abuse” or “exploitation.” Instead, the practitioner should develop questions that will provide indicators as to potential abuse situations, such as: (1) Who manages your finances? (2) Does anyone else have authority to access your bank accounts? If so, have you noticed any funds missing? (3) Has anyone encouraged you to sign documents that you did not understand or did not want to sign? (4) Do you have a health care or financial power of attorney? If so, does your agent do things that you do not want her to do? (5) Does your caregiver make you pay extra for things that should be included in your care? (6) Do you live with anyone? If so, whose name is on the title, deed, or lease?

A legal practitioner may have difficulty determining whether a client’s situation involves misappropriation of assets or whether transfers were intentional

25. See, e.g., *infra* Section V.A. “Improvident Transfers of Title” regarding issues that may arise in the context of real estate or asset transfers made an elderly client who is not represented by independent counsel.

and involve an acceptable exchange. There are certain characteristics that suggest an elder may be vulnerable to abuse: cognitive, physical, or sensory impairments that may limit the elder's ability to make reasoned decisions and socio-economic or emotional vulnerabilities that may increase an elder's dependence upon others.²⁶

If abuse is suspected, the nature of the relationship between the elder and the suspected perpetrator²⁷ should be examined, if at all possible. Explore the history, nature, and purpose of the relationship, and question the elder's expectations for exchange or reciprocity. Examine the reasonableness—or the benefits—of any monetary transfers, and question the elder about how those funds were used, and whose interests were actually served by the transfers. Also, ask whether the elder's basic needs are being met, such as nutrition, housing, medicine, and heat.

V. THE LEGAL PRACTITIONER'S DILEMMA(S)

In circumstances of financial exploitation, by the time elderly victims reach the legal practitioner for assistance, they are often at the very end of their rope. The reasons for the exploitation and abuse have been rationalized and self-analyzed by the elder, who just wants to recover her money or property with no fuss. The elder often feels guilty or that she is somehow to blame. And when the abuser is a family member, these issues are exacerbated. An elderly victim may be fearful that by reporting the abuse she and her family will lose standing in the community, or that the abuser will get in trouble with the law and lose her job, or that there will be anger and repercussions towards the abuser from other family members.

Oftentimes, it is the angry family member who is dragging the elder in to see the legal practitioner once she realizes that the inheritance has been depleted or completely wiped out. Other times, actual abuse by another sibling or rival member of the family can set off a type of feeding frenzy among those close to an elder, leading to multiple abusers and competitive financial abuse.

These attitudes make the practitioner's job all the more difficult. Discerning who is the client, assessing the potential client for capacity,²⁸ and attempting to ascertain whether the transfers were truly voluntary²⁹ or the result of pressure or

26. Kathleen H. Wilbur & Sandra L. Reynolds, *Introducing a Framework for Defining Financial Abuse of the Elderly*, 8 J. ELDERLY ABUSE NEGLECT 61, 68-80 (1996) (proposing a four-part framework that may assist the practitioner in distinguishing whether an elderly client has been—or may become—the victim of financial exploitation).

27. For a listing of characteristics common to perpetrators who exploit the elderly, see Ryan Hall, Richard Hall & Marcia Chapman, *Exploitation of the Elderly: Undue Influence as a Form of Elder Abuse*, 13 CLINICAL GERIATRICS 28, 30-31 (2005).

28. See ME. R. PROF'L CONDUCT, 1.14 comment 6:

In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision, and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstance, the lawyer may seek guidance from an appropriate diagnostician.

Id.

29. Transfers made by the elder may very well be voluntary and intentional. Occasionally there is a chosen sibling, a "favorite" who the parent is trying to transfer assets or make gifts to unbeknownst to

coercion are just the beginning of the legal practitioner's dilemma with an elder abuse or exploitation case. What are the options for a client who is unwilling to pursue civil or criminal remedies? How do you plug the dike?

CHARLES

Charles has a family home and modest savings from his lifelong job at the mill. His income encompasses one small pension and Social Security. Charles and his family contemplate declining health due to chronic obstructive pulmonary disease and decide that they don't want the state to "just come in and take everything" when he dies. The family attempts to circumvent that eventuality and decides that Charles will deed the house over to his daughter, who will move her family into the home and take care of him for the remainder of his life. Charles's remaining assets are used to build an in-law apartment over the garage in which he will live. His modest income will be used to pay his daughter for her services of cooking, cleaning, and transportation.

Choose your own ending: Charles and his daughter can't get along; or other siblings get jealous that his daughter inherits everything; or Charles's health condition deteriorates more rapidly than expected; or his daughter isolates him from other family and friends and cycle of abuse begins.

Charles is forced into a nursing home or assisted living facility, where his income is expected to pay for care. The state reviews his application for MaineCare, and determines that transfers made to the daughter make him ineligible for a period of a number of months. Charles has no remaining assets and cannot pay privately for his own care. His daughter is unable return the money she has gotten from Charles—as it has all been spent—and is unwilling to deed the house back over to him. His daughter feels she is entitled, and Charles has nowhere to go.

The facility begins the process of discharging Charles for non-payment and will sue to recover the thousands of dollars he now owes to the facility that the state will not pay.

A. *The Role of MaineCare Planning in Exploitation of Elders*

Further exacerbating the problem of elder exploitation is the issue of MaineCare penalty or MaineCare denial due to asset transfers made as the result of exploitation.³⁰ An entire industry of financial planners, attorneys, and other professionals exist to help middle-class—or wealthier—citizens appear poor enough to qualify for needs-tested public benefits through the Medicaid program. These asset transfers are simply a subset of modern estate planning. Generally, the approach taken is to somehow gift or otherwise transfer the assets of the elder—or near elder—to a trusted relative. These transfers are often accompanied by—undocumented—promises of care and fealty.

Much of the exploitation we see at Legal Services for the Elderly is estate

the other family members. However, the elder may later experience feelings of regret once the truth comes out and work to undo or cover up the otherwise voluntary transfers.

30. MaineCare is the title of Maine's Medicaid program.

planning gone bad, as transfers are made by the lower-income—but often real estate rich—elder without consulting a professional.³¹ Deeds are re-written, bank accounts are re-named, cars or other large-ticket items are purchased in the name of a relative, all without any real understanding of the MaineCare program and its strict regulatory structure, and the repercussions represented by the MaineCare penalty system, as described below. These actions are a direct consequence of the non-existence of a comprehensive social safety net for all citizens: that a needs-tested benefits program becomes attractive enough³² to drive elders—often with the enthusiastic urging of their family—to impoverish themselves in an attempt to game the system. In a way that its designers surely did not anticipate, the MaineCare program’s “needs-testing” financial eligibility requirements have become the handmaiden of financial exploitation.

1. MaineCare Framework for Asset Transfers and Penalties

*Individuals must use their assets to meet their needs
before MaineCare will be available.*³³

MaineCare will not begin paying nursing facility or assisted living facility bills until an applicant’s assets are spent down below \$10,000.³⁴ This figure is used as a rough estimate by those practitioners who work around MaineCare issues.³⁵ It is

31. Maine is the poorest state in New England and ranks thirty-seventh nationally in per capita income. How Maine Ranks, <http://people.maine.com/publius/almanac/encycweb/htm/rankofme.htm> (last visited Feb. 20, 2010).

32. With benefits at \$7,258.00 per month effective January 1, 2009. OFF. OF INTEGRATED ACCESS AND SUPPORT, STATE OF ME. DEPT. OF HEALTH AND HUMAN SERV., MAINECARE ELIGIBILITY MANUAL, Chart 4.3 (2009), available at <http://www.maine.gov/dhhs/OIAS/mainecare-manual/indes.shtml> (last visited Mar. 29, 2010) [hereinafter MAINECARE ELIGIBILITY].

33. *Id.* at Pt. 16. § 1.

34. *Id.*

35. This figure is based on the following combined language in the MAINECARE ELIGIBILITY MANUAL:

SECTION 1 MEDICALLY NEEDED ASSET LIMITS:

Assets can be under the following limits on any day of the month to be eligible for that month.

I. For Family – Related coverage groups:

The maximum amount of countable assets an individual or assistance unit may retain for Medically Needy eligibility is:

\$2000 for one person

\$3000 for two persons

\$100 for each additional person

Id.

Section 2.46 Savings Exclusion – *excluded for all categories, except State Supplement*

Up to \$8,000 of savings for an individual, \$12,000 for an assistance unit of two or more. Any amount over the excluded amount is counted toward the asset limit.

Savings is defined as an account which earns interest or dividends except that a checking account does not need to earn interest/dividends. “Savings” includes:

- savings or checking account including those in a credit union;
- IRA;
- Keogh;
- available cash value of an annuity;

not an easy task, however, to ascertain the exact asset limit for MaineCare eligibility. For example, certain annuities are exempt, while others are not.³⁶ So called “mortuary trusts” are exempt within a certain range.³⁷

MaineCare coverage for expenses in a nursing facility average has a value of more than \$85,000 per year.³⁸ Individuals may attempt to make themselves *appear* poor enough to receive MaineCare benefits by gifting, shifting, or hiding assets.³⁹ The most common tactic used by an elder who undertakes “MaineCare planning” without legal advice is transferring assets to a trusted relative for less than value or no value at all.

What is a transfer?

For transfer purposes, an asset includes all income and resources of the individual and the individual’s spouse. This includes any income or resources which the individual or the individual’s spouse is entitled to but does not receive because of action or lack of action by the individual as defined above, including but not limited to renouncing an inheritance or failing to exercise a spousal share in a challenge to a will.⁴⁰

Certain transfers are exempt: the transfer of a home to a child under age twenty-one, a sibling, a caregiver child,⁴¹ or a child with disabilities, certain limited transfers to special needs trusts, and all transfers to spouses. Any transfer for fair market value is an exempt transfer.

Pursuant to the federal Deficit Reduction Act of 2005,⁴² Maine has been vigilant regarding this activity in passing statutes and adopting regulations specifically targeting this potentially fraudulent behavior. The sanction the State of Maine adopted is called the “MaineCare penalty,” which involves denial of MaineCare long-term care benefits for a period of time equal to the amount gifted—or shifted outside the recipient’s control—multiplied by the monthly average cost of care in a nursing facility in Maine.⁴³

-
- stocks;
 - bonds;
 - mutual funds; and
 - cash surrender value of life insurance.

The \$8,000/\$12,000 exclusion applies to all accounts subject to the exclusion. The exclusion is not applied to each account.

Id.

36. *Id.*, at Pt. 16. § 2.3.

37. *See id.* at Pt. 16. § 2.6.

38. MAINECARE ELIGIBILITY, *supra* note 32.

39. This is often called “MaineCare planning” or, more broadly, “estate planning.”

40. MAINECARE ELIGIBILITY, *supra* note 32, at Pt. 15. § 1.3.

41. The child must have been residing in the home for at least two years prior to transferor’s entry into a facility and have been providing care—pursuant to a doctor’s opinion—that kept the applicant out of nursing facility of assisted living long-term care.

42. Deficit Reduction Act of 2005, Pub. L. No. 109-171, 120 Stat. 4 (codified as amended in scattered sections of Tit. I-X).

43. MAINECARE ELIGIBILITY, *supra* note 32, at Pt. 15. § 1.8. For example, in 2009 a “transfer for [no] value” of \$7,258 would therefore result in one month of *no* payment for nursing facility care. A transfer of \$14,516 would result in a penalty of *no* payment for nursing facility care for a period of two months. *Id.* at chart 4.3. The look back period for these transfers is currently three years and will expand to five years—increasing one month at a time—by February 2011. The MaineCare penalty

Penalties resulting from transfers can be cured by returning the applicant's assets. Maine, unlike most other states, also allows a partial cure in the past.⁴⁴ The bottom line is that transfer of assets by an elder—or near elder—to anyone besides a spouse⁴⁵ is risky in terms of potential for creating a MaineCare penalty. Anyone, of any age, contemplating such transfers—under the auspices of “MaineCare planning”—should consult with an attorney and should strongly consider the actual and potential costs of self-improvement for the purpose of obtaining a public benefit.

2. *The Double and Triple Whammies of MaineCare Planning Gone Awry*

The recent change in February 2006 in the MaineCare look-back period has had the perverse effect, in our experience, of putting a hair-trigger on transfers by elders and near elders. Previously, the look-back period had only been three years.⁴⁶ In an effort to capture more transfers for penalty purposes—and, it is assumed, dissuade elders and their families from undertaking Medicaid planning maneuvers—the Deficit Reduction Act expanded the look-back by two years. The unintended consequence of this change to a five-year look-back period has been to make elders—and their relatives—project much farther ahead—creating in a sense a hair-trigger situation regarding transfers—in contemplating eventual, expensive nursing home care.

In Maine, transfers made for less than fair value after February 8, 2006, in any five-year period prior to application for the MaineCare program⁴⁷ are subject to recapture. This means that the state will make the elderly victim undo those transfers and recover the money before they will be eligible for the program. However, nine times out of ten, the transferred property has already been sold, the money has been spent, and there is no chance of recovery from the transferee.⁴⁸

Often, the result of exploitation in the MaineCare world creates a type of “double whammy,” leaving the elderly person both homeless—often through eviction from what used to be their own home by the trusted family transferee who promised fealty and care before receiving the property or money—and impoverished. A further iteration of MaineCare planning gone bad comes with the penalties that accrue *to the elder* as a result of the transfer to caregiver or loved one for less than value. This “triple whammy” leaves the now impoverished and homeless elder with no chance to qualify, or receive the federal or state benefits

begins at the moment of MaineCare *eligibility* for all nursing facility care for all transfers after February 8, 2006. *Id.* at Pt. 15. § 1.8(IV)(B). Transfers prior to February 8, 2006, amortize the penalty from the moment of the transfer. *Id.*

44. ME. DEPT. HUM. SERV., 10-144 CMR 332-4120.

45. Or a disabled child, as described above. *See* MAINECARE ELIGIBILITY, *supra* note 32, at Pt. 15. § 1.4(I)(D).

46. ME. DEPT. HUM. SERV., 10-144 CMR 332-4120.

47. MAINECARE ELIGIBILITY, *supra* note 32 at Pt. 15. § 1.8(I)(C). *See also* Deficit Reduction Act of 2005, *supra* note 42. As we approach February 2, 2011, this five-year lookback continues to be phased in.

48. These transfers may also be the result of faulty estate planning, or “MaineCare planning” gone wrong, where the elder is convinced—usually by misinformed, greedy family members or other persons with no legal training—that the state will take all her assets and her home immediately if she does not transfer full ownership interest.

needed to qualify, for nursing home care. Because the transferee—read, exploiter—is often a family member, the elder is emotionally unable, or often simply unwilling, to undertake legal action. The elder will risk her own safety and health to avoid further personal embarrassment and future legal entanglements with the exploiter.

Another very serious roadblock to recovery of assets for an exploited elder is the lack of resources to litigate. The prime example is the land-rich, cash-poor elder living in her own home, mortgage-free, on a very limited income. The transfer of this home—and oftentimes additional acreage that has been in the family for generations—can represent tens or hundreds of thousands of dollars of value. The financially abused elder, however, may not have the money needed to hire an attorney, despite the value of the home—and, perhaps, land—in controversy. Cases like these can only be litigated effectively via public interest or pro bono representation, and, in these difficult economic times, these resources are scarcer than ever.

RACHEL

Sixty-two-year-old Rachel comes in to review and update her health care advance directive. During the course of our conversation, Rachel reveals that she was in a coma due to a brain aneurism she had last year. While she was hospitalized in Boston for six weeks, her children spent thousands of dollars of her money and ran up thousands more in credit card debt. Rachel's daughter and son went to Red Sox games, stayed at downtown hotels eating lavishly, and paid their own rent using bank checks drawn on their mother's Maine account. These checks had been signed by her daughter as "Power of Attorney" (POA) for mom.

However, Rachel had never given her daughter any legal authority—either financial or medical—to act on her behalf. The only POA that her daughter had been given was the physical possession of Rachel's previously executed Health Care Advance Directive that named Rachel's sister as her agent. However, the bank authorized the funds withdrawn from Rachel's account, and she is now paying \$130 per month of her \$680 Social Security income to pay off the debt incurred by her children. Rachel is now living in subsidized housing on an extremely fixed income. Does Rachel wish pursue legal action against her children? No, she does not. Will she report this theft to her bank? Again, the answer is no.

B. Powers of Attorney—Misconceptions and Abuse

There are five misconceptions about Powers of Attorney (POA) that are deleterious to any elder and can greatly exacerbate the potential for elder abuse and exploitation. The first common misconception is that an agent's power is immediate and absolute. The second is that the principal has no revocation capability.⁴⁹ Third is that there is no clear understanding—either by the principal or the agent—of the differences between a health care advance directive and a

49. See, *infra*, Section V.C.i. "Revocations of Powers of Attorney."

durable POA.⁵⁰ Fourth is the legal and logical confusion the title of the document itself can cause—the “power” in “power of attorney” is an archaic word referring to the document itself.⁵¹ And finally, there is the prevalent misconception that there is no recourse if an agent has acted against the wishes of a principal or against the principal’s best interest.

Generally, the purpose of executing a POA is to grant legal authority to an agent to make financial or health care decisions in the event that the principal is unable to do so.⁵² This granting of authority is accompanied by the principal’s presumption that an agent will follow her wishes and act in her best interest. The grant of authority to act on behalf of the principal in no way waives *any* of the mentally competent principal’s autonomy or right to act for herself. More than once we have been presented with this type of scenario:

Client: “I want to go south to Florida this winter, but I can’t.”

Attorney: “Why not?”

Client: “My daughter has power of attorney over me, and she won’t let me go.”

It bears repeating that nobody ever has POA “over” anyone else who is competent. In fact, the competent elder is the principal who obtains a sort of authority over the agent to direct her to carry out the principal’s wishes.

At Legal Services for the Elderly, we have witnessed blatant abuses of POA—for example, an agent deeding property to him or herself or wiping out a bank account—when an agent feels that no one is watching, and the principal feels that she has no control. More surreptitious abuses involve: the agent incrementally cashing out insurance policies or certificates of deposit; an agent funding her own business ventures as an “investment” with the principal’s capital; an agent appointing herself as primary beneficiary of life insurance policy; an agent adding herself to a deed as joint property owner; and an agent adding herself as joint holder of a principal’s bank account. Often an agent’s actions will deprive other family members of any inheritance.

A potential exploiter may also be able to assume power and control over an elder by convincing them that a nursing facility requires a POA prior to

50. There are other common and pervasive misconceptions about POA that are not directly linked to the issues of exploitation and abuse but do show that there is a lack of education or understanding about this subject in the general population. Other misconceptions include: (1) the agent’s legal authority continues after the principal’s death; (2) the agent must assume responsibility for the principal’s debts; (3) the agent becomes an executor or personal representative of the principal’s estate upon death; (4) a spouse automatically assumes the role as agent under POA.

51. “Power” is defined as “[a] document granting legal authorization.” BLACK’S LAW DICTIONARY 1189 (7th ed. 1999). “Power of Attorney” is defined “[a]n instrument granting someone authority to act as agent or attorney-in-fact for the grantor.” *Id.* at 1191. A POA is the equivalent of a letter appointing agent.

52. *See generally* ME. REV. STAT. ANN. tit. 18-A, § 5-501-10 (2004). In June 2009, the Maine Legislature passed “An Act to Enact the Maine Uniform Power of Attorney Act,” which adopts a version of the Uniform Powers of Attorney Act as drafted in 2006 by the National Conference of Commissioners on Uniform State Laws and endorsed by the National Bar Association. L.D. 1401 (124th Legis. 2009). Maine is one of the first states to adopt the act, after New Mexico and Idaho. Lisa Shidler, *States Mull Power-of-Attorney Rule Shift*, INVESTMENT NEWS (Feb. 15, 2009), <http://www.investmentnews.com/article/20090215/REG/302159971> (last visited Feb. 20, 2010).

admission,⁵³ or that the Department of Health and Human Services requires a POA prior to acceptance for a state program.⁵⁴ In this way, the exploiter may coerce the elder into signing a POA and naming her as agent.

The prospective client that presents as reluctant—feeling that she has to sign a POA or advance directive for such and so reason—is the one that should raise immediate red flags for the legal practitioner. A practitioner should never assume that an elderly person understands the broad powers that may be granted under a POA or assume that the elderly person is acting entirely of her own free will.⁵⁵ Similarly, the client who comes to the practitioner’s office with a child or relative who insists that they all meet with you together should raise a big red flag. Every practitioner should meet a prospective elderly client alone and assess the client’s motivation for executing the POA or advance directive.

C. The Protection from Abuse vs. Protection from Harassment Conundrum

With elder abuse on the rise, orders seeking protection from violence, intimidation, abuse, and restriction of freedom are becoming a familiar tool to advocates for the elderly. However, in Maine, statutes laying out the standards for obtaining protection from abuse remain limited, and their interpretation in Maine courts remain rooted in outdated social concepts and constructions.

In Maine, the protection from abuse (PFA) statute describes “abuse” as “the occurrence of the following acts between family or household members or dating partners or by a family or household member or dating partner upon a minor child of a family or household member or dating partner. . . .”⁵⁶ Further, the statute defines “household member”:

Family or household members means spouses or domestic partners or former spouses or former domestic partners, individuals presently or formerly living together as spouses, natural parents of the same child, adult household members related by *consanguinity*⁵⁷ or affinity or minor children of a household member when the defendant is an adult household member and, for the purposes of this

53. Federal regulations repeatedly iterate the right to financial autonomy for persons residing in long-term care facilities. See 42 C.F.R. § 483.10 (2008). These regulations, which provide that a person may *choose* to have an advance directive (but does not require one), list the resident’s right to manage her own finances. *Id.* The corresponding Maine regulations regarding resident rights and requirements for long-term care facilities are found at ME. DEPT. HUM. SERV. 10-144, 110-10, and 113-5.9. Similarly, in regards to advance directives, both 42 U.S.C. §1 395cc (2008) and ME. REV. STAT. ANN. tit. 18-A § 5-807(h) (2004) clearly state that execution or revocation of a healthcare power of attorney is not an acceptable prerequisite to receiving long-term care.

54. The regulations regarding an application for MaineCare are found at *MaineCare Eligibility*, *supra* note 32, at Pt.2. § 11 and state:

An application is a signed request for MaineCare coverage. This request must be made on a document approved by OIAS as an application form. The individual or someone acting on the individual’s behalf may sign the application form. The applicant may choose anyone to help in completing the form.

Id.

55. See *infra*, Section III. “Identifying Elder Abuse – Tips for the Legal Practitioner.”

56. ME. REV. STAT. ANN. tit. 19-A, § 4002(1) (2004).

57. Consanguinity: n. 1. The quality or state of being related by blood or descended from a common ancestor. 2. Genetic relationship. 3. A close relation or connection. WEBSTER’S 3D. NEW INT’L DICTIONARY OF THE ENG. LANGUAGE UNABRIDGED 482 (1986).

chapter . . . includes individuals presently or formerly living together and individuals who are or were sexual partners. Holding oneself out to be a spouse is not necessary to constitute “living as spouses.” For purposes of this subsection, “domestic partners” means two unmarried adults who are domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other’s welfare.⁵⁸

The prevalence of elders abused by their children or other family members is very high.⁵⁹ However, in certain Maine courts, elderly parents of adult children who do not live within the same building are not allowed to seek a PFA order, because they are not deemed “household members” and, apparently, are not deemed to have the status of “formerly living together.” Hence, elders being abused by non-resident children are directed to seek Protection from Harassment (PFH) orders.⁶⁰

When an elder victim is barred from utilizing the PFA statute and must instead employ the PFH statute, the problems are manifold and include: (1) “three or more acts” are commonly required to prove harassment; (2) when “reasonable” the plaintiff must give notice to the defendant before obtaining even a temporary order; (3) PFA orders routinely bar defendants from possessing firearms, while PFH orders do not; (4) there is a filing fee for the PFH, as opposed to no filing fee for a PFA; and (5) PFH orders expire in one year.⁶¹

The dilemma or difficulty for the practitioner is forcing the PFH statute to fit the abusive situation that calls for a PFA. When the elements of a PFA cannot be met, the elder victim must sometimes be counseled to wait for the abuser to commit three or more acts in order to overcome the hurdles of the PFH statute. The elder victim therefore remains unprotected by the law and in fear from the abuser.

GERTRUDE

When Gertrude’s spouse passed away, her son assumed POA as the alternate agent named on the durable POA document. Her son, who lived next door to her in a remote area of Maine, began using her bank accounts to pay his own credit card, utility, and tax bills. Her son would also plow her driveway, do yard work, and invoice her exorbitant fees for services rendered, then pay himself from her account.

As Gertrude’s health began to deteriorate she became more isolated and dependent, and her son grew bolder in his transfers. Her son deeded himself fourteen acres of Gertrude’s property; with her money, he bought two Harley Davidson motorcycles for himself and his wife; and he opened large college trust accounts for his wife’s children. He also bought a boat and parked it in his Gertrude’s yard.

Gertrude’s son was verbally abusive to her. He would not allow her to attend doctor’s appointments alone, nor allow visits alone, with friends, or with other family members. When her son’s abuse was finally discovered by another family

58. ME. REV. STAT. ANN. tit. 19-A, § 4002(4) (2004) (emphasis added).

59. See *supra* Section I. “What Is Elder Abuse?”

60. ME. REV. STAT. ANN. tit. 5, § 4651 *et seq.* (2004).

61. *Id.* at § 4651(2)(A).

member, she immediately contacted Legal Services for the Elderly. Fortunately, Gertrude was willing to report her son to the police. After the dust had settled, her son and his wife were indicted on multiple criminal charges, including felony theft, and all remaining monies were recovered for Gertrude through a civil lawsuit.

VI. LEGAL AND PRACTICAL APPROACHES TO ELDER ABUSE FOR THE PRACTITIONER

A. *The Value of Maine's Improvident Transfer of Title Act*

The Improvident Transfer of Title Act⁶² is a powerful device that can be used to help repair elderly clients who have been financially damaged through exploitation. It can be very effective in summary judgment practice and in driving settlement due to its presumption of undue influence.⁶³ In short, if you satisfy the elements—(1) transfer of assets by a “dependent”⁶⁴ elder—over the age of sixty—totaling 10 percent of an estate or any real property; (2) to a person who has a confidential or fiduciary⁶⁵ relationship with the elder; (3) for less than full consideration and without *independent* representation by counsel⁶⁶—the transfer is presumed the result of undue influence.

The presumption of undue influence creates a dynamic wherein a defendant⁶⁷ becomes aware that the court is *required* to presume that the transfer was the result of undue influence. This presumption—although rebuttable—is actually quite difficult to otherwise establish in most civil actions.⁶⁸ Under Maine law “[a]

62. Legal Services for the Elderly, Inc., was instrumental in crafting this legislation, which was enacted in 1987. ME. REV. STAT. ANN. tit. 33 §§ 1021-25 (2004). Legal Services for the Elderly is a not-for-profit organization whose mission is to provide free, high quality legal services to Maine's socially and economically needy residents age sixty and over. Since 1974, Legal Services for the Elderly has been helping Maine seniors protect their rights to live independently and with dignity. See Maine Legal Services for the Elderly, <http://www.mainelse.org> (last visited Mar. 21, 2010).

63. *First Union Nat'l Bank v. Curtis*, 2005 ME 108, ¶ 4, n.2, 882 A.2d 796, 797. “At the heart of the Improvident Transfers of Title Act is a presumption of undue influence.” *Id.*

64. An elder wholly or *partially* dependent on one or more persons—not necessarily the exploiter—for care or support may be one who suffers from limited mobility, vision, hearing, emotional or mental function or one who has limited reading ability or is suffering from or recovering from a major illness or is facing or recovering from major surgery. ME. REV. STAT. ANN. tit. 33 § 1021(1) (2004).

65. There is a very long list that appears amenable to the canon of construction of *ejusdem generis* that includes, for example, all family relationships, guardians, trustees, attorneys, lovers, friends, caregivers, and even neighbors. *Id.* at § 1022(2).

66. “‘Independent counsel’ means an attorney retained by the elderly dependent person to represent *only* that person’s interests in the transfer.” *Id.* at §1021(3) (emphasis added). This is specific to the transfer at issue and does not mean that the elderly dependent person was represented by an attorney regarding an overall estate planning or the execution of a will or powers of attorney. As Patricia Nelson-Reade discusses, an incapacitated person could not retain an attorney pursuant to the Improvident Transfer of Title Act, as that person would not have the capacity to enter into an attorney-client relationship. Patricia Nelson-Reade, *Powers of Attorneys and Non-Tax Gifting Considerations*, ME. B. J., May 1996, at 178.

67. The Improvident Transfer of Title Act, when deployed against pro se defendants, can suffer from the same issues that all pro se litigation suffers—unpredictability and the inevitable procedural morass.

68. “Undue Influence is one of the most bothersome concepts in all the law. It cannot be precisely defined.” JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUST, AND ESTATES 160 (5th ed. 1995).

presumption of undue influence arises when the existence of a confidential relationship between the two parties has been established.”⁶⁹ In other civil actions a blood relationship, or even great trust alone, is not enough to establish the existence of a confidential relationship.⁷⁰ The Maine Supreme Judicial Court, sitting as the Law Court, in *Ruesbsamen*, announced a two-part test: (1) the actual placing of trust and confidence *in fact* by one party in another party and (2) a great disparity of position and influence between the parties to the relationship.⁷¹

If the defendant fails to rebut the presumption of undue influence, the court shall grant relief through legal or equitable means. Such relief may include avoidance of the transfer, rescission or reformation of a deed, imposition of a constructive trust, or commanding the return of property.⁷² Improvident Transfer of Title is not an exclusive remedy and may be joined to any other cause of action in law or equity.⁷³

In short, if a practitioner can hit the elements, the Improvident Transfer of Title Act can often provide a royal road to an early settlement or summary judgment.

B. Additional Civil Remedies

In addition to the statutory cause of Improvident Transfer of Title, there exist myriad common law remedies that might be plead in a civil legal action involving elder abuse or exploitation. With financial exploitation cases, the most common causes of action would include breach of fiduciary duty, negligence, abuse of a confidential relationship, and conversion. Undue influence is also often plead in a civil action, although it can be more difficult to prove. In order to prove undue influence a confidential relationship must be proven. This legal demonstration can be quite difficult.⁷⁴

Many times an elder is induced into transferring assets to an abuser with the promise of a long-term relationship providing the elder with physical care, companionship, or housekeeping and maintenance services. When those promises are unfulfilled, causes of action for the elder may include actual or constructive fraud and misrepresentation. Although it is uncommon for an elder to memorialize the terms of a contract for services in writing—which creates a separate legal hurdle—other causes of action may include breach of contract or unjust enrichment. A plaintiff may wish to seek reformation, a declaratory judgment, or the imposition of a constructive trust.

69. *Sylvester v. Benjamin*, 2001 ME 48, ¶ 6, 767 A.2d 297, 299.

70. *Id.* ¶ 8, 767 A.2d 297 at 300.

71. *Ruesbsamen v. Maddocks*, 340 A.2d 31, 35 (Me. 1975).

72. ME. REV. STAT. ANN. tit. 33, § 1023(2) (2004).

73. *Id.* at § 1024.

74. Some examples wherein Maine courts have found by a preponderance of the evidence that a confidential relationship existed, supporting findings of undue influence are: *Eldridge v. May*, 150 A. 378 (1930) (seventy-three-year-old man suffering valvular disease, kidney trouble, and dropsy transfers his home and contents of five bank accounts to his sister, a former caregiver, after she lures him away from his wife); *Gerrish v. Chambers*, 189 A. 187 (1937) (eighty-two-year-old widow suffering rectal cancer of long standing and receiving at least eighty drops of tincture of opium a day transferred one-third of her estate to a nurse-caretaker at private hospital); *Small v. Nelson*, 16 A.2d 473 (1940) (ninety-year-old bachelor dying of rectal cancer and on codeine for pain management transferred his final \$938 of savings to his cousin and caretaker four days before his death).

In many elder exploitation cases the facts are very sympathetic to the plaintiff and defendant's actions may warrant the pleading of intentional or negligent infliction of emotional distress. If defendant's conduct is outrageous enough to imply malice, the plaintiff may wish to seek punitive damages as well. Further, it is wise to seek attachment⁷⁵ and trustee process against the defendant in elder exploitation cases. Because the facts involved in elder abuse will usually evoke an emotional response—often shock and outrage—at the defendant's alleged behavior, judges may be more inclined towards granting attachment and trustee process.

Keep in mind that when elder abuse is perpetrated in a regulated facility—such as a nursing home, residential care or assisted living facility—in addition to the causes mentioned above, the legal practitioner should consider an action for negligent hiring or retention, and *respondeat superior*. If the elder is willing, complaints should also be made to the appropriate professional licensing boards and state regulatory agencies.

C. Alternative Approaches to Elder Abuse

As discussed above, there are emotional and physical barriers that can make elders reticent to litigate or criminally prosecute their abusers. The legal practitioner should become familiar with non-litigious, straightforward approaches to help an elder end the cycle of exploitation and prevent further abuse.

Oftentimes, the first concrete steps to be taken in an elder abuse case involve re-establishing a client's independence and ensuring her safety. First, the practical concerns of the elder should be ascertained. The legal practitioner should query: (1) whether the abuser is a family member, household member, neighbor, or agent under POA;⁷⁶ (2) whether the abuser has been threatening the elder in any way; (3) whether the elder relies upon the abuser for personal care, food, medications, or necessary transportation; and (4) whether the elder lives in a remote area or is otherwise isolated by her circumstances.

Although the legal practitioner may feel an overwhelming urge to rescue or protect an elderly client, first consider whether immediate legal action will actually jeopardize the elder's physical safety or overall circumstance. The practitioner should take care that there is a social safety net in place to ensure basic care needs are being met.⁷⁷ If an elder is willing, help her to make connections with local social service agencies—such as adult protective services, family crisis intervention, domestic abuse hotline, or area agencies on aging—whose personnel can ensure that the elder is receiving proper nutrition and medications and can help

75. Preferably *ex parte* attachment if you can hit the “clear danger” element.

76. An agent may be acting for, or assuming control over, the elder using a Durable Power of Attorney or Health Care Advance Directive. For further discussion, see *supra* Section IV.B. “Powers of Attorney—Misconceptions and Abuse.”

77. The practitioner should consider casting wide the social safety net. The Authors have regularly resorted to measures such as application to the Salvation Army or other charities and, on occasion, municipal based general assistance programs. “General Assistance Program” means a service administered by a municipality for the *immediate* aid of persons who are unable to provide the basic necessities essential to maintain themselves or their families. ME. REV. STAT. ANN. tit. 22 § 4310 (2004).

to find alternate housing or facility placement, if needed.

1. Revocation of Powers of Attorney

With matters involving abuse of an elder by an agent acting under a POA, the most immediate and effective way of halting malicious action is the revocation of the agent's legal authority. This is a simple process that an elder can undertake without legal representation, if necessary. The revocation of an agent's POA should specifically and expressly include any and all forms of legal authority the abuser may have. If an elder is unsure about what authority they may have previously granted to their abuser, the best course of action may be to play it safe and execute a general revocation.

In order to be effective, actual notice of the revocation must be given to the agent.⁷⁸ If the elder does *not* plan to take any further legal action against the agent, she may choose not to involve an attorney at the notice stage and can inform the former agent of the revocation either verbally or in writing. However, a straightforward letter from the elder's attorney to the agent simply giving notice of the revocation is often enough to halt any future abuse of funds or threats against the elder without any further legal action. Once an abuser knows that someone else is watching her, it's a whole new ball game.

Ancillary to notification of the agent is notification of the revocation to the client's financial institutions and income sources. If the elder owns real estate, it is worthwhile to file a copy of the revocation with the registry of deeds, as well. If the abuser is named jointly on a client's bank account, notify the bank immediately of the potential abuse of funds. Many banks are keyed into financial exploitation of the elderly, will assist the client to close a joint account, and re-open a new account in the client's name alone, further establishing independence for the elder and providing them with additional needed piece of mind.

2. Criminal Trespass Notice

When an abuser is a neighbor, care giver, or non-household member, another simple way to protect an elderly client from immediate contact with the abuser is through the issuance of a criminal trespass notice (CTN). If the elder is willing to involve law enforcement, contact the local police or sheriff's department for assistance. In most circumstances, the police department will issue and serve a CTN on an abuser, which essentially orders the abuser not to enter the elder's property. More importantly, it sets up a criminal cause of action if the abuser violates the terms of the notice.⁷⁹ (This assumes, of course, that the elder is willing or able to call the police in the event that an abuser violates the order.)

An elder can also choose to issue a CTN to the abuser without the direct assistance of law enforcement personnel. However, it is advisable that the elder—or legal practitioner—send a copy of the notice to the local police department to make them aware of the elder's situation. This can prove helpful if law enforcement is called for a violation of the notice or other incidents at the elder's

78. *Id.* at tit. 18-A, § 5-504 (2004).

79. *See, e.g., id.* at tit. 17-A, § 402(5) (2004).

residence.

3. Eviction

When an abuser is a household member with no legal claim of ownership to the property, an elderly client can make a demand that the abuser leave the property. If the abuser refuses to leave, his actions may constitute a criminal trespass.⁸⁰ However, prosecuting the abuser for a criminal violation such as trespass requires the involvement of law enforcement. If an elder is unwilling to involve the authorities, she can commence a civil eviction action against the household member—as a tenant-at-will—to remove him from the elder’s home.

Again, the client’s safety is paramount. In cases where an abuser is living in the elder’s home, it may be necessary to find alternate housing⁸¹ prior to serving a notice to quit on an abusive household member, as there is a real tendency for threatening or abusive behavior to escalate. Furthermore, the client should consider whether there is a risk that her property might be damaged by an abuser-tenant prior to a judgment, and take steps to protect their real and personal property during pendency of the eviction action, if possible. With proper process, the Forcible Entry and Detainer action⁸² will force the abuser to remove himself from the elder’s home.

4. Reporting to Adult Protective Services

The Maine Legislature enacted the Adult Protective Services Act⁸³ in 1981 to protect incapacitated and dependent adults and to ensure assistance from the Department of Health and Human Services (DHHS) to persons who are unable to manage their own affairs or to protect themselves from abuse, neglect, or exploitation.⁸⁴ Currently, when a legal practitioner encounters a client who may be in an abusive circumstance, the standard for reporting to the Adult Protective Services (APS) division of the DHHS is very high. Unless a client presents with diminished capacity,⁸⁵ an attorney can only disclose information of a client to APS

80. In Maine, mere demand by the owner constitutes a lawful order for the purposes of the criminal trespass statute. *Id.* at tit. 17-A, §402; *State v. Neild*, 2006 ME 91, ¶ 13, 903 A.2d 339, 342.

81. The Elder Abuse Institute of Maine received a federal Recovery Act Transitional Housing Assistance grant in 2009 from the U.S. Department of Justice Office on Violence Against Women, which will fund alternative housing options specifically for victims of elder abuse.

82. ME. REV. STAT. ANN. tit. 14, §§ 6001-17 (2004).

83. *Id.* at tit. 22, § 3470 (2004).

84. *Id.* at § 3471.

85. *See* ME. R. PROF’L CONDUCT, 1.14(b):

When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client.

Id.

Comment (5) to Rule 1.14 further clarifies:

[P]aragraph (b) permits the lawyer to take protective measures deemed necessary. ... In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client’s best interests and the goals of

“to the extent that the attorney reasonably believes disclosure is necessary: (i) to prevent the commission of a criminal act that is likely to result in death or bodily harm to another person; or (ii) to avoid the furthering of a criminal act.”⁸⁶

However, most health care professionals, social workers, and law enforcement personnel are mandated to report suspected abuse, neglect, or exploitation of the elderly to the DHHS.⁸⁷ If the legal practitioner suspects an abusive situation, she should query whether the elderly client is seeking assistance or counsel from any social services agencies and whether there are health care professionals working with the elder who may be aware of the potential abuse. If a client is willing to authorize disclosure, have a conversation with caseworkers or medical personnel who are currently involved with the elder’s well-being to see whether APS has been informed of the circumstances and to what end.

As legal service practitioners in Maine, we have found that APS will decline to become involved when an elderly victim is deemed to have “capacity,”⁸⁸ even when the elder voices her preference to continue living in an abusive or exploitive situation. A client who APS considers to be mentally competent will be allowed to go on making (what we would consider to be) “bad” decisions for herself if she so chooses. And, unfortunately, many elderly victims feel that their current circumstance *with* an abuser is preferable to life without the abuser around.

VII. CONCLUSION

America has experienced an unparalleled century of prosperity and economic growth. This is due in no small part to the efforts of our “Greatest Generation.” Now, that thrifty, hard-working generation is in need of care and deserving of respect.

As the American economy has declined in recent years, there has been a palpable coincident breakdown of the social contract. The younger generations feel “entitled” to their parent’s hard-earned wealth, and they want it now. Our elders have been pushed to the margins of society, forced into institutions—or family settings—where they are isolated and marginalized. Often their assets and egos have been stripped bare and they are regarded by their caregivers and loved ones as

intruding into the client’s decision-making autonomy to the least extent feasible, maximizing client capacities and respecting the client’s family and social connections.

Id.

86. *Id.* at 1.6(b).

87. ME. REV. STAT. ANN. tit. 22, § 3477 (2004). In Maine, mandated reporters include physicians and their interns or assistants, nurses and their assistants, emergency medical personnel, dentists, medical specialists such as podiatrists and chiropractors, pharmacists, physical and speech therapists, social workers, psychologists, and clergy members in certain circumstances. *Id.* Forty-two states currently require mandatory reporting of suspected elder abuse by health care professionals; the remaining have voluntary reporting laws. *See* Hall, Hall & Chapman, *supra* note 27.

88. The Adult Protective Services Act defines “incapacitated adult” as:

any adult who is impaired by reason of mental illness, mental deficiency, physical illness or disability to the extent that that individual lacks sufficient understanding or capacity to make or communicate responsible decisions concerning that individual’s person, or to the extent the adult can not effectively manage or apply that individual’s estate to necessary ends.

Id. at § 3472(10).

little more than ATMs.

Elder abuse and financial exploitation will never be a preventable crime so long as there are people lacking a conscience or remorse who are willing to exploit and fleece vulnerable elders. We need to repair this social contract by recognizing this unconscionable form of abuse and calling out those who act aggressively and irresponsibly towards our elders. As practitioners, we must take off the blinders, see this abuse for what it is, and act as zealous advocates to protect and repair our elderly clients. The legal community has an opportunity and an obligation to help stem the rising tide of elder abuse and exploitation.