

**Financial Exploitation
of the Elderly**

A litigator's perspective...

Many planners don't accurately foresee how their advice might eventually manifest in their clients' actions...

Or how those actions might eventually be litigated...

If you can foresee how others might attack the actions that result from your advice, you might change the advice you give...

Recognizing Exploitation

Established by two primary statutory definitions...

- > §415 ADULT PROTECTIVE SERVICES
- > §825 ABUSE, NEGLECT, AND EXPLOITATION OF ELDERLY PERSONS AND DISABLED ADULTS

Recognizing Exploitation

Exploitation is merely a particular form of theft...

- > The perpetrator
- > obtains or uses, or endeavors to obtain or use
- > the victim's assets or property
- > with the intent to temporarily or permanently deprive the victim of the use, benefit, or possession of the funds, assets, or property
- > for the benefit of someone other than the victim.

Recognizing Exploitation

The primary distinctions are:

- > The nature of the victim
- > The method of the taking
- > The gravity of the crime when prosecuting

Recognizing Exploitation

The nature of the victim...

- > Vulnerable adults... 415.102(26)
 - > Includes age 18 or older who is 'impaired'
- > Elderly persons... 825.101(5)
 - > Includes age 60 or older who suffer from infirmities of aging
- > Disabled adults... 825.101(4)
 - > Includes age 18 or older who suffer from physical or mental incapacitation

Recognizing Exploitation

The method of the taking...

415.102(7)(a)

"Exploitation" means a person who:

1. Stands in a position of trust and confidence with a vulnerable adult and knowingly, by deception or intimidation, obtains or uses, or endeavors to obtain or use, a vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive a vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult; or

Recognizing Exploitation

The method of the taking...

415.102(7)(a)

"Exploitation" also means a person who:

2. Knows or should know that the vulnerable adult lacks the capacity to consent, and obtains or uses, or endeavors to obtain or use, the vulnerable adult's funds, assets, or property with the intent to temporarily or permanently deprive the vulnerable adult of the use, benefit, or possession of the funds, assets, or property for the benefit of someone other than the vulnerable adult.

Recognizing Exploitation

The level of the offense...

For further discussion under criminal remedies.

Recognizing Exploitation
415.102(7)(b)
"Exploitation" may include, but is not limited to:
1. Breaches of fiduciary relationships, such as the misuse of a power of attorney or the abuse of guardianship duties, resulting in the unauthorized appropriation, sale, or transfer of property;

Recognizing Exploitation
415.102(7)(b)
"Exploitation" may include, but is not limited to:
2. Unauthorized taking of personal assets;

Recognizing Exploitation
415.102(7)(b)
"Exploitation" may include, but is not limited to:
3. Misappropriation, misuse, or transfer of moneys belonging to a vulnerable adult from a personal or joint account; or

Recognizing Exploitation

415.102(7)(b)

"Exploitation" may include, but is not limited to:

4. Intentional or negligent failure to effectively use a vulnerable adult's income and assets for the necessities required for that person's support and maintenance.

Recognizing Exploitation

415.102(7)(b)

"Exploitation" may include, but is not limited to:

**THIS IS A VERY BROAD LIST
AND IT IS NOT AN EXCLUSIVE LIST**

Perpetrators

Who Commonly Comes to Mind?

Definitely Strangers

Charities Fraud
Identity Theft
Imposter Fraud
Mail Fraud (Email Fraud)
Telemarketing Fraud, *72, *90



Perhaps Familiar Strangers

Self-interested financial types
investment scams, annuity fraud
twisting, churning
(lots of good articles)



Sticky fingered care providers
(occasional mention)

Familiar Strangers #1

Officials searching for man accused of senior exploitation
Las Vegas Sun, By Mary Manning Tuesday, June 23, 2009 11:47 p.m.
State security officers served a search warrant today at the office of a man charged with senior exploitation, as more victims continue to come forward in an investigation of a real estate scam.
Five more potential victims of Jamal Eljwaidi, also known as Jama Mar, came forward after Secretary of State Ross Miller issued an arrest warrant for him last week. Eljwaidi is still at large, Miller said.
Eljwaidi initially was sought for elder exploitation in December 2008, said Miller. The recent victims say they fell for investments with the real estate developer from 2005 through 2008.
In one case Eljwaidi took \$400,000 from a 67-year-old man, who has been diagnosed with several medically incapacitating conditions. Investigators said that Eljwaidi told the man he would be an equal partner in a commercial real estate venture.
Instead, Eljwaidi used up to \$600,000, including the man's money, to live a lavish lifestyle while leaving the elderly man destitute.
Investigators said Eljwaidi and his employees called potential investors to offer them high interest payments if they would invest in short-term loans in a shopping center project on 9.23 acres of land near Russell Road and the 215 Beltway in the southeast Las Vegas Valley, Miller said.
The shopping center, hotel, theater and restaurant complex was supposed to be completed in October 2009, but so far it is an empty desert lot, Miller said. It is next to Eljwaidi's office, he said.
With evidence gathered by investigators with the search warrant, Eljwaidi could face new charges including securities fraud, sale of unregistered securities, claiming money under false pretenses and racketeering, Miller said.
Eljwaidi's attorney Steve Wolfson, also a Las Vegas City councilman, said in Justice Court recently that his client was out of the country. However, the Nevada Attorney General's Office said it has information that he is in the United States.
Anyone who knows where to find Eljwaidi or who invested with him or his companies, Babaki LLC and JCC Development, or anyone who believes they may have been a victim, is asked to call the Secretary of State's Office in Las Vegas at 496-1446, or (775) 682-4892 in Carson City.

Familiar Strangers #2

Mount and on all other state agencies

Monday, November 20, 2006

By Tracy Smith

According to a report by the state's attorney, a woman met a man who offered her a job as a caregiver for an elderly person. The man later turned out to be a scammer who had stolen the woman's money and fled the state.

According to the report, the woman met the man at a social gathering. The man offered her a job as a caregiver for an elderly person. The woman accepted the offer and moved into the man's home. She later discovered that the man had stolen her money and fled the state.

The woman reported the theft to the police. The police investigated and found that the man had stolen her money and fled the state. The woman is now seeking help from the state's attorney to recover her money.

The state's attorney is currently investigating the case. The man is believed to have fled to another state. The woman is now seeking help from the state's attorney to recover her money.

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Familiar Strangers #3

Ga. financial adviser convicted in fraud case

The Associated Press

MARIETTA, Ga. — A 65-year-old financial adviser has been convicted in Marietta on charges of violating Georgia racketeering laws.

Frank Constantino was accused of swindling \$2.7 million from a woman through fraudulent investment schemes.

The jury deliberated over three days before finding him guilty Wednesday on 13 of 29 counts, including violations of the Georgia Securities Act, theft by taking and exploitation of an elder person.

The case involved 83-year-old Judy Cox, who said she invested with Constantino from 2002 to 2005. Prosecutors said Constantino took investors' money for his own use.

Constantino faces up to 95 years in prison when Cobb Superior Court Judge Adele Grubbs sentenced him Feb. 18.

Constantino's attorney, Frank J. Marquez, wouldn't discuss whether his client will appeal.

Information from: The Atlanta Journal-Constitution.

Familiar Strangers #4

People Charged With Exploitation of the Elderly, Other Charges

TALLAHASSEE — Attorney General Charlie Crist and Statewide Prosecutor Peter Williams today announced the arrests of a Palm Beach County couple on charges of stealing almost \$900,000 from three elderly victims who were being taken care of by the wife, Rita Tyler, 94, and her husband Gerald Dalrymple, 94, as well as accused of stealing from the three victims over a two-year period while Tyler worked as a home health care manager for the victims.

Deputies from the Palm Beach County Sheriff's Office arrested the pair early today in West Palm Beach. Tyler and Dalrymple will appear in court in Palm Beach County. They were charged in seven separate felony counts, including exploitation of an elderly individual person, conspiracy to commit theft from a person 65 years of age or older and theft from a person 65 years of age or older. Tyler was charged with seven felony counts and faces up to 10 years in prison and \$60,000 in fines, while Dalrymple was charged with five felony counts and faces up to 10 years in prison and \$60,000 in fines.

"Abusing the trust of the elderly by preying upon their vulnerability is a despicable act," said Crist. "These seniors deserve justice and this office will see that they receive it."

According to a probable cause affidavit filed in support of the charges, Tyler and Dalrymple moved large sums of money from the victims' bank accounts into their own accounts using forged or unauthorized checks in amounts ranging from \$500 to \$2,000. This activity ended when one bank alerted the fraud and froze the accounts of one of the defendants.

Tyler was employed as a home health care manager by Source Finders Corporation, which participates in the Palm Beach County Guardian Ad Litem program. Source Finders fired Tyler when it discovered she had misappropriated funds from a patient's account, and then contacted police. A three-month investigation revealed that Tyler & Dalrymple stole from the patient's account and then wrote checks to Dalrymple as a way to move the money into their private bank accounts. Dalrymple also received forged or unauthorized checks from one of the victims' accounts, records show.

This case is being prosecuted by the Attorney General's Office of Statewide Prosecution in West Palm Beach.

Who Doesn't Come to Mind

Premature "Heirs"
(almost never in the news)

Second Spouses

Fiduciaries

Who Doesn't Come to Mind

Premature "Heirs"

Second Spouses
(sometimes in the movies, never in the news)

Fiduciaries

Who Doesn't Come to Mind

Premature "Heirs"

Second Spouses

Fiduciaries
(Fiduci-whatst!?)

Who Doesn't #2... FINALLY 2

The pair pocketed the \$235,000 from the house sale and cleaned out the elderly woman's bank accounts and savings, sharing the money among themselves and family members, police and prosecutors say. They also arranged and pre-paid for her funeral.

However, Evelyn Roth made an amazing recovery and had no idea what her relatives were up to.

Now the two suspects, Roth's cousin Virginia Ann Kuehn, 66, and her niece Kathleen Sue Jingling, 53, face a 35-count felony indictment charging them with first-degree criminal mistreatment, aggravated theft and first-degree theft. They've pleaded not guilty.

Who Doesn't #2... FINALLY 3

Roth, a sprightly white-haired woman with a ready laugh and remarkable memory, showed up at Multnomah County Circuit Court for her relatives' arraignment this week. Portland Officer Deanna Wesson, who investigates elder abuse, wheeled Roth up to the judge so she could explain what happened.

"They robbed me blind," Roth said. "Everything was for money, just to get money, money, money. That's not the way it should be."

Roth said she pursued criminal charges because she's lost her savings and all her possessions to relatives who betrayed her trust. "I think they need to be taught a lesson. ... I feel like I helped raise Virginia. That's why it hurts so bad."

Who Doesn't #2... FINALLY 4

Jingling's lawyer, Daniel Lorenz, said his client may have received poor advice from another attorney and is working "to put matters in as good a situation as possible." Kuehn's lawyer, Pat Birmingham, declined to comment.

Roth, a Portland native, had lived on her own in her Southeast Kelly Street house since her husband, Bob, died 26 years ago. She had worked for 35 years as the U.S. Bank branch near Southeast Milwaukie and Powell Boulevard. She loved the job and got to know her customers well. She also taught Sunday School at the Trinity Baptist Church.

Who Doesn't #2... FINALLY 5

In February 2008, she fell ill. A doctor removed a cancerous growth from her esophagus. Kuehn took her to the hospital for the outpatient surgery and drove her back home. But no one ever checked on Roth after that.

The day after the surgery, Roth fell and wasn't discovered until four days later. Phillip Klein visited the house, concerned because his friend hadn't shown up for their weekly dinner date.

Police found Roth on the floor, severely dehydrated, confused and suffering from delusions. She was hospitalized for two weeks and then placed in a nursing home. Through the spring of 2008, she continued to receive radiation treatments for cancer.

Who Doesn't #2... FINALLY 6

On April 24, she signed over the power of attorney to Kuehn and Jingling. She remembers them wheeling her to a nearby bank to get it notarized.

"I kept insisting, 'I want to take care of my bills. I can take care of myself,'" Roth recalled. "They said, 'We have to be able to take care of you if you get sick.'"

Four days later, Kuehn and Jingling each wrote \$12,000 checks to themselves out of Roth's account, Wesson said.

About the same time, Jeanine Boldt-Ginn, the daughter of one of Roth's close friends, helped her mother track Roth down. They found Roth at Care Center East and became reacquainted.

Who Doesn't #2... FINALLY 7

Roth's health steadily improved, surprising her doctors. By the fall 2008, Roth began hearing from her neighbors that a "For Sale" sign was up outside her home, and her relatives seemed to be cleaning it out.

Roth didn't believe it. "I said, 'Well, they can't sell it because I haven't signed anything.' I had no idea what was all going on, just what the neighbors saw."

Police said Kuehn and Jingling sold the house for \$235,000 in October 2008, deposited the money into Roth's bank account and then promptly spent all of it, writing checks to themselves and other family members. They cleaned out \$35,000 in her checking account and cashed her two annuities totaling \$88,000.

Who Doesn't #2... FINALLY 8

They also cleaned out all of Roth's belongings -- her antique china and glassware collection, her silverware, the mahogany furniture her husband made, their wedding pictures, a 7-foot-tall grandfather clock.

They sold her Buick Park Avenue.

Boldt-Ginn, who remembers having Roth as her Sunday School teacher when she was 5, and her husband, Jim Ginn, worked tirelessly to help Roth unravel what had happened to her belongings. They got county adult protective services investigator Irma Mitchell-Phillips and police to investigate.

"My mom said, 'I know the Lord brought us back here so we can help you,'" Boldt-Ginn recalled.

Who Doesn't #2... FINALLY 9

When Wesson interviewed the accused, they said they had sold Roth's house and belongings to avoid probate. Jingling kept saying that Roth's doctors had "guaranteed us" that Roth would die, Wesson recalled.

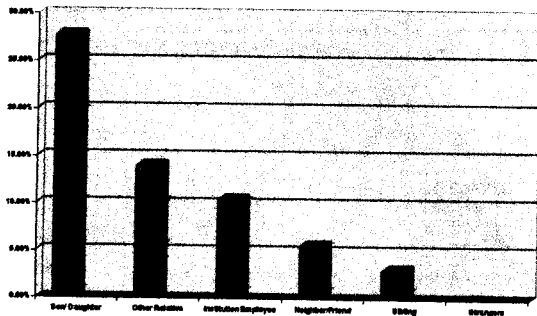
Wesson described the suspects as cold and callous, who never showed concern for Roth's well-being.

Police, prosecutors, county investigators and others who've met Roth said they're amazed at how she kept her spirits up, despite her losses.

She said she wants to see her relatives go to jail.

"I guess I'm just a stubborn old lady."

Significant Lack of Reliable Data



Remedies

Civil Action

§ 415 and § 772

Criminal Prosecution

§ 812 or § 825

Remedies - Civil

§ 415.1111 Civil actions.—

A vulnerable adult who has been ... exploited ...has a cause of action against any perpetrator and may recover actual and punitive damages for such ... exploitation. The action may be brought by the vulnerable adult, or that person's guardian, by a person or organization acting on behalf of the vulnerable adult with the consent of that person or that person's guardian, or by the personal representative of the estate of a deceased victim.

Remedies - Civil

§ 415.1111 Civil actions.—

The action may be brought in any court of competent jurisdiction to enforce such action and to recover actual and punitive damages for any deprivation of or infringement on the rights of a vulnerable adult. A party who prevails in any such action may be entitled to recover reasonable attorney's fees, costs of the action, and damages. The remedies provided in this section are in addition to and cumulative with other legal and administrative remedies available to a vulnerable adult.

Remedies - Civil

772.11 Civil remedy for theft or exploitation.-

(1) Any person who proves ... he or she has been injured in any fashion by reason of any violation of ss. 812.012 - 812.037 or s. 825.103(1) has a cause of action for **threefold the actual damages sustained ... and reasonable attorney's fees and court costs in the trial and appellate courts.**

Remedies - Civil

772.11 Civil remedy for theft or exploitation.-

(1) Any person who proves ... he or she has been injured in any fashion by reason of any violation of ss. 812.012 - 812.037 or s. 825.103(1) has a cause of action for **threefold the actual damages sustained ... and reasonable attorney's fees and court costs in the trial and appellate courts.**

Remedies - Civil

772.11 Civil remedy for theft or exploitation.-

(4) The death of an elderly or disabled person does not cause the court to lose jurisdiction of any claim for relief for theft or exploitation when the victim of the theft or exploitation is an elderly or disabled person.

(5) In a civil action ... an elderly or disabled person ... may move the court to advance the trial on the docket. The presiding judge, after consideration of the age and health of the party, may advance the trial on the docket.

Remedies - Criminal

812.014 Theft.—

(i) A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

(a) Deprive the other person of a right to the property or a benefit from the property.

(b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.

(Sounds a bit familiar, eh?)

Remedies - Criminal

825.103 Exploitation of an elderly person or disabled adult; penalties.—

Same as found in §415 and...

(c) Breach of a fiduciary duty to an elderly person or disabled adult by the person's guardian or agent under a power of attorney which results in an unauthorized appropriation, sale, or transfer of property.

Civil vs Criminal

Civil	Treble Damages, Punitive Damages & Attorney's Fees
Criminal	Restitution, Threat of Incarceration and State prosecutes the charges

Civil vs Criminal

Authorities Complicate Remediation

- **Lack of knowledge**
 - Inadequate understanding of relevant statutes
 - Non-attorney investigators
- **Lack of confidence**
 - Law enforcement desires ample proof, clear crime
 - Victims are difficult witnesses
 - Stereotyped as forgetful, senile, fragile
- **Lack of interest**
 - Higher burdens of proof in criminal court
 - Sympathetic perpetrators related to victim
 - Cases aren't "sexy", lack media or statistical appeal

Civil vs Criminal

Higher Burden...

McNARRIN v. STATE
876 So.2d 1253
... evidence was insufficient to support conviction.

EVERETT v. STATE
876 So.2d 1253
... insufficient evidence supported conviction for exploitation.

Civil vs Criminal

Choose one...

RICH v. STATE
823 So.2d 208
...the two offenses of exploitation of the elderly and grand theft were not separate, for double jeopardy purposes...

THOMASON v. STATE
790 So.2d 1189
...Convictions for third-degree grand theft and exploitation of an elderly person ... violated double jeopardy...

Civil vs Criminal

The level of the offense...
 §825 would presumably provide enhanced criminal penalties...

§812.014 Theft	§825.103 Exploitation
<\$20,000 3 rd degree felony	<\$20,000 3 rd degree felony
\$20,000-\$100,000 2 nd degree felony	\$20,000-\$100,000 2 nd degree felony
\$100,000+ 1 st degree felony	\$100,000+ 1 st degree felony

Civil vs Criminal

However...
 §812.0145 (enacted in 2002) actually provides more severe penalties...

§812.0145 Theft, victim over 65	§825.103 Exploitation
\$300-\$10,000 3 rd degree felony	<\$20,000 3 rd degree felony
\$10,000-\$50,000 2 nd degree felony	\$20,000-\$100,000 2 nd degree felony
\$50,000+ 1 st degree felony	\$100,000+ 1 st degree felony

Civil vs Criminal

Practical application doesn't support §825 ...

§812 Theft	§825 Exploitation
3 rd Degree Felony	3 rd Degree Felony
2 nd Degree Felony	2 nd Degree Felony
1 st Degree Felony	1 st Degree Felony

Civil vs Criminal

Victims Complicate Remediation

- **Emotional Frailty**
 - Afraid to report being victimized
 - Feel ashamed
 - Fear being alone, fear losing independence
- **Diminished Capacity**
 - Dementia, inability to recall events
 - Possibility cause must be advanced by agent
 - Action under guardianship requires additional steps
- **Falling health and death**
 - Preservation of evidence
 - Acceleration of docket

Civil vs Criminal

Civil	<p>Troble Damages, Punitive Damages & Attorney's Fees</p> <p>Victim must prosecute the claim</p>
Criminal	<p>Restitution, Threat of Incarceration and State prosecutes the charges</p> <p>Collected restitution is rare and the State is a reluctant partner</p>

Planning Considerations

Power of Attorney

Voluntary Guardianship

Incapacity Proceedings

Trusts

Planning Considerations

§709.08 Power of Attorney

709.08 (8) Standard of Care.—

Except as otherwise provided in paragraph (4)(e), an attorney in fact is a fiduciary who must observe the standards of care applicable to trustees as described in s.736.0901.

Planning Considerations

§744.341 Voluntary Guardianship

(1) Without adjudication of incapacity, the court shall appoint a guardian of the property of a resident or nonresident person who, though mentally competent, is incapable of the care, custody, and management of his or her estate by reason of age or physical infirmity and who has voluntarily petitioned for the appointment.

(5) A voluntary guardianship may be terminated by the ward by filing a notice with the court that the voluntary guardianship is terminated.

Planning Considerations

§744
Adjudication of Incapacity
and
Appointment of Guardian

744.347 Oath of guardian.—

Before exercising his or her authority as guardian, every guardian shall take an oath that he or she will faithfully perform his or her duties as guardian. This oath is not jurisdictional.

Planning Considerations

Trusts

Co-Trustees

Incapacity Provisions

Irrevocable Clauses

Contacts

National Center on Elder Abuse
www.ncea.aol.com

Academy of Florida Elder Law Attorneys
www.afla.org

Florida Abuse Hotline
1-800-96-ABUSE

Florida Elder Help Line
1-800-963-5337

Florida Domestic Violence Hotline
1-800-500-1119
