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PROTECTIVE ASSISTANCE FOR ELDERS: MAINE EXPERIENCE AND COMPARISONS

Alison Barnes*

Working in home services to the elderly, inevitably I saw instances of elder abuse that are unforgettable even these twenty years later. Sometimes I tried to be the presence that made the abuse stop because the abuser would know that I knew. That can work. Sometimes I called the hotline people. Some of them were really good, but sometimes nothing happened and no one explained why. Sometimes I knew of abuse, but there seemed to be no point in calling.

Two examples, very different: First, a tough, beautiful woman of 83, dependent now on her adopted son who ran a carpet business. She had taken the child in at 5, never wishing otherwise to be a parent. She now was isolated and ignored by her son and his wife within their upscale suburban house, in a stark unused mudroom with a bed and an empty refrigerator. She said she wanted to stay there in the bed, that she wanted nothing. She was adamant and she intended to die.

Second, a long trip down a two-track that hadn't changed in decades. A house where you'd be a fool to get out of the car unless someone knew to call in the dogs. The elder was a tiny frail woman with Parkinson's disease, bedridden. Her caregiver was her 40 year old son, over 6 feet and 200 pounds. My project nurse, a long time in home care, visited separately from me. We conferred: What do you think? We think he abuses her sexually, maybe when he takes care of her. She's not afraid of him and it looks like she's not going to tell.

(Florida 1984)

Protective assistance is a system of service by the states to their citizens, including "preventive, supportive, and surrogate

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services for the elderly living in the community to enable them to maintain independent living and avoid abuse and exploitation."¹ Elder abuse is, one can only hope, the last form of domestic violence America "discovers" subsequent to finding child and spousal abuse in our families. Elder abuse was the topic of a Congressional hearing for the first time in 1981.² It includes physical, psychological, fiduciary [financial], and sexual abuse or exploitation.³ In some instances, it also includes neglect to provide necessary care.⁴

The law responded to the needs of older victims of abuse with laws termed "adult protective services" acts or statutes. These laws provide legal and administrative process for receiving and investigating reports of suspected abuse, and typically identify the services that may be given by the state to remedy the situation. These laws are, however, incomplete in themselves in that they deal only with the needs of the victim and the process required of service providers. Other statutes typically important to the resolution of abuse include 1) criminal statutes that punish the abuser for physical, psychological, financial and sexual abuse; and 2) guardianship statutes that provide process to identify victims of abuse who are unable to understand their interests and circumstances.

The victims of elder abuse, who are most likely to be the targets of protective services, may come from any ethnicity or race and are represented roughly in proportion to the population. However, most are very elderly women who have limited financial means.⁵ Thus, the vulnerability of the abuse victim is an important cue to suspect abuse.

The population of the state of Maine presents some circumstances that assist protective services response, and others that complicate it. The relatively low average density makes it

1. John J. Regan, *Intervention Through Adult Protective Services Programs*, 18 GERONTOLOGIST 250, 251 (1978).

2. HOUSE SELECT COMM. ON AGING, 97TH CONG., 1ST SESS., ELDER ABUSE: AN EXAMINATION OF A HIDDEN PERIL (Comm. Print, 1981). Recently, hearings were held on SB 333, the Elder Justice Act, which would require the states to meet federal standards for protective intervention in order to receive federal matching funds.

3. See LAWRENCE A. FROLIK & ALISON MCCHRYSTAL BARNES, ELDER LAW 632-36 (Lexis-Nexis Publ., 3d ed. 2003).

4. For brevity, this article will use the term "abuse" to encompass all three components (abuse, exploitation and neglect) unless special attention is drawn to financial or passive abuse.

5. FROLIK & BARNES, *supra* note 3 at 636-37.

more often feasible to respond while maintaining only a small staff to serve most of the state. On the other hand, many elders and their families are very poor and isolated in rural Maine. As a result, the array of options for intervention – without completely usurping life as the elder has known it – is limited.

This article is based in Maine law in comparison with statutes of other states and the regulations and practices governing Maine administrative process under those statutes. In addition, this author spoke with various representatives of the state agency that governs direct protective social services and legal services potentially related to a resolution of abuse situations.

The purpose of this discussion is to see at once what works and to identify alternatives that might work more effectively for elder victims of abuse. None of the professionals interviewed are identified because of the potential for some misstatement of mine to cause dissension or even dysfunction in the complex, delicate and sometimes tense relations that inevitably comprise the protective services process. Further, this article proposes various alternatives knowing that law and policy may not represent present practice throughout the state. The results that are right for Maine or any other state must come from its citizens, including those most familiar with the needs of dependent and incapacitated elders

MAINE PROTECTIVE SERVICES STATUTES AND REGULATIONS

Protective services laws vary significantly from state to state with regard to the definitions of abuse, neglect and exploitation; processes for intervention; and mandatory reporting requirements. Some statutes apply only to elderly victims of abuse, while others protect all vulnerable or disabled adults.⁶ Typically, process is authorized for intervention by social services providers, with the assistance of law enforcement if necessary, when either the elder consents or is determined to be incapable of making the consent decision. In addition, most states authorize intervention over the objection of the individual for a limited period of time in circumstances of imminent harm to the person's health or safety.⁷ Reports of suspected abuse

6. *Id.* at 646.

7. *Id.* at 649-50.

generally can be made by any person, typically to a hotline. Most states designate a social services agency as investigator of reports, leaving a limited period of time to respond.⁸ Protective services may include health and psychological care, social services such as home care or change of residence, counseling, transportation, and meals delivered under a comprehensive plan to meet the elder's needs.

Significant provisions of Maine's Adult Protective Services Act are as follows:

- *Agency and responders*

Protective services may be provided by the Bureau of Elder and Adult Services (BEAS), established in the Department of Human Services (DHS). This Bureau is the agency designated in Maine's state plan as having primary responsibility for coordination of all state activities related to purposes of the Older Americans Act.⁹

Citizens with mental retardation can be provided protective services by the Bureau of Mental Retardation.¹⁰ Clearly, this agency might serve the small population of older persons with mental retardation. However, because one agency generally serves the aged and the other younger adults,¹¹ a comparison of the policy and purposes of services from each of the agencies may be of interest in assessing the adequacy of protective services for older people.

- *Who can be served?*

The BEAS can provide services to any person eighteen years of age or older. Non-aged adults typically must be dependent¹² or incapacitated.¹³ The individual must be the victim of abuse,¹⁴

8. *Id.* at 647.

9. CODE ME. R. 10-149, Ch. 5, § 1 (2003).

10. *Id.*

11. The details of access and delivery are beyond the scope of this paper.

12. See CODE ME. R. 10-149, § 11, (14) (defining a dependent adult as any adult who is wholly or partially dependent upon one or more other persons for care or support, either emotional or physical, and who would be in danger if that care or support were withdrawn).

13. *Id.* at § 21 (defining an incapacitated adult as any adult who is impaired by reason of mental illness, mental deficiency, physical illness or disability to the extent that the individual lacks sufficient understanding or capacity to make or communicate responsible decisions concerning that individual's person, or to the extent the adult cannot effectively manage or apply that individual's estate to necessary ends (citing ME. REV. STAT. ANN. tit. 22, § 3472(10) (West 2003))).

Interestingly, a second definition appears in this section, cited from the Probate

exploitation,¹⁵ or neglect.¹⁶ Each term is defined originally by statute. The matter is known to the agency personnel by means of a referral from the abused person or any other who knows or has reasonable cause to suspect the need for protective services.¹⁷

- *What services can be provided?*

Protective services are defined by Maine statute as services that will separate incapacitated or dependent adults from danger. They may include but are not limited to social, medical, and psychiatric services necessary to preserve the individual's rights, resources and physical and mental well-being.¹⁸ Services also include assessment of need, a plan for services, and periodic reassessment.¹⁹

- *What process is required to intervene?*

The statute implicitly authorizes investigation by DHS staff²⁰ in response to a report.²¹ If the person who is the subject

Code, ME. REV. STAT. ANN. tit. 18-A, § 5-101(1) (West 2003): "Incapacitated person" means any person who is impaired by reason of mental illness, mental deficiency, physical illness or disability, chronic use of drugs, chronic intoxication, or other cause except minority to the extent that he lacks sufficient understanding or capacity to make or communicate responsible decisions concerning his person.

14. CODE ME. R. 10-149, Ch. 5, § 11 (1) (2003) (defining abuse as the infliction of injury, unreasonable confinement, intimidation or cruel punishment with resulting physical harm or pain or mental anguish; sexual abuse or exploitation; or the willful deprivation of essential needs).

15. *Id.* at (18) (defining exploitation as the illegal or improper use of an incapacitated or dependent adult or his resources for another's profit or advantage).

16. *Id.* at (25) (defining neglect as a threat to an adult's health or welfare by physical or mental injury or impairment, deprivation of essential needs or lack of protection from these).

17. CODE ME. R. 10-149, Ch. 5, § 11 (31) (2003) (defining referral as a request for protective services or a report by any person who knows or has reasonable cause to suspect that an incapacitated or dependent adult is in danger or at substantial risk of danger or by any person who has reasonable cause to suspect that an adult is incapacitated).

18. *Id.* at (30).

19. *Id.* at (6-7, 9): (6) a case plan is the result of an assessment. It consists of realistic objectives stated in terms of measurable outcomes.

(7) a case assessment is an assessment to review capacity, dependency, and danger or substantial risk of danger; the need for services, medical information; an evaluation of findings; and the development of a revised case plan.

(9) a care study is an assessment to review capacity, dependency, and danger or substantial risk of danger, including ability to give informed consent, and results in making findings, identifying service needs, and the development of a case plan.

20. Maine has an extensive list of persons required to report suspicion of elder abuse to DHS. The structure of the statute requires the investigation described only in response to a mandatory report. ME. REV. STAT. ANN. tit. 22, § 3477.

21. *Id.* at § 3480.

of the report is not readily found, the staff is required to engage in and document a diligent search.²² Agency policy requires screening and information gathering,²³ including information on client capacity, dependency, and danger or substantial risk of danger, in order to determine if the referral is appropriate for case study. The definition of danger is referenced in agency policy, but does not specifically appear in the definitions section referenced, § 3472. If the initial assessment indicates the report is unfounded, the agency ends intervention.

For other cases, a case study is conducted and leads to a case plan.²⁴ Any legal guardian must be notified, and referrals must be made to appropriate government entities, including the district attorney.

- *Mandatory reporting*

The following professionals are required to report or to "cause a report to be made" to DHS upon suspicion that an adult has been abused and the professional has reasonable cause to suspect that the individual is incapacitated or dependent:

- allopathic (M.D.) or osteopathic (D.O.) physicians, medical interns or physician's assistants;
- medical examiners and coroners (presumably in the course of investigating crime or death);
- various other health care providers including dentists, chiropractors, licensed and practical nurses, and certified nursing assistants;²⁵
- physical, speech and occupational therapists;
- social workers, psychologists, and mental health professionals;
- pharmacists;
- emergency room personnel, ambulance attendants, and emergency medical technicians;
- unlicensed assistive personnel; and
- any other person who has assumed full, intermittent or occasional responsibility for the care or custody of the

22. CODE ME. R. 10-149 § 11.04 (2003).

23. See definition of "Intake", *id.* § 11.01(23); § 11.03.

24. *Id.* at § 12.01.

25. Although peripheral to this article, it is worth noting that direct care providers of lesser status and training must have protection from retaliation should their reports become known. See Seymour Moskowitz, *Golden Age in the Golden State: Contemporary Legal Developments in Elder Abuse and Neglect*, 36 LOYOLA L.A. L. REV. 589, 647-51(2003).

adult, regardless of whether the reporter receives compensation.²⁶

- *Emergency Intervention*

The statute provides for emergency services when an incapacitated or dependent adult is in immediate risk of serious harm; and, the person is unable to consent to services that will diminish or eliminate the risk; and there is no guardian to consent.²⁷ Emergency services include only those services necessary to avoid serious harm.²⁸ Serious harm includes serious physical injury or impairment; serious mental injury or impairment;²⁹ or sexual abuse or exploitation. The statute does not define immediate risk, and agency policy apparently substitutes “substantial risk,” defined as a situation or condition where it is more likely than not that danger will occur.³⁰ Agency policy provides DHS with authority to place an individual in a licensed facility if the person would be harmed by awaiting the appointment of a guardian after notice and hearing.³¹

There is general agreement that APS processes in Maine do fill the function for which they are intended. How well they do so, and whether significant improvements can be effected is discussed below. Any assessment of how well APS statutes and systems work encompasses the tension between autonomy for self-determining adults and benevolent justifications for preventing harm to people who cannot or do not protect themselves. Special attention must be accorded to autonomy rights because interveners represent the state. Thus, the choice to intervene must include rigorous and recurring assessment and access to the means and services with the least impact on an individual’s life choices.

26. ME. REV. STAT. ANN. tit. 22, § 3477 (2003).

27. *Id.* at § 3472(7).

28. *Id.* at § 3472 (8).

29. CODE ME. R. 10-149 § 11.01(33)(C) (2003) (mental harm “which now or in the future is likely to be evidenced by serious mental, behavioral or personality disorder, including but not limited to, severe anxiety, depression or withdrawal, untoward aggressive behavior or similar serious dysfunctional behavior.”).

30. *Id.* at § 11.01 (35).

31. *Id.* at § 15.05 (A)(2).

RECOMMENDATIONS TO CONSIDER FOR POLICY, STATUTE AND RULES

When, and if, a state should provide protective services for elders is an ongoing controversy. Clearly, if an elder asks for assistance to prevent or end abuse, all states provide process to do so. However, such a request is rare.³² Instead, an investigation proceeds from a report by a third party, typically about caregiver abuse or an elder's bad housing, behavior and/or nutrition. The investigator often is unknown to the elder prior to the initial visit and assessment. If harm were a slow accumulation of bad acts and neglect, a standard guardianship process initiated at this point would answer the need. By the time a report is made, however, most likely this opportunity is long past. The APS assessors and services providers therefore must have sufficient independence to support rapid and decisive protective services response to a variety of circumstances. The following factors affect that capability.

THE ORGANIZATIONAL STATUS OF APS PROVIDERS

Adult protective services providers in Maine are employees of the DHS, and are supervised by state administrators who have responsibility for financing and delivering a variety of supportive services. While APS choices to provide services are theoretically limited to the short term, in fact APS is a conduit to long term state services, including long-term Medicaid financed nursing home care. This exposes decisions to provide or withhold APS decisions to a conflict of interest with the financial well-being of the agency. To some extent, it politicizes the choice to provide services because of the fiscal impact. The problem is complicated when the right to intervene is unclear because of questionable competency, no matter how urgently the individual needs the assistance. In such an event, frontline APS decision makers might benefit from legal advice, but are likely to find that the only available source is an attorney for the agency.

The issues of organizational status have been addressed in

32. Even this statement is controversial. Some researchers have found that elders are far more likely than other abused persons to seek help, but that effective help may not be forthcoming.

two other service delivery contexts: The Office of the Public Guardian, and legal assistance for the Long-Term Care Ombudsman. Most states now authorize activity by a public guardian, a guardian of the last resort for those with neither able, willing family or friends, nor assets to pay for guardianship services. A number of potential conflicts of interest inhere in the post of public guardian, including choosing institutionalization over home care for convenience, risk avoidance, or sufficiency of funding; and choosing to create guardianships in order to justify the need and budget allocation for the office.³³ In this context, the most significant conflict of interest involves the choice of services to the ward.

In Maine, DHS serves as the public guardian. Commentators note that the structural independence of public guardians is critical, yet this public guardian is a branch of the social services agency. Should DHS be under a mandate to minimize provision of services in a fiscal crisis, the public guardian's purposes continue to be urgent. A public guardian should be an independent agency in order to protect and promote the interests of the ward, regardless of impact on other agencies and services.³⁴

Similarly, the federally mandated Long Term Care Ombudsman has found conflict of interest when placed within the structure of social services provider agencies. A particular difficulty is the state's inability to provide the Ombudsman's office with "adequate counsel" to support suits on behalf of long term care residents in pursuing administrative, legal and other appropriate remedies as required by the Older Americans Act.³⁵

The organizational location of APS providers varies widely,³⁶ so other models are available. Conflicts of interest for APS workers seem no less pressing than those of public guardians. As this author's experience bears out, APS providers are as frequently in need of legal counsel as the Ombudsman's office. The current fiscal crisis for the states should identify this

33. FROLIK & BARNES, *supra* note 3 at 516-17.

34. *Id.* at 517.

35. 42 U.S.C. § 3058(g) (2003). Maine expressly provides a private right of action to protect individual rights of residents in long term care facilities. Various authorizing statutes are cited in "The Maine Long-Term Care Ombudsman Program, Advocates for Residents: Your Guide to Resident Rights in Assisted Living Facilities." The Ombudsman can be contacted at www.maineombudsman.org. (last visited March 28, 2004).

36. Eloise Rathbone-McCuan, *Elder Abuse Within the Context of Intimate Violence*, 69 U. MO. KAN. CITY L. REV. 215, 217-18 (2000).

conflict in sharp detail. The need to protect the limited number of elderly citizens in need of emergency protective services should be protected from the impact of widespread budget cuts. The decision to protect includes not just a choice to intervene, but also choice of the "package" of services most appropriate for the elder. This protection effectively exists in the independence of professionals who investigate and decide on delivery of services.

COORDINATION OF SERVICES

A persistent problem with delivery of protective services is marshalling the most appropriate services available in the community to assist the elder in a time of transition in housing or caregivers, perhaps to new independence from an abusive friend or relative.³⁷ The success of APS is dependent on access to preventive counseling, social, health care and legal services to pursue and resist initiation of guardianship, and to secure needed services.

PREVENTION OF ABUSE AND EXPLOITATION

The extent to which elders can avoid abuse by family members and other caregivers is limited, regardless of the means available under state law. The reasons lie in the simple fact that elders, like all of us, wish to rely on people who assist them.³⁸ The alternative is a terrible sense of threat and loss. Yet, when elders and good helpers (the great majority) are informed about strategies available to them under state law, they are more likely to prevent bad practices.

This assertion is particularly true with regard to financial exploitation, because the unauthorized transfer of assets typically involves others who might provide a check on bad

37. Bonnie Brandl & Tess Meuer, *Domestic Abuse in Later Life*, 8 ELDER L.J. 297, 320-21 (2000) (noting that while piecemeal response is typical, some communities have developed systemic efforts including multidisciplinary elder abuse teams or family violence councils that address elder abuse as well as other domestic discord.) This author recommends a form of professionally diverse, volunteer intervention group convened to help an adult in transition to a more independent life, termed a "Joshua Committee," because "the walls come tumbling down." I do not know where this idea still is implemented.

38. Carolyn L. Dessin, *The Impaired Matrimonial Client: Financial Exploitation Statutes' Impact On Domestic Relations Practice*, 16 J. AM. ACAD. MATRIMONIAL LAW 379, 435 (2000).

practices.³⁹ Such measures as direct deposit of income checks, now routine but often ignored or avoided by elders, are avoided because elders feel more secure having seen a paper check. Many also avoid using credit and debit cards because of the historical association with overspending. A frequently overlooked check on spending and non-payment of bills is a third party notice. The bank or creditor is advised to send any notice of unusual activity on an account to a reliable friend.

Similar preventive provisions can be used with durable powers of attorney (DPOA).⁴⁰ The durable power is a statutory extension of common law agency, by which the principal (the elder) authorizes another (the attorney-in-fact, or holder of the power) to act on the elder's behalf for certain or all purposes. The common law power ceased when the principal became incapacitated, but the statutory durable power of attorney continues, or may become effective when the elder becomes incapacitated. Such arrangements are now very common, and are easily abused because there is no oversight of the attorney-in-fact.

A number of strategies are available to provide protection against abuse of a DPOA. For example, in 2001 the Texas legislature created a requirement that the agent under a DPOA account to the principal (the elder) and keep records in case of any future need to account.⁴¹ While the new law provides only for termination of the DPOA for failure to account, other remedies discussed herein are available under other statutes. In the U.K., durable powers, called "enduring powers," must be recorded with an administrative agency. While the lack of active oversight might be viewed as a liability in the U.S., I have argued that the agent under such a registered power is more likely to understand that the community has an interest in protecting the elder.

The instrument creating the DPOA might also require an accounting or oversight by another for the agent's more significant decisions. Oversight might be provided by a trusted relative who is not available for day to day transactions

39. See Carolyn L. Dessin, *Financial Abuse of the Elderly*, 36 IDAHO L. REV. 203, 226 (2000).

40. See generally Carolyn L. Dessin, *Acting as Agent under a Financial Durable Power of Attorney*, 75 NEB. L. REV. 574, 620 (1996).

41. Christopher J. Pettit, *Vultures and Lambs: A Journey Through Protective Services for the Texas Elderly*, 33 ST. MARY'S L.J. 57, 97-98 (2001).

performed by the agent, or by a professional. It might be required on a regular basis or when a significant decision is contemplated.

MARSHALLING RESOURCES FOR ELDERLY VICTIMS

Often, the will to gather the community's resources to support an elder in transition lacks the vitality that may support women and children who are victims of abuse. An important issue is access to supportive housing immediately available upon leaving an abusive caregiver. Many shelters for women and children fail to consider whether their beds are available to elders, even elderly women. As a result, there very often is no place for a relatively capable elder to go. Almost no options for abused elderly men have been considered, though shelter in church facilities or group homes is available to others.

For more impaired elders, the hospital, which takes all in need of acute care, is the first stop. Once stabilized with nutrition, hydration and any appropriate medication, a frail, abused elder must have another place to go. The press of community needs on nursing homes assures that waiting lists scrupulously recognize those with access to scarce beds. However, it would be appropriate to allow an elderly victim of abuse to take a bed, however briefly, if going home is premature or ultimately inappropriate. No government sanctioned procedure applies in Maine that would advance that elder above others whose needs arguably are less urgent.

A specific Maine issue is the withdrawal of support services because of threat to worker safety, a problem that resonates with this author. The threat might be a family member or neighbors, who are inappropriately interested in the typically young, female direct service workers. Equally threatening are the environmental hazards such as dangerous gas and kerosene heating, dogs and aggressive rats. I have cooked the breakfast myself when the worker told me she was afraid of the rats on the rafters, because I needed to know how bad it was. Nevertheless, protective services workers faced with the withdrawal of program support need more than a couple of days to assess the individual and her situation and put a plan in place. Such delay may seem inappropriate to supervisors (like me) who are newly apprised of their worker's alarm, but the level of risk typically does not differ from that which the workers endured prior to the

extra scrutiny. If there is some specific source of increased risk, workers might double up for services to that client for the fourteen to twenty-one days appropriate to prepare a transition strategy.

CIVIL ACTIONS TO RECOVER MISAPPROPRIATED FUNDS

When a relative or caregiver has appropriated or spent an elder's money, it is sometimes difficult to determine whether the transfer was a gift, or a payment in return for services. Courts have looked to patterns of giving by the elder, or specific reasons for a single gift such as extraordinary service or great need on the part of the recipient.

Inevitably, a gray area exists when someone makes a substantial purchase with an elder's money and claims some such justification. The gift is particularly suspect when the taker is apparently foreclosed from achieving a lifestyle or assets held by the elder property owner.⁴²

A number of common law remedies are available to recover assets, including:

- **Trover and conversion.** When one person has taken money or property, the owner sues for damages for the value of that property.
- **Replevin.** The owner of property asks the court to return the specific property that was taken.
- **Constructive trust.** The court may impose a trust on property taken by fraud, meaning that the holder of the property is not the legal owner. Such a trust may also be imposed if the holder is unjustly enriched.
- **Breach of contract.** A service provider who takes assets can be required to return value in excess of the amount due under the services agreement. An important advantage of this action in contract is that it has a longer statute of limitations than tort

42. For example, in Maui, where this author discussed financial abuse with APS workers, a significant risk of financial exploitation existed because elderly retirees from Dole Pineapple had been given their worker houses and plots of land. The value of that asset far outweighs the foreseeable earnings of children and grandchildren who have neither greater education nor any property that might produce wealth.

actions.

This short list includes common law remedies typically absent from statutes and thus sometimes overlooked by advocates. Perhaps more important is the fact that, by the time social services providers refer cases for legal assistance because of financial abuse, the money often cannot be recovered.

This is an opportunity for training in a sensitive area where watchful oversight can be very effective. The social services provider who regularly talks about money with the elder is a significant barrier to financial abuse.

LEGAL REMEDIES BEYOND BASIC ASSISTANCE AND ASSET RECOVERY

Assumptions about the "family paradigm,"⁴³ that is, the powerful ties and influences between family members, may weigh unjustly against the punishment of those who have abused their elders. Two areas of interest are the rights of inheritance due an abuser, and the extent to which an abused elder can recover for the acts of abuse, beyond compensation for misappropriated assets.

LIMITING INHERITANCE TO UNWORTHY HEIRS

The law of inheritance provides the maxim that a person should not profit from her own wrong. Thus, one who intentionally murdered cannot take anything from the estate of her victim, by intestacy or by will. The person is viewed as an "unworthy heir."

In the same mode, an heir or legatee who has abused an elder might be considered unworthy to take any inheritance.⁴⁴ Beginning in 1999, California bars inheritance from victims to those who are found guilty of elder abuse or neglect. The standard of proof the prospective heir is unworthy is "clear and convincing," less demanding than that required for the finding

43. See generally Melanie Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 336 (1996) (on the probate court's preference for family members over other legatees); Frances H. Foster, *The Family Paradigm in Inheritance Law*, 80 N.C. L. REV. 199 (2001) (the preference for traditional family fails to recognize the importance of nontraditional loving and caregiving relationships).

44. See Moskowitz, *supra* note 25 at 653.

of guilt on which the criminal law is based.⁴⁵ Therefore, the civil trial to determine whether the heir is unworthy might succeed though the criminal trial acquitted or found guilty for negligence.⁴⁶

CIVIL AND CRIMINAL ACTIONS TO PUNISH ABUSERS

Some states have considered or implemented laws that provide causes of action in addition to those for the general population. For example, beginning in 1992, California's Elder Abuse and Dependent Adult Civil Protection Act provides remedies suited to the circumstances if a criminal defendant engaged in recklessness, oppression, fraud or malice in the course of the abuse.⁴⁷ The statute assures that if the elder should die during the litigation, the estate or an interested successor can pursue the cause of action. Perhaps most importantly, the statute's procedural innovations are based on the finding that infirm elders and dependent adults are a "disadvantaged class" under the law, so that few cases dispute their mistreatment.⁴⁸ The general stance of encouraging actions to achieve just compensation for those who have been harmed is controversial today as a general matter. The endorsement of these actions is an appropriate correction for a largely voiceless group.

RECOGNIZING THE LIMITATIONS OF MANDATORY REPORTING

Maine advocates strongly endorse mandatory reporting requirements. I expected more reservations, considering the errors that can arise when any person, presumably well-intentioned, can ask for investigation that may lead to intervention. Some strongly support pending changes to the statute that would limit the way in which a reporter can fulfill the requirements. Under current law, the reporter may report or

45. See generally Kymberleigh N. Korpus, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse But Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 578 (2001).

46. Moskowitz notes that California also has made an important exception in its evidentiary law to allow prosecution of elder abuse crimes. Generally, testimony is excluded if its declarant is unavailable, rendering the statement "hearsay." In elder abuse cases, the elder may be videotaped under certain circumstances, but need not be available for cross-examination. *Id.* at 657.

47. See CAL. WELF. & INST. CODE §§ 15600 – 15657.3 (2003).

48. See Moskowitz, *supra* note 25 at 605.

cause a report to be made. This, some feel, is license for doctors and other important sources of information about the circumstances to distance themselves from the investigation.

Such a view seems to have a tenuous connection with the substance of the investigation and intervention. It appears that other reasons to support broad mandatory reporting laws also are similarly related to indirect benefits. Legal providers report that the mandates provide an opportunity to offer training to medical associations and nursing home staffs to help them understand their legal obligations.

Regardless of the mandates, however, fairly extensive evidence shows that reporters do not comply.⁴⁹ Whether by reason of lack of recognition or fear of involvement in litigation, no professional group is noted for being helpful in abuse cases.⁵⁰ This knowledge should be taken as a given with regard to the general incidence of elder abuse. It is not reported and investigated as contemplated in the statutes. Cases that are reported and pose imminent danger or are confirmed by investigation and case plan should be the target of intensive intervention services.

INTERVENTION DESPITE OBJECTION BY THE ELDER: EMERGENCY PROCESS

If an elder consents to the proposed intervention, services can be provided. This point of decision is, however, critical and often fails to secure greater protection for the elder. The reasons are apparent upon considering the vantage point of the subject of the intervention, who receives initial investigation and inquiry in his or her (usually unkempt and deteriorated) home. A state worker, most often a complete stranger, must broach the topic of the hazards and losses of the elder's living situation. The hazard might be an adult child who has in fact caused the elder physical harm, or that same child might be a very negligent caregiver who leaves the elder in embarrassing circumstances of physical care, or provides only erratic opportunities for nourishment.

The Maine statute reaches the issue of whether the individual can consent to services, and seems to call for

49. See *id.* at 610.

50. *Id.* at notes 116-119 and accompanying text.

considerable information gathering in order to make that judgment. DHS staff can seek authority once they have gathered adequate information to support temporary guardianship. This represents a serious commitment to the elder's autonomy, allowing temporary guardianship as intervention on abbreviated evidence of the elder's possible lack of capacity to consent.

However, the statute appears to bypass important measures for involuntary services. The fact that those interviewed in Maine report no issues with the statutory language may arise from the fact that the agency, advocates and court have agreed on process for involuntary services. Most likely, this is an agreement that certain circumstances warrant intervention over objection regardless of clear determination of the individual's capacity to consent. The mechanism for providing services requires a finding of incapacity when in fact it is unwarranted. Because no involuntary services are expressly authorized, no constraints are set on justification or duration. The provisions of temporary guardianship, which has recurring deadlines, are much longer than those for emergency involuntary services. And, lacking emergency intervention authority raises the risk that unnecessary guardianships, though temporary, will be created.

Typical process for such emergency intervention includes a finding that short term, emergency services are necessary where there is imminent risk of death or serious physical harm and the individual exposed to risk cannot comprehend the consequences of remaining in the situation.⁵¹ Some state statutes include imminent risk to mental health, though the duration of involuntary services does not seem a good fit for this category of harm.

An alternative that does not duplicate emergency, nonconsensual services is provided for elders to reach immediate and compulsory process to avoid further abuse. States have also expanded the possible actions to punish abusers. For example, Oregon statutes provide a personal cause of action for damages. The abused elder is the plaintiff in the circuit courts, filing sworn allegations of abuse within the past 180 days, and immediate and present danger from further abuse by the respondent. Limited time is provided for hearing. The

51. See FROLIK & BARNES, *supra* note 3, at 649-50.

court may require the plaintiff or the respondent abuser to move from a jointly held home (regardless of the fact that the elder might have left the home at the time), and may award attorney's fees and costs to either party.⁵²

The Oregon circuit court holds a hearing with only the elder petitioner, in person or by telephone, on the day the petition is filed or the following day. If the court finds sufficient evidence of abuse in the past 180 days, the respondent may be required to move from the petitioner's residence (whether individually or jointly owned); a law enforcement officer may accompany the party leaving to remove personal property; and the abuser may be under order restraining contact with the elder or the premises, or other methods of intimidation or interference. The statute provides a form for the petition. (See Appendix.)

SELF-NEGLECT BY AN ELDER

Questions of self-neglect intervention are a thorny problem in protective services. Urban emergency responders may be called upon to "rescue" individuals on a recurring basis because of cyclical opportunities for substance abuse that aggravates the infirmities of old age and/or problems of substance abuse or family victimization. Providers in Maine have raised the dilemma of "self-neglect," which in regulation is defined as "persons who have lost the capacity to care for themselves due to their physical or mental impairment, as opposed to persons who have capacity but have chosen an unsafe lifestyle." The distinction poses questions of whether one chooses to be an alcoholic who only periodically has the means to obtain alcohol, or a member of a family whose loved members have come to be desperate and threatening in their needs.

Two issues are posed:

- Can the elder extricate him or herself from a situation of imminent danger to life and health?, and
- Can the individual understand the nature of the recurring harm or risk of harm?

In each instance, if the answer is "no," intervention is

52. OR. STAT. ANN. § 124.010-.015.

warranted and justified, though admittedly intervention in addiction and domestic squalor do not bring easy or certain success.

A wedge for distinguishing the volition of a self-neglecting individual from incapacitating mental and emotional failure is review of the person's personality and life-style choices. The difficulty in distinguishing autonomy from a debilitating mental condition reflects the facts that less than twenty-five percent of older people with moderate to severe dementia were identified by their primary care physicians; and, three fourths of physicians surveyed felt that depression among the elderly was understandable and therefore did not warrant treatment.⁵³ The difficulty is exacerbated by widespread acceptance of the progressively declining capabilities of older people.⁵⁴ Physician reports often reflect these preconceptions.

As described by Dr. Steve Fox and others, the patient's personality traits persist over a lifetime, whether generous, anxious, or prone to dependency.⁵⁵ These traits produce a lifelong pattern of behavior. Any genuinely new behavior is likely the result of a new medical or psychological condition, whether it is querulousness or (as seen in some Alzheimer's patients) sweet compliance and good humor. The most confusing group includes those with lifelong personality disorders, who have difficulty in personal relationships, persistent lack of insight, and difficulty in establishing trust.⁵⁶ Specific variations are discussed in literature appropriate for education of any direct service workers.

A more difficult question is whether and when to offer services regardless of the elder's incapacity. The emergency services process discussed above is a critical component, but does not resolve the question of appropriate services when the individual is known to recover capacity with treatment and nutrition, but abandon adequate self-care once the APS system (or the county jail) no longer can provide protection from a neglectful self.

This section poses at least three different issues in protective services intervention that should be the subject of some

53. Steve Fox, *Is It Autonomy or a Personality Disorder?*, ELDER'S ADVISOR, Vol. 3, No. 1 (Summer 2001) at 63-65.

54. *Id.* at 64.

55. *Id.*

56. *Id.*

guidance before an intervener confronts the more complex questions posed by cases in the field.

ELDERS AND OTHERS: THE PURPOSES OF PROTECTIVE SERVICES

The authorization provided to the Bureau of Elder and Adult Services includes 1) protection of abused, neglected or exploited incapacitated and dependent adults and incapacitated and dependent adults in circumstances that present a suspected risk; 2) prevention of abuse, neglect or exploitation; 3) enhancement of the welfare of these adults; and, 4) promoting self-care whenever possible. The purposes are laudable, but should be considered in comparison with the purposes for which protective services are offered to mentally retarded people:

- to mobilize the individual's own strengths and to utilize whatever resources are available in the community in order to improve the adult's ability to function and to live his life in safety and dignity, with as much satisfaction, enjoyment and comfort as possible;
- to prevent unnecessary or inappropriate institutionalization;
- to safeguard the rights and resources and maintain the physical and mental health of the adult; [and] . . .
- to recognize and preserve the adult's right of self determination.

I have argued that society has great reluctance in supporting elders when their wishes upset the family and social structure. However, in protective services, there is no justification for favoring others with disabilities over the aged. Any argument that the individual should have chosen his or her circumstances and family more carefully might apply to people of any age. Perhaps an aspirational statement of principles would benefit the function of APS for elders.

EQUITABLE ALLOCATION OF FUNDS FOR AGENCIES SERVING PROTECTED GROUPS

All state legislatures have authorized protective services for elders. Unfortunately, recurring federal hearings have failed to

produce allocations of funds to support these important efforts. States, therefore, undertake the full responsibility of administering protective services under their obligation to protect the "health, safety and welfare" of citizens.⁵⁷

It is reasonable to assume that the cost of protective services for a person with some assets can be supported by reasonable payment from those assets. Clearly, this is a difficult issue when the elder objects to some or all of the services, a matter that is discussed in literature on guardianship actions. With regard to APS, however, there often may be more justification due to urgent needs with no viable alternatives for the elder. Texas, for example, determines how costs are to be met as part of assessment of the individual's capacity, needs and resources.⁵⁸

Advocates for protective services in Maine point out that the proportion of abuse intervention funds allocated to elders is pitifully small (an estimated average of 6.8% according to recent Congressional hearings) in proportion to the amounts allocated to child and domestic abuse. It is difficult to advocate taking from abuse response for other populations, and of course that is not necessary. Rather, an equitable allocation for the care of abused elders is an appropriate response. Further, emergency responders should be trained to know and expect that they are available and competent to respond to elder abuse, just as they have been educated to respond to other domestic abuse.

CONCLUSION

Maine's Adult Protective Services system benefits from a relatively small, absolute population of people in need. It is burdened by the need to respond to relatively remote locations, and the seasonal scarcity of direct services workers. It fails, according to national statistics and Maine workers, in that the majority of cases of elder abuse are undiscovered.

There is no doubt that the problem is significant. The Administration on Aging reports that over 500,000 elders experience abuse and neglect annually.⁵⁹ An estimated one third of victims are wholly able to care for themselves, while another third can meet some of their needs independently. Their abusers

57. FROLIK & BARNES, *supra* note 3 at 646.

58. Pettit, *supra* note 41 at 97.

59. http://www.aoa.gov/press/fact/alpha/fact_elder_abuse.asp. (last visited April 2004).

are primarily family members, but one must bear in mind that the definition of abuse usually calls for repeated instances that indicate a caregiving relationship. Also, physical abuse and theft of goods or money by someone other than a family member is readily classified for what it is: a crime.

A number of important issues are ripe for debate, in part because the harsh fiscal times will call for greater creativity and coordination, for strategic risk-taking to facilitate transitions for abused, neglected and self-neglecting elders. It will also call for stamina from workers and communities for two reasons. First, when caregiving families are counseled about the nature of elder abuse, the number of reported incidents rises. Second, intervention does not often lead to swift, clean resolutions of the elder's life circumstances. As with other domestic abuse cases, the victim often returns repeatedly to the abusive caregiver, or trusts the exploitative caregiver with access to money. As with other domestic abuse cases, this is not reason simply to abandon the victim.

Most importantly, if the number of elder abuse cases reported in Maine rises with education and concern in the community, it is a good sign. The next step is a strong helpful response from all of the individuals needed to change a life, because life can change (again) at eighty, or ninety, or more.

APPENDIX:

OREGON STATUTES
The Elder Abuse Prevention Act
(in pertinent part)

Chapter 124 — Abuse of the Elderly, Disabled and
Incapacitated

2001 EDITION

**ELDERLY AND DISABLED PERSON ABUSE
PREVENTION ACT**

124.005 Definitions

- (1) "Abuse" means one or more of the following:
- (a) Any physical injury caused by other than accidental means, or that appears to be at variance with the explanation given of the injury.
 - (b) Neglect that leads to physical harm through withholding of services necessary to maintain health and well-being.
 - (c) Abandonment, including desertion or willful forsaking of an elderly or disabled person or the withdrawal or neglect of duties and obligations owed an elderly or disabled person by a caregiver or other person.
 - (d) Willful infliction of physical pain or injury.
 - (e) Use of derogatory or inappropriate names, phrases or profanity, ridicule, harassment, coercion, threats, cursing, intimidation or inappropriate sexual comments of such a nature as to threaten significant physical or emotional harm to the elderly or disabled person.
 - (f) Causing any sweepstakes promotion to be mailed to an elderly, disabled or incapacitated person who had received sweepstakes promotional material in the United States mail, spent more than \$500 in the preceding year on any sweepstakes promotions, or any combination of sweepstakes promotions from the same service, regardless of the identities of the originators of the sweepstakes promotion and who represented to the court that the person felt the need for the court's assistance to prevent the person from incurring further expense.

124.010 Petition for relief; time limitation; information to be provided petitioner.

- (1) Any elderly or disabled person who has been the victim of abuse within the preceding 180 days may petition the circuit court for relief under ORS 124.005 to 124.040, if the elderly or disabled person is in immediate and present danger of further abuse from the abuser. The elderly or disabled person may seek relief by filing a petition with the circuit court alleging that the elderly or disabled person is in immediate and present danger of further abuse from the respondent, alleging that the elderly or disabled person has been the victim of abuse committed by the respondent within the 180 days preceding the filing of the petition and describing the nature of the abuse and the approximate dates thereof. The abuse must have occurred not more than 180 days before the filing of the petition. Allegations in the petition shall be made under oath or affirmation. The circuit court shall have jurisdiction over all proceedings under ORS 124.005 to 124.040.
- (2) The petitioner has the burden of proving a claim under ORS 124.005 to 124.040 by a preponderance of the evidence.
- (3) An elderly or disabled person's right to petition for relief under ORS 124.005 to 124.040 shall not be affected by the fact that the elderly or disabled person has left the residence or household to avoid abuse.
- (4) A petition filed under ORS 124.005 to 124.040 shall disclose the existence of any Elderly and Disabled Person Abuse Prevention Act proceedings, Abuse Prevention Act proceedings, or any marital annulment, dissolution or separation proceedings, pending between the parties.
- (5) Upon the filing of a petition under ORS 124.005 to 124.040, the clerk of the court shall give the elderly or disabled person information provided by the Department of Human Services about local adult protective services, domestic violence shelters and local legal services available.
- (6) For purposes of computing the 180-day period in this section

and ORS 124.020, any time during which the respondent is incarcerated or has a principal residence more than 100 miles from the principal residence of the petitioner shall not be counted as part of the 180-day period. [1995 c.666 §4; 1999 c.738 §2; 1999 c.1052 §11]

124.015 Hearing upon request of respondent; relief; settlement; effect of proceedings.

- (1) If the respondent requests a hearing pursuant to ORS 124.020 (7), the court shall hold the hearing within 21 days following the request, and may cancel or change any order issued under ORS 124.020.
- (2) In addition to the relief granted under ORS 124.020, the court, in a hearing held pursuant to subsection (1) of this section, may:
 - a) Require either party to move from any residence whose title or right to occupy such premises is held jointly by the parties; and
 - (b) Assess against either party reasonable attorney fees and such costs as may be incurred in the hearing.
